

IN THE TAX COURT
AT SUVA

Civil Appeal No. HBT 09 of 2018
Tax Tribunal VAT Action No. 04 of 2017

BETWEEN : WESTBUS FIJI LIMITED

APPELLANT

AND : CHIEF EXECUTIVE OFFICER,
REVENUE AND CUSTOMS AUTHORITY

RESPONDENT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Mr R. Singh for the Appellant
Mr O.Verebalavu, Mr E. Eterika with him, for the Respondent

Date of Hearing : 7 February 2019

Date of Judgment : 15 February 2019

JUDGMENT

1. This is the Appellant's Notice of Originating Motion (OM) for an order that the decision of the Tax Tribunal of 18 June 2018 be wholly set aside.
2. The grounds of the appeal are as follows:

The Tribunal erred in law and in fact:

- (1) In finding that the service provided by the Appellant for Intercontinental Hotel (Intercon) was at all times a "charter service."
 - (2) In finding and holding, the Appellant did not hold any permit/approval from the Land Transport Authority (LTA) to transport Intercon's employees when contrary evidence was adduced by the former CEO.
 - (3) In failing to consider:
 - (i) The effect of a government imposed moratorium on the grant of any licence or permit by the LTA.
 - (ii) The consequences of the moratorium for Value Added Tax (VAT) by the Respondent (Revenue) from the Appellant.
 - (iii) The powers of the LTA under sections 8 and 9 of the Land Transport Act (Act) despite the imposition of the moratorium to the grant of any license or permit to the Appellant.
 - (4) In finding the supply by the Appellant was not zero-rated pursuant to the VAT Act 1999.
 - (5) In finding that the Appellant had failed to supply and tender the structure of charges it claimed to be VAT exclusive when the Appellant had done so in the affidavit of Vijendra Kumar (filed 2 February 2018)
 - (6) In failing to consider that the service provided to Sofitel Hotel were under the Road Route License (RRL) issued by the LTA.
3. The Statement of Agreed Facts and Issues (SAFI) include the following:

Agreed Facts:

- (1) The Government of Fiji and the Fiji Bus Operators Association (Operators) entered into a Deed of Agreement dated 7 January 2011 (Deed)
- (2) The Applicant's (Westbus's) Agreements with Intercontinental Hotel were to provide transportation services (service) to all staff and employees (passengers) of Intercon.
- (3) The vehicles used by Westbus to provide the service are all licensed as public services vehicles (PSV).

Agreed Issues:

- (1) Whether the service is classified as a charter service?
 - (2) If so, are charter service qualified for zero rating of VAT?
 - (3) What is the “other outputs of a bus operator” as stipulated in clause 3 of the Deed?
 - (4) Whether the service qualified as “other outputs of a bus operator”?
 - (5) Whether Westbus is entitled to a zero rating of VAT for the service?
4. The hearing commenced with Mr Singh submitting. He referred to the agreement between Westbus and Intercon and the deed between Government and the bus operators. Westbus did not pay VAT because of the deed. After 7 years, Revenue said it was a charter service. The Tribunal found it was carriage. Counsel accepted it was carriage. The Cabinet decision bound the LTA not to issue any Road Contract Licence (RCL) nor any RRL. He said it was carriage and the deed applies as the Intercon staff are members of the public.
5. Mr. Verebalavu then submitted. He said Revenue treated it as a charter service. Para 27 of the second schedule of the VAT Act 1991 does not accommodate charter service. There was no RCL for the route to Intercon. The LTA letter has no effect in the absence of an actual licence.
6. Mr Singh in his reply said although a charter was stated, he submitted it was not a charter. “Charter” is the short term for specific purpose e.g funerals. The Tribunal found it was carriage in accordance with s.2 of the VAT Act. He said if it was a charter that would be fatal to their case.
7. At the conclusion of the arguments I said I would take time for consideration. Having done so I shall now deliver my decision.
8. The crux of the matter is whether the service provided by Westbus was a charter service. If so, then Revenue was entitled to levy VAT.
9. I shall start with the definition of “charter”. According to the Concise Oxford English Dictionary (Dictionary), 12th edn, “charter” means “4. the hiring of an aircraft, ship or motor vehicle.”
10. To my mind, it is significant that both in the Memorandum of Agreement made the 1st April 2013 (clause 1.2) and the preceding Memorandum of Agreement made the 1st March 2009 (Clause 1.2) the operative words are “a charter all employees associated with Intercontinental ...” and “a charter for the exclusive use of all employees associated with Intercontinental ...” respectively.

11. The Dictionary defines “exclusive” as “2. restricted to the person, group, or area concerned” and also defines “public” as “1. of, concerning, or open to the people as a whole.”
12. It is therefore clear that the persons travelling on the Westbus vehicles concerned were NOT members of the public at large but were entirely Intercon staff only.
13. A perusal of the Deed reveals the following:
 - (A) Preamble (ii) refers to the impact of VAT “on the bus fares currently levied on the travelling public.”
 - (B) Clause 1 reads “There will be no increase in the bus fares currently paid by the travelling public as a result of the increase in VAT by 2.5%.”
 - (C) Clause 2 reads “In consideration of no change in the bus fares, VAT will be zero-rated for all bus fares with effect from 1 January 2011...”
 - (D) Clause 3 reads “For the avoidance of doubt, VAT will only be zero rated on bus fares, and this will not extend to other outputs of a bus operator.”
14. The Dictionary defines “fare” as “the money payable for a journey on public transport.”
15. The Oxford Dictionary of Law, 9th edn, defines “output tax” as “the value-added tax that is charged by a taxable person on making a supply of goods or services.” So I shall take “output” to mean “a supply of (bus) services” in the instant case.
16. The salient features of the agreement/contract between Westbus and Intercon are, I find, the following:
 - (1) The transportation is only of staff/employees of Intercon who do not pay any fares.
 - (2) Accounts are paid by Intercon within 30 days of the Invoices which are billed monthly (see clauses 3 and 2 of the Agreement)
 - (3) Westbus has the right to ask employees for confirmation/identification of employment with Intercon prior to accepting them as passengers (see clause 11)
17. In contrast to the above, the salient features of a bus service catering to the travelling public are as follows:
 - (1) A member of the public directly pays a fare when he enters a bus at the commencement of his intended journey.

- (2) The amount of the fare will generally vary with the distance of the intended journey i.e the longer the journey the higher the fare.
- (3) A member of the public is not required to confirm or identify himself prior to the bus driver/conductor accepting him as a passenger.

18. I am of opinion the intention of Government was clearly that only the travelling public would benefit from the concession given by Government to bus operators in Fiji. This meant that other outputs (read other services) provided to non-members of the public e.g. charter service would not come within the ambit of the concession/exemption. This is because the charter/service provided by Westbus were not to the general (travelling) public at large but restricted to the staff of Intercon.
19. Westbus makes it crystal clear that its contention that it was granted exemption from VAT, i.e zero-rated, is based at all times “on the Deed which provided the exemption from VAT ...” (see para 41 of its solicitors’ submission dated 6 February 2019). It is therefore unnecessary for the Court to look elsewhere to find the source for Westbus’s belief in an alleged entitlement to a zero-rating. Certainly this cannot be found in para 27 of the Second Schedule to the VAT ACT 1991 because that relates to the carriage of passengers “by an omnibus licensed as a public service vehicle.” In the instant case the Tribunal states Westbus submitted it did not possess a public service permit at the relevant time (see para [24] of the Decision) and at para [31] the Tribunal concluded the service undertaken “could not fall within the definition of Paragraph 27 to Schedule 2 of the Value Added Tax Act 1991.”
20. This Court has not been persuaded why it should not accept the Tribunal’s conclusion arrived at after a full hearing and consideration of the evidence and applicable law, and especially the non-production of the relevant PSV licences. In any event there could not be any in the light of the Cabinet Decision on 15 March 2011 imposing a temporary freeze on the further issuance by the LTA of “All Public Service Vehicle (PSV) Licences in Fiji.”
21. Thus there can be no denying Westbus was not entitled to be zero-rated on the supply of hire/bus services to Intercon.

22. In the light of the decision I have reached it would be inexpedient for the Court to consider the other issues raised. Suffice it to say this Appeal has to be dismissed without any need to consider those extraneous matters.

23. In the result I make the following orders:

- (1) The decision of the Tribunal dated 18 June 2018 is affirmed.
- (2) The Appeal in the Originating Motion filed on 16 July 2018 is dismissed.
- (3) Each party shall pay their own costs of this Appeal.

Delivered at Suva this 15th day of February 2019.



David Alfred
JUDGE
High Court of Fiji