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

Application No 9 of 2010

BETWEEN: **COMPANY R**

Applicant

AND: **FIJI REVENUE & CUSTOMS AUTHORITY**

Respondent

Counsel: **Ms M Rakai, Sherani & Co, for the Applicant**

Ms T Rayawa, FRCA Legal Unit, for the Respondent

Dates of Hearing: **Tuesday 27 August 2013**
Tuesday 5 November 2013

Date of Decision: **Friday 15 November 2013**

DECISION

ZERO RATED SUPPLY– Section 2 - VALUED ADDED TAX DECREE 1991; Section 13A Custom Tariff Act (Cap 197) Duty Suspension Scheme; Section 15 Value Added Tax Decree

Background

1. The Applicant Taxpayer is a limited liability company and is the manufacturer and wholesaler of knitted fabric and knitted accessories.

2. The Taxpayer was the subject of an audit undertaken by the Respondent in or about February 2010. The audit was concerned with sales made by the Taxpayer in the period 2004 to 2009.

3. The Audit found that the Applicant had been wrongly claiming a concession that enabled zero rated taxation to be claimed for supply of goods in accordance with Section 15(2) of the *Value Added Tax Decree* 1991.

4. As a result of the Audit, the Respondent issued Amended Assessments against the Taxpayer for the following VAT periods:

    - November and December 2004;
    - January 2005 to October 2009.

5. The consequence of the Amended Assessments, was that the Taxpayer was required to pay to the respondent the amount of $286,781.91, including $69,205.50 paid by way of penalties.

6. On 6 April 2010, the Taxpayer formally objected to the Amended Assessments and a series of further communications took place between the parties.

7. On 1 September 2010, the Respondent confirmed its position by way of issuing an Objection Decision.
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8. The Applicant has filed this application for review dated 23 September 2010, against that decision.

Grounds of Application

9. The Applicant relies on the following grounds for review:

    a) The Applicant imported materials duty free and tax free for adding value and exporting as well as supplying to others Duty Suspension Scheme (DSS) operators for processing and exporting. As no VAT was payable on importing raw materials for sale to other DSS companies,

the Applicant accordingly did not charge VAT on sale of these materials.

b) The above sales were declared as zero rated in the VAT returns. FIRCA (sic) has wrongly reversed these transactions demanding the Applicant to pay VAT on these sales.

10. 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

11. The case of the Applicant relies on various submissions and materials, including:-
    - Submissions of the Applicant dated 25 September 2012;
    - Supplementary Submissions of the Applicant filed on 26 September 2013;
    - Supplementary Affidavit of Ravindra Prassad dated 2 September 2013;
    - Agreed Bundle of Documents dated 16 November 2012; and
    - An Agreed Statement of Facts prepared between the parties on 6 August 2012.

12. The Agreed Statement of Facts have become somewhat contentious. It is the case that during the course of the trial, Counsel for the Respondent has moved away from some of that Agreement. The Revised Submission of the Respondent dated 23 October 2013, also clearly sets out the change of position.

13. The primary issue, is whether or not, the Applicant was a member of the Duties Suspension Scheme, and thereby liable to the exemption from the payment of duties (including value added taxation) in accordance with Section 13 A of the *Customs Tariff Act* (Cap 197). And while it appears that the

Respondent may have at one stage acted as if the Applicant was the holder of a DSS licence for the purposes of Section 36G of the *Customs Act*, it is the case that it no longer holds that view.[1]

14. As I think the parties are all well aware, the determination of that issue is a question of law. As has been said by this Tribunal in *Company G v Fiji Revenue and Customs Authority*[2]

> *In Punjas Ltd v Commissioner of Inland Revenue, the Court of Appeal confirmed the general authority that the doctrine of estoppel does not operate to preclude the Commissioner from pursuing his (or her) statutory duty to assess tax in accordance with law.*

15. Further and for reasons previously alluded to by the Tribunal, the fact that the parties prepare an Agreed Statement of Facts for the assistance of the hearing, does not confine the Tribunal to those facts, particularly if they are discovered to be erroneous. As has been said in *Taxpayer A v Fiji Revenue & Customs Authority*[3] there is nothing to confine the Tribunal to the issues that have been flagged by the parties when discharging its obligations for the purposes of Section 17 of the *Tax Administration Decree* 2009.

Obligation to Pay Value Added Tax (VAT)

16. Section 15 of the *Value Added Tax Decree* 1991 provides

> *(1) Subject to the provisions of this Decree, the tax shall be charged in accordance with the provisions of this Decree at the rate of fifteen percent*[4] *on*

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1 See paragraph 21 of the Revised Submission of the Respondent dated 23 October 2013.

2 [2012] FJTT 9

3 [2012] FJTT 3

4 Decree No.66 of 2010 deleted "twelve and a half percent" and substituted "fifteen percent".

the supply (but not including an exempt supply) in Fiji of goods and services on or after the 1st day of July 1992, by a registered person in the course or furtherance of a taxable activity carried on by that person, by reference to the value of that supply.

(2) Where, but for this subsection, a supply of goods and services would be charged with tax under subsection (1) of this Section, any such supply shall be charged at the rate of zero percent where that supply is a zero-rated supply

Was the Taxpayer Able to Claim An Exemption Under the DSS?

17. Until the first day of trial, the case of the Taxpayer was that it had been granted exemption for duty of goods imported under the Duty Suspension Scheme (DSS). The DSS is an investment scheme that was introduced in 2002[5] as a form of 'Inward Processing Relief', waiving the payment of import duties and taxes on certain goods, on the basis that such goods are intended for manufacturing, processing and subsequent exportation.[6]

18. The entitlement to exemption comes about by virtue of Section 13 A of the *Customs Tariff Act* (Cap 197), that reads:

> *Exemption from duty of goods imported under the duty suspension scheme*
>
> *13A—(1) The Minister may, subject to such conditions as the Minister may consider necessary, exempt from payment of duty the importation or purchase ex-bond of goods or materials if the Minister is satisfied that such goods or materials are to be used by a person licensed under section 36G of the Customs Act.*

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[5] See *Customs (Duty Suspension) Scheme) (Amendment) Act* No 9 of 2002; *Customs Tariff (Duty Suspension Scheme) (Amendment) Act* No 10 of 2002; and *Value Added Tax Decree (Amendment)Act* No 11 of 2002.

[6] See Fiji Islands Customs Services Public Notice Number 10 of 2002. (Annexure 1 of the Respondent's Supplementary Supporting Documents).

19. Section 36G of the *Customs Act* provides as follows:

> *Part 7B—Duty Suspension Scheme for Imported Goods*
> *Power to grant licence, etc*
>
> *36G.—(1) The Comptroller may grant a licence to a person authorising such person to import and export goods that are subject to the duty suspension scheme.*
> *(2) A person who intends to be licensed under subsection (1) may apply to the Comptroller in the prescribed form and accompanied by the prescribed fee.*
> *(3) The Comptroller may, at any time, in his or her discretion, revoke, cancel, or suspend a licence, issued under subsection (1).*
> *(4) Where the Comptroller makes a decision to revoke, cancel or suspend a licence in accordance with subsection (3), the Comptroller shall cause to be served, either personally or by registered post, on the licensee, a notice in writing setting out the Comptroller's findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.*
> *(5) The Comptroller may, at any time, impose conditions on a licence issued under subsection (1) that, in the opinion of the Comptroller are necessary for the protection of revenue or for the purpose of ensuring compliance with this Act and may, at any time, revoke, suspend or vary such conditions so imposed.*
> *(6) Where the Comptroller makes a decision to revoke, suspend or vary a condition of a licence in accordance with subsection (5), the Comptroller shall cause to be served, either personally or by registered post, on the licensee, a notice in writing setting out the Comptroller's findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision.*
> *(7) A person who fails to comply with any conditions imposed under subsection (5)*
> *commits an offence and is liable on conviction to a fine not exceeding $5,000.*

<u>Was Company R Licensed Under the *Customs Act*?</u>

20. First and foremost this is the most critical issue to the analysis, whether the Applicant is a person licensed under Section 36G of the *Customs Act*.

21. The Applicant appears to one of a group of Companies. In October 2004, the Managing Director of Company R2, wrote to the Chief Executive Officer of the Organisation responsible for the administration of the DSS under the *Customs (Duty Suspension Scheme) Regulations* 2002, asking that its operating

licence that had been issued on 1 October 2002,[7] be transferred to Company R.

22. On 15 November 2004, the Chief Executive Officer of the Organisation responsible for the administration of the DSS, wrote to Company R[8] and advised that "we are giving our approval to the transfer of the DSS license ".[9]

The Licence That Was Issued in 2002 and Whether It Can be Transferred?

23. The Operating Licence that was issued to Company R2 on 1 October 2002, appears to be slightly defective. It reads:

> *By virtue of the powers vested in me under subsection (1) of section 36G of the Customs (Duty Suspension Scheme) (Amendment) Act 9 of 2002 I hereby grant an operating licence to*
>
> *(Company R2)*

24. The reality of the situation is that there is no such provision contained within that amendment Act. The amendment Act had the effect of doing just that, causing an amendment to the *Customs Act.* The power vested in the Comptroller to issue any licence, arises out of the *Customs Act.*

25. Be that as it may and even if it is accepted that the licence is not defective on the basis of that mistake,[10] the licence has been issued with the condition that

> *(the) licence shall not be transferable and shall remain valid until it is revoked, cancelled or suspended*

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7 See Operating Licence No DSS 010 as contained within Supplementary Affidavit of Mr Ravindra Prassad dated 2 September 2013.

8 Not Company R2.

9 See Folio 47 within the Agreed Bundle of Documents.

10 Which I assume that it is not (See for example, *The Perpetual Executors and Trustees Association of Australia Limited v Hosken (Registrar of Titles)* [1912] 14 CLR 286)

26. The language of this condition is clear.

27. On that basis, any decision by the Organisation responsible for the administration of the DSS to transfer the licence to Company R, was simply unlawful. The licence cannot pass by transfer and any new licence would need to be issued, only after it was approved by the Comptroller, having regard to Sections 12 and 13 of the *Customs (Duty Suspension Scheme*) *Regulations* 2002.

28. Similarly any transfer of import credits would need to take place having regard to Section 25 of those Regulations. There is simply no evidence that any of this has taken place. Put more strongly and as Counsel Rakai conceded on the final day of hearing,

> *If we don't have a valid DSS licence, the rest of the argument falls over and then (we) won't be able to claim exemption,*

29. Unfortunately, that position has to be the correct one. The protocols implicit in the administration of the DSS appear quite plain. Their purpose to ensure not only complete transparency, but that all eligibility issues are endorsed by the Comptroller, ensures an appropriate level of checks and balances.

Can the Respondent Otherwise Say that the Items Constitute Zero Rated Supplies

30. Within its original submissions, the Taxpayer sought to otherwise claim that the supplies of the items, should be regarded as "zero rated supplies "for the purposes of Section 15(2) of the Decree.

31. The Applicant relies on Item 2 of the Second Schedule that sets out the circumstances in which zero rated supplies occur. Item 2 reads:

The supply of goods where the goods have been deemed to be entered for export pursuant to the Customs Act 1986, and those goods have been exported by the supplier.

32. The argument runs, that providing the Taxpayer causes the goods to be taken out of Fiji,[11] then the condition is met. Within the Supplementary Submissions, Counsel relies on the case of *The Commissioner of Inland Revenue (NZ) v International Importing Limited*[12] to support the view that the exporter need not be the beneficial owner of the exported goods. That may be so, but in *Australian Trade Commission v Goodman Fielder Industries Ltd*[13] it was held by a Full Federal Court that in order to be the exporter, the supplier must be the effective sender, either contracting with an international carrier at its own expense for the transportation of those goods, or be responsible for the delivery of those goods to another ship or aircraft operator who has been engaged by another party to transport those goods overseas.

33. The argument of the Taxpayer on that basis, must also fail. The Taxpayer advances no other reason why it should be entitled to claim the zero rating for its sales. The argument in relation to past practice or change of position,[14] does not defeat the statutory imperative. While the Tribunal recognises that the Respondent does appear to have had a change of position, for the reasons eluded to earlier, providing that it does so in order to meet its statutory duty, then it simply cannot be estopped.

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11 Presumably by their supply to other companies who were Tax Free Factories

12 72 ATC 6033

13 (1992) 36 FCR 517

14 See for example the Supplementary Submissions of the Applicant dated 26 September 2013 at pp 8-10.

Implications for the Applicant

34. Counsel Rakai argues that if the Taxpayer cannot claim an exemption from the VAT input, then it too should be allowed to pass on that taxation to its suppliers. It is said that they then too could seek to claim the input credit , with their sales.

35. The logistics of such an arrangement, appear too difficult to contemplate, The issue of timing of supply is a difficult obstacle to overcome and the enforceability of any order that was made by the Tribunal would also in such circumstances appear somewhat problematic. The three year limitation imposed for the claiming of input credits under Section 39(6) of the *Value Added Tax Decree* 1991, is also an obvious block to any administrative process that would attempt to impose the sales tax on purchasers long after the sales period had concluded.

Position of the Respondent

36. I note that the language and submissions of the Respondent have altered over time. By the time of trial and certainly on the last day of hearing, there was no mistake though as to what the position of the Respondent was.

37. To summarise that position; the Taxpayer was not regarded as an exported entitled to claim zero rated supplies, nor did Company R hold a licence for the purposes of the Duty Suspension Scheme.

38. As the onus in these matters rests with the Taxpayer,[15] the burden of proof has not otherwise been established. The application for review must therefore fail.

[15] See Section 21 of the *Tax Administration Decree* 2009

Conclusions

39. By way of conclusion, the Tribunal finds that the Taxpayer was not the holder of a Duty Suspension Scheme licence at the relevant time and therefore not entitled to claim an exemption from duty for the purposes of Section 13 A of the *Customs Tariff Act* (Cap 197).

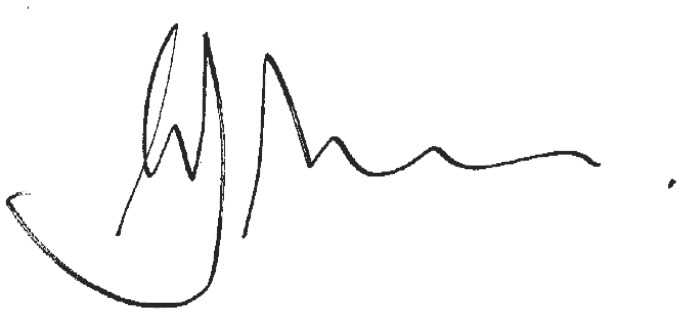
40. The Taxpayer was neither an exporter or entitled to any zero rating of supplies, in accordance with the Schedule of Items contained within the *Value Added Tax Decree* 1991.

41. On that basis and for the reason that the Taxpayer has not otherwise justified why the Amended Assessments of the Respondent should be disturbed, the matter is dismissed.

42. Finally, as a result of the manner in which this matter has been conducted, it would be unfair to entertain any cost application from the Respondent, in light of its own change of position at the commencement of this trial.[16] There shall be no application entertained in relation to costs.

Decision

It is the decision of this Tribunal that the Application for review is dismissed.



Mr Andrew J See
Resident Magistrate

[16] It is noted though that Counsel has changed prior to the hearing getting under way.