FIJI TAX TRIBUNAL

Decision

Section 83 *Tax Administration Decree* 2009

Title of Matter:	**A WESTERN TRANSPORT OPERATOR** **V** **FIJI REVENUE AND CUSTOMS AUTHORITY**	**(Applicant)** **(Respondent)**
Section:	**Section 83 (1) *Tax Administration Decree* 2009**	
Subject:	**Application for Review of Reviewable Decision**	
Matter Number(s):	**Valued Added Tax Action No 4 of 2017**	
Appearances:	**Ms Doton & Ms Sanchez, Rams Law, for the Applicant** **Mr O. Verebalavu & Mr E Eterika, FRCA Legal Unit for the Respondent**	
Dates of Hearing:	**12 March 2018**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**18 June 2018**	

KEYWORDS:
***Values Added Tax Decree* 1991; Schedule 2- Zero Rated Supply of Goods; Provision of Carriage Services by Omnibus licensed as public service vehicle; Definition of charter service; Land Transport Act 1998..**

CASES CITED:
A Fijian Resort v Fiji Revenue and Customs Authority [2014] FJTT 1; Application 01.2013 (6 January 2014)
Civil Aviation Safety Authority v Caper Pty Ltd (2012) 207 FCR 357

Background

[1] This is an application for review of an Objection Decision issued by the Respondent Authority on 7 February 2017, whereby it declared revenue generated by the Taxpayer in the provision of transport services to a hotel, to be subject to value added taxation for the purposes of the *Value Added Tax Act* 1991. The Agreed Facts and Issues provided by the parties, can be summarised in the following way, that:-

- On 1 March 2009 and again on 1 June 2016, the Applicant Taxpayer entered into a Memorandum of Agreement with a company trading as a hotel (resort and spa), to

provide transportation services to all staff and employees and any of its affiliated businesses operating at or near the hotel premises and within the Nadi and Sigatoka areas.

- The terms and conditions pertaining to the provision of that service were set out within the agreements and that the vehicles utilised by the Applicant were all licensed as public service vehicles.

- Arising out of an audit undertaken by the Respondent, it was identified that the Applicant had failed to declare output tax on income received from the provision of the charter services and instead had declared the service as 'zero rated' as at 27 April 2016.

- The Respondent communicated with the Land Transport Authority (LTA) seeking approved transport routes for the period 2009 to 2016.

- Arising out of a further audit of the Taxpayer's records, the Respondent identified a tax discrepancy of $522,415.73.

- By agreement between the parties on 9 November 2017, the Respondent accepted $286,411.64 as satisfaction of any tax arrears claimed.

Issues to be Determined

[2] The parties are of the view that the following issues need to be determined:-

(i) Whether the services provided by the Applicant to the hotel classified as charter services?
(ii) If so, are charter services classified as zero rating of VAT pursuant to section 27 of the Second Schedule of the *VAT ACT* 1991.
(iii) Whether the services provided by the Applicant can be otherwise classified as being 'zero rated' for the purposes of the *VAT Act* 1991.

[3] For reasons that may be best left to consider later on within this judgment, the Tribunal is of the view that the analysis requires an exploration of issues that extend beyond this agreed scope.

The Value Added Tax System and Zero-Rating Scheme

[4] In *A Fijian Resort v Fiji Revenue and Customs Authority*[1], this Tribunal noted that the Value Added Tax Regime has been described in this way:

> *It is a multistage tax imposed at all levels on all providers of goods and services (save those exempted). The essential features of VAT is that it taxes final and intermediate sales at each stage of the production and distribution process. This is usually implemented using a credit offset mechanism, otherwise known as the invoice method. Using the invoice method, credits are given for inputs purchased. In effect, each firm is taxed only on the "valued added" to the product. In other words, tax is levied on taxable sales minus*

[1] [2014] FJTT 1; Application 01.2013 (6 January 2014)

purchases of taxable inputs. This means that, when the tax at each stage of the transaction is aggregated and credits subtracted, the total amount of tax paid is equivalent to the final consumer price times the VAT rate.[2]

[5] The legislation is structured so that there needs to be a 'supply' of goods and services as defined by Section 3 of the Act, and thereafter such supply will be amenable to the imposition of tax in accordance with Section 15, that 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 nine percent on 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.

[6] The exemption for the taxation on zero-rated supplies, has the effect of lowering the total purchase price of the goods or service. There are various policies reasons for doing this. Section 2 of the Act further defines 'zero rated supply' to mean a supply described relevantly in this case at Paragraph 27 of Schedule 2 as follows:

The supply of transport services relating to the carriage of passengers and goods from a place in Fiji to another place in Fiji by an omnibus licensed as a public service vehicle and constitutes —carriage for the purpose of the Land Transport Act.

For the purposes of this paragraph the terms – —Omnibus means any motor vehicle equipped for the conveyance of not less than 12 persons excluding the driver within the meaning of the Land Transport Act; —passenger means, any person other than a driver carried in or on a vehicle within the meaning of the Land Transport Act.

[7] The Respondent holds the position within its Objection Decision dated 7 February 2017, that as the services provided by the Taxpayer to the hotel are 'charter services'[3], that they cannot gain the benefit of the zero-rated concession, that was otherwise provided to licensed route transport operators as part of an agreement entered into between the Government of the Republic of Fiji and the Fiji Bus Operators Association on 7 January 2011.

Paragraph 27 of the Second Schedule

[8] It should be noted that Paragraph 27 of the Second Schedule was introduced into the present Act in its current form by virtue of the *Value Added Tax (Amendment)* Decree 2011[4]. The original Decree, now Act, as it was first made in 1991, saw a zero rating for "the supply of public passenger transportation by bus"[5]. That original provision exempting the taxation on passenger transportation was repealed effective from 1 January 1996, following the passing of the *Value*

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2 Qionibaravi , Litia and Green, Richard (1993) "The Adoption of a Consumption Tax in Fiji ," *Revenue Law Journal*: Vol. 3: Iss. 2, Article 6.

3 See the definition of that expression as it appears in Section 66(5) of the *Land Transport Act* 1998.

4 See Decree No 6 of 2011.(14 January 2011)

5 Refer to Paragraph 17 of the Second Schedule as it was then made.

Added Tax (Amendment) (No 2) Act 1995[6], at which time the specific paragraph as well as the definitions of 'bus' and 'public passenger transportation' were also deleted from the Schedule[7].

[9] Returning to the current statutory provision, this has to be the focus of attention in any statutory analysis. Here the language of paragraph 27 is critical

> ***The supply of transport services relating to the carriage of passengers and goods from a place in Fiji to another place in Fiji by an omnibus licensed as a public service vehicle and constitutes —carriage for the purpose of the Land Transport Act.***

[10] There does not appear to be any dispute between the parties that there is a supply of transport services relating to the carriage of passengers from a place in Fiji to another place. It does not also seem to be contested that the Applicant is utilising omnibuses licensed as public service vehicles. What is in contention, is whether or not the transportation of employees of the hotel to and from their place of work, constitutes carriage for the purpose of the *Land Transport Act*. That is, are these vehicles providing that service, involved in carriage for the purposes of the *Land Transport Act*.

What is Meant by the Term "Carriage for the Purposes of the *Land Transport Act* ?

[11] The Respondent relies on a Notice issued by its then Chief Executive Officer, entitled 'Value Added Tax (VAT) Compliance Issues' as giving an illustration of the policy intent underpinning Paragraph 27 of the Second Schedule[8]. It has been identified within the Notice, that an example of a zero-rated supply is in the case of :-

> "Bus Industry- bus fares for scheduled trips only and not charter services"

[12] Whilst the Tribunal accepts that this may have been the interpretation of the Chief Executive Officer and his advisers, that in itself, is an insufficient basis to attempt to give meaning to a statute. The more contemporaneous document being the Agreement reached between the Government and the Fiji Bus Operators though still not ideal, nonetheless is likely to be closer in point and time and more suggestive of any policy intent. Remarkably though, neither party sought to explore that situation. The Deed of Agreement was entered into on 7 January 2011[9]. The subsequent amendment that created the taxation exemption were introduced on 14 January 2011, with retrospective effect from 1 January 2011.

[13] In any event, as indicated, the starting point for the analysis must be the language of paragraph 27 itself. To start with, the term 'carriage' appears in the *Land Transport Act* on 14 occasions. Within Part VI of the Act, under the heading Public Service Vehicle Licensing, the term is used in the following ways:-

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6 See Act 29 of 1995 as assented to on 19 December 1995.

7 Where "Bus" meant any heavy public service vehicle licensed to carry thirteen or more passengers within the meaning of the Traffic Act; and "Public passenger transportation", in relation to a bus meant stage carriage within the meaning of the Traffic Act.

8 See Tab 15 of the Respondents Bundle of Documents as filed on 12 March 2018.

9 See Annexure 'VK 11' to the Affidavit of Evidence in Chief of VK sworn on 1 February 2018.

- Referring to the carriage of passengers for hire, reward or other consideration[10];

- Referring to a vehicle being used for the carriage of goods and is carrying the owner of the goods or his employee[11];

[14] In *Civil Aviation Safety Authority v Caper Pty Ltd*[12], Murphy J defined the term carriage in this way:

> *"Carriage" is a non-technical term and should be given its ordinary meaning. The Australian Concise Oxford Dictionary relevantly defines carriage as "the conveying of goods" although in this provision it plainly applies to the conveying of people as well. The dictionary definition of "convey" is "transport or carry". "Transport" too is an ordinary word and should to be given its ordinary meaning. The dictionary definition of "transport" relevantly includes "take or carry (a person, goods, troops, baggage, etc) from one place to another". Transport is used to describe the verb "convey" which in turn is part of the definition of 'carriage". The words "transport" and "carriage" are effectively interchangeable*

[15] The transportation of employees between their place of work and their homes or to another destination as part of that journey, would amount to "carriage of passengers and goods from a place in Fiji to another place in Fiji"

Are the Omnibuses Licensed as Public Service Vehicles?

[16] Sections 61 and 62 of the Act, deal with the circumstances as to when a motor vehicle needs to be licensed as a Public Service Motor Vehicle. In the case of Section 61, that provision is set out as follows:

> *(1) Subject to subsection (2), a motor vehicle used for the carriage of passengers for hire, reward or other consideration is deemed to be a public service vehicle for the purpose of this Act and the regulations.*
>
> *(2) A motor vehicle may, on an application made to the Authority, be exempted as a public service vehicle although it is being used for the carriage of passengers for hire, reward or other consideration if -*
>
> > *(a) such carriage is not the principal activity of the owner of the vehicle and the passengers are being carried in the course of that principal activity; or*
> >
> > *(b) the vehicle is also being used for the carriage of goods and is carrying the owner of the goods or his employee.*
>
> *(3) For the purpose of paragraph (a) of subsection (2), principal activity includes the operation of a school, charitable or religious organisation or similar institution but does not include any commercial activity as may be determined by the Authority.*

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10 See Section 61(1) of the Act.

11 See Section 61(2)(b0 of the Act.

12 (2012) 207 FCR 357

(4) A holder of a driving school certificate may apply to the Authority for the approval of the use of an omnibus for the purposes of driving tests or examinations.

(5) An omnibus approved under subsection (4) is deemed to be a licensed public service vehicle for the purposes of driving tests or examinations.

(6) No person shall, from the date of commencement of this Part, be granted a public service vehicle driver's licence unless that person has attended and participated in a formal course and programme of instruction in defensive driving and road safety approved by the Authority.

(7) A person who is a holder of a public service vehicle driver's licence on the date this Part comes into force shall be required to attend and participate in a formal course and programme in defensive driving and road safety conducted or approved by the Authority within 12 months from that date or within such other period as may be determined by the Authority; and the Authority may refuse to renew a public service vehicle driver's licence for non-compliance with this subsection.

[17] There seems no doubt that in accordance with Section 61(1) of the Act, these buses would be regarded as public service vehicles if they are *used for the carriage of passengers for hire, reward or other consideration.* The two agreements entered into between the Applicant and hotel on 1 March 2009 and 1 June 2016 are sufficient to establish that fact. Yet to operate a Public Service Vehicle, requires a licence, in accordance with Section 62 of the Act. And that licence is issued to enable a motor vehicle owned by that person to operate in the manner described in a public service permit held by that person[13].

[18] The classes of licence are set out in Section 63(3) of the Act as:-

a) a taxi licence, which shall only be issued in respect of a motor vehicle equipped for the conveyance of not less than 4 and not more than 5 persons excluding the driver;

(b) a rental vehicle licence, which shall only be issued in respect of a motor vehicle equipped for the conveyance of not more than 8 persons excluding the driver;

(c) a hire vehicle licence, which shall only be issued in respect of a motor vehicle equipped for, the conveyance of not less than 4 and not more than 8 persons excluding the driver;

(d) a road service vehicle licence, which shall only be issued in respect of -

(i) an omnibus which, for the purpose of this Act, is a motor vehicle equipped for the conveyance of not less than 12 persons excluding the driver and constructed so that the driver and passengers are located in the same structural compartment; or

(ii) a carrier which, for the purpose of this Act, is a motor vehicle constructed and equipped for the safe carriage of passengers and goods such that the majority of passengers are located separate from the driver's compartment.

[13] See Section 63(1) of the Act.

[19] The licence that would be relevant in this case, would be that issued in accordance with Section 63(3)(d)(i) of the Act. It is also important to note, that Section 64 (1) of the Act makes clear, that "a public service permit issued under this Part does not authorise the use of any motor vehicle otherwise than in accordance with such conditions as may prescribed in relation to that permit". There appear to be five types of public service permits that can be issued in accordance with Section 65 of the Act:-

(i) Taxi Permit

(ii) Rental Permit

(iii) Hire Permit

(iv) Road Permit

(v) Minibus Permit

[20] In turn the road permits can be used for three distinct activities:-

(i) A Road Route Licence
- A scheduled service with specified route, and stops between terminating points; or
- An Express Service;

(ii) A Road Contract Licence – (one or more road services for transportation of passengers and goods on basis of a contract); or

(iii) A carrier licence.

[21] In each case though, the proviso contained at Section 65(3) of the Act, is that the Authority will set the fares for such service. It should also be pointed out, that the Act prescribes a penalty, in the case where a person operates a public service vehicle without or contrary to the conditions of a permit issued under Section 65.

What is Meant by the Words 'Constitutes – Carriage for the purposes of the Land Transport Act" ?

[22] So, when do we have carriage for the purposes of the Act? This is the more important question in the statutory analysis, not whether the service is a charter service or not. The Long Title of the *Land Transport Act* is:

To establish the Land Transport Authority, to regulate the registration and use of vehicles, the licensing of drivers of vehicles and the enforcement of traffic laws and to provide for the repeal of the Traffic Act and for related matters.

[23] The provision of a transport service to the hotel by the Taxpayer would seem to be compatible with the purposes of the *Land Transport Act.* There is no doubt that the vehicles used are public service vehicles and it does not appear to be in dispute that the Taxpayer has licenses for these vehicles for the Denarau to Nadi route. Though in the present set of circumstances, the Respondent correctly asserts that the Taxpayer did not have at the relevant time, the permit to operate a licensed service for the purposes of Section 65 of the Act. Instead, the Respondent says that the Applicant was operating a charter service. This may have been the case, however

what is the consequence of that, for the purposes of Paragraph 27. What Paragraph 27 of the Second Schedule is in effect saying, is that the exemption will apply, provided that the Taxpayer is licensed to provide those transport services in accordance with Section 63(d)(i) of the Act. It does not appear sufficient for the vehicle to be simply licensed for the purposes of Section 62 of the Act. The vehicle must be operating with a specific permit to support its use. At Paragraph 19 of the Affidavit of Mr K, it indicates that the Applicant had lodged an application for an RCL (road contract licence) on or about mid May 2009 and submitted a copy of its First Agreement at that time.

[24] It would seem crystal clear within the Applicant's own submissions[14] that it did not possess a public service permit at the relevant time, in accordance with Section 63(d)(i) of the Act. Whether the service provided is thereafter characterised as a charter service is another issue. The definition of charter service contained within Section 66(5) of the Act is given to mean "the use of a public service vehicle for the transportation of passengers and goods on the basis of a contract for the hire of the vehicle as a whole between the holder of the road permit or a minibus permit and the hirer". The Applicant clearly intended to gain a road permit in respect of a road contract licence. The requirement of a road contract licence is that there is in existence a contract between the holder of the licence and another person. Whether the road permit is one issued for 'charter services', is contingent upon whether the contract for the provision of those services is a "contract for the hire of the vehicle as a whole between the holder of the road permit ….and the hirer". A contractual arrangement of that type would be a special condition to the issuing of a permit for the purposes of Section 66 of the Act, that would most likely avoid the requirement at Section 65(3) of the Act, that the fares would otherwise be fixed by the Authority[15].

[25] So much can be concluded by the use of the words, "a contract for the hire of the vehicle as a whole". This seems to suggest that the hirer is paying the total contract price and no fares are being paid to the bus operator directly by the passengers. Whether the supply of those services, can or cannot attract the zero-rating exemption, is quite another matter.

[26] The Applicant has provided a copy of the first Agreement that it entered into with the hotel dated 1 March 2009[16]. Clause 3 of that Agreement appears to demonstrate that the Taxpayer rather than the employees is responsible for the payment of the service. That is, that invoices will be issued to the hotel (and not employees) for the provision of the service. It is noted that the Applicant has failed to supply the structure of those charges, which it claims to be VAT Exclusive that were set out within the Schedule 1 as referenced. The Second Agreement made on 1 April 2013, at 'VK8" of that same Affidavit, is of the same type. Again, the Taxpayer has elected not to disclose the structure of charges that are included as Schedule 1 to that Agreement. The Tribunal can only but speculate as to what that structure actually contains. Nonetheless it is noted that Clause 1.2 of the Second Agreement, provides:

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14 See Paragraph 35 of the Applicants Submissions filed on 29 March 2018.

15 Though that issue would need to be determined on another occasion.

16 See Annexure VK 4 of the Affidavit of VK filed on 2 February 2018.

"The agreement for transportation of staff is a charter (sic) all employees associated with (the hotel)"

[27] The question arises, does it matter whether the Taxpayer has been issued a permit for charter services rather than a specific road permit? Unless the license is issued, then no exemption can lawfully be claimed. If the Taxpayer was acting upon any representations and undertakings in relation to the status of such matters, those such representations and undertakings have not surfaced during these proceedings.

Deed of Agreement 7 January 2011

[28] Finally and against the backdrop that appears to be the legislative answer to this review application, the Tribunal wants to make some observations about the Deed entered into between the parties on 7 January 2011. Firstly, the preamble to that Agreement recognises that in the past Government has granted to the Bus Operators Association and its members, various concessions and subsidies. Secondly, it seems that an agreement was made to forego any increase in bus fares, paid by the travelling public and in exchange, there would be a zero rating for all such base fares. There are several further conditions that appear to have been imposed by Government as part of this trade off. They are, that there shall be a service agreement that senior citizens and disabled travellers will receive concessional and free services; that the bus operators will continue to provide and effectively implement the bus fare voucher system; and that there be a moratorium on fare increases for a three- year period, subject to crude oil prices not exceeding $145 US per barrel.

[29] All of these factors appear to be ones that have as their focus public transport considerations. At first glance, it is difficult to understand how a private transport arrangement between a hotel and a bus company would have any real interest with such matters[17]. Certainly, there would be no obligation to provide concessional travel for patrons, as it would seem highly unlikely that they would be employees of the hotel. There is insufficient information before the Tribunal in relation to the question of fares; whether it is user pay or whether this is a service provided by the hotel. From the information contained within the Affidavit of Evidence in Chief of VK dated 1 February 2018, it would appear that the determination of the rate was very much a negotiated outcome between the hotel and the Applicant. Whilst it is further noted within Paragraph 31 of the Affidavit of Mr K, that the Applicant relied on the Fiji Bus Operators Deed with Government to both continue to provide its services to the hotel and to thereafter retain the VAT portion collected from the bus fares, there is no evidentiary support to such a claim. And if it was the case that the Taxpayer believed that the zero rating would apply, why was it then that it "retained the VAT portion collected from the bus fares"[18]. Wouldn't the situation be that it should not charge the VAT in the first instance?

Conclusions

[30] It is noted within the submissions of the Applicant that it has a road route licence to operate exclusively between Nadi and Denarau and as the Annexure VK3 to the Affidavit of Mr K reveals,

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17 The Tribunal nonetheless notes that the inclusion of the definition of charter service as a consequence of the *Land Transport (Amendment) Act* 1999 and notes that a special condition, could although it would not seem to be desirable in all instances, relate to the fares to be charged.

18 See Paragraph 31 of the Affidavit of Mr K filed on 2 February 2018.

this licence identifies various public service vehicles that are used for that purpose. The existence of that licence for that route does not really provide any assistance on this occasion. It is also noted that a person who operates or permits to operate a public service vehicle without a permit commits an offence[19]. Within Paragraph 16 of the Affidavit of the former LTA Chief Executive Officer, Mr Tuinaceva filed on 2 February 2018, it is stated that the Applicant provided it services to the hotel in question, pursuant to a consent issued on 2 February 2009. Yet nowhere in the materials does that consent appear to be located. The Applicant was not issued with a permit for the purposes of the Act and that is a fundamental requirement under the legislation.

[31] The undertaking of a service be it described as a charter service or otherwise, without a permit, would not constitute carriage for the purpose of the Land Transport Act. It therefore would mean that it could not fall within the definition of Paragraph 27 to Schedule 2 of the *Value Added Tax Act* 1991. Whilst that may appear a somewhat unfortunate conclusion, at the end of the day there appears no other way of making a determination according to law. If a permit providing a road contract licence had been issued, the question remained whether or not, such a case would qualify the operator for a zero-rating exemption as provided for in Schedule 2. There appears nothing in the statute that would prohibit such an outcome. Whether the legislator intended to draw a distinction between public services as opposed to private transport services (charter services) and provide for the exclusion of one category and the inclusion of another, is not evident within the language of the statute. As no party has provided any other extrinsic material, nor asked for an interpretation of the law reliant on such, the conclusion must be given as is apparent through the plain language of the law.

[32] Whether a road contract licence could be issued retrospectively, for example, to formalise what may have otherwise been informally in place, so as to produce a different result, is not a matter for this Tribunal on this occasion. The application must be dismissed for the above reasons.

Decision

[33] It is the decision of this Tribunal that:-

(i) The application for review dated 30 August 2017 is dismissed.
(ii) The Respondent is free to make application for costs within 21 days hereof.

Mr Andrew J See
Resident Magistrate

[19] See Section 66(4) of the Act.