01/09/17

IN THE SUPREME COURT OF TONGA **AM 4 of 2017** Scan, email, upload + file

APPELLATE JURISDICTION

NUKU'ALOFA REGISTRY

BETWEEN: **MINISTER OF REVENUE AND CUSTOMS**

- Appellant

AND: **FRIENDLY ISLANDS SATELLITE COMMUNICATIONS COMPANY LIMITED (TONGASAT)**

- Respondent

S. Sisifa SC for the Appellant

W. Edwards for the Respondent

JUDGMENT

[1] This is an appeal from a Decision of the Tax Tribunal dated 3 February 2017 brought pursuant to section 10 of the Revenue Services Administration Act.

[2] By way of preliminary observation it will be noted that the President of the Tax Tribunal is a Supreme Court Judge and this appeal is being considered by another Supreme Court Judge. From the perspectives of public confidence in due process and judicial comity it is undesirable that an appeal from one Supreme Court Judge should be heard by another, particularly when the latter sits alone. I record my regret that this aspect of section 10 has not, as recommended, been amended.

[3] On 14 August 2015 the Ministry issued Tongasat with a Consumption Tax assessment for the period July 2006 to March 2015 amounting to just under TOP$18 million, not including penalties for late payment.

[4] On 8 October 2015 Tongasat filed notices of objection to the taxation decision and the assessment. In paragraph 1 of the objection to the assessment Tongasat stated.

> "The assessment is insofar as it purports to find that there is a taxable supply in accordance with the Consumption tax 2003 as amended ("the Act") amounts to an error of law in that there was no supply of goods or services that has taken place in Tonga and, insofar as the legislation requires the conduct of a taxable supply as defined in S.2 there was no such taxable supply and the assessment is in the circumstances null, void and of no legal effect".

[5] On 23 October 2015 the Ministry replied to the notices of objection. It stated its view that Tongasat had made taxable supplies (as defined in the Act) to the Government of Tonga in Tonga and that these supplies were neither zero rated nor exempt. The supplies made by Tongasat consisted of agency/marketing/facilitation services to the Government from a business carried on in Tonga. Finally, such supplies could not be characterised as for use outside Tonga.

[6] On 20 November 2015 Tongasat applied to the Tax Tribunal for a review of the Minister's decision. A lengthy response containing a chronology of events was filed by the Minister. Paragraph 115 of the response reads:

> "In a nutshell the Respondent's contention is that Tongasat is supplying an agency service to the Tongan Government in Tonga through a Tongan enterprise to explore a Tongan asset

being the rights to use orbital slots which has been allocated for the exclusive use by the Tongan Government by the International Telecommunications Union (ITU)".

In the following paragraph it was explained that the supply of the agency services is a taxable supply since a) there is a supply of goods and services b) the supply is in Tonga and c) the supply is made in connection with the carrying or of an enterprise. Furthermore, the supply is not consumption tax exempt since no exemption order has been made and the tax supply is not zero rated as the services are not supplied for use outside Tonga.

[7] At paragraph 122 counsel for the Minister expresses the "crux of the dispute" as follows:

> "[Tongasat] is contending that the supply is the provision of services overseas in respect of the use by the licensee/lessee overseas of the Tongan asset whereas the Respondent is contending that the supply is the provision of agency services by Tongasat on behalf of the Tongan Government irrespective of where provided".
>
> "The marketing services provided by the subagent of Tongasat and paid by Tongasat out of its share of the agency income may well be overseas and not connected to Tonga as is the use by the entity using the slot, but *these is not the taxable supply subject to consumption tax in Tonga*". (emphasis added).

[8] There followed lengthy and detailed submissions to the Tax Tribunal, largely repeating, in expanded form, the issues already raised.

[9] In paragraph 1 of its Decision the Tax Tribunal identified the issue for determination as follows:

> "Whether in terms of section 10(2) the Applicant made supplies of services [that] occur at a place of business [in Tonga] from which the services were supplied".

[10] Section 10 of the Consumption Tax Act (Cap 26.02) is as follows:

"Place of Supply

(1) (Not relevant)

(2) Subject to subsections (3), (4) and (5) a supply of services shall occur at the place of business from which the services are supplied.

(3) The supply of the following services shall occur in Tonga if the recipient uses or obtains the advantage of the services in Tonga of –

(a) A transfer, assignment of, or grant of a right to use, a copyright, patent, trademark;

(b) Accountants, architects, consultants, engineers or law practitioners;

(c) The processing of data or supplying information or any similar service;

(d) An advertising service;

(e) The toleration of any situation or the refraining from doing any act;

(f) The supply of personnel; or

(g) The service of an agent in procuring a service described in this subsection.

(4) A supply of services in connection with real property shall occur in Tonga if the real property is in Tonga

(5) A supply of services by a licencing authority shall be deemed to have occurred in Tonga regardless of where the licence, permit,

certificate, concession, authorisation or other document is issued".

[11] The parties' cases were summarised in paragraphs 3 – 6 of the Decision. Paragraph 5(b) stated that the Minister claimed that Tongasat had "its principal place of business in Tonga and operated from premises leased by Tongasat in Tonga".

[12] In paragraph 6 the Tribunal stated that:

> "The key issue is whether the agency services were supplied from a place of business in Tonga".

[13] At paragraph 23 the Tribunal concluded:

> "Having studied the various documentation and agency agreement obligations we have little doubt that most of the work carried out by Tongasat that resulted in revenue under the Agency agreement was performed overseas for the Government of Tonga though there may, at times, have been some reporting and possibly meetings to update the Government that were held in Tonga". "Our finding is that the actual performance of the Agency agreement very substantially, if not exclusively, took place outside Tonga, and thus the services were, as Mr Edwards submitted, in reality foreign services and not domestic services performed by Tongasat for the Government under its Agency agreement".

[14] During the hearing before the Tribunal it emerged that Tongasat not only had an office, a place of business, in Tonga, but also in Hong Kong which it operated through a sub-agent PAGH. This place of business, the Tribunal found was the actual place of business from

which Tongasat's income generating activities were "advanced" (paragraph 38).

[15] In paragraph 43 the Tribunal stated:

> "... The outcome of this case has turned on the importance of place of business and the [Hong Kong] premises, the importance of which was underscored until the tribunal took up the point in more detail ...".

[16] At paragraph 28 the Tribunal had stated:

> "We agree to that extent with the argument advanced by Mr O'Shannassy that the agency agreement did create a relationship of supplies – Tongasat [with the] recipient of services being the Government of Tonga – and that consideration was paid for those services, namely retention of [a] defined part of the revenue received from the contracting parties for the assignment of the orbital slots".

[17] It appears to me however that the Tribunal took the view that since the bulk of Tongasat's business activity took place out of its overseas place of business, the supply which it acknowledged was provided by its Tongan place of business should be disregarded.

[18] The Court has before it a synopsis of submissions filed by Mr Sisifa and a synopsis of submissions filed by Mr Edwards. These documents are essentially restatements of arguments already on file including the Notice of Appeal. In February 2017 Counsel for the Minister stated:

> "(ii) To put it succinctly the Tribunal considered the wrong services. It looked at the services performed by the

Government of Tonga through its agent Tongasat overseas. It found a place of business overseas and therefore said that the subsection 10(2) did not apply as there was not a place of business in Tonga from which the services were supplied.

(iii) The services that the Minister considered were subject to CT were the agency services provided to the Government of Tonga and these were services supplied at a place of business in Tonga".

At paragraph 15(iv):

"The Tribunal erred in finding that performance was exclusively outside Tonga. The Tribunal addressed the wrong issue. The performance outside Tonga was not Tongasat's services. It was the Government of Tonga's services performed by its agent. That is, you can perform a contract on behalf of someone else outside Tonga but that does not make the services from a place of business outside Tonga".

[19] In his synopsis, paragraph 8.4, Mr Edwards wrote:

"It appears that the central argument for the Crown is the 'place of business', the issue of 'supply' and 'taxable supply' which the Appellant contends that the Tax Tribunal erred.

At 8.5 he wrote:

"It is the respectful submission of [Tongasat] that the Tax Tribunal made correct findings of fact that predominantly the services that the Respondent provided were overseas. The income generated by the services carried out by the

Respondent were foreign revenue and therefore the supply of services was foreign".

[20] In my view neither the existence of places of business outside Tonga not the proportion of the supplier's business conducted through such overseas places of business affects the critical question which is, was there a taxable supply within Tonga? In my view there was nothing before the Tribunal to show that this was not the case and accordingly the application should have been dismissed.

[21] The findings of the Tribunal with respect to certain 2014 agreements (paragraphs 35, 40, 41 and 42) are accepted by the Minister.

[22] Towards the end of the hearing of the appeal Mr Edwards pointed out that tax invoices had not, in fact, ever been issued by Tongasat. If therefore this Court were minded to allow the appeal he suggested that the matter be remitted to the Tribunal for consideration of any further resulting issues. Both counsel, however, advised the Court that in view of the importance of the question of law raised and the very large sum of money at stake, a second appeal would be taken to the Court of Appeal. In my view the better course would be for that Court to remit the matter to the Tribunal if, following disposal of the appeal, there are still matters awaiting resolution.

[23] The appeal is allowed. There will be no order as to costs.

M. D. Scott

DATED : 1 SEPTEMBER 2017 **J U D G E**