OHSAN-BELLEPEAU J.C V THE DIRECTOR GENERAL, MRA

IN THE SUPREME COURT OF MAURITIUS

2015 SCJ 153

Record No. 96727

In the matter of:

Jean Christophe Ohsan-Bellepeau

Appellant

v.

The Director General, Mauritius Revenue Authority

Respondent

AND

Record No. 97059

In the matter of:

The Director General, Mauritius Revenue Authority

Appellant

v.

J.C. Ohsan-Bellepeau

Respondent

JUDGMENT

The appellant in the first appeal was at all material times an attorney-at-law practising in Mauritius. On 1 October 2002, he became a registered taxable person under the Value Added Tax Act (VAT Act). However, prior to his registration, the appellant had purchased a private car in September 2000. He sold the car in 2003 after he had become a VAT registered person. The appellant appealed to the Assessment Review Committee ("The Committee") against a decision of the Respondent claiming that VAT was chargeable on the sale price of the car. The Committee concluded that:

(1) VAT is chargeable on the sale of the car under Section 9(1) of the VAT Act;
(2) The chargeable VAT should be apportioned and VAT was chargeable on 60% of the sale price of the car on the basis that, for income tax purposes, the respondent had claimed 60% capital allowance for the professional and business use of the car.

In the first appeal the appellant is challenging the decision of the Committee that VAT is chargeable on the sale of the car. In the second appeal the appellant (MRA) is contesting the decision of the Committee on the ground that the law does not provide for any apportionment of the VAT chargeable on the sale price of the car and that VAT is payable in full under the VAT Act.

Both appeals were heard together. We shall deliver a single judgment which shall be filed in each record since both appeals question the same decision of the Committee and which arise from the same set of facts involving the same parties.

Apportionment

We shall deal first with the second appeal which can easily be resolved. In the second appeal, the MRA as appellant claims that the VAT Act does not provide for any apportionment of the chargeable VAT. The Committee had found that VAT is chargeable on the sale of the car under Section 9(1) of the Act since the sale of the car was made in the course of the business carried on by respondent Ohsan-Bellepeau. The Committee also found that VAT was not chargeable on the totality of the sale price, since the car was also being used for private purposes. The appellant had claimed in respect of the same car in his income tax returns for financial years 2001-2002 and 2002-2003, capital allowances apportioned on the basis of 40% for personal use and 60% for professional use. The Committee concluded that on the basis of the apportionment used for capital allowances claimed for income tax purposes, VAT is chargeable on 60% of the sale price of the car.

Learned Counsel for Attorney Ohsan-Bellepeau did not challenge the appeal of the MRA. He readily conceded that the Committee's decision on the issue of apportionment is erroneous in law inasmuch as there are no provisions for any such apportionment under the VAT Act.

Our law in Mauritius, unlike the UK and European legislation and also unlike our income tax legislation, does not provide for any apportionment in the case of a mixed-use capital item. There is in fact no provision under the VAT Act which allows or provides for apportionment between private and business use. An apportionment may be made in respect of the deduction of input tax as a credit under Section 21(3) only in the case where the goods are used to make *"both taxable and exempt supplies"* which is not the case in the present matter. The Committee erred in law in basing its decision to make an apportionment on Section 12(4) of the Act. Section 12(4) in fact only applies *"where a taxable supply is not the only matter to which a consideration in money relates …".* This is clearly not the situation in the present matter where the transaction involved only the sale of a car which constituted the full consideration for the purchase price which was paid wholly for the car. There is no legal basis, under the VAT Act, to make any apportionment as was done under the income tax legislation for the capital allowances claimed in respect of the car for income tax purposes.

In the absence of any legal provisions allowing for an apportionment in the VAT chargeable under the Act for the sale of the car, we hold that the percentage claimed as capital allowances for the purposes of income tax would not warrant a similar apportionment in respect of the VAT chargeable for the sale of the car.

For the given reasons, we hold that the Committee erred in law in finding that VAT could be apportioned and was chargeable on 60% of the sale price of the car on the basis that the proportionate percentage which had been assigned for business purposes was 60%. The second appeal must therefore succeed.

We accordingly quash the decision of the Committee and hold that the sale price of the car can only be subject in full to VAT in case VAT is chargeable.

We shall now turn to the first appeal. The appellant's case is that VAT is not chargeable in respect of the sale of his car since it was not a supply made in "*the course or furtherance of a business*" carried on by him. The respondent (The MRA) on the other hand claims that in the circumstances the appellant is bound to pay VAT on the sale price of the car since the appellant is, by virtue of the applicable provisions of the VAT Act, "*a taxable person*" making "*a taxable supply*" and the supply is made in "*the course of a business".*

It is necessary at this juncture to reproduce all the relevant provisions of the VAT Act which are material for the determination of the question whether VAT is chargeable or not in the present matter in respect of the sale of the car by the appellant.

The liability to be charged for the payment of VAT is created under Section 9 of the Act, the relevant provisions of which read as follows:

*"9. **Charge to value added tax***

(1) VAT shall be charged on any supply of goods or services made in Mauritius, where it is a taxable supply made by a taxable person in the course or furtherance of a business carried on by him.

(2) VAT on a taxable supply is a liability of the person making the supply and becomes due at the time of the supply.

… … …

(6) Every taxable person shall be liable to pay to the Director-General VAT on all his taxable supplies as from the date he is required to be registered as a registered person under this Act."

Section 2, which is the Interpretation Section of the Act, contains the following definitions which are applicable in the present matter.

"input tax" – in relation to a taxable person, means –

(a) VAT charged on the supply to him of any goods or services; …"

"output tax" – in relation to a taxable person, means VAT on the taxable supplies he makes in the course or furtherance of his business;"

"taxable person" means a person who is required to be registered under section 15"

"taxable supply"-
(a) means a supply of goods in Mauritius, … …
(c) … ...
made by a taxable person in the course or furtherance of his business;"

Section 3 provides a definition of "*business*" which, apart from the exercise of any "*activity in the nature of trade, commerce or manufacture, profession, vocation or occupation*", includes under **Section 3(1)(b) of the Act**.

"an activity carried on by a person, whether or not for gains or profit, and which involves the supply of goods or services to other persons for a consideration"

Section 4(1) further defines "*supply*" as meaning –

"(a) in the case of goods, the transfer for a consideration of the right to dispose of the goods as the owner;"

There is in the light of the above provisions a liability on a taxable person to collect and pay VAT as an output tax in respect of a supply of goods made in the course or furtherance of his business. The appellant who is an attorney is compulsorily required to be registered by virtue of **Section 15(2)(a)** of the Act. It is not in dispute that at the material time of the sale of the car, he was a 'taxable person'. Nor can it be contested that the sale of the car, effected by him for a consideration, constituted a supply of goods within the meaning of the Act.

What is questionable is whether there was a '*taxable supply*' of goods by him "*in the course or furtherance of a business carried on by him*" such as to give rise to a VAT charge under **Section 2 and Section 9** of the Act **(*Supra*)**.

It was forcefully argued by learned Counsel for the appellant that the charging section i.e. Section 9 of the Act would not be applicable and would not operate in order to create a charge on the appellant to pay VAT since the sale of his private car was not made "*in the course or furtherance of a business carried on by him*". He was an attorney at law providing legal services. In the exercise of his profession, for which he was compulsorily registered as a taxable person, his "business" consisted of the supply of legal services and did not concern the supply of any goods. In the circumstances, the sale of his private car was not a "taxable supply" within the meaning of the Act. The private car was not part of the assets of the "business" and the sale of the car could not constitute a taxable supply "*in the course or in furtherance of a business"* within the meaning of the Act, since he was never a supplier of goods but only a law practitioner. It was finally submitted that in any event, in view of the uncertainty and ambiguity in the law with regard to the charging of VAT in such a situation, this is a fit and proper case for the law to be interpreted in favour of the tax payer as a result of which the appellant cannot be subjected to the payment of any VAT charge.

In **Mattia Ltd v The Commissioners [1976] VATTR 33**, the London VAT Tribunal was called upon to interprete Section 2 of the UK Finance Act 1972, the relevant provisions of which with regard to the charging of VAT, bear very close resemblance to the Mauritian VAT legislation:

> "*2(1) Except as otherwise provided by this Part of this Act the tax shall be charged and payable as follows.*
>
> *(2) Tax on the supply of goods or services shall be charged only where -*
>
> *(a) the supply is a taxable supply; and*
>
> *(b) the goods or services are supplied by a taxable person in the course of a business carried on by him; and shall be payable by the person supplying the goods or services*." **(Emphasis added)**

The appellant company, Mattia Ltd, carried on a business as a wholesaler of radio and television sets and was registered for VAT purposes as a taxable person. Between October 1973 and August 1975 the appellant sold a number of vans which it had acquired for the purposes of its radio and television business prior to the VAT becoming chargeable on 1 April 1973. The respondents, the Commissioners, decided that such sales were supplies made by the appellant "*in the course of its business*". The appellant appealed against that decision on the ground that its business consisted only of the buying and selling of radio and television sets, and not the buying and selling of vans and the sale of its vans could not be taxable supplies of goods made by it in the course of its business. The argument was rejected and the appeal was dismissed.

The appellate Tribunal concluded that the sale of each of the vans used for the purposes of the business and forming part of its assets must be considered, when disposed of by way of sale, to have been supplied in the course of the business carried on by the Appellant company.

Like in the present case, Mattia Ltd was not a registered taxable person at the time it acquired the vans and was not entitled to claim any input tax in respect of their purchase. It was not in the business of buying or selling vans but the sale of each of the vans was held to be a taxable supply of goods in the course of its business mainly because it was used in relation to its business and formed part of its capital assets.

The same question, more interestingly in connection with the mixed use of a car both for private and business purposes, arose in the case of **Bakcsi v Finanzamt Fürstenfeldbruck (ECJ) [2002] STC 802.**

The claimant ('B'), a taxable person for VAT purposes, had purchased a car which he used to the extent of 70% for business purposes and 30% for private purposes. Since B had purchased the car from a private seller, there was therefore no VAT charge in the purchase price which B could deduct as input tax. However, when B sold the car, without including any VAT element, the German Tax authority claimed that the sale of the car was subject to VAT as output tax and issued a notice of assessment on B accordingly.

The conclusions of the **Court of Justice of The European Communities** in **Bakcsi (*Supra)***, which finally determined the question whether VAT was chargeable or not on the sale of the car, were as follows:

> (1) A taxable person who acquired a capital item, in order to use it for both business and private purposes, could retain it wholly within his private assets and thereby exclude the item entirely from the system of VAT.
>
> (2) Where a taxable person however has chosen to incorporate into his business assets a capital item which he uses for both business and private purposes, the sale of that item is subject in full to VAT. The fact that the item was purchased second hand from a non-taxable person and that the taxable person was not authorised to deduct the residual VAT on that item was irrelevant.

To what extent is **Bakcsi (*Supra*)** which is a decision of the European Court of Justice, of assistance and applicable to the determination of the present matter?

As was indicated by the Judicial Committee in **Director General, Mauritius Revenue Authority v. Central Water Authority [2013] UKPC 4** –

> *"The VAT Act 1998 is framed, on a significantly condensed basis, on the general model of the United Kingdom Value Added Tax Act 1994, which in turn gives effect to European Union requirements, initially under the Sixth Council Directive of 17 May 1977 (77/388/EC) and, since 1st January 2007 under Council Directive 2006/112/EC. …"*

The Judicial Committee (Lord Mance) went on however to point out that the case-law of both United Kingdom Courts and the European Court of Justice may be relied upon *"although care may need to be taken in other cases before supposing that the effect of Mauritian and United Kingdom and European Union legislation will always coincide, bearing in mind in particular the differences in their working at a detailed level".*

The EC Council Directive 77/388 (the Sixth Directive) which was under consideration in **Bakcsi (*Supra*)**, provided for the introduction of VAT in the European Community and the harmonisation of the laws of the member states, defining in detail the rules governing the basis of assessment to pay VAT.

The provisions of the Sixth Directive, more particularly **Articles 2(1), 4, 5, 6, 10 and 11** provide a legal mechanism which bears close resemblance in its working to the UK and Mauritian VAT legislation as regards the charging of VAT in respect of the supply of goods and services by a taxable person. We find it useful therefore to refer to the **Bakcsi** case to the extent that the Mauritian legislation and European Union legislation may bear similar characteristics subject however to drawing the necessary distinction in case of any difference which may arise in their application.

An analysis of the facts of the present case reveals that, like in the **Bakcsi** case,

(1) The appellant was not entitled to deduct any input tax. Appellant was in fact not VAT registered and therefore not a taxable person at the time of the purchase of the car. Even if he had been registered as a taxable person, he would not have been entitled to deduct any input tax which is not allowable in respect of the purchase of the car by virtue of Section 21(2)(b) of the Act.

(2) The appellant had been using the car partly for business purposes and partly for private purposes.

(3) Although the provisions of the Income Tax legislation and VAT legislation cater for two distinct taxes, the income tax returns of the appellant included claims for capital allowances for the part business use of the car. There were capital allowances which had been claimed by the appellant for income tax purposes and which were apportioned as follows: 40% personal use and 60% professional use.

The use either for business or private purposes, to which a taxable person actually puts a capital item is an essential element to be taken into account for the purposes of determining

how that item has been assigned. "*This is a question of fact to be determined in the light of all the circumstances of the case, including the nature of the goods concerned and the period between the acquisition of the goods and their use for the purposes of the taxable person's economic activities"* [**Bakcsi (*Supra*)** at para. 29]

It is beyond dispute in the present matter that the appellant had been using the car for his professional activities in a manner which falls within the purview of a *"business"* as defined under Section 3(1)(a) of the Act. The inescapable conclusion on the facts is that, by opting to claim capital allowances for income tax purposes, which was admittedly for the business and professional use of the car, the appellant had opted not to retain the car wholly within his private assets but had unequivocally chosen to incorporate the car as a capital item in his business assets. The sale of the car in such circumstances would as a result be considered to be *"in the course or furtherance of a business"* and be subject to VAT. This is made explicit by the legal reasoning adopted by the Court in **Bakcsi (*Supra*)**:

> *"The purpose to which a particular capital item is assigned determines the application of the VAT system to the item itself …"* **[para. 33]**

> "*a taxable person who acquires a capital item in order to use it for both business and private purposes may retain it wholly within his private assets and thereby exclude it entirely from the system of VAT."* **[paras. 34 and 47]**

Thus, where a taxable person retains a capital item wholly within his private assets, he will be carrying out the transaction of a sale in a private capacity and not as a taxable person in the course or furtherance of a business whenever he sells the goods. Such a private transaction would therefore be excluded from the system of VAT. But, as is the situation in the present case, "*where a taxable person has chosen to incorporate wholly into his business assets a capital item which he uses for both business and private purposes, the sale of that item is subject in full to VAT*" **[para 38].**

> "*In this regard it is necessary to point out that, when a taxable person has chosen to incorporate, wholly or partly, the capital item into his business assets, the fact that the item was purchased second hand from a non-taxable person and that the taxable person was therefore not authorised to deduct the residual VAT attaching to that item is irrelevant*" **[para. 40]**

The appellant had failed to keep the car exclusively within his private assets. But instead, the appellant has, on his own accord, chosen to use the car both for private and professional business purposes and has incorporated the private car into his business assets as a capital item when he opted to claim capital allowances for income tax purposes in view of the "business" use of the car. As a result, the sale of the car became a taxable supply "in furtherance of a business", within the purview of Section 9(1) and Section (2) of the VAT Act, and was thus unambiguously subject to VAT charge.

Fiscal Neutrality and Double Taxation

We need however to address a further argument raised by Counsel for the appellant to challenge the imposition of a VAT charge upon the appellant which in his submission cannot arise in the circumstances of the present case. It has been strongly argued by Counsel for the appellant that the charge of any VAT based on the mixed use of a private car by a professional user like the appellant, "*in the course or furtherance of the business*" of a law practitioner, may amount to double taxation and would be against the neutral concept of such a tax as the VAT. On one hand, by virtue of Section 21(2)(b) of the Act, a professional user is precluded from making any deduction in respect of the input tax paid on the purchase of a car, yet he becomes chargeable for the payment of VAT in respect of the sale of the same car, without being allowed any credit for input tax. Such double taxation is against the concept of a neutral tax which lies at the root of the VAT legal *régime* under the VAT Act. Furthermore the law does not allow for any apportionment on the output VAT, as under the Income Tax Act, although the car has admittedly a mixed use and is not exclusively used for business purposes.

The neutral concept of the VAT system, both in Mauritius and the UK, is characterised by the fact that it is designed to tax final consumers only. Although the taxable persons are the main persons responsible to collect and pay VAT they do not in the final resort bear the burden of the tax. The taxable persons must comply with the formalities laid down by the legislation for the collection and remittance of VAT in order to ensure that the system functions. But the mechanism of impositions of output tax coupled with deductions of input tax was set up to make the tax "neutral" with regard to them [**para. 28** of **Bakcsi (*Supra*)]**.

The deduction rule is in fact designed to ensure that the VAT paid by traders and other professionals do not give rise to any tax charge on them, thus upholding the principle of

neutrality on which the system of VAT, which is a tax which targets the ultimate consumer. If there were no right by the taxable person to deduct the amounts of VAT paid, they would distort the principle of neutrality **[E.C Commission v Italian Republic case c-45/95 [1997] STC 1062 (para. 14)**. VAT previously paid may thus be deducted in so far as the goods or services in question are purchased and used by the taxable person in turn to carry out transactions in the course of his economic activity. As was explained in **Kühne v Finanzamt Mürchen III 1990 STC 749 at 766,** the reason behind the right of deduction is merely technical: "*It avoids the double tax charge which arises where tax is charged on the transfer by a trader who resells goods on which he has already made a final VAT payment without having been able in turn to deduct the amount paid*". In that case, the taxable person was not entitled to deduct the residual tax because he had purchased the goods second hand from a non-taxable person. The Court in **Kühne v Finanzamt Mürchen** (***Supra***) concluded that "*such taxation of business goods on which the residual tax was not deductible would lead to double taxation contrary to the principle of fiscal neutrality which is inherent in the common system of value added tax."*

Such a reasoning was fully endorsed by the **Court** in **Bakcsi** whilst considering "*whether the disposal of goods intended by the trader for business use should be subject to VAT, even if at the time of purchase, it was not possible to deduct VAT"*. The Court agreed with the stand of both parties to the case that "*that such liability gives rise to double taxation which is contrary to the principles of VAT, in particular the principle of fiscal neutrality. This is because the taxable person has to pay VAT both when he purchases the goods (as it cannot be deducted from the consideration) and when he disposes of them (as he must pay the amount contained in the sale price)"* **[Para. 30]**.

This is precisely the same situation in which the appellant, attorney Ohsan-Bellepeau, finds himself in the present case. Whilst he is VAT chargeable for the sale of the car under Section 9 of the Act, he is precluded from making any deduction of the input tax to which he was subjected when he purchased the car. This is not due simply to the fact that he was not a registered taxable person at the time of the purchase of the car, or that the car was a second hand car. He, like other professional or taxable persons, is not entitled to make any deduction in respect of the input tax paid upon the purchase of a motor car **[Section 21(2) (b) of the VAT Act]**. Such liability indisputably gives rise to double taxation in a manner which is contrary to

the principle of fiscal neutrality which generally characterises the functioning of the VAT mechanism under the VAT Act.

But however unfair is the appellant's liability to double VAT taxation, it is nevertheless legal and enforceable in view of the applicable provisions of the Act. As it has been seen, the sale of the car by the appellant falls, without any ambiguity or uncertainty, within the ambit of Section 9(1) of the Act and as such is subject in full to VAT. On the other hand, the law clearly does not allow for the deduction of any input tax in relation to the purchase of the same car, thereby subjecting the appellant to double VAT taxation contrary to the principle of fiscal neutrality which underpins the VAT régime.

In **Bakcsi (Supra)** the Court had to deal with that question of double taxation and fiscal neutrality of the VAT system when considering the harmonisation of the national legislation of European member states. The Court adopted the decision in **ORO Amsterdam Beheer BV and Concerto B.V. v Inspecteur der Omzetbelasting (Case C-165/88) [1991] STC 614**. In that case also, the Court was required to rule on the legitimacy of taxing the supply of goods which had been acquired without the right to deduction and it was argued that this situation gave rise to "*double taxation"* which is "*contrary to the principle of fiscal neutrality which is inherent in, the common system of value added tax".* The Court, in **ORO Amsterdam (*Supra*)** however, concluded that double taxation was unavoidable in the absence of the appropriate national legislation adopted by member states. The Court held that "*member states are not obliged to introduce into their own legislation on VAT provisions to exclude from that tax, the supply of second hand goods effected by a trader …. in order to avoid double taxation*". The law may therefore exclude the deduction of input tax with regard to the purchase of certain goods and nevertheless provide for their supply to be subject to VAT as an output tax without allowing for any deduction.

We consider that the same reasoning would apply in the present case. Although it appears unfair, and in breach of the principle of fiscal neutrality inherent in the VAT system, that the appellant should be subjected to double taxation, this is the law as it stands. We are bound, by the dictates of the Rule of Law and the doctrine of separation of powers to implement any constitutionally compliant law which has been duly enacted by the legislature. By virtue of the provisions of the VAT Act, however unfair and arbitrary they may sound in that respect, the

appellant is on one hand bound to pay VAT in full on the sale price of the car and is on the other hand not entitled to deduct any input tax to which he may have been subjected for the purchase of the same car.

For all the given reasons, (1) we find no merit in the first appeal which is dismissed; (2) we quash the decision of the Committee in the second appeal and hold that in the absence of any apportionment permissible in law, VAT is chargeable in full on the total sale price of the car.

In view of the intricate points in law involved in both appeals, we shall make no order as to costs.

A. Caunhye
Judge

G. Angoh
Judge

18 May 2015

Judgment delivered by Hon. A. Caunhye

For Appellant: **Mr Attorney F. Hardy**
Mr G. Glover, SC, together with Mr A. Domingue, SC

For Respondent: **State Attorney**
State Counsel