

Western Samoa Hotel Company Ltd. v. Commissioner of Inland Revenue

Supreme Court
Bathgate J.
9 March 1987

Statutes - interpretation - Acts Interpretation Act - "fair, large and liberal construction" - tax exemption under Incentive Act - subsequent tax under Goods and Services Tax Act - whether subsequent goods and services tax is outside exemption of Incentives Act.

Tax - goods and services - provider to collect and account - consumer to pay - whether provider is liable to consumer tax.

Constitutional law - Article 15 - unequal protection - whether a goods and services tax is discriminatory.

The applicant hotel corporation sought a declaration that it was not liable to collect and "pay" a "Goods and Services" tax under the Act of that name passed in 1986. The applicant argued that the 1984 Enterprise Incentives Act, and the exemption order granted thereunder, rendered the hotel corporation not liable to "pay" the 1986 consumer tax. The applicant also argued that the tax was imposed discriminatorily and thus was a violation of the equal protection clause of the Constitution.

HELD:

- (1) The hotel corporation collects and accounts for the new tax, but it is the consumer and not the provider who is taxed; the applicant, therefore, has not been subjected to any new tax. The applicant is not exempt from collecting the goods and services tax; the Enterprise Incentives Act 1984 does not reach taxes which are imposed directly on the consumer.
- (2) The consumer tax was not a violation of the equal protection clause of the Constitution. All consumers of the same goods pay the same tax equally.

Cases referred to in judgment:

C.I.R. v. Lemmington Holdings Ltd. [1982] 1 N.Z.L.R. 517

Legislation referred to in judgment:

Acts Interpretation Act 1984, section 7
Constitution, Article 15
Enterprise Incentives Act 1984, section 14
Goods and Services Tax Act 1986
Hotel Levies Act 1972

Kamu for the applicant
Bell for the respondent

BATHGATE J.

Judgment:

On 14 November 1986 the applicant, Western Samoa Hotel Co. Ltd., applied to the Court by way of an originating motion for a case stated to resolve the issue, it said to be whether the Goods and Services Tax Act 1986 ("the Goods and Services Act") supersedes and overrules the Enterprises Incentives Act 1984 ("the Incentives Act"). The respondent named in the application is the Commissioner of Inland Revenue. The applicant said it had been granted by Order of Cabinet certain tax exemptions ("the exemption") under section 14 of the Incentives Act but the Commissioner had decided the applicant was liable to collect tax under the Goods and Services Act. The short answer to that question would appear to be that it is not liable to pay the tax, but only to collect that tax under the Goods and Services Act and to account to the Commissioner for all collectable tax.

The applicant filed an affidavit of a Mr Boyle in support of its application. In his affidavit Mr Boyle underlined the background and reasons for the application for the exemption. He referred to a letter of intent given by the Government prior to the exemption. On one interpretation of events leading up to the exemption it may be it was intended that the applicant would not be liable for any increase in any consumption tax that may have affected the profitability of the applicant's hotel in Western Samoa. However such preliminaries do not to my mind alter the clear and plain meaning of the relevant clause of the exemption considered in this case, as there is no doubt or ambiguity as to its meaning and intent.

In January 1987 an amended case stated dated 1 January 1987, between the applicant and the Commissioner, and signed by counsel for each party, was filed. I set out the essential contents of the amended case stated, and in full, the question stated for the opinion of the Court; these are as follows:

- (1) the applicant is the owner of a hotel in Western Samoa which provides meals, refreshments, beverages and offers accommodation for periods of less than one month;
- (2) on 30 January 1985 the Cabinet approved of the applicant being granted the exemption by an Order under section 14 of the Incentives Act; included in the Order, or the exemption, was the following particular item:

Exemption from future increases in other taxes excluding Customs duties and Excise taxes during the extended Income "Tax Holiday period;"
a copy of the exemption which contained all of the terms and conditions of the Order was annexed;

- (3) the applicant was registered as a registered provider, pursuant to section 11 of the Goods and Services Act;
- (4) the question for decision is:
whether the company [applicant] is required to collect and remit tax pursuant to sections 7 and 9 respectively of the Goods and Services Tax Act 1986 in view of the incentives granted to the company by Cabinet pursuant to section 14 of the Enterprises Incentives Act 1984 on 30 January 1985.

90 Some written submissions were made prior to the hearing of argument on 23 February 1987. I have considered those submissions and the oral and written submission of counsel made at the hearing. I refer briefly to the various submissions made and then set out my conclusions. In my view the question in issue is basically a question of statutory interpretation. I have referred to and considered submissions outside the ambit of the amended case stated, although I have no jurisdiction to do so, to ensure that the applicant knows it has had all its submissions considered and hopefully to ensure it is aware that there might possibly be no grounds for relief in the Supreme Court.

100 Prior to referring to the submissions and stating my conclusions I note that prior to the hearing, on 15 January 1987 before Pain J., both counsel agreed that this Court had power and jurisdiction to hear and make the declaration asked for in the amended case stated. I do not therefore have to consider the question of jurisdiction to make a declaration on matters of taxation as considered by the New Zealand Court of Appeal in *C.I.R. v. Lemmington Holdings Ltd.* [1982] 1 N.Z.L.R. 517. Nor does it appear that the provisions of the Goods and Services Act exclude the Court from making the declaration.

110 Mr Kamu for the applicant in his written submissions contended there was a conflict between the Incentives Act, the exemption, and the Goods and Services Act. By implication this argument meant that the phrase in the exemption, "Future increases in other taxes . . ." included the goods and service tax. If it did not, there could be no conflict. On the other hand if it did, then the only conflict could be that the goods and services tax had in fact increased. Mr Kamu argued there was a conflict and that should be resolved in favour of the applicant.

120 The next submission of Mr Kamu was that the parties to the exemption, by reason of their earlier negotiations, including the letter of intent from Government, had intended that the exemption would extend to and cover the goods and services tax levied at a rate higher than \$1 per bed per night for accommodation at the applicant's hotel. Mr Bell for the Commissioner objected to this submission on the grounds that it was outside of the amended case stated in my jurisdiction. Even if I could consider this submission, in my view it does not help the applicant. In determining the meaning of the particular term of the exemption in question I must take into account the context in which that term appears, that is the whole of the Order or the whole of the exemption. I consider I should also take into account the provisions of the Incentives Act and the surrounding circumstances under which the exemption was made. And then I am to apply "... such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act ...", [and the exemption order] and of every provision thereof, "... according to its true intent, meaning and spirit", pursuant to the provisions of section 5(i) of the Acts Interpretation Act 1974. That direction applies both to the
130 Incentives Act and the order or exemption thereunder, according to section 7 of the Acts Interpretation Act. I am therefore to apply a liberal interpretation to the relevant legislation. In so doing however, and on applying those other rules of construction mentioned, I cannot change the clear, plain meaning of the words used in the Incentives Act and in the particular part of the exemption in question. I must interpret those words in their context as expressing the intent of the Act and the exemption because there is no uncertainty, ambiguity or doubt in my mind as to their clear, plain meaning. To give them some other interpretation, or extend the

140 meaning of the phrase beyond the obvious would, I think, require me to legislate, and add to the exemption, which I cannot and will not do. That is the province of Parliament and not the Court. Similarly, I cannot change the meaning of the Act.

The next submission of Mr Kamu was that the Goods and Services Act was unconstitutional and contrary to Article 15 of the Constitution. He said that Act was therefore void. Mr Kamu said that only a small sector of the total population was taxed under the Act; the tax was only on the goods and services set out in the First Schedule to the Act. He claimed that the tax was therefore discriminatory and contrary to Article 15. No authority or case was cited, by counsel in support of such a far reaching and bold assertion. It is not appropriate for me to deal with such a submission in the present proceedings as it was not raised in either of the cases stated. It is clearly outside of the question for determination. Article 4 of the
150 Constitution makes provision for the enforcement of remedies or rights under the Constitution. Without the benefit of detailed argument from both counsel on this point I do not consider that I should make any sort of authoritative determination, which in any event would be outside my jurisdiction in the present proceedings. The Goods and Services Act should not be set aside by a mere side wind. However, I do not consider there is a merit in the argument. It could only succeed, under Article 15(2), if the Goods and Services Act can be shown to discriminate on its face or on its application against a section of the community by reason of their "... descent, sex, language, religion, political or other opinion, social origin, place of birth, family status, ...", or any such quality or attribute of that section of the community. The
160 goods and services tax under the Act is imposed only in respect of certain goods and services consumed by members of the public. To that extent it may be that there is discrimination as to what goods and services are taxed. However it is the particular quality or type of goods and services as defined in the First Schedule to the Goods and Services Act which determines what are and what are not taxable. No person is discriminated against by reason of the attributes or qualities specified in Article 15(2) of the Constitution. It does not seem to me that the Goods and Services Act is void as being contrary to the Constitution on the ground submitted by Mr Kamu.

As I had earlier mentioned, it was implicit in the applicant's submissions that the goods and services tax amounted to an increase in other taxes, and such increase was
170 exempted, so far as the applicant was concerned, because of the terms of the exemption granted to it. Mr Kamu argued that the goods and services tax was in effect an increase in other taxes for the applicant because when the exemption was made, the only goods and services tax affecting it was one tala per night per person accommodated, and that was increased by the Goods and Services Act by 10% of the value of the goods and services provided by the applicant. The rate of one tala per night per person accommodated was provided for in the Hotel Levies Act 1972. An Order was in force pursuant to section 5 of that Act when the exemption was made. That Order and the Hotel Levies Act are still in force.

For the Commissioner, Mr Bell submitted the Goods and Services Act imposed
180 no liability to tax on the applicant, and so there had been no increase of any sort of tax so far as it was concerned, by reason of the goods and services tax. He claimed the exemption was not relevant to the applicant's obligations under the Goods and Services Act.

Mr Bell's further admission was that the goods and services tax was not an increase of tax as provided for in the exemption clause in question but it was the

imposition of a new tax. As such, he said, it was outside of the exemption.

I consider the applicant is required to collect and remit tax pursuant to sections 7 and 9 of the Goods and Services Act, and the exemption does not relieve the applicant from that obligation.

190 The phrase in the exemption item, "Exemption from future increases in other taxes" in the context of the whole exemption document, or Order means taxes other than income tax and withholding tax on dividends. Those two taxes were specifically dealt with in preceding items or clauses of the exemption. They are all revenue taxes. It is clear that by the specification of taxes in the exemption as income tax, withholding tax, and excise taxes, taxes in the exemption are categorized according to their character, nature and imposition into different types of revenue taxes. To say that "other taxes" means merely other revenue taxes I do not think is correct. It is an unjustified simplification in the interpretation of the exemption. In my view "other taxes" in the context of the exemption means other categories or types of tax
200 determined by their character, nature and imposition. On that basis a goods and services tax is not necessarily a hotel levy. A hotel levy under the Hotel Levies Act 1972 is at the best a tax at a flat rate on a service provided by a hotel, namely, accommodation. That Hotel Levies Act remains unchanged and unaffected by the Goods and Services Act and the hotel levy thereunder was also unchanged and unaffected by the goods and services tax. The goods and services tax is a tax on certain goods and services consumed, proportionate to the value of the goods and services involved. It is a tax on certain goods as well as on a variety of services. The Goods and Services Act had no effect on the Hotel Levies Act.

210 Although the hotel levy is a form of consumption tax on a single service, the goods and services tax is a consumption tax on a variety of both goods and services, including the service subject to the hotel levy. The character, nature, extent and imposition of the hotel levy and the goods and services tax are substantially and significantly different. I refer in particular to section 5 of the Hotel Levies Act and to the definition of "goods" and "services" in section 2, and to sections 5 and 6 of the Goods and Services Act. The two Acts provide for a different tax or levy and a comparison of one with the other would not in my opinion, generally, amount to an increase or decrease of the tax or levy imposed by the one or the other, except on a wide and liberal interpretation of the words "other taxes", in the particular item of the exemption in question. The word "levy" is usually used as a verb to describe the
220 raising of a tax, or the action of taxing. The word as used in the Hotel Levies Act, section 5, is a noun, but in the context of that Act is for a sum imposed or charged as a contribution to the public revenue. It is in effect a form of tax. Although it is charged on the use, rather than the value of the service, it is nevertheless for a service that is also included as a taxable service, namely accommodation, in the Goods and Services Act. The consumption tax imposed for accommodation under the Hotel Levies Act of one tala per night was increased by the Goods and Services Act, as the 10% of a fee paid by a guest at the applicant's hotel is in addition to the levy of one tala. Accommodation is the only service that comes within the Hotel Levies Act and the Goods and Services Act; in respect of which it could be said the
230 Goods and Services Act may have provided an increase. The Hotel Levies Act does not provide for a goods and services tax but only a single, service tax; goods are not taxed at all, nor are services. Only one service is taxed, and that on a different basis to the goods and services tax.

Having regard to the object, purpose and intent of the Incentives Act and the Enterprises Incentives Amendment Act 1984, and having regard to the provisions of section 5(i) of the Acts Interpretation Act, to apply a liberal construction to the Incentives Act and the exemption, I consider the Goods and Services Act increased a tax on accommodation. Therefore, that tax of 10% on the fee paid for accommodation at the applicant's hotel, would be exempt, as it would then be an increase on the one tala levy or tax. However, all other taxes under the Goods and Services Act would continue to apply to the other taxable goods and services of the applicant's hotel. Those other taxes are new taxes, first imposed by the Goods and Services Act. They are not an increase in any tax that existed prior to that Act. There was no prior goods and services tax. There was only an increase in a service tax.

Under section 14(1) of the Incentives Act the Cabinet is authorized to grant an exemption or relief from any increase in any tax, duty, fee, levy or charge, other than those specified in the paragraph. Nowhere is the Cabinet authorized to grant an exemption or relief from the imposition of a new tax. In my view the Goods and Services Tax Act provided for a new tax rather than an increase in any other or existing tax except for the one tala levy. To determine whether there has been an increase in any tax, or "other taxes", is a comparative exercise requiring the comparison in the amount of tax payable at two different times or dates. It is not permissible, on the proper interpretation of the provisions of section 14(1)(1) of the Incentives Act in the context of that Act to merely lump all other taxes that are not specified in the subsection together, to see whether there was an increase between the two dates for exemption purposes. That has to be done in respect of each type or category of tax. The goods and services tax did not increase "any other tax" within the meaning of section 14(1)(1) of the Incentives Act other than that on accommodation, so that Cabinet was not authorized to grant an exemption from the goods and services tax generally. The goods and services tax was not within the phrase "future increase in other taxes" of the exemption that Cabinet could authorize as it was the imposition of a new tax and not an increase in other taxes, with the one exemption. However, this is not the end of the matter. The scheme of the Incentives Act provides for tax exemptions and tax relief for a person, the applicant for such relief, in respect of a particular undertaking or "enterprise". It must be an enterprise of the type specifically eligible for approval under the Act. Once the enterprise receives approval, and relief or exemption is given, that applies only to the applicant for the exemption or relief. It could not apply to other persons using the enterprise, such as hotel customers, guests or patrons, all of whom would have various tax liabilities or no tax liabilities. The tax liability of the users of the enterprise, other than the operator, the applicant for relief under the Incentives Act, remain unaffected so far as their personal tax liabilities are concerned. The exemption is for the applicant and no other person.

The tax exemption or relief of the Incentives Act is personal to the "enterpriser", the person authorized by the approval Order to conduct an approved enterprise. Applying that scheme to the case in question, only the applicant receives exemption from its future increases in other taxes. It could not have the benefit of any exemption in respect of either the hotel levy or the goods and services tax, because it personally has no liability to tax for such levy or tax. It is neither liable to the levy or tax under either Act, unless it somehow becomes a consumer of the service levied or the goods and services taxed. As a result, there has been no increase in any tax of the

applicant by reason of the goods and services tax.

Under the Hotel Levies Act, section 5 imposed the hotel levy on a guest. Under section 6 the hotel proprietor is to collect the levy and account for it to the Commissioner. The proprietor is not liable for the levy as such, but only for collecting and accounting for it. The same system applies under the Goods and Services Act. Sections 4, 5, 6 and 7(1) of the Goods and Services Act provide:

Imposition of tax

- 290 4. Subject to and in accordance with this Act, tax shall be levied and paid upon every paid fee by a consumer for goods or services.

Rates of tax

5. Tax shall be levied at the rate of 10 per centum of the fee paid by a consumer for goods or services.

Payment of tax

6. Subject to and in accordance with this Act, tax shall be paid by every consumer.

Collection of tax

- 300 7. (1) Subject to and in accordance with this Act, every provider shall collect tax from every consumer as agent of the Department and such tax shall be due and payable to the Department on the 10th day of the calendar month immediately following the calendar month of collection.

310 Under the Goods and Services Act the scheme is that a person who pays the fee to a provider for any taxable goods and services pays the tax. It is the consumer and not a provider who is taxed. The provider merely collects and accounts for the tax but is not itself taxed. There is no tax assessed for the provider except that which he collects or should collect from the consumer. I must assume the provider would comply with its obligations. In so doing it merely passes on the tax it collects. If it does not it is not then taxed, but penalized, and may have to pay the amount of tax it should have collected, and an additional sum as a penalty for its failure to collect and account for the correct amount of tax. The provider is only assessed for the collection of tax and not for the payment of tax. It is not liable to tax as such. The scheme for Goods and Services Tax Act requires the provider to account to the Commissioner; the assessment of the provider is for tax collected or which should have been collected. The assessment is in respect only of collected or collectable tax, rather than tax paid or payable as a tax of the provider.

320 The applicant is a provider under the Goods and Services Act and not a consumer. As it is not liable for tax as such, but only to account for collected or collectable tax, the goods and services tax does not amount to any increase in tax for the applicant, because it is not taxed. It does not pay goods and services tax as tax, but it only pays that tax collectable from and payable by the consumer. It would not be entitled to any exemption under the Incentives Act or the exemption from its responsibility to collect tax. That could amount to an unjustified exemption to its customers, a failure to account, or both. The Incentives Act and the exemption never intended and never gave an exemption to the applicant's customers or guests. That would be the result however if the applicant did not collect the goods and services tax.

330 Whether or not I take into account the evidence of Mr Boyle, the letter of intent and the surrounding circumstances to the exemption, or as I should, confine myself

solely to the question in issue, I can see no ground for relief to the applicant with regard to its obligations under the Goods and Services Act by reason of the exemption. Nor do I think the Cabinet would have given such relief having regard to the provisions of the Incentives Act and the liability for tax under the Goods and Services Act.

The answer to the question posed must be that the applicant is required to collect and remit collectable tax pursuant to sections 7 and 9 of the Goods and Services Tax Act 1986. The question of costs is reserved.