Easter Term
[2016] UKPC 12
Privy Council Appeal No 0090 of 2014

JUDGMENT

Shophold (Mauritius) Ltd (Appellant) *v* The Assessment Review Committee and another (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Kerr
Lord Sumption
Lord Hodge

JUDGMENT GIVEN ON

16 May 2016

Heard on 19 April 2016

Appellant
Sanjay Bhuckory SC
Jason Harel
Sandiram Poonisamy
(Instructed by Sheridans)

Respondents
Philip Baker QC
Karuna Gunesh-Balaghee
Imran Afzal
(Instructed by Royds LLP)

LORD HODGE:

1. This appeal raises a question of the interpretation of the Value Added Tax Act 1998 ("the 1998 Act"). It is whether a taxable person, who has a contractual right to be paid for the services which it has provided, is obliged to pay Value Added Tax ("VAT") even where it has waived the enforcement of its contractual right and has neither issued an invoice nor received payment for those services.

Background facts

2. Shophold (Mauritius) Ltd ("Shophold") owned 51% of the issued share capital of Shoprite (Mauritius) Ltd ("Shoprite"); the other 49% was owned by a separate entity, Ireland Blyth Ltd. Shoprite was and is the owner and operator of a hypermarket in Mauritius. On 19 March 2003 Shophold entered into a management services agreement ("the Agreement") with Shoprite, in which it undertook to provide management services to Shoprite in return for a management fee ("the Management Fee") equal to 1% of Shoprite's gross turnover. The Agreement provided that Shoprite would pay the Management Fee on a monthly basis with an adjustment after the end of a financial year once auditors had certified its annual turnover. Shophold has been registered for VAT since 1 October 2002 and so is a taxable person.

3. In May 2003 the board of directors of Shophold decided by written resolution to waive its right to the Management fee "until such time as [Shoprite] is in a profit making position and where sustainable profitability is foreseeable in the future". The Agreement was not varied to reflect this waiver. Shophold continued to provide management services to Shoprite but at a reduced level. By a further written resolution signed in December 2007 and January 2008 the board of directors of Shophold resolved:

> "that the 1% management fee be re-instated with effect from 1 July 2006, because [Shoprite] is trading profitably and sustainable profitability is foreseeable in the future."

4. As a result of the two resolutions Shophold did not issue any invoice in respect of its management services or receive any payment for those services for the taxable periods from July 2003 until the end of June 2006.

5. Shophold submitted tax returns for the years of assessment 2004/2005 and 2005/2006, which the Mauritius Revenue Authority ("MRA") examined. The MRA

determined that Shophold had failed to declare the management fees and issued a VAT assessment in the sum of Rs3,114,028 for the taxable periods July 2003 to June 2006 ("the relevant period").

6. Shophold appealed against the VAT assessment to the Assessment Review Committee ("ARC") which upheld the assessment. The ARC considered sections 5(1) and 9(1) and 12(2), 12(3) and 12(5) of the 1998 Act and held that Shophold had made taxable supplies to Shoprite by providing the services whether or not it had submitted invoices or had been paid for those services. It concluded that if Shophold had decided to forgo the payments, it was deemed for VAT purposes to have received payment at the end of every month.

7. At Shophold's request, the ARC stated a case for the opinion of the Supreme Court, which upheld its decision. In its reasoning the Supreme Court referred also to sections 2, 4 and 9(2) of the 1998 Act. In substance the Supreme Court held that because Shophold had only waived its entitlement to receive the Management Fee and had not agreed a variation of the Agreement with Shoprite, the latter's contractual obligation to pay the Management Fee remained. That contractual obligation to pay 1% of its turnover was the consideration that Shoprite gave for the management services, and as a result the services were taxable supplies subject to VAT under section 9(1) of the 1998 Act. Accordingly, it held that Shophold ought to have received payment for the service at the end of each month during the relevant period and was liable to VAT as if it had.

8. Shophold appeals to the Board with the leave of the Supreme Court of Mauritius. While the ARC made no finding as to whether Shophold had invoiced Shoprite and had received payment of the Management Fee in the relevant period, counsel for both parties have sensibly proceeded on the basis that there had been no invoices and no payments. The Board also proceeds on that basis.

The principal issues

9. The questions raised by the appeal are questions of statutory interpretation and may be summarised as (i) whether Shophold made taxable supplies to Shoprite at any time in the relevant period and, if so, (ii) whether Shophold is liable to pay VAT in respect of such supplies. In addressing those questions the Board must also consider the meaning of "consideration" in section 4(1)(b) of the 1998 Act as it was the central argument of the MRA that Shophold was liable to VAT as consideration had moved from Shoprite to it during the relevant period.

The relevant statutory provisions

10. Section 9 of the 1998 Act is the charging provision and it provides (so far as relevant):

> "(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 any business carried on by him.
>
> (2) VAT on any taxable supply is a liability of the person making the supply and becomes due at the time of supply." (emphasis added)

11. "Supply" is a central concept in the VAT regime and section 4(1) provides:

> "Subject to the other provisions of this Act, 'supply' means -
>
> ...
>
> (b) in the case of services, the performance of services for a consideration."

12. "Taxable supply" is defined in section 2 as "... a supply of services performed or utilised in Mauritius; and ... made by a taxable person in the course or furtherance of his business". It is not disputed that Shophold was a taxable person as it was registered for VAT and that the services were provided in the furtherance of its business. What is contested is whether Shophold "supplied" services within the meaning of the 1998 Act in the relevant period.

13. Section 5 defines the time of supply. It is an important provision because, as emphasised in para 10 above, section 9(2) provides that VAT becomes due at the time of the supply. So far as relevant section 5 provides:

> "(1) Subject to the other provisions of this Act, a supply of goods or services shall be deemed to take place -

(a) at the time an invoice or a VAT invoice in respect of that supply is issued by the supplier; or

(b) at the time payment for that supply is received by the supplier, whichever is the earlier.

(2) Where services are supplied for a continuous period under any ... agreement which provides for periodic payments, the services are treated as successively supplied for successive parts of the period as determined by the ... agreement and each successive supply shall be deemed to take place -

(a) at the time an invoice or a VAT invoice in respect of that supply is issued by the supplier; or

(b) at the time payment for that supply is received by the supplier,

whichever is the earlier."

14. Although the ARC referred only to section 5(1), the Board considers that section 5(2) is the relevant provision as the Agreement provided for periodic payments. But this is of no moment because section 9(2), when read with either subsection of section 5, provides that VAT becomes due on the earlier of the supplier's issue of an invoice or the supplier's receipt of payment for the supply.

15. The other provisions of the 1998 Act which were mentioned in argument are of less importance. Section 12 defines the value of taxable supplies and subsection (2) of that section provides that if the supply is for a consideration in money, its value shall be taken to be such as, with the addition of the VAT chargeable, is equal to the consideration. Subsection (3) provides that the value of the supply shall be taken to be its open market value if the supply is for a consideration not consisting or not wholly consisting of money. Subsection (5) defines the open market value of the supply for the purpose of subsection (3).

16. Section 20 provides so far as relevant:

"(1) Every registered person who makes a taxable supply to another registered person shall issue to that person a VAT invoice in respect of that supply.

> (2) A registered person who issues a VAT invoice under subsection (1) shall specify in that VAT invoice - … (e) the value of the supply exclusive of VAT."

The interpretation of the 1988 Act

17. The 1998 Act was modelled on the Value Added Tax Act 1994 of the United Kingdom. In *Director General, Mauritius Revenue Authority v Central Water Authority* [2013] UKPC 4, the Board, in a judgment delivered by Lord Mance, stated at para 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 1 January 2007 under Council Directive 2006/112/EC. The CWA thus relied below upon case-law of both United Kingdom courts and the European Court of Justice in support of its analysis of its supplies to its customers. The general value of such case law was not disputed in relation to the issues on this appeal, 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."

18. The Board's warning at the end of that passage is pertinent in this appeal. As shall be shown, while the concept of consideration in section 4(1)(b) of the 1998 Act can be elucidated by reference to the case law of the Court of Justice of the European Union ("CJEU") and the courts of the United Kingdom, the definition of the time of supply in section 6 of the United Kingdom legislation is materially different from that in section 5 of the 1998 Act. This makes it dangerous to rely on United Kingdom case law which addresses or depends on United Kingdom's definition of the time of the supply of services as a guide to the interpretation of the 1998 Act.

The meaning of "consideration"

19. Mr Philip Baker QC for the MRA submitted that a fundamental error in Shophold's case was the assumption that because there had been no payment, no consideration passed from Shoprite to Shophold. The waiver had not varied the agreement. During the relevant period Shophold provided management services and Shoprite remained under a contractual liability to pay 1% of its gross turnover in consideration for those services. Consideration did not have to be in money, as section

12(3) of the 1998 Act showed. The continuing contractual obligation of Shoprite, even if not enforced by Shophold, provided the necessary "consideration" to meet the definition of supply in section 4 of the 1998 Act. Accordingly, Shophold made supplies to Shoprite during the relevant period and was under an obligation to issue a VAT invoice under section 20 of the 1998 Act.

20. The Board does not agree. In Council Directive 2006/112/EC ("the Principal VAT Directive"), article 73 defines the taxable amount as including "everything which constitutes consideration obtained or to be obtained by the supplier, in return for the supply, from the customer or a third party, …". The concept of "consideration" in the European VAT legislation is quite different from the English law concept of consideration. In the English law of contract consideration has two meanings. It is, first, the benefit necessary to support the validity of a simple contract, which may be nominal or consist simply in an enforceable but unperformed obligation. Secondly, it is the value given for the goods and services in question. Only the second meaning has an analogy in European law. In the European law of VAT and thus in the United Kingdom's VAT legislation "consideration" refers to what the CJEU has described as "reciprocal performance". Thus in *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/73) [1994] STC 509, the CJEU stated (para 14):

> "a supply of services is effected 'for consideration' …, and hence is taxable only if there is a legal relationship between the provider of the service and the recipient pursuant to which there is reciprocal performance, the remuneration received by the provider of the service constituting the value actually given in return for the service supplied to the recipient."

This means that there must be a direct link between the service provided and the consideration received, as the CJEU had earlier stated in the case to which Mr Baker referred, *Staatsecretaris van Financiën v Coöperatieve Aardappelenbewaarplaats GA* (Case 154/80), [1981] ECR 445, para 12, and also in *Apple and Pear Development Council v Customs and Excise Comrs* (Case C-102/86) [1988] 2 All ER 922, paras 11 and 12, and other cases.

21. When the CJEU speaks of "consideration" as "reciprocal performance" it is looking at the matter from the perspective of the supplier of the services. It requires that under the legal arrangement the supplier receives or is to receive remuneration for the service that it has performed either from the recipient of the service or a third party. This is not the same as the first meaning of "consideration" in English contract law, which in any event plays no part in the Mauritian law of contract, which is derived from the French Civil Code. In the Board's view, "consideration" in section 4(1)(b) of the 1998 Act has the European law meaning.

The time of supply

22. There is a fundamental difference between the United Kingdom legislation and the 1998 Act in relation to the time of supply of services. In section 6(3) and (4) of the United Kingdom's VAT Act a supply of services is treated as taking place for the purpose of the charge to VAT at the time when the services are performed or, if the supplier issues a VAT invoice or receives payment before that time, at the time when the invoice is issued or the payment received. This is a regime which Principal VAT Directive permits in articles 63 to 66. In the context of United Kingdom legislation, the performance of a service combined with a contractual right to receive payment, which has not been waived, could be sufficient to give rise to the charge to VAT before an invoice was issued or payment received.

23. By contrast, in Mauritius, in section 5 of the 1998 Act a supply is deemed to occur only at the earlier of the issue by the supplier of an invoice or VAT invoice or the supplier's receipt of payment for the supply. Thus in the Mauritian legislation consideration in the form of reciprocal performance is treated as occurring at that time, which is when the liability to pay VAT arises under section 9(2). The performance of the services does not by itself give rise to a charge to VAT.

24. Because of this clear difference, dicta in United Kingdom case law, including the decisions of the First-tier Tribunal and the Upper Tribunal in *Norseman Gold plc v Revenue and Customs Comrs* [2014] UKFTT 573 (TC) and [2016] UKUT 0069 (TCC) on which counsel relied, cannot be applied uncritically to Mauritian VAT law.

25. Shophold did not issue any invoice for the management services which it provided during the relevant period under the Agreement and did not receive payment for those services. As a result no liability has arisen to pay VAT for the services provided in the relevant period.

Supply and taxable supply

26. That is sufficient to dispose of this appeal. The Board however adds that in order to read the 1998 Act coherently, "supply" in section 4(1)(b) (ie "the performance of services for a consideration") is deemed to occur when the invoice is issued or when payment is received, whichever is the earlier. Although services may have been performed under a contract which provides for payment for those services, there is no "supply" or "taxable supply" under the 1998 Act until the earlier of the issue of the invoice or payment. When the service is provided to another registered person, the invoice must be a VAT invoice: section 20(1). In the Board's view, this gives rise to no mischief of tax avoidance through a service provider's failure to issue an invoice in a

timely manner as the receipt of payment itself triggers the liability to pay VAT on the supply.

Conclusion

27. The Board allows the appeal and determines that Shophold was not liable to pay VAT for the services which it provided to Shoprite under the Agreement during the relevant period.

28. The Board invites any submission on costs to be made within 21 days.