Round Up of International GST Decisions

1.6.2016

by S. Saravana Kumar
Partner
Tax, GST & Customs Practice
sks@lh-ag.com

LH AG ADVOCATES AND SOLICITORS

Lee Hishammuddin Allen & Gledhill

Commissioner of Taxation v Qantas Airways Ltd [2012] HCA 41

- Amount in contest was the GST on fares received from prospective passengers who failed to take the flights for which reservations and payment had been made.

- Some fares were forfeited while others were refundable on application within a stipulated period but no refund claim was made.

- This dispute is concerned not with refunds but with cases where no refund was claimed or none was available.

LH AG ADVOCATES AND SOLICITORS

- Issue was whether there a supply?

- Majority decision: the HC held that GST was payable by Qantas when a customer books and pays for domestic air travel, but subsequently cancels the booking or does not turn up for the flight, and does not receive a refund of the unused fare.

- '*For*' in the phrase *'supply for consideration*', is not used to adopt contractual principles but rather requires a connection or relationship between the supply and the consideration.

LH AG ADVOCATES AND SOLICITORS

Ian Flockton Development Ltd v C & E Comrs (1987) 3 BVC 23

- Company purchased a racehorse to promote its image and to provide a talking point for its salesmen in discussions with potential customers.

- Company appealed against an assessment to VAT disallowing its claim that it was entitled to deduct input tax paid on the purchase and upkeep of the horse as supplies of goods or services 'used or to be used for the purpose of (the company's) business'.

LH AG ADVOCATES AND SOLICITORS

- Whether the expenditure incurred for business purposes?

- VAT Tribunal must not substitute the test of what the average businessman would do for the test of what was in the mind of the witness at the time of the expenditure.

- Once the Tribunal accepted that the company's only purpose in purchasing the racehorse was to further its business, the question whether the directors ought to have believed that the purchase and running of the horse would be for the company's benefit became irrelevant.

LH AG ADVOCATES AND SOLICITORS

- Test of whether a supply is used for business is a subjective one.

- Looks into taxpayer's mind at the relevant time to ascertain his intention in contracting for the supply in question.

- All the circumstances of the case must be considered and court must be satisfied that the object was to use the goods and services in question for the purpose of business.

- Company's appeal was allowed.

LH AG ADVOCATES AND SOLICITORS

The Clean Car Co Ltd [1991] BVC 568

- A second interim certificate issued by architect was dated 29 June 1990 and received by the company on 3 July 1990.

- No invoice was received from the contractor but the company paid to the contractor on 6 July 1990 the amount shown on the architect's certificate. This included the VAT charegable.

- Actual invoice by contractor was received by 8 July 1990.

LH AG ADVOCATES AND SOLICITORS

- On 6 July 1990, company submitted VAT return for the period to 30 June 1990 and included £15,765 as input tax for which credit was claimed.

- As contractors were not in fact paid by 30 June 1990, the supply on which input tax had been charged could not be treated as having taken place by the end of June.

- Those supplies only became chargeable on 2 July 1990 when the contractors issued the tax invoice.

LH AG ADVOCATES AND SOLICITORS

- VAT regulation stated that the company should have claimed input tax credit for the period that included July.

- By claiming in the wrong return, the company had overstated its entitlement to credit for input tax for that period.

- Customs imposed penalty for incorrect return.

LH AG ADVOCATES AND SOLICITORS

- Does the company have a reasonable excuse for claiming credit for input tax in the period before the invoice was received?

- VAT Tribunal set aside the penalty for these reasons:

(a) Managing director's daughter had a bone marrow transplant and came out of hospital in July 1990.

(b) He could not give the time he usually gave to office business.

LH ADVOCATES AND SOLICITORS AG

(c) He knew that all the work for which he had to pay had been completed before the end of June, was anxious to pay promptly and did so before the tax invoice arrived.

(d) Parliament must have intended whether a trader had a reasonable excuse should be judged by the standards of reasonableness exhibited by a taxpayer who has a responsible attitude to his duties as a taxpayer and relevant to the situation being considered.

LH AG ADVOCATES AND SOLICITORS

(e) Bearing the taxpayer's age and experience, his health or the incidence of some particular difficulty or misfortune may all have a bearing on whether, in acting as he did, he acted reasonably and so had a reasonable excuse.

(f) It was not unreasonable for the managing director to include the claim for input tax in the taxpayer company's return for the period to the end of June.

LH AG ADVOCATES AND SOLICITORS

C&E Commrs v Nomura Properties Management Services Ltd [1994] BVC 126

- Company submitted a return in which the value of the output was included in Box 1 instead of Box 4; the value of input was included in Box 5 rather than Box 2; the amounts of output tax and input tax were entered in Boxes 4 and 5 instead of Boxes 1 and 2; and in Box 3 was entered the excess of inputs over outputs, rather than the excess of input over output tax.

- Resulted in the return claiming a refund of £218,718.56, (instead of claiming £32,807.79, an error of £185,910).

LH ADVOCATES AND SOLICITORS AG

- A computer credibility check by Customs raised a query and an officer of Customs made a control visit.

- Error was explained and an amended return was submitted before the issue of a penalty of £55,773.

- Taxpayer appealed contending that the figures were so obviously wrong that there was no risk of the VAT controller being misled and the return should be regarded as a nullity, as if no return had been made.

LH AG ADVOCATES AND SOLICITORS

- Whether a return can be so grossly wrong that it is treated as “null”?

- There was no class of error which would invalidate a return.

- If a return was made containing errors, whether the errors were obvious or not, the consequences prescribed by law followed.

LH ADVOCATES AND SOLICITORS AG

- To permit amendment of a return retrospectively to cure a defect in the return would be to undo the effect and policy of the penalty provision.

- Such a provision would have little purpose or effect, if at any time when an error, even a fraudulent one, had been detected, the taxpayer by amendment could cure the original defect.

LH ADVOCATES AND SOLICITORS AG

Van Boeckel v Customs and Excise Commissioners (1980) 1 BVC 378

- Taxpayer ran a pub and prepared VAT returns on the takings handed to him by his manager.

- During Customs' audit, they found the VAT returns were incorrect because taxpayer failed accurately to account and declare tax due on the full value of supplies made by him.

- Taxpayer suggested that pilferage was probably the cause of the deficiency.

LH AG ADVOCATES AND SOLICITORS

- Taxpayer appealed to the VAT Tribunal and contended:

(a) Assessment had not been made to the best of the Customs' judgment.

(b) Customs had taken insufficient steps to ascertain the true amount of tax due.

(c) Period of five weeks over which the test was conducted was too short a period on which to base an assessment covering a three-year period.

(d) Customs had taken no account of the possibility of pilferage.

LH AG ADVOCATES AND SOLICITORS

- Tribunal dismissed the appeal but reduced the amount of the assessment to take account of pilferage.

- At the High Court, taxpayer argued the assessment in question was not valid because the Customs had taken insufficient steps to ascertain the amount of tax due before making the assessment.

- The word ‘judgment’ makes it clear that the Customs are required to exercise their powers in such a way that they make a value judgment on the material which is before them.

LH AG ADVOCATES AND SOLICITORS

- Whether Customs exercised best judgment in raising the impugned assessment?

- HC held that “best of their judgment” does not envisage the burden being placed upon the Customs of carrying out exhaustive investigations.

- It envisages that the Customs will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due.

LH AG ADVOCATES AND SOLICITORS

- As long as there is some material on which the Customs can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them.

- Reference made to to the Privy Council's decision in *Commissioner of Income-Tax, United and Central Provinces v Badrida Ramrai Shop, Akola, Owner Laxminarayan Badrida Shrawagi of Akola* (1937) 64 L. R. Ind. App. 102.

LH AG ADVOCATES AND SOLICITORS

- HC dismissed the taxpayer's appeal.

- The assessment based on a five-week period was not arbitrarily applied.

- Proper for the Customs to make a test over a limited period such as 5 weeks, and take the results which are thrown up by that test period of 5 weeks into account in performing their task of making an assessment for a period of 3 years in accordance with the law.

LH AG ADVOCATES AND SOLICITORS

- As a matter of good administrative practice, it is desirable that the Customs should make all reasonable investigations but there was no necessity for the Customs to interview the manager or visit the public house when it was open.

- Customs officer's good faith was not being challenged and it was not unreasonable not to make further investigations into the question of pilferage or to come to a conclusion that there was pilferage in this case.

LH AG ADVOCATES AND SOLICITORS

Thank you

For further queries, please e-mail us at:

sks@lh-ag.com

LH AG ADVOCATES AND SOLICITORS

Lee Hishammuddin Allen & Gledhill