

BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL JURISDICTION

No: 1197 of 2000

BETWEEN:

BRIDGETOWN CRUISE TERMINALS INC.

(Plaintiff)

AND

ATTORNEY GENERAL OF BARBADOS

(1st Defendant)

BARBADOS PORT AUTHORITY

(2nd Defendant)

Before the Honourable Mr. Justice Carlisle Payne, Judge of the High Court.

2001: December 12, 13, 17

2002: March 1, 5, 20

Sir Henry Forde, Q.C., for the Plaintiff, with Miss Wendy Straker.

Miss Donna Brathwaite for the First Defendant with Miss Valentina Blackman, Mr. Barry Carrington and Mr. Prince Hope.

Mr. Patterson Cheltenham, Q.C. for the Second Defendant, with Mr. Roger Forde.

DECISION

The Plaintiff is a company incorporated under the Companies Act. It manages and operates the Cruise Passenger Terminal at the Bridgetown Port, pursuant to an agreement between the Plaintiff, the Second Defendant and others.

2. The second defendant (Port Authority) is established under the Barbados Port Authority Act (Cap. 285B). Its functions include the provision, maintenance, operation and improvement of port and harbour services in Barbados. It is authorised to impose and levy rates, charges, dues or fees for the services performed and the facilities provided.

3. With effect from 1st July, 1994, the Port Authority has pursuant to the agreement aforesaid paid to the Plaintiff out of head taxes collected from cruise ships, US \$ 2.00 for every passenger who transits the facilities.

4. The main question for determination in this Originating Summons is whether there is a taxable supply between the Plaintiff and the Port Authority for the purposes of the Value Added Tax Act (Cap. 87).

The Material Facts

5. The Plaintiff was incorporated in July 1993 for the purpose of developing and managing the cruise passenger terminal at the Bridgetown Port. Its formation was the result of a joint venture arrangement, the negotiation of which the Crown played a role, between the Port Authority, the private sector and the public. The Port Authority is a major shareholder. The scheme is reflected in the following extract from the Prospectus of the Plaintiff:

"BCTI will lease the whole of the proposed cruise complex from the Barbados Port Authority, finance the cost of renovation of the existing terminal and other buildings, the landscaping, the car park and any other initial costs associated with the upgrade of the entire area. BCTI will generate its revenues through rental of space, tour and tax concessions, advertising and commissions, as well as receive

a percentage of the passenger head tax.. It will be responsible for all aspects of day to day operations of the facility. Technical and ship operations, e.g. Pilotage, berthing, fuel and water disposal will continue to be provided by the Barbados Port Authority."

6. These arrangements were implemented mainly by two documents. The first was the agreement already referred to, which was dated 30th

September, 1993. The agreement recited its objects as follows:

"WHEREAS:

(1) the Authority was incorporated for the purpose of assuming and amalgamating the functions of the former Port Department and Port Contractors (Barbados Limited and to provide maintain operate and improve the Port and harbour services of Barbados and to generally carry out the provisions of the said Barbados Port Authority Act Cap 285B (hereinafter called "the Act")

(2) In furtherance thereof the lands described in the First Schedule hereto became vested in the Authority for a term of fifty years by virtue of a Lease dated 8th February, 1989 and made between the Crown of the One Part and the Authority of the other part.

(3) The Authority, Cave Shepherd and Goddards with the approval of the Crown have agreed to co-operate in the operation and management of the Cruise Passenger Terminal and related facilities situated at the Port of Bridgetown of Barbados which facilities form part of the land vested in the Authority by the Crown as aforesaid.

(4) To give effect to this co-operation it has been agreed:

(a) that the Authority, Cave Shepherd and Goddards join in the formation of a Public Company to be called Bridgetown Cruise Terminals Inc., which company was incorporated on the 28th day of July, 1993 (hereinafter called "The Company")

(b) that the said Passenger Terminal be renovated and refurbished at a cost not exceeding \$6m to be financed as hereinafter appears

(c) that a sublease of the premises described in the Second Schedule be granted by the Authority to the Company."

7. The Second document was the sublease envisaged in the agreement. It was dated 1st January, 1994, and recited its purposes in part as follows:

"AND WHEREAS it has been agreed that the Tenant should assume responsibility for the management and operation of the Cruise Passenger Terminal at the Bridgetown Port and to effect such management and operation it has been deemed desirable to grant to the Tenant a sublease of the land and premises hereinafter described AND THAT the Tenant shall repair and renovate and refurbish the existing building thereon and lay out such new access roads and car parking area and landscape the same in accordance with the plan and specifications therefor as annexed to an agreement..."

8. The sublease was for a period of 10 years. There was provision for renewal which in accordance with clause 8 (2) of the agreement, was subject to the approval of the Crown.

9. Clause 14 (a) of the agreement provided for payment by the Port Authority to the Plaintiff of a portion of the head tax as follows:-

"(a) In consideration of the Company's Management of the facilities as aforesaid the Authority shall with effect from the 1st day of July, 1994 and out of head taxes collected by it from Cruise Ship Passengers in accordance with Tariffs and regulations from time to time in force pay to the company for every such passenger who transits the said facilities the sum of equivalent in Barbados dollars of \$2.00 US. other sum as may be agreed in writing from time to time."

10. It must be observed that this head tax is not collected from the passenger but from the ship, and that U.S.\$ 6.00 per passenger is collected by the Port Authority whether or not the passenger disembarks. These arrangements were in place before the V.A.T. Act was passed.

11. It should also be mentioned that Government shares the use of the renovated cruise terminal, for purposes such as Immigration, Customs and Health. No payment is made by Government, either to the Port Authority or to the Plaintiff for the use of these facilities.
The Value Added Tax Act

12. The Value Added Tax Act (VAT Act) came into force on 1st January, 1997. Section 7 provides inter alia.

"(1) Subject to this Act, a tax to be known as "value added tax" shall be imposed in accordance with this Act

(a) on the taxable supply in Barbados of goods or services by a registrant."

"(2) The tax imposed by subsection (1) on a taxable supply of goods or services by a registrant is equal to 15 percent of the value of the supply and is payable by the registrant at the time the supply is made."

"(7) A registrant who makes a taxable supply in Barbados to another registrant shall, forthwith upon the request of the other registrant, issue a tax invoice to the other registrant containing such particulars as may be prescribed."

Definitions are contained in section 2 as follows:

"taxable supply" means a supply of goods or services made in the course of furtherance of a taxable activity and includes a zero-rated supply but does not include an exempt supply;"

"supply" means the provisions of goods, services, real property or any other thing in any manner and includes a sale, transfer, barter, exchange, gift, lease, rental, hiring, letting, licensing or disposition;"

“taxable activity”

(a) means

(i) an activity carried on in the form of a business,

(ii) an activity that is carried on continuously or regularly by a person, whether or not for a pecuniary profit, and involves or is intended to involve in whole or part, the supply of goods or services for a consideration.

(iii) an activity engaged in by association, club, society, commission, union or other organisation in providing for a subscription or other consideration, facilities or advantages to its members.

“Consideration”, in relation to a supply of goods or services to a person, includes any payment made or any act or forbearance in respect thereof, in response thereto or for the inducement of, the supply, whether by the person to whom the goods or services are supplied or by any other person and where the consideration is money, includes an amount paid as tax.”

13. Section 8 provides for zero-rated supplies. A zero-rated supply is defined as “a taxable supply on which tax is imposed at zero-rated per cent.” Zero-rated supplies are contained in the First Schedule where, at paragraph 3, the following supplies are zero-rated:

“(3) (1) A supply made to an unregistered non-resident of a service of repairing, maintaining, cleaning, outfitting, refurbishing or improving a ship, aircraft or cargo container used by the person in international commercial service.

(2) A supply of services

(a) by the Barbados Port Authority to a ship, or

(b) by the Civil Aviation Division of the Ministry of International Transport to an aircraft.

14. Zero-rated supplies are not to be confused with exempt supplies, which are provided for in section 10 and are contained in the Second Schedule.

15. The characteristics of the Value Added Tax Scheme must be considered. It is a tax on goods and services and it is paid by the consumer. However, it is collected by the registered supplier, or registrant. He is under a statutory duty to collect it and account to the Comptroller of Customs. The registrant becomes liable to pay the tax at the time of the supply.

16. Both the Plaintiff and the Port Authority are registrants under the Act.

17. The main question, as stated before, is whether there is a taxable supply between the Plaintiff and the Port Authority.

18. Sir Henry Forde submits that the Plaintiff receives no consideration, since there is no link between the payment of the portion of the head tax to the Plaintiff and the management and operation of the cruise terminal. He submits that in the absence of consideration there can be no taxable supply. He further submits that the entire scheme must be looked at to determine whether there is a taxable supply.

19. The Crown’s case is that the Plaintiff is supplying services to the Port Authority for a consideration, namely the portion of the head tax. The Crown relies inter alia on the agreement.

20. Difficulties with the Crown’s contention are seen when the activities carried on by the Plaintiff and the alleged consideration are looked at in the context of the overall scheme. The consumer or recipient seems to me to be the ship and/or passengers, and not the Port Authority as the Crown contends. The very statutory purpose and function of the Port Authority is to provide these services, not to receive them.

21. Further, under paragraph 3 (2) of the First Schedule to the VAT Act, the Port Authority is treated as the supplier and the ship as the recipient. The scheme for the operation of the cruise facility had already been established several years before this Act was passed. I do not see how, without straining the words of the Act or implying something that is not expressed there, the ship’s statutory status as recipient can be transferred to the Port Authority merely because the Port Authority pays a portion of the head tax to the Plaintiff. Nor do I see how the Port Authority’s status can ipso facto be reversed so as to make it the recipient.

22. The governing principle of interpretation is best expressed in the oft-quoted words of Rowlatt J. in *Cape Brandy Syndicate v. I.R.C.*, 1921, 12 T C 358 at p. 366.

“In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”

23. For these reasons I find that there is no taxable supply between the Plaintiff and the Port Authority for the purposes of the V A T Act.

24. But if it were a taxable supply, there is the question as to the rate of tax to be applied.

25. We have seen that under paragraph 3 (2) of the First Schedule of the VAT Act, a supply of services by the Port Authority to a ship is zero-rated. The evidence is that the Port Authority provides services such as pilotage, navigation aids, berthing, water and fuel. Under Section 4 of the Barbados Port Authority Act the functions of the Port Authority include the provision, maintenance, operation and improvement of the port and harbour services and facilities. Section 5 (c) authorizes the Port Authority to enter into any agreement with any person for the performance or the

provision by that person of any of the services or facilities which may be performed or provided by the Port Authority.

26. I consider therefore that any services provided by the Plaintiff in managing and operating the cruise terminal were provided on behalf of the Port Authority as contemplated by Section 5 and thus fall within paragraph 3 (2) of the First Schedule to the VAT Act and are therefore zero-rated.

27. My conclusion therefore is that there is not a taxable supply but in any event any taxable supply would be zero-rated.

28. There will therefore be an order that the monies paid by the Plaintiff to the Comptroller of Customs, the Plaintiff having been assessed by the Comptroller of Customs to pay VAT at the rate of 15 per cent with effect from 1st January, 1997, amounting to \$1,140,534.60 as at 31st May, 2000, and such further sums as have been paid since that date, be repaid to the Plaintiff.

29. There will also be an order that the Plaintiff be paid interest on each sum paid from the date on which it was paid at the rate of 8 per cent per annum until repayment.

30. The Plaintiff will have costs for two counsel to be agreed or taxed against the First Defendant and the Second Defendant will have costs for two counsel to be agreed or tax against the First Defendant.

31. Liberty to apply if necessary on the amount found due and on the question of interest.

32. Formal order to be submitted.

Carlisle S. Payne

High Court Judge.