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Judgment issued by the Supreme Court of Mauritius

Smit Salvage Pte Ltd ("Appellant")

v/s

1. The Assessment Review Committee ("First Respondent" or "ARC")
2. The Director-General, Mauritius Revenue Authority ("Second Respondent" or "MRA")

2024 SCJ 59

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On 8 February 2024, the Supreme Court issued its judgment in favor of the Appellant with regards to whether a VAT ruling issued by the MRA, relating to whether a supply of goods or services is a taxable supply, amounts to a "decision", for which the Appellant may lodge a written representation to the ARC.

Executive summary

- SMIT Salvage Pte Ltd entered into a contract with the owner of a tanker vessel, the MK Wakashio, for the salvage of the vessel.
- To undertake the salvage operations, the Appellant entered into an agreement with the Police Helicopter Squadron ("PHS"), for the leasing of helicopters.
- In order to have certainty as to whether the leasing of helicopters by PHS to the company constitutes an exempt or zero-rated supply for VAT purposes, the Appellant applied for a ruling with the Second Respondent.
- Dissatisfied with MRA's ruling, the Appellant lodged representations before the ARC under section 40 (1) of the Value Added Tax Act ("VAT Act").
- The representations were set aside by the ARC on the basis that "the ARC has no jurisdiction to review a 'ruling' issued by the Director-General under section 69A of the VAT Act".
- The Appellant, being dissatisfied by the ruling of the First Respondent, made an appeal to the Supreme Court of Mauritius as to whether the ruling issued by the Second Respondent amounts to a 'decision' within the meaning of section 40 of the VAT Act and therefore, falls within the jurisdiction of the ARC.
- The appeal of the Appellant was upheld by the Supreme Court and the ruling of the ARC was quashed.

Analysis of the Judgment

Pursuant to section 40 (1) (a) of the VAT Act, any person who is aggrieved by a decision of the Director-General as to whether or not a supply of goods or services is a taxable supply, may lodge written representations with the Clerk to the ARC in accordance with section 19 of the MRA Act 2004.

In the present appeal, the question to be determined is whether a ruling given under section 60A of the VAT Act tantamount to a 'decision' within the meaning of the VAT Act.

According to Section 19 (1) of The Mauritius Revenue Authority Act 2004 ("MRA Act"), "*any person who is aggrieved by a decision, determination, notice or claim under any of the enactments specified in the Fifth Schedule may, within 28 days of the date of the decision, determination, notice or claim, as the case may be, lodge with the Clerk to the Committee, written representations, with copy to the person against whose decision, determination, notice or claim the person aggrieved lodges the written representations, specifying the reasons for asking for a review of the decision, determination, notice or claim, as the case maybe* " (emphasis is ours).

It is to be noted that section 40 of the VAT Act is specified in the Fifth Schedule of the MRA Act whereas section 69A of the VAT Act is not mentioned in that Schedule.

Although the Second Respondent stated that "had it been the intention of the legislator that rulings of the Director-General given under section 69A of the VAT Act could be reviewed before the ARC, clearly that would have been expressly mentioned in the Fifth Schedule", the Supreme Court held the view that since section 40 (1) (a) of the VAT Act already allows for written representations to be lodged by an aggrieved party, there was no need for the legislator to add section 69A of the VAT Act to the Fifth Schedule to the MRA Act.

The Supreme Court also failed to see any substance in the proposition made by the First Respondent that representations may be lodged by an aggrieved party only when an assessment has been raised by the MRA.

The Supreme Court agreed with the submission of the Appellant that should the interpretation given by the Respondents be confirmed, the Court would render Section 40 (1) (a) of the VAT Act inoperative.

It was therefore held that the VAT ruling issued by the MRA is a decision within the meaning of section 40 (1) (a) of the VAT Act. Hence, the ARC was wrong to decline jurisdiction on the present matter.

The ruling of the ARC was quashed by the Supreme Court and the matter was remitted back to the ARC to proceed with the hearing on its merits.

The present judgement is gladly received as it empowers taxpayers to challenge VAT rulings issued by the MRA.

Other remarks

Can a person make a representation to the ARC for a dissatisfied income tax ruling?

The Authors would like to make a nuance with whether a ruling issued by the MRA under section 159 of the Income Tax Act 1995 ("ITA") tantamount to a "decision" for which a representation to the ARC may be lodged under section 134 of the ITA.

According to section 19 and the Fifth Schedule to the MRA Act, in relation to the ITA, only a decision, determination, notice or claim in so far as it relates to section 134 of the ITA falls within the purview of representations to the ARC. Section 134 of the ITA refers to specific sections of the ITA for which a person may lodge a representation and these specific sections do not refer to section 159 (Rulings) of the ITA.

Based on the above sections, a person aggrieved by an income tax ruling of the MRA would not be able to make a representation to the ARC in respect of that ruling.

This clearly shows some disparity between the VAT Act and ITA.

Remarks on VAT Ruling VATR 94

Although a VAT Ruling published on the MRA's website is in redacted form, the facts of VATR 94 are similar to the facts in the present judgment.

In VATR 94, a company resident in Singapore ("the Company") entered into a verbal leasing agreement for the hire of manned helicopters from X in Mauritius. The helicopters are used for the transport of persons from the mainland to the place where a ship is grounded. The ship is owned by a company resident in Japan and the Company entered into a contract with the ship owner for salvage operations.

One observation which the Authors would like to make on VATR 94 is, despite the points at issue mentioned the VAT treatment of the **leasing of helicopters by X**, the ruling issued by the MRA referred only to the **supply of helicopter services**.

A couple of provisions of the VAT Act which are relevant to the present points at issue are:

1. Item 38 of the First Schedule to the VAT Act, according to which aircraft leasing should be treated as an exempt supply.
2. Item 3 (a) of the Fifth Schedule to the VAT Act, pursuant to which the transport of passengers by air from or to Mauritius should be treated as a zero-rated supply.

The question which arises is whether the leasing of helicopters amounts to aircraft leasing or merely to a supply of helicopter services.

The ruling of the ARC on this matter is much awaited and will provide clarity on the VAT treatment of leasing of helicopters.

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