[2013] UKPC 24
Privy Council Appeal No 0090 of 2012

JUDGMENT

The Director General, Mauritius Revenue Authority (Appellant) *v* Paradis Brabant Hotel (Respondent)

From the Supreme Court of Mauritius

before

Lord Neuberger
Lord Wilson
Lord Carnwath
Lord Toulson
Sir Paul Girvan

JUDGMENTS DELIVERED ON

23 July 2013

Heard on 11 June 2013

Appellant	*Respondent*
Philip Baker QC Karuna Gunesh-Balaghee Laurent Sykes (Instructed by Carrington & Associates)	P. Maxime Sauzier SC Michael King Fat (Instructed by Blake Lapthorn)

LORD NEUBERGER (WITH WHOM LORD TOULSON AND SIR PAUL GIRVAN AGREE)

1. This is an appeal brought by the Mauritius Revenue Authority ("the MRA") against an order of the Mauritius Supreme Court dismissing the MRA's appeal against the decision of the Assessment Review Committee ("the Committee").

Introduction

2. The issue before the Committee concerned the appropriate rate of Hotel and Restaurant Tax ("HRT") applicable to taxable receipts in respect of supplies made by each of the fifteen or sixteen respondents, in connection with its hotel and/or restaurant business.

3. The respondents contended that the rate should be that prevailing at the date on which a respondent received payment of a sum in respect of a particular supply, whereas, the MRA contended that it should be the rate prevailing at the date on which the supply was actually made. The Committee agreed with the respondents and that decision was upheld by the Supreme Court (Matadeen and Angoh JJ) on appeal.

4. The difference between the parties can be demonstrated through the example of a hotel booking for 1 September 1998, offered by a respondent to a customer on 1 July 1998 for a particular sum, which the customer accepted on 1 August 1998, although it actually paid the sum on 1 October 1998. In such a case, the respondents contend, and the Committee accepted, that the relevant date for assessing the rate of tax on the sum in question should be 1 October 1998, when the customer pays –i.e. the date on which the sum is received. The MRA's case is that the relevant date should be 1 September 1998, when the contract was made, and the commitment was given to the customer – i.e. when the service was supplied and the respondent became entitled to payment.

5. The issue is one of statutory construction, so it is appropriate to start by referring to the two relevant statutes.

The Hotel and Restaurant Tax Act 1986

6. HRT was introduced by the Hotel and Restaurant Tax Act 1986 ("the 1986 Act").

7. Section 3 of that Act was headed "Liability to tax", and it provided:

> "(1) The manager of every designated establishment shall be liable to a tax on the taxable receipts of that establishment.
> (2) The tax shall be calculated at the rate specified in the Third Schedule.
> (3) The liability to tax shall accrue daily but shall be discharged monthly.
> (4) The manager may recover from customers the tax payable on the taxable receipts."

8. A "designated establishment", referred to in section 3(1), was defined in the First Schedule to the 1986 Act as comprising any restaurant, hotel or similar concern. "Taxable receipts", referred to in section 3(1) and (4), were defined in section 2 as meaning "the gross receipts … arising from the supply of [specified] goods and services", subject to an irrelevant exception. (The Board was told that this definition was subsequently amended, and that, while the contention was that the amendment be withdrawn, this did not happen; it was agreed between the parties that the definition should be treated as always having been in its original form.) The Third Schedule to the 1986 Act, mentioned in section 3(2), simply stated "Rate of Tax: 10%".

9. Section 5 required every designated establishment to issue, and keep copies, in sequential order, of "a serially numbered bill in respect of every receipt". Section 6 stated that such an establishment should keep "a full and true written record … of every transaction", and to do so for at least "6 years after the completion of the transaction to which it relates".

10. Section 7(1) of the 1986 Act required every designated establishment, on or before the end of each month, (a) to submit a monthly return "specifying the taxable receipts of the establishment" for the previous month, and (b) "to pay the tax due". The form of the return is, according to section 7(2), to be approved by the MRA.

11. Section 11 was concerned with "cessation of business" and it provides as follows:

> "(1) … [W]here the manager of a designated establishment ceases to carry on business … , he shall … (b) not later than the last day of the month following the month in which he ceased to carry on business, submit … (ii) in respect of the last month in which he carried on business, a return which shall include any amount owing to the establishment as taxable receipts at the date of the cessation of business … and pay the tax specified therein.

(2) Where the manager of a designated establishment, who ceases to carry on business at that establishment, sells … the business together with the amount owing to the establishment as taxable receipts at the date of the cessation of business, he shall not pay tax on those taxable receipts but the purchaser or transferee shall be liable to pay the tax on those taxable receipts …".

The Finance Act 1998

12. In May 1996, the Minister announced that the rate of HRT was to be increased to 15% from 1 June 1996, but this increase was abandoned, although there was a week from 1 June 1996 during which an increase took effect. It is agreed between the parties that nothing hangs on that for present purposes, and that the issue in this case can be approached on the basis that the rate of HRT remained at 10% until 6 September 1998.

13. With effect from 7 September 1998, Value Added Tax ("VAT") was introduced into Mauritius by the Value Added Tax Act 1998. The intention was that VAT would replace HRT (as well as Sales Tax). Accordingly, the Finance Act 1998 ("the 1998 Act"), as well as including a number of other unrelated measures, phased out HRT by means of a stepped decrease.

14. Section 3 of the 1998 Act amended the Third Schedule to the 1986 Act "with effect from the different dates specified in section 24":

"(a) by deleting the words '10 percent' and replacing them by the words '4 percent';
(b) by deleting the words '4 percent' and replacing them by the words '2 percent'; and
(c) by deleting the words '2 percent' and replacing them by the words 'zero percent'."

15. Section 24 included the following relevant subsections:

"(3) Section 3(a) shall, in respect of taxable receipts arising on or after 7 September 1998, come into force on 7 September 1998.
(4) Section 3(b) shall, in respect of taxable receipts arising on or after 1 July 1999, come into force on 1 July 1999.
(5) Section 3(c) shall come into force on 1 July 2000."

The factual background

16. The facts are within a very small compass. In respect of the period after 6 September 1998, the respondents accounted for, and paid over, HRT at the rate prevailing at the date on which they received payment for any relevant goods or services.

17. So far as a customer was concerned, it appears, at least from the evidence which the Board was shown, that the respondents would often quote a figure (e.g. per item, such as a night in a room or a meal, or else an overall "package" figure) which was expressed "inclusive of Government tax as applicable" (or some similar expression). Thus, there was no breakdown or explanation to the customer as to what taxes were included, let alone at what rate any tax was being assumed to be payable. (It is only fair to record that, after the hearing, the Board's attention was drawn to other evidence which showed that some of the respondents did sometimes include a specific sum in respect of HRT in the bills presented to customers).

The approach favoured by the Board

18. It is clear from section 3(1) of the 1986 Act that HRT was a tax on receipts: thus it was only payable on money actually received by a respondent for a specified good or service. It is equally clear from section 3(3) of the 1986 Act that the liability to tax only actually accrued on receipts. Although it does not follow as a matter of strict logical necessity that the tax to be calculated under section 3(2) of the 1986 Act must be also calculated by reference to the rate prevailing at the date of receipt, that is clearly the natural inference, at least in the absence of any indication to the contrary

19. In other words, given that (i) receipt of a sum is the necessary and sufficient condition for payment of HRT, (ii) the amount of HRT (whatever the rate) is to be assessed by reference to the sum received, and (iii) the HRT accrues on the sum received from the date of receipt, it would be surprising, at least in the absence of any indication to the contrary, if the rate of HRT payable on the sum was not also assessed as at the date of its receipt.

20. It was suggested on behalf of the MRA that sections 5, 6 and 11 of the 1986 Act tended to support the contrary view, namely that the rate was to be assessed by reference to the moment of supply. The Board does not agree.

21. The notion that section 5 supports the contrary view is based on the point that the bill will precede the receipt, but that is of little assistance. The bill may well not bear the same date as the date of supply, but even if it does, the fact that the bill has to be retained is scarcely much of an indication that the date of the bill is the date by reference to which the rate of HRT is to be assessed. After all, the issue of the bill does not give rise to liability, and it is by no means necessarily the case that the sum

specified in the bill would be the sum on which HRT is payable. The tax is payable on whatever sum, if any, is eventually received for the goods or services referred to in the bill.

22. Section 6 is of no assistance, save that, by tying the 6-year retention period to "completion", it is consistent with the notion that completion, ie payment of the sum due, is the crucial event. However, in the Board's view, that is no more harmful to the MRA's case than section 5 is helpful to it.

23. Section 11(1)(b)(ii) was a deeming provision which would accelerate liability to pay HRT if a respondent's business closed down. It is equally consistent with either interpretation. The expression "amounts owing ... as taxable receipts" is entirely consistent with the notion that there is no tax until there is an actual receipt. As for section 11(2), it simply transfers liability for future HRT to a transferee of a business and it is also irrelevant for present purposes.

24. The MRA's contention that section 11(1)(b)(ii) is only consistent with the rate of HRT being fixed by reference to a date earlier than receipt is based on the point that, if the respondents are correct, it would be impossible to know what rate of tax would be appropriate when the provision applied. The answer to that is that the effect of the provision is that the rate is that which is appropriate for "taxable receipts at the date of the cessation of business". Quite apart from that, section 11(1)(b)(ii) is not a helpful guide as to the basis on which HRT was normally to be assessed, as it represented, on any view, a departure from the normal way in which HRT was payable. That is because it gave rise to a liability for HRT on sums which might never be received, whereas it is common ground that HRT is only payable in respect of sums which are received. In any event, section 11(1)(b)(ii) was enacted at a time when there was no question of the rate of HRT being varied, and it would therefore be unsafe to look to it in connection with the issue raised on the present appeal.

25. Turning to the 1998 Act, section 3 introduces a trio of changes in the rate of tax, but it gives no steer on the issue raised on this appeal. However, that means that it does nothing to undermine the natural implication that one would draw from section 3 of the 1986 Act, as explained in paras 18 and 19 above, namely that the rate of HRT is to be assessed as at the date it is charged.

26. Section 24(3), (4) and (5) provide more assistance. They each state that a new rate, 4%, then 2%, then 0%, is to apply, successively, "in respect of taxable receipts arising on or after" a certain specified date. The natural meaning of the expression "receipts arising" is sums which are being received, and the requirement that any such sum must arise on or after a certain date suggests that the sum must be received on or after that date, which is consistent with the respondents' case.

27. That is admittedly a contextual reading, and one must interpret the words in their context. A vital part of that context is, of course, the 1986 Act, which sections 3 and 24 of the 1998 Act amend. Reference to the 1986 Act brings one back, in the first place, to section 3 of the 1986 Act, whose natural implication, as already mentioned, is that the rate of HRT is to be assessed as at the date of receipt. Secondly, the words "receipts arising" in sections 24(3), (4) and (5) of the 1998 Act link back to section 2 of the 1986 Act, in which "taxable receipts" are defined as "gross receipts … arising from the supply of goods and services". It seems clear from that definition that "receipts arising" in the 1986 Act is a reference to sums which are received. There must be a strong presumption that the drafter of section 24 of the 1998 Act intended the expression to have the same meaning, a conclusion supported by the fact that it is the natural meaning of the words.

Contrary arguments

28. Mr Baker QC, who presented the case of the MRA, argued that the conclusion that the rate of tax was to be assessed as at the date of receipt was not correct essentially for four reasons.

29. First, it was said that the Committee's conclusion would render the HRT system impractical, because a respondent would not know what rate of tax to pass on to a customer, unless that rate was fixed as at the date of the supply of the relevant service. While that point has some force, it is not very telling. HRT is not a tax which has to be charged by a supplier to a customer as part of the cost of the supply involved. All that section 3(4) of the 1986 Act did was to entitle the supplier to recover from the customer a sum equal to the HRT which the supplier had to pay.

30. That could have been achieved in more than one way. For instance, the contract with a customer could provide that the customer would include the appropriate figure for HRT at the time he made the payment. More likely, the customer could simply agree a gross figure, as he or she will normally only be concerned about the overall cost as opposed to worrying how it is made up. It is quite rational for the Act to contemplate that a supplier would quote a gross figure, and would then take the risk of the HRT rate moving up or down between the date of contract and the date of receipt. Indeed, that appears to have been the practice of at least some of the respondents – see para 4 above. As Mr Sauzier SC, who appeared for the respondents, said, such an approach would be similar to a supplier taking the risk on moves in currency exchange rates – a particularly apt analogy given that hotel rates in Mauritius appear to have been quoted in South African rand (at least to some customers).

31. It is perhaps rather question-begging and pejorative to describe as a windfall any benefit that a respondent gains as a result of a reduction in HRT between the date on which a gross sum is quoted to a customer and the date on which the sum is paid.

Where a respondent quotes a gross price, he is taking the risk of HRT changes, on the basis that he is offering a fixed price to a prospective customer, who would normally be free to propose different terms or to find another hotel, and would simply decide whether the holiday (or other service) was worth the fixed price. Different considerations may well apply in cases where a respondent quoted a price and then added HRT at, say, 10% in the quotation or estimate, and the respondent subsequently paid tax at, say 6%. In such a case, the customer may well have a claim for recovery of the difference between the HRT at 10% and the HRT at 6%, but that is not an issue which arises, or which should be determined, on this appeal.

32. Secondly, it was said by the MRA that it would be unsatisfactory if a taxpayer could manipulate the rate of HRT by putting off a payment, which would be the effect of the tax being assessed by reference to the date of receipt. While not without some force, the Board does not consider this to be an impressive point. It is by no means unknown for a rate of tax to be under the control of the taxpayer, in circumstances where the rate is changed as at a particular date. In any event, the date on which payment is received is not in the sole control of a supplier: it also depends on the customer and/or the customer's agent. Furthermore, a supplier is unlikely, at least in many cases, to be keen to put off the customer making payment. Quite apart from this, even on the MRA's construction, a supplier could manipulate matters in a case where it was not entitled to payment until it tendered its invoice, by waiting until the rate had decreased before formally contracting for a supply.

33. Thirdly, it was argued that the rate of tax should remain constant throughout the course of a particular transaction, and therefore it should be fixed as at the date the transaction is entered into. In the Board's view, that argument mischaracterises the tax. HRT is not a tax on a transaction, but on a sum which is received pursuant to a transaction, and it does not arise until receipt of that sum. There is therefore no question of the rate of tax applying at any time during the course of a transaction before the moment of payment.

34. The MRA rightly placed no reliance on the fact that HRT was or may have been paid at 15% during the week when it was increased as mentioned in para 12 above. Even if taxpayers adopted a stance on that occasion which was inconsistent with that which the respondents are taking in these proceedings, that cannot affect the proper interpretation of the legislation.

Conclusion

35. In all the circumstances, the Board concludes that the meaning and effect of the 1986 and 1998 Act on the point at issue are clear, and that, while the practical arguments raised by the MRA are not wholly without force, they fall far short of justifying a court departing from the natural meaning of section 3 of the 1986 Act,

when read together with sections 3 and 24 of the 1998 Act, namely that the rate of HRT applicable to a receipt is the rate prevailing as at the date of that receipt.

36. The Board accordingly dismisses the appeal of the MRA against the decision of the Supreme Court, upholding the decision of the Committee.

LORD WILSON (DISSENTING)

37. With respect, I consider that the Board should have allowed the appeal.

38. There is no doubt that under section 3(1) of the 1986 Act HRT is payable on receipts: it is only when a sum is received that the liability is triggered. But to say that receipt triggers liability is not to say that the liability which then arises is to pay at the rate of HRT prevailing on the date of receipt. I discern no "logical inference" to that effect. Upon sums received from 1986 to 6 September 1998 (apart from one week in 1996) HRT was, in the event, payable at the rate prevailing on the date of receipt; but in my view that occurred only because the rate which was prevailing on the date of receipt (10%) happened to be the same as that which had prevailed on the date of supply.

39. The situation which obtained during that one week, which began on 1 June 1996, provides a good test of the respondents' contentions: for the rate then increased from 10% to 15%. The Committee found that, since the respondents did not receive payment of HRT from customers at the rate of 15% during that week, they had paid it at the rate of only 10% for the entire month of June 1996. Nevertheless it follows from their contentions that they were legally obliged to pay that extra 5% on all sums received during that week, even (extraordinary though it may seem) in respect of supplies made prior to it; and, equally, that they would have been obliged to pay the excess in respect of supplies made prior to 7 September 1998 but paid for afterwards, if, instead of going down, the rate had then again gone up.

40. The definition of "taxable receipts" in section 2 of the 1986 Act makes clear that they are receipts "arising from [a] supply". In my view this definition informs the proper construction of the crucial subsections (3) and (4) of section 24 of the 1998 Act. By subsection (3), the reduction to 4% was applied to "taxable receipts arising on or after 7 September 1998" and, by subsection (4), the reduction to 2% was applied to "taxable receipts arising on or after 1 July 1999". The word "arising" in the two subsections should in my view be given the meaning which it is given in the definition in section 2 of the 1986 Act: in other words receipts arise from a supply so it is only if the supply occurs on or after 7 September 1998 and 1 July 1999 respectively that the receipts arise on or after those dates respectively.

41. I find myself unable to agree with the respondents that section 11(1)(b) (ii) of the 1986 Act is equally consistent with the contentions of each side. Its wording is interesting: the phrase "amount owing to the establishment as taxable receipts", replicated in subsection (2), shows that the word "receipts" in the Act must be handled with care and that, there at least, it referred to sums which were to be received in the future as opposed to those which had been received in the past. More significant still was the effect of the provision: it was that, save where he sold or transferred his business in the circumstances set out in subsection (2), the manager of a designated establishment who ceased to carry on business had within one month to pay HRT on any amount owing to it as taxable receipts at the date of cessation. Ignorant, of course, as to the date when the amount would be received from the customer, how could he (on the respondents' case) have computed the tax payable? The answer is, of course, that, instead, he had to do so by reference to the date of supply. The respondents may prefer to call it a special, deeming, solution for a special situation; but it is more convincing to regard it as the logical application to that situation of an Act which fixed the rate of tax by reference to the date of supply.

42. That the tax should be payable at the rate prevailing on the date of receipt, rather than on that of supply, seems to me to be scarcely workable for two related reasons.

43. The first relates to the permission which, by section 3(4) of the 1986 Act, Parliament gave to the manager of a designated establishment to "recover from customers the tax payable on the taxable receipts". How in practice could he recover the proper sum from them if such was to depend on the date when they chose to pay? The respondents admit that invoices to customers for supplies made, for example, prior to 7 September 1998 included, whether expressly or otherwise, a charge to HRT at 10% and that, in respect of payments against such invoices as were received from customers thereafter (albeit prior to 1 July 1999), the respondents

(a) paid HRT at 4% to the Commissioner of VAT;

(b) failed to refund to the customers 60% (or indeed any part) of their payments referable to HRT; but, on the contrary,

(c) kept the 60% and included it in their accounts as part of their turnover for the purposes of income tax.

The respondents accept the description of the 60% as being a windfall, although (so they say) it was more than offset by the introduction on 7 September 1998 of VAT; but in my view the Act was not intended to work in that way and, it is clear that, on their construction, the respondents have unlawfully exceeded the permission given to them by subsection (4) to recover from customers only the tax payable. But if, upon

receipt from the customers, HRT is payable at the rate prevailing on the date of supply, no such bizarre consequences arise.

44. The second relates to the facility for a manager to have reduced his liability for HRT by declining, until the date when a reduction of HRT took effect, to invoice a customer in respect of a supply made on a date prior to the date of reduction. For my part, I would not, without clear words, construe a scheme as being open to manipulation of that sort on the part of the tax-payer.

45. One factor alone has caused me to hesitate in offering this dissent. It is the principle against doubtful penalisation, which applies as much to the imposition of taxes as to that of criminal sanctions: see *Bennion on Statutory Interpretation*, 5th ed. (2008), Part XVII, section 271. In that no less than three members of this Board and two, also highly respected, judges of the Supreme Court have reached a conclusion in favour of the respondents, how can there not – to put it at its lowest – be doubt about my conclusion that the respondents have failed to pay the full amount of the tax due? But in the end, rightly or wrongly, I consider that the proper construction of section 24 (3) and (4) of the 1998 is so clear that my dissent should stand.

LORD CARNWATH (ALSO DISSENTING)

46. Like Lord Wilson I also consider that the appeal should have been allowed, for the reasons he gives.

47. Like him I do not see this as involving any departure from ordinary principles of statutory construction. Section 3 must be construed as a whole. It is common ground that the tax under section 3(1) is payable only on actual receipts. However that subsection says nothing about the rate of tax. That is covered by section 3(2), which provides that "the tax shall be calculated at the rate specified in the Third Schedule". This gave rise to no difficulty in the Act in its original form because only one rate was specified in the Third Schedule, namely 10%. However the section has to be read for present purposes in the light of the amendments made by the 1998 Act by which lower rates are inserted in respect of receipts "arising" following the dates defined by section 24.

48. It therefore becomes important to decide whether the "tax ... calculated" under section 3(2) in relation to the same transaction can vary over the course of a transaction, or if not by reference to what date it is to be fixed. As a matter of ordinary reading of section 3(2) it seems to be clear to me that what is envisaged is a single rate for a particular "taxable receipt", which is valid for all purposes. If that is correct the rate should be valid not only at the time the tax becomes payable, but also (under section 3(4)) at the prior time when the Manager is seeking to recover the "tax

payable" from customers. Since the latter is the first occasion on which that calculation has to be carried out, then assuming what is contemplated is a single calculation, that must be the rate applicable for the whole transaction. I agree with Lord Wilson's analysis of the other sections which support this view.

49. Mr Baker submitted that his proposed construction was necessary to avoid "absurdity". He referred us to familiar authorities which allow a departure from the natural meaning of the statutory words where that is necessary to avoid "injustice or absurdity" (see for example *Mangin v Inland Revenue Comrs* [1971] AC 739, 746). Lord Reid in *Luke v Inland Revenue Comrs* [1963] AC 557, 577 referred to the need on occasion to do some violence to language to avoid "a wholly unreasonable result" (p577). However, I do not think it is necessary to go so far in order to resolve the present case. The language of the statute is not such that the construction which I favour requires "violence" to the words used. It is more a matter of applying a purposive approach to achieve a result which accords with what appears to be the Parliamentary intention (see per Lord Steyn *Inland Revenue Comrs v McGuckian* [1997] 1 WLR 991, 999).