Trinity Term
[2023] UKPC 24
Privy Council Appeal No 0067 of 2019

JUDGMENT

Blue Lagoon Beach Hotel & Co Ltd (Appellant) *v* Assessment Review Committee and another (Respondent) (Mauritius)

From the Supreme Court of Mauritius

before

Lord Briggs
Lord Sales
Lord Hamblen
Lady Rose
Lord Richards

JUDGMENT GIVEN ON
4 July 2023

Heard on 9 May 2023

Appellant
Maxime Sauzier SC
Shrivan Dabee
(Instructed by AxiomStone Solicitors)

2nd Respondent
Philip Baker KC
Imran S Afzal
(Instructed by RWK Goodman LLP (London))

Appellant
Blue Lagoon Beach Hotel & Co Ltd

Respondents
[1) Assessment Review Committee]
2) Director General, Mauritius Revenue Authority

LADY ROSE:

1. This appeal is brought by Blue Lagoon Beach Hotel & Co Ltd ("Blue Lagoon") which operates a hotel in Mahebourg, Mauritius. It raises the issue of the proper treatment for the purposes of the charge to Value Added Tax ("VAT") of payments which Blue Lagoon receives from travel operators who reserve and pay for rooms at the hotel but do not in fact send along a guest to occupy that reserved room. Blue Lagoon enters into one-year contracts with travel operators under which each operator binds itself to buy a specified number of rooms for each night of the contractual period at a specified price. That price includes VAT at 15%. Every month the tour operator pays for the rooms in advance less a fraction of the amount already paid when the contract was signed. The price paid by the tour operator is for an "all-inclusive package" which comprises meals and certain other activities offered by the hotel. Blue Lagoon does not refund the operator any night which the operator has bought and has not been able to sell to a client.

2. Blue Lagoon accounted to the Second Respondent, the Mauritius Revenue Authority ("the MRA") for VAT charged for accommodation where a client of the tour operator stayed at the hotel overnight and used the hotel facilities. But where no client arrived, Blue Lagoon treated the money paid by the tour operator as "special income" and as not comprising the consideration for a chargeable supply of services.

3. Blue Lagoon challenges two assessments to VAT issued by the MRA for the taxable periods July 2005 to December 2007 and January 2008 to June 2010. The VAT assessments were issued on the basis that there was a chargeable supply of services in those circumstances so that VAT had to be accounted for on those payments from tour operators.

4. Blue Lagoon sought an adjudication from the Assessment Review Committee ("the ARC") as to whether it had made any supply of goods or services in relation to those payments. The ARC produced a Case Stated pursuant to section 21 of the Mauritius Revenue Authority Act 2004 on 24 November 2015. It stated that in making reserved rooms available to the tour operators against payment, Blue Lagoon had performed services for a consideration. That decision was upheld although on different grounds by the Supreme Court of Mauritius (The Hon A Caunhye Ag Senior Puisne Judge and the Hon G Jugessur-Manna, Puisne Judge) in its judgment of 4 June 2018.

5. Blue Lagoon now appeals to the Board. In its written case (dated 14 March 2023), Blue Lagoon sought to rely on an argument which had not been raised before the ARC or the Supreme Court. That argument was that if, contrary to its primary

argument, there was a supply of services to the tour operators, that supply should be zero-rated in so far as the supply was to tour operators outside Mauritius at the time the services were performed. Blue Lagoon notified the Board a few days before the hearing that it intended to apply at the hearing for permission to introduce this new point. The Board acceded to the Respondent's request to determine before the hearing whether such permission should be given. The Respondent considered that they would be prejudiced by having to address this new argument on short notice and pointed out that the issue was not a pure point of law but depended on aspects of the factual background which had not been explored by the courts below. Having considered the submissions of both parties, the Board refused permission.

6. The sole issue in this appeal to the Board is, therefore, whether Blue Lagoon is liable to account for the VAT which it had charged to tour operators to whom it had sold nights of accommodation at its hotel in Mauritius even where the tour operator had not in fact provided a client to occupy the hotel room on the particular night.

The VAT legislation and the test for the supply of services

7. The relevant provisions are found in the Value Added Tax Act 1998 ("VATA"). Section 2 of VATA contains the following definitions:

(i) "services" are defined as "anything which is not goods or money".

(ii) a "taxable supply" is defined as a supply of goods in Mauritius, or a supply of services performed or utilised in Mauritius made by a taxable person in the course or furtherance of his business; including a zero-rated supply but excluding an exempt supply.

8. The term "supply" is defined in section 4:

"4. **Meaning of supply**

(1) Subject to the other provisions of this Act, 'supply' means-

(a) in the case of goods, the transfer for a consideration of the right to dispose of the goods as the owner; or

(b) in the case of services, the performance of services for a consideration.

(2) Without prejudice to the provisions of the Third Schedule and to any regulations made under subsection (4) –

(a) 'supply' in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services. …

(5)(a) A supply of goods incidental to the supply of services is part of the supply of the services. …"

9. Section 9 VATA provides:

"9. **Charge to value added tax**

(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. …"

10. There is no real dispute between the parties as to the test to be applied to determine whether there has been a supply of services within the meaning of section 4. The appeal was presented by both parties on the basis that the terms of the VATA are to be construed in line with the corresponding provisions in the United Kingdom Value Added Tax Act 1994. That Act (as amended) gives effect to the Sixth Council Directive of 17 May 1977 (77/388/EEC) and since 1 January 2007, to the Principal VAT Directive (2006/112/EC). As the Board explained in *Shophold (Mauritius) Ltd v The Assessment Review Committee* [2016] UKPC 12, paras 17 and 18 ("*Shophold*"), case law of both the United Kingdom courts and the Court of Justice of the European Union ("the CJEU") may be relied upon when construing the provisions of VATA. One must,

however, bear in mind differences in the working of Mauritian law at a detailed level. In this appeal, both parties relied on English and CJEU authorities and did not draw the Board's attention to any relevant difference between the UK and EU provisions and those of VATA as regards when there is a supply of services.

11. In order for there to be a chargeable supply of services, the case law of the CJEU establishes that there must be 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 constituting the consideration for the service supplied to the recipient: see Case C-16/93 *Tolsma v Inspecteur der Omzetbelasting Leeuwarden* [1994] ECR I-743, para 14. There must also be a direct link between the service provided and the consideration received: see Case 102/86 *Apple and Pear Development Council v Commissioners of Customs and Excise* [1988] ECR 1443, paras 11 and 12. Further, the term "supply of services" must be interpreted objectively without regard to the purpose or results of the transactions concerned and without it being necessary for the tax authorities to carry out inquiries to determine the intention of the taxable person: see *Commissioners of Revenue and Customs v Newey* (C-653/11) judgment of 20 June 2013 EU:C:2013:409, para 41.

12. Blue Lagoon argues that the supply of services here is the supply of the hotel room, meals and other services to a guest who occupies the room for which the tour operator has paid. If no guest arrives, there is no supply of services to which the payment of consideration by the tour operator to Blue Lagoon is linked, directly or at all. It asserts that Blue Lagoon can only be said to be supplying rooms once a tour operator has referred a client to it. Prior to that, the tour operator is simply given the opportunity of selling rooms to clients for a profit. Blue Lagoon relies on *Esporta Ltd v Revenue and Customs Commissioners* [2014] EWCA Civ 155; [2014] STC 1548 ("*Esporta*") to the effect that one must have regard to the economic realities and to all the circumstances in which the transaction takes place.

13. The Board disagrees with that analysis. As the ARC correctly found, the service provided by Blue Lagoon to the tour operator is the reservation of the accommodation which the tour operator can then confidently sell on to its clients, knowing that when the guest arrives at Blue Lagoon's hotel, they will be welcomed and provided with a room and meals during their stay. The ARC's conclusion is supported by decisions in Mauritius, the UK and the EU.

14. The ARC referred to the judgment of Popplewell J in *Customs and Excise Commissioners v Bass plc* [1993] STC 42 ("*Bass*"). In that case the hotelier allowed guests to reserve a room without advance payment but the guest had to arrive before 6 pm. After that time the reservation lapsed, no charge was made to the guest and the

room could be released to another customer. If a customer wished to guarantee that the room would be available on arrival after 6 pm, they had to make a guaranteed reservation. In that case, the hotel undertook to make the room available and the customer undertook to pay the price of one night's lodging. The commissioners assessed the hotelier to VAT in respect of charges levied on customers who had made guaranteed reservations but who had failed to take up the rooms. The hotelier asserted that there was no supply of services unless or until the customer checked in. The judge agreed with the commissioners that "what the company are charging the customer for is the use of the room whether it is occupied or not. Making available a room, even if not a specified room, seems to me to constitute a supply" (page 45).

15. The MRA also relied on *Air France-KLM and Hop!-Brit Air SAS v Ministère des Finances et des Comptes publics* (Joined Cases C-250/14 and C-289/14) judgment of 23 December 2015 ECLI:EU:C:2015:841 ("*Air France*") on a preliminary reference by the Conseil d'État to the CJEU. The issue in that case was the liability to VAT on sales of tickets issued by Air France to passengers on domestic flights but not used by the passenger either because the customer was a "no show" at boarding or because the ticket was not used during its period of validity. The CJEU reiterated that a supply of services is only made "for consideration" within the meaning of the Sixth VAT Directive if there is a legal relationship with reciprocal performance and a direct link between the service and the consideration. Was there an identifiable service here which was directly linked with the actual consideration received? The CJEU held that there was:

> "28 Therefore, the consideration for the price paid when the ticket was purchased consists of the passenger's right to benefit from the performance of obligations arising from the transport contract, regardless of whether the passenger exercises that right, since the airline company fulfils the service by enabling the passenger to benefit from those services."

16. The CJEU in *Air France* rejected the taxpayer's attempt to recharacterise the payment as a contractual indemnity aimed at compensating the carrier for harm suffered by the failure of the passenger to board. Applying an objective test, the Court concluded that that was not the nature of the consideration paid. The CJEU noted that since the customer paid the same price for the ticket whether they flew or not, the payment made by a flying passenger (being a sum inclusive of VAT which had to be accounted for) would be less than the payment made by the no-show passenger if the airline did not have to account for VAT on that same sum. That could not be justified.

17. Finally, the CJEU rejected the submission made by Air France relying on the case law of the Court relating to the exemption from VAT of sums paid by way of a deposit. The leading case on deposits, on which Blue Lagoon strongly relies in the present appeal, is *Société thermale d'Eugénie-les-Bains v Ministère de l' Économie, des Finances et de l'Industrie* (C-277/05) [2007] ECR I-6415, ECLI:EU:C:2007:440 ("*Société thermale*"). The Société thermale provided hotel and restaurant facilities. The hotel collected a deposit paid in advance by the customer when reserving a room. The deposit was either then deducted from the amount paid for the accommodation later or was retained by the company if the client cancelled their reservation. If the hotel cancelled the booking, it had to return double the amount of the deposit to the customer.

18. The Tribunal administratif de Pau held that the deposit constituted the remuneration for the supply of a service consisting of "client reception formalities"; that is opening a booking file for the client and undertaking to reserve accommodation for them. The CJEU noted at para 17 the following:

> "At the outset, it must be pointed out, first, that the definition of the concept of a 'deposit' can vary from one Member State to another and, second, that the exercise of the cancellation option which is linked to the deposit may entail different consequences depending on which national law is applicable. Thus, it is clear from the observations of the French Government that, in French law, the exercise of that option as a rule completely releases the resiling party from the consequences of the non-performance of the contract, whereas in several Member States, a right remains, in such a situation, to exact damages exceeding the amount of the deposit retained."

19. The CJEU held that the conditions for there being a chargeable supply were not met. This was because the creation of the legal link between the hotel and customer did not usually depend on the payment of a deposit – the deposit "seems to be no more than an optional element within the parties' freedom of contract": para 21. The CJEU observed that clients usually reserve a hotel room by mail or even orally without a deposit being required. It was that reservation which of itself required the hotelier to open a file in the name of the client and to reserve the accommodation for them, even without a deposit being required. It was that contract for accommodation and not the payment of the deposit, therefore, which placed the hotelier under an obligation not to contract with anyone else in a way which prevented it from honouring its undertaking to keep a room available. There was therefore no direct connection

between the service rendered and the payment received. This was confirmed by the fact that the deposit was applied towards the price of the reserved room if the client took up the occupancy.

20. The CJEU therefore characterised the deposit in *Société thermale* as a cancellation charge paid as compensation for the loss suffered as a result of the client's cancellation. The deposit encouraged the parties to perform their contract and fixed the level of compensation, since its payment released the hotel from the need to prove the amount of the loss suffered if the other party went back on the agreement: para 30. It was not the fee for the service. The deposit was not therefore liable to VAT.

21. In so far as there is a line drawn between the non-refundable payments in *Air France* and *Bass* on the one hand and the deposit paid in *Société thermale* on the other, the Board holds that Blue Lagoon's position falls firmly on the *Air France* and *Bass* side. The tour operators are not merely reserving the rooms in Blue Lagoon's hotel on behalf of their guests but paying the total cost of the room, a cost which they then recover if they can from their own clients. As the court said in *Esporta* (para 32) the question of whether the deposit for a hotel booking is to be regarded as in consideration for the supply of services depends on the contract:

> "If the deposit is expressed to be payable as part of the consideration for the first night's stay, then there is no adequate direct and immediate link between the payment and the service, if the room is cancelled. In that case, no accommodation will ever be provided. But if the deposit was paid as an administration fee, it would be paid in return for a service. Moreover, a person, who books a hotel room on terms that the deposit is part payment for the stay and then fails to show up, is also making the payment in return for a service, namely the hotel keeping a room available for the guest."

22. The tripartite nature of the relationship in the present case, which Blue Lagoon stresses in its submissions, does not affect the nature of the service offered; it simply means that the obligation to provide the room if the room is required is owed by Blue Lagoon to the tour operator rather than directly to the client. The payment is consideration which is directly linked to the service which the hotel provides to the tour operators and on which the tour operators rely in running their own businesses. It does not matter that there is no direct relationship between Blue Lagoon and the hotel guest.

23. It may be said that the obligation undertaken by Blue Lagoon might not comfortably be described as a "service". However, section 4(2)(b) of VATA makes clear that the term "supply of services" here includes anything which is not a supply of goods but is done for consideration.

24. One further point may be dealt with briefly. In upholding the decision of the ARC, the Supreme Court of Mauritius referred to section 5 VATA. This provides that "a supply of goods or services shall be deemed to take place" either at the time the VAT invoice is issued in respect of the supply or at the time of payment for the supply, whichever is earlier. Since Blue Lagoon issued invoices to the tour operators and received payment, there was deemed to be a supply of services.

25. The Supreme Court referred to *Shophold* as supporting that interpretation. In that case, however, there was no doubt that the management services provided by Shophold to Shoprite were services provided in the furtherance of its business. The issue was whether the waiver of the management fee until Shoprite became profitable and the absence of any invoicing or payment during the period of that waiver made the services non-taxable because there was in fact no consideration invoiced or paid at all. The ARC had held that despite Shophold's decision to forego payment to which it was still contractually entitled, it was deemed for VAT purposes to have received payment for the services it provided at the end of every month. The Board disagreed. The Board noted in *Shophold* that the definition of the time of supply in the UK VAT legislation was materially different from section 5 of VATA: para 18. The MRA argued in that case that the continuing contractual obligation of Shoprite to pay for the services, even if not enforced by Shophold, provided the necessary "consideration" to meet the definition of supply in section 4 VATA. The Board held, however, that the word "consideration" in the Mauritian provision meant the remuneration that the supplier receives or is to receive for the services it performs. As to the timing of the supply of services, the Board in *Shophold* contrasted the UK provisions with those in VATA. Under the UK legislation, the time of supply was the earlier of three dates – the time when the services were performed, or when the invoice was issued or when the payment was made. Under the Mauritian provisions, only the last two of those dates are relevant - the performance of the service does not by itself trigger the charge to VAT. Since Shophold did not issue an invoice and did not receive payment, no liability arose.

26. The Supreme Court of Mauritius contrasted Blue Lagoon's position with that of Shophold:

> "… it is not in dispute that payment inclusive of VAT had been received by the appellant for the accommodation and

> services which it had to provide during the contractual period. This indeed gave rise to appellant's liability to pay VAT by virtue of the provisions of section 9(2) of the Act read together with section 5 of the Act. Section 9(2) of the Act provides that VAT 'becomes due at the time of supply' and section 5(1)(b) of the Act provides in that connection that VAT becomes due on the receipt of payment by the supplier …"

27. If the Supreme Court was suggesting there that the provision of a VAT invoice or payment can convert something which would not otherwise be in the nature of a supply of goods or services into such a supply, then the Board respectfully disagrees. Section 5 VATA is primarily about the timing of the supply and hence determines the accounting period within which the taxable person must account for the VAT received. It is not an additional charging provision which deems something to fall within section 4 which would not otherwise do so.

28. In the light of the reasons given above, the Board dismisses the appeal.