



COURT OF CRIMINAL APPEAL

**THE HON. MR. JUSTICE
DAVID SCICLUNA**

Sitting of the 28 th March, 2012

Criminal Appeal Number. 366/2011

The Police

v.

Marie Cristina Massa

The Court:

1. Having seen the charge brought against Marie Cristina Massa before the Court of Magistrates (Malta) as a Court of Criminal Judicature with having on behalf of M2 Business Frameworks Limited and/or as a registered person with the Commissioner of Value Added Tax, on the 18th of May 2010 and/or in the preceding weeks, in these Islands, failed, either herself or any other person acting on her behalf, to issue or produce a fiscal receipt in the form provided by the Commissioner of Value Added Tax, for the payment received for that supply, and this in

breach of Regulations 1 and 2 of the Thirteenth Schedule and articles 51, 77(a)(e) and 82 of Act XXIII of 1998.

The Court was requested to impose an additional fine representing ten times the endangered tax in terms of article 77 of Chapter 406, which endangered tax amounts to €540;

2. Having seen the judgement delivered by the Court of Magistrates (Malta) as a Court of Criminal Judicature on the 14th September 2011 whereby that Court, having seen articles 51, 77(a)(e) and 82, and regulations 1 and 2 of the Thirteenth Schedule of Chapter 406 of the Laws of Malta, found the said Marie Cristina Massa guilty of the charge brought against her and condemned her to a fine of seven hundred Euros (€700) and to an additional fine of €5,400 representing ten times the endangered tax;

3. Having seen the application of appeal filed by the said Marie Cristina Massa on the 26th September 2011 whereby she requested this Court to revoke the judgement delivered on the 14th September 2011 and declare her not guilty of the charge brought against her and thus acquit her from said charge;

4. Having seen the record of the proceedings; having seen applicant's updated conduct sheet; having heard the witnesses; having heard oral submissions; having considered:

5. Appellant's grounds of appeal are in synthesis the following: (1) that she should not have been found guilty of the offence contemplated in article 77(a) of the Value Added Tax Act because in her capacity as a director of the company M2 Business Frameworks Ltd. she gave an account of the taxable supply in the documents and accounts that this company keeps in compliance with the law and furthermore paid the tax in question in terms of subarticle (4) of article 27 of the Act within the time limit established in subarticle (1) thereof; (2) that she should not have been found guilty of the offence contemplated in paragraph (e) of article 77 of the Act because, in her

same capacity, she did not fail to provide the necessary document required by article 51 of the Act. The receipt was issued as soon as the company received the fiscal receipt book from the VAT Department. The company had not been in possession of a fiscal receipt book when payment was effected by COMNET-IT because until that date, the company was never required to issue a fiscal receipt as all its clients are registered for VAT according to the Act and consequently, M2 Business Frameworks Ltd was required to issue a tax invoice in terms of article 50 of the Act and not a fiscal receipt in terms of article 51 and the second item of the Eleventh Schedule; (3) that the tax in question was not “endangered” in any way and therefore the additional fine should not have been imposed; (4) that although the offence in question is one, the Court of Magistrates attributed the failure to every director of the company. Although subarticle (1) of article 82 extends the burden of compliance with the provisions of the Act upon all directors of a company or body of persons, it does not mean that every director of a company should be found guilty of an offence attributable to the company represented by such directors; (5) that in terms of article 82(1), a director of a body of persons is not guilty of an offence if he proves that he was unaware and could not with reasonable diligence be aware of such act or omission and that he did everything within his power to prevent that act or omission. Appellant was not aware of the fact that the receipt requested from COMNET-IT was different from that of ordinary clients; as at January 2010 COMNET-IT itself was still not in a position to inform M2 as to its VAT status. Once appellant was asked by COMNET-IT to issue a fiscal receipt, appellant ordered the issue of a fiscal receipt book and issued a fiscal receipt. Appellant had no intention to evade the tax or to fail to report the transaction, so much so that she issued an invoice in terms of the Twelfth Schedule and reported and paid the VAT due in the VAT return for the relative period. Consequently she took all reasonable steps to avoid any failure in terms of the Act.

6. As to appellant’s first grievance, she is right in stating that she could not have been found guilty of the offence

contemplated in paragraph (a) of article 77 of the Value Added Tax Act, Chapter 406 of the Laws of Malta. That paragraph indeed contemplates the offence of whosoever knowingly fails to account for any taxable supply or any intra-community acquisition made by him in the records, documents and accounts required by the Act or any regulations made under the Act. Appellant has been charged with having failed to issue or provide a fiscal receipt in the form provided by the Commissioner of Value Added Tax for the payment received for a supply. Consequently appellant's first grievance is granted and any finding of guilt purporting to be in terms of paragraph (a) of article 77 of the Value Added Tax Act, Chapter 406 of the Laws of Malta is hereby revoked.

7. As to appellant's second grievance, there is no doubt that appellant did issue a fiscal receipt but this was not issued when it should have been issued. Nor was it originally issued in the form contemplated in terms of article 51 with reference to the Thirteenth Schedule of Chapter 406. Item 2 of the Thirteenth Schedule provides:

“Subject to the other provisions of this Schedule, every person who makes a supply, other than an exempt without credit supply shall, except where he is required to issue a tax invoice in respect of that supply, issue a fiscal receipt in accordance with this Schedule for the consideration paid to him for that supply and such fiscal receipt shall, unless issued before the payment is made, be issued and delivered to the person who effects the payment or to the person to whom the supply is made immediately after payment has been effected, to the extent covered by that payment.” (underlining by this Court)

8. A fiscal receipt is defined by item 1 of the Thirteenth Schedule as **“a receipt or invoice issued on a form supplied or approved in writing by the Commissioner and containing all the information and details required to be specified thereon in accordance with the said form, or a receipt issued by means of a fiscal cash register ...”**. Appellant did not issue such a fiscal

receipt as the company's business required the issuing of tax invoices in terms of article 50 of Chapter 406. When it came to the services rendered to COMNET-IT, however, the tax invoice issued lacked mention of this organisation's VAT number precisely because it did not have a VAT number. Consequently, when a receipt was issued on the 18th May 2010, this was not done **“on a form supplied or approved in writing by the Commissioner”**.

9. Appellant says in her fifth grievance that she was not aware of the fact that the receipt requested from COMNET-IT was different from that of ordinary clients; as at January 2010 COMNET-IT itself was still not in a position to inform M2 as to its VAT status. This Court, having heard the evidence tendered by Joseph Tabone and by appellant, has no doubt that appellant was unaware that she had to produce a different receipt, one in terms of article 51 of Chapter 406. But it was for her to discover whether such was the case. All that it could have taken would have been a simple telephone call to the VAT Department to make the necessary inquiries. As a result of her failure to do so, one cannot say that she had done everything in her power to avoid this failure (article 82(1) of Chapter 406).

10. Appellant's second and fifth grievances are therefore dismissed.

11. By means of her third grievance appellant objects to the imposition of additional tax, saying that the tax in question was never endangered. The first Court imposed such additional tax after having referred to the judgement in the names **Il-Pulizija v. Lino Cachia** delivered by this Court differently presided on the 26th February 2001. The circumstances in this case, however, are somewhat different to those in the Cachia case. Here, the payment by COMNET-IT was made on the 10th March 2010. Appellant had, however, already registered in the company's records the amount of VAT due (€540) in respect of the services rendered to COMNET-IT. The payment of this amount was made by appellant to the

Commissioner with the company's return for the period 1st December 2009 to 28th February 2010 (due by 15th April 2010) and debited to appellant's company's account on the 22nd April 2010. This means that, although payment by COMNET-IT was effected after the period covered by said return, appellant had credited the amount of VAT in question to the Commissioner in her company's records on the date the invoice was issued (31st January 2010), and paid to the Commissioner for the return period which, as stated, did not cover the date on which the company had received payment. COMNET-IT then asked for a VAT refund on the 18th November 2010. By no stretch of the imagination can it be said that, in this case, was there at any moment in time even the mere possibility of any endangered tax. Appellant's third grievance is thus acceded to.

12. As to appellant's fourth grievance it is clear from the evidence that appellant, as chief financial officer of the company, was responsible for the failure in question and was therefore correctly found guilty by the first Court for a breach of articles 51 and 77(e) of Chapter 406.

13. For these reasons the judgement delivered against appellant is hereby reformed in that the part whereby she was condemned to pay an additional fine of €5,400 is hereby revoked, while the rest of the judgement is hereby confirmed.

< Final Judgement >

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