



COURT OF CRIMINAL APPEAL

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

Sitting of the 28 th March, 2012

Criminal Appeal Number. 367/2011

The Police

v.

Pier Massa

The Court:

1. Having seen the charge brought against Pier 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 himself or any other person acting on his 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 Pier Massa guilty of the charge brought against him and condemned him 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 Pier Massa on the 26th September 2011 whereby he requested this Court to revoke the judgement delivered on the 14th September 2011 and declare him not guilty of the charge brought against him and thus acquit him 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 he should not have been found guilty of the offence contemplated in article 77(a) of the Value Added Tax Act because in his capacity as a director of the company M2 Business Frameworks Ltd. he 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 he should not have been found guilty of the offence contemplated in paragraph (e) of article 77 of the Act because, in his same

capacity, he 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 he 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 he took all reasonable steps to avoid any failure in terms of the Act.

6. As to appellant’s first grievance, he is right in stating that he 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 this Act or any regulations made under this 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 other grievances, reference is made to the judgement delivered today in the names **The Police v. Marie Cristina Massa** (App. 366/11) and to the considerations made therein, particularly in respect of the conclusion that there was a breach of the law by the company. Here too, however, appellant objects to the fact that responsibility was attributed by the first Court to him as well as to Marie Cristina Massa. Moreover, he states that he took all reasonable steps to avoid any failure in terms of the Act.

8. Now, article 82(1) of Chapter 406 of the Laws of Malta provides that **"where anything is done or omitted to be done by a body of persons, the provisions of this Part shall apply as if such thing were done or omitted to be done by every director, manager or other principal officer of that body of persons: provided that a director, manager or other principal officer of a body of persons shall not be guilty of an offence in virtue of this subarticle 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."** In the judgement delivered by this Court differently presided on the 12th December 2002 in the names **Il-Pulizija v. Victor Sant**, it was held:

“Kif gie ritenut minn din il-Qorti diversament preseduta fl-Appell Kriminali ‘Il-Pulizija vs. Emanuel Scerri’ [30.3.00], li kien jittratta ksur tal-ligi identiku pero` taht l-Att XII tal-1997, ‘meta xi haga ssir jew tonqos milli ssir - f’dan il-kaz ma nghatatx ricevuta - minn persuna li tkun qed tagixxi ghan-nom ta’ persuna registrata, ghandu jitqies bhallikieku dik il-haga tkun saret jew naqset milli ssir sew minn dik il-persuna l-ohra kif ukoll mill-persuna registrata. Il-persuna registrata, pero`, tista’ tezimi ruhha minn din ir-responsabilta` vikarja JEKK TIPPROVA, IMQAR FUQ BAZI TA’ PROBABBILITA` (enfasi ta’ din il-Qorti) jew (a) li ma kinitx taf u li ma setghetx b’diligenza ragonevoli tkun taf b’dak l-eghmil jew nuqqas, jew (b) li tkun ghamlet kull ma setghet taghmel sabiex izzomm milli jsir dak l-eghmil jew nuqqas.’ Mela l-persuna registrata trid tkun hi li tipprova dawn ic-cirkostanzi u dan almenu fuq bazi ta’ probabbilita` - li hu l-kriterju tal-prova impost fuq l-akkuzat fil-kamp penali, fejn hu tenut li jipprova xi haga jew fejn hu jaghzel li jipprova xi haga. Dan il-kriterju gie addottat bl-istess kliem fid-dispozizzjoni tas-subartikolu (1) tal-artikolu 82 ta’ l-Att Dwar it-Taxxa fuq il-Valur Mizjud (Kap.406) citat mill-istess appellant odjern.

“Issa f’dan il-kaz mhux biss l-appellant ma ghamilx prova sal-grad tal-probabbilita` ta’ dan kollu, izda lanqas biss ghamel bidu ta’ prova ghax ghazel, kif kellu dritt li jaghzel, li ma jixhidx. Ghalhekk hu ovvju li l-appellant ma jistax jezimi ruhu taht xi wahda mic-cirkostanzi imsemmija f’dan l-art. 82 (1) ghax huwa ma gabx prova tieghu mentri l-ligi tipprovdi tali skuzanti ‘jekk huwa jgib prova’.”

9. In the present case, appellant, as a director of M2 Business Frameworks Ltd, chose, as he had every right to do, not to give evidence before the first Court and consequently did not give evidence before this Court. There was clearly a breach of the law on the part of the company for which “every director, manager or other principal officer” is responsible. Appellant did not prove “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". According to law he is therefore also responsible for such breach.

10. As to appellant's objection regarding the imposition of additional tax, saying that the tax in question was never endangered, it appears that the first Court imposed such additional tax after having referred to the judgement in the names **II-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. The VAT due amounting to €540 had, however, already been registered in the company's records. The payment of this amount was made by the company 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 the 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, the company had credited the amount of VAT in question to the Commissioner in its 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.

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

< Final Judgement >

Informal Copy of Judgement

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