IN THE TAX COURT
AT SUVA

Tax Action No: HBT **13 of 2013**

IN THE MATTER of the Income Tax Act 1974 and Value Added Tax Decree 1991

AND

IN THE MATTER of Section 82 of the Tax Administration Decree 2009 (Decree 50 of 2009)

BETWEEN: RANIGA JEWELLERS LIMITED

APPLICANT

AND: CHIEF EXECUTIVE OFFICER, FIJI ISLANDS REVENUE AND CUSTOMS AUTHORITY

RESPONDENT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr B. Solanki for the Applicant
Mr O. Verebalavu for the Respondent

Date of Judgment : 26 May 2017

JUDGMENT

1. The Further Amended Application for Review (Application) was heard by Kotigalage J who on 13 February 2015 stated he would deliver his Judgment on notice. Counsel on both sides did not express any desire that I hear the matter afresh nor to hear further submissions. I informed I would take time for consideration. Having done so I now proceed to deliver my Judgment.

2. I am advised that at the Applicant's request the Tax Tribunal had transferred this matter to the High Court.

3. This Application seeks an Order that the Court revise or set aside the decision of the Respondent (Revenue) dated 24 September 2013 (Decision) wholly disallowing the 3rd September 2013 objection by the Applicant to the Income Tax assessment for 2008, 2009 and 2010 and demanding payment by the Applicant of $621,690.35 (Disputed Sum) as income tax and penalties.

4. The grounds of the Application are that the Decision is wrong in law and fact in that:
   (a) The Respondent erred in holding the sale of Lot 20 of the Vodawa property was taxable pursuant to ss.11 and 11(a) of the Income Tax Act Cap 201 (ITA) when the gain on the sale was capital in nature.
   (b) The gain made on the sale of Lots Nos.27,30,33 and 53 in Legalega were not taxable pursuant to ss.11 and 11(a) of the ITA since the gains were capital in nature.
   (c) The Respondent over stated the gain made on the sale of the 4 properties by not allowing full deductions for costs and expenditure incurred on the said properties.
   (d) The penalties imposed by the Respondent are unreasonable, unjust and excessive in the circumstances.

5. The Statement of Agreed Facts and Issues include:

   3. **FACTS:**
   (1) The Applicant is a company incorporated in Fiji.
   (2) Mr Laxmi Chand Raniga is a shareholder, director and authorized officer of the Applicant.
   (3) The Applicant is principally in the jewellery business.
   (4) In 1992, the Applicant obtained a "commercial" property, Lot 20, Vodawa from the NLTB which was sold for $2,250,000 in 2010.
   (5) Lot 33, Legalega obtained in 2007 was sold in 2008 for $50,000.
   (6) Lot 53, Legalega obtained in 2006 was sold in 2009 for $50,000.

(7) Lot 30, Legalega obtained in 2006 was sold in 2010 for $70,000.
(8) Lot 27, Legalega obtained in 2006 was sold in 2008 for $130,000.

ISSUES

(1) Are ss.11 and 11(a) of the ITA applicable to the sale of the Applicant's properties.
(2) Are the gains capital in nature and therefore not subject to tax.
(3) Has the Respondent over stated the gains on the sales by not deducting costs and expenditure incurred on the properties.
(4) Were Lots, 27, 30, 33 and 53 being Native Leases purchased for investment purposes for a joint venture with Ratu Jona Savou.
(5) Was the project abandoned after Ratu Savou passed away.
(6) Are the penalties imposed harsh and excessive in the circumstances

6. The transcript of the proceedings before Kotigalage J records the evidence of witnesses called by both side and the oral submissions of both Counsel as follows:

7. The Applicant's authorised officer, Mr L Raniga put it that the reason the Applicant sold the Vodawa property was the floods that hit Nadi town, which is surrounded by river, which resulted in the tenants not paying the rents in time, which consequently led to financial difficulty from 2007 onwards.

8. The Applicant's next witness was Ashwin Nanda who was a chartered accountant, a registered auditor and a tax agent. He said their initial position viz a viz the Applicant's sale of the property was the gain was treated as a capital gain after taking out the depreciation recoup, which they chose to show as the taxable portion. Because Raniga was not in the business of buying and selling properties over the years they had shown that additional gain as capital gain, which is not taxable.

9. The Vodawa Lot was held for 18 years, deriving rental income with no intention to sell at any time. With regard to the other 4 properties, they were held for a shorter period of time and then sold due to forced circumstances and Raniga's financial position.

10. In cross-examination, Nanda said the records of the expenses were lost because of the floods and "if these records were available, that would have solved this issue. He confirmed the reason why the $300,000 expenses for the Vodawa

property was not allowed by the Revenue was because there was no original document provided as evidence for the cost.

11. The final witness was Rakesh Kumar, the senior relationship manager for the Bank of South Pacific (BSP). The salient evidence from this witness was what he said in examination in chief, as recorded in the transcript:

Mr Solanki: Now the letter that you have prepared is it correct to say that in relation to the discussion that you had with Mr Raniga and his accountant in particular prior to what I understand to the sale of the property that this letter captures what was discussed by the parties in relation to the property that were sold in 2010.

Mr R. Kumar: In fact it is not in relation to one property the discussions are centered around the general discussions regarding the customer so this could be applicable to that property plus any other property that he would have sold in that period.

Judge: ***Now you have said in 2010 his business was declined and you wanted to reduce his outstanding to manageable level to repay so what was the big idea after giving him further $2 million as a loan.***

Mr R. Kumar: In fact what our advice to him was since his trading business is declining and his investment properties are located in the flood zone to sell those properties and try to invest outside of the flood zone so that he has a steady income from his property portfolio whilst his trading business is impacted he has a steady income coming from his property investments".

Later Kumar continues:

Mr R. Kumar: "Yes, in fact when we fund a property even though we have noticed that there were cash flow strains on his trading business but if you are looking at the property investments that itself has a good return so for the banks repayment purposes we are able to determine what would be the return coming from the property".

12. The Revenue's first witness was Selai Nava an auditor with the Revenue. In examination in chief, he said the taxable activity of the Applicant is the manufacture and wholesale and retail sale of gold jewelleries. In the course of their audit they found out the Applicant was engaged in sale of properties basically land.

13. Under cross-examination, Nava said the Revenue was taxing the Applicant under s.11 of the ITA because it covered income derived from any trade. However, he agreed that the Applicant was renting out the properties; that the Vodawa property had been held for a long period of time (18 years); and selling a property within a couple of years might raise an inference that the Applicant is involved in buying and selling.

14. The next witness was John Faktaufon who was at the material time, a Chief Auditor with Revenue. Under cross-examination he said a capital gain is not caught under s.11 of the ITA. He also said if the holding period is 18 years it would have probably not been caught under s.11(a).

15. In re-examination Faktaufon said if there is no supporting evidence it means Revenue will loose on taxes through scams as had happened, in his experience, when he was in Revenue.

16. The Counsel for the Applicant in his oral submission said there was no longer a VAT issue and only the income tax assessment of $621,000 was an issue. He also said that Revenue accepted that s.11(a) is not applicable. He submitted that the Vodawa property was a passive investment which means it was kept for a period of time.The other (4) Legalega properties were for a long term investment to be developed. At no point did the Applicant engage in property activity. The 5 properties did not come within the purview of s.11 because they are all capital assets and when sold derive a capital gain. Finally Counsel said the penalties should be reduced or set aside because his client was not deliberately trying to avoid the tax or to mislead the Revenue.

17. Counsel for the Revenue then submitted. He said he was relying on s.11. The fact that the Applicant is not in selling and buying is irrelevant in establishing s.11. On the facts of the case, it is very clear that even the 4 properties were bought and sold.

18. In my view, from the record the pivotal issue to be decided is whether the sale of the 5 properties came within the ambit of s.11.

19. S.11 ITA, defines total income as "the aggregate of all sources of income including.....profits from a trade or commercial or financial or other business".

20. The ITA is an Act enacted by the Parliament of Fiji to re-enact and amend the law relating to income tax. No doubt s.11 casts the tax gatherer's net very widely, but it is not for the Court to question the intention of the Legislature if that intention be clearly expressed in language which lends itself to a correct interpretation by the Courts of the land.

21. To my mind, s.11 is intended to capture all sources of income for the purpose of imposing tax on them. The question then is whether the gains from the sale of the 5 properties are, either in the case of all or some, profits from a trade or other business.

22. The Applicant in its written closing submissions submitted that none of the gains made by the Applicant are amenable to income tax, as the gains are capital in nature. The basis for this appears to be the evidence of Mr Raniga that he acquired the Legalega properties as part of a business arrangement with Ratu Savou and that could not be achieved with the death of the Ratu.

23. It is hard for any Court to accept that the demise of one ostensibly significant partner, if I may use this term, could have resulted in the aborting of an entire business project. I opine it would not have proved a Herculean task to have secured another influential partner.

24. Mr Raniga's evidence that the property sales were precipitated in September 2006 by the murder of a former employees of the Applicant, on the orders of men who were also engaged in the jewellery trade is hard to accept. If this did have any effect on the business decision of Mr Raniga, as alleged, then it should have followed as the night the day that he would have left the jewellery business altogether and concentrated on the commercial development of the real properties involved. But the evidence shows he did not do this. I therefore set no store by the argument that business exigencies caused or contributed to the sale of the properties.

25. It is accepted by both sides that the Applicant's principal business is the jewellery trade. But does that ipso facto prevent it from also having another business viz buying and selling properties. It would appear clearly from the evidence, that the jewellery trade was waning while the property business was

waxing. So much so, the sale of the properties generated income which provided a financial lifeline for the jewellery trade to continue. This much is apparent with regard to the Vodawa property sale from the evidence of the Applicant's witnesses which I have reproduced above.

26. The 4 Legalega properties also could not be classified as capital in nature. The evidence of the Applicant's director and his 2 witnesses tended to show they were purchased for sale, when the time was ripe. Excuses or explanations for their sale like Nadi was prone to flooding etc, do not lend themselves to credence, for this would been known to all from way back in time, before their purchase.

27. I accept as persuasive authority the decision of the High Court of Australia in: F.C.T. v Myers Emporium Ltd. [1987] 163 CLR 163. Para 14 thereof states "Although it is well settled that a profit or gain made in the ordinary course of carrying on a business constitutes income, it does not follow that a profit or gain made in a transaction entered into otherwise than in the ordinary course of carrying on the taxpayer's business is not income".

28. I also consider the majority decision of the New Zealand Court of Appeal in: C.I.R. vs National Distributors Limited: CA 137/87 (1989) 11 NZTC 6,347 as being of persuasive authority, in fortifying the decision I have arrived at. I adopt the words of Casey J (one of the 2 judges in the majority of the Court) that unless the taxpayer could show the main or dominant purpose which led him or her to acquire the property was not to sell or otherwise dispose of it, then the profits or gains were taxable.
Here I find the Applicant has failed to show this in regard to all the lots.

29. With regards to the costs expended on the properties, the Court has a steer a path between a tax payer's loss of documents and the Revenue's fear that it may be a victim of a scam. Therefore not showing partiality to one side nor favour to the other, the Court considers it is best to let the matter rest where it lies.

30. I have not been supplied with anything by way of document or evidence or submission as a basis on which I can revise or set aside the penalties. Merely using unhappy language like harsh or excessive achieves no objective certainly not the desired objective which I presume is to get the Court to reduce or set aside the penalties.

31. In the light of the way I have taken to arrive at my decision, I can see no way how it can conceivably be contended by the Applicant that the penalties "are unreasonable, unjust and excessive". I therefore affirm the penalties imposed by the Revenue.

32. In the event it is inexpedient to refer to the other authorities cited by both sides or to any arguments that may draw a red herring across the trail.

33. In the result, the Application is dismissed, and the Decision including the penalties are affirmed. In the circumstances, however, each party shall bear their own costs.

Delivered at Suva this 26th day of May 2017.

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David Alfred
JUDGE
High Court of Fiji