IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE TAX TRIBUNAL

Income Tax Appeal No 4 of 2007
Income Tax Appeal No 5 of 2007

BETWEEN: **TAXPAYER "A" AND TAXPAYER "B"**

Applicant

AND: **FIJI REVENUE & CUSTOMS AUTHORITY**

Respondent

Counsel: **Ms B Malimali of Pacific Chambers, for the Appellant**
Mr B Solanki, FRCA Legal Unit, for the Respondent

Dates of Hearing: **Thursday 17 November 2011; Friday 18 November 2011; Tuesday 10 January 2012; Wednesday 11 January 2012; Monday 23 January 2012.**

Date of Judgment: **Tuesday 31 January 2012**

JUDGMENT

DEFINITION OF INCOME – Section 11 INCOME TAX ACT (CAP 201) – Capital gains; sale of shares; carrying on or carrying out of a business.

Background

1. The Applicant taxpayers ("Taxpayers A and B") were equal 50% shareholders in a company registered and incorporated within the Republic of Fiji Islands, hereafter referred to as "Company C". The Applicants have known each other for in excess of 50 years and have worked together as business partners and Company Directors within Fiji, since 1972.

2. Between 1972 and 2007, the taxpayers were actively involved as Directors and joint owners of "Company J", a company registered and incorporated in Fiji, primarily for the purpose of construction consulting and building and civil engineering contracting. During various periods, the taxpayers held common Directorships of six companies.[1]

3. Company C, the sale of its shares which gives rise to the issue in dispute before this Tribunal, was acquired by the taxpayers through their involvement in Company J. Company C was initially regarded as a shelf company and according to the evidence of Taxpayer A, was passed over to Company J as a condition to the transfer of property title, involving a land transaction undertaken by Company J at Lami, Suva, in the 1980's.

4. Since that time, Company C has been held in equal shares by the taxpayers.[2]

5. In 1995, Company C acquired two parcels of land, being 131.2 acres of crown lease island land and 506 acres of Crown "tiri" and foreshore leased land, together with a 99 year Crown Lease in a western location of Viti Levu.

6. The land was acquired for $300,000.00 and the transferred lease, that had been granted in 1990 to the previous owner, proposed that the lessee would reclaim and develop the said land for hotel, resort, residential, condominium, commercial, jetty/marina, golf course, public open space and ancillary purposes, as follows:

    (a) Phase 1. Expend not less than $70,000,000.00 on foreshore reclamation landscaping, construction of access roads, water, sewerage, stormwater, electricity reticulation and construction of a hotel and golf course.

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1 See Agreed Statement of Facts and Issues dated 11 November 2011.

2 Whether directly or indirectly.

(b) Phase 2. Expend not less than $70,000,000.00 on the construction of a second hotel, a residential/condominium development, commercial shops and marina.

(c) Phase 3. Expend not less than $65,000,000.00 on the construction of a third and fourth hotel.

7. Between the period from Company C's acquisition of the property in 1995, to the taxpayers disposal of their ownership of its shares in Company C in July 2006, the company had expended an amount of approximately $4.2million[3] on various aspects associated with the 'integrated development' of the site.

8. In July 2006, the Taxpayers sold their interest in Company C, to a non-related entity for $12,850,000.00.[4]

9. Part of that sales price, included repayment of a debt owed to Company J for preparation works on the land[5], in the amount of $3,000,000.00. The remaining amount of $9,750,000.00,[6] was paid to Company C and thereafter distributed in equal shares to the Taxpayers.

10. The Respondent in a series of tax assessments, has sought to impose on each taxpayer, an income tax against monies derived from the sale of these shares.

11. In the case of both taxpayers, that amount of taxation approximates to $1.46 million dollars.

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[3] Some of this amount appears to have been claimed as a tax deduction in other relevant periods.

[4] Inclusive of a payment for late settlement.

[5] Undertaken either directly by Company J or through its sub-contractors.

[6] This amount is calculated, less the original purchase price of the land.

Issues for Consideration

12. The issue for the Tribunal and ultimately the Taxpayers, is whether or not the profits made by the individuals as shareholders in the buying and selling of the shares in Company C, is income for the purposes of the Income Tax Act (Cap 201).

13. The Agreed Statement of Facts that has been prepared and filed in the Tribunal on 11 November 2011, has identified the Issues for Determination as being:-

    (1) .....whether profit from the sale of shares in Company C derived from the carrying on or carrying out of any undertaking or scheme entered into for the purpose of profit is "income" and

    (2) ...whether the transaction falls within the exception to the third limb of s.11(a): "the profit or gain derived from a transaction or purchase and sale which does not form part of a series of transactions and which is not in itself in the nature of trade or business" and therefore excluded as income.

Company C

14. Company C was registered and incorporated in Fiji in 1975.[7]

15. The shares in Company C were acquired by the Taxpayers in 1981, coinciding with the acquisition of three parcels of land, bought by another of the Taxpayers jointly owned companies, for the purposes of establishing a business premise. In the Annual Return of Company C made on 1996[8], 100 ordinary shares had been issued by the company and were held as follows:

    - 99 shares – Company J
    - 1 share - Company CP (the shares of which were jointly owned and held by the Taxpayers)

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7 See Respondent's Bundle of Documents at Tab T.

8 At the time of the disposal of the shares on 25 July 2006, Taxpayers A and B each held 50% of the shares in the company. (See Respondent's Bundle of Documents at Tab G.

16. While it would appear that the initial purpose of Company C was an investment company, Counsel for the Applicant, indicated that at some stage following the acquisition of the land, its primary purpose became that of property development.

17. Before examining the events that transpired in the attempt by Company C to develop the land and the Taxpayers decision to dispose of their interest in the shares of the company, it is perhaps useful to look at the roles of the Taxpayers in the context of the events both prior to and after their acquisition of interest.

The Taxpayers

18. Taxpayer A is a dual Australian and Fijian Citizen, who arrived in the country in August 1970. He lived and worked in Fiji for 37 years before retiring to Australia in 2007. He was a Chartered Civil Engineer. Together with Taxpayer B, the taxpayers ran Company J, a successful undertaking, providing building and civil engineering contractor services, as well as construction consultancies.

19. The Taxpayers evidence was that Company C acquired the land on the western side of Viti Levu, as part of a Mortgagee Sale at the time. The land being the only asset that was held by that company. According to Taxpayer A, he "looked after developing tenders and pay/contract management" and his business partner Taxpayer B, "operations". The purpose of the acquisition was to "develop a site like Denaru, but picking the good things out". It was to integrate hotels with common facilities. According to the witness, it would be a "15 year dream".

20. The evidence of Taxpayer B, was in most respects comparable and consistent with that of Taxpayer A. He too had arrived in Fiji in the 1970's and began a business association with Taxpayer A, that was to span in excess of 30 years. Taxpayer B, remains actively working in Company J. When Taxpayer B was asked why he sold his interest in the shares, he retorted, "the whole thing became a bloody disaster".

The Development of the Land

21. As was explained by Taxpayer A, there were a series of environmental and planning approvals, required to undertake development works on the site. This also included the payment of a concessional royalty for the extraction of sand[9]. Following acquisition of the site, the Taxpayers through Company C, commenced the first phase of site preparation works. This included establishing a road to access the site, the deployment of approximately 50 earthmovers within three months and the pegging out and commencement of excavation of the canal system that was to be a feature of these works.

22. In addition, it was the evidence of Taxpayer A, that Company C had upgraded the seawalls, established a workshop and a 25,000 tree nursery. The earthworks continuing for 3.5 years up and until 1998. Some time shortly after 1998, it was the evidence of Taxpayer A, the he engaged 3 international experts in resort development finance and paid them $20,000FJ a month for their services. The consequence of the consultancy was that the development plan for the site was upgraded and meetings held with various Government Ministers at the time, with a view to providing 'tax break' incentives to encourage overseas investment.

23. According to the evidence of the witness, "we offered to draft legislative amendments". As it transpired, those proposed changes to the law were never realised.

24. While the Taxpayers had developed a range of proposals[10] and marketing documents for investors[11], by the time of the sale of the shares in 2006, $4.2million had been expended.

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9 By June 1996, it was estimated by Taxpayer A that between 250,000 to 300,000 cubic metres had been removed from the site.

10 See for example Tax Rebate proposal at Exhibit A8.

11 See Respondent's Supplementary Documents; see also Exhibit A7 that sets out a list of issues being sought to gain various investment concessions.

25. Taxpayer A said that he decided to sell his shares in Company C in 2006, for reasons that included: the tourist industry had not picked up, he had spent all available surplus cash and that given that the Taxpayers were now "in their 6o's", the "dream had soured".

26. The uncontested evidence was that Company C had expended $4.2 million of a required estimated $48million for site development costs.Upon cross examination by Mr Solanki for the Respondent, the Taxpayer indicated that the original feasibility study,[12] undertaken by the former owners of the site, had been disposed of when the Taxpayer retired from his business interests in Fiji in 2007.

Sale of Shares in Company C

27. The sale agreement that gave rise to the disposal of the shares is also interesting.[13] The Agreement appears to have initially been prepared some time before 13 April 2005. While the sales price of the shares is $12,750,000, of that amount and as part of the agreement, $3,000,000 was to be paid upon settlement to Company J, to take an assignment of the debt owed by Company C, to that company, for work performed on the site development.

Role of Company J and relationship to works undertaken

28. During cross examination, Mr Solanki put to Taxpayer A, that he had been involved in various acquisition and disposition of properties, primarily in his capacity as a Director of Company J. The inference arising out of the question, was that such commercial or business activities comprised dealing in such properties, that would render the profit from such, income.[14]

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12 Understood to have been made available by the ANZ Bank to the Taxpayers in 1995

13 See Tab HI of the Respondent's Bundle of Documents.

14 See Section 11(a) of the Act, where this expression is used in what is regarded as the "first limb" of that sub-section.

29. These transactions appear to be accepted by both parties as capital gains achieved on business assets and not "income" for the purpose of Section 11 of the Act.

30. The evidence of Taxpayer B, was that Company J had provided 10% of the supervisory and leading hands to the project works on the development site and approximately 10% of the sub-contractors to the site. Despite the fact that Taxpayer A had said that Taxpayer B was the Operations Manager for the project, the evidence of the Taxpayer B, was that "he didn't have to be at the site for a great period of time".

Treatment of the Profit by Company Accountants

31. Mr C, a Partner with a major firm of accountants, was called by the Applicants to provide supportive evidence. Much of the negotiation between the Respondent and the Applicant appears to have been facilitated by Mr C. As his evidence revealed, several of the Notices of Amended Assessment,[15] were issued as a result of his communications with the Respondent.

32. The evidence of Mr C was, that when the property (and the shares of the Taxpayers) were acquired in the 1995-1996 period, the land was shown as a fixed asset. According to the witness, later it was converted into inventory and thereafter the costs capitalised. Mr C, did indicate that Company C did have some rental properties in 1994 and sold assets and rental properties.

33. According to this witness, the Company had no employees in the Year Ending 1995. Mr C indicated to the tribunal, that he disagrees with the way in which the Respondent has classified the gain as "income", on the basis that "his clients had realised a capital gain". That they had "sold shares in a company that they have owned for 20 years".

[15] See Exhibits R1 and R2

34. According to the witness, it was important to distinguish between the capital gains and revenue gains, prior to the introduction of the Capital Gains Decree 2011.[16] Upon re-examination by Ms Malimali for the Applicants, Mr C indicated that he did not believe that the taxpayers were dealers in properties. He regarded Company J as building contractors and Company C, as an investment company.[17] He opined that if Company C had sold their inventory (the land), it would have been income. But as shares, this was just a capital gain.

Evidence of the Respondent

35. The Respondent authority called one witness to give evidence in relation to the way in which the income tax assessment took place. This included her evidence in relation to how the decisions were formed and the issues that were to be considered relevant in establishing those reasons for decision. The witness in her role as Auditor, is a long serving member of the Authority.

36. In her evidence, she says that the taxpayers files were brought to her attention as part of a "Land Sales Project", initiated by the Authority in response to "a lot of land being sold". In her words, "Government thought that we should look at the tax implications". According to the Auditor, "the two shareholders did a bit of a job on the land ....we allowed for all of those expenses".

37. The Auditor was referred by Counsel Solanki to the Exhibit A16, which was the correspondence sent to the taxpayers firm of accountants on 5 December 2006, setting out the basis for the initial tax calculation. The Auditor was referred to the third paragraph of that communication, where she advised the accountants, "the

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[16] See Decree No 23 of 11.

[17] It should be noted at this juncture, that the classification of Company C as an investment company, differs to that given by Counsel for the Respondent, when asked during her closing submissions indicated that it was "initially an investment company" and later a "property developer".

taxpayer is engaged in a scheme of dealing in properties devised for the purpose of making profit from the renting out and sales of real properties.."

38. As it transpired in the course of the related evidence, the Auditor then revealed that in reaching this view, she had done a "background check" on Company J, where she was of the view its main purposes were building, construction and buying and selling of properties. The witness was taken by Counsel to Tabs E and F of the Respondent's Bundle of Documents, in which she was shown a Notice of Amended Assessment #1 for the Income Year Ending 31 December 2001[18] and a Notice of Assessment for the Year Ending 31 December 2006, both of which were issued to Company J.

39. The witness was asked to explain within Exhibits R 1 and R2, the reasons for the issuing of 4 amended assessments for each taxpayer in the financial year 2006 and was referred to Exhibit R3, a document she had later prepared to explain the rationale. In giving her explanation for why these amendments to the Assessments took place, the Auditor revealed:

> *"the two taxpayers were two shareholders in (Company C)...looked at the balance sheet..only asset was (the land)..even though one off sale..what we saw was a scheme...because (Company C) doesn't trade in shares they buy and sell land.. shares represent value of land.. thought it was a scheme to get out of paying tax..that is the reason why we raised the assessment".*[19]

40. The witness was then asked did she carry out any research ?, in which she then replied

> *Yes..First we tried to find out how much was the cost of land. Then wanted to find out from buyers why the wanted to buy land? They said build an expensive property.. (they) did not take any feasibility study...didnt go to all of*

[18] Issued 29 September 2006

[19] Evidence in Chief of Auditor as Witness in proceedings.

that ..how much money (was required) ..they diverted a lot from the initial idea of building themselves..upgrade the land and then get someone to build the hotel themselves.. we did check about funding ..no records to show how they had taken steps ..how much they would spend.. visited the (land) on two occasions.

41. The witness was shown exhibits A3 and A4, that were photographs taken by the Applicants upon acquisition and later at the time of seeking to encourage investors. The witness recognised the site, as that which she did visit in 2006.

42. The cross examination by Counsel Malimali to a substantial degree placed a cloud of doubt over the evidence of the witness. Not that she was being evasive or dishonest, though during the course of the questioning, it became clear that for several reasons which serve no purpose upon elaborating here, the Auditor did not in fact personally review of all of the information that was provided to the Respondent by the Authority. Under cross examination, the witness revealed that she had obtained the Sales and Purchase Agreement, relating to the transfer of shares after being notified from the Titles Office.

43. As it transpired, the witness did make certain assumptions of information, when forming the view on behalf of the Respondent, that the taxpayers had been engaged in various activities.[20] For example the witness was not aware of the existence of the Respondent's Supplementary Document (a document variously described as a prospectus to investors, or a marketing document). Significantly there are costing and feasibility plans within that documentation, although as later recognised by the witness upon re-examination by Mr Solanki, in the case of the feasibility study, that was more for the viability of a single hotel venture, rather than an integrated site development.

[20] They need not necessarily be fatal to the position adopted by the Respondent, or the ultimate determination of the law.

44. One issue raised by Ms Malimali in cross examination related to the witnesses lack of knowledge in relation to various communications and documents forwarded to the Respondent. On one occasion in relation to whether invoices had been received by the Authority relating to various expenditure items, the witness replied, "when the invoices came in, I was no longer in that team". In relation to the rationale contained within the witness's communication to Company C's accountants on 5 December 2006, pertaining to whether the taxpayers personally dealt in properties, the witness was of the view that both taxpayers did. Though the exchange between Ms Malimali and the witness in relation to Taxpayer A's place of evidence, revealed the following:

Ms Malimali: Does (Taxpayer A) own property in his own name ?

Witness: Yes in Lami..Didn't look at title. We usually deliver letters there .I presumed that it was his property.

Ms Malimali: What if I said to you it didn't belong to (Taxpayer A), what would you say to that ?

Witness: (I would) ask who it would belong to.

Ms Malimali: What if I said the property was owned by? (Company J).

The witness did not respond.

45. To partially establish the factual evidence in this regard, Ms Malimali showed the witness Taxpayer A's Income Tax Return, including an amount identified as "Quarters", being chargeable income within the 'Statement of Total and Chargeable Income' for the taxpayer in the year ending 2006.[21] While such evidence hardly constitutes best evidence for the proof of property title, I am satisfied for the purposes of the analysis to accept that position.[22]

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[21] See Exhibit A17

[22] If I believed a significant issue turned on this material fact, I would have sought additional evidence on this point.

46. The witness conceded that she did not undertake any title search on the personal property interests of Taxpayer B.

47. Counsel for the Applicant then took the witness through the tax assessments and amended assessments of Company J. The purpose here was that any sales of property undertaken by these companies, were always regarded as Capital Gains. This issue was conceded by the witness. Further in cross examination, the Auditor conceded that the taxpayers as individuals were not dealing in shares as property.

48. Insofar as the Auditor's letter dated 5 December 2006[23] is concerned, the witness further conceded that the only matter she had considered in reaching her view that

> *"These activities are indicative of the fact that the taxpayer(s) (are) engaged in a scheme of dealing in properties devised for the purpose of making profits from the renting out and sales of real properties and is therefore caught under Section 11(a) both the second and third limbs",*

was the Sale and Purchase Agreement acquired from the 'Titles Office'.

49. Despite the concessions made to Ms Malimali, the witness remained of the view under re-examination by Mr Solanki, that the profit realised from the sale of shares was income and subject to taxation. In relation to Exhibit A 16,[24] and the Objection decision dated 9 January 2007, the witness was asked, "Do you maintain that is still taxable under one or both of those limbs? She replied – Yes.

Issues at Law – An Introduction

50. During closing submissions, Counsel for the Respondent clarified that the initial grounds of appeal had been abandoned on the basis that the parties jointly agreed on the Statement and Facts and Issues before this tribunal.[25] The application is

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[23] Exhibit A16

[24] Letter dated 5 December 2006 from Auditor to firm of accountants on behalf of taxpayers.

[25] Dated 11 November 2011

heard in accordance with the relevant provisions of the *Tax Administration Decree* 2009 and the *Magistrates Court (Amendment) Decree* 2011. There is nothing that confines the role of the tribunal to the issues of law that have been identified by the parties.[26]

51. While the document that sets out the Agreed Statement of Facts and Issues is a very essential starting point for the Tribunal and the parties in the conduct of the case, this is not an arbitration of a fixed set of issues. Through its inquiry, the Tribunal is free to discover and rule on all relevant issues that evoke the powers set out in Section 17 of the Decree.[27]

Historical Analysis of the Relevant Provisions under the Income Tax Act

52. It is accepted that within this country, the income tax law has been shaped by many jurisdictions, both geographically far afield and close.[28]

53. Upon introduction of the first Inland Revenue (Income Tax) Ordinance 1920, the proposed law was described to the Legislative Council as:

> *the fairest and most just form of taxation one can introduce, putting as it does the burden upon the people who can most afford it*[29]

54. That law remained in place for less than 12 months and the following year was replaced by the *Income Tax Ordinance* 1921. [30]

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[26] See for example the powers of the Tribunal at Section 17(2) and 17(4) of the Tax Administration Decree 2009.

[27] It was also for that reason, that I invited the parties to make further submissions in relation to the affect of Section 11 of the Act.

[28] See for example, Fulcher P, *Fiji Income Tax Law*, *Institute of Justice and Applied Legal Studies ,* University of the South Pacific 1999.

[29] Ibid, at p9

[30] See Ordinance No 1 of 1921.

55. At that time, Section 3 of that Ordinance, set out the definition of "income" as follows:

> 3.-(1) For the purpose of this ordinance "income" means the annual net profit or gain or gratuity whether ascertained and capable of computation as being wages salary or other fixed amount or unascertained as being fees or emoluments or as being profits from a trade or commercial or financial or other business or calling or otherwise howsoever directly or indirectly received by a person from any office or employment or from any profession or calling or from any trade manufacture or business or otherwise howsoever as the case may be .....

56. In 1957, a Bill to amend the Income Tax Ordinance was introduced into the Legislative Council. The effect of the passing of that Bill, was the enactment of the *Income Tax (Amendment)(No2) Ordinance* 1957, which came into effect on 1 January 1958.

57. Section 3 of the Ordinance was amended by adding the following subsection immediately after subsection (1) –

> (1A) Without in any way affecting the generality of the last preceding subsection, total income for the purposes of this Ordinance shall include (a) all profits or gains derived from the sale or other disposition of any real or personal property or any interest therein, if the business of the taxpayer comprises dealing in such property or (except in the case of a transaction which is isolated and not part of a series of transactions) if the property was acquired for the purpose of selling or disposing of it, and all profits or gains derived from carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit.

58. On the second reading of the Bill[31], the Commissioner of Inland Revenue stated:

[31] See Fiji Council Debates 6 December 1957, pages 380-384.

Despite the criticism that has been aimed at it, (the clause) is merely a clarifying clause. The section it proposes to clarify is an important one as it defines "total income". This provisions now writes into the law what is believed is already in the law, but it has been a matter of continual dispute and I believed that it is now necessary to have this in the law so that the taxpayer can see how and on what he is liable to pay taxes.....

This definition follows very closely that laid down in the model ordinance and has often been referred to as "wide as a church door". I too believe that it is and, also, the few people who have disputed it in Court have found it is....

The new provision has been referred to in these terms: "It seems unjust and un-British in so far as it sets to tax items of capital" Similar provisions are written into most British laws either by inference or specifically, mainly specifically, and I do not consider, Sir that they are unjust and un-British. In order to determine whether it sets out to tax items of capital, I would like to refer to a now famous remark of the Lord Justice Clarke in the case of *Californian Copper Syndicate v Harris*, 5 Tax Cases 165:

"it is quite a well settled principle in dealing with questions of assessment of income tax that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit in the sense of ...assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done what is truly the carrying on or carrying out of a business..."

I contend , Sir that the proposed amendment, or rather I prefer to call it the addition, to our law, does not intend to by-pass the principle laid down in those remarks.

59. Apart from some minor restructuring[32] and renumbering of these specific provisions, the language of the law following the 1957 amendments, has remained unchanged within the Consolidated Ordinance No 32 of 1964,[33] the *Income Tax Act* No 6 of 1974,[34] or the current provision that is Section 11 of the *Income Tax Act (Cap 201)*.

Interpreting Section 11 of the *Income Tax* Act

60. During the conduct of the proceedings, both Counsel gave the impression that they sought to have the question of whether the legal impost exists or not, by focusing on the provision of Section 11 (a). To my mind, given the language of the commencement of Section 11, those preceding words rather than Section 11(a) in itself, is the starting point for assessing the law.[35]

61. To that end, I can fully appreciate the words of Chief Justice Young in the case of *Commissioner of Inland Revenue v Morris Hedstrom Ltd*,[36] when he referred to the definition as being ".. of very comprehensive and sweeping nature".

62. So much can be ascertained by an examination of Section 11 of the current Act, that defines the total income to be assessed , to include profits from:

> *A trade or commercial or financial or other business or calling or otherwise howsoever directly or indirectly accrued to or derived by a person from any*

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32 Compare for example, the location of the proviso that excludes single non business transactions.

33 Section 2 of the 1964 Ordinance, included within the definitions provision a meaning of "income", as "total income or chargeable income as the context may require". No such definition exists under the current Act.

34 In 1974, the definition of "dealing in property" was included within the definition of the Act at Section 2.

35 It was also on that basis that I asked parties to provide me with additional submissions in relation to the scope of Section 11, by close of business on 27 January 2012.

36 [1937] FJSC 1

office or employment or from any profession or calling or from any trade, manufacture or business or otherwise howsoever as the case may be

63. At first blush the sale of the Taxpayers shares in Company C, given their direct involvement in the running of that company and its business, renders such profits, "income" for the purposes of the Act.

64. These are profits from a business of the Taxpayers that have been indirectly accrued by way of the sale of the shares. They are also profits derived by the Taxpayers from a business or otherwise howsoever as the case may be.

65. It is nonetheless recognised that a closer examination of the case law is required.

66. I am grateful to both Counsel for their legal submissions that have prepared in relation to the case law.

67. In 1930 for example, in the case of *Jones v Leeming*,[37] a taxpayer who sold his share of options in a rubber plantation to a company for the purposes of public floatation, was found to have undertaken an isolated transaction, not arising or accruing from any trade.

68. In that case though as Lord Dunedin pointed out:

Were the taxpayer a company promoter or was his business associated with purchase and sale of estates, wholly different considerations would apply.

69. Some ten years later in the Sri Lankan case of *Thornhill v The Commissioner of Income Tax,* the owner of land who sold some of his tradeable tea and rubber coupons that were part of an industry quota system for growers, had the proceeds from that sale treated as if it was the reward for labour or effort and thereby classified as income for the purposes of the Income Tax Ordinance.

[37] [1930] All ER Rep 584

70. In Fiji, one of the first cases that dealt with the 1957 amendments to the Income Tax Ordinance, was that of *Commissioner of Inland Revenue v C. Roose (Fiji) Ltd*. [38] In the case of *C.Roose*, the Court held that the test to be applied in determining whether such profits are capital profits or income was that laid down in *Californian Copper Syndicate v Harris* (1904) 5 T.C. 159.

71. Having regard to the above, there is nothing in the submissions of either Counsel, that encourages me to look outside of this authority.

72. To restate that test:

> *where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he*[39] *originally acquired it at, the enhanced price is not profit in the sense of ...assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done what is truly the carrying on or carrying out of a business..."*

Were the Taxpayers Carrying out a Business in Company C ?

73. While I believe as I have stated earlier, that the general provision of Section 11 is wide enough for me to determine that profits arising from the sale of shares in Company C, are profits from the Taxpayers "*business or otherwise howsoever directly or indirectly accrued to or derived... howsoever as the case may be",* I do think it is useful to look at the language of the clarifying provisions for additional assistance.

74. There appears to be a prevailing view that Section 11(a) has three limbs, the consequence being that if the relevant facts scenario does not fall squarely in one

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38 [1962] 8 FLR 94

39 I presume that the language intends to cover the case of female investors as well.

of those three, then the "income" test for the purposes of the Act fails. Firstly, I regard Section 11 (a) as having only two limbs. Secondly and for the reasons I have explained earlier, I believe Section 11 needs to be read in its entirety. Some reform of the language of the Authority within its correspondence, may be required in that respect.[40]

75. The first clarifying example (or limb) of Section 11(a) is as follows:

Total income shall include any profit or gain accrued or derived from the sale or other disposition of any real or personal property or any interest therein, if:

- The business of the taxpayer comprises dealing in such property; or
- If the property was acquired for the purpose of selling or otherwise disposing of the ownership of it.

76. The second clarifying example in Section 11(a) is as follows:

Total income shall include any profit or gain derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit.

77. The proviso to Section 11(a) demonstrates those categories of case that are excluded not included for the purposes of the Act. It reads:

Profit or gain derived from a transaction or purchase and sale which does not form part of a series of transactions and which is not in itself in the nature of trade or business shall be excluded.

78. Turning though to the first example that has been given. The case of the Applicants is that the taxpayers through the acquisition of their shares in Company C, or in their interest in the said land, did not do so at the time of acquisition for the purposes of reselling the same and to make a profit. Counsel for the Respondent has submitted that there is some doubt as to the bonafides of the taxpayers in truly

[40] See for example the Auditors letter to the taxpayer's accountants, where she speaks of the work the second and third limbs of the provision.

wanting to see through their dreams, given their lack of planning and absence of financial support.

79. Ms Malimali in her submissions dated 27 January 2012, correctly identifies the introduction of a clarifying definition introduced within Section 2 of the revised *Income Tax Act* in 1974. On that occasion, the term "dealing in property" was introduced into the definitions section of the legislation, so that some better understanding could be given to the category of cases that were caught by the first limb of Section 11 (a).

80. In the Respondent's Further Closing Submissions, Counsel Solanki, canvases the relevance of the then Supreme Court's decision in *Commissioner of Inland Revenue v George Alexander Thompson*[41]. That case has as its focus, whether or not the taxpayer had as its dominant purpose to acquire the property in question, so as to resell its interest therein at a profit.[42]

81. The facts of that case and the issue being considered under the appeal provisions of the Income Tax Act are distinguishable. Mr Thompson was a civil servant not a businessman working and deriving income within the property development industry. It is also the case, that during the relevant period within Thompson's case, "no development had been carried out on the property by or on behalf of the owners or any of them".[43]

82. In any event, it may very well be as Ms Malimali contends, that the Applicants are not caught by the example provided within the first limb. I make no finding in that respect. I note that the definition of "dealing in property and dealing in real and personal property" at Section 2 of the Act, is not intended to be an exhaustive list

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41 [1979] 25 FLR 79

42 An analysis which may be described as one relating to the first limb of Section 11(a).

43 See basic facts agreed to between the parties as set out within that case.

of the meanings in relation to those terms.[44] It may well be, that additional examples of what is meant by those terms could come to light. For present purposes though, I am satisfied that it is not a critical consideration to the analysis.

83. In relation to the second limb of Section 11(a) the position is somewhat different. That limb provides that "total income shall include any profit or gain derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit".

84. In this regard I have been referred to the Australian case of Steinberg and Others v Federal Commissioner of Taxation[45]. In my mind, the present case before me, is not analogous to that relating to the disposition of the Innaloo land, in Steinberg's case.

85. In contrast to the case of Steinberg, the initial conduct of the taxpayers before me, appears far from equivocal. I am satisfied that they had a plan to develop the site as part of their undertaking to make a profit.

86. While during the course of the taxpayers evidence, both persons identify medical and family reasons that also impacted upon their capacity to commit to the task at hand, I nonetheless accept that the works that were undertaken, were bonafide.

87. Reference has also been made to the Australian case of *Kratzman v Commissioner of Taxation*[46], but in that case the profit generated from the sale of the land, took place not as a result of the undertaking or scheme. The scheme in that case had been abandoned. This was simply profit arising as a consequence of the land sale and is distinguishable for that reason.

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[44] This seems to be clear by the various ways that the draftsperson has differentiated between the word "means" rather than "includes" when defining words within Section 2. See: *Cohns Industries Pty Ltd v Deputy FCT* (1979) 24 ALR 658

[45] (1975) 7 ALR 491

[46] (1970) 44 ALJR 293

88. In the later case of *Commissioner of Taxation v Whitfords Beach*[47], Gibbs CJ stated:

> *In deciding whether what was done was an operation of business, it is relevant to consider the purpose with which the taxpayer acted, and since the taxpayer is a company, the purposes of those who control it are its purpose.*

89. The purpose of Taxpayers A and B, was to develop an integrated resort. That had become the business of Company C.

What is the Implication of the Proviso to Section 11 (a)?

90. For the proviso at Section 11(a) of the Act to operate, requires two things.

(i) it needs to be profit or gain derived from a transaction or purchase and sale which does not form part of a series of transactions; and

(ii) it needs to be a transaction or purchase and sale, which is not in itself in the nature of trade or business.

91. In McLelland v Commissioner of Taxation,[48] the Privy Council noted that for a single transaction to fall within the notion of assessable income, the undertaking or scheme must exhibit features that give it the character of a business deal.[49]

92. Such is the case in this instance before me.

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47 (1982) 150 CLR 355

48 (1970)120 CLR 487

49 At [27]

Conclusions

93. In my view the purpose of the Taxpayers to develop the land, the nature of the works that were undertaken, together with the form of disposal, that including the repayment to a related entity of Company C, owned by the taxpayers, is sufficient basis to conclude that the undertaking was very much a business deal.

94. I conclude that the income arising from the sale of shares in Company C, is caught by both the general provision of Section 11 of the Act, as well as specifically caught within the second illustrative example set out as the second limb of Section 11 (a).

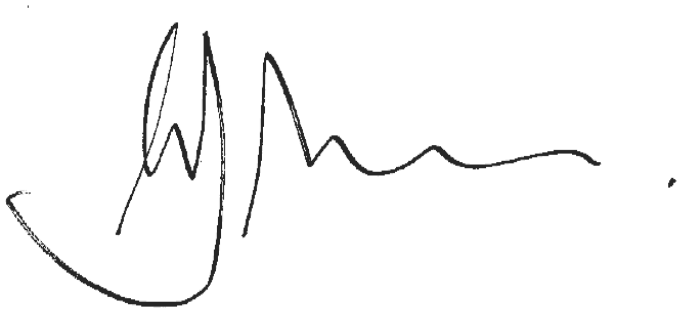
95. For the above reasons, the case of the Applicants must fail.

DECISION OF THE TRIBUNAL

96. The Tribunal orders:

(i) That the Applications for Review be dismissed.

(ii) That the parties are invited to make submissions in relation to costs within 28 days.



Mr Andrew J See
Resident Magistrate