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

Action No 8 of 2012

BETWEEN: **A TAXPAYER FROM LAMI**

Applicant

AND: **FIJI REVENUE & CUSTOMS AUTHORITY**

Respondent

Counsel: **Mr B Solanki, Toganivalu Barristers and Solicitors**
Mr S Ravono, FRCA Legal Unit for the Respondent

Date of Hearing: **Monday 15 April 2013**

Date of Decision: **Monday 13 May 2013**

DECISION

Section 11 INCOME TAX ACT (Cap 201); Capital or Revenue Expenses; Business of the Taxpayer; Deductibility of Expenses

Background

1. The parties have provided the following relevant Agreed Statement of Facts:-
    - The Applicant owns a residential property in Suva City, Viti Levu which was rented out with effect from November 2008.
    - In 2008, the Applicant carried out renovations and refurbishment at the property.
    - The Applicant in his return of income for 2009, claimed for the above expenses as repairs and maintenance.
    - On 1 September 2011, the Respondent through the Applicant's original Notice of Assessment for 2009, disallowed the expenses for repairs and maintenance.

- On 2 September 2011, the Applicant paid the sum of $54,140.00 as provisional tax.
- On 28 October 2011, the Applicant filed a Notice of Objection to the 2009 Notice of Assessment, as issued on 1 September 2011.
- On 16 November 2011, the Respondent issued Amended Notice of Assessment No 1 for 2009, whereby other issues were resolved, except the disallowance of the repairs and maintenance expenses for the sum of $133,927.00.
- On 23 November 2011, the Respondent issued Amended Notice of Assessment No 2 for 2009. A refund of $58,551.66 was credited in favour of the Applicant, however it was determined that it was issued in error by the Respondent.
- On 23 November 2011, the Respondent issued Amended Notice of Assessment No 3 for 2009 in which the repairs and maintenance expenses were allowed by the Respondent. This assessment was in accordance with the tax return lodged by the Applicant. A refund of $58,551.66 was credited in favour of the Applicant.
- On 8 May 2012, the Respondent emailed the Applicant's accountant KPMG and advised them that the Amended Notice of Assessment No 3 was being reviewed before any refunds will be issued.
- On 30 May 2012, the Respondent issued Amended Notice of Assessment No 4 for 2009 whereby they disallowed the repairs and maintenance expenses for the sum of $129,348.71.
- On 13 August 2012, the Applicant filed a Notice of Objection against Amended Notice of Assessment No 4 for 2009.
- On 27 September 2012, the Respondent disallowed the repairs and maintenance expenses for the sum of $133,927.00 and further issued Amended Notice of Assessment No 5 for 2009.
- The Applicant filed an Application for Review in the Tax Tribunal on 24 October 2012.

Grounds of Application for Review

2. The Applicant makes his Application reliant on the following grounds:-

> That the Objection Decision is wrong in law in not taking account of the fact that:

a) The Applicant has provided sufficient evidences that show that the sum of $133,927 was incurred as repairs and maintenance at his rental property and therefore correctly claimable as a deduction;

b) That the expenses incurred as repairs and maintenance are not capital in nature as claimed by the Respondent; and

c) That the repairs and maintenance expenses were incurred wholly for the purpose of letting the property for an increased rental and generating income therefore correctly deductible.

Matters for Determination

3. The parties have identified that the following matters are the issues warranting determination:-

   (i) Whether the expenses claimed by the Applicant totalling $133,927.00 can be classified as repairs and maintenance.

   (ii) Whether the Respondent was right in stating that the expenses totalling $133,927.00 are capital in nature and therefore non-deductible for tax purposes.

4. I accept that these are the central points of debate between the parties.

5. The application is heard in accordance with the relevant provisions of the *Tax Administration Decree* 2009 and the *Magistrates Court (Amendment) Decree* 2011.

The Income Tax Act (Cap 201)

6. In any analysis of applications of this type, it is useful to refocus the parties and the Tribunal on the language of the law that is shaping the decision making process.

7. The starting point logically is that of Section 11 of the Income Tax Act, where the definition of income is relevantly set out as follows:

> ***Definition of total income***
> ***11. For the purpose of this Act, —total income means the aggregate of all sources of income including 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 accrued to or derived 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, including the estimated annual value of any quarters or board or residence or of any other allowance or benefit provided by his employer or granted in respect of employment whether in money or otherwise, and shall include the interest, dividends or profits directly or indirectly accrued or derived from money at interest upon any security or without security or from stock or from any other investment, and whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including the income from, but not the value of, property acquired by gift, bequest, devise or descent, and including the income from, but not the proceeds of, life insurance policies paid up upon the death of the person insured, or payments made or credited to the insured on life insurance, endowment or annuity contracts upon the maturity of the term mentioned in the contract:***
>
> ***Provided that, without in any way affecting the generality of this section, total income, for the purpose of this Act, shall include .....***

(b) any rent, fine, premium or like consideration (including a payment for or in respect of the goodwill of any business or the benefit of any statutory licence or privilege) derived by the owner of land from the grant of any lease, licence, concession, permission, easement or any other right granted to any person to use or over any land, or from the grant of any right of taking the profits thereof:

Provided that, where any such sum is derived by way of anticipation, the Commissioner may, in his discretion, apportion that income between the income year and any number of subsequent years, not exceeding 5, and the part so apportioned to each of those years shall be deemed to have been derived in that year and shall be chargeable with tax accordingly;

8. This Tribunal has on various occasions provided a brief historical account and analysis of the way in which Section 11 of the Income Tax Act came about. (See for example, *Company B v Fiji Revenue & Customs Authority* [2011] FJTT 1; *Taxpayer S v Fiji Revenue & Customs Authority* [2012] FJTT 18; and *A Property Management and Investment Company v Fiji Revenue and Customs Authority* [2013] FJTT 3)

9. The starting point for any discussion must therefore commence by examining the way in which the notion of income or total income is determined and thereafter, considering any deductions or entitlements that may be offset against the calculated total income, by virtue of any relevant offsetting provision.

10. In this regard, Section 19 of the Act relevantly provides:

Expenses not deductible
19. (1)In determining total income, no deductions shall be allowed in respect of—
.....
(b) any disbursement or expense not being money wholly and exclusively laid out or expended for the purpose of the trade, business, profession, employment or vocation of the taxpayer;
(c) any loss not connected with or arising out of the trade, profession, business, employment or vocation of the taxpayer;

.....
(i)any expenditure or loss of capital nature;

(j)any expenditure on repairs, alterations and improvements, other than that actually incurred on the repair of property either occupied for the purposes of any trade, business, profession, employment or vocation or in respect of which income is receivable, including any expenditure so incurred on the treatment against attack by beetles and similar pests of any timber forming part of such property and sums expended for the repair of machinery, implements, utensils and other articles employed by the taxpayer for the purposes of his trade, profession, business, employment or vocation;

11. It seems that drawing from Section 19(1)(i) and (j) of the Act, the parties agree, that the argument in relation to whether or not the expenses that have been incurred by the Taxpayer are deductible ones or not, rests with the interpretation of two concepts:

whether the expenditure is of a capital nature; and/or

actually incurred on the repair of property either occupied for the purposes of any trade, business, profession, employment or vocation or in respect of which income is receivable

12. In relation to this question of determining whether or not an expense is capital or revenue in nature, this Tribunal in *Company B v Fiji Island Revenue and Customs Authority*[1] stated

British Insulated and Helsby Cables v Atherton[40] provides a useful guide as to how historically questions of revenue and capital expenses have been distinguished. Consistent with the submissions of Mr Bale and as noted in the judgments of Viscount Cave and Lord Atkinson, care needs to be taken when resolving this question.

Both Counsel before me agree, that in the case of an assessment as to whether expenditure is revenue or capital in nature, a wider reference to Commonwealth authorities is permissible.

Viscount Cave LC, for example, cited the approach taken by Lord Dunedin in Vallambrosa Rubber Co v Farmer[41], that characterised "in a rough way" a dichotomy where:

Capital expenditure is a thing that is going to be spent once and for all, and income expenditure is a thing that is going to recur every year

[1] [2012]FJTT 1

> *This was not intended to be a prescriptive or universal formula. The purchase of a one off annuity in the British Insulated case, was one such case that did not conform to that rule.*
>
> *Here in my view, the Australian case of Sun Newspapers provides a good framework for further assessment. As mentioned earlier, that framework deals with the character of the advantage sought; the manner in which it is to be used, relied upon and enjoyed and the means to obtain it*[2].

13. So reliant on the test in *Sun Newspapers,* the analysis should be undertaken by evaluating the Taxpayer's expenditure at the Suva property, against the following indicia:

> *The character of the advantage sought, and in this its lasting qualities may play a part,*
>
> *The manner in which it is to be used, relied upon or enjoyed, and in this and under the former head recurrence may play its part, and*
>
> *The means adopted to obtain it; that is by providing a periodical reward or outlay to cover its use or enjoyment for periods commensurate with the payment or by making a final provision or payment so as to secure future use or enjoyment.*[3]

14. But to do so, requires a better undertanding of the distinction between capital and revenue expenditure. In the case of the latter, Capital expenditure has often been distinguishable as expenditure incurred in establishing, replacing or enlarging the profit yielding structure, rather than being a working or operating expense.

15. In *Hallstoms Pty Ltd v Federal Commissioner of Taxation*[4], Dixon J reviewed many of the leading English cases and concluded that there was a common consensus that

> *where a sum of money is laid out for the acquisition or the improvement of a fixed capital asset it is attributable to capital, but that if no alteration is made*

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2 See paragraphs [65] to [69]

3 (1938) 61 CLR 337 at 363

4 (1946) 72 CLR 634

in the fixed capital asset by the payment, then it is properly attributable to revenue,

Repairs and Maintenance Section 19(1)(j) – (Non) Deductible Expenses

16. As earlier mentioned Section 19(1) of the Act, sets out the expenses that are not deductible against total income. The language of that provision while written in the negative, expressing that which is not allowed, can be easily transposed into reading by natural deduction and commonsense, what is capable of being claimed.

17. In the case of Section 19(1)(j) that transposition means that

any expenditure on repairs, alterations and improvements,
actually incurred on the repair of property either occupied for the purposes of any trade, business, profession, employment or vocation or in respect of which income is receivable is a deductible expense.

18. The proper dissection of this provision is important in determining the issue. The class of works that are to be considered are "repairs, alterations and improvements", but that they need to be undertaken or more particularly incurring on the "repair of the property". Further, at least in this particular case, the property needs to be occupied for the purposes of a business or in respect of which income is receivable.

19. l think that there is little doubt that the nature of the works set out within Exhibit R 27 relate to expenditure on repairs, alterations and improvements.

20. But do these works take place in the context of the repair of the property?

21. In *Lindsay v Federal Commissioner of Taxation*[5], reliant on the decision of Buckley LJ in *Lurcott v Wakely & Wheeler*[6] , the notions of 'repair' and 'renewal' or reconstruction, was contrasted as follows:

5 (1960) 106 CLR 377 at 391

6 [1911]1KB 905

Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal as distinguished from repair, is reconstruction in its entirety, meaning by the entirety not necessarily the whole but substantially the whole subject matter under discussion.

22. The case law thereafter appears to turn on questions as to what constitutes notions of entirety.

23. What the case of *Odeon Associated Theatres Ltd v Jones (HM Inspector of Taxes)*[7] does in this regard, is reinforce the fact that ordinarily in reaching conclusions,

The Courts will follow the established principles of sound commercial accounting unless they conflict with the law as laid down in any Statute.

24. What the statute requires in the case of Section 19(1)(j), is relationship between the expense incurred and the fact that the business is either in occupation of the property, or at least receiving income from that property.

25. In *Odeon's* case, the cinema was recognised as being "a profit-earning asset at the date of its acquisition in spite of its state of repair"[8].

26. But there is one final consideration and that relates to the category of case, where the acquired asset is not in good order or suitable for use at that time. In *W.Thomas & Co Pty Ltd v Federal Commissioner of Taxation* [9], Windeyer J stated:

Expenditure upon repairs is properly attributed to revenue account when the repairs are for the maintenance of an income-producing capital asset. Maintenance involves the periodic repair of defects that are the result of

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7 (Ch.D)[1971] 1 WLR442

8 See decision of Salmon LJ

9 (1965) 9 AITR 710 at 719-720

normal wear and tear in operation. It is an expense of a revenue nature when it is to repair defects arising from the operations of the person who incurs it. But if when a thing is bought for use as a capital asset in the buyer's business it is not in good order and suitable for use in the way intended, the cost of putting it in order suitable for use is part of the cost of its acquisition, not a cot of its maintenance.

Conclusions

27. Counsel for the Respondent has produced a Table that consists of all of the invoices that have been produced by the Taxpayer, the subject of this Application.[10] Having regard to the above analysis, I am only prepared to entertain expenditure for repair, maintenance and improvements actually incurred on the repair of the property from that stage in which the property was an income producing asset. That is, from that period in which it was actually rented out as a rental property.[11] The Taxpayer should not be allowed to claim deductible expenses for the simple renovation of a property that was clearly in need of repair, prior to that time. The case is also distinguishable from *Odeon's* case, insofar as no business was in operation at the time.

28. It is noted and the parties were asked to consider the relevance if any, of the decision in *Taxpayers S and G and their Diving Business*,(Income Tax Appeal No 8/2007 and VAT Appeal No 8/2007, 23 November 2012), in which it would appear that the Respondent had allowed various renovation costs incurred by a Taxpayer to be deducted from the profit realised from the sale and disposition of a property in Ra.

29. It would seem that in the *Diving Business Case,* the renovations may have been granted on the basis that on that occasion, the Taxpayer had also acquired an existing business in which the diving operations were being conducted. In the present case before me, the factual scenario is materially different; there was simply no business in operation at the said time. In the circumstances and having regard to the Table prepared by Mr Ravono, I am prepared to allow the following deductions:

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[10] See Exhibit R 27

[11] Some time on or around 1 November 2008.

Table of Allowable Deductions

Invoice No	Date	Amount	Particulars
52	29/12/08	$1092.69	Electrical installation –power point
54	19/12/08	$70.00	Check water leak, replace insulation
57	1/05/09	$5140.00	Repair of screen window
Total Amount		**$6302.69**	

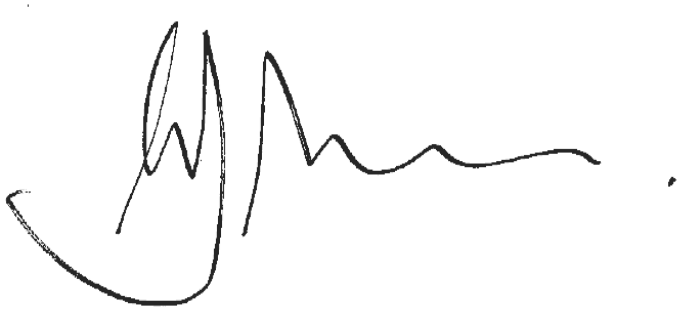
30. This amount may be calculated as a deductible offset against the income produced in the relevant taxation year. In all other respects, the application of the Taxpayer is not allowed.

DECISION

(i) The Notice of Amended Assessment #5, issued by the Respondent on 27 September 2012 is set aside.

(ii) The Respondent is ordered to reissue an Assessment Notice based on the allowable deductible expenses, calculated in the amount of $6,302.69.

(iii) Either party is free to make application in relation to costs within 28 days.



Mr Andrew J See
Resident Magistrate