

Decision

Section 89 *Tax Administration Decree 2009*

Title of Matter: A NEW ZEALAND IP HOLDER (Applicant)
v
FIJI REVENUE AND CUSTOMS AUTHORITY (Respondent)

Section: Section 82 *Tax Administration Decree 2009*

Subject: Application for Review of Reviewable Decision

Matter Number(s): Action No 6 of 2014

Appearances: Mr R Naidu and Ms N Basawaiya, for the Applicant
Ms T Rayawa, FRCA Legal Unit for the Respondent

Date of Hearing: Wednesday 3 December 2014

Before: Mr Andrew J See, Resident Magistrate

Date of Decision: 25 February 2015.

CAPITAL GAINS TAX DECREE 2011-Definition of Fiji Assets; Capital gains tax in case of non-resident; Intangible Assets and Intellectual Property, Sale and Purchase Agreement.

Background

1. The Applicant Taxpayer is a New Zealand company incorporated under the laws of that country. According to *the Statement of Agreed Facts* filed by the parties,¹ after the company' formation in 2009, the Taxpayer acquired or developed and held the intellectual property in certain brands of alcoholic beverages manufactured in Fiji, that were sold both domestically and internationally. The intellectual property held, was in the form of trademarks (both words and logos) that were registered in various countries, including Australia, the United States, Canada, Fiji and Japan.
2. By a licensing agreement dated 15 November 2009, the Taxpayer granted to another New Zealand registered company operating in Fiji, the exclusive royalty free right to use the

¹ See document filed on 14 August 2014.

trademarks for the purpose of distributing, promoting, marketing, advertising and selling beer and other beverages.

3. On or about 2 September 2013, the Taxpayer entered into a Sale and Purchase Agreement with a Fiji brewing company, whereby it sold all of the goodwill and intellectual property rights in and associated with its trademarks. Arising out of that sale, the Respondent advised the Taxpayer that the proceeds of that sale were subject to 10% capital gains tax. On 18 November 2013, the Taxpayer lodged an Objection to the Notice of Assessment issued by the Respondent. An Objection Decision was subsequently issued by the Respondent on 30 April 2014, following which a Notice of Amended Assessment was also produced. The effect of that Amended Assessment was to correct the calculation of the tax imposed, having regard to the prevailing exchange rate at the time and to issue a penalty against the Taxpayer in accordance with Section 46 of the *Tax Administration Decree 2009*.
4. On 30 May 2014, the Taxpayer made an application for review of that decision in accordance with Section 82(1) of the *Tax Administration Decree 2009*. Following the lodgement of that application, the Respondent withdrew the penalty imposition and notified the Taxpayer accordingly. On 28 October 2014, the Tribunal granted the Taxpayer leave to amend the application as originally filed.

Is the Sale of Intellectual Property Subject to Capital Gains Tax?

5. The *Capital Gains Tax Decree 2011* came into force on 1 May 2011 and applies to capital gains arising on the disposal of capital assets after that date.² The tax is imposed on a person who has made a capital gain, other than an exempt capital gain, on the disposal of a capital asset.³ If the person who has made a capital gain is a non-resident person, the imposition of the tax only arises in the case where the capital asset is a Fiji Asset.⁴
6. The parties are in agreement that the Taxpayer is a non-resident person for the purposes of the Decree. At issue however, is whether the intellectual property sold by the Taxpayer to a Fijian entity, is both a "capital asset" and a "Fiji(an) asset", for the purposes of Section 6(1).
7. To analyse this issue requires the determination of the following matters:-
 - (i) Did the Taxpayer achieve a capital gain by selling its intellectual property in the trademarks?;
 - (ii) Is that capital gain an exempt capital gain?; and
 - (iii) Is the intellectual property a "capital asset"?

² See Section 1(2) of the Decree.

³ See Section 6 (1) of the Decree.

⁴ See Section 6(3) of the Decree.

Did the Taxpayer achieve a capital gain by selling its intellectual property in the trademarks?

8. Section 10(1) of the Decree states:

The capital gain made by a person on the disposal of a capital asset is the consideration received on the disposal reduced by the cost of the asset at the time of the disposal.

9. It appears non-controversial that the disposal amount (the consideration)⁵ of the intellectual property, was NZD \$4,999,999.00.⁶

10. The Applicant in its submissions makes the point that the Respondent has not taken into account any cost of the asset in calculating the capital gain at the time of the disposal.⁷ Though having said that, the submissions provide no understanding as to what it says the cost of the asset was. At the very least, ceteris paribus, it would seem that the method for calculating the capital gain needs to be revisited, having regard to the formula for cost of the asset, as set out within Section 11 of the Decree.⁸

Is that capital gain an exempt capital gain?

11. The definition of what constitutes an exempt capital gain, is set out within Section 7(1) of the Decree, as follows:-

The following capital gains are exempt capital gains-

(a) a capital gain made by a resident individual or a Fiji Citizen that does not exceed twenty thousand Fiji dollars;

(b) a capital gain made by a resident individual or a Fiji Citizen on disposal of the individual's principal place of residence, provided the residence has been the individual's principal place of residence during the whole of the period in which the individual owned the residence;

(c) a capital gain made by a person on the disposal of shares listed on the South Pacific Stock Exchange; and

(d) a capital gain made on disposal of an asset that is used solely to derive income exempt from tax under the Income Tax Act.

⁵ See Section 12 of the Decree.

⁶ This amount at the relevant time, appears to have equated to FJD \$7,438,797.72.

⁷ See *Applicant's Outline Submissions* dated 19 November 2014 at [21] to [27].

⁸ One further issue that was flagged by the Applicant, related to whether or not the taxation should only apply to that aspect of the value of the intellectual property as it was exploited in Fiji. Upon closer examination, there appears no capacity within the language of the Decree to fragment such value. And in any event, it would seem that the trademarks and their exclusive global use were sold in their entirety. [Note for example the definition of "Intellectual Property Rights" and "Related Third Party IP" as appearing within Clause 1 of the *Agreement for Sale and Purchase* at Annexure 9 of the Bundle of Agreed Documents].

12. Neither party have sought to rely on the relevance of this provision.

Is the intellectual property a "capital asset"?

13. As previously canvassed, in the case of a non-resident, the subsequent test is a two-fold one. Firstly, is the intellectual property a capital asset and if so, whether it is a Fiji Asset.

14. The definition of "capital asset" is set out within Section 2 of the Decree. It provides:

"Capital asset" means –

- (a) land, a structural improvement to land, or an interest inland or including a lease;*
- (b) a vessel of over 100 tonnage;*
- (c) yacht;*
- (d) a share, security, equity, or other financial asset;*
- (e) an intangible asset; an interest in a partnership or trust;*
- (g) an airplane, helicopter or other aircraft; or*
- (h) an option, right, or other interest in an asset referred to in the foregoing paragraphs, other than an asset that is trading stock for the purposes of the Income Tax Act*

15. Within the Applicant's Outline of Submission filed 19 November 2014, the Taxpayer sets out its primary argument for why it believes that the intellectual property cannot be categorized as a Fiji Asset for the purposes of Section 2.⁹ The critical issue unsurprisingly falls upon the determination as to what is a Fiji Asset. The definition of "Fiji Asset" is also set out within Section 2 of the Decree as follows:

"Fiji asset" means-

- (a) land, a structural improvement to land, or an interest in land or structural improvement to land, including a lease, where the land is located in Fiji;*
- (b) a share in a company, or interest in a partnership or trust, if the assets of the company, partnership, or trust are solely or principally Fiji assets under paragraph (a);*
- (c) a capital asset of a fixed place of business in Fiji;*
- (d) a share, security, equity, or other financial asset issued by a resident person;*
- (e) an interest in a resident partnership or resident trust; or*
- (f) an option, right, or other interest in an asset referred to in the foregoing paragraphs;*

16. In this regard, the Respondent argues that the Taxpayer has a "right" for the purposes of paragraph (f) of the definition of Fiji asset. That right it argues is the right in a capital asset of a fixed place of business in Fiji. The Respondent draws the link between the licensing agreement

⁹ See paragraphs [6] to [20].

that was in place between the Taxpayer and the other New Zealand brewing entity referred to in Paragraph [2] above and the fact that that entity had a fixed place of business in Fiji.

17. In the Outline of Submission filed by the Respondent on 3 December 2014, it stated:

The Respondent submits that the asset which is the subject of disposal is a Fiji asset in accordance with paragraph (f) of the definition of Fiji Asset for the following reasons:

- (a) That the trademark is registered in Fiji; and*
- (b) That the trademark is attached to the product ie Beverages manufacture in Fiji.¹⁰*

18. In the Respondent's Closing Submission dated 23 February 2015, it further relies on that argument by restating that:

.....under paragraph (c) the capital asset of a fixed place of business in Fiji was the (New Zealand) Brewing Company which manufacture the beverage.¹¹

19. But hereafter poses the problem for the Respondent, because it still has not explained what it says is the capital asset in that context. It may be for example, that the capital asset that the Respondent is referring to, is the land and structural improvements on the land, but there is no evidence at all that the Taxpayer has any right in this. And in any event, there is no evidence whatsoever that this asset has been sold. The analysis does not concern itself with the sale of a vessel¹², or yacht.¹³ The sale of the intellectual property rights could not be regarded as the sale of a share, security, or other financial asset.¹⁴ Nor can it be said that the sale relates to the sale of an interest in a partnership or trust¹⁵, or an airplane, helicopter or other aircraft¹⁶.

20. There is no doubt that the Taxpayer had an interest in the New Zealand brewing entity's manufacturing of beverages. The fact that it entered into a commercial licensing arrangement for a five year period for the total amount of \$1.00, provides a likelihood that some relationship existed between the two entities. But the capital gains taxation is not aimed at the production of beverage, only the consequences of the disposal of capital assets, where a capital gain has been made. The capital assets captured by the definition at Section 2 of the Decree are quite

¹⁰ See paragraph [13].

¹¹ See Paragraph 7 of that submission.

¹² See paragraph (b) of the definition of capital asset.

¹³ See paragraph (c) of the definition of capital asset.

¹⁴ A financial asset in this context may for example, be a bond or debenture note.

¹⁵ See paragraph (f) of the definition of capital asset at Section 2.

¹⁶ See paragraph (g) of the definition of capital asset at Section 2.

well defined. The Applicant's Outline of Submission filed on 19 November 2014 state at paragraph [9], that

(the Taxpayer) accepts that if it was a Fiji registered company, (its) IP would be an intangible asset and considered to be a capital asset as defined in s.2 of the Decree.

21. This concession opens up a wide inquiry. Firstly, it is the case that the intellectual property licensed to the New Zealand brewing entity, is an intangible asset and therefore a "capital asset", having regard to the meaning given to the term at paragraph (e) of the definition at Section 2.¹⁷ Secondly, when paragraph (f) of the definition of "Fiji asset" speaks of an "option, right or other interest in an asset referred to in the foregoing paragraphs", nowhere is the further requirement imposed, that the capital asset be owned by the Taxpayer. The requirement is that the Taxpayer has an option, right or interest in it. The Taxpayer as the licensor of the intellectual property must be said to have an interest in that capital asset.¹⁸ So much is made clear within the relevant *Trademark Licensing Agreement*.¹⁹ As a result, the only logical conclusion that can be drawn from the structure and language of the Decree is that the Taxpayer does have an interest in a capital asset (an intangible asset) of a fixed place of business in Fiji.²⁰

Implications for a Non Resident Person

22. The implication arising out of the above analysis is found at Section 6 of the Decree. As earlier indicated, Section 6(1) states that

a tax to be known as "capital gains tax" is imposed on a person who has made a capital gain, other than an exempt capital gain on the disposal of a capital asset.

23. Further, Section 6(3) provides that:

If the person who has made a capital gain is a non-resident person, subsection (1) applies only if the capital asset is a Fiji asset.

24. There appears no doubt that the Taxpayer has made a capital gain on a Fiji asset.²¹ As a result, the Respondent is entitled to impose a 10% capital gains tax on the Taxpayer, in accordance with Part 3 of the Decree.

¹⁷ For an example of the historical recognition that the courts have given to the intangible nature of intellectual property, see *Re Dickens*[1935] Ch 267.

¹⁸ To that end, the Tribunal notes the relevant Clause 2.5 of the *Trade Mark Licence Agreement* entered into between the Taxpayer and the New Zealand Brewing Company on 15 November 2009, though assumes that the word Licensee where it appears in paragraph (a) of that Clause has mistakenly replaced the word Licensor.

¹⁹ See Annexure 2 of the Bundle of Agreed Documents.

²⁰ The fixed place of business being the location of the New Zealand brewing company.

²¹ Though it is recognized that the precise nature of that gain is still to be determined.

Computation of Capital Gain

25. Section 11 (3) of the *Capital Gains Decree 2011*, provides that for the purposes of determining the capital gain of an intangible asset, that the consideration received for the disposal of the asset, is offset by the:

total expenditure incurred by the person in acquiring, creating, improving and renewing the intangible asset and any incidental expenditure incurred in acquiring or disposing of the intangible asset.

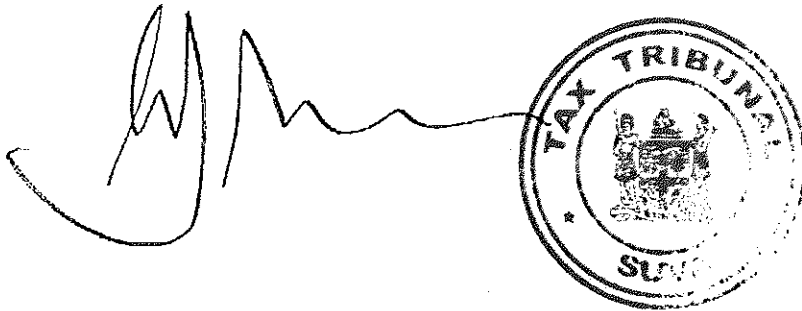
26. Given the unreconciled positions of the parties, it is understandable that a more robust analysis of this issue had not taken place up and until this point in time. The Taxpayer should be given an opportunity to submit to the Respondent, details in relation to the cost of the asset.

27. On that basis, the matter will be remitted to the Chief Executive, in order that a further re-assessment of the tax to be imposed for the purposes of Section 10 of the Decree is made.

Decision

The Tribunal orders:-

- (i) That the Notice of Amended Assessment issued on 7 May 2014, be remitted to the Chief Executive Officer for review.
- (ii) Either party is at liberty to make application for costs.



Mr Andrew J See
Resident Magistrate