FIJI TAX TRIBUNAL

Decision

Section 11 of Income Tax Act (Cap 201)

Title of Matter:	**TAXPAYER R: A Company** **V** **FIJI REVENUE AND CUSTOMS AUTHORITY**	**(Applicant)** **(Respondent)**
Section:	**Section 11 of Income Tax Act (Cap 201)**	
Subject:	**Application for Review of Reviewable Decision**	
Matter Number(s):	**ITA Action No 2 of 2016**	
Appearances:	**Mr P, as Director for the Applicant** **Mr E. Eterika and Mr O. Verebalavu, FRCA Legal Unit for the Respondent**	
Date of Hearing:	**Tuesday 7 February 2017**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**Friday 19 May 2017**	

KEYWORDS: Income Tax Act (Cap 201) – Section 11 definition of income; Section 10(3) (b) Capital Gains Tax Decree 2011; sale of properties; meaning of capital and income.

CASES CITED:

A Property Management and Investment Company v Fiji Revenue and Customs Authority [2013] FJTT 3
Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes) (1904) 5 TC 159.
Company L v Fiji Revenue and Customs Authority [2012] FJTT 17.

Background

1. This is an application for review of an Objection Decision of the Chief Executive Officer of the Fiji Revenue and Customs Authority, dated 20 April 2016. The application for review has been made in accordance with Section 82 of the *Tax Administration Decree* 2009. The issue before the Tribunal is whether or not the proceeds arising from the disposal of two properties owned by the Applicant Taxpayer are subject to taxation in accordance with Section 11 of the *Income Tax* (Cap 201).

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

The Case of the Applicant

3. According to the *Outline of Submissions* filed by the Applicant on 27 September 2016, the Taxpayer was incorporated under the laws of Fiji on 12 August 2003. The Directors of the company are a father and son. The father (Mr R) is a Fijian Citizen and has a permanent residency status within Australia. The son (Mr P) holds dual citizenship within the two countries. The shareholders of the Taxpayer entity to be referred to as Company R, are as follows:-

    - The father (Mr R)
    - A company owned by the son (Mr P); and
    - A further company owned by Mr P on behalf of a family superannuation fund.

4. Within that submission, the Objectives of the Applicant are identified as follows:

    a) To invest in companies listed on the South Pacific Stock Exchange to derive passive income.
    b) To invest in unlimited companies to derive passive income.
    c) To invest in properties to derive passive income.

5. The Applicant told the Tribunal through its Director Mr P, that it had purchased three properties, one in Lautoka and two in Suva. Two of those purchases took place in 2004, the other in 2006. According to his evidence, in 2014, the Applicant decided to divest itself of two of the properties, after which time the proceeds of sale were used to purchase shares in companies listed on the South Pacific Stock Exchange. Coinciding with the disposal of the properties, the Taxpayer paid capital gains amounts in the sums of $25,939.50 and $18,929.79 and thereafter completed its income tax return for the 31 December 2014 period and lodged the same on 7 April 2015. The Taxpayer subsequently received a *Notice of Assessment* dated 12 May 2016 for that income tax year, however was later contacted by the Respondent requesting further information and clarification pertaining to the property sales. The Taxpayer says within its submission, that it later was advised by the Respondent that it was conducting an audit of the Taxpayer's affairs, that in turn saw a reversal of the capital gains taxes already paid and a decision by the Respondent to treat proceeds as income rather than capital gains for taxation purposes. It is against this treatment of the taxation by the Respondent, that the Taxpayer brings about this application for review.

Evidence of Applicant's Witness Mr K

6. To support the Applicant's case, Mr P called a Suva Real Estate Agent Mr K to give evidence. Mr K told the Tribunal that he had known Mr P since 1998 and that he had been involved in the purchase and sale of the respective properties on behalf of the Taxpayer. Insofar as there was any relationship between the parties, the evidence adduced through the witness, was that on a yearly basis Mr K would contact Mr P to tell him the value of the property. According to Mr K, he would assist the Taxpayer with repairs and maintenance on the properties, although said that he didn't charge any property management or commission fees for maintenance works such as obtaining quotes etc. On cross examination, the witness indicated that the properties had been rented by his real estate firm, though he was not collecting rent, only assisted by asking tenants

that they pay on time and enquiring when monies were not paid. The witness conceded that he helped acquire the properties, helped secure the tenants, helped with their maintenance and helped with the selling of the properties. Mr K told the court that Mr P was regarded as a commercial client.

Video Evidence

7. In further support of the Taxpayer's case and with the consent of Counsel for the Authority, Mr P exhibited for the Tribunal two short videos, that showed his father at home, using a 'walker' and generally demonstrating a sedentary and ailing existence. The purpose of this short demonstration was to support the contentions of the Taxpayer, that one of the reasons giving rise to the sale of the properties came about due to the failing health of the Director. It is noted by the Tribunal, that another significant reason that the Taxpayer claims brought the decision to dispose of the properties, was due to a strained relationship that had existed between the Taxpayer and the provider of its banking services within Fiji.[1]

The Cross Examination of Mr P

8. On cross examination, Mr P indicated that he was an Accountant by qualification and was now residing in Victoria, Australia. Mr P told the Tribunal that he was involved with three Fijian companies, two of which he was a shareholder, including the Taxpayer entity and two within Australia, one of which was used to outsource Melbourne accounting works to Fiji. Mr P told the Tribunal that in relation to one of the Fijian entities, that it engaged three staff, charged with the task of looking after Melbourne accounting operations. Mr P said that the company sold the properties due to the personal reasons of the Directors. Mr P told the Tribunal that he and his father had joint management responsibility for decisions of the Taxpayer. In re-examination, Mr P indicated that there were multiple factors that gave rise to the selling of the properties that included, his father's health, the difficulties he had experienced with local bankers, the stress of being involved in multiple roles and tenants not paying their rent.

The Case of the Respondent Authority

9. Mr Eterika of Counsel opened the case for the Authority, by indicating that the issue was one for the Tribunal to ascertain whether or not the treatment of proceeds is one of capital gains or income tax. It was submitted that the two properties were sold within the same year, that there had been an ongoing relationship with the real estate agent that facilitated their acquisition, continuing right up to the time of disposal and that there had been profits achieved from both properties.

Evidence of Mr Ashnil Mishra

10. Mr Mishra gave evidence in his capacity as an Auditor of the Fiji Revenue and Customs Authority. He said that the attention of the Authority was turned to the Taxpayer, following its submission of a Capital Gains Tax Return.[2] The witness told the Tribunal that following a review of the issues,

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1 The Tribunal takes no issue with that evidence, though does not assess it as being materially relevant to any analysis pertaining to the application of Section 11 of the Act.

2 See Tab 1 of the Respondent's Bundle of Documents. (Exhibit R1)

that the Taxpayer was forwarded a *Schedule of Discrepancy Letter*[3]. According to the witness, theTaxpayer's case was part of a random audit selection process that is operated within the Authority that relies on industry matrix selection criteria. The witness told the Tribunal that part of the rationale for the amendment to the assessments came about, because of the purpose of the Taxpayer and that it was in the business of buying and selling properties. Mr Mishra said that there was evidence of constant communications between the Taxpayer and the real estate agent involved in the disposal of the properties. The witness was taken to Tab 15 of the Respondent's Bundle and shown a screen shot of the Taxpayer's registration details that showed the nature of its business to be "share and property investment". Mr Mishra said that the purpose of the business was in generating income through buying, selling and renting of properties. In cross examination, Mr Mishra told the Tribunal that he had been an Auditor for 6 years. The witness was challenged by Mr P in relation to some of the concepts that underpinned notions of share trading as opposed to investing and asked to explain the conclusions that had been drawn by the Authority pertaining the relationship between the Taxpayer and the real estate agent that it had utilised. The witness referred to the response given by Mr K, that he "had managed the rentals", as being a useful starting point.

Evidence of Mr Vilimoni Nailotei

11. Mr Nailotei has worked as an employee of the Respondent for the past 21 years. He is presently the Chief Auditor. The witness was responsible for making the decision to wholly disallow the Objection to Decision raised by the Taxpayer, based on Section 11 of the *Income Tax Act* (Cap 201). Mr Nailotei indicated that the reasons for making this decision were reliant on several factors that included the nature of the business like profit that had been directly accrued to the business, the timing and repetitive nature of transactions, the ongoing relationship with the real estate agent and the decision to sell at profit. Mr Nailotei said that the Authority was of the view that the Taxpayer and the real estate agent had been in a commercial relationship between 2004 to 2014.

Analysis of the Issues

12. The Taxpayer has sought to rely on the decision of Lord Justice Clerk in *Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes)* [4] to support his contentions that the proceeds from sale should not be regarded as income. It is well known, that this decision has been constantly referred to within the authorities relied upon by this Tribunal, particularly when determining matters of this type. For example, in *Company L v Fiji Revenue and Customs Authority*[5], this Tribunal stated:

> In *Californian Copper Syndicate v Harris* (1904) 5 T.C. 159, Lord Justice Clerk, formulated the long accepted test:
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> > *where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he*[6] *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*

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3 Refer Tab 6 of the Respondent's Bundle of Documents. (Exhibit R1)

4 (1904) 5 TC 159

5 [2012] FJTT 17

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

assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the carrying on or carrying out of a business..."

That this test was well enshrined within the legal development of the Fijian Income Tax Act (Cap 201) is easily illustrated when the legislative provisions that now make up Section 11(a) were introduced, with the enactment of the Income Tax (Amendment)(No2) Ordinance 1957.

On the second reading of the Bill to introduce that law[7]*, the Commissioner of Inland Revenue stated:*

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....

..... 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 (sic) in the case of Californian Copper Syndicate v Harris, 5 Tax Cases 165 ....
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.

That is the foundation on which any analysis of the Fijian law is to take place

13. If *Californian Copper* is to provide some guiding light, then the question seems to be whether the proceeds arise out of *"merely a realization or change of investment"* and not *"an act done in what is truly the carrying on or carrying out of a business"*. It is further noted within the *Final Closing Submissions of the Applicant*[8] that the Taxpayer states:

On a passing note the Applicant requires clarification on the relationships of the two laws as it finds it very confusing. The sale of the two properties took place after the introduction of the Capital Gains Tax Decree 2011 which became effective from 1st May 2011. Reading the same, any taxpayer would come to a conclusion that sale of an asset would immediately attract capital gains tax of 10%. The Applicant does understand that the legislature was given broad powers as per Section 23(1) whereby the two laws can be applied concurrently, exclusively or in a complementary fashion. Moving forward, the laws should be simple and clear to understand.

14. The Taxpayer itself has been registered for tax purposes as being in the business of share and property investment. Clearly there is evidence that the Taxpayer did not like the financial and

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7 See Fiji Council Debates 6 December 1957, pages 380-384.

8 Filed on 26 April 2017.

non-financial returns that were being yielded from the properties.[9] Despite the submissions made by the Applicant, it is hard to comprehend how income generated from the proceeds of property sales, could not be viewed as amenable to income taxation rather than capital gains taxation in this instance. If the nature of the business was something quite different, then it may have been the case that a different argument could exist. But that seems to be the primary obstacle for the Taxpayer. Once the Taxpayer lays claim to an activity and engages in the acquisition, management and then sale of more than one property, it is hard to come to any other conclusion. How else could one assess income derived from a business of this sort?

15. The Applicant has acknowledged various decisions of this Tribunal that deal with an analysis of comparable issues.[10]Certainly in the case of *A Property Management and Investment Company v Fiji Revenue & Customs Authority*[11] there is some insight provided as to how Section 11 of the *Income Tax Act* (Cap 201) should be interpreted. The question too as to what constitutes the dealing in property is also canvassed where it states at [58] to [65].

> *For the present time, what is needed to be determined, is whether or not, the sale of the property at Denarau was a transaction that was it itself in the nature of trade or business. The first point of examination is found within the words at Section 11 of the Act, that read: 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,*
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> *The profit arising from the sale in 2009, does seem to be profits from the Taxpayer's business, directly accrued to the Taxpayer. This was profits from the sale of land, purchased by the Taxpayer for business purposes. To my mind it makes no real difference whether or not, the Taxpayer was going to let out the finally constructed property to an unknown entity or to one of the Company Directors himself[33]. This was profit from a business derived from that business. It was more than a mere capital accretion having regard to the law that is California Copper. The profits would be captured by the general provision of Section 11 of the Act.*
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> ***Are the Profits Also Captured by Section 11 (a) of the Act?***
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> *For the sake of completeness, I am also satisfied that the proceeds could be caught by the language that is described as the first limb of Section 11(a) of the Act. The business of the Taxpayer could be argued to comprise dealing in property. While I note that the definition of "dealing in property" was introduced into Section 2 of the Act in 1974,[34] this definition was not an exhaustive one. The term dealing, given its ordinary meaning, would mean "to do business with" or "to trade". The fact that the illustrative example had been in place since*

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9 See *Closing Submission of the Respondent* filed on 5 April 2017 at 7.4.5, with reference to the email exchanges between Mr K and the Respondent dated 28 September 2015.

10 See for example. *Three Sisters v Fiji Revenue & Customs Authority* [2013] FJTT1; *Taxpayer P v Fiji Revenue & Customs Authority* [2013] FJTT6; *Company C from New Zealand v Fiji Revenue & Customs Authority* [2013] FJTT9; *A Property Management and Investment Company v Fiji Revenue & Customs Authority* [2013] FJTT3.

11 [2013] FJTT 3

1957, some 17 years prior to the introduction of that definition, makes it clear that the term was always intended to be interpreted broadly.

I am satisfied that the term could capture the activities of the Taxpayer. The Taxpayer is a Property Management and Investment Company. It does more than receives passive income rental. It acquired a property, held it, did nothing with it and disposed of it, having made a sizeable profit. According to the submissions, it saw a better opportunity to exploit, needed the money and reapplied it elsewhere.

In Shankar Lal s/o Ram Tahal vCommissioner of Inland Revenue[35], Dunckley J., stated:
by definition, to be a business as a property dealer, a person must buy and sell properties with the object of profit. A dealer in property is a trader in property. Usually the more transactions a person enters into, the more obviously he can be termed a dealer. In this case, the number of transactions is not large in relation to the period involved. This does not necessarily mean that the appellant is not a dealer

It needs to be kept in mind here, that his Honour was speaking of the business of a property dealer. The first limb though does not require that the Taxpayer be a property dealer, only that the business of the Taxpayer comprises dealing in property. If the legislature sought to only capture 'property dealers' by way of this illustrative example, it would have been a very simple drafting task to do so. Instead it chose a wider net, that while clearly cognisant of comparative taxation law of the time, was also steeped in its own rich jurisprudential tradition, arising out of the very wide language that was the 1920 Income Tax Ordinance.
In the present case, the business of the Taxpayer does comprise dealing in property, even if that activity only takes place intermittently. [36]

16. In the present case, the Taxpayer purchased the relevant properties for investment purposes. That was its business. There was a seamless approach taken by the Taxpayer in the acquisition, management and disposal of the properties. From a business perspective, the Taxpayer saw a more advantageous opportunity in the investment of shares on the stock exchange and made a decision to dispose of the properties for that purpose.[12] This was income derived from the business of the Taxpayer, that was "share and property investment".[13] It is income captured within the general language of Section 11 of the Act, insofar as it is "profits from .. a business".It can also be regarded as "gain ..derived from the sale..of any real ..propety .(where) the business of the taxpayer comprises dealing in such property".

17. The ongoing dialogue between Mr P and Mr K as emerged through the oral evidence, coupled with the constant representations by the real agent to ascertain if the Taxpayer wanted to sell the property[14], very much demonstrates such characteristics. As Lord Justice Clerk also said in *California Copper*[15]:

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12 Whether one action came before or after the other does not seem that material. The decision had come to sell the properties and new investment opportunities were pursued reliant on the proceeds from the sales.

13 See earlier reference within Tab 15 to the Respondents Bundle of Documents (Exhibit R1).

14 This was the evidence of Mr P that almost annually the real estate agent would inquire if the Company was wishing to dispose of the property.

15 At 166-167.

I feel compelled to hold that this Company was in its inception a Company endeavouring to make profit by trade or business, and that the profitable sale of its property was not truly a substitution of one form of investment for another. It is manifest that it never did intend to work this mineral field ... its purpose was to exploit the field and obtain gain by inducing others to take it up on such terms as would bring substantial gain to themselves. This was that the turning of investment to account was not to be merely incidental , but was, as the Lord President put it in the case of the Scottish Investment Company, the essential feature of the business, speculation being among the appointed means of the Company's gains.

18. The Applicant Taxpayer was similarly a company created to make profit and derive income by trade or business. The definition of Income for the purposes of Section 11 of the Act, makes clear that "annual net profit of gain" is included for the purposes of determining "total income". That trade and business was taking place through share and property investment. In such circumstances, speculative activities associated with such investments, must be seen in that same context.They are not consequences that remain incidental to the business of the Taxpayer;they are not private dealings of the individual Directors, but an essential part of the trade or business. This was,to use the words of Lord Clerk, the "carrying on or carrying out of a business". A comparison of the language that was Schedule D of the Income *Tax Act 1853* (16 & 17 Victoria, Cap 34) that was referred to within *Californian Copper* and Section 11 of the *Income Tax Act* (Cap 201), reinforces the view that under Fiji law, profits from a trade or commercial or financial or other business or calling are intended to be caught by the legislation.

Implication of Capital Gains Tax Decree 2011

19. Further and as mentioned, within its *Final Closing Submissions,* the Taxpayer raises concern in regard to the relationship between the income and capital gains taxation laws. As has been stated in previous decisions, Section 10 of the *Capital Gains Tax Decree* states:

(1) 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.

(2) A capital gain made by a person on disposal of a capital asset is not reduced by any capital loss on disposal of another capital asset.

(3) A capital gain made by a person on disposal of a capital asset is reduced by--

(a) in the case of a disposal of shares, the amount deemed to be a dividend under section 8(2)(a)(ii) of the Income Tax Act; or

(b) in any other case, any part of the gain that is included in the total income of the person or treated as exempt income under the Income Tax Act.

20. For the reason that the capital gain of the Taxpayer in relation to this property is now included in the total income for the purposes of the Income Tax Act, by virtue of Section 10(3) (b) of the Capital Gains Tax Decree, there is no further taxation imposed. Having paid the initial capital gains tax, the Authority was required to adjust that amount and impose the correct calculation for income taxation purposes. The confusion should not take place, where a business identifies correctly what is a proper income source at the outset.

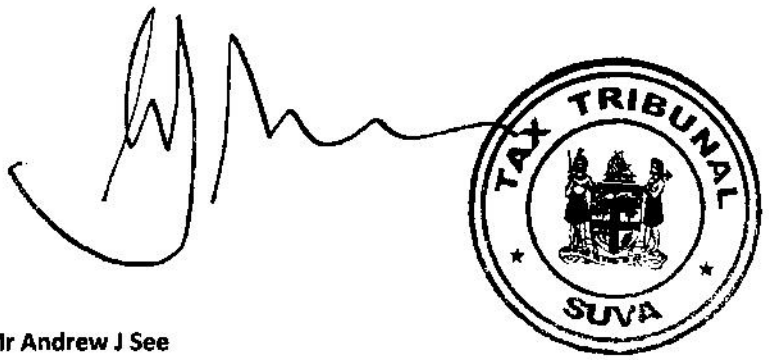
21. The lodgement of the Capital Gains Taxreturn by the Taxpayer,needs to take place having regard to Section 10(3) (b) of the Decree. In the case of the Taxpayer this simply did not take place.

22. On that basis and for the above reasons, the application of the Taxpayer is dismissed.

DECISION

(i) The Application for review is dismissed.

The Tribunal orders accordingly.



Mr Andrew J See
Resident Magistrate