IN THE TAX COURT
AT SUVA

Tax Action No. HBT No. 01 of 2017

IN THE MATTER of section 11 of the Income Tax Act

AND

IN THE MATTER of sections 17 and 82 of the Tax Administration Decree 2009

BETWEEN	:	SUN YUNG KWON
		APPLICANT
AND	:	CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS AUTHORITY
		RESPONDENT
Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Ms M Tikoisuva for the Applicant Mr R Singh, Mr O Verebalavu with him, for the Respondent
Dates of Hearing	:	2 and 3 November 2017
Date of Judgment	:	22 June 2018

JUDGMENT

1. This is the Applicant's Application for Review of the Respondent's Objection Decision (Decision) dated 26 October 2016 partially disallowing the 4 March 2016 objection by the Applicant to the tax assessment for the years ended 31 March, 2009 to 2014 and demanding payment by the Applicant of $200,657.77 (Disputed Sum) as income tax and penalties. The ground of the Application is that the Decision is wrong in law and in fact on the following grounds:

   (1) The Respondent was wrong in holding that only 50% of the bank deposits received on behalf of Mrs Yeonsul Yang and Mrs Do Young Kim were allowable deductions when those deposits are not the income of the Applicant or the company.
   (2) The Respondent was wrong in holding the Notarial Certificates provided were insufficient, to support the Applicant's objection that those deposits were loans provided to the Applicant and not the income of the Applicant or the company.
   (3) The Respondent erred in assessing the deposits under section 11 of the Income Tax Act (ITA) as they cannot be classified as income.
   (4) As a result the revised income tax assessments for the years ended 31 December 2009 to 2014 are excessive and must be revised or set aside.

2. The Statement of Agreed Facts and Issues include, inter-alia, the following:
   (1) The Applicant is the managing director and shareholder of Edupia (Fiji) Limited (the company). The company's taxable activity is "Affiliate Korean Students to Learn English and homestay services".
   (2) The Applicant is not registered with FRCA for carrying out a taxable activity but is registered as director authorized officer of the company.
   (3) The Respondent had identified certain deposits made to the Applicant and subjected them to income tax under s.11 ITA.
   (4) The issue for determination is whether the unidentified deposit (sic) is subject to the above tax.

(5) The relief sought by the Applicant are a declaration that the unidentified deposits are not subject to the above tax and an order setting aside the decision of the Respondent dated 4 March 2016 (sic).

3. On 2 March 2017, the Tax Tribunal transferred this matter to the Tax Court. The Respondent will be referred to as the Revenue herein.

4. The hearing commenced with the Applicant's first witness (PW1), Jongbae Koo. He said he loaned 60M won to the Applicant and signed a document which was notarized. He confirmed the money was given to the Applicant from 2011-13. It was a loan which the Applicant promised to repay when his business picked up.

5. Under cross-examination, PW1 said he deposited the loan into the account of Sun Hee Kwon (Sun). The Applicant had at that time told him to send the money to Sun who would transfer it to him. There was no written agreement. The Applicant did not make any repayment. The notarial certificate is dated 3 March 2016 a few years after the loan was made.

6. In re-examination PW1 said he was confident the Applicant would repay the loan. He wrote the certificate at the request of the Applicant who had asked him to write it in early 2016.

7. The next witness was Jaesueng Kim (PW2). He said he loaned about 30M won, to the Applicant, between 2009 and 2014. He did not write a letter as the Applicant was a close friend and he (PW2) loaned him money whenever he needed it.

8. Under cross-examination, PW2 said there was no documentation to show the loans. The Applicant had not made any repayment of the loan.

9. The next witness was Ms Aessook Song (PW3), the sister in law of the Applicant. She said she loaned 80M won to the Applicant who with her sister was in a difficult situation in Fiji. The Applicant will repay when he is able to. Under cross-examination PW3 said she did not insist the loan be repaid but knew it would be repaid.

10. The final witness was the Applicant himself (PW4). He said he was in the business of education, bringing Korean children to learn English and different subjects in Fiji and operated homestays for students in his residence. He began his business in 2006. He was down here but in Korea he was a successful businessman. He had lost all his investments in the world financial crisis-stock market, so he came to Fiji to be refreshed. He needed money so he asked his friends and his wife's sister for assistance. They are PW1, PW2 and PW3, and they loaned him 60M won, 30M won and 80M won respectively. They gave money to his sister (Sun) who sent the money to him in Fiji. The loans and payment by parents of fees etc were collected by his sister and sent to him. It was convenient for the parents to send into a Korean account.

11. He received confirmation letters from the lenders which were given to FRCA. He has to repay the loans as soon as circumstances permit, little by little because of self-respect and he may start to repay in one year's time. He said the Revenue allowed the fees etc but the documents that are insufficient relate to the loans by his friends. Edupia Co. (Fiji). Ltd (Edupia) is his company.

12. Under cross-examination, PW4 said Edupia has its own bank account. When clients send money to Fiji there are lots of documents so they look for the easy way. He withdraws from his account and deposits into Edupia's account. He operated in Fiji 3 years and he was not aware he had to file a tax return. He charged $800 per student but did not issue receipts to the students as they were of no use in Korea. He was aware he was required to provide documentary evidence to the Revenue auditors when they visited him.

13. In re-examination PW4 said until 2013 Edupia's tax returns were filed by an accountant who has since died. With that the Applicant closed his case and the Revenue opened their's.

14. The Revenue's only witness was Shalvyn Chand (DW1). He said he was the senior auditor in the Revenue objection review team. He was the objection review officer for this case. The audit was carried out on the Applicant's account because of unidentified deposits for which he did not give the documents. The Applicant was actually given 8 months to furnish documents as the Revenue letter is dated 18 June 2015 and the assessment was issued in February 2016. The audit team assessed the loans and the director's advance as income because there was no evidence of such.

15. He went through all invoices provided and allowed all identified income, except for the petty cash voucher ($50,847.46) (Exhibit D6) for which he allowed 50% as it is unusual to have a petty cash voucher for such a large sum. The voucher was dated 3 March 2016 which was after the audit team had raised their assessment. The petty cash vouchers were not signed by the director or C.E.O. of Edupia when first given to him. The Revenue did not accept the letters and notarial certificates given to them because anyone can write letters. The appropriate documents would have been bank statements to show transfers to the Applicant's sister's account and also from the sister's account to the Applicant's account in Fiji.

16. Under cross-examination DW1 said all the documents were dated 3 March 2016. The Applicant always said he had no documents. The letters were provided after the audit. In re-examination, DW1 said the documents were not provided during the audit and are dated after the audit.

17. With this the Respondent closed its case and both Counsels made their submissions.

18. The Appellant's Counsel submitted there were no loan agreements but honourable arrangements between childhood friends. The Applicant only asked for loan documents because the audit team asked him for documents. She said it was too strict a requirement to have to show bank transfers in another country. By allowing 50% why not allow the balance of it? Counsel said the Revenue should have allowed fully. If it were not intended to repay, it would be a gift on which tax is leviable. The Applicant as a matter of honour will repay. The $490,000 is not income. All the documents are dated March 2016 as prior to that he had no documentary evidence. The monies were in the Applicant's personal account for the clients' convenience as long as that was not illegal. The Applicant requested for a review and refund of the tax paid.

19. Counsel for the Revenue now submitted. He said the Applicant was operating outside of the tax laws of Fiji. The Applicant never paid tax; never filed any tax returns, and never issued receipts to his clients. He never maintained any proper records of his tax and business affairs. Counsel said the Court should not accept the letters and notarial certificates as they are not contemporaneous documents. There was no mention of any loan during the audit stage and no evidence provided. DW1 confirmed 8 months were given to the Applicant but the documents only came during the objection stage. The notarial certificate only confirms the person signed it but not the authenticity of its contents. The 50% given by the Revenue was giving the Applicant the benefit of the doubt which was not actually supposed to be done. The Applicant's sister should have provided the bank statements from Korea to show the payments to her in Korea. There were no repayment and it might be intended as a gift. The Revenue were correct under s.11 ITA and the Court should confirm the assessment.

20. The Counsel for the Applicant in her reply said the Applicant confirmed he did not keep records of his personal business and tax affairs.. She said attestation means confirmation of contents.

21. At the conclusion of the arguments. I said I would take time for consideration. Having done so, I shall now deliver my judgment. The sole issue for me to decide here is this. Was the Revenue entitled to consider the deposits in the Applicant's bank as income under s.11 ITA and therefore subject to income tax.

22. I shall therefore start by perusing the said section. It states that "total income" "means the aggregate of all sources of income..... and shall include – (cc) undefined or unidentified deposits in any bank account".

23. It is accepted by both sides that these bank deposits were there and if I hear the Applicant's Counsel correctly she is saying the Revenue exempted only 50% of the bank deposits from income tax. If I may say so with respect, this argument ill serves her client's cause. This is because Counsel for the Revenue has stated this was not supposed to be done. In my view this shows the Revenue's imposition of tax was not done in an arbitrary and unfair manner which would have called for the judicial intervention of the Tax Court. The Applicant failed to show on the balance of probabilities that these deposits were loans which he had to repay. On the contrary all the evidence that the Plaintiff led through his witnesses and by his own sworn testimony satisfied me that these were not loans that had to be repaid but out-right gifts that those who gave these monies had no intention of requiring the Applicant to repay.

24. I have arrived at this conclusion by a careful consideration of the notarial certificates tendered as evidence. I shall take Exhibit P1 tendered by PW1 as an example. The Notarial Certificate states that Jong Bae Koo (PW1) appeared before the notary public on 7 March 2016 "and admitted his (her) subscription to the attached". That is dated 3 March 2016 and is entitled "TO WHOM IT MAY CONCERN" and merely states that the Applicant borrowed money from him when he was facing financial difficulties in Fiji. The money was given to the Applicant through his sister from 2011 to 2013. To my mind it is significant that there is no mention of any repayment to date (2016) some 3 to 5 years later and significantly no mention at all that the amount borrowed has ever to be repaid. This

must lead me irresistibly to the conclusion that it must be intended to be a gift to a "best friend".

25. Further, this is a case where the Applicant has failed to produce documents to prove his allegations that the bank deposits were loans. He is a businessman in Fiji. Surely he knew he had to keep proper records of his business activities. Surely he knew he had to file tax returns and pay income tax and yet he can testify in one breath he was a successful businessman in Korea and in the next that he operated in Fiji 3 years and was not aware he had to file a tax return. The absence of any bank statement from Korea or Fiji to bolster his allegations of loans caused his application to collapse.

26. Finally the Applicant failed to show what the correct tax position was for the Court to evaluate its validity, even though all these matters were within his own personal knowledge.

27. In reaching my conclusion I am relying on the decision of Sinclair J in Taxation Review Authority [2014] NZTRA 09. In this case there were a number of unidentified deposits in the taxpayer's bank accounts in the 2000 to 2006 tax years. It was held, inter-alia, as follows:

(1) The unexplained deposits were business income.
(2) The taxpayer carried the onus of proof of satisfying the Taxation Review Authority that the income tax assessments were wrong and by how much they were wrong.
(3) It was plain on the evidence that the taxpayer knew he could rely on financial support in the form of gifts of money to fund his living expenses and continue his charitable activities. Such amounts were income.

28. In the result the Application for Review is dismissed and the Objection Decision dated 26 October 2016 is upheld. The tax assessments and penalties are affirmed. The Applicant is to pay the Respondent the costs of this Application which are summarily assessed at $1,000.

Delivered at Suva this 22nd day of June 2018.

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David Alfred

JUDGE

High Court of Fiji