

IN THE TAX COURT
AT SUVA

ITA Review Action No: 9 of 2014

IN THE MATTER of Sections 17 and 82 of the Tax
Administration Decree No 50 of 2009

AND

IN THE MATTER of Section 82 of the Tax
Administration Decree No. 50 of 2009

AND

IN THE MATTER of an application for review by
LIFE PROPERTIES LIMITED

BETWEEN : **LIFE PROPERTIES LIMITED**

APPLICANT

AND : **FIJI REVENUE AND CUSTOMS AUTHORITY**

RESPONDENT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr. H. K. Nagin for the Appellant
Mr. O. Verebalavu, Mr Rohit Singh with him, for the
Respondent.

Date of Hearing : 19 April 2017

Date of Judgment : 7 December 2017

JUDGMENT

1. This is the Applicant's Application for Review of the Respondent's Decision (Decision) dated 16 June 2014 wholly disallowing the objection by the Applicant dated 24 January 2014.
2. The Applicant seeks the following Orders:
 - (1) The Court to set aside the Decision.
 - (2) The Respondent (Revenue) to refund with interest the tax paid by the Applicant

The Grounds for the Application are:

- (1) The Decision did not properly consider and apply Section 11 of the Income Tax Act (ITA) as the sale of the property was not caught under s.11 of the ITA.
- (2) The Decision was erroneous in that :
 - (i) The Applicant was not in the business of dealing in property.
 - (ii) The property was not acquired for the purpose of selling or disposing of it, or as an undertaking for making profit.
 - (iii) The sale was of a capital nature

The Revised Statement of Agreed Facts and Issues contain inter-alia the following:

Part A

Agreed Facts

- (1) In 2013, the Applicant and Lady Bird Limited (LBL) reached an agreement for sale of the said land for a total consideration of AUS\$2.45M
- (2) On 19 November 2013 the Respondent assessed Capital Gains Tax (CGT) on the sale at \$157,533.43 which the Applicant paid on 22 November 2013.

- (3) The Respondent subsequently treated the gain as income tax under s.11 of the ITA and the Applicant paid the tax of \$157,533.40 under protest.
- (4) The matter was transferred by the Tax Tribunal on 22 August 2014 to the Tax Court.

Part B

Issue for Determination

- (1) Whether income tax is payable on the proceeds of sale of the land by the Applicant under the ITA.
 1. At the hearing before this Court, the Applicant's Counsel submitted that there were 3 limits to s.11(a) of the ITA viz.
 - (1) Dealing in property. This is a one off sale. Selling property is not the Applicant's business.
 - (2) The property is acquired for selling.
 - (3) Profit is derived from a scheme. There is no scheme here. So the income should be subject to CGT and not income tax.
 2. The Applicant accepts it is subject to CGT. The intention to sell must be present at the time of acquisition. That must be the dominant purpose at the time of acquisition. Here it was acquired for the purpose of developing as a hotel resort. The property was sold because of the inability to obtain funds.
 3. Counsel for the Revenue then submitted. He said their stand is based on s.11, not s.11(a). The holding period of 3 years is too short. Feasibility studies by any investor will eliminate any funding dispute. The implicit intention was to profit. The Applicant's VAT activity is wide enough to encompass the selling of land.

4. At the conclusion of the arguments, I said I would take time for consideration. Before I deliver my judgment it is necessary for me to state that it appears to the Court that while the Applicant's Counsel's submission was based on s.11(a), the Revenue's stand from the start was based on s.11.
5. The sole issue before me is whether the gain of \$1,575,334.01 is subject to income tax in the sum of \$315,066.80. The basis for this assessment is given in the Revenue's letter dated 28 November 2013 to Pricewaterhouse Coopers the tax agents of the Applicant. Therein the Revenue states that the activities of the Applicant "are caught under the Section 11 preamble" which means the gain will not be taxed under s.11(a).
6. The Revenue goes on to state there are "Strong evidences of marketing and advertising on undeveloped/developed land confirm the business nature of the disposal and the Authority is confident of its stand".
7. The Revised Statement of Agreed Facts and Issues dated 27 October 2015 at Agreed Facts state at para 3 the said land was transferred to the Applicant by a transfer dated 6 January 2010 which was registered by the Registrar of Titles on 15 July 2010. At para 4 it is stated the Savasi East development was advertised on the internet attracting some interested buyers. In 2013 the land was sold to Lady Bird Limited (LBL) for a total consideration of AUS \$2.45M.
8. This sale is referred to in the last line of para 2.2 of the Applicant's Objection to Assessment dated 24 January 2014 as "Having received this attractive offer, the company (Applicant) agreed to sell the land to LBL."
9. It is crystal clear that the land was acquired, it was advertised for sale a few years later, an attractive offer was received and the Applicant sold the land for a significant profit.

10. The above circumstances confirm the correctness of the Revenue's stand that the gain be considered as one upon which income tax is payable by the Applicant under s.11 ITA which lays down that "total income" means the aggregate of all sources of income including profits from a trade or commercial.....or other business.
11. In reaching my decision I am fortified by the words of Lord Oaksey in: Barton (Inspector of Taxes) v Littman [1953] AC 116 H.L. that "what the taxing authorities have to investigate is whether there has been a transaction in which, if it had resulted in a profit, that profit would have been assessed."
12. In the result I shall uphold the Respondent's Objection Decision and dismiss this Application for Review. However, in the circumstances I shall order each party to bear their own costs.

Delivered at Suva this 7th day of December 2017.



David Alfred

JUDGE

High Court of Fiji