

**IN THE TAX COURT**  
**AT SUVA**

**Tax Action No. HBT No. 03 of 2014**

**IN THE MATTER** of the Income Tax Act  
1974

**AND**

**IN THE MATTER** of Section 82 of the Tax  
Administration Decree 2009 (Decree 50 of  
2009)

**AND**

IN THE MATTER of an application for  
review by MODERN INVESTMENT  
SERVICES LIMITED

**BETWEEN** : MODERN INVESTMENT SERVICES LIMITED  
*Applicant*

**AND** : **CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND**  
**CUSTOMS AUTHORITY**  
*Respondent*

**Coram** : The Hon. Mr Justice David Alfred  
**Counsel** : Ms R Malani, Mr R Singh with her, for the Respondent  
**Date of Hearing** : 14 September 2017  
**Date of Judgment** : 27 February 2018

**JUDGMENT**

1. At the outset I will state for the record, that the Applicant was represented at the hearing by its director, Mr Anand Kumar.
2. This is the Applicant's Application for Review (Application) which was referred to this Tax Court, on the application of the Applicant, by the Tax Tribunal on 23 June 2014.
3. In the Application, it seeks an order that the Objection Decision (Decision) of the Respondent dated 12 May 2014, be revised or set aside on the grounds that the Decision was wrong in law and in fact in not taking into account:
  - (1) That expenses had been under claimed in the Applicant's Return of Income for 2010 and 2011;
  - (2) That the Applicant had provided the Respondent (Revenue) with its tax invoices relating to expenses for 2010 and 2011 but Revenue instead used a different methodology to determine expenses rather than determining this from the books of accounts.
  - (3) That the Applicant had requested Revenue to lodge amended income tax returns under s.12 of the Tax Administration Decree 2009 (TAD) which Revenue declined.
  - (4) That the methodology used to derive (sic) at total expenses by Revenue is unacceptable and unreasonable in the circumstances.
  - (5) That the penalties imposed by Revenue are excessive and harsh in the circumstances.
4. A précis of the Revenue's Statement pursuant to s.83(1) TAD would be as follows:
  - (1) Revenue had provided reasons for partially disallowing the Applicant's objection to the income tax assessments for 2010 and 2011 in its letter of 12 May 2014 (letter).
  - (2) Due to insufficient documentary evidence provided to Revenue to support the Applicant's objections, adjustments of expenses were only considered where relevant documentary evidence were provided.

5. The Statement of Agreed Facts and Issues contain, inter alia, the following:

**Part A – Agreed Facts**

- (1) The Applicant lodged an objection to the amended income tax assessments.
- (2) The objection was considered by Revenue and was partially disallowed.

**Part B – Fact in Dispute**

- (1) Have the expenses been underclaimed in the Applicant's Return of Income for 2010 and 2011?

**Part C – Issues for Determination**

- (1) Whether Revenue properly considered all the Applicant's tax invoices relating to expenses which were given to it by the Applicant.
  - (2) Did the Respondent determine the expenses allowed from the books of accounts?
  - (3) Is the methodology used by Revenue to derive (sic) at total expenses acceptable and reasonable?
  - (4) Are the penalties excessive and harsh?
6. The hearing commenced with Anand Kumar (PW1) giving evidence. He said Revenue did an audit and came up with its assessment on the bank statements and not the invoices they gave to Revenue which Revenue lost.
7. The next witness was Dhirendra Pratap (PW2). He said that PW1 requested him to do the accounts for 2010 and 2011. He was provided with the bank statements, cheque butts and loan statements, and 2009 financial statements. With those he was able to prepare the financial statements for 2010 and 2011 and the chargeable income. There were difference between his chargeable income and Revenue's. He, the Counsel, Mr B. Solanki and PW1 went to Revenue's office to have a meeting. Revenue informed them the period for appeal had lapsed.

8. PW2 said Revenue's assessment was not correct for the following reasons:
  - (1) The Applicant registered with the Registrar of Companies on 19 March 2010, and changed from a sole proprietorship to a limited liability company. The cutoff date was 1 April 2010.
  - (2) The Applicant had 2 bank accounts.
  - (3) Depreciation of fixed assets were allowed by Revenue. He said if the calculation is wrong then the VAT is also wrong.
  
9. Under cross-examination, PW2 said PW1 told him he had had 2 previous accountants. He asked him to do an independent audit but he, PW2, did not have the invoices. With that the Applicant closed its case and Revenue opened their's.
  
10. Their first witness was Pratik Chand Rabulu (DW1) who has been with Revenue since 2013. The taxable activity of the Applicant is its construction business. Revenue started a full audit and discovered substantial deposits from the bank statements which were not disclosed to Revenue and which Revenue considered were income. The Applicant (PW1) countered that the deposits were not income. Revenue removed the non-income items and issued the revised tax liability. The documents were insufficient for Revenue to consider for objection.
  
11. Under cross-examination DW1 said the transfers were picked from the narration in the bank statement. Revenue eliminated non-revenue items based on information supplied by the Applicant. They were waiting for invoices which never came.
  
12. With that Revenue closed their case. The Court then heard oral submissions from both sides at the conclusion of which the parties were informed that the Court would take time for consideration. Having done so I shall now deliver my Judgment:
  
13. The pivotal point in question here is this. Did Revenue err in its determination of the Applicant's expenses when assessing its net income and based thereon its liability for income tax.

14. The Applicant by its letter of 8 January 2014 to Revenue objected to the assessment (as it was entitled to under s.16(1) TAD) and essentially blamed its previous accountant for understating sales and understating expenses. The Applicant also stated that all tax invoices relating to expenses for 2010 and 2011" were provided to your auditors". The letter concluded by asking for a correction of the tax discrepancy, but failed to give the basis why Revenue should do so.
15. The Revenue in its reply dated 12 May 2014 to the Applicant, says the Applicant's objection to the amended assessments for 2010 and 2011 is partially allowed in accordance with s.16(6) of the TAD. The reasons for that are:
  - (1) It is mandatory to retain accounts and documents for 7 years after the end of the tax period concerned (s.34(1)(b) TAD).
  - (2) Revenue ascertained there was insufficient documentary evidence to support the Applicant's objections, but where such were provided adjustments were made accordingly.
16. It can be seen that the Applicant is:
  - (1) saying the tax levied is excessive;
  - (2) saying the penalties imposed are excessive and harsh.These fall to be decided by the Court.
17. I shall take (1) first. The starting point has to be s.21(1)(a) of TAD, which reads "in the case of a tax assessment, the burden is on the taxpayer to prove the assessment is excessive".
18. However the Applicant has woefully failed to do this. Instead it has engaged in a lamentation that its previous accountant had understated sales and expenses. It has not shown through its latest accountant (PW2) or at all how the assessment was excessive. No figures of what the tax assessments should actually have been were provided to the Court. PW1 in his reply informed the Court that he had no documentary

acknowledgement by Revenue of its receiving the tax invoices for 2010 and 2011 that PW1 contends were provided to the Revenue auditors.

19. It is trite that the burden is on him who asserts to prove what he is asserting. It is also trite law that the standard of proof in civil proceedings – and this is what this application is – is on the balance of probabilities.
20. In the event, I am unable to find that the Applicant has satisfied me that the tax assessments for 2010 and 2011 were excessive in any way and accordingly the Objection Decision is upheld.
21. I turn now to (2). S.46 TAD provides penalties for the making of false or misleading statements. I shall reproduce the relevant part thereof below.

“46-(1) This section applies to a person-

- (a) Who makes a statement to a tax officer that is false or misleading in a material particular or omits from a statement made to tax officer any matter or thing without which the statement is false or misleading in a material particular; and
- (b) The tax liability of the person or of another person computed on the basis of the statement is less than it would have been if the statement had not been false or misleading (the difference being referred to as the “tax shortfall”).

(2) Subject to subsection (3), a person to whom this section applies is liable-

- (a) If the statement or omission was made knowingly or recklessly, for a penalty equal to 75% of the tax shortfall; or
- (b) In any other case, for a penalty equal to 20% of the tax shortfall”.