IN THE TAX COURT
AT SUVA

Tax Appeal No: HBT **2 of 2016**

In the matter of Section 11 of the Income Tax Act

AND

In the matter of Section 107 of the Tax Administration Decree 2009

BETWEEN: MALCOLM GRIFFITH BRAIN AND JOHN STEWART HILL

APPELLANTS

AND: CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS AUTHORITY

RESPONDENT

Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr J. Apted, Ms W Chen with him, for the Appellants Mr O. Verebalavu, Ms R Malani with him, for the Respondent
Date of Hearing	:	1 May 2017
Date of Judgment	:	22 January 2018

JUDGMENT

1. This is the Appellants' appeal against the decision of the Tax Tribunal given on 31 January 2012 (Decision) whereby it ordered that the Application for Review be dismissed.

2. By their Supplementary Notice of Appeal, the Appellants seek the following relief:

(1) That the Decision be set aside
(2) An order that they are not liable to income tax on the profits earned on their sale of shares in Chater Properties Limited (CPL).
(3) That the Notice of Amended Assessments for the periods ending 31 December 2006 issued to the Appellants be revised or set aside to the extent of $1,255,394.23 (or $1,460,852) for each Appellant (Amended Assessments).
(4) An order that the Respondent refund to the Appellants the sums collected under the Amended Assessments.
(5) Interest and Costs.

3. The Grounds of Appeal are as follows:.
The Tribunal erred in law in interpreting section 11 and the proviso in section 11(a) of the Income Tax Act (ITA) including:

(i) In holding s.11 (a) had only 2 limbs.
(ii) In holding that the Appellants' profit from the sale of their shares was caught by s.11.
(iii) In finding that the Appellants' profit from the sale of their shares was derived from the carrying on or out of an undertaking or scheme entered into for the purpose of making a profit within s.11(a).
(iv) By erroneously applying the exclusion to s.11(a) which provides that income is not taxable where the gain or profit derived from the transaction does not form part of a series of transactions and it is not in itself in the nature of trade or business.
(v) By ascribing to the taxpayers the business of their companies and wrongly focusing on the land development transaction carried out by CPL instead of the Appellants' share transaction.

4. The Agreed Statement of Facts and Issues (ASFI) includes the following:

(1) The Appellant taxpayers were directors of CPL, a shelf company, until 5 July 2006.

(2) After 1995, the sole asset of CPL was "Vulani Lagoon".

(3) The document of lease dated 23 January 1990, stated inter alia, that the lessee (later CPL) proposed within 5 years of the commencement of the lease (the date) to expend $70m, within 10 years of the date to expend $70m, and within 15 years of the date to expend $65m on various specified projects. The total expenditure for the development would be the minimum sum of $205m.

(4) In or about 2000 the directors of CPL experienced ill-health.

(5) "On 5 July 2006, Chater Properties Ltd made agreement with Highway Stabilizers (International) Trust Co Ltd and Hopper Fiji Ltd to sell all shares in Chater Properties Ltd. The sale of shares also necessitated the passing of the asset Vulani Lagoon to the said companies". This is para 19 of the ASFI.

(6) The issues already disposed of are that the Appellants do not deal in shares and did not acquire the shares for the purpose of sale.

(7) The issues for determination are (a) whether profit from the sale of shares in CPL derived from the carrying on or carrying out of any undertaking or scheme entered into for the purpose of profit and (b) if the profits are so derived whether the transaction falls within the exception to the 3rd limb of s.11(a) where the profit from a transaction of purchase and sale which does not form part of a series of transactions and is not in itself a trade or business shall be excluded.

5. The Decision of the Tribunal is contained in its Conclusions which I append below:

"93. In my view the purpose of the Taxpayers to develop the land, the nature of the works that were undertaken, together with the form of disposal, that including the repayment to a related entity of Company C, owned by the taxpayers, is sufficient basis to conclude that the undertaking was very much a business deal.

94. I conclude that the income arising from the sale of shares in Company C, is caught by both the general provision of Section 11 of the Act, as well as specifically caught within the second illustrative example set out as the second limb of Section 11(a).

95. For the above reasons, the case of the Applicants must fall".

Accordingly the Tribunal dismissed the Applications for review.

6. The hearing commenced with Counsel for the Appellants submitting. He said the issue was wholly on the fact that the CPL shares were acquired in 1981. CPL later became a property developer and acquired the Vulani land (land). The issue is the purpose why the land was acquired. The original purpose was to develop an island resort. The Respondent contends that they bought the shares with the intention to sell the land and the shares for a profit and that they engaged in a scheme under the 3rd limb of s.11(a).

7. Counsel said the Tribunal accepted the Appellants' purpose in acquiring the land was for a resort. The Respondent accepted the Appellants were not share dealers. He contended that it was not open to the Tribunal to tax under either limb. The Tax Administration Decree 2009 (TAD) was not applicable, only ss.11 and 11(a) ITA.

8. The Tribunal could not have found under the preamble to s.11. The Tribunal conflated the Appellants with the company and the business with the Appellants' activity in owning the shares. The abandonment of the scheme and selling the asset is not income. Counsel concluded by asking for interest at the rate of 6% p.a

9. Counsel for the Respondent (Revenue) then submitted. He said Revenue contends that the activities of CPL were actually the activities of the 2 Appellants. The share value increased because of the $4.2m put in by the Appellants. This

added value to the shares. Either purpose was to profit the activities of CPL and were caught by the 3rd limb. It was an extraordinary transaction. The intention under s.11 was to tax profits. From $300,000 to $12m shows the purpose to acquire the land was to make a profit on the business of the Appellants.

10. Counsel for the Appellants in his reply said the finding of fact were based on the evidence before the Tribunal and could not be disturbed. S.11 ITA only catches pure income but not a capital gain. It only catches profit which are in the nature of income, not profits made on the disposal of an asset.

11. At the conclusion of the hearing I said I would take time for consideration. Having done so, I now deliver my decision.

12. In my opinion the pivotal issue for me to decide in this Appeal is were the profits on the sale of their shares by the Appellants derived from a business entered into for profit and if so were these profits itself excluded from tax because they were derived from a transaction which was not a trade or business.

13. To discern the answer to this question requires me to get to the bottom of this matter. So I turn to the Copy Records (CR) volume 1 and peruse what I may call the brochure for this venture that the 2 Appellants embarked upon. From this I note, work on Vulani commenced on June 12, 1995 and is expected to take four years. Construction is progressing on schedule.

14. I turn next to the agreement made the 25th day of July 2006 between the Second and First Appellants AND Hiway Stabilizers International Trust Co. Limited (purchaser) (agreement). The Appellants are described as the Vendors who own 100% of the shares in CPL. The preamble also states that the sole unencumbered asset of CPL is the Vulani Lagoon Resort Project (the Project).

15. Clause 1 of the agreement provides "The Vendors will sell the shares to the Purchaser and the Purchaser will purchase all the shares in CPL from the Vendors in accordance with the terms and conditions nominated herein for the total consideration of FJD$9,750,000 Vep which sum is inclusive of all Vendor's fees, and commissions, plus the payment to J S Hill & Associates Limited of FJD$3,000,000 to take an assignment of the debt owed by CPL to J S Hill & Associates Limited which the vendor will arrange to be assigned from the debtors. Total payment to the vendor and J S Hill & Associates Limited will be FJD$12,750.000".

16. But this is not all. Clause 2 provides for the Vendor (sic) warranting the sole liability of CPL, that all necessary approvals have been obtained to allow development work to commence on site, that the assets of CPL will be unemcumbered and that the land on which the project is to be undertaken is not charged or mortgaged.

17. And clause 5(v) states the agreement is conditional on the Purchaser (b) undertaking due diligence on whether the sole asset of the company, the property, is a suitable and viable development.

18. Clauses 2 and 5 are clearly providing for the sale of CPL's asset, which is a strange thing to do if only the shares were being sold.

19. When the above two clauses are considered together with para 19 of the ASFI (sale of shares also necessitates passing of the asset) it becomes crystal clear that the Appellants are not merely selling their shares, they are also selling the asset of CPL, the land, which is not something that shareholders do when they are selling only their shares. From their own deeds has come the proof that CPL is only a façade and that therefore the corporate veil should be pierced.

20. The 2 Appellants being experienced and knowledgeable in their field of business would have known from the experience of the previous owner/mortgage, if nothing else, that it was an obviously over optimistic scheme that they were embarking on if they were really contemplating constructing a hotel/island resort. The evidence points in the opposite direction.

21. Instead of the $140m that the lessees were supposed to expend on the development within 10 years, or at least the $70m which CPL were supposed to expend between 1995 to 2000, para 7 of the Decision states only a miniscule $4.2m had been expended in development in the 11 years to when the Appellants sold their shares in CPL.

22. This clearly then was a property acquired by both Appellants for the clear purpose of selling it when the time was ripe. The Vulani Lagoon Resort land was purchased by the 2 Appellants through their solely owned vehicle, CPL and then sold by an agreement which purported to be one purely for the sale of shares in a company but was actually a sale of the company's asset (the land) as well.

23. I am of opinion that the transaction from start to finish was the purchase and sale of a property which was in itself in the nature of a business of both Appellants.

24. I am fortified in the decision I am making by the decision of the Court of Exchequer (Scotland), Second Division in Californian Copper Syndicate (Limited And Reduced) v. Harris (Surveyor of Taxes) (1904) 5 TC 165 – 167. At pages 166 and 167 Lord Justice Clerk said ".....I feel compelled to hold that this Company was in its inception a Company endeavouring to make profit by a 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 with the capital at its disposal. Such a thing was quite impossible."

25. Lord Trayner also at page 167 said " I am satisfied that the Appellant Company was formed in order to acquire certain mineral fields or workings – not to work the same themselves for the benefit of the Company, but solely with the view and purpose of reselling the same at a profit..... The price obtained, namely, £300,000, for a subject which cost £24,000 points in the same direction".

Here the land purchased for $300,000 (para 6 of the Decision) was sold through the device of the agreement for $9,750,000.

26. The Revenue have not imposed the tax on CPL but on the Appellants who are the sole shareholders. The question that arise then is are they entitled to do this given the well established legal principle that a limited company and its shareholders are separate and distinct legal entitites.

27. On the totality of the evidence before this Court I am satisfied that I shall have to conclude that although notionally there was a company, CPL, involved, in truth this was entirely and exclusively a business undertaking conducted by the Appellants themselves in their personal capacities as individuals. The fact that the Appellants both took ill in or about the same year 2000 and that apparently, with the difficulties in finding investors, caused their purpose to develop an integrated resort to be thwarted and "they therefore abandoned their dream resulting the sale of their shares in CPL" (see para 25 of Appellants' Submissions dated 18 November 2016) has caused me to reach the conclusion that it were the 2 Appellants and not CPL who were carrying on the business. This is because a limited company's operations do not grind to a halt just because their directors (the 2 Appellants here) become ill; the operations still continue.

28. For the Appellants a mere 5 years after the lease of the land was transferred to CPL on 26 July 1995 to abandon the project speaks volumes for it not having been acquired in the first place for a resort. Indeed it bolsters the Revenue's contention that the land had been acquired for a resale later.

29. I do not accept the Appellant's contention that it was CPL which was carrying on the business. On the contrary I find and I so hold that the corporate veil provided by CPL was merely to hide or obscure the fact that this was in reality a partnership of the 2 Appellants. I am fortified in my conclusion here by the decision of the Federal Court of Australia in : Dennis Willcox Pty Ltd v Federal Commissioner of Taxation : 79 ALR 267 (1988). At page 272, Jenkinson J. (per totam curiam) quoted Young J in Pioneer Concrete Services Ltd v Yelnah Pty Ltd. (1986) 11 ACLR 108 saying "Young J observed that the separate legal personality of a company is to be disregarded only if the court can see that there is, in fact or in law, a partnership between companies in a group, or that there is a mere sham or façade in which that company is paying a role....."

30. Based on the material before this Court, I am of opinion that it can be reasonably inferred that there is a partnership of the 2 Appellants running the show behind the façade provided by CPL.

31. It remains for me to decide whether the Revenue were correct in law to impose the tax that they did on each of the 2 Appellants. This only requires me to peruse s.11 proviso (a) ITA. Paraphrasing the relevant wording I read it as total income shall include any profit or gain derived from the sale of any real property or any interest therein if the business of the taxpayer comprises dealing in such property but the profit or gain derived from a solitary transaction of purchase and sale which is not itself a trade or business shall be excluded.

32. In my considered opinion once the corporate veil of CPL is lifted it becomes crystal clear that its business was that of the 2 Appellants and thus the sale of their shares in CPL as well as the sale of the land in the one and the same transaction results in both Appellants coming within the ambit of s.11 and proviso (a) (but not within the exclusion) as follows:

(1) It is an income being profits from a business

(2) It is a profit or gain derived from the sale of shares and of the land where the (CPL) business of the taxpayers/Appellants comprises dealing in such property (the Land).

(3) It is a profit or gain derived from carrying on or out of a scheme (development of an island resort) entered into or devised for the purpose of making a profit.

(4) The profit or gain from the purchase of the land and the sale of the shares and the land were a transaction which was a business of the Appellants. In the event it was income, but not income which was excluded from tax.

33. In fine, having reached the conclusion that upon a correct view of the factual and legal situation it would not be reasonable to deduce that this was anything other than a trading or business transaction carried on or out by the 2 Appellants, I shall hereby dismiss the Appeal against the decision of the Tribunal and uphold the Respondent's assessment of income tax against each of the Appellants.

34. However, in the circumstance of this matter, I shall order each of the parties to bear their owns costs throughout these proceedings.

Delivered at Suva this 22nd day of January 2018.

HIGH COURT OF FIJI SUVA

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David Alfred
JUDGE
High Court of Fiji