

In the High Court of Fiji

At Suva

Civil Jurisdiction

HBT 02 of 2019

Viwa Island Resort Limited

Appellant

v

Fiji Revenue and Customs Service

Respondent

Counsel: Mr P. Knight for the appellant
Mr O.Verebalavu for the respondent

Date of hearing: 21st January,2020

Date of Judgment: 31st May,2022

Judgment

1. The appellant appeals a decision of the Tax Tribunal. The Tribunal had dismissed the appellant's application for review of the capital gains tax assessed on the sale of its resort and penalty imposed by the respondent.
2. The appellant appeals the decision of the Tribunal on the following grounds:
 - a. *That the learned Tax Tribunal erred in law and in fact in only allowing the sum of \$1,905,432.00 as the cost of the acquisition of the assets the Appellant subsequently sold when those assets were acquired by the Appellant from Sag Limited on or about 01st January 2009 for a cost of \$3,557,654.00 and when the Appellant subsequently incurred costs of \$1,905,432.00 in completing the construction of the resort, making a total cost of acquisition of those assets by the Appellant of \$5,463,086.00.*

- b. *That the Learned Tax Tribunal erred in law and in fact in upholding the imposition of a penalty of \$9,558.00 under Section 46 of the Tax Administration Act and in finding that the Appellant made a statement, namely a Capital Gains Tax Return, to a tax officer that is false or misleading in a material particular or omitted from a statement made to a tax officer any matter or thing without which the statement is false or misleading in a material particular.*
3. Sag Ltd had transferred the resort to the appellant for a written down value of F\$3,557,654.00. The appellant did not make any payment. The appellant subsequently sold the resort. The respondent assessed capital gains tax of \$ 47,791.00 and imposed a penalty of \$ 9558.00 under section 46 of the Tax Administration Act,2009, on the appellant for making a false or misleading statement that its cost of acquisition of the resort was FJ\$ 5,335,300.00.
 4. The first ground of appeal takes issue with the respondent allowing only a sum of \$1,905,432.00, as the appellant's cost of acquisition.
 5. The appellant argues that it acquired the resort for a sum of \$3,557,654.00 and subsequently incurred costs of \$1,905,432.00 in developing the resort, making a total of \$5,463,086.00. Capital gains tax was not payable, as the appellant sold the resort at \$ 2,383,342.00 with a significant loss. It was further submitted that the resort was transferred to the appellant for \$3,557,654.00 and shown as a debt in its accounts, though consideration was not paid. A debt incurred on acquisition of an asset should be included as cost of acquisition.
 6. The respondent submitted that in calculating the capital gains made by the appellant, it allowed only the development costs actually incurred of \$1,905,432.00. The cost of \$3,557,654.00 claimed as costs of acquisition was disallowed, as that was incurred by Sag Ltd, a different entity. A debt is not a cost for capital gains.
 7. Section 10 of the Capital Gains Tax Act, 2011 provides that capital gains tax will be assessed on the consideration received on the disposal of an asset reduced by the cost of the asset at the time of disposal.

8. Section 11(2) provides that the cost of a capital asset is the sum of the following amounts:

- a) *the total consideration given by a person for the asset, including the fair market value of any consideration in kind determined at the time the asset is acquired and, if the asset is constructed, produced or developed, the cost of construction, production or development;*
- b) *any incidental expenditure incurred by the person in acquiring or disposing of the asset; and*
- c) *any expenditure incurred by the person to install, alter, renew, reconstruct, or improve the asset.*(emphasis added)

9. In my view, the section clearly provides that the cost of a capital asset comprises the total consideration and the cost of development, as applicable in the present case. It does not include a debt.

10. The Resident Magistrate, in his decision succinctly differentiated the manner in which the costs claimed by the appellant should be treated vis a vis the costs allowed to be claimed by Sag Ltd, as follows:

The most influential factor that draws the distinction between the two entities and the way in which their costs should be treated, comes about from the situation where Company S (Sag Ltd) has been allowed to claim input costs during the resort's construction stage and thereby treating such costs as its own. From thereafter, it cannot seek the further concession of those amounts, regardless of whether or not they are now held on the books of that company a debt owed by Company V (the appellant). Put simply, they were not costs incurred by Company V, but costs assumed by Company S. They had already been treated as such. .(emphasis added)

11. In my judgment, the Tribunal reached a correct finding that the appellant's costs of acquisition was \$1,905,432.00 .

12. It follows that the respondent's calculation of capital gains tax of 10% on the consideration of \$2,383,342.00 less cost of acquisition of \$1,905,432.00, was correct.

13. The second ground of appeal contends that the Tribunal erred in upholding the imposition of a penalty on the ground that the appellant made a false or misleading statement on a material matter.

14. Section 46 of the Tax Administration Act 2009, provides as follows:

- 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 a 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”)...*
- 5) *No penalty is payable under subsection (2) if –*
 - a) *the person who made the statement did not know and could not reasonably be expected to know that the statement was false or misleading in a material particular; or*

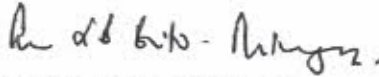
15. The Act provides that a penalty is payable if a person makes a statement that is false or misleading in “*a material particular*”.

16. In my judgment, the appellant made a false and misleading statement as to the cost of acquisition of the resort. The appellant was “*reasonably.. expected to know that the statement was false or misleading in a material particular*” and should not have been made.

17. I conclude the penalty of \$9,558.00 was correctly imposed on the appellant.

18. **Orders**

- a. The appeal of the appellant is declined.
- b. The appellant shall pay the respondent costs summarily assessed in a sum of \$1500.


A.L.B. Brito-Mutunayagam
JUDGE
31st May, 2022

