IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 02 of 2022

IN THE MATTER of the Income Tax Act 2015

AND

IN THE MATTER of Section 17 and 82 of the Tax Administration Act of 2009.

BETWEEN: **LONDON GUARANTEE CORPORATION PTE LIMITED**

APPLICANT

A N D : **THE FIJI REVENUE AND CUSTOMS SERVICE** Revenue and Customs Service Complex, Corner of Queens Elizabeth Drive & Ratu Sukuna Road, Nasese, Suva Businessman.

RESPONDENT

Counsel **: Applicant:** Mr. Blakeley I and Mr. Kapadia V
: Respondent: Mr. Eterika E and Ms R. Malani

Date of Judgment : 23.04.2025

Catch Words-

Sections 17(1) and 86 of Income Tax Act 2015- trade or commerce- mixed issue of law and fact- intention at the time of purchase- investment i44 n long term project- providing loan-obtaining loan- development in terms of Master Plan – income generation from project- economic slump- regulatory requirements- heavy debt burden- options for sale of capital asset- decision to sell shares- consideration- capital asset- disposal-share sale- debt assignment-

Cases Referred

[1] *Fiji Cayman Holdings v Fiji Revenue and Customs Service* [2023] FJHC 737; HBT04.2019 (9 October 2023).
[2] *Lilian Millar v CEO, FRCS* [2016] FJHC 813(decided on 12.9.2016)
[3] *Commrs for HMRC and Timothy Mark Collins [2009] EWHC 284 (Ch),*
[4] *Revenue and Customs v Collins [2009] EWHC 284 (Ch) (20 February 2009)*
[5] *Ransom (Inspector of Taxes) v Higgs, Motley (Inspector of Taxes) v Higgs's Settlement Trustees, Dickinson (Inspector of Taxes) v Downes, Grant (Inspector of Taxes) v Downes's Settlement Trustees, Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes) [1974] 3 All ER 949 [1974] 1 WLR 1594*
[6] *Ingenious Games LLP and others v Revenue and Customs Commissioners [2022] 2 All ER 338*
[7] *Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners* [1980] 2 All ER 798
[8] *Californian Copper Syndicate v Harris* (1904) 5 TC 159
[9] *London Australia Investment Co Ltd v FC of T ATC 4398*
[10] *National Distributors Ltd v CIR* (1987) 9 NZTC 6,135
[11] *Danmark Pty Ltd v FC of T (1944) 7 ATD 333*
[12] *Taxation v Myer Emporium Ltd [1987] 163 CLR 199*

JUDGMENT

INTRODUCTION

[1] Applicant sold 9,999,999 shares of Gold Century Group Company (Fiji) Pte, (GCG) and Dayanand Damodar sold one share of GCG for $ 23,500,000 to Challenge Engineering Pte Limited (CEP) in terms of Share Sale and Purchase Agreement (SPA).

[2] Prior to above shares sale, between 2015 and 2021 Applicant and Bank of South Pacific and Federal Pacific Finance had lent GCG about $14,000,000.

[3] According to Respondent the amount paid for 'consideration' for the sale of the shares of GCG consisted the loan of CEP to GCG to settle loans to Applicant and Bank of South Pacific and purchase price in terms of SPA which amounts to aggregate sum of $36, 0000.

[4] CEP obtained shares of GCG free of all debts. Debts of Applicant and BSP were settled by GCG from a loan provided by CEP to GCG for the said settlement amount debt 12,500,000. So said amount is a loan to GCG to pay its debtors including Applicant at the time of sale of its entire issued shares to CEP. Applicant had taken over the remaining debt of GCG in terms of SPA.

[5] Applicant through its solicitor filed Capital Gains Tax (CGT) Return dated 9.7.2021 for the disposal of shares of GCG held by Applicant, in terms of Section 83(1) of Tax Administration Act.

[6] On 13.7.2021 Respondent wrote to Applicant's solicitor that, share sale of GCG would be subjected to Income Tax in terms of Section 17(1)(c) (i) of the Income Tax Act 2015, hence no Capital Gains Tax imposed on it.

[7] Respondent's letter of 18.2.2022 replied to Applicant's request of the objection pursuant to Section 16(6) to Tax Administration Act 2009 and informed that the objection was wholly disallowed.

[8] Being aggrieved by said decision Applicant sought to review the objection decision of 18.2.2022 in the Tax Tribunal.

[9] Tax Tribunal had transferred it to this court in terms of Section 17(3) of Tax Administration Act 2009 and both parties had agreed to this.

[10] The issue before this court is the determination of 'consideration' for the sale of shares of GCG and whether said sale can be considered as 'trade 'in terms of Section of Income Tax Act 2015.

FACTS

[11] Both parties had agreed to following facts and they are contained in Agreed Facts submitted to court. Following facts are derived from the said document and further facts that that were not disputed by parties.

[12] The Applicant, is a limited liability company having its registered office at Suva, Fiji.

[13] Applicant acquired 9,999,999 and Mr. Dayanand Damodar acquired 1 fully paid Ordinary Shares in GCG on 20 .8. 2015 for $16,600,000 being $1.66 per share.

[14] Between August 2015 and July 2021 Applicant's loan to GCG stood a total of $10,839,077 (see affidavit of Pickering filed on 23.3.2023)[1].

[15] On 24.8. 2020 Applicant and Dayanand Damodar entered into SPA with CEP and GCG *inter alia* to sell all 10,000,000 ordinary shares of GCG to CEP.

[16] Clause 1.1 of SPA had stated that Applicant would receive: 23,500,000 from CEP as the stated 'purchase price' for the shares. There were conditions attached to the said 'purchase price' contained in Clause 4 .1 of SPA

[17] 'Purchase Price' is defined in SPA , exclusively as follows

[1] In the agreed fact this is erroneously stated as $12,500,000 but there is no dispute that settlement of debt of $12,500,000 included Applicant and Bank of South Pacific in terms of Clause 4 .1(b)(i) . So it is incorrect to state $12,500,000 was lent by Applicant to GCG despite being an agreed fact.

"Purchase Price means ……. $23,500,000.. "

[18] CEP agreed to provide a loan of $12,500,000 to GCG for settlement of its debt obligations to Applicant and Bank of South Pacific.

[19] Applicant filed a Capital Gains Tax Return on 13 .7. 2021 for the disposal of the shares held in GCG to CEP (Annexure 2 to the Respondent's bundle of documents provided under section 83(1) of the Tax Administration Act 2009. (Respondent's statement)

[20] On 13 .7. 2021 the Respondent wrote to LGC advising that the Respondent considered the disposal of the shares by LGC would be subject to Income Tax under section 17(1)(c)(i) of the Income Tax Act 2015.

[21] Following further correspondence between Applicant and or its representatives and the Respondent, on 2.9. 2021 the Respondent wrote to Applicant, proposing an Advance Assessment of income tax under section 17(1)(c)(i) and (ii) of Income Tax Act 2015 on the proposed sale of shares by Applicant to CEP for the income year ended 31 .12. 2021 (Annexure 5 of Respondent's statement)

[22] On 1 .10. 2021 Applicant lodged an Objection under section 16(1)(b) of the Tax Administration Act 2009, to the notice of Advance Assessment made by the Respondent.(Annexure 6 to the Respondent's statement)

[23] The Objection Decision was set out in the letter dated 18 .2. 2022 from the Respondent to Applicant. The Respondent wholly disallowed Applicant's Objection on the basis the Transaction was subject to income tax under section 17(1)(c)(i) and (ii) of the Income Tax Act 2015 and not Capital Gains Tax and that the total consideration received by Applicant for the disposal of GCG's shares is $36,000,000 being made up of the stated share purchase price of $23,500,000 plus the $12,500,000 the loan to GCG for settlement of its debts to Applicant and Banka of South Pacific.

[24] On 16.3. 2022 Applicant instituted these proceedings seeking to vary and/or set-aside the Respondent's decision of 18 .2. 2022.

[25] Both parties consented this action being transferred from Tax Tribunal to this court and the proceedings transferred to this court.

ISSUES TO BE DETERMINED

[26] Following joint issues raised by parties to this action for

determination , and they are

(i). What is the true legal form of the transaction entered into between Applicant and CEP?

(ii) Is the amount of $23,500,000 received by Applicant on settlement of the transaction an amount received from the conduct of 'trade, commerce, agriculture, or manufacture, or the carrying on or from the carrying out of a profit-making undertaking or scheme for the purposes of Section 17 (1) (c) (i) or (ii) of the Income Tax Act 2015 ?

(iii) Is the amount received by Applicant and or Bank of South Pacific for settlement of debts from GCG through a loan from CEP be considered as payment for the purposes of Section 17 (1) (c) (i) or (ii) of the Income Tax Act?

(iv) Has the Respondent correctly calculated the "net gain" derived by LGC?

[27] The burden of proof rests on Applicant in terms of Section 21 (1) (b) of the Tax Administration Act of 2009 which is as follows: -

> "In the case of a tax decision (other than a tax assessment), the burden is on the person objecting to the decision to prove that the decision should not have been made or should have been made differently."

EVIDENCE

[28] At the hearing both parties relied on affidavits and documents submitted as well as Respondent's statement that in terms of Section 83 of Tax Administration Act 2009. Some documents are duplicated but there is no dispute as to any document produced in court.

[29] The dispute is the application of the facts and interpretation of relevant law.

[30] Applicant relied on the evidence of Mr. Steven Pickering partner of multinational accounting firm who provided professional services to the Applicant. The Applicant had

also relied on the affidavit of Mr. Dipakbhai B. Patel who was the Group Chief Financial Officer for the Applicant as well as GCG.

[31] The Respondent relies on the evidence of Mr. Tevita Tuiloa who was the Principal Auditor and Mr. Shalvyn Chand who was the Objections Review Officer and they had also filed affidavits with annexed documents.

[32] The Respondent, in cross-examining Mr. Pickering was able to adduce the following evidence: -

i. That he agreed that in paragraph 4 of his Affidavit, he had stated that there were two assets disposed by the Applicant as viewed from a financial reporting perspective and they were disposal of shares and a debts of GCG to the Applicant and Bank of South Pacific.
ii. He was referred to the SPA signed by Applicant and CEP and GCG where he agreed that in 'Introduction' in SPA in Part A and B for sale of shares.
iii. It is worth to note Clause 4.1 which stipulated conditions attached to the consideration obliged GCG to settle its debts.
iv. He agreed that Clause 4.1 (b) (i) talks about settlement of a debt of $12,500.000 and it was put to him that that amount forms part of the consideration for the disposal of shares.
v. This is a matter for court to determine in this action based on evidence.
vi. He was referred to the Capital Gains Tax Return filed by the Applicant and the Declaration by the Vendor (Document 6- Agreed Bundle)

vii. He stated for tax purposes, the Capital Gains Tax Return is the document that will be provided by the Applicant for disposal of shares.

viii. He stated that as per Capital Gains Tax Return, the Applicant had disposed Equity shares in Company GCG. The Applicant had declared that the consideration for the disposal of the shares is $36,000,000.

[33] Respondent had called Mr. Tevita Tuiloa is a Principal Tax Auditor stated : -

i. Respondent received from the Applicant the following documents: -

- Sale and Purchase Agreement.
- Valuation of the Land (asset) and
- Master Plan for the Land.

ii. That apart from the documents Applicant's Memorandum of Association/Article of Association were obtained by Respondent.

iii. Confirmed position in terms of the consideration for the disposal of the shares in Company GCG by the Applicant is $36,000,000.

iv. He was referred to the SPA where he confirms the Respondents position where he states that the Share Agreement is only for the sale of shares only as seen in Part A and B.

v. According to witness Clause 4.1, 4.3 of the Share Agreement confirms that the consideration of the shares is broken down into 3 parts which are as follows: **-**

Company Debt	**$12,500,000**
Deposit	**$1,000,000**
Balance Purchase Price	**$22,500,000**
TOTAL	**$36,000,000**

vi. That based on the above, the total consideration that was being declared and paid by CEP was $36,000,000.

vii. He was referred to the Capital Gains Tax Return. He also confirmed that according to said Tax Return form, the disposed asset is the equity shares in GCG that were held by the Applicant.

viii. That in terms of computation the consideration declared by the Applicant was $36,000,000 and the allowed cost is $18,040,000 and the Computed Gain is $17,960,000.

ix. He confirmed the position that the sale of the shares was subject to income tax.

x. He referred to the MOA of the Applicant and specifically to objects 1 and 6 of the Objects of the Company which talks about the Applicant to engage in acquiring, to underwrite and dispose of shares and interests in such companies or associations and to buy, make advances, or sell all...shares.

xi. He stated that Applicant was able to acquire the land that was required for development by way of buying shares in Company CCG in 2015 for $17,120,000.

xii. The fact that the Applicant has bought shares in CGC and later disposed the shares shows that Applicant was in the business of buying and selling shares and be subjected to Income Tax for the sale of shares in GCG.

The "*Consideration*" of the Disposal of Shares

[34] Section 86 of Income Tax Act 2015 states,

> **"Consideration**
>
> 86(1) Subject to this Act, this section establishes the amount of consideration for the disposal of an asset for the purposes of the Act.
>
> (2) The consideration for the disposal of an asset is the total amount received or receivable for the asset, including the fair market value of any consideration in kind determined at the time of the disposal.
>
> ……..
>
> (5) If 2 or more assets are disposed of by a person in a single transaction and the consideration for each asset is not specified, the total consideration for the disposal is apportioned among the assets disposed in proportion to their respective fair market values determined at the time of the disposal."

[35] From the above provisions it is also clear if two assets are disposed at the same time consideration for each needs to

be assessed separately even if consideration is not specified for such disposals. In this case SPA had specified consideration for the shares of GCG in Clause 1.1 of SPA.

[36] According to Respondent's Objection Decision of 18.2.2022 states,

> '3. The Sale and Purchase Agreement dated 24. August 2020, also states that the purchase price to be $36, 00,000 which is made up of
>
> a. $12,500,000-settlement of debt with BSP;
> b. $1,000,000-Deposit into the trust account of the Vendors Solicitors and
> c. $22,500,000 balance be deposited in the trust account of Vendor's solicitor upon completion.
>
> 4. Hence in accordance with Section 86of the (sic) ITA (2015) we maintain the tax announcement in that the total consideration for the sale is $36,000,000'

[37] Respondent relies on Item 1 of the Agreed Bundle of documents which was the Offer letter from CEP to GCG dated 17.7. 2020. This was not an offer for shares of GCG but an offer for a land belonging to GCG.

[38] This was an offer for $36,000,000 (plus VAT if applicable) for the Land owned by GCG which was Lot 1-4 on S07919, State Lease No 21672. (The Land). The offer was subjected to due diligence and also finance. CEP also offered to deposit $1,000,000 upon execution of sale and purchase agreement for the Land.

[39] There is no dispute that no Sale and Purchase Agreement for the Land was entered and ownership of the Land did not change.

[40] According to evidence of Chief Financial Officer of GCG they had following options

i. Sale of the Land.
ii. Sale of Shares of Proprietor of the Land.

[41] From the above options CEP's offer was for the purchase

of the Land only but this did not proceed. Instead counter offer was made for the second option.

[42] It is not in dispute that there was no sale of the Land owned by GCG. Instead a counter offer for 100% shares of GCG as proprietor of the Land was made. The conditions of the said offer were,

a. "Deposit of $1 million to be paid on signing of the relevant paper work.
b. Land fill and drainage works to be completed by Dec 2020 or any other date agreed between the parties.
c. Sale and purchase to be by way of purchase of 100% shares in Gold Century Group Company (Fiji) Pte Limited.
d. Execution of relevant Share sales documents."

[43] So instead of sale and purchase of the Land, 100% shares of GCG were sold being the proprietor of the Land. This is the exercise of alternate option of Applicant stated above, and this involved further negotiations with CEP which resulted in SPA.

[44] Sale of all the shares of the proprietor of the Land is completely different transfer of rights and obligations compared with transfer of the Land with indefeasible title.

[45] So there was no consideration paid for transfer of the Land for which offer was made by CEP. So the character of the offer changed from sale of the Land to counter offer of sale of 100% shares of GCG.

[46] In that context it is incorrect to treat the consideration offered for the Land as consideration offered to share sale.

[47] The consideration stated in SPA for sale of 100% shares of GCG is $23,500,000 in terms of clause 1.1 where 'purchase price' was stated. This consideration contained certain conditions and they are contained in clause 4.1 (b).

Which reads;

"(b) The parties acknowledge and agree that the Purchase Price is set on the condition that on

completion

(i) The Company (GCG) will settle debt of $12,500,000 owed by the Company to London Guarantee Corporation Pte Limited (Applicant) and Bank of South Pacific Limited (Company Debt).

(ii) The Purchaser(CEP) shall lend the Company the sum to pay the Company Debt and

(iii) The Vendor agrees to settle any sum in excess of the company Debt or any other debt owed to any third parties

[48] So $12,500,000 was an amount lent by CEP to GCG. The purpose of the said loan of CEP was to settle the debts of Applicant and Bank of South Pacific fully and Applicant also agreed to settle other debtors. So if the settlement of debt is part of 'consideration' in terms of Section 86 of Income Tax Act 2015, why did Respondent left the settlement of remaining debt of GCG, by Applicant?

[49] Respondent had not considered Applicant's payment of debt of GCG for deduction of 'consideration' in terms of SPA, but had increased the price through payment of debt by GCG.

[50] It should be noted in transfer of the Land will not affect the debt obligations of GCG, specifically additional obligation of Applicant to pay the debts of GCG which it had undertaken in terms of SPA. This was an obligation of GCG but Applicant had taken over it in terms of SPA.

[51] So at the time of transfer of all the shares of GCG, two out of three specifies debts were also settled by GCG. According to Applicant it had disposed shares of GCG and two out of three debts of GCG were transferred to CEP through a loan from CEP.

[52] So a new debt is created for the identical amount for $12,500, 000 to GCG in favour of CEP.

[53] Applicant had also agreed to settle the third creditor, indicating CEP and Applicant had agreed to dispose shares and also as conditions of were stated as disposal of debts of GCG in SPA. This does not change that consideration for shares was $ 23,500,000.

[54] Despite stating in letter of 17.7.2020 that offer for the Land was accepted, the above conditions show it was not accepted in law but a counter offer, for the sale of all the shares of GCG were offered and parties had negotiated and final terms of the sale of the shares of GCG and also disposal of debts of GCG as stated in SPA GCG.

[55] Conditions of share sale and purchase agreement changed the character of the offer of CEP, for the purchase of a single property namely the Land, to purchase of 100% of the entity of shares of GCG which remained owner of the land for which CEP made the offer on 17.7.2020. This invariably makes any debt obligations of GCG a relevant factor to be taken in to consideration by CEP as well as Applicant which was not a consideration in sale of the Land. Settlement of debt obligations of GCG were contained as conditions for consideration.

[56] Respondent does not allege any Tax avoidant scheme adopted by Applicant and transaction needs to be assessed as stated in SPA.

[57] This is not an uncommon feature to change the debt obligations of an entry, in commercial sale of shares when 100% ownership of shares change hand due to various factors.

[58] The intention of CEP was to purchase the Land from its proprietor GCG and the offer for $36 million was to transfer ownership of the Land from GCG to CEP. This would have given CEP indefeasible title to the Land. The rights derived from transfer of the Land are different from purchase of shares of proprietor of the land. So parties had further negotiated and arrived at SPA.

[59] Applicant, and CEP accepted that consideration for 100% shares of GCG is $23,500,000. There were conditions attached to said consideration, relating to disposal of all the debts.

[60] Debt obligations of GCG were shared between Applicant and CEP in the following manner

a. CEP to provide a loan to GCG for $12,500,000.

b. GCE to settle debt obligations of Bank of South Pacific and Applicant.
c. Remaining Debts of GCG to be settled by Applicant and Dayanand Damodar (being Vendors of SPA)

[61] Parties are free to determine commercial transactions and structure them as they wish. See High Court decision (Per Mansoor J *Fiji Cayman Holdings v Fiji Revenue and Customs Service* [2023] FJHC 737; HBT04.2019 (9 October 2023).

[62] In *Fiji Cayman Holdings v Fiji Revenue and Customs Service* [2023] FJHC 737; HBT04.2019 (9 October 2023) Mansoor J held,

> "It is clear, therefore, that the consideration was in respect of both share sales and the assignment of the loan payables. The valuations by Knigh Frank on behalf of the purchaser are clearly of the properties, and do not necessarily reflect that of Farleigh's share value.
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> The applicant referred the court to the judgment in *Spectros International Plc v Madden* in which the court said the law respects the freedom of the parties to a transaction to frame and formulate their agreement as they wish to suit their legitimate interests as long as the form adopted is genuine. The court stated:
>
> > "What is the relevant consideration may depend upon the terms and form of the transaction adopted by the parties. The parties to a proposed transaction frequently can achieve the same practical and economic result by different methods. Take for example the position of the owners of the entire issued capital of a company with gross assets of $2 million and net assets (after discharging a debt of $1 million owed to the owner or someone else of $1 million. The shares are worth $1 million, but would be increased to $2 million if the owner at his own cost and for the benefit of the company released or discharged the debt. IN this situation, the owner may agree to sell his share for $1 million or, on condition that he first releases or discharges the debt for $2 million. The law respects the freedom of the parties to a transaction to frame and formulate their

agreement as they wish and to suit their own legitimate interests (taxation and otherwise) and, so long as the form adopted in genuine, and not a sham, honest, and not a fraud on someone else, and does not contravene some established principle of public policy, the court will give effect to the method adopted. But as a corollary to this freedom, where the parties have chosen one method, it is not open to them to invite the court to treat as adopted some other method because it is more advantageous to them, because it leads to the same practical and economic result and because it is the more obvious and sensible method to have adopted. If the question is raised what method has been adopted and the transaction is in writing, the answer must be found in the true construction of the document or documents read in the light of all the relevant circumstances. If the terms of the documents are clear, that is the end of the question."[3]

For these reasons it is reasonable to conclude that the consideration of $280,000,000.00 was for the composite transaction including the assignment of debt, and not solely for the transfer of the applicant's ordinary and preference shares in Farleigh."

[63] Accordingly, disposal and or assignment of debt of GCG, cannot be considered as consideration for sale of shares GCG.

[64] Applicant and CEP had entered in to sale of 100% of shares of GCG who is the registered proprietor of the Property.

[65] So the consideration offered for the purchase of the Land is not the consideration for the consideration of the purchase of shares of GCG.

[66] The consideration is the amount paid for purchase of 10 million shares and this is $23,500 million as stated in the SPA Clauses 1.1.

[67] The Applicant, through its witness Mr. Pickering, in paragraph 4 of its Affidavit stated the following: -

"……The money owed by Gold Century to the Applicant and the value of the ordinary shares in Gold Century are two distinct assets within the Applicant's balance sheet."

[68] The Respondent submitted that CEP in its offer letter had offered $36,000,000 for the sale of the land and when it was accepted, the asset was changed to the sale of the shares in GCGCL, but the consideration accepted was still $36,000,000 as stated in the share agreement and calculated below:-

Company Debt	$12,500,000
Deposit	$1,000,000
Balance Purchase Price	$22,500,000
TOTAL	$36,000,000

[69] The Respondent contended that consideration for disposal of an asset for tax purposes is determined under section 86 (2) of the Income Tax Act of 2015 which states as follows: -

> 86 (2) The consideration for the **disposal of an asset is the total amount received or receivable for the asset,** including the fair market value of any consideration in kind determined at the time of the disposal.

[70] In the case of *Lilian Millar v CEO, FRCS* [2016] FJHC 813(decided on 12.9.2016) held,

> "42. Having set out the legal position, I shall cut to the chase by determining the consideration. One does not need to refer to a legal dictionary to be informed that the consideration is the amount of **money that moved from the purchaser (Parker) to the Applicants** as payment for the shares purchased by Parker from the Applicants."(emphasis added)

[71] Respondent relied on above decision. This can be distinguished as CEP did not pay $12,500,000 to Applicant, it was a loan granted to GCG in order to settle two out of three debt obligations of GCG. It was GCG who settled debt obligations of Applicant and Bank of South Pacific. Those were future obligations of GCG, which were settled at the time of sale.

[72] So there was no money paid by CEP to Applicant except payment of $23,500,000 the consideration for the shares in GCG.

[73] In *Lilian Millar v CEO, FRCS* [2016] FJHC 813(decided on 12.9.2016), the taxpayer had sold its shares in Nanuya and Westside Resorts for $2.1million and $2million respectively as per the Share Sale Agreement. The Taxpayer had contested the amount of consideration for the sale of shares on the basis that they had not received the full amount of $4.1million since the money was used to offset the ltaukei Land Trust board poundage, purchasers disputed items not paid and to settle the Company bank debt thus receiving only $2.9 million as part of the share Agreement. The Taxpayer argued that the consideration should be reduced based on the same. The Respondent's position is that the poundage fee, working capital adjustment and loans does not reduce the consideration and as such, the consideration is $4.1 million. The Court held that the poundage fee, and working capital provided by the shareholders and loans made by them are liabilities of the company and not debts of the shareholders to which the same to be paid from the consideration received from the purchaser. The same principle can be applied to debt settled by GCG to Applicant and Bank of South Pacific. CEP assigned two loans and remainder was to be settled by Applicant.

[74] Paragraph 46 and 47 of the case of *Lilian Millar v CEO, FRCS [2016] is* applicable in this case where Justice Alfred held,

> *"*46.Well-dressed language utilised by the Applicants' tax planners (accountants and lawyers) cannot transform debts owed by the companies to 3rd parties and the Applicants qua shareholders, into liabilities of the Applicants qua shareholders. If the Applicants qua shareholders consent or authorise or instruct that portions of the consideration received from Parker be utilised to settle the liabilities of the companies, then that is their prerogative.
>
> 47. However, this by no means reduces the consideration received from Parker, and the Applicants consequently remain liable to pay the full CGT on the full consideration. It is a specious argument to contend they did not receive the full consideration."

[75] Respondent relied on *Commrs for HMRC and Timothy Mark Collins [2009] EWHC 284 (Ch),* Henderson J held:

> "The fact that the sum was not payable to Mr Collins himself, but to the Company at his direction, is irrelevant. The sum still formed part of the consideration agreed between the parties for the sale of his shares. It is equally irrelevant that the agreement went on to specify what the Company was to do with the payment. If I dispose of an asset on terms that the purchase price is to be paid, at my direction, to a third party, and then applied by the third party, in a specified way for my benefit, none of that alters the fact that the agreed purchase price is the consideration for my disposal of the asset."

[76] In the said UK case interpreted section 48 of the Taxation of Chargeable Gains Act 1992 which stated,

> '**48 Consideration due after time of disposal**
> (1) In the computation of the gain consideration for the disposal shall be brought into account without any discount for postponement of the right to receive any part of it and, in the first instance, without regard to a risk of any part of the consideration being irrecoverable or to the right to receive any part of the consideration being contingent; and if any part of the consideration so brought into account subsequently proves to be irrecoverable, there shall be made, on a claim being made to that effect, such adjustment, whether by way of discharge or repayment of tax or otherwise, as is required in consequence."

[77] So the interpretation of consideration in *Commrs for HMRC and Timothy Mark Collins [2009] EWHC 284 (Ch),* is not identical to Section 86(2) of Income Tax Act 2015 and cannot be applied *in toto.*

[78] In *Revenue and Customs v Collins* [2009] EWHC 284 (Ch) (20 February 2009) further held,

> "It was common ground before the Special Commissioner, and was also common ground before me, that the relevant principles for determining what forms part of the consideration for the disposal of an asset for CGT purposes were correctly stated by Lightman J *in Spectros International Plc v Madden* [1997] STC 114, 70 TC 349, at 136a-e:

> "What is the relevant consideration may depend upon the terms and form of the transaction adopted by the parties. The parties to a proposed transaction frequently can achieve the same practical and economic result by different methods. Take for example the position of the owners of the entire issued capital of a company with gross assets of £2 million and net assets (after discharging a debt of £1 million owed to the owner or someone else) of £1 million. The shares are worth £1 million, but would be increased to £2 million if the owner at his own cost and for the benefit of the company released or discharged the debt. In this situation, the owner may agree to sell his shares for £1 million or, on condition that he first releases or discharges the debt, for £2 million. **The law respects the freedom of the parties to a transaction to frame and formulate their agreement as they wish and to suit their own legitimate interests** (taxation and otherwise) and, so long as the form adopted is genuine, and not a sham, honest, and not a fraud on someone else, and does not contravene some established principle of public policy, the court will give effect to the method adopted. But as a corollary to this freedom, where the parties have chosen one method, it is not open to them to invite the court to treat as adopted some other method because it is more advantageous to them, because it leads to the same practical and economic result and because it is the more obvious and sensible method to have adopted. If the question is raised what method has been adopted and the transaction is in writing, the answer must be found in the true construction of the document or documents read in the light of all the relevant circumstances."

[79] CEP provided a loan to GCG to disburse two debt obligations of GCG. It is logical for said disbursement as Applicant was abandoning the project due to delay and other factors. From all the debt obligations of GCG, Applicant had over $10 million which was about 75% of total debts of GCG. The purchase price of the shares was around $15 million. This was a future obligation of GCG to creditors including

Applicant.

[80] This debt obligation of GCG is transferred from Applicant and Bank of South Pacific to GCG through a loan provided by GCG. A loan obligation of GCG can be paid at the time of transfer of ownership of GCG or subsequently depending on the terms of the said loan. Applicant's directors are abandoning the project hence it is not unusual to exit from loans to GCG. If not creditors could request loan from GCG in future. So the loan obligation of GCG to Applicant and Bank of South Pacific is transferred to CEP for $12,500,000. In the circumstances consideration is only $23,500,000.

[81] The Respondent also relied on CGT Return of Applicant which stated the consideration for the equity in shares of GCG is $36,000,000.

[82] There fact that Applicant had declared so is not conclusive on this matter as determination is to be made in terms of Section 86(2) of Income Tax Act 2015.

Sale of Shares- Appliant's conduct of a Trade (Trade Issue)

[83] Applicant and Respondent had raise four issues and those issues were mentioned in this judgment. In my mind there are two main issues and one is regarding the determination of consideration for the share transfer in terms of SPA, which I have already dealt, and the next issue is summarized as "Trade Issue" for ease of reference.

[84] Respondent states that the disposal of the shares in GCG by the Applicant was subjected to Income Tax in terms of Section 17(1) (c) (i) of the Income Tax Act of 2015 and not subject to Capital Gains Tax.

[85] This classification can be determined in application of facts and circumstances to determine share transfer of GCG by Applicant. Does the sale of GCG amounts to 'trade' in terms of Section 17(1) of Income Tax Act 2015? (Trade Issue)

[86] Section 17 (1) (c) (i) of the Income Tax Act 2015 is stated as follows:

> 17(1) The following are included in the business income of a person conducting a business

(c)the net gain from-

(i)the conduct of a venture or concern in the nature of a **trade, commerce**, agriculture or manufacture;(emphasis added)

[87] There is no definition of what 'trade' or 'commerce' in Income Tax Act of 2015. This is so in many countries and the determination of such activity as trade or commerce is left to common law to develop.

[88] In most tax statutes ''Trade' is a term which determination that is mixed law and fact. In *Ransom (Inspector of Taxes) v Higgs, Motley (Inspector of Taxes) v Higgs's Settlement Trustees, Dickinson (Inspector of Taxes) v Downes, Grant (Inspector of Taxes) v Downes's Settlement Trustees, Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)* [1974] 3 All ER 949 at 964, [1974] 1 WLR 1594 at 1610, referring to corresponding provisions in the Income Tax Act 1952 of UK for interpretation of word 'trade' held,

> 'We have rather to apply to the facts the legal concept of "trade" ... This may be called a concept of common law. Trade has for centuries been, and still is, part of the national way of life; everyone is supposed to know what "trade" means; so Parliament, which wrote it into the law of income tax in 1799, has wisely abstained from defining it and has left it to the courts to say what it does or does not include.'

[89] So it is important to see whether 'Objection Decision' applied the facts available and arrived at the conclusion.

[90] According to 'Objection Decision' dated 18.2.2022 sole consideration for the determination in terms of Section 17(1)(c) (i) of the Income Tax Act 2015, stated

> "As per LCPL's Memorandum of Association (MOA. (now, Articles of Association). Under Objects 1 and 6, we note that LGCPL, is in the business of acquiring and selling shares, in addition to being, a real estate developer therefore LGCPL is also in the business of buying and selling shares as set out in its MOA (now AOA)".

[91] This is the only reason stated in the 'Objection Decision' that is reviewed in this action. This is insufficient consideration of relevant facts to decide on "Trade Issue" in terms of Law.

[92] It may be a tall order for Respondent when constrained by statutory limitations for such decision, and volume of objections and also time constraint in the statute. Before 'objection Decision' Applicant had correspondence with Respondents audit personnel and provided documentary evidence stated before.

[93] Respondent states that the sale and disposal of shares by the Applicant is a 'trade'. According to submission of Respondent the sale of shares in GCG is liable for Income Tax on the basis of two grounds and they are;

a. Memorandum of Association (MOA) of Applicant. One of the objective of Applicant is to sell shares.
b. Engagement of Estate Agent for the sale of the Land.

[94] This is stated in the letter of Respondent dated 28.4.2021 prior to in 'Objection Decision'. So at the time of 'Objection Decision' of 18.2.2022 this letter as well as relevant facts such as Master Plan of Damodar Crown project , SPA , Offer of CEP for the Land, Letter from EY dated 9.8.2021, Letter of Applicant dated 1.102021)etc. were collated by Respondent. (These are annexed to Respondent's Statement).

[95] At the outset word 'trade' cannot be determined either from MOA or engagement of a professional agent on behalf of the entity for the disposal of the asset, including shares.

[96] In some cases such as shares or treasury bonds that are publicly traded, there may be mandatory requirement to engage an agent such as stock broker or primary dealer for sale or purchase of such assets due to regulatory or other requirements. So, the fact of engagement of an agent cannot determine "Trade Issue", even when there is no such mandatory requirement for an agent. Using such an agent may be to maximize profit as well as lack of expertise with principal, in such sales that require special statutory and or regulatory compliance.

[97] So engagement of such an agent for sale also shows lack of

expertise with Applicant for such activity, which can also show as outsourcing a trade activity or disposal of capital asset which is not a trade activity. So in my mind this fact is not a good indicator for determination of “Trade Issue”.

[98] Even without such mandatory requirement for a special agent, it is common to engage estate agents to dispose real estate by persons who are not engaged in ‘trade’ in terms of Income Tax Act 2015.

[99] Any owner of a capital asset seeks higher price in the sale. That does not necessarily mean the sale through stock broker, or engagement of estate agent for sale of an asset , is ‘always’ and indication of ‘trade’ in terms of Income Tax Act 2015.

[100] Similarly having an objective for share trade in MOA, by itself would not be conclusive proof of a share transfer of such entity, without considering circumstances of the activity.

[101] If Applicant had no such objective to deal in shares, it will only be restricted even to purchase of an legal entity such as GCG and will be not be able to sell it. Without such an objective, such an activity can be considered as *ultra vires*. So inclusion of object to sell shares only allows legal entiry to conduct such activity legally without being declared *null and void*. So in my mind MOA cannot determine the “Trade Issue”.

[102] In the affidavit of Tevita Tuiloa, Principal Auditor of Respondent, in his affidavit filed on 7.12.2022 further admitted that Applicant provided SPA, Title to the Land, Master Plan for the Damodar Crown Project.’ Respondent had also requested further documents such as valuation of the Land, Copy of Board Meeting of Applicant where ‘options on the development and financing scenarios for the Damodar Crown Project’, EOI of potential investors.

[103] Word ‘trading’ cannot be determined by looking in to MOA and or engagement of professional agent such as property agent or stock broker. The issue cannot be simplified, in order to adopt the path of least resistance. The ‘trade’ issue is multifaceted and cannot find easy ‘fix’ by looking at MOA and or sale through a professional in order to gain higher

price. It is a multifaceted issue and needs to consider all the available facts before decision is taken.

[104] In *Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners* [1980] 2 All ER 798 at 801(Per Lord Wilberforce)

> ”Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed.”

[105] Applicant had purchased GCG for integrated development project Damodar Crown, and this evidence was produced to Respondent according to the affidavits of Respondent as stated earlier. So this evidence of ‘Master Plan” of Damodar Crown should have been considered by Respondent

[106] There is also the five year period of time GCG was held by Applicant and substantial investment compared with the purchase price (approximately 16 million purchase price and around $14 million investment through loans to GCG. From that about $10 million provided by Applicant, and the rest through a Bank and Finance Institution. All such investment were for development of the Land for ten year Master Plan.

[107] It was also evidenced that these work were incomplete at the time of offer indicating significant delay in ten year development plan of “Damodar Crown” and sunk capital cost of GCG for the said project was becoming high debt burden for GCG. Hence the reason for sale can be deduced from facts.

[108] Another factor for consideration in “Trade Issue” was that there were no evidence of Applicant to sell GCG and or the Land prior to this sale for more than five years and implementation of ten year Master Plan for Damodar Crown. All these facts were not considered in “Objection

Decision", but were relevant.

[109] So Applicant had no intention of sale of GCG at the time of purchase of GCG or there after till it became over burden with debt over $12 million, even without initial approval from relevant local authorities such as City Council and Town and Country Planning. This needs to be considered with total price paid for the purchase of GCG.

[110] So the 'intention' existed at the time of the acquisition of the asset' was not to sell even after development at a profit but for an implementation of ten year long Master Plan and hold it while generating income through rentals .Applicant had not engaged in such activity of trade in shares or entities with real estate or property sales from the evidence before Respondent. So there was no evidence of change of intention in acquisition of GCG. So there is no evidence of 'trade' of GCG by Applicant.

[111] There is no evidence that Respondent had considered these facts either in its letter of 28.4.2021 or in Objection Decision of 28.2.2022.

[112] In *Ransom (Inspector of Taxes) v Higgs, Motley (Inspector of Taxes) v Higgs's Settlement Trustees, Dickinson (Inspector of Taxes) v Downes, Grant (Inspector of Taxes)* v Downes's Settlement Trustees, *Kilmorie (Aldridge) Ltd v Dickinson* (Inspector of Taxes) [1974] 3 All ER 949 at p 965 Lord Wilberforce further held,

> 'Trade is infinitely varied; so we often find applied to it the cliché that its categories are not closed. Of course they are not; but this does not mean that the concept of trade is without limits so that any activity which yields an advantage, however indirect, can be brought within the net of tax.....
>
> Trade' cannot be precisely defined, but certain characteristics can be identified which trade normally has. Equally some indicia can be found which prevent a profit from being regarded as the profit of a trade. Sometimes the question whether an activity is to be found to be a trade becomes a matter of degree, of frequency, of organization, even of intention, and in such cases it is for the fact

> finding body to decide on the evidence whether a line is passed. The present is not such a case: it involves the question as one of recognition whether the characteristics of trade are sufficiently present. I do not think that we need here to get enmeshed in the intricacies—I am tempted to say sophistries—of primary or secondary facts or inferences. We are clearly in the realm of principle and of law.

[113] So what is ‘trade’ or ‘commerce’ means for Income Tax purpose of a Tax Payer, cannot be determined with a tunneled view. It is an issue that required deliberation on relevant facts available to Respondent at the time of ‘Objection Decision’. Section 16(5) of Tax Administration Act 2009 empowers Respondent’s CEO to seek relevant facts though additional information from Tax Payer.

[114] Applicant in this case had relevant information such as

a. SPA
b. Certificate of Title for the Land.
c. Master Plan for Damodar Crown Project.
d. Offer of CEP
e. Letter in Reply to offer of CEP
f. Correspondence of EY and GCG to Respondent explaining facts and circumstances of the sale of GCG.
g. MOA of Applicant

[115] To my mind ‘trade’ or ‘commerce’ are words that can be interchanged depending on the nature of the transaction and means the same type of activity by a Tax Payer which is subjected to Income Tax. So when there is a dispute as to a transaction which was not conducted previously, as in the case before the court, all the facts provided by Applicant needs to be considered and holistic approach is desirable than taking facts in isolation , unless such facts can have only one inference, which is rare.

[116] Both MOA and engagement of estate agent can infer activities which are capital disposal of assets as well as trading activitis. So in my mind emphasis or the reasons given by Respondent in Objection Decision cannot determine the “Trade Issue” or ‘badges of trade’.

[117] In UK Court of Appeal decision of *Ingenious Games LLP and others v Revenue and Customs Commissioners* [2022] 2 All ER 338 at 359 held;

> "[52] A number of factors which experience has shown to be useful in performing this exercise have come to be known as the 'badges of trade'. They were conveniently set out by Sir Nicolas Browne-Wilkinson V-C in *Marson* (Inspector of Taxes) v Morton [1986] STC 463 at 470–471, [1986] 1 WLR 1343 at 1348–1349, but Sir Nicolas emphasized that the factors were 'in no sense a comprehensive list of all relevant matters', and after setting them out he said:
>
> > 'I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question—and for this purpose it is no bad thing to go back to the words of the statute—was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?'
> >
> > It should be noted, however, that these observations were made in the context of a 'single transaction' case, where the question was whether it constituted an adventure in the nature of trade.
> >
> > In *Eclipse*, the judgment of this court was delivered by Sir Terence Etherton C, who said at [112]:
> > 'As an ordinary word in the English language "trade" has or has had a variety of meanings or shades of meaning. **Its meaning in tax legislation is a matter of law**. Whether or not a particular activity is a trade, within the meaning of the tax legislation, depends on the evaluation of the activity by the tribunal of fact. These propositions can be broken down into the

> following components. It is a matter of law whether some particular factual characteristic is capable of being an indication of trading activity. It is a matter of law whether a particular activity is capable of constituting a trade. Whether or not the particular activity in question constitutes a trade depends upon an evaluation of all the facts relating to it against the background of the applicable legal principles. To that extent the conclusion is one of fact, or, more accurately, it is an inference of fact from the primary facts found by the fact-finding tribunal.'

Sir Terence Etherton C went on to say, at [113]:

> 'It follows that the conclusion of the tribunal of fact as to whether the activity is or is not a trade can only be successfully challenged as a matter of law if the tribunal made an error of principle or if the only reasonable conclusion on the primary facts found is inconsistent with the tribunal's conclusion. These propositions are well established in the case law ...'

[118] So the determination of Trade Issue is interpretation of relevant law and application of all the facts relating to share transfer of GCG. I do not reject two factors Respondent relied on its submissions, but these two factors cannot be considered in an water tight apartment in isolation as either or both of the said factors cannot determine “Trade Issue”.

[119] Respondent was aware of the long terms investment in Damodar Crown Project and the objective of Applicant was not to sell GCG and or the Land but to develop and retain the ‘Damodar Crown’ Project in order to generate income in the long term. Applicant had prepared “Master Plan” for such investment in ‘Damodar Crown Project’. Applicant had already successfully completed similar project ‘Damodar City’ and this was not for sale either in part or in full, but for revenue generation from rentals of the developed premises.

[120] Both ‘Damodar City’ and proposed ‘Damodar Crown’ are situated on Grantham Road and synergy from the two projects for Applicant would have been a vital factor for retaining GCG or the Land than for sale, in the long term.

So purchase of GCG and retaining it and also substantially investing on it according to the 'Master Plan' shows Applicant had the intention of retaining GCG as a Capital Asset than sale of it. A capital asset can be sold with profit and this does not change the activity to form a 'trade'.

[121] There were no evidence of Applicant involved in any sale of shares and or legal entities and or sale of land in line with its property development or sale objective. It should be borne in mind an entity which manages and develops real estate may not involve in 'trade' of sale of such assets and limit its activities to manage and maintain such property for long term. This may depend on the business model of an entity and it can be determined from its previous conduct, such determination cannot be made by looking at MOA.

[122] In this instance there is no evidence of Applicant involved in such trading activity in order to generate revenue or profit through sale of shares, or real estate as a property manager and developer Applicant had purchased GCG with the intention of long term development in terms of 'Master Plan' of 'Damodar Crown' for ten year and to rent the premises in order to generate income for Applicant's investment.

[123] Even a one transaction can be considered as 'trade' depending on the circumstances of the case. Both parties to this action relied in the decision of *Californian Copper Syndicate v Harris* (1904) 5 TC 159 .It was a case where the principle that for a gain to be taxable as part of the operation of a business or in carrying out a profit-making scheme or venture, something more than the simple realization of an investment for a gain is required. In this case it was proved that purchaser never intended to do mining but to resell it at a profit.

[124] The facts relating purchase of GCG and the intention of Applicant till it decided to part with it is in sharp contrast with facts of above *Californian Copper Syndicate v Harris* (1904) 5 TC 159 which intended long term investment for 'Damodar Crown Project' till the sale of GCG. There was no evidence to support change of its intention for sale of GCG a venture of 'trade'.

[125] The *Californian Copper Syndicate* (supra) case was referred to in *London Australia Investment Co Ltd v FC* of T ATC 4398. The principal purpose of the company in that case was to invest in Australian securities, usually where there was growth potential and

a dividend yield for long term, but it was involved in buying and selling shares. In his judgment Gibbs J observed that for the sale of shares to be taxable it must be an act done in what is truly the carrying on of a business. He found it was an integral part of the taxpayer's business to deal in shares as a normal operation in the course of carrying on its business.

[126] It is illogical to think a company that is involved in long term investment in shares will not sell its shares at all. Capital assets may be sold due to financial constrains or strategic decision making or for down size etc. This may generate Capital Gains but cannot be considered as 'trade'.

[127] Due to various factors, a long term investor in shares can sell such shares in order to purchase shares that can maximize the value of its portfolio. Similarly Applicant had taken a business decision to shelve its capital asset, shares in GCG for factors stated in the affidavit of its Financial Controller. These factors are subjective to Applicant.

[128] Since the objective of any business entity is to maximize profits, it could adopt best method to dispose its capital asset the shares in GCG or the Land. So it had engaged a real estate agent initially for the sale of the Land, on which Damodar Crown Project was proposed. This cannot determine that the sale of GCG was a trade for the purpose of Income Tax Act 2015.

[129] *National Distributors Ltd v CIR* (1987) 9 NZTC 6,135 is a New Zealand case that accepted the principles applied in the *London Australia* case. Quilliam J, set out the factors that ought to be considered in determining whether investment activity amounts to the carrying on of a business of buying and selling shares. Those factors are:

a. Whether the share purchase and sale has taken place as an integral part if the investment business of the taxpayer, so as to amount to a dealing in shares.
b. Whether there has been a regular or continuous monitoring of the share portfolio by the taxpayer.
c. Whether there was any system according to which the shares were sold.
d. Whether the sales were frequent and part of the taxpayer's normal operations in course of making profits.

e. Whether the sales and purchases were upon a large scale.

[130] In that case the Court concluded the switching of the share investments was not the carrying on of a business because of the haphazard manner in which shares were bought and sold. Applicant no intention of sale of GCG or the Land due to ten year massive development Master Plan of Damodar Crown Project. Applicant had not only lent substantial amount over five years, without commencement of construction.

[131] In *Danmark Pty Ltd v FC* of T (1944) 7 ATD 333, the taxpayer company's directors had originally resolved that the company's principal business was the buying and selling of shares as trading stock. Later they resolved that the shares were held as investments. So this is a case where 'intention' has changed.

[132] Though initial intention may be relevant it is not determinant of "Trade Issue" and all the facts should be considered holistic manner.

[133] In *Denmark* (supra) The Court held that the taxpayers was not engaged in the business of buying and selling shares for profit having regard to the length of time of shares were held (not a short period) and the circumstances that gave rise to the sales (which was to reduce its bank overdraft at the time). The requirement to consider the circumstances and reasons for the sale is particularly relevant in our case.

[134] In *Beautiland Co Ltd v CIR (Hong Kong)* [1991] BTC 262, where the taxpayer company was formed as a joint venture company between partners to acquire a shareholding in a company that owned a valuable land. The plan of the joint venture partners was to develop the land for sale. However, after just five months the shares in the land-owing company were sold for a considerable profit. The Court held the acquisition and disposal of the shares in the company was not "in the nature of trade" since the shares held by the taxpayer constituted its capital structure, the broad purpose of the joint venture being to bring about the profitable development of land, not to buy and sell shares.

[135] Court of Appeal in *Chottabhai Patel Holdings Ltd v Commissioner of Inland Revenue [ABU 1 of 2017]* under paragraph 3 of the judgment had considered MOA, but this is not the sole criterion for determination of "Trade Issue" as indicated in 'Objection Decision' of Respondent.

[136] The Respondent referred to the MOA of the Applicant, specifically to Objects 1 and 6 which are as follows: -

> *"The objects for which the company is established are:-*
>
> 1. To establish companies and associations for the prosecution or execution of undertakings, works, projects, or enterprises of any description, whether of a private or public character, in Fiji or elsewhere, **and to acquire, underwrite, and dispose of shares and interests in such companies or associations, or in any other company or associations, or in the undertakings thereof**
>
> 6. **To buy,** make advances on, **or sell** all descriptions of freehold, leasehold, or other properties, and all descriptions of produce or merchandise, and stocks, **shares,** bonds, mortgages, debentures, or obligations."
>
> *(emphasis added)*

[137] Both parties to this action, refers to the concluding paragraph of clause 3 of the MOA which states as follows: -

> "IT IS HEREBY DECLARED that the intention is that the objects specified in the preceding paragraphs shall be construed in the most liberal way and shall not be limited, restricted or characterized by reference to or inference from the terms of the first or any paragraph *.....but all of the objects and powers expressed in each paragraph of this clause shall except where otherwise expressed in such paragraph be capable of being pursued by the Company as independent main objects.." (emphasis added)*

[138] In my mind these objectives only provides legal basis for validity of a transaction and can be used to support a contention of Respondent only if there were other evidence to support "Trading Issue". As stated earlier engagement of

estate agent for the sale is not such evidence.

[139] Respondent stated that the Applicant was able to acquire the Land that was required for development of their Damodar Crown Project by way of buying shares in Company GCG in 2015. This is admitted by Applicant and the sole objective of the Applicant in the purchase of GCG was to retain it its portfolio as a capital asset and develop the land belonging to GCG according to a ten year Master Plan for Damodar Crown Project.

[140] In *Ransom (Inspector of Taxes) v Higgs, Motley (Inspector of Taxes) v Higgs's Settlement Trustees, Dickinson (Inspector of Taxes) v Downes, Grant (Inspector of Taxes) v Downes's Settlement Trustees, Kilmorie (Aldridge) Ltd v Dickinson (Inspector of Taxes)* [1974] 3 All ER 949 at 965 further discussed elements of trade such as primary requirements such as goods or services and having at least two parties and further held,(Wilberforce J)

> "Then there are elements or characteristics which prevent a trade being found, even though a profit has been made—the realisation of a capital asset, the isolated transaction (which may yet be a trade). In recent years a transaction, even one of property dealing, which amounts to no more than a planned raid on the revenue (see *FA & A B Ltd v Lupton*) has been held not to be by way of trade—a sophistication which I do not reject, but which must be carefully watched for illegitimate extension. Although these are general characteristics which one cannot state in terms of essential prerequisites, they are useful benchmarks, so when one is faced with a novel set of facts, as we are here, the best one can do is to apply them as tests in order to see how near to, or far from, the norm these facts are. I attach no importance to the fact that, if there was trade, there is a difficulty in knowing what to call it. Christening normally follows sometime after birth, and if Mr Higgs's activities were found to be trading activities, a description would soon be found. Are they trading activities?

[141] In the same case, *Ransom*(supra) Lord Morris of Borth-y-Gest said ([1974] 3 All ER 949 at 960, [1974] 1 WLR 1594

at 1606):

> 'In considering whether a person “carried on” a trade it seems to me to be essential to discover and to examine what exactly it was that the person did.'

[142] It is not in dispute that substantial investment through loans to GCG for development over five year period and preparation and or implementation of 10 year Master Plan for Damodar Crown Project in the Land belonging to GCG. There is no dispute as to these facts.

[143] So it is important to consider evidence of Applicant and facts stated in the affidavits with annexed documents as one or two facts alone cannot determine the “Trade Issue”. As stated previously MOA and or engagement of estate agent are not determinative on the said issue.

[144] Applicant through Dipakbhai B. Patel in his affidavit stated it was incorporated on 27.10.1997 and carried on business as investor and real estate manager and developer. He stated that for example Applicant had invested in Damodar City Complex at Grantham Road, Suva and purchase of GCG was for ‘for ‘mixed property development at site in Grantham Road, Suva. The development would take place over many years and involved significant civil, round and drainage works.

[145] He further stated, that financial model was that GCG ’would drive trading income via rent from tenancies that would be part of the development that could take 10 years to complete’. These facts were available to Respondent and no evidence before this court that such facts were given due consideration in the determination of “Trade Issue” by Respondent in the ‘Objection Decision’ under review in this action.

[146] It is clear that since 2015, Applicant was unable to complete major part of its project despite more than five years lapsed. According affidavit of Financial Controller of GCG major factor for sale of GCG, was pandemic and economic slump from that and both directors of CGC were approaching eighty years old and were unable to commit further on the proposed project. So the directors were seeking offers for sale of the Land on which the project was planned or sale of GCG. There was no need to produce

medical certificates to prove mental status of alleged ‘stress’ for them or their ages. What is relevant is Applicant had decided to sell its long term investment as it no longer desired to hold as long term capital asset of Applicant.

[147] Respondent stated that in buying the shares and disposing of shares in GCG, Applicant had ventured into the business of buying and selling shares thus fulfilling objects 1 and 6 of the Applicant's MOA which were quoted earlier in this judgment. This position cannot be accepted.

[148] There was no history of Applicant purchasing legal entities or shares and disposing them for a profit or otherwise. There is undisputed evidence that purchase of GCG was for long term investment in terms of ten year Master Plan for the development of the Land for rental income.

[149] Applicant’s position was that purchase of GCG was a long term investment and not for sale. This is proved through investment of over 10 million by Applicant through debts for the initial stage of the development of the Land. There were two other financial bodies that had provided an aggregate debt of less than four million over six year period. It is also evidenced that there were preliminary earth work such as drainage etc that required further institutional approvals such as City Council and Town and Country Planning. This shows despite infusion of over fourteen million in six years even the initial development of ground had not completed.

[150] So, decision to dispose such capital asset cannot be considered as a “trade” but a strategic disposal of capital asset and any Capital Gains can be assessed for Tax purposes.

[151] It is not in dispute that the main asset in GCG is the Land and Applicant had invested on it for more than six years in expectation of completing the project they planned and this had hit several snags including downturn in economy after pandemic. So Applicant had taken a decision to sell the Land or GCG.

[152] Though initial offer was for the Land parties had negotiated and entered in to sale of all the shares of GCG.

[153] According to Applicant, as in some instances there were number of unexpected obstacles that caused unplanned delays, including

the Covid-19 pandemic, financial pressures, and health issues for the directors. Applicant had decided it was not in a position to continue investing time and money into GCG and commercial decision was taken, to exit the capital investment.

[154] The Applicant's usual operations were to invest capital and expertise into business ventures to grow those businesses over time, ultimately holding them long-term to generate yields and capital growth. The shares were part of the capital structure of the Applicant not part of its income earning process. This can be deduced from financial statements, without additional evidence. The financial statements were not produced to Respondent and it had also not requested such information prior to this action.

[155] Applicant had proved through evidence that it had purchased GCG for a specific project and had also invested significant amount of over $ 10 million from its own loan to it for development and had also obtained a commercial loans from two entities including a Bank. These loans accrue interest and Applicant had decided to dispose GCG through sale of all its shares. There is no evidence of Applicant conducting sale of land or shares as a trade, though it could do so as real estate investor. An investor can either invest in long term investment of projects and derive income or develop land and sell at a higher price. There was no evidence that Applicant had engaged in the later category.

[156] In the case of *Californian Copper Syndicate v Harris* (1904) 5 TC 159 'Lord Traynor, in its judgment stated the following: -

> "My reading of the Appellant Company's Articles of Association, along with the other statements in the case satisfy me that the sale on which the advantage was gained in respect of which the Income Tax is said to be payable, was a proper trading transactions, one within the Company's power under their Articles and contemplated as well as authorised by their Articles."

[157] In the sale shares of GCG, Applicant has made a profit but this itself is not sufficient to answer the "Trade Issue" in favour of Respondent. As a natural person would endeavor to gain maximum profit from a sale of an asset, that itself would not be determinative to consider such sale as 'trade'. This can happen to natural person in most cases such as sale of vehicle or fixed asset such as house or land.

[158] Similarly a legal entity may also dispose capital assets due to various reasons. It may be strategic decision to shed some capital asset due to its low growth prospect in future in order to invest the same amount with higher growth prospect in long term. Long term investments need not be kept eternally by an entity and sale of such an asset for a profit does not change its character as evidenced from this case.

[159] Respondent in the written submission relied on High Court of Australia case of Federal Commissioner of *Taxation v Myer Emporium Ltd* [1987] 163 CLR 199(14.5.1987) paragraph 14 HCA where following passage is quoted in the submission in support of Respondent's contention

> "Generally speaking, however, it may be said that if the circumstances are such as to give rise to the inference that the taxpayer's intention or purpose in entering into the transaction was to make a profit or gain, the profit or gain will be income, notwithstanding that the transaction was extraordinary judged by reference to the ordinary course of the taxpayer's business. Nor does the fact that a profit or gain is made as the result of an isolated venture or a "one-off" transaction preclude it from being properly characterized as income (*Federal Commissioner of Taxation v. Whitfora's Beach Pty. Ltd*. (1982) 150 CLR 355, at pp 366-367 376)."

[160] In my mind this is not the ratio of said Australian High Court decision. In *Myer* (supra) involved assessments of income tax in relation to a transaction where the right to receive future interest payments under a loan made to a subsidiary was assigned three days later to a third party (i.e securitization). This is financial product that is available in certain advanced financial markets, and such transactions are not sale of capital asset. The assignment interest for a value is a 'trade' however isolated such transaction is performed. The use of such financial tool itself proves the transaction can be classified as 'trade', but this cannot be used to classify disposal of capital asset as 'trade'.

[161] *Myer* (supra) classified a financial transaction which was not a frequent occurrence. By its nature such transactions may not frequent but they are part of 'trade' despite being infrequent. So it is not an authority to classify whether disposal of a long term asset

such as shares of GCG can be classified as ‘trade’. It is not a case that decided distinction between sale of capital asset and ‘trade’ that generate income.

[162] *Myer* (supra)at page 213 stated,

> "It is one thing if the decision to sell an asset is taken after its acquisition, there having been no intention or purpose at the time of acquisition of acquiring for the purpose of profit-making by sale. Then, if the asset be not revenue asset on other ground, the profit made is capital because it proceeds from a mere realisation. But it is quite another thing if the decision to sell is taken by way of implementation of an intention or purpose, existing at the time of acquisition, of profit-making by sale, at least in the context of carrying on a business or carrying out a business operation or commercial transaction.”

[163] So again the paramount consideration given for disposal of an asset was the ‘intention’ of the taxpayer at the time of creation (in *Myer* (supra)) or purchase of it. This needs to determine from the facts and cannot be determined either from MOA or profit making objective such as engagement of an agent or from profit made out of such transaction.

[164] *Myer* (supra) in its head note clearly stated, at p200

> “Profits made on a realization or change of investments may be income if the investments were initially acquired as part of business with the intention or purpose that they should be realized subsequently to capture the profit arising from an increase in value. If the decision to sell asset is taken after the acquisition, there having been no intention or purpose at the time of acquision of acquiring for the popoe of profit making sale , the profit will be capital because it proceeds from a mere realization, unless the asset is a revenue asset for other reasons. But it is quite another thing if the decision to sell is taken by way of implementation of an intention or purpose of profit making by sale, existing at the time of acquision, at least in the context of carrying on a business or carrying out a business operation or commercial transaction.”

[165] So *Myer* (supra) cannot be misapplied to the facts to classify the sale of shares in GCG in terms of SPA as contended by Respondent. As stated earlier even single transaction can be classified as ‘trade’ depending on the circumstances but the

distinction between disposal of capital asset and 'trade' activity had not eroded over the time and it should not be considering long legacy of decided cases and being part of common law for the courts to develop depending on circumstances.

[166] Legislature had left interpretation of 'trade' to common law to allow due its flux nature due to human ingenuity over time and types of instruments available.

[167] So 'Trade Issue' needs careful consideration of all the facts that are available. Respondent contend that affidavit of financial controller relating to facts such as impact on Covid 19 on the project, plight of directors of GCG such as advanced age and being not able to commit fully, and status of 'Master Plan of Damodar Crown' project were not proved.

[168] The economic slump from Covid 19 pandemic is a global phenomenon that needs not proof and judicial notice can be taken and economic indicators are available publicly in Fiji.[2] Similarly details of directors of GCG is also available for Respondent to contradict if desired. Whether directors were stressed or not is irrelevant, what is relevant is that they had taken a decision not to proceed with 10 year 'Master Plan' of 'Damodar Crown' project after injecting more than $10 million to it for over five years. These facts are not in dispute and self-evident. One condition of the counter offer was also to complete drainage work on the land indicating initial stage of development of the ten year 'Master Plan' for the Land.

[169] Applicant had taken a decision to sell GCG, which was purchased with the intention of generation of income in the long term through ten year 'Master Plan'. In line of that substantial investment made by providing loan and also obtaining loan for development of GCG. This shows GCG was a capital asset of Applicant at the time of purchase as well as for more than five years out of planned ten year 'Master Plan' without any construction on the land, with only ongoing earthwork. So the disposal of GCG was a business decision of Applicant, but not 'trade' in terms of Section 17(1)(c) (i) of Income Tax Act 2015.

[170] Respondent said that the shares of GCG were sold with an intention of making profit as evidenced in paragraph 8 of the Affidavit of Mr. Patel. But 'Trade Issue' cannot be determined by the profit or maximizing price motive. Any disposal of

[2] https://www.parliament.gov.fj/wp-content/uploads/2022/03/Revised-2021-2022-Budget-Estimates.pdf (23.4.2025)

capital asset will be sold to the highest price irrespective of such a sale is 'trade' or not in terms of Section 17(1)(c)(i) of Income Tax Act 2015.

[171] It is clear from preceding paragraph of the affidavit of Mr. Patel who was the Chief Financial Officer of the Applicant and GCG that there were two options and they were sale of the Land only and sale of shares of GCG. It also evidenced that land sale required approvals from City Council as well and Town and Country Planning and also Director of Land's approval and this could delay the sale. So Applicant had decided to sell shares of GCG. So the intention of purchase of shares in GCG as well as sale of GCG was not a 'trade' but disposal of capital asset in the most pragmatic manner under the conditions at that time.

[172] When Capital Assets are disposed, they are not usual 'trade' of an entity hence options will be considered. This also shows despite having a profit motive, Applicant was dealing with a Capital asset which required evaluation of options with specific pros and cons in such transaction. This supports the share sale of GCG was not a 'trade' of Applicant but sale of capital asset.

[173] Applicant stated that its reason for the sale of shares was due to the following reasons: -

i. The development of the planned project was delayed.
ii. COVID 19 had a major impact on the project.
iii. The Directors of Applicant were more stressed and due to their advanced age, and health.

[174] Respondent contended that in terms of Section 21 (1) (b) of the Tax Administration Act of 2009, the Applicant has the burden of proof Applicant had provided affidavits and provided financial statements of Applicant as well as GCG.

[175] Respondent stated that there was no proof that the company was facing financial difficulties thus affecting the development of the planned project. There is no dispute that Applicant had lent more than $10 million and Bank of South Pacific had also provided a loan more than $1 million and GCG had total debt obligation over $12 million and still earth work was not completed in order to commence construction

in terms of Master Plan of Damodar Crown Project. These facts show the financial burden of GCG and also high debt servicing and delay in the project to generate income in long term.

[176] If the debt burden is not managed a company may be unable to pay its debt obligation in the long term. So the sale of it before reaching liquidation are options available to investor, and cannot be considered 'trade'.

[177] Respondent also state there were no evidence to show that COVID 19 had a major impact on their development of the planned project, but again economic slump due to pandemic is a global phenomenon and judicial notice can be taken on such fact.

CONCLUSION

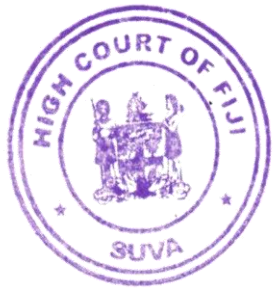
[178] Applicant and D. Damodar had sold 100% shares in GCG in terms of SPA for a consideration of $23,500,000. Applicant had purchased GCG for a long terms investment in order to generate income from rental of the 'Master Plan of Damodar Crown' project. For this Applicant had provided more than $10 million by way of loan and two other financial institutions had also invested less than $4 million over five years. No construction commenced and earth work was not completed despite long time period and heavy debt compared with the value of the Land. Due to slow progress and delay in Damodar Crown integrated development project, Applicant decided to sell its shareholding in GCG. From the facts it is proved on balance of probability that the intension of Applicant in purchase of GCG as well as exercise of option to sell GCG was not a 'trade' in terms of Section 17 (1) (c) (i) and (ii) of Income Tax Act 2015 . So the sale of GCG was not a 'Trade' of Applicant despite MOA containing an objective for sale of shares as stated in; 'Objection Decision' as sole reason. So the objection decision is set aside fully. Respondent is directed to assess tax liability of Applicant accordingly. Applicant's sale of shares in GCG is in terms of SPA is for consideration of $22,500,000 and this sale is not a 'trade'.

FINAL ORDER;

a. Respondent's 'Objection Decision' dated 18.2.2022 is set aside fully.

b. Respondent to assess Applicant's tax liability in term of the decision and also to refund the excess.

c. Cost of this action summarily assessed at 4,000 to be paid in 21 days.



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Deepthi Amaratunga

Judge

At Suva this 23rd April, 2025.

Solicitors

Kapadia Lawyers

Fiji Revenue Customs Services