

**IN THE STATUTORY TRIBUNAL, FIJI ISLANDS**  
**SITTING AS THE TAX TRIBUNAL**

**Actions No 1 and 2 of 2009**

**BETWEEN:**            **A UNITED STATES BUSINESSMAN**

**Applicant**

**AND:**                 **FIJI REVENUE & CUSTOMS AUTHORITY**

**Respondent**

**Counsel:**            **Mr A Khan, Khan & Company Barristers and Solicitors**  
**Ms F Gavidi, FRCA Legal Unit for the Respondent**

**Date of Hearing:**    **Monday 10 December 2013**

**Date of Decision:** **Thursday 16 May 2013**

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**DECISION**

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**Section 11 INCOME TAX ACT (Cap 201); Sale and Disposition of Property – Section 11(a) Purpose of Acquisition**

**Background**

1. The Applicant Taxpayer is a former Fijian Citizen, now residing in the United States of America. According to a Statement provided by the Taxpayer to the Tribunal dated 3 February 2013, the Taxpayer worked as a truck driver while living in Fiji.
2. On 19 October 2005, while still residing in Fiji, the Taxpayer purchased freehold land on Denarau Island, Nadi for FJD \$400,000.00

3. According to the submissions of Counsel for the Taxpayer, the Applicant proceeded to construct a residential house on the land from which he ultimately borrowed \$796,000.00 to do so.
4. The submissions state, that after the Taxpayer completed construction of the house, it was vacant for 18 months.<sup>1</sup>
5. On 24 December 2007, the Applicant entered into a sales and purchase agreement and sold the property in the amount of FJD \$1,225,000.00
6. The Taxpayer was ultimately assessed as having earned \$78,600.00 as income from the property, of which the amount of \$23,216.00 was calculated as tax payable.
7. It is against that Notice of Assessment dated 27 June 2008 and the subsequent Objection Decision dated 19 February 2008, that this Application for Review comes about.

#### **Grounds of Appeal By the Applicant**

8. There are three grounds of appeal that can be drawn out of the Notices of Appeal filed by the Taxpayer.<sup>2</sup>:
  - (i) It is not lawful to levy taxation on a personal property transaction when the Appellant was not in the business of dealing in real property, and it is not lawful to levy taxation on a real property transaction on the basis of alleged suspicion that the Appellant was in the business of dealing in real property.

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<sup>1</sup> Appellant's Statement of Response to Statement By The Respondent Dated 16<sup>th</sup> November 2012 and Submissions. ( 22 April 2013) at Paragraph 4

<sup>2</sup> It is probably worthwhile at this point indicating that in fact 2 separate Notices of Appeal were lodged with the High Court Registry, the first apparently one to ensure that the time requirements for appeal were met, the second, so as to expand on the substance of the first. .

- (ii) The Appellant acquired the property for the purpose of it being his holiday and retirement home ie for himself, his wife and family. It was not acquired for the purposes of selling or otherwise disposing of the ownership of it. The Appellant sold the property due to the political coup of 2006 in the country and the circumstances prevailing thereof as a result of that military coup.
  - (iii) The sale of the subject property did not involve the carrying on or carrying out of any undertaking or scheme as envisaged by s11(a) of the Act. The sale was not an operation (of) a business undertaking or scheme of any kind whatsoever.
9. The application is heard in accordance with the relevant provisions of the *Tax Administration Decree 2009* and the *Magistrates Court (Amendment) Decree 2011*.

**The Income Tax Act (Cap 201)**

10. The Income Tax Act (Cap 201) and the definition of ‘total income’ and ‘income’ from its earliest stages, was cast widely and for apparently deliberate reason.
11. In *Company B v Fiji Revenue & Customs Authority* [2011] FJTT 1; *Taxpayer S v Fiji Revenue & Customs Authority* [2012] FJTT 18; and *A Property Management and Investment Company v Fiji Revenue and Customs Authority* [2013] FJTT 3), the historical developments impacting on the existing Section 11 of the Act, were traced.
12. Central to those analyses was the fact that the clarifying examples that make up Section 11(a) of the current Act, were not in fact introduced into the law for 38 years. That is, that for a good deal of time the general provision of Section 11 was regarded as robust enough and wide enough to encapsulate a wide range of income sources.
13. As such and as had been said on many occasions, the starting point for any analysis of Section 11 of the Income Tax Act, is at the commencement of the provision where it sets out as follows:

*Definition of total income*

**11. For the purpose of this Act, —total income means the aggregate of all sources of income including the annual net profit or gain or gratuity, whether ascertained and capable of computation as being wages, salary or other fixed amount, or unascertained as being fees or emoluments or as being profits from a trade or commercial or financial or other business or calling or otherwise howsoever, directly or indirectly accrued to or derived by a person from any office or employment or from any profession or calling or from any trade, manufacture or business or otherwise howsoever, as the case may be, including the estimated annual value of any quarters or board or residence or of any other allowance or benefit provided by his employer or granted in respect of employment whether in money or otherwise, and shall include the interest, dividends or profits directly or indirectly accrued or derived from money at interest upon any security or without security or from stock or from any other investment, and whether such gains or profits are divided or distributed or not, and also the annual profit or gain from any other source including the income from, but not the value of, property acquired by gift, bequest, devise or descent, and including the income from, but not the proceeds of, life insurance policies paid up upon the death of the person insured, or payments made or credited to the insured on life insurance, endowment or annuity contracts upon the maturity of the term mentioned in the contract:**

14. Thereafter, Section 11(a) becomes useful, insofar as it then provides guidance as to what is intended to be canvassed and included within the scope of the general provision. Section 11(a) reads:

***Provided that, without in any way affecting the generality of this section, total income, for the purpose of this Act, shall include .....***

***(a) any profit or gain accrued or derived from the sale or other disposition of any real or personal property or any interest therein, if the business of the taxpayer comprises dealing in such property, or if the property was acquired***

*for the purpose of selling or otherwise disposing of the ownership of it, and any profit or gain derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit; but nevertheless, the profit or gain derived from a transaction of purchase and sale which does not form part of a series of transactions and which is not in itself in the nature of trade or business shall be excluded;*

15. In *Taxpayer N* and in related cases that ultimately deal with the disposition of property, the Tribunal has concluded that the governing principles that shape this question are set out within the decision in *Californian Copper Syndicate v Harris*, where Lord Justice Clerk formulated the test:

*where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than (s)he originally acquired it at, the enhanced price is not profit in the sense of ...assessable to income tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done what is truly the carrying on or carrying out of a business..."*

16. The Tribunal stated in *Taxpayer N*,

*That is the first question that needs to be considered, was the act done by the taxpayer realised through the carrying on or carrying out of a business?.....*

*In Hope v Bathurst City Council, the High Court of Australia observed that the expression "carrying on a business", implies the repetition of acts and activities which possess something of a permanent character.*

*In Ferguson v Federal Commissioner of Taxation, a Full Court of the Federal Court of Australia were of the view, that there are many elements to be considered when looking at this question. These include, the nature of the activities, particularly whether they have the purpose of profit making; repetition and regularity of activities, or even the commencement of carrying on a business and whether there is an organization of activities in a businesslike manner.*

*Further the court held that "the fact that concurrently with the activities in question, the taxpayer carries on the practice of a profession or another business, does not preclude a finding that his additional activities constitute the carrying on of a business."* [\[10\]](#)

*As the High Court of Australia determined in Martin v Federal Commissioner of Taxation, whether a person is carrying out a business is simply a question of the right conclusion to draw from the whole of the evidence.*

*Further within Fergusons's case, the Federal Court found, that a*

*person may conduct a business, albeit of a limited nature, the activities of which business are preparatory to or in preparation for the conduct of another business on a larger scale. The question is whether the activities at an earlier stage, standing alone, constitute a business.*<sup>3</sup>

### **The Case of the Taxpayer**

17. In this case, Counsel for the Taxpayer was content to have the matter dealt with, essentially by way of submissions of the parties.
18. The best evidence of the Taxpayer in relation to his intentions in relation to the purchase and development of the property, was provided to the Tribunal by Mr Khan in the form of a single page undated letter from the Taxpayer<sup>4</sup> and a further Statement provided by the Taxpayer dated 3 February 2013, that was unsworn and because of the position adopted by Counsel in presenting its case, not subject to any interrogation before the Tribunal by way of cross –examination.
19. The submissions of Counsel were that the main intention of purchasing the property was for the Taxpayer to build a holiday home for his children. According to Counsel, his client had wanted to return to Fiji. That he had been the owner of a trucking business, though sold it all in 2006 as a result of the military coup.
20. Ms Gavidi for the Respondent had indicated that the proceeds from sale, were first identified by the Authority when the Taxpayer had sought a tax clearance.

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<sup>3</sup> See paragraphs [29] to [35]

<sup>4</sup> See Exhibit A1.

21. Counsel argued that the Taxpayer continued to spend money on improvements to the property after the coup, indicating that there were other motives afoot.
22. The Respondent's case is that given the short period of time in which the property had been held, that the presumption should be drawn that it was bought for disposition<sup>5</sup> and relies on the cases of *Commissioner of Inland Revenue v National Distributors*<sup>6</sup> and *Williams v Commissioner of Inland Revenue*<sup>7</sup> as support for the law that:

*"Unless the taxpayer could show that the main or dominant purpose which led him or her to acquire the property was not to sell or otherwise dispose of it, then the profits or gains will be taxable"*

23. In essence that is as simple as the case really is.
24. The only real conundrum is whether, one needs to clarify the activity of the taxpayer as "the carrying on or carrying out of a business..." for the purposes of *California Copper* or whether it needs to be assessed against the framework that is Section 11(a) or both.
25. In *Taxpayer A* the framework of Section 11(a), was broken down in this way:

*The first clarifying example (or limb) of Section 11(a) is as follows:*

*Total income shall include any profit or gain accrued or derived from the sale or other disposition of any real or personal property or any interest therein, if:*

- *The business of the taxpayer comprises dealing in such property;*<sup>8</sup> or
- *If the property was acquired for the purpose of selling or otherwise disposing of the ownership of it*<sup>9</sup>.

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<sup>5</sup> See *Gauci v Massi v Federal Commissioner of Taxation* [1975] HCA 54

<sup>6</sup> [1989] 11 NZTC 6346.

<sup>7</sup> [2008] FJCOR 1

<sup>8</sup> The first limb referred to in the case of *Commissioner of Inland Revenue v Pacific Mercantile* [1990] FJCA 18 .

<sup>9</sup> The second limb in *Pacific Mercantile*.

*The second clarifying example in Section 11(a) is as follows:*

*Total income shall include any profit or gain derived from the carrying on or carrying out of an undertaking or scheme entered into or devised for the purpose of making a profit.<sup>10</sup>*

26. It may be the case that based on the facts before the Tribunal, that attempting to analyse the venture against a framework of whether or not the Taxpayer was engaged in some form of business is somewhat unnecessary, as this was only a single transaction and it may be a category of case that was not otherwise envisaged by the Privy Council in *McClelland v Federal Commissioner of Taxation*<sup>11</sup>. Though having said that, I am not prepared to reach that conclusion with the little amount of information before me.<sup>12</sup> What I can say, is that what has been traditionally referred to as the “second limb” of Section 11(a), that is

*“if the property was acquired for the purpose of selling or otherwise disposing of the ownership of it”,*

appears to be a fairly significant obstacle for the Applicant in these proceedings.

### **Overall Conclusions of the Tribunal**

27. In cases of this type, the onus rests on the Taxpayer to make out its case.
28. In *Gauci’s* case, Mason J cited the case of *Pascoe v. Commissioner of Taxation*<sup>13</sup>, where his Honour Fullagar stated:

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<sup>10</sup> The third limb in *Pacific Mercantile*.

<sup>11</sup> (1970) [120 CLR 487](#) at 502

<sup>12</sup> As identified within *Taxpayer N*, the case of *Ferguson* appears to cast the notion of business quite widely in any event.

<sup>13</sup> (1956) 30 ALJ 402, at p 404



*it is "broadly true to say that, when a (person) invests money in the purchase of any kind of property, it will generally be either with a view to holding it and deriving income from it, or with a view to realising sooner or later an enhanced capital value ... Evidence which tends to exclude one of the two contrasted 'uses' as the use intended will generally, I think, tend to support an inference that the other use was intended"*

29. Unfortunately for the Taxpayer the lack of evidence before the Tribunal makes it very difficult to take a view other than the profits arising from the disposition of sale, would be amenable to income tax law. The short time frame between acquisition and disposition is certainly one consideration. The lack of any solid evidence to support the purpose of the Taxpayer is another.
30. Mr Khan in his submissions advised the Tribunal that the Taxpayer acquired citizenship in the United States of America on 28 April 2009.
31. As mentioned earlier, within the *Appellant's Further Documents* filed on 22 April 2013, is the Statement of the Appellant dated 3 February 2013, in which it is said inter alia:

*That my family and I are now used to first world living standards and therefore Denarau Island was an appropriate choice for us to live there, This decision was not based on any attraction for real estate speculation whatsoever.*

*That as I did not have any real property in Fiji which I could accommodate our extended families who wished to visit Fiji, it was another reason why I bought the land and constructed a house in Denarau, Nad Fiji*

....

*That after I completed construction of the house it was unoccupied for about eighteen months.*

*That after the coup of 2006, my family members and I felt fearful to come to Fiji and feared that the property would get vandalized or even burnt down which is a real possibility during the coup and subsequent events thereafter.*

*That I had acquired the land before the coup and had to continue building on it as I had taken a loan from Westpac Banking Corporation (WBC) and thus I was obligated to the bank to complete the building project and the construction of the amenities like the jetty, fencing and landscaping of the property as the whole property concept was part of the security for the Bank loan.*

32. According to the Respondent, the Applicant had taken out an Investment Property Loan with the bank.<sup>14</sup> The property was constructed and lay idle for 18 months.
33. The reported military coup of December 2006 referred to within the Taxpayer's statement, was long over by the time of the sale of the property in December 2007.
34. The Taxpayer claimed to be in fear of his property being burnt to the ground, but at the same time his Counsel acknowledges further improvements took place on that property after that time.
35. My impression of all the material before me, is that the Taxpayer sought to acquire an investment property in Fiji. He showed no intention of using the property as a family residence and holiday home and there is no evidence of the property being used at all for that purpose.
36. The Taxpayer purports to have selected the property location in Denarau as he had been accustomed to "first world living standards". Clearly by virtue of his own statement, he admits that as a United States citizen, his right of access into the country

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<sup>14</sup> Respondent's Preliminary Submissions at Paragraph 2.5

without permanent visas would be restricted. He had borrowed significantly on the property.

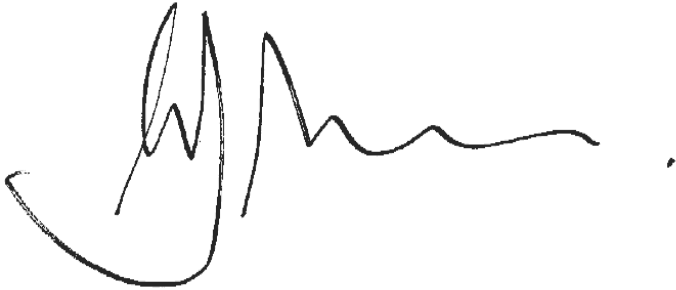
37. For whatever reason the Taxpayer wanted to dispose of the asset. He did so while making a profit and that profit as far as I can ascertain would be income for the purposes of the Income Tax Act (Cap 201).
38. There is nothing within any of the relevant Fijian case law that makes me inclined to think otherwise. All, I can do at the end of the day is to construe this law having regard to the purpose of the Act. As mention in *Taxpayer A*, the first Inland Revenue (Income Tax) Ordinance 1920 was described to the Legislative Council as:

*the fairest and most just form of taxation one can introduce, putting as it does the burden upon the people who can most afford it*

39. The definition of ‘total income’ was later referred to by Chief Justice Young in the case of *Commissioner of Inland Revenue v Morris Hedstrom Ltd.*<sup>[36]</sup> when he referred to the definition as being “.. of very comprehensive and sweeping nature”.
40. On balance my impression of the material before me, is that the Taxpayer was seeking to make a profit from his investment. There is no evidence that would lead me to another conclusion. A sales contract was entered into on the Taxpayer’s property on Christmas Eve 2007.
41. There is certainly no evidence before the Tribunal at all, that properties at Denarau were at risk of being burnt to the ground at this time. There was no evidence of any civil unrest anywhere in this precinct and even if there was, that would not necessarily alter the likelihood that the Taxpayer had acquired the property for profit maximising purposes. Such a conclusion, renders the profit as being income within the context of the v
42. The Applicant has not made out its case and I therefore am not prepared to accept the submissions of Counsel as satisfaction for otherwise departing from that view.

**DECISION**

- (i) The Application is dismissed.
- (ii) The Respondent is free to make application in relation to costs within 28 days.

A handwritten signature in black ink, appearing to read 'A. J. See', with a large, sweeping initial 'A' and a long, horizontal tail.

**Mr Andrew J See  
Resident Magistrate**