THE TAX TRIBUNAL (HIGH COURT)
AT SUVA, FIJI

HBT Review No. 03 of 2017

IN THE MATTER of a Review by **PRAKASH DAYAL** against Objection Decision of the CEO of Fiji Revenue and Customs Authority dated 3rd February 2017 against the Notice of Assessment of Income Tax for the year 2014.

AND

IN THE MATTER of a Review under Section 17 and 82 of the Tax Administration Decree 2009 (Decree 50 of 2009)

BETWEEN : PRAKASH DAYAL

APPLICANT

AND : CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS AUTHORITY

RESPONDENT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Mr. D. Sharma for the Applicant

Mr. S. Ravono for the Respondent

Dates of Hearing : 22, 23 and 24 October 2018

Date of Judgment : 11 December 2018

JUDGMENT

1. This is the Applicant's Application for Review seeking an Order that the Tax Decision made by the CEO of the Respondent (Revenue) on 3 February 2017 when he wholly disallowed the notice of objection dated 26 September 2016 submitted by the Applicant against the imposition of income tax pursuant to section 41(B) of the Income Tax Act (ITA) and Penalty pursuant to section 46 of the Tax Administration Act (TAA) be reconsidered and allowed.

2. The grounds of objection are that the Revenue erred in law and in fact in assessing that:
   (a) The monies paid by Dayals (Fiji) Artesian Waters Limited (Artesian) and Dayals Saw Millers Limited (Sawmillers) to the Applicant were dividends.

   (b) The Applicant had used the said monies to personally acquire the life insurance policies.

   (c) The Applicant intended to maximize his wealth from returns of the investment.

3. On 19 May 2017, the Tax Tribunal transferred the Application to the Tax Court for hearing.

4. The hearing commenced with Jay Prakash Dayal (PW1) giving evidence. He said the Applicant is his father who was a shareholder in Artesian and Sawmillers. In 2014 they sold Artesian's assets at $4.85M and the surplus after tax was $4M. Artesian owed Sawmillers $4.2M. LICI offered a 6% return on the investment and is tax free. PW1 said he was present at the Board of Directors' meetings (BOD). LICI said only individuals could invest and not companies. The Applicant said he was willing to be an investor. In 2014, the company did not declare dividends. Four resolutions were passed by the Company on 15 May 2014 and all the 3 shareholders signed. Funds were advanced to the Applicant. No dividends were paid for the year ended 31 December 2014. There was no profit in 2014. All the LICI policies were transferred back to Sawmillers. The Applicant did not keep the money for himself. None of the beneficiaries acquired any interest. The Revenue did not identify the basis for the penalties for making false statements. PW1 said their company will lend money to a shareholder but this $4M was not lent to the Applicant.

5. Under cross-examination, PW1 said he agreed the matter in dispute is only 2014. He said he signed on behalf of the authorized person. If the BOD minutes were available they would be reflected in the notes. There was no

specific resolutions to take out the investment. It would not be commercially sensible to put funds in the company's checking accounts. To maximize returns for the company they put the funds in LICI. They assigned the policy to the company. If the Applicant died the proceeds of the policy would have gone to the beneficiaries, his children. It was a bona fide investment.

6. In re-examination, PW1 said the 2014 financial report was prepared by Ernst Young (EY) on the documents supplied by them. The Company did not ask for security from the Applicant. He was not required to pay back within a specified period. He did not keep any monies nor use any of them. Sawmillers received all the money back. The reason for not putting in call deposit is to maximize returns. The beneficiaries are all children of the Applicant. He carried out the instructions in the resolution.

7. The next witness was Anil Kumar Amin (PW2), an insurance consultant with Life Insurance Corporation of India (LICI). He said he advised the Applicant and PW1 to put money in insurance policies. He suggested 5 year insurance policies. They agreed on $3M and the bonus on 5 years would be $800,000. The policies of LICI are tax free. Policies have to be in the name of individuals. The company could not be the beneficiary. There was provision to reassign the policy to the company and it receives the money.

8. Under cross-examination, PW2 said the source of the fund was to come from an individual account.

9. With that the Applicant closed his case and Revenue opened theirs.

10. Revenue's first witness was Navitalai Biukoto (DW1), principal auditor in Revenue. The letter from Revenue relates to unidentified deposits. The life assured for 6 policies was the Applicant and for the other 6 policies was his wife. The total of the 12 policies was $3,295,000. To get a policy of $275,000 they need to pay one single premium upfront of $250,466.80. The advance by Artesian to its director, the Applicant of $4,530,889 was with no agreement relating to this advance. On the same day, the portion was transferred to LICI. Revenue deemed these as dividends under S.41B of the ITA. This deals with advances to a director or a related person - S.8 ITA. The investment was done in 2014. There was no repayment to the company. The advance was not a bona fide investment by the company. The proceeds were transferred to the directors. In EY's response they were supposed to liquidate the company after receiving the proceeds and in 2016 there was still no liquidation taking place. The Revenue did not change its mind that it was not bona fide.

11. Under cross-examination DW1 said it was his duty to consider all the evidence provided by the taxpayer and to act in good faith. The Applicant is signatory to the company account. Revenue knows the money was transferred to LICI on the same day it was paid into the Applicant's account. DW1 did not see any resolution at that time. He never received any documents from PW1. He had gone through the 2014 accounts and it was an advance to the Applicant. There must be a return to the company but there was no return. It was a personal investment but not the company's.

12. In re-examination DW1 said he is an auditor not an investigator. The issue is dividend and not normal dividend.

13. The next witness was Ms Laisa Bainimarama (DW2), principal auditor with the objection and review team. Its role is to handle objections and review objection applications. The review here was for the end of 2014. She said penalties are imposed specifically on tax shortfalls where there are false or misleading statements. Revenue has the jurisdiction to treat substance over form and to treat something as dividend. This is a concept used in tax jurisdictions. $4M was recorded as an advance and it was invested in an insurance product by the Applicant and his wife for the benefit of their children. No additional information was available to make it to be seen as an advance. Other than in financial statements there was no other information about these large amounts.

14. During cross examination, DW2 said Artesian did not declare a dividend. She agreed it was an objection to the amended assessment and to the penalty. The Applicant is saying there is no basis for the penalty. In 2014 the false information is declaring an advance when it was a dividend. The penalty was for understatement of income.

15. In re-examination DW2 said a deemed dividend is statutory authority given to tax jurisdictions for amounts paid or credited for the benefit or on behalf of shareholders of a company or their associated persons. This is where Revenue will deem such amounts as dividend income. DW2 found the absence of documentation indicates at face value the amounts invested in insurance policies to the directors, Mr and Ms Dayal and their children. The investment product conditions:
    (1) Indicate gain to individual persons and not the company.
    (2) The company was under liquidation and on the income received by the taxpayer for the past 5 years according to Revenue information, the

taxpayer would not be able to repay the $4M on the income he has declared.

(3) The commercial reality of a loan was not present.

(4) The company advanced $4M of which $3M was invested in insurance and $1M left to his devices.

(5) No BOD minutes to indicate decision to advance was for the commercial interest of the company as an artificial person versus the interest of the shareholders.

16. With that the Revenue closed their case and both Counsel made their oral submissions on the next day.

17. Mr. Sharma said the company broke the policies to show it was in control. If the Revenue did not respond within 90 days, its decision should be invalid and a nullity. No penalty should be imposed. The tax and penalty have not been paid. He asked for the application to be allowed as the taxpayer had a valid objection to the tax and the penalty.

18. Mr. Verebalavu then submitted. He said the issue is the $4M - $3M to LICI and $1M in FD in the name of the tax payer. The year of assessment, 2014, is the focus. Revenue says it is profit paid as a dividend and Revenue can deem it as a dividend. Revenue is not looking at the past audit situation. He said the BOD resolution was not in existence in 2014. The penalty was correctly applied under S.46(1) and (2) TAA.

19. Mr. Sharma in his reply said the accounts reflect it was an advance to the Applicant before the audit was done. He said the resolution was not a fabrication. It was not put to PW1 that the investment matures in future.

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

21. At the outset I shall deal with a peripheral issue raised by Mr. Sharma. He submitted that because the Revenue did not deliver an objection decision within 90 days after lodgment of the objection as required by S.16(7) TAA, that meant the objection was allowed.

22. If I may say so with respect, that argument does not hold water. A careful perusal of the said S.16 discloses no legal basis for such an assertion or assumption. The concept of judicial deference requires courts as a constitutional principle to pay deference to the view of the legislative

authority as to what is in the public interest. Where the legislation does not provide for what Counsel is contending, it is not open to the Court to judicially legislate to give the Applicant a right to compel the Revenue to act as if his objection has been allowed.

23. The pivotal issue is whether the payment concerned was a dividend. The Oxford Dictionary of Law, 9th edn, defines "dividend" as "A payment declared either by the directors of a company or at the annual general meeting as being payable to shareholders from profits available for distribution".

24. In the light of the way the argument developed in Court, it is necessary for me to consider what is called "disguised distribution". Gower & Davies Principles of Modern Company Law, 9th edn, chapter 12 describe "disguised distributions" as "transactions between a company and a shareholder on other than an arm's length basis, so that value is transferred from the company to the shareholder."

25. So I shall turn to the BOD of Artesian resolution of the 15th May 2014 which states as follows:

"THE Board has agreed as follows:

a) That the company will advance $4 million to shareholder Mr. Prakash Dayal who will utilize the funds as follows:

   i. $3 million is to be invested into LICI 5 year money back single premium policy which will return with $800,000 bonus. Details of policy is to be discussed with Mr. Anil Amin the agent of LICI in Ba. Upon maturity the principle with bonus earned shall be paid to Dayals Sawmillers Limited in full.
   ii. $1 million to be invested in term deposit in Bank of South Pacific. Upon maturity with interest, the full sum shall be paid back to Dayals Sawmillers Limited. For 1 year, in case we proceed with liquidation early.

b) All funds after maturity shall be invested in various projects undertaken by the Directors.

c) No part of these funds are meant for personal use or distribution as dividend or income to any shareholder or director.

d) An agreement will be drawn to reflect these resolutions."

26. The Memorandum of Agreement (MA) was made the same day that is 15 May 2014. It is noted that the copy of the MA, in the Applicant's Supplementary Bundle of Documents filed in Court on 19 January 2018, does not have the name and the signature of the witness who explained the MA to the Applicant and witnessed his signature.

27. Even more the MA is not stamped. The Stamp Duties Act 1920, by section 41 states no instrument executed in Fiji shall be given in evidence or admitted to be good, useful or available in law or equity, unless it is duly stamped in accordance with the law.

28. But even if the MA were admissible it would cause the Applicant's case to collapse. Its preamble states the (Applicant) "borrower has agreed to borrow and invest on behalf of the lender" (Artesian). Clause 3 provides "THAT before maturity of the LICI policies the borrower shall assign the policies in favour of Dayal Sawmillers Limited as beneficiary". Clause 4 provides "THAT the sums advanced shall be interest free and repayable upon demand by the lender". Clause 6 provides that "If the borrower shall make default in repayment of any moneys when due....."

29. To my mind the MA is clearly and unequivocally a distribution of profits to the Applicant disguised as a loan which is in turn disguised as an investment. If it were true that the LICI policies could not have been purchased directly by a limited liability company in the first instance, how then could the policies be assigned, before maturity it is to be noted, in favor of a limited company as beneficiary.

30. The same judicial treatment is to be given to the $1M term deposit in Bank of South Pacific. There was no reason to advance the sum to the shareholder/Applicant when the company could have perfectly legitimately put the same amount in the same bank in a fixed deposit in its own name. No evidence was provided by any Bank witness that the return on a FD placed by an individual is higher than that on a FD placed by a company.

31. At the end of the day I am satisfied that the whole exercise was to enable the Applicant to receive the princely sum of $4M without him paying the requisite tax on it. The Applicant's own Application for Review in para 4.4 establishes the Revenue's contention and causes the Applicant's case to fall to the ground for it states "The payment to the Applicant is recorded as an unsecured borrowing by the Applicant with no fixed term of repayment". If I may say so

with respect this is the clearest admission that the Applicant did not need to repay which can only be the case if the moneys received by the Applicant were dividends. What he did thereafter was his own affair.

32. I shall finally turn to the imposition of the penalty. It is not for the company to assert in the Financial Statements that the payments were not dividends. It is for the Court to decide if the Revenue were correct to classify them as dividends. The Court has arrived at its conclusion that the Revenue were correct. The penalty is to be imposed if the taxpayer makes a statement "that is false or misleading in a material particular." It cannot be denied that to describe the payments as loans for investment on the company's behalf is at variance with the truth. It would be like describing chalk as cheese. The Applicant advised by accountants, auditors and no doubt tax lawyers knew full well he was receiving moneys from the company which would have been objectively described as dividends. But he chose to assert to the very end that they were not dividends. The Revenue have made out their case why they imposed a penalty as they were entitled to under the TAA.

33. In the result the Application for Review filed on 3 March 2017 is dismissed and I shall make the following orders:

    (1) The Respondent's Decision (income tax and penalties) for the sum of $2,252,234.68 for the year 2014 to be paid by the Applicant is affirmed.

    (2) The Applicant shall pay the Respondent the costs of these proceedings summarily assessed at $1,000.

34. Delivered at Suva this **11th** day of **December 2018.**

HIGH COURT OF FIJI
SUVA

David Alfred
JUDGE
High Court of Fiji