IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE TAX COURT, DIVISION OF THE HIGH COURT OF FIJI

CIVIL APPEAL NO: ABU 0046 of 2015
(High Court HBT 3 of 2012)

BETWEEN	:	**CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS AUTHORITY**
		Appellant
AND	:	**FLOUR MILLS OF FIJI LIMITED**
		Respondent
Coram	:	**Calanchini P** **Jameel JA** **Alfred JA**
Counsel	:	**Ms R Malani with Ms F Gavidi for the Appellant** **Mr V Kapadia for the Respondent**
Date of Hearing	:	**16 August 2017**
Date of Judgment	:	**14 September 2017**

JUDGMENT

Calanchini P

[1] This is an appeal from a judgment dated 20 May 2015 of the Tax Court sitting as a division of the High Court. The Tax Court allowed an appeal by the Respondent (Flour

Mills) from a decision dated 25 June 2012 of the Tax Tribunal. The Tax Court set aside the decision of the Tax Tribunal and in so doing effectively held that Flour Mills was entitled to a 200 per cent deduction under section 21(1) (v) of the Income Tax Act in respect of a $200,000.00 payment made by Flour Mills to the Fiji Sports Council. The Tax Tribunal had disallowed the deduction that had initially been allowed and then reversed by the Appellant.

[2] The Appellant is the Chief Executive Officer of the Fiji Revenue and Customs Authority. Throughout the proceedings in the Tribunal and in the Tax Court the Appellant at different times has been referred to as "*the Commissioner*" (of Inland Revenue), as the "*CEO*" and as "*FIRCA.*" For the purposes of this appeal judgment the Appellant will be referred to as the *"Revenue Authority."* The Respondent's Accountants, Price Waterhouse Coopers, will be referred to as "*PWC."*

[3] The background facts that are relevant to the appeal may be stated briefly. In January 2003 the Ministry of Youth Employment Opportunities and Sports announced that the Government would offer a 200 per cent tax incentive to corporate bodies to encourage private sector participation in the development of sports in Fiji. To give effect to the offer of this tax incentive the Income Tax (Budget Amendment) Act 2004 amended section 21(1)(v) of the Income Tax Act (the Act) to enable a taxpayer to claim a 200 per cent deduction in respect of cash donation exceeding $100,000.00 made to a sports fund between 1 January 2004 and 31 December 2006 for the purposes of sports development in Fiji.

[4] Following the amendment to the legislation the Fiji Sports Council entered into an agreement with Flour Mills in consideration for money paid to the Sports Fund, Flour Mills would acquire naming and signage rights in respect of certain facilities that were managed by the Sports Council. These facilities came under Sports Council management following the 2003 South Pacific Games that were held in Suva in June/July 2003.

[5] The agreement was for a period of five years commencing on 1 November 2004. It was agreed by the parties that the actual date of the agreement was 4 November 2004. Under the agreement the National Indoor Stadium was to be known as the *"FMF Dome"*. Flour Mills was also to have exclusive advertising rights at the National Indoor Stadium. There was also a right of renewal for a further term of five years. As consideration Flour Mills was required to pay to the Sports Council the sum of $100,000.00 per annum the final payment on or before 31 October 2004 and each year thereafter till 2008. The agreement provided that out of the said sum of $100,000.00, $20,000.00 was to be used for construction and maintenance of signage and billboard structures and for that purpose, $20,000.00 would be paid back to Flour Mills who agreed to be responsible for the same. The effect of this arrangement was that the cash payment each year was only $80,000.00.

However, clause 4 of the agreement provided as follows:

> *"FMF agrees to pay an additional sum of $100,000.00 in the first year of the agreement which will be exclusively allocated by FSC for the construction of the structures for the signs and the billboards"*

[6] Clause 16 of the agreement provided that the terms and conditions were subject to the 200 per cent tax rebate applying to the annual payments of $100,000.00 referred to in paragraph 2 of the agreement (i.e. the five annual payments to be made in consideration for the naming and advertising rights). However that clause must be read down since the deduction was only available up to 31 December 2006.

[7] By letter dated 11 November 2004 the Revenue Authority wrote to PWC indicating that *"the request for 200% deduction be supported. This approval is one off _ _ _."*

[8] As a result of that letter and pursuant to the agreement on 19 November 2004 Flour Mills paid by cheque $200,000.00 to the National Sports Funding Commission for which a receipt dated 19 November 2004 and numbered 776202 was issued.

[9] For reasons that are not directly relevant to this appeal the agreement between Flour Mills and the Sports Council was terminated by the Sports Council by letter dated 13 February 2007. Consequently the Revenue Authority by letter dated 25 April 2007 advised PWC in the third paragraph that:

> *"We note that in 2004 a total amount of $200,000.00 was paid to Government by FMF whereas in 2005 an amount of less than $100,000.00 was paid and in 2006 the contract was rescinded. The 200 per cent deduction claimed for Sports Fund Contribution of $200,000.00 was allowed for the year 30 June 2005. The cancellation of the contract and the cash donation of an amount of less than $100,000.00 in 2005 have a direct impact, amongst other thing, on the status of the 200 per cent sports deduction. In this regard we are of the view that the Naming Rights Agreement has been breached and accordingly the deduction allowed will be reversed and an amended assessment will be issued to effect this change. ___."*

[10] It is apparent from this letter that the only reason for reversing the 200 per cent deduction was the alleged breach by Flour Mills and subsequent cancellation of the agreement. The breach related to the failure by Flour Mills to pay $100,000.00 by the due date in 2005.

[11] Subsequently an amended assessment # 2 dated 1 May 2007 was issued to Flour Mills for the tax year 30 June 2005. This assessment reversed the 200 per cent deduction claimed and previously allowed.

[12] By letter dated 20 June 2007 PWC objected to the amended assessment under section 62 of the Income Tax Act on behalf of Flour Mills. PWC relied on the reason stated in the letter dated 25 April 2007 from the Revenue Authority as the basis of the objection. The grounds of the objection are not entirely clear. However the first ground appears to be that by making the payment of $200,000.00 on 19 November 2004 Flour Mills had become entitled to the tax deduction at the rate of 200 per cent in accordance with section 21(1)(v) and which had been allowed by the Revenue Authority in its assessment dated 29 June 2006 for the tax year that ended on 30 June 2005. It was contended by Flour Mills via PWC that section 21(1)(v) did not require $100,000.00 to be paid each year and that as long as "*donations*" exceeding $100,000.00 are made between 1 January 2004 and

31 December 2006, an entitlement to claim a 200% deduction arose. PWC also claimed that section 21(1)(v) was not dependent upon the existence of any agreement. There was no basis for linking a breach of the agreement with the entitlement to claim the 200 per cent deduction. Finally PWC pointed out that Flour Mills had sought clarification that money paid to the Sports Council would qualify for 200 per cent deduction and that the Revenue Authority had indicated in writing that the request for *"200 per cent deduction was a one off approval."*

[13] By letter dated 22 October 2007 the Revenue Authority advised PWC that the objection was *"wholly disallowed."* The Revenue Authority did not give any reasons for the disallowance.

[14] A Notice of Appeal dated 13 November 2007 was filed by Flour Mills challenging the decision of the Revenue Authority to disallow the objection on the following grounds:

> *"1. That the Commissioner of Inland Revenue has erred in law and in fact in not properly applying the provisions of section 21(1)(v) of the Income Tax Act Cap 201 of Fiji which allows taxpayers to deduct from their total taxable income twice the amount of cash donation exceeding $100,000.00 if the donation is made between 1 January 2004 and 31 December 2006 to a Sports Fund for the purposes of sports development in the Fiji Islands*
>
> *2. That the Commissioner of Inland Revenue has failed to uphold the undertaking given to the Appellant on 11 November 2004 that the Appellant would indeed qualify for the deduction pursuant to section 21(1)(v) of the Income Tax Act Cap 201 of Fiji if the donation was made."*

[15] The appeal came before the Tax Tribunal for hearing on 1 June 2012. The Tribunal identified the issue before it as being whether $100,000.00 of the $200,000.00 paid to the Sports Council by Flour Mills on 19 November 2004 fell within the meaning of cash donation for the purposes of section 21(1)(v) of the Act. It should be noted that this was not the basis upon which the Revenue Authority had disallowed the deduction in its letter

dated 25 April 2007. However, in its submission before the Tribunal the Revenue Authority had claimed that (1) since the donation was made under a contract and since the contract was later cancelled, the Revenue Authority decided to disallow the deduction and (2) the donation was not a bona fide donation as there was a direction as to how the funds were to be used by the Sports Council. The Tribunal approached the issue on the basis that the money paid by Flour Mills to the Sports Council was either an ordinary business expense or a cash donation qualifying for the 200 per cent deduction. The Tribunal concluded that the Revenue Authority had correctly applied section 21(1)(v) when it issued the amended assessment. After considering a number of Australian tax authorities the Tribunal decided that as a result of the agreement between Flour Mills and the Sports Council, the payment of $200,000.00 to the Sport Council went beyond the meaning of *"cash donation"* since there was a material benefit to Flour Mills and since the payment of $100,000.00 had strings attached. The Tribunal also concluded that the Revenue Authority was free to review its position and its earlier assessment based on a reconsideration of the law. In reaching that conclusion the Tribunal relied on the decision of this Court in **Punjas Limited and Anor. –v- Commissioner of Inland Revenue** (ABU 99 of 2005; 10 November 2006).

[16] Flour Mills filed on 18 July 2012 a notice of appeal in the Tax Court seeking an order that the decision of the Tribunal dated 25 June 2012 be wholly set aside and a further order that the cash donation of $200,000.00 made by Flour Mills be allowed as a 200 per cent deduction under section 21(1)(v) of the Income Tax Act on the following grounds:

> *"**1. THAT** the Learned Tribunal erred in law and in fact in disallowing the Appellant's Appeal to the Tribunal dated 22nd October 2007 when the grounds before the Tribunal stipulated that the provision of Section 21(1)(v) of the Income Tax Act Cap. 201 were not properly considered. The said provision allows any taxpayer to deduct from their total taxable income, twice the amount of cash donation exceeding $100,000.00 if the donation is made between 1st January 2004 and 31st December 2006 to a Sports Fund for the purposes of sports development in Fiji*

2. ***THAT*** *the Learned Tribunal erred in law and in fact in not properly considering that the donation in question was a genuine donation and was properly negotiated by all parties and agreed and accepted that it would qualify under Section 21(1)(v) of the Income Tax Act Cap.201.*

3. ***THAT*** *the Learned Tribunal erred in law and in fact in wrongly applying the Australian case authorities in this matter when these Australian case laws had no relevance to the issue before the Tribunal as the Australian provisions were different from Section 21(1)(v) of the Income Tax Act Cap.201.*

4. ***THAT*** *the Learned Tribunal erred in law and in fact in giving undue importance to the naming rights agreement when that agreement was only a by-product of the negotiated donation agreement.*

5. ***THAT*** *the Learned Tribunal erred in law and in fact in applying Punjas Limited case when this case was different and the Naming Rights Agreement was provided to the Respondent and the Respondent agreed that 200% deduction would be allowed on that basis and the Respondent only wrongly retracted from this based on erroneous belief that because the Agreement was terminated the Respondent was obliged or entitled to disallow the deduction."*

[17] The Tax Court considered the correspondence that had passed between PWC, the Sports Council and the Revenue Authority. The Court accepted that when the Authority had stated in its letter dated 11 November 2004 that a one off approval was given, the Revenue Authority was aware that there was in existence a signed agreement between Flour Mills and the Sports Council. The Court concluded that the Authority could not subsequently review the position it had conveyed to PWC in the letter dated 11 November 2004.

[18] The Court noted that it was an agreed fact that Flour Mills had paid $200,000.00 to the Sports Council via National Sports Funding Commission on 19 November 2004. The Court stated that this fact had been overlooked by both the Revenue Authority and the Tax Tribunal. The learned Judge then observed that the rescission of the agreement did not affect the right to a deduction of 200 per cent under section 21(1)(v) of the Act.

[19] In determining whether the payment of $200,000.00 was a donation for the purposes of section 21(1)(v) the Tax Court concluded that the payment of $200,000.00 to the Sports Council under the agreement should not affect its right to claim the tax deduction under section 21(1)(v). I take that conclusion to mean that notwithstanding that the payment was made pursuant to the agreement between the Sports Council and Flour Mills the payment should nevertheless be regarded as a cash donation entitling Flour Mills to claim a 200 per cent tax deduction.

[20] The Court took the view that the Tax Tribunal had erred *"in law and in fact"* when it applied an Australian Tax Ruling (2006/13) that relates to section 78A of the Australian Income Tax Assessment Act 1936 which did not have an equivalent provision to section 21(1)(v). The Court concluded that the appeal should succeed and that Flour Mills was entitled to the tax deduction of 200 per cent under section 21(1)(v) of the Act.

[21] Being dissatisfied with the decision of the Tax Court the Revenue Authority filed a notice of appeal in this Court seeking an order that the whole of the judgment of the Tax Court be dismissed and for such other orders as the Court deems fit on the following grounds:

> *"**1.** **THAT** the Learned Judge erred in law and in fact when he failed to properly consider the position of the Commissioner in disallowing the Respondent's claim for 200% deduction under section 21(1)(v) of the Income Tax Act.*
>
> ***2.** **THAT** the Learned Judge erred in law and in fact when he failed to properly consider the Naming and Advertising Rights Agreement. The said Agreement provided a material benefit to the Respondent and in accordance to the Tax Tribunal ruling, it went well beyond what is envisaged within the language of a cash donation as per section 21(1)(v) of the Income Tax Act.*
>
> ***3.** **THAT** the Learned Judge erred in law and in fact when he failed to properly consider the reasons behind the change in the Commissioner's position and also in not properly considering the Punjas Limited and Anor. vs Commissioner of Inland Revenue case which is the authority that supports the fact that the Appellant is free to review its position.*

4. ***THAT*** *learned Judge erred in law and in fact when arriving at its decision considered the concept known as "split receipting"; this concept is new and was not deliberated in the lesser Court nor is it part of 21(1)(v) of the Income Tax Act.*

5. ***THAT*** *the Learned Judge erred in law and in fact in not properly considering the application of the Australian case Authorities which is relevant in determining the definition of "cash donation" within Section 21(1)(v) of the Income Tax Act.*

6. ***THAT*** *the Learned Judge's decision is unfair and unreasonable in all the circumstances."*

[22] Of these grounds of appeal ground 4 raises the issue of *"split receipting."* However this issue was not a matter upon which the Tax Court relied in reaching its conclusions. Ground 6 claims that the decision is unfair and unreasonable in all the circumstances. This ground is vague and is not sufficiently particularised to be considered by the Court.

[23] In relation to the remaining grounds it is necessary to consider the issue of jurisdiction. The appeal before this Court is an appeal from a division of the High Court (the Tax Court) in the exercise of its appellate jurisdiction. It must be recalled that the Tax Court; in the exercise of its appellate jurisdiction under section 18 and section 107 of the Tax Administration Act 2009, had determined an appeal from the Tax Tribunal filed by Flour Mills. The issue of jurisdiction raises two questions. The first question is whether this Court has jurisdiction to determine an appeal from the Tax Court. The second question is related to the answer to the first question. If this Court does have jurisdiction to hear such an appeal, what, if any, are the restrictions or limitations to the exercise of that jurisdiction.

[24] The first question can be readily answered by reference to section 109(1) of the Tax Administration Act which provides:

"(1) An appeal from the Tax Court shall lie to the Court of Appeal."

[25] The answer to the second question is not so readily obvious and the process starts with section 109(2) of the same Act which states:

> *"(2) For the purpose of an appeal to the Court of Appeal the Court of Appeal Act 1949 applies with necessary modifications."*

[26] The effect of section 109(2) of the Tax Administration Act is that the provisions of the Court of Appeal Act 1949 are incorporated into the Tax Administration Act for the purpose of appeals to the Court of Appeal from the Tax Court under section 109 of that Act. The insertion of the words *"with necessary modifications"* in section 109(2) enables the provisions of the Court of Appeal Act to be read as one with the provisions in the Tax Administration Act whenever any inconsistency between the incorporating act and the incorporated act arises.

[27] Under section 91 of the Tax Administration Act the Tax Court exercises both an appellate and an original jurisdiction. When the Tax Court is exercising its appellate jurisdiction, such as an appeal from the Tax Tribunal, then any subsequent appeal from its decision to the Court of Appeal is what is sometime referred to as a second tier appeal to an intermediate Court of Appeal. The appeal before this Court is a second tier appeal from the Tax Court exercising its appellate jurisdiction to hear and determine an appeal from the Tax Tribunal. Unlike in an appeal from a final judgment of the Tax Court exercising its original jurisdiction where an appeal to the Court of Appeal lies as of right, in an appeal to this Court from the Tax Court exercising its appellate jurisdiction there should and does exist a restriction to the right of appeal.

[28] The general jurisdiction of the Court of Appeal is set out in section 3 of the Court of Appeal Act. In particular section 3(3) states that an appeal lies as of right from a final judgment of the High Court in the exercise of its original jurisdiction. On the other hand section 3(4) provides that an appeal lies to the Court of Appeal on a question of law only from a final judgment of the High Court in the exercise of its appellate jurisdiction.

Although section 3(4) in the recently published revised laws states that this limited jurisdiction is subject to section 121(2) of the Constitution the reference to section 121(2) must necessarily be regarded as an error since section 121(2) refers to the composition of the Accountability and Transparency Commission. The relevant section is section 99(4) which has the effect of providing an unrestricted right of appeal to the Court of Appeal from any final judgment of the High Court in any manner arising under the Constitution or involving its interpretation. Section 99(4) of the Constitution has no application to the present proceedings. It should also be noted that section 12 of the Court of Appeal Act in so far as civil appeals to the Court are concerned, is consistent with sections 3(3) and 3(4) of the Court of Appeal Act.

[29] The effect of these provisions is that in this appeal the Court of Appeal's jurisdiction to hear and determine the appeal is restricted to grounds of appeal involving questions of law only. Unless the Revenue Authority, in its grounds of appeal, has raised a ground of appeal involving a question of law only (as distinct from questions of mixed fact and law or questions of fact alone) the Court has no jurisdiction to determine the appeal.

[30] Rule 29(3) of the Court of Appeal Rules requires an appellant to state in the notice of appeal precisely the question of law upon which the appeal is brought. This has not occurred in this appeal. The grounds of appeal upon which the Revenue Authority relies in its notice of appeal dated 1 July 2015 are all stated to have arisen as a result of errors *"in law and in fact"* on the part of the learned Judge. That, of course, is not by itself, decisive. However having carefully considered grounds 1 to 3 and ground 5, I am satisfied that none of those grounds involve a question of law only. In my opinion, since the Income Tax Act has used words in section 21(1)(v) according to their ordinary meaning, whether the facts do or do not fall within those words is a question of fact: **Collector of Customs –v- Pozzalonic** (1993) 43 FLR 280 at 287. Furthermore, when the judge has correctly stated the law, whether the facts have been misapplied to the law is usually regarded as a question of mixed fact and law and is therefore not a question of law alone: **Chief Executive Officer of Customs –v- El Hajje** (2005) 224 CLR 159 at

[39]. [See: **The Appellate Jurisdiction of the Courts in Australia** – Mildren 2015 The Federation Press, pages 16 – 18].

[31] Before concluding there is one other issue that has not been raised by the parties in this Court but which also goes to the question of jurisdiction. The judgment was pronounced in the Tax Court on 20 May 2015. The notice of appeal was filed in this Court on 1 July 2015 being 42 days later. However section 109(3) of the Tax Administration Act provided that an appeal from the Tax Court must be filed within 28 days of the delivery of judgment. The 28 days period for filing a notice of appeal was not amended until 1 August 2016 when section 3 of the Tax Administration (Budget Amendment) Act 2016 deleted 28 days and substituted 42 days. Thus the appeal was filed out of time by 14 days. There has been no application made for an enlargement of time and the Court did not have the benefit of hearing the parties on whether such an application should be entertained at a late stage and or granted.

[32] In any event it is not necessary to consider the usual principles for determining such an application since I have concluded that the Court lacks jurisdiction to hear the appeal and any application for an enlargement of time must fail.

[33] I would dismiss the appeal for the reasons stated and order costs to the Respondent in the sum of $5,000.00.

Jameel JA

[34] I have read the judgment of Calanchini P and agree with the findings, reasons and proposed orders.

Alfred JA

[35] I have read in draft the judgment of Calanchini P. I agree with the reasons for, and the decision and have nothing to add.

Orders:

1. *Appeal dismissed.*
2. *Appellant to pay costs of $5,000.00 to the Respondent.*

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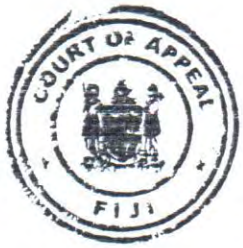
Hon. Justice W D Calanchini
PRESIDENT, COURT OF APPEAL



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Hon. Madam Justice Jameel
JUSTICE OF APPEAL

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Hon. Justice Alfred
JUSTICE OF APPEAL