IN THE TAX COURT
AT SUVA

HBT ACTION NO: 5 OF 2015

IN THE MATTER of the Capital Gains Tax Decree 2011

AND

IN THE MATTER of section 82 of the Tax Administration Decree 2009 (Decree 50 of 2009)

BETWEEN : **(1) LILIAN MILLAR**

First Applicant

(2) LANCE JOSEPH MILLAR

Second Applicant

(3) MAX IVAN MILLAR

Third Applicant

(4) TERRY LAVONNE MILLAR

Fourth Applicant

AND : **CHIEF EXECUTIVE OFFICER, FIJI ISLANDS REVENUE AND CUSTOMS AUTHORITY**

Respondent

Coram : The Honourable Mr Justice David Alfred

Counsel : Mr B Solanki for all the Applicants
Ms F Gavidi (Ms S Nasiga with her) for the Respondent

Dates of Hearing : 4, 5 and 12 August 2016
Date of Judgment : 12 September 2016

JUDGMENT

1. This is an Application for Review seeking a revision or a setting aside of the decision of the Respondent (Objection Decision) dated 4 March 2015 disallowing the objection dated 29 December 2014 by the Applicants to the Capital Tax Assessments issued on 11 November 2014 against them in their respective several cases.

2. The grounds of the Application, include the following:

   (1) Section 12(1) of the Capital Gains Tax Decree 2011 (Decree) requires the Respondent to determine the amount of consideration actually received by the Applicants on their sale of shares.

   (2) The Respondent overstated the consideration received by the Applicants for the sale of shares in Nanuya Island Resort Limited (Nanuya) and Westside Watersports Ltd (Westside) to Parker Investment Trust.

   (3) The Respondent had not reduced from the consideration received in Nanuya the amounts paid as follows:
   (i) i Taukei Land Trust Board Poundage.
   (ii) Purchaser's disputed items not paid.
   (iii) Company bank debt settled.

   (4) The Respondent had not reduced from the consideration received in Westside the amounts paid as follows:
   (i) i Taukei Land Trust Board Poundage.
   (ii) Company bank debt settled.

   (5) The Respondent failed to allow the non-interest bearing loans made by each of the Applicants to the companies when they acquired their respective shares in Nanuya and Westside and which were to be repaid when the shares were sold or transferred.

(6) The Respondent failed to consider that the Applicants had contributed further cash to Nanuya which had been used by the Company to construct the Nanuya Island Resort and which had been treated as *quasi-equity* by the company.

(7) The Respondent failed to consider that the total consideration given, which is the Applicants' investment, should have been used in computing the consideration for the acquisition of the capital asset.

3. The hearing commenced with the 2nd Applicant (Applicant) giving evidence. He was Lance Joseph Millar (PW1). He said the 1st Applicant is his mother and the other two Applicants are his siblings

4. He said the issue is the tax on the sale of shares. He was a shareholder in Nanuya and Westside and offers were made by Ivan and Val Parker to purchase both Resorts.

5. The Applicants wanted to move on and agreed to sell both companies by sale of shares. He tendered as Exhibit P1, the Share Sale Agreement (SPA) between Westside Watersports Limited (Vendor) and Parker Investment Trust (Purchaser) made the 13th day of May 2014.

6. PW1 then tendered as Exhibit P2, the Share Sale Agreement (SPA) between Nanuya Island Resort Limited (Vendor) and Parker Investment Trust (Purchaser) made the 13th day of May 2014.

7. PW1 continued that the purchase price in Exhibit P1 is F$2.1 million and the purchase price in Exhibit P2 is F$2 million. The capital gains tax returns for both companies were done by Ernst & Young (EY). He said the Applicants did not receive the consideration.

8. At this juncture, Counsel for the Respondent (Revenue) stated Revenue accepts that PW1 is speaking for all 4 Applicants.

9. PW1 resumed his evidence and said the Applicants considered the assessments were too high. EY objected but the Applicants paid under protest, because of time constraint and because the Purchaser threatened to sue them. The Revenue's response to both letters of objection whereby they did not accept the Applicants' objections, was tendered as Exhibit P15.

10. Under cross-examination by Counsel for Revenue, PW1 said they did not receive the purchase price because the iLTB etc had to be paid. They (Applicants) were the vendors and were to benefit from the purchase price of $2.1 million.

11. Counsel for the Applicants said he had no objection to the share transfers being admitted in evidence.

12. PW1 said that he is not entitled to claim the 10% paid to the iLTB as it was paid by the company and not the shareholders.

13. PW1 said the company and the shareholders are separate entities. Only the company could claim that and not the shareholders. The shareholders are not entitled to claim the 3 costs.

14. PW1 concluded by saying they were assessed on $4.1 million although they only received $2.9 million.

15. In re-examination, PW1 said the Bank loans had to be paid out of the consideration. The consideration received was actually less.

16. The next witness, PW2 was Shaneel Jain Nandan. He said he is an accountant and has been with EY for the last 15 years. He is familiar with the background of the sale of shares in Nanuya and Westside. The Applicants had objections to

the assessments and instructed them to write the objection letter on behalf of the 2 shareholders regarding the sale of shares in Westside.

17. The company is liable to pay the poundage not the shareholders. The consideration is increased by the amount paid by the debtors. The bank debts should be deducted from the consideration. It is not the obligation of the shareholders to pay the Company's debts.

18. He said the consideration is not the $2.1 million. If the new shareholders had taken on the liabilities the consideration will be less. The shareholder's advances are not part of the consideration for the shares. The issues were similar for the other company. The purchaser disputed items of $444,607.29 are owed by the company, not by the shareholders.

19. In Nanuya, the company repaid the loans to the old shareholders from the proceeds recovered by the old shareholders from the new shareholders. The net value is the value received by the shareholders (Exhibit P24). The objection were declined by the Revenue.

20. When cross-examined by Counsel for the Revenue, PW2 said the share agreement is for the sale of the capital asset which is the shares in each company. The agreement states the purchase price is $2 million and PW2 agreed the total consideration is $2 million.

21. He also agreed the liabilities of the company are to be paid before settlement. He said payment of the poundage is by the company. The working capital adjustment relates to the daily operation of the resort. The $55,305.51 is the company's and relates to the daily operation of the company. The computation of $1,895,996.70 is incorrect. He did not agree the consideration of $2.1 million and the consideration of $2 million are correct.

22. When re-examined, PW2 said those liabilities could not be settled without receiving the purchase consideration from the purchasers because the company in each case did not have surplus cash to settle those companies' liabilities. In his opinion the consideration in each case is the lesser amount in each objection letter.

23. With this the Applicant closed its case.

24. The Revenue opened its case with its sole witness, DW1. He was Akuila Cuburekareka, a senior auditor in Revenue. He conducted assessments of both Applicants. The documents submitted were the Capital Gains Tax (CGT) return, the Capital Gains (CG) Declaration, the stamped transfers for the shares, and the SPA of each company. He sent the notice of assessment to each of the Applicants.

25. They objected and Revenue said their objections were not valid. The lease was to the company while the sale was by the shareholders. For CGT, section 6 of the Decree states 10% of the capital gain. The cost to the company is disallowed. The poundage fee is paid by the company, and here it is the shareholders who are selling their shares. Also the poundage is charged on the lease and the lease is a capital asset by itself.

26. The working capital adjustment is for the operation of the company. The company debt was disallowed because it was not under section 11 of the Decree. The CGT is equal to the consideration received less the cost of the capital asset. This would give capital gain and revenue imposes 10% of the gain as the tax. The cost of the capital asset in Nanuya is $180,000 while that in Westside is $100,000. Revenue arrived at the assessment amount by taking into consideration the original purchase price plus incidental expenditure.

27. Under cross examination DW1, said he based the consideration on the purchase price of the shares. If told the Applicants did not receive that, it would make no

difference. He disagreed that the amounts in Exhibit P22, should reduce the consideration. He did not agree the shareholder loans should reduce the consideration in both cases. He disagreed that poundage fee, working capital adjustment and loans should reduce the consideration. He did not agree they were not received by the shareholders. He agreed the loans were *quasi-equity* and they should be paid by the company. He denied that Revenue had overstated the consideration or had understated the costs.

28. During re-examination DW1 said the objection was done by an officer and vetted by his superior.

29. With that the Revenue closed its case. I then fixed the 12th August 2016 for oral submissions by both Counsel.

30. Counsel for the Applicants submitted there were 2 issues. The CGT Decree 2011 defines consideration. The consideration in the memorandum of transfer was the same as in the SPA. The shareholders did not receive the full consideration because the purchasers paid off the liabilities of the companies out of the purchase price. The actual consideration received were actually less. Revenue overstated the consideration.

31. The loans by the Applicants to the companies should have been allowed as costs as these loan repayments, were made by the purchasers. The Revenue cannot rely merely on the SPA. EY had correctly stated the amounts. Counsel concluded by saying he had no authorities but was only relying on the legislation.

32. Counsel for the Revenue then submitted. She said the consideration is the amount stated in each agreements and is reflected in the memorandum of transfer of shares. The parties are free to decide how consideration is to be used but the consideration remains the same.

33. She quoted 2 English decisions. As Revenue had correctly assessed the CGT she asked for the Application to be dismissed.

34. Counsel for the Applicant in his reply said the 2 English cases should be differentiated.

35. At the conclusion of the hearing, I informed I would take time to consider my decision.

36. In arriving at my decision I have perused:
    (1) The Application for Review.
    (2) The Statement of Agreed Facts and Issues.
    (3) The Applicants' Documents (1) and (2).
    (4) The Respondent's Documents.
    (5) The Respondent's Documents(1).
    (6) The Applicants' skeleton submission.
    (7) The Respondent's skeleton submission.
    (8) The Capital Gains Tax Decree 2011.
    (9) Practice Statement 34 of 14 June 2011.
    (10) The Authorities cited by Counsel for the Revenue.

37. I now proceed to deliver my judgment.

38. The 2 issues that fall to me to decide are:
    A. Whether section 12(1) of the CGT Decree requires Revenue to determine the amounts of consideration received by the Applicants for the sale of their shares in Nanuya and Westside to Parker.

    B. Whether Revenue in determining the consideration received by the Applicants should have reduced from the considerations of $2.1 million and $2 million respectively the following:
        (i) The Poundage.

(ii) The Working Capital.

(iii) The Company's debts.

The amounts need not be stated and it is the principle that is involved.

39. The arguments advanced by Counsel on both sides, the legal provisions and therefore the legal issues are the same for both the Nanuya and Westside applications.

40. I shall therefore expound the law and the reasons for my decision as being applicable to both.

41. I will now consider (A):

Section 12(2) of the Decree states: "The consideration received by a person on disposal of a capital asset is the total amount received by the person for the asset."

Section 2 defines: "Capital asset as (d) a share....."

Section 6(2) states: "The capital gains tax payable by a person on the disposal of a capital asset is 10% of the amount of the capital gain arising on the disposal."

Section 10(1) states:

"The capital gain made by a person on the disposal of a capital asset is the consideration received on the disposal reduced by the costs of the asset at the time of the disposal."

Section 11(2) states the cost of a capital asset of a person is the sum of the following amounts:

(a) the total consideration given by the person for the asset.

(b) any incidental expenditure incurred by the person in acquiring or disposing of the asset; and

(c) any expenditure incurred by the person to install etc or improve the asset.

I shall state straightaway that (c) is inapplicable here because the asset is shares.

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.

43. I move to the root of the matter which is the SPA to ascertain what is the consideration paid by Pacific. Contrary to the submission of Counsel for the Applicants, the Revenue were correct to look to the SPAs only and not to the surrounding circumstances.

44. In the Nanuya SPA, I note the following provisions:

(i) Clause 2.1.1 states the sale of shares by the Vendors to the Purchaser is for the purchase price and on the terms and conditions of this agreement.

(ii) Clause 2.2 states:

(a) the shares are all the issued shares i.e. 180,000 shares.

(b) these "have been allotted and fully paid up and no moneys are owing to the Company in respect of them.

(d) "The shares transfer will be at a value of FJD2.1 million for the total Shares.

(iii) Schedule 1 states the vendors are the 4 Applicants and the number of shares are stated against each name.

45. In the Westside SPA, I note the following provisions:

(i) Clause 2.1.1 states:

"the sale of Shares by the Vendors to the Purchaser is for the Purchase price and on the terms and conditions of this agreement."

(ii) Clause 2.2 states:

(a) the shares are all the issued shares i.e. 100,000 shares.

(b) these shares "have been allotted and fully paid up and no moneys are owing to the Company in respect of them."

(d) the Shares transfer will be at a value of FJD2.1 million for the total shares.

(iii) Schedule 2 states the authorised and issued share capital is $100,000.00 divided into 100,000 shares at $1 each and the registered shareholders are the 1st and 2nd Applicants.

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.

48. In my opinion Revenue did correctly determine the consideration received and did correctly compute the CGT to levy thereon.

49. All cash paid and all loans made by the Applicants to the companies are to be repaid by the companies themselves out of their own funds and NOT BY the companies utilising the consideration paid by Parker. I reiterate if the shareholders consent to this, they must be prepared for the Revenue not reducing the CGT to levy on the full consideration received from Parker.

50. At this juncture, I shall state I find from the evidence and I so hold that the full consideration has been paid by Pacific in each case and all the shares have been transferred to Pacific, of both of which, there appears to be no dispute.

51. I am fortified in my finding when I peruse the share transfers tendered as Exhibits in the course of the hearing which all show the transferors, the transferees and the total consideration are exactly the same as in the 2 SPAs.

52. How then can the Applicants assert they did not receive some part of the total consideration. If this were true then the Applicant would have said in his evidence that the Applicants have taken legal action to recover the alleged short payments from Parker, but he did not.

53. To put the issue at rest, the following English decisions cited by Counsel for the Revenue, are persuasive authority. In *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."

The judge reiterated "the fact that Mr Collins did not himself receive the £95,179 is irrelevant, because it was paid at his direction to the Company; and what was then done by the Company with that sum is equally irrelevant, because the focus is on the wrong payment. Instead of answering the question of what the consideration consisted of, it answers the question of what was done with the consideration by the Company pursuant to the terms of the Share Sale Agreement."

54. Henderson J also quoted from the judgment of Lightman J in: *Spectros International Plc v Madden* [1997] STC 114, 70 TC 349, at 136." 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.

55. So in the instant matter, it is equally the case, that I should look at the consideration received and not at what was done with some part of it.

56. I turn now to consider (B):
The Applicants argue that certain payments made out of the consideration received were properly made and therefore the Revenue should have deducted these payments for the purpose of completing the CGT.

57. The basic principle of law here is, as admitted by the Applicants that a corporate body is a separate and distinct legal entity from its shareholders. However, the Applicants treat the debts of the Company as having by magic been transformed into the debts of its shareholders. This flies in the face of the evidence in court and the law. It is conceded that the poundage has to be paid by each company as it is a liability of the company. The working capital provided by the shareholders and the loans made by them are liabilities of the company. I fail to see how by a tax planning (I nearly said tax avoiding) sleight of hand these have become debts of the Shareholders/Applicants which they are to pay from the consideration received by them from Pacific.

58. For the Applicants to allege that the loans made by the Applicants to the companies are to be repaid by the companies out of the consideration paid by Pacific to the Applicants, is like saying A owes money to B and C owes money to B and A uses money paid by C to B to pay A's debt to B. It would stretch credulity beyond breaking point if I were to accept such a untenable argument.

59. Having decided (A) and (B) as I have done, it follows there is no basis for me to upset the computation of the CGT by Revenue in both cases.

60. In fine I dismiss the Application for Review, decline to set aside or revise the Objection Decision in both cases and Order the 4 Applicants to pay the Respondent costs which I summarily assess at $500.00 each (making a total of $2,000.00).

Delivered at Suva this 12th day of September 2016.

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David Alfred
JUDGE
High Court of Fiji