IN THE TAX COURT, HIGH COURT OF FIJI AT SUVA
(APPELLATE JURISDICTION)

HBT Appeal No 02 of 2015

(On Appeal from the Decision of the Tax Tribunal of 25 February 2015 in Tax Tribunal Action No. 06 of 2014)

IN THE MATTER of the Capital Gain Tax Decree, 2011, No. 23 of 2011 (Decree) and the Tax Administration Decree 2009, No. 50 of 2009.

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IN THE MATTER of section 107 of the Tax Administrative Decree 2009

BETWEEN	:	VONU HOLDINGS LIMITED
		Appellant
AND	:	CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS AUTHORITY
		Respondent

Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr R. Naidu, Ms N Basawaiya with him, for the Appellant Ms T Rayawa for the Respondent
Date of Hearing	:	23 March 2016
Date of Judgment	:	2 November 2017

JUDGMENT

1. This is an appeal against the decision of the Tax Tribunal (Decision) delivered on 25 February 2015 whereby he ordered that the Notice of Amended Assessment issued on 7 May 2014 be remitted to the Chief Executive Officer (Revenue) for review.

2. By its notice of appeal, the Appellant seeks the following relief:

   (1) An order that the Decision be set aside.
   (2) An order to revise or set aside:
      (a) The Notice of Assessment issued on 20 September 2013 for the payment of capital gains tax (CGT) (Assessment) to the extent of F$791,264.28 and
      (b) The Notice of Amended Assessment issued on 7 May 2014 revising the CGT to $743,936.77 and imposing a 20 percent penalty of $148,787.35.
   (3) An order that Revenue refund the Appellant the sum of $791,264.28 (the sum) being the CGT collected under the Assessment.
   (4) An order that Revenue pay to the Appellant interest on the sum from the date payment was made to Revenue.

3. The Grounds of Appeal are as follows:

   (1) That the Tribunal erred in law and fact in concluding the Appellant had made a capital gain on a Fiji asset and thus Revenue was entitled to impose a 10% CGT on the Appellant in that :
      (a) in seeking to determine whether the Appellant's Intellectual property (IP) was a Fiji asset as defined in s.2 of the CGT Decree, the Tribunal concluded "there is no doubt that the Taxpayer had an interest in the New Zealand brewing entity's manufacturing of the beverages".

(b) the Tribunal erroneously relied on the licensing agreement between the Appellant and Brewsawa Trustee Limited (Brewsawa) in reasoning "the fact that it entered into a commercial licensing arrangement for a five year period for the total amount of $1.00, provides a likelihood that some relationship existed between the two entities".

(c) the Tribunal found that the Appellant had sufficient interest in the IP for it to be a "Fiji asset" and reasoned"….nowhere is the further requirement imposed, that the capital asset be owed by the Taxpayer. The requirement is that the Taxpayer has an option, right or interest in it.

2. The Tribunal erred in holding the IP was a "Fiji asset" by misapplying the definition of "Fiji asset" in s.2 of the Decree.

4. At the hearing of the Appeal, Counsel for the Appellant said the nub of the appeal is whether the asset sold is not an asset for CGT, as it does not qualify as a Fiji asset as the Appellant is not a Fiji resident. There is no issue as to quantum, the issue is principle - whether Revenue can charge 10% CGT on the sale of the IP, as the Appellant has no presence in Fiji and no fixed place of business in Fiji.. The IP is a capital asset owned by a non-resident of Fiji. The issue is how can the licensing of the IP to a Fiji company make it a Fiji asset. Counsel submitted the Appellant fits into the s.6 (3) box of the Decree. The license is not a Fiji asset. The IP is not the capital asset of a company with a fixed place of business in Fiji.

5. Counsel for Revenue then submitted. She said the sale of the IP in a trade mark is a sale of an asset that attracts CGT. Island Brewing Trust is the actual manufacturer of the beer in Nadi, so its place of business is in Fiji. The sale of the IP to Paradise Beverages (Fiji) Limited (Paradise) is the sale of a Fiji asset. The sale of an intangible asset is the sale of the IP in the trade mark to Paradise.

Counsel concluded by asking for the appeal to be dismissed and the matter remitted to Revenue for the CGT to be calculated.

6. The Appellant's Counsel in his reply said the option deed is for the sale of tangible assets and not the IP in the trade mark. Revenue has to show the Appellant has a registered place of business in Fiji.

7. At the conclusion of the arguments I informed I would take time to consider my decision. Having done so I now deliver my judgment.

8. Before I do so I make the following observations:

(1) The CGT Decree is no longer in force.
(2) The 20% penalty has been withdrawn by Revenue.

9. I shall now direct my attention to the CGT Decree 2011 (Decree) the relevant sections of which are the following.

10. S.1 – (2) provides that the Decree applies to capital gains arising on the disposal of capital assets on or after 1 May 2011.

11. S.2 states "Capital asset" means – (inter-alia) (e) an intangible asset and (h) an option, right or other interest in an asset referred to in the foregoing paragraphs. I opine that (h) in these circumstances refers to the asset in (e).

12. S.2 states that "Fiji asset" means (inter-alia) (c) a capital asset of a fixed place of business in Fiji and (f) an option, right, or other interest in an asset referred to in the foregoing paragraphs. Again I opine that (f) refers to the asset in (c).

13. S.14 – (1) and (a) states a person makes a disposal of a capital asset if the person parts with its ownership including when it is sold, exchanged transferred or distributed.

14. S 6 – (1) provides for the imposition of CGT on a person who has made a capital gain…….on the disposal of a capital asset and s.6 (3) provides that if the person who has made a capital gain is a non-resident person subsection (1) applies only if the capital asset is a Fiji asset.

15. I have to determine whether the sale of the IP is a disposal of a capital asset. In other words is it an intangible asset and is it a capital asset of a fixed place of business in Fiji. Only if the answer is in the affirmative in each case is the disposal of the IP by the Appellant subject to CGT.

16. The word "intangible" in the Oxford Advanced Dictionary of Current English is defined as "that cannot be touched or grasped by the mind," and "intangible assets" means "assets of a business which cannot be measured e.g. a good reputation". Thus what will come to mind immediately here is intellectual property (IP) and goodwill.

17. The draftsman of the Decree clearly did not intend by the words he used in s.2 to include "an intangible asset" in the definition of a "Fiji asset" for it is not included anywhere in paras (a) to (f). The maxim that is applicable here is when there is express mention of certain things, then anything not mentioned is excluded. What is included however is a capital asset of a fixed place of business in Fiji.

18. So if Revenue contends the disposal of the IP is subject to the imposition of CGT, it now has to satisfy the Court that the owner of the IP (Appellant) who has disposed of it, has a fixed place of business in Fiji through which the Appellant is carrying on its business. The English Court of Appeal decision in South India Shipping Corp Ltd v Export-Import Bank of Korea [1985] 2 All ER at pg 220 is relevant here. The Court held that where the bank had both premises and staff within the jurisdiction and was carrying on business activities, it had established a place of business within Great Britain.

19. Here it is accepted by both sides that the Appellant is a New Zealand registered company and no evidence has been provided by Revenue that it has premises in or carries on business activities in Fiji. At this point Revenue should have accepted that CGT cannot be imposed on the Appellant, but it did not.

20. Instead, Revenue fell into the error of thinking that the Trade Mark License Agreement dated 15 November 2009 had the effect of making the Appellant to have an interest in a capital asset of a fixed place of business in Fiji. If I may say so, the license agreement does no such thing. Far from making the Appellant to merely be having an interest in the capital asset (the intangible asset) it has the contrary effect. It states in Introduction A that the (Appellant) is the proprietor of the Trade Mark. It provides by clause 2.5(b) that this Agreement does not give (Brewsawa) any right title or interest in or to the Trade Marks, except the rights of use specifically set out in this Agreement. These make it crystal clear that the Appellant is the owner of the Trade Mark and not merely having an interest in it.

21. In any event, Revenue by its letter dated 20 September 2013 to the Appellant, Revenue refers to the Agreement for Sale and Purchase (SPA) dated 2 September 2013 (sic) for NZ$4,999,999 between the Appellant and Paradise. It states Revenue has decided this to be a sale of a Fiji asset and thus subject to CGT in the sum of $791,264.28.

22. The heading of the Revenue letter is the "Sale of Intellectual Property – VONU Brands". Thus Revenue had seen with blinding clarity that it was the Appellant which disposed of the intangible asset (Intellectual Property) and it was the Appellant which would be given the notice of assessment and which would have the right to object under s.16 of the Tax Administration Decree 2009.

23. The SPA is actually undated and its Clause 2.1 provides that the Appellant sells and transfers to Paradise all the Appellant's rights, title and interest in the brands and the related Third Party IP.

24. The notice of assessment dated 20 September 2013 states the consideration received is $7,912,642.80 which the Revenue letter states is the Fijian value of the NZ$4,999,999 which is the consideration received by the Appellant for the sale of its intellectual property to Paradise. Thus the circle is completed and it is consequently not open to the Revenue to contend the Appellant merely had an interest in the IP and was not the owner of the IP. This is because Paradise would not be paying out the large sum of NZ$1 short of NZ$5M if it was not getting the entire ownership of the IP but only an interest in it.

25. The sale is a fait accompli for the following reasons:

(i) First the Revenue has given a letter to the Reserve Bank of Fiji dated 20 September 2013 that the payment of NZ$4,999,999.10 is for the purchase of intellectual property assets.

(ii) The second is Revenue's receipt dated 20 September 2013 confirming the receipt from the Appellant (of Auckland, New Zealand) of $791,264.28 being payment of CGT for 2013

26. The Revenue has clearly and unequivocally accepted that the capital (intangible) asset is the property of the Appellant. It cannot then say that that the IP is the capital asset of Brewsawa in which the Appellant has only a right or interest. In any event I note from the Statement of Agreed Facts dated 14 August 2014 signed by the Counsel for the Appellant and Revenue in para 6 that Paradise is now the owner of the IP and Brewsawa has ceased operations**.**

27. If I may say so with respect, the Tribunal's statement in para 21 of the Decision that the intellectual property licensed to Brewsawa is the intangible asset and a capital asset and that the Appellant as licensor of the intellectual property has an interest in it, is untenable. I am compelled to reiterate the licensed agreement acknowledged that the Appellant is the owner and Brewsawa is thus not having a capital asset but having a fixed place of business in Fiji.

28. I am of opinion that the IP is not a capital asset of a fixed place of business in Fiji. Consequently it is not a Fiji asset. Thus its disposal is not subject to CGT.

29. In the result the Appeal is allowed and the decision of the Tribunal set aside. In fine, I make the following orders:

(1) The Notice of Assessment issued on 20 September 2013 is hereby set aside.
(2) The Respondent (FRCA) is to refund to the Appellant the sum of F$791,264.28 collected under the CGT assessment.
(3) The Respondent is to pay the Appellant interest on (2) at the rate of 4% p.a from the date of this judgment to the date of payment.
(4) Each party is to pay their own costs throughout these proceedings.

Delivered at Suva this 2nd day of November 2017.

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David Alfred

JUDGE of the High Court of Fiji