**IN THE TAX COURT OF FIJI**
**AT SUVA**
**CIVIL JURISDICTION**

**Civil Action No. HBT 04 of 2019**

**BETWEEN** : **FIJI CAYMAN HOLDINGS**

*APPLICANT*

**AND** : **FIJI REVENUE AND CUSTOMS SERVICE**.

*RESPONDENT*

**BEFORE** : M. Javed Mansoor, J

**COUNSEL** : Mr. R. Krishna & Mr. R. Naidu for the applicant
: Mr. O. Verebalavu with Ms. F. Gavidi for the respondent

**Date of Hearing** : 18 November 2019
**Date of Judgment** : 9 October 2023

# JUDGMENT

*TAXATION Sale of shares – Capital gain – Capital gains tax – Exempt income – Consideration – Whether transaction a tax avoidance scheme – Sections 2, 65 (1), 66 (1), 67 (1) (d), 84 (1), 86 (2) and 102 of the Income Tax Act – The Income Tax (Exempt Income) Regulations 2016 – Income Tax (Budget Amendment) Act 9 of 2019 – Section 88, Tax Administration Act 2009*

The following cases are referred to in this judgment:

a) *The Commissioners of Inland Revenue v Duke of Westminster* [1936] AC 1
b) *The Cape Brandy Syndicate v The Commissioner of Inland Revenue [1921] 12 TC 358*
c) *Spectros International plc v Madden [1997] STC 114, 70 TC 349*
d) *Ben Nevis Forestry Ventures Ltd v The Commissioner of Inland Revenue [2009] 2 NZLR 289*
e) *Inland Revenue Commissioners v McGuckian [1997] 1 WLR 991*

---

**1.** The present dispute concerns whether the sale of the applicant's shares in its fully owned subsidiary – Farleigh Limited (Farleigh) – to the Fiji National Provident Fund (FNPF), is exempt from capital gains tax (CGT), and, if not, whether the amount of tax has been correctly assessed by the respondent.

**2.** The applicant sold its shares in Farleigh to FNPF in May 2018. The applicant's primary position is that, under the law as it then stood, any gain made on the sale of shares was exempt from CGT. Secondly, and alternatively, the applicant states that the respondent assessed CGT by taking a wrong sum as the consideration. Thereby, the applicant says, the assessment resulted in a grossly excessive capital gains tax.

**3.** The respondent denies that the sale of shares in Farleigh is exempt income. The Fiji Revenue and Customs Service assessed the transaction for CGT on a consideration of $277,000,000.00 by its notice of assessment dated 23 March 2018.

4. In response to the assessment, the applicant filed an objection. In its objection decision, the respondent disagreed with the applicant's contention that the claim is tax exempt. The decision stated that Farleigh has never paid any dividend to Fiji Cayman Holdings and the exemption claimed under section 67 (1) (d) of the Income Tax Act ("Act") cannot apply as the shares have not been used solely to derive exempt income. The respondent stated that the applicant's interpretation of the law is a tax avoidance scheme.

5. Rejecting the revenue authority's position, the applicant says that even if the capital gain is not considered as exempt income, the consideration for the sale of shares is approximately $158 million dollars. The difference of approximately 119 million dollars, the applicant says, is the amount of debt payable to offshore companies that were assigned to FNPF, and that the share sale and the assignment took place at the same time as a single transaction.

6. The applicant challenged the respondent's objection decision by way of a review to the tax tribunal, and the case was subsequently transferred to this court under section 88 of the Tax Administration Act 2009.

**The transaction**

7. The main facts, which are not in dispute, and are taken from the statement of agreed facts, are stated below.

8. The applicant is a company incorporated in the Cayman Islands, and is a part of Marriot International Inc. ("Marriot"), a group of companies which owns, operates and manages hotels in numerous countries. The applicant held all the issued shares in Farleigh, a company incorporated in Fiji. Farleigh through its subsidiaries owned three tourism properties in Fiji

9. The applicant says it made a commercial decision to sell its ownership interests in the Fiji properties and invited bids for the sale of these interests. FNPF, a statutory body established under the Fiji National Provident Fund Act 2011, was the successful bidder.

**10.** On 28 November 2017, the applicant sent to FNPF a letter stating the basis of their final negotiations. On 26 January 2018, the applicant, FNPF and Marriot entered into a share sale deed. At the time the share sale deed was executed, Farleigh and its wholly owned subsidiary Barton Limited ("Barton") owed debts to related parties ("Starwood creditors") in the way set out below:

| | **Debtor** | **Starwood Creditors** | **Balance as at 31 December 2017** |
|---|---|---|---|
| (i) | Farleigh | Sheraton International LLC | USD36,450,486.23 |
| (ii) | Farleigh | SII Real Estate Holdings Inc | FJD14,832,225.17 |
| (iii) | Barton | Sheraton on the Park Pty Ltd | AUD22,768,383.20 |

**11.** The applicant says that the debts were entered into on arm's-length terms and accrued interest, with balances varying over time. These debts are collectively referred to in the share sale deed as "Starwood payables".

**12.** The applicant's transaction with FNPF contemplated the sale of shares and the assignment of the Starwood payables. The transaction was completed on 25 May 2018, and the applicant delivered to FNPF the stamped share transfer for all the issued shares in Farleigh and the stamped deeds of novation and assignment for the Starwood payables. Under the deeds of novation and assignment, Sheraton International LLC, SII Real Estate Holdings Inc. and Sheraton on the Park Pty Ltd assigned the debts owed to them by Farleigh and Barton to FNPF.

**13.** The applicant filed a preliminary CGT return claiming exemption under section 67 (1) (d) of the Act. On 23 May 2018, the respondent issued a notice of assessment and assessed the applicant for CGT on the transaction in the sum of $25,977,261.31. The notice referred to the disposed assets as 3 ordinary shares and 70 preference shares in Farleigh. The assessment took the sum of $277,000,000.00 as consideration for disposal of the shares. The respondent rejected the description in the share sale deed that consideration was for shares and the Starwood payables. The assessed sum was paid to the respondent on 25 May 2018.

**14.** On 20 July 2018, the applicant filed a notice of objection against the assessment. On 11 October 2018, the respondent issued its objection decision disallowing the applicant's objection. On 8 November 2018, the applicant filed an application for review against the objection decision.

**15.** The following issues are before court:

*1.* Whether:

(a) The gain made from the sale of shares in Farleigh by the applicant is an exempt capital gain under section 67(1)(d) of the Act or

(b) The applicant should receive dividend income from Farleigh in order for the gain on the disposal of the Farleigh shares to be exempt under section 67(1)(d) of the Act.

*2.* Whether:

(a) Both the shares in Farleigh and the Starwood Payables were disposed of (as contended by the applicant) or

(b) Only the shares in Farleigh were disposed of (as contended by FRCS)

*3.* Whether the consideration received by the applicant for the shares in Farleigh for the purposes of the Act was:

(a) $277,000,000.00 (as contended by FRCS) or

(b) $157,807,723.00 the amount calculated as the share sale price pursuant to the share sale deed and recorded in the share transfers (as contended by the applicant)

*4.* Whether the share sale deed or the transaction under the share sale deed was a *tax avoidance scheme*, designed to reduce CGT liability, for the purposes of section 102 of the Act.

**16.** The main issue before court is whether the exemption under section 67(1) (d) of the Act applies to the applicant's sale of shares.

**The question of exempt capital gain**

**17.** The respondent's notice of assessment states the consideration received as $277,000,000.00. The cost is given as $17,227,386.93. The capital gain is shown as $259,772,613.00. CGT is worked out at 10% of the gain.

**18.** There is no dispute that the transaction resulted in a capital gain.

**19.** Section 65 (1) of the Act states that a tax to be known as *capital gains tax* is imposed at the rate prescribed by regulations under the Act on a person who had made a capital gain, other than an exempt capital gain, on the disposal of a capital asset.

**20.** Section 2(d) of the Act defines a *capital asset* as a membership interest in a company security or other financial asset. What the applicant disposed was a capital asset in the form of shares in Farleigh.

**21.** Section 84 (1) of the Act states a person makes a disposal of an asset if the person parts with the ownership of the asset, including when the asset is -

*(a)* Sold, exchanged, transferred or distributed; or

*(b)* Cancelled, redeemed, relinquished, destroyed, lost, expired or surrendered.

**22.** The controversy is whether or not the gain from the disposal of the asset resulted in an exempt capital gain under section 67 (1) (d) of the Act. The issue must, therefore, be resolved by construing the meaning and purpose of the provision. Section 67 (1) (d) states:

> (1) "The following capital gains are exempt capital gains -
>
> (d) capital gain made on disposal of an asset that is used solely to derive exempt income";

**23.** The applicant submitted that Farleigh's shares are assets used solely to derive dividends, which are exempt income, and that any capital gain made by the applicant on the disposal of the Farleigh share is an exempt capital gain.

**24.** By an amendment made to part 5 of the Income Tax (Exempt Income) Regulations 2016 any dividend received was made exempt income. The law that exempted all dividends from tax became effective from 1 August 2017.

**25.** The applicant submitted that other changes were also made to the law to ensure that the benefits of the new policy were made effective for shareholders. These included the removal of dividends from the provisions on non-resident withholding tax in section 10, removal of the deemed dividend distribution provision in section 20 (a) and deletion of the requirement to withhold tax from dividends paid to residents under section 112 (2) of the Act.

**26.** The applicant says that the question whether Farleigh paid a dividend to the applicant was not relevant and that the plain and ordinary meaning of the exemption provision is that at the time of the disposal the asset is *used* only to derive exempt income. Where the asset is used in that way, the gain on its disposal is exempt capital gain, and would not attract CGT.

**27.** The applicant's argument is that the only income that could be derived by the applicant from the Farleigh shares was dividends, and, therefore, it is exempt income. As a result, the capital gains on the share disposal are exempt capital gains.

**28.** The exemption made available by section 67 (1) (d) was taken away by section 6 of the Income Tax (Budget Amendment) Act No. 9 of 2019. The amended provision states:

> "The following capital gains are exempt capital gains –
>
> (d) a capital gain made on disposal of an asset that is used solely to derive exempt income, excluding the disposal of shares".

**29.** The respondent says that the applicant did not receive dividends at any time the exemption was available under part 5 of the regulations. The respondent says that the shares were not used solely to derive exempt income, and that had the applicant received dividends prior to the amendment of the regulations in 2017, such dividends were not exempt income. The respondent says that the only

return the applicant has received from the asset was at the time of disposal of the shares and that this was due to a capital appreciation of the asset.

**30.** The respondent contends that Farleigh had had an accumulated loss of $34,059,857 for the financial year ended 2017, and that according to the directors report the board of directors did not recommend the declaration of dividends for the year ended 31 December 2017. Therefore, it says, the applicant did not receive a dividend that was exempt income under the Income Tax (Exempt Income) Regulations.

**31.** The respondent said that the word derived in the context of section 67(1) (d) means that the asset (share) is used to receive exempt income (dividends). It was submitted that the word solely suggests that the shares in Farleigh should have been used only to generate dividend income for the applicant prior to the sale.

**32.** The plain meaning of the enactment must be considered without straining the words used by the legislature to see whether the applicant is entitled to the exemption.

**33.** In *The Commissioners of Inland Revenue v the Duke of Westminster* Lord Russel said:

> "I confess that I view with disfavor the doctrine that in taxation cases the subject is to be taxed, in accordance with a Court's view of what it considers the substance of the transaction, the Court thinks that the case falls within the contemplation or spirit of the statue. The subject is not taxable by inference or by analogy, but only by the plain words of statute applicable to the facts and circumstances of his case. As Lord Carins said many years ago in *Partington v Attorney-General [(1896) L.R. 4 H. L 100, 122]* : "As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be."[1]

**34.** In *The Cape Brandy Syndicate v The Commissioners of Inland Revenue* Rowlatt J said:

[1] [1936] AC 1 at 24

> "Now of course it is said and urged by Sir William Finlay that in a taxing Act clear words are necessary to tax the subject. But it is often endeavored to give to that maxim a wide and fanciful construction. It does not mean that words are to be unduly restricted against the Crown in such Acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for any intendment: there is no equity about a tax; there is no presumption as to a tax; you read nothing in; you imply nothing, but you look fairly at what is said and at what is said clearly and that is the tax".[2]

**35.** Section 2 of the Act gives the meaning of the word "derived".

"Derived means:

(a) In the case of income tax, received or the arising of the right to receive as determined under section 37; or

(b) In the case of any other tax imposed under this Act, received".

**36.** In relation to a dividend, the term derived must be taken to include income received or the arising of the right to receive income. The term dividend is defined by section 2 of the Act. The ordinarily understood meaning of distributing profits to a member of a company will suffice for the purpose of this matter.

**37.** The applicant did not receive dividends after 1 August 2017, when all dividends were made exempt income. This fact was relied on by the respondent in seeking to deny the exemption. What the applicant received on disposal of the shares was a capital receipt resulting in large gains. Section 67 (1) (d) made provision for capital gains to be exempt when such gain is made on disposal of an asset that is *used solely to derive exempt income*.

**38.** The enactment must be read as the deployment of the asset to derive exempt income, and nothing more. Whether exempt income resulted from the asset is not a necessary consideration. The declaration of dividends by a company depends on several factors. Firstly, there must be available distributable profits. The company's board must see it fit to make a declaration for distribution to its members. Farleigh did not make profits for distribution. Taking these factors into

[2] [1921] 12 TC 358 at 366

account, the court is of the view that the applicant is entitled to the exemption given by section 67 (1) (d) of the Act.

**39.** The respondent referred to inconsistencies in the applicant's correspondence in regard to the transaction. One such inconsistency is to be found in the applicant's letter dated 3 April 2018. The letter represented that the capital gain from the sale of shares will be subject to tax under section 65 of the Act.

**40.** The respondent submitted that the applicant's claim for exemption was not raised initially, and was only raised by letter dated 8 May 2018.

**41.** However, the applicant's omission to claim the exemption at the outset or its exploration in seeking to pay a lesser sum as capital gains tax does not disentitle it from claiming an exemption made available by law.

**The consideration**

**42.** Issues 2 and 3 relate to the consideration received by the applicant for the disposal of the shares. The applicant states two types of capital assets – share and debt – were disposed under the share sale deed. These were the Farleigh shares and the Starwood payables. The shares were disposed through share transfers executed by the applicant. The Starwood payables were assigned by deeds of novation and assignment, executed by the respective Starwood creditors.

**43.** The share sale deed sets out the purchase price:

"Purchase Price F$280,000,000 comprised of

(a) F$155,000,000, payable in respect of Sale Shares which is subject to adjustment in accordance with Clause 5.1(b) at Completion **(**"Sale Share Price"); and

(b) The Starwood Payables Amount payable in respect of the assignment or novation of the Starwood Payables".

**44.** Clause 5.1 (b) states:

> "The Starwood payables amount will be adjusted to be equal to the amount of the Starwood payables at completion. The share sale price will be adjusted to an amount equal to F$280,000,000 minus the amount of the Starwood payables on completion."

**45.** The owners of the Starwood payables were not parties to the share sale deed. The applicant said that the share sale deed did not convey title to property, and that the owners of the payables conveyed title by a separate instrument.

**46.** Section 66 (1) of the Act says that the capital gain made by a person on the disposal of a capital asset is the consideration for the disposal reduced by the cost of the asset at the time of the disposal. Section 86 of the Act establishes the amount of consideration for the disposal of an asset for the purposes of the Act. Section 86 (2) states the consideration for disposal of an asset is the total amount received or receivable of the asset, including the fair market value of any consideration in kind determined at the time of the disposal.

**47.** The respondent pointed to several factors based upon which it placed the consideration at $280,000,000.00 in assessing the transaction's capital gain.

**48.** The first concerned the applicant's letter dated 24 March 2018 which listed out the companies that made tenders to buy shares owned by the applicant in Farleigh and their indicative offers. FNPF made an offer of $280,000,000.00 to purchase the shares and was the second highest bidder. Norwich Properties made the highest bid of $305 million dollars. Turnstone Capital offered $250 million dollars.

**49.** The respondent submitted that the applicant lodged a preliminary return for capital gains on 22 March 2019 – along with its tax clearance application – setting out the transaction's consideration as $155,923,256.62. In this return, the applicant set out a capital gain of $139,083.714.53 and worked out the capital gains tax at $13,908,371.45 at the tax rate of 10%.

**50.** The respondent also drew the court's attention to letter dated 17 May 2018 sent on behalf of the applicant by the accounting and advisory firm, PWC, which gave different sums as the purchase consideration for the shares and the

Starwood payables. The share sale consideration was given as $163,154,768.49 and the Starwood payables value as $113,845,231.54. In this letter, the capital gain of $145,927,381.53 was shown as not attracting capital gains tax.

**51.** The applicant explained this discrepancy by saying that the share sale deed superseded the letter of intent and that under the share sale deed FNPF was required to pay an aggregate sum of $280,000,000.00 in return for all the shares in Farleigh and the Starwood payables.

**52.** Out of the aggregate consideration, the applicant says, $157,807,723.00 was paid for the Farleigh shares and the balance sum of $119,192,227.00 was settled by way of an assignment of debt. No gain or loss was made on the assignment of the Starwood payables. The respondent submitted that the consideration received by the applicant for the disposal of these shares was $280,000,000.00 less $3,000,000.00 as adjustment for payment to land owners.

**53.** The respondent stated that the initial bid amount is described as the purchase price in the share sale deed. It says it is justified in taking the full amount as the consideration for the share sale for tax purposes, while it is the applicant's prerogative in how it distributes and declares the full consideration. The respondent stated that the valuations done by Knight Frank on the purchaser's instruction was confirmation that the shares were purchased at the aggregate value of the three entities that operated under Farleigh.

**54.** The respondent submitted that the total average value of Sheraton Fiji Resort, Denarau Golf and Racquet Club and Associated Development land and Westin Island Resort & Spa was $285 million dollars. The three entities operated under Farleigh. The respondent stated that the average value of the three entities operated by Farleigh is equivalent to the amount which FNPF bid to purchase the shares.

**55.** The valuations were carried out on 26 January 2018 by New Zealand based valuation firm, Knight Frank under instruction from FNPF. Sheraton Fiji Resort was valued at $142,500,000.00, Denarau Golf & Racquet Club and Associated

Development Land at $38,000,000.00 and the Westin Denarau island Resort Resort & Spa at $104,500,000.00.

**56.** The valuations were, however, in respect of the tourism properties operated by Farleigh. These properties were valued for the purpose of mortgage finance. The valuations were not of the Farleigh shares. In the case of Sheraton Fiji Resort and Westin Denarau Island Resort & Spa, the interests valued were of the leasehold of the properties. In regard to Denarau Golf & Resort Club, the report says, the interest valued is the market value of the leasehold interest (crown lease), particularly pertaining to the potential individual lots and the underlying block value.

**57.** There is no evidence that the total assets of the three properties add up to the net assets or net book value of Farleigh. The share value of the company is a reflection of its total assets less its liabilities – current and long term. The FNPF financial statements tendered to court show that the consideration for the acquisition of the Farleigh shares includes goodwill of $16,885,000.00, which is mainly attributed to the Marriot brand name.

**58.** The respondent also pointed out that the consideration shown for stamp duty purposes on the share transfer document was $280,000,000.00. On the basis of the disclosed consideration, the seller paid a stamp duty of $8,400,000.00. In response, the applicant explained that stamp duty was paid on the full consideration covering both types of assets conveyed by the transaction.

**59.** The way in which the full acquisition of Farleigh is recorded by the purchaser is relevant. The FNPF annual report 2018 stated:

> "On 24 May 2018, FNPF acquired 100% shareholding in Farleigh Limited (the holding company) from Fiji Caymans Holdings for a consideration of $157,808,000. FNPF acquired Farleigh Limited as part of its growth and diversification strategy to increase their footprint in the tourism sector in order to enhance the return on its member's fund. Farleigh Limited owns the Sheraton Fiji Resort, the Westin Denarau Island Resort and Rylestone Limited – an entity which owns the Denarau Golf and Racquet Club and the Residential Villas. The shares purchased comprised of 70 preference shares and 3 ordinary shares. Goodwill of $16,855,000 was recognized as the excess of the consideration transferred over the

fair value of the net assets of $140,923,000. The fair values of the identifiable assets and liabilities of Farleigh Limited at the date of acquisition were:

**Farleigh Limited**
FNPF entered into a Share Sale Deed with Marriot International, Inc. and Fiji Cayman Holdings for the acquisition of the 100% shares in Farleigh Limited, the Holding Company for $157,808,000 which was made up of Debt and Equity. The debt novated under Farleigh Limited to the Fund amounted to $82,220,000. The interest rate on the loan is 5.00% p.a fixed for 3 years, with the loan maturing on 24 May 2033. The loan is payable on quarterly basis amounting to $1,955,932 inclusive of interest and principal.

The loan is secured by:

(i) First Registered Mortgage over NL 13796 described as Lot 1, Denarau Island being the Westin property

(ii) First registered Mortgage over State Lease No. 13451 described as Lots 1, 2 and 3 on SO. 3705 being the Golf Course & Racquet Club.

(iii) First registered Mortgage over State Lease No. 19370 described as Lot 9 on SO. 5005 being Dump Site and ponds.

(iv) First registered Mortgage over Sate Lease No. 19371 described as Lot 7 on SO. 5005 being the residential dwelling.

**Barton Limited**
The debt novated under Barton Limited amounted to $36,980,000 as part of the Starwood Properties acquisition. The interest rate on the loan is fixed at 5.00% for 3 years, with the loan maturing on 24 May 2033. The loan is payable in quarterly repayment of $879,644 inclusive of interest and principal.

The loan is secured by:

(i) First Registered Mortgage over NL.14619 described as Lot 2 on SO.4946 being the Sheraton Property.

(ii) First Registered Debenture over all the assets and undertakings of Barton Ltd. (This is a fixed and floating charge over all present and future assets, undertakings (including good will) and unpaid/uncalled capital of the company".

**60.** FNPF recorded the Farleigh share transfer at a consideration of $157,808,000.00. The fund puts the fair value of net assets at $140,923,000.00, which is less than the

transaction sum. The balance $16,885,000.00 is shown as goodwill. This valuation can be said to fairly represent the entirety of the Farleigh shareholding.

**61.** The report of the board of directors of FNPF says:

> "On 24 May 2018, FNPF acquired 100% shareholding in Farleigh Limited (the holding company) from Fiji Caymans Holdings for a consideration of $157,800,000.00".

**62.** The assignment removed the debt as an asset in the creditor's balance sheet and made it an asset owned by FNPF. The Starwood payables became receivables in FNPF's books upon assignment of the debts. As the new owner of the asset, FNPF became entitled to capital and interest on the receivables. FNPF paid a price for acquiring the receivables. The price recorded as such is the consideration for the debt. The purchaser's annual report shows the value of the receivables it has acquired.

**63.** It is clear, therefore, that the consideration was in respect of both share sales and the assignment of the loan payables. The valuations by Knigh Frank on behalf of the purchaser are clearly of the properties, and do not necessarily reflect that of Farleigh's share value.

**64.** The applicant referred the court to the judgment in *Spectros International Plc v Madden* in which the court said the law respects the freedom of the parties to a transaction to frame and formulate their agreement as they wish to suit their legitimate interests as long as the form adopted is genuine. The court stated:

> "What is the relevant consideration may depend upon the terms and form of the transaction adopted by the parties. The parties to a proposed transaction frequently can achieve the same practical and economic result by different methods. Take for example the position of the owners of the entire issued capital of a company with gross assets of $2 million and net assets (after discharging a debt of $1 million owed to the owner or someone else of $1 million. The shares are worth $1 million, but would be increased to $2 million if the owner at his own cost and for the benefit of the company released or discharged the debt. IN this situation, the owner may agree to sell his share for $1 million or, on condition that he first releases or discharges the

debt for $2 million. 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 in 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. But as a corollary to this freedom, where the parties have chosen one method, it is not open to them to invite the court to treat as adopted some other method because it is more advantageous to them, because it leads to the same practical and economic result and because it is the more obvious and sensible method to have adopted. If the question is raised what method has been adopted and the transaction is in writing, the answer must be found in the true construction of the document or documents read in the light of all the relevant circumstances**.** If the terms of the documents are clear, that is the end of the question."[3]

**65.** For these reasons it is reasonable to conclude that the consideration of $280,000,000.00 was for the composite transaction including the assignment of debt, and not solely for the transfer of the applicant's ordinary and preference shares in Farleigh.

**Is the transaction a tax avoidance scheme?**

**66.** In its objection decision, the respondent stated that the applicant's interpretation of the law is a tax avoidance scheme to suit the best interest of its business. The respondent noted that Farleigh has never paid dividends. Hence, the respondent said, section 67 (1) (d) cannot apply because the shares have not been used solely to derive exempt income. As such, the respondent concluded, there are reasonable grounds to say that a scheme exists and is designed to reduce CGT liability.

**67.** The respondent relied upon its standard interpretation guideline 2018.

**68.** Section 102 of the Act states:

(1) "Notwithstanding this Act, if the CEO is satisfied that –

(a) A tax avoidance scheme has been entered into or carried out; and

(b) A person has obtained a tax benefit in connection with the tax avoidance scheme,

[3] [1997] STC 114, 70 TC 349

the CEO may determine the tax liability of the person who obtained the tax benefit as if the tax avoidance scheme has not been entered into or carried out and can make compensating adjustments to the tax liability of any other person affected by the tax avoidance scheme.

(2) When a resident person has entered into a transaction that directly or indirectly has the effect that income is foreign-source income derived through a non-resident entity that is connected to a tax haven, the CEO may adjust the income and foreign tax credit position of the resident person to reverse the tax effect of the transaction

(3) If a determination or adjustment is made under this section, the CEO must issue an assessment giving effect to the determination or adjustment

(4) A determination or adjustment under this section must be made within 7 years from the last day of the tax year to which the determination or adjustment relates"

The term "scheme" includes a course of action and an agreement, arrangement, promise, plan, proposal, or undertaking, whether express or implied and whether or not enforceable.

"Tax avoidance scheme" is defined to mean any scheme, whether entered into by a person affected by the scheme or by another person, that directly or indirectly- (a) has avoidance as its purpose or effect; or (b) has tax avoidance as one of its purposes or effect, if the tax avoidance purpose or effect is not merely incidental.

"Tax benefit" means –

(a) a reduction in a liability to pay tax;
(b) a postponement of a liability to pay tax;
(c) an entitlement to a refund
(d) an increase in a tax credit;
(e) any other advantages arising because of a delay in payment of tax; or
(f) anything that causes gross income to be exempt income, a capital gain to be an exempt capital gain, or a fringe benefit to be an exempt fringe benefit; and …."

**69.** The respondent submitted that there was only one disposal made for the purpose of part 3 of the Act. This was the disposal of a capital asset comprising 3

ordinary and 70 preference shares owned in Farleigh, and that this was the only Fiji capital asset owned by the applicant. It says the applicant was not the owner of the Starwood payables, and, therefore, could not have transferred ownership to FNPF.

**70.** The initial letter of intent made no reference to the Starwood payables. This prompted the respondent to question the applicant's motive in adopting a different structure in its final form as given in the share sale deed.

**71.** The respondent states that instead of drawing up a complex transaction, the debt from the Starwood payables could have been paid from the share sale proceeds. It made reference to the decision in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue*[4], in which the court took into consideration the manner in which an arrangement was carried out, when determining its commercial and economic reality. In this instance, the respondent submitted, the applicant chose a more complex arrangement by including the Starwood payables as part of the purchase price whereby the value of the share is determined by the amount of the Starwood payables at the time of the share sale.

**72.** The respondent said that the applicant split the purchase price so that there were two disposals so as to allow a deduction for the payables on the value of consideration. By this, the actual value of the shares established by the valuation report was substantially reduced giving the applicant a significant tax benefit. The respondent suggested that it would have been much simpler for the applicant upon receipt of $280 million dollars to pay off the liabilities owed to the Starwood creditors. By this, the respondent says, Barton and Farleigh would have become debt free from the Starwood creditors and also from FNPF.

**73.** The respondent states that the legal consequences of the transaction would not be affected by how the buyer has declared its investment in its annual report. The respondent submitted that the deed of novation is of no significance as the applicant is not a party to it and that for CGT purposes, only the seller and the

---

[4] [2009] 2 NZLR 289

buyer mentioned in the share sale deed would be considered along with the consideration for the share sale.

**74.** The respondent referred to the House of Lords decision in *Inland Revenue Commissioner v McGuckian*[5] in which the court held that in constructing tax legislation, the statutory provisions were to be applied to the substance of the transaction disregarding artificial steps in the composite transaction or series of transaction inserted only for the purpose of seeking to obtain a tax advantage. In that case the court held that the only possible inference was that an assignment of the right to the dividend by the tax payer was inserted for the sole purpose of gaining a tax advantage.

**75.** The respondent's witness, its principal auditor, Richard Bieskoto, gave evidence and said there was no commercial sense in the transaction. He made reference to the applicant's income tax return for the year 2017 and its directors' report, which showed there was no declaration of dividends. The applicant was also not the owner of the assigned debt. The witness said the transaction was for the purpose of a tax benefit.

**76.** In cross examination, however, the respondent's witness admitted that the seller and the purchaser of the shares were not related. Starwood creditors are also not related parties to FNPF. He agreed that there is no accusation of a sham concerning the transaction.

**77.** The applicant and FNPF entered into an arms-length transaction. The transaction took place in the way it was documented in the share sale deed. It is not inconsistent with the way in which commercial transactions are arranged.

**78.** Lisa Jane Apted, a chartered accountant attached to KPMG giving evidence for the applicant said that the sale of shares and debt is common in mergers and acquisitions, an area in which she said she has experience.

---

[5] [1997] 1 WLR 991

**79.** The respondent has not established that the transaction or the claim for exemption was a tax avoidance scheme.

**Conclusion**

**80.** The applicant's claim for exemption of capital gains tax was in accordance with section 67 (1) (d) of the Act as it then stood. The transaction was for the sale of shares and debt. The claim for exemption is not a scheme for the avoidance of tax

**ORDER**

*A.* The respondent's objection decision dated 11 October 2018 is set aside.

*B.* The assessment dated 23 May 2018 is set aside.

*C.* The respondent is to refund to the applicant the sum paid under the assessment.

*D.* The respondent is to pay the applicant costs summarily assessed in a sum of $4,000.00 within 21 days of this judgment.

Delivered at **Suva** on this **9th** day of **October**, **2023.**

M. Javed Mansoor

**Judge**