IN THE TAX COURT
AT SUVA

ITA Action No. HBT 17 of 2019

IN THE MATTER of sections 17 and 82 of the Tax Administration Act No 50 of 2009

and

IN THE MATTER of an Application for Review by Foods (Pacific) PTE Limited (Tax Identification No: 50-05466-0-6)

BETWEEN	**:**	**FOODS (PACIFIC) PTE LIMITED** **Applicant**
AND	**:**	**CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS SERVICE** **Respondent**
Counsel	**:**	**Ms Prasad & Ms Deo for the Applicant** **Mr Qalo & Ms. Singh for the Respondent**
Hearing	**:**	**17 & 19 March 2025**
Submissions	**:**	**28 March 2025**
Judgment	**:**	**11 August 2025**

JUDGMENT

[1] The applicant applies for a review from the respondent's objection decisions of 31 July 2019 and 7 January 2022.

[2] The applicant challenges an assessment of its tax liability for a number of tax years in respect to expenses incurred overseas. The respondent has disallowed a number of marketing expenses[1]. The applicant has paid the tax. The relief sought by the applicant is a refund plus interest.

Background

[3] The applicant is in the business of food manufacturing. It manufactures the food products and sells locally. In about 2010, the applicant ventured into the overseas markets of USA, Australia, the United Kingdom and India. It set up subsidiary companies in USA[2] and Australia[3], owning 100% of the shares of each company, and incurred marketing and other costs in those jurisdictions. It sought to recoup those expenses, claiming tax deductions for them in Fiji from 2010 onwards.

[4] The respondent undertook an audit of these expenses from 2017. On 21 December 2018, the respondent issued an assessment in respect to the years from 2010 to 2017, disallowing deductions for marketing expenses as well as charging penalties.

[5] The applicant lodged an objection from the assessment on 15 February 2019 which led to the issuance of an objection decision on 31 July 2019 (**the first objection decision**). These proceedings were originally filed in the Tax Tribunal on 27 August

[1] The expenses are described as marketing expenses but in fact pertain to general operating expenses.
[2] Foods (Pacific) USA Ltd.
[3] Foods Pacific (Pty) Ltd.

2019[4] but later transferred on 9 December 2019 to the Tax Court under s 88(1) of the Tax Administration Act 2009.

[6] The respondent issued a second objection decision on 7 January 2022. A Terms of Settlement was executed by the parties on 25 March 2022 reducing the issues for determination to only the marketing deductions. An Amended Statement of Agreed Facts and Issues to be Determined was executed by the parties on 6 June 2022. The issues for determination in this proceeding are set out therein as follows:

1. *Are the USA marketing expenses of FJ$3,943,234 incurred by FPL [the applicant] during the tax years 2012, 2013, 2014, 2015, 2016 and 2017 deductible under section 19 of the Income Tax Act Cap 201 and section 21 Income Tax Act 2015?*

2. *Are the Australian marketing expenses of FJ$658,325 by FPL during the tax years 2012, 2013, 2014, 2015, 2016 and 2017 deductible under section 19 of the Income Tax Act Cap 201 and section 21 Income Tax Act 2015?*

3. *Are the UK marketing expenses of FJ$1,365,753 incurred by FPL during the tax years 2014, 2015, 2016 and 2017 deductible under section 19 of the Income Tax Act Cap 201 and section 21 Income Tax Act 2015?*

4. *Is the Objection Decision of the Applicant made on 31 July 2019 invalid and of no effect on the grounds it is outside the statutory time frame provided in subsection 16(7) of the Tax Administration Act 2010?*

Applicant's Evidence

[7] The applicant called three witnesses, being:

[4] The applicant filed an Application for Review challenging the respondent's decision.

- Vikash Gupta
- Stephen Pickering
- John Faktaufon.

[8] An affidavit was filed for Mr Gupta on 11 January 2021. He is the Group Chief Financial Officer for the applicant and familiar with the circumstances of this case. Mr Gupta provided the following evidence in examination in chief:

i. The applicant employs over 300 people in its Fiji and overseas operations. Between 2010 and 2017 the company incurred expenses with respect to its overseas ventures. Its overseas entities were set up primarily to reduce its product liability as well as be in a position to enter into contractual relationships with overseas entities in order to advertise and grow its market.

ii. Mr Gupta stated that the applicant's objection letter dated 15 February 2019 sets out the position of the applicant in respect to the respondent's objection decision. In short, the expenses claimed were genuinely incurred by the company in order to venture into overseas markets. The process was as follows. The Fiji parent company would sell the product to its subsidiary company in Australia or the United States at cost plus margin. The margin was a commercially viable margin with an arm's length figure. As the subsidiary could not afford to actually pay for the product it was a paper transaction only. The subsidiary would then sell the product in that jurisdiction for a higher margin and endeavour to cover its operating costs in doing so. The intention was for the overseas subsidiary to become independent and for it to make a profit. However, the subsidiaries were operating at a

loss and the parent company was covering shortfalls in the subsidiaries operating expenses to keep the subsidiary afloat.

iii. When the tax documents were completed in the overseas jurisdiction, the total expenses incurred by the subsidiary were treated as an expense in the subsidiaries tax accounts but the amount of reimbursement from the parent company to the subsidiary was treated as income received from the parent company. The parent company claimed the amount paid to the subsidiary to cover its shortfall as a taxable expense in Fiji.

iv. A second objection decision was issued by the respondent on 7 January 2022 reducing the period in question from eight years to six years – the 2010 and 2011 tax years were excluded from the assessment.

v. Mr Gupta accepted in cross-examination that the overseas subsidiaries were separate legal entities with their own tax identifications in those jurisdictions. Also, he accepted that when the product was sold from the parent company to the subsidiary, the subsidiary became the new owner of the product.

[9] Stephen Pickering is the Managing Partner of Ernest and Young, the agent for the applicant and responsible for looking after the applicant's tax affairs. Ernest and Young advised the applicant on its tax liabilities at the material time and structured the applicant's overseas venture. Mr Pickering responded to the reasons provided by the respondent for its objection decision. He expressed the view that the respondent's reasons had no merit. It was his view that pursuant to ss 19 (1)(b) and 21 of the Income Tax Act the applicant was permitted to claim the deductions for overseas expenses as they were directly related to selling the applicant's products in overseas markets.

[10] Mr Pickering stated that both the expenses and the venture were genuine and that there was a significant cost for the applicant in attempting to break into new markets

(as the applicant was seeking to do) and that it took time for such a venture to be successful. He stated that because of the respondent's decision, imposing a significant tax burden on the applicant and, in effect, requiring the applicant to pay tax on its losses, this led to the shutdown of the venture and the overseas subsidiaries.

[11] The final witness for the applicant was John Faktaufon, Tax Director for Ernst & Young. He played an instrumental role in the tax affairs of the applicant over the material time. He had previous experience working for the respondent, heading its transfer pricing team – he was employed with the respondent from 1996 to 2013. He has considerable experience with respect to the tax matters that are the subject of this proceeding. He disagreed with the respondent's objection decision. In cross-examination when asked why the applicant did not close down its overseas operations given its losses, Mr Faktaufon explained that it took time to break into new markets. In answer to questions from the Court as to what would be the focus of his scrutiny of the applicant's venture if he were still employed with the respondent, Mr Faktaufon stated that there would be three concerns; first, whether the venture was genuine, second, whether the transactions for which expenses were sought to be taxed were genuine, and, third, that the applicant was not seeking to claim a tax credit twice for the same losses, ie in the overseas jurisdiction as well as locally in Fiji. Mr Faktaufon noted that none of these three concerns were the basis for the respondent's objection. He was of the view that the applicant's deduction was not only legitimate but in line with s 21 of the Income Tax Act.

Respondent's Evidence

[12] The Respondent called one witness being Ms. Laisa Bainimarama. She is the Acting Chief Assessor for the respondent and is familiar with the present case.

[13] In examination-in-chief, Ms Bainimarama stated that the applicant's transfer pricing policy and its declaration of expenses as 'management fees' rather than marketing

expenses were red flags affecting the applicant's credibility. This justified an audit. Ms Bainimarama explained that the respondent's position was as per the objection decision of 7 January 2022. She acknowledged that the basis for its decision was not in relation to the applicant's transfer pricing or the classification of the expenses as management fees. She explained that its position was as per paragraph 4 of the objection decision which reads:

> *The marketing expenses in relation to Australia market, UK market and USA market is disallowed as these expenses are related to those market for which are treating as separate and distinct under the* ***separate legal entity concept****. Moreover, these overseas markets have their due diligence to their respective tax jurisdiction for which they have already lodged and declared their Financial Statements.* ***Your claim for the losses from these external markets to be transferred and be claimed and be claimed and Foods (Pacific) Pte Limited Fiji books of accounts would be double dipping tantamount to tax evasion****.*
>
> *In addition, there is no documentary agreements between Food (Pacific) Pte Limited Fiji and the distributor nor the overseas marketing branch on these marketing expenses.*[5]

[14] Ms Bainimarama stated that the subsidiaries were separate and distinct with their own obligations and ability to declare income expenses for these same expenses in their own tax jurisdiction.

[15] In cross-examination, Ms. Bainimarama accepted that the objection decision of 31 July 2019 was made more than 90 days after the objection letter of 15 February 2019 and that there had not, in the intervening period, been a request by the respondent's Chief Executive Officer for further information triggering the 90-day extension. She accepted that the respondent did not take issue with the transfer pricing or the management fees classification by the applicant and that after a consideration of

[5] My emphasis.

several provisions in the Income Tax Act and the Tax Administration Act, the real difference between the parties lay in its view as to whether the applicant was entitled to claim expenses incurred in overseas jurisdictions and whether the expenses were, in fact, those of the applicant or those of a separate legal entity being the subsidiary companies in Australia and the USA.

Positions of the parties.

[16] The arguments for the applicant are as follows:

i. Pursuant to s 16(7) of the Tax Administration Act, the respondent was required to issue its objection decision within 90 days of the objection letter. It did not do so and, therefore, its decision is invalid and the objection letter is deemed to be successful.

   Ms Prasad accepted that s 16 did not provide any express consequences for non-compliance with s 16(7) but submitted that the above could be inferred from s 16(8) which provided consequences where a taxpayer did not lodge an objection letter from the original assessment. In such circumstances a late lodgment letter (objection letter) is considered to be invalid unless an extension is provided by the CEO of the respondent.

ii. In terms of the substantive issue, Ms Prasad stated that the narrow issue concerned the deductibility of marketing expenses in the US, UK and Australian markets for the period from 2012 to 2017. She stated that pursuant to the legislation the applicant was entitled to treat these expenses as deductible expenses in Fiji with particular reliance on ss 14 and 21(1) and (8) of the Income Tax Act. Mr Prasad did not accept that the applicant was double dipping and submitted that there was no concept of separate legal entity under the tax legislation.

[17] Mr Qalo made the following submissions for the respondent:

i. With respect to the procedural issue, he stated that both parties agreed on 31 January 2021 to remit the matter back to the respondent's CEO to make a new decision based on further information that had been supplied during these proceedings. The new decision in 2022 was reflected in the amended statement of facts and issues at paragraphs 9 and 10. With respect to the first objection decision he accepted that it was made outside the 90 days but submitted that the respondent had sought further information, thereby triggering the additional 90 days.

ii. With respect to the substantive issue, he stated that the onus was on the applicant to prove that the respondent's decision was wrong. Mr Qalo submitted that in line with the evidence from the applicant's witnesses, ownership of the product transferred from the applicant to the subsidiary companies and, therefore, the marketing expenses outside of Fiji were incurred by the subsidiaries to generate their own income overseas and not the income of the applicant. He emphasized that the subsidiaries were separate legal entities and could and should have claimed its own expenses in that jurisdiction.

Decision

[18] The issue for determination pertains to the applicant's claim for deduction of marketing expenses for its subsidiaries in the United States[6] and Australia[7] and its third-party sales agent (Kana Foods) in the United Kingdom[8]. The tax years that are the subject of the applicant's objection are from 2012 to 2017.

[19] The Income Tax Act Cap 201 (**the former Tax Act**) was in force for part of the period and the Income Tax Act 2015 (**the 2015 Act**) in force for the 2016 and 2017 tax years.[9] While the material provisions in the two Acts are not identical they are

[6] In the amount of $3,943,234 FJD.
[7] In the amount of $658,325 FJD.
[8] In the amount of $1,365,753 FJD.
[9] The Income Tax Act 2015 came into force on 1 January 2016.

largely the same and, in my view, the differences do not impact on the outcome. For example, s 19(1)(b) of the former Tax Act allowed the applicant to claim expenses that were '*wholly and exclusively*' for the purpose of its business. Section 21 of the 2015 Act allows the applicant to claim a deduction for expenses incurred '*deriving income included in gross income*' and gross income is defined under s 14(1) as '*business income'*.

[20] For ease of reference, I will refer to the 2015 Act. The applicant is incorporated in Fiji and is a resident company under the 2015 Act. Pursuant to s 13 the chargeable income is the gross income for that year '*reduced by the total amount of deductions allowed'* for the year. The applicant is entitled to claim deductions for expenditure or loss on revenue incurred during the tax year '*in deriving income included in gross income'*.

[21] Gross income is defined at s 14(1) as including business income. Subsection (3) provides that subject to this Act, '*the gross income of a resident person includes income derived from all sources within and outside Fiji'*.

[22] The applicant claimed deductions for marketing expenses incurred overseas from 2012 to 2017. The respondent has disallowed these deductions and the onus is on the applicant to establish on the balance of probabilities that the respondent is wrong.

[23] The applicant relies on a wholistic view of its venture into the overseas market. It attempted to break into a number of international markets to sell its locally manufactured food products. It set up subsidiaries, which the applicant owned outright, in the United States and Australia in order to contract in those territories. It had a sales office in India and contracted with a third party (Kana Foods) in the United Kingdom to promote and sell its products. There is no doubt that the applicant as the parent company of the subsidiaries, and directly in respect to India and the United Kingdom, carried the cost of the venture. The purpose of the venture was clearly to generate business income for the applicant. It is disingenuous to contend otherwise.

[24] The applicant applies a plain reading of the relevant provisions in the income tax legislation, arguing that the marketing expenses were incurred in the relevant tax year

for the purpose of deriving business income '*outside Fiji'*. As such, the expenditure were properly claimed as deductions by the applicant. I agree that on the face of it the expenses were properly claimed.

[25] The respondent contends that the said expenses are not deductible expenses for the applicant. The reason being that the subsidiaries are separate and distinct entities with their own tax identity in the overseas jurisdictions. Further the ownership of the food products passed to the subsidiary when sold by the applicant thereto. That the subsidiaries must account for the expenses in their own tax returns in those jurisdictions.

[26] The overriding concern expressed by the respondent is that the applicant is 'double dipping'. Its subsidiary is obtaining a deduction for the expense in the overseas jurisdiction and the applicant is claiming a deduction for the same expense in Fiji. Ms Bainimarama stated in her evidence that any losses by the overseas subsidiaries can be carried forward to the subsequent tax years.

[27] The evidence of Mr Pickering and Mr Faktaufon is to the contrary. They say that the subsidiaries were operating at a loss. That these ventures take some time to generate an income to permit the subsidiaries to operate independently of the parent company. In the meantime, the parent company kept the subsidiaries afloat to make the venture successful to generate business income outside Fiji. They say the applicant paid the shortfall in the subsidiaries operating costs to keep them operating. The subsidiaries treated these payments from the applicant as income in their records overseas while the applicant treated the payments as expenses in Fiji claiming deductions. In such circumstances I accept that the amount treated as expenses by the applicant in Fiji would not be treated as expenses in the United States or Australia and thus would not amount to double dipping.

[28] The respondent argues that the reference in s 14(3) to income derived outside Fiji in fact refers to foreign source income and is to be dealt with under s 60 of the 2015 Act. I do not agree. Section 60 pertains to foreign tax credits which does not apply here. Moreover, if s 14(3) were to relate to foreign tax credits I would expect a reference at s 14(3) to s 60 or, alternatively, a reference at s 60 to s 14(3). There is neither.

[29] The disallowance by the respondent of marketing expenses for the United Kingdom is, in my view more straightforward. The applicant did not have any subsidiary operating in the United Kingdom. It was contracting with, and paying, a third-party agent. The purpose was to sell the applicant's food products in the United Kingdom market. They are expenses incurred to derive business income outside Fiji. The respondent argues that these expenses should be claimed in the United Kingdom by Kana Foods. However, those marketing expenses will have been passed on from Kana Foods to the applicant.

Procedural issue

[30] Section 16 of the Tax Administration Act 2009 sets out the process for taxpayers challenging the respondent's assessment of their tax. A taxpayer must lodge an objection within 60 days of the assessment. The respondent's Chief Executive Officer has a discretion to extend the time. Pursuant to subsections (6) and (7) the respondent must issue a decision on the objection (either allowing the objection in whole or part, or disallow it) no later than 90 consecutive days after lodgment of the objection, or where additional information has been sought in accordance with subsection (5), 90 consecutive days after receipt of such additional information. The respondent did not issue the objection decision of 31 July 2019 within 90 days of the applicant's objection of 15 February 2019. I have seen no request for additional information by the respondent between the two dates. As such, the respondent did not comply with the statutory requirement to make its decision within 90 days.

[31] The applicant argues that the failure to comply means that its objection of 15 February 2019 must be allowed in full. The legislation is silent as to the consequences of a failure by the respondent to make its decision within 90 days. The applicant argues that there must be a consequence on the respondent as there is on a taxpayer who fails to lodge an objection within the time limit and does not receive an extension – the assessment is treated as valid and binding on the taxpayer.[10]

[10] Section 16(8).

[32] I am not prepared to read into the legislation any consequence on the respondent for failing to breach the time specified under s 16(7). If Parliament intended that such a breach entitled the taxpayer to a favourable outcome then it would have expressly provided so in the legislation.

Result

[33] The applicant is successful. In respect to the issues framed in the Amended Statement of Agreed Facts and Issues to be Determined, I answer them as follows:

1. *Are the USA marketing expenses of FJ$3,943,234 incurred by FPL [the applicant] during the tax years 2012, 2013, 2014, 2015, 2016 and 2017 deductible under section 19 of the Income Tax Act Cap 201 and section 21 Income Tax Act 2015?*

   Yes

2. *Are the Australian marketing expenses of FJ$658,325 by FPL during the tax years 2012, 2013, 2014, 2015, 2016 and 2017 deductible under section 19 of the Income Tax Act Cap 201 and section 21 Income Tax Act 2015?*

   Yes

3. *Are the UK marketing expenses of FJ$1,365,753 incurred by FPL during the tax years 2014, 2015, 2016 and 2017 deductible under section 19 of the Income Tax Act Cap 201 and section 21 Income Tax Act 2015?*

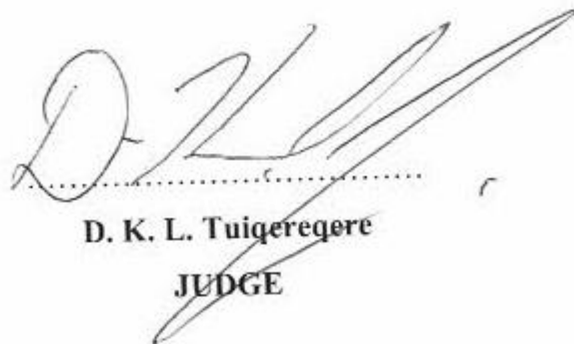
   Yes

4. *Is the Objection Decision of the Applicant made on 31 July 2019 invalid and of no effect on the grounds it is outside the statutory time frame provided in subsection 16(7) of the Tax Administration Act 2010?*

   No

[34] The respondent is to refund any tax (and penalties) paid by the applicant as a result of the disallowed marketing expenses.

[35] The applicant is entitled to costs summarily assessed in the amount of $5,000 to be paid by the respondent within 1 month.



D. K. L. Tuiqereqere
JUDGE

Solicitors:

Sherani & Co for the Applicant

Office of Legal Section of Fiji Revenue & Customs Service