

IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE TAX TRIBUNAL

Income Tax Appeal No 19 of 2007

BETWEEN: Company F
Applicant

AND: FIJI REVENUE & CUSTOMS AUTHORITY
Respondent

Counsel: Mr H Nagin, for the Applicant
 Ms F Gavidu, FRCA Legal Unit, for the Respondent

Dates of Hearing: Friday 1 June 2012;
 Tuesday 19 June 2012

Date of Judgment: 25 June 2012

JUDGMENT

DEFINITION OF EXPENSES – Section 21(1)(v) INCOME TAX ACT (CAP 201) – Deductibility of expenses; cash donations; concessionary treatment of donations to Sports Fund.

Background

1. The Applicant company is engaged in the manufacturing business and has been a long and established employer within Fiji.

2. On 19 November 2004, the Applicant paid \$200,000.00 to the Fiji Sports Council, on the basis of a five year agreement entered into between the Sports Council and Company F, in which the Applicant would, among other things, obtain the naming and exclusive advertising rights of a National Indoor Stadium.

3. The total value of the agreement between the parties was \$600,000.00, the amount to be paid in instalments over the term of the Agreement.
4. The case of the Applicant, is that the first payment of \$200,000.00¹ made under the terms of the Agreement, was a qualifying deductible expense for the purposes of the earlier provision that was Section 21 (1)(v) of the Income Tax Act (Cap 201).
5. That provision as it then was, provided for cash donations to sports funds exceeding \$100,000.00 made within the period 1 January 2004 to 31 December 2007, to be treated as a deductible expense, with a concessionary rate of 200% deduction. That is a taxpayer could receive an income expense deduction of twice the value of a cash donation that exceeded \$100,000.00.
6. While the respondent authority initially allowed \$100,000.00 of the \$200,000.00 to be treated as a cash donation in the Income Year ending 30 June 2005, that position was subsequently reversed when the Respondent issued an Amended Assessment disallowing the deduction, on 1 May 2007.
7. The Applicant now appeals against that position and the Objection Decision of the Authority, dated 22 October 2007.

Issues for Consideration

8. The Statement of Agreed Facts prepared by the parties on 5 April 2012, is a useful document for placing this issue into perspective.
9. The commencing point seems to be the flagging by the then Ministry of Youth, Employment Opportunities and Sports, in January 2003, that government would

¹ The eligible amount being \$100,000 of that \$200,000.

offer a 200% tax incentive to corporate bodies to encourage private setor participation in the development of sports in Fiji.²

10. That announcement followed with the introduction of the Income Tax (Budget Amendment) Bill 2004 into the Parliament on 11 February 2004.³
11. The bill subsequently passed in June of that year, amended the principal Act by inserting the following new provision as a deductible expense as follows:

“(v) two times the amount of cash donation exceeding \$100,000 made by a taxpayer between 1st January 2004 and 31 December 2006 to a Sports Fund for the purposes of sports development in the Fiji Islands”

12. The Agreed Statement of Facts identify 4 November 2004⁴, as being the date in which Company F and the Sports Council, entered into the Naming and Advertising Rights Agreement.
13. Following the entering into that Agreement, the Applicant’s accountants wrote to the Respondent seeking clarification that the payments made under the Agreement would qualify for the purposes of a tax concession.
14. Specifically that correspondence stated:

Due to the lack of any available guidelines regarding the operation of contributions to the Sports fund, our general discussions with officers of IRS of their understanding of what qualifies, has not provided us with sufficient comfort that a contribution through the Sports Fund earmarked for the FSC together with a contract between (Company F) and FSC detailing the two parties obligations, will be accepted as qualifying for the 200%

² See Document A of the Agreed Statement of Facts.

³ See Second Reading Speech of the Hon Ratu J.Y. Kubuabola, Proceedings 11 February 2004, p 2243.

⁴ See Document G

deduction....we look forward to your confirmation that payments by (Company F) into the Sports Fund should qualify for the 200% tax deduction.

15. It is also a matter of record that the Authority wrote to the Applicant's accountants on 11 November 2004, in the following terms⁵:

Given the difficulty experienced by the Sports Council to raise funds for the maintenance of the sporting facilities under its control and the problem of attracting sponsors for sporting development in general, the Authority is of the view that the request for 200% deduction be supported. This approval is one off and future request of similar nature will be dealt with on a case-by-case basis depending on the nature of the contract and the amount of sponsorship, which in this case is \$600,000 for a period of 4 years"

16. The change of position of the Authority, is that the "cash donation" deduction claimed by Company F in the Financial Year Ending June 2005, was not an eligible deduction for the purposes of Section 21(1)(v) of the Income Tax Act (Cap 201).

17. In the Respondent's Submission, dated 14 May 2012, it is argued specifically that

The fact that the donation was in the form of the contract and the contract was later cancelled by FSC led to the Respondents decision to disallow the 200% tax deduction.

(And further)

The Respondent submits that the Appellant's donation was not a bona fide donation as it made direction on how the funds were to be used by the Fiji Sports Council.

⁵ See Documents IJ of the Agreed Statement of Facts.

18. The central issue for determination is therefore whether or not, the \$100,000 of the \$200,000 paid by Company F to the Sports Council, fell within the meaning of “cash donation” for the purposes of Section 21 (1)(v) of the Act.
19. The Applicant has conceded that the Respondent cannot be estopped from changing its position in these circumstances. (See *Punjas Limited & Anor v Commissioner of Inland Revenue*, Fiji Court of Appeal, 3 November 2006)

What is a Cash Donation?

20. The legislation provides no definition of the term “cash donation” as it exists within Section 21(1)(v) of the Act.
21. The Applicant submits that while the Authority has relied on Australian case law to assist in the interpretation of the words “cash donation”, that these authorities are not binding on the tax law of Fiji.
22. While that is true, this tribunal can be informed by the case law of other jurisdictions and there is no reason why in this instance, some regard to the Australian authorities should not be given.
23. In this regard, the Taxation Ruling 2005/13⁶ as provided by Ms Gavidi, does set out a range of circumstances where a cash donation (in that case referred to as a tax deductible gift) does or does not fall within the notion of a “gift”, as opposed to an ordinary business expense. This is an important distinction and one that renders the decision of Stuart J in *Fiji Sugar Corporation Ltd v Commissioner of Inland Revenue*⁷, not on point for the arguments that are sought to be advanced by the Applicant.

⁶ As issued by the Australian Government Tax Office 20 July 2005.

⁷ [1983] FJSC7

24. In *Federal Commissioner of Taxation v McPhail*⁸, Owen J opined:

..to constitute a "gift", it must appear that the property transferred was transferred voluntarily and not as a result of a contractual obligation to transfer it and that no advantage of a material character was received by the transferor by way of return.

25. In the case of *Re Hodges v Deputy Commissioner of Taxation*⁹, McMahon DP, reduced the concept to whether or not it was "a payment with strings attached".

26. In *Klopper's* case, an offshore yacht racing enthusiast who made indirect payments through a sports foundation to a racing club, so as to avoid having to meet financial obligations under the racing club's competitor agreement, was too found to be a material benefit for the purposes of the Australian tax law.

27. So what of the present circumstances?

Was the Payment of the Applicant a Cash Donation ?

28. The starting point for this analysis must be with the language and provisions of the Naming and Advertising Rights Agreement that was entered into between the parties on 4 November 2004.

29. The Schedule to that Agreement sets out the extent of the signage and advertising to be allowed by the Sports Council for Company F, at the Indoor Stadium.

30. The extent of that signage was as follows:

⁸ (1968) 117 CLR 111

⁹ 37 ATR 1091 at 1098

- (i) (Company F) signage on the front and rear oval facia of the National Indoor Stadium;
- (ii) 8' x 4' Name Boards at each of the three entrances to the National Indoor Stadium;
- (iii) Three numbers of two or three sided outdoor billboards within the premises of the National Indoor Stadium;
- (iv) Name boards at the ticketing booths at the entrance to the National Indoor Stadium;
- (v) Billboard/name board at the entrance to the car park of the National Indoor Stadium, Sports City.
- (vi) Name board/signage inside the National Indoor Stadium on the Electronic Score Board; and
- (vii) Any other signage's (sic) and or billboards as may be mutually agreed between the Council and (Company F) from time to time.

31. At Clause 2.6 of the Further Submissions By Counsel for the Appellant, it is contended that there is a "huge disproportion between the value of giving away the naming rights and the quantum of the donation \$200,000".

32. In my view that submission is misconceived. The first point is this. Naming and Advertising expenses incurred wholly and exclusively for the purpose of the business, would in any event, be deductible expenses for the purposes of the Income Tax Act (Cap 201).

33. It is the concessionary treatment of an amount in excess of \$100,000 that is paid as a cash donation, that is the basis by which a 200% deductibility is granted. The issue is not so much about the amount, but that it is still "without strings attached" or provides the donor with no material advantage as a consequence of the donation.

34. Despite Mr Nagin's argument, that the items within Clause 6 of the Naming and Advertising Agreement, were only incidental in nature and not significant to the analysis, I am not persuaded by that view.

35. Clause 6(i) of the Agreement for example, stated that the Sport Council would provide Company F on an annual basis with:

One perimeter billboard each, not exceeding 3m x 6m at each of the following locations owned by FSC

1. Lawaqa Park, Sigatoka
2. Regional Tennis Centre, Lautoka
3. Thomson Park, Navua
4. Ra Sports Ground.

36. This coupled with the exclusive naming and advertising on all of the locations within the Schedule as above, would arguably in ordinary circumstances, reflect a significant advertising spend. One in my view that cannot be dismissed as a simple by-product of the "cash donation".¹⁰

37. By way of comparison, it should be noted that there are other categories of case located within the various sub-paragraphs of Section 21 of the Act, that would provide a useful benchmark in this regard. Consider for example, "any donation made by (a) taxpayer to the War Memorial Anti-Tuberculosis Fund [Section 21(1)(d) of the Act] or "any cash donation ...made by (a) taxpayer to the Poverty Relief Fund [Section 21(1)(zi) of the Act].

38. The policy underpinnings of any tax concessions in these cases, appears to be that the donation comes unencumbered. That is there are no strings attached. The money can be used and the beneficiary able to exploit the benefit of the donation freely.

39. To illustrate that point, another scenario could have been that the donor made payment without any other contractual promise attached and the beneficiary in this

¹⁰ I use the term illustratively only, as I do not regard the relevant payment as meeting that statutory definition.

case the Sports Council, could have in turn sold the advertising and signage rights at the Stadium and those other locations, as part of a separate commercial venture.

40. It serves no purpose speculating to that end, what sort of asking price could have been commanded by the Sports Council, should it have pursued such a matter outside of the Naming and Advertising Agreement. Company F clearly secured significant advertising exposure through its venture. The fact that it appears that the Agreement was ultimately terminated between the parties for reasons that are not relevant to this analysis, is another issue.
41. In this regard, the case of Company F can be distinguished from the examples provided at Example 63 and 65 of the Taxation Ruling 2005/13¹¹, where for example a hospital wing was named after the individual donor of a considerable cash sum, or where a plaque was installed as a token gesture of appreciation recognising a donation to a school building fund, in the foyer of that school. Again, while Mr Nagin's submits that the Australian case law is not binding, it does provide an initial useful starting point to embrace conceptual understandings of taxation principles, not otherwise readily clarified within Fijian case law.

Conclusions

42. As mentioned earlier, both parties accept the fact that the decision of the Court of Appeal in *Punjas Limited and Anor v Commissioner of Inland Revenue*, is authority for the proposition that the Respondent is free to review its position (and its earlier assessment) based on a reconsideration of the law.
43. According to Ms Gavidy, the Respondent has done just that.
44. I find that the structure and terms of the Naming and Advertising Agreement, went well beyond what is envisaged within the language of a "cash donation", as the

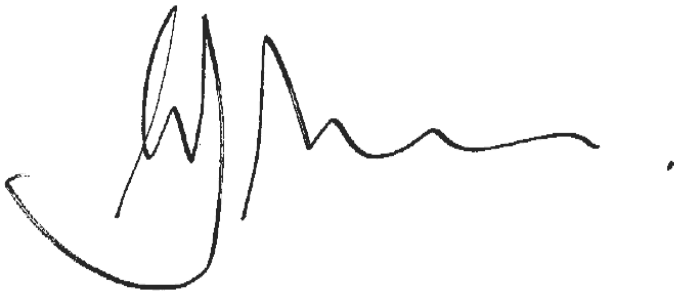
¹¹ For example, where a building was named after the donor or where a plaque or sign honouring the donation was the sole consequence of the payment.

concept is to be understood under taxation law. The Agreement clearly provided a material benefit to Company F. The donation did have a number of strings attached.

45. On that basis, I also find that the Amended Assessment conformed to the purpose of the former provision, that was Section 21(1)(v) of the Income Tax Act (Cap 201).

DECISION OF THE TRIBUNAL

The Tribunal orders that the Application be dismissed.

A handwritten signature in black ink, appearing to read 'A. See', with a large, sweeping initial 'A' and a long, horizontal tail.

Mr Andrew J See
Resident Magistrate