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

Income Tax Appeal No 14 of 2012

BETWEEN: **TAXPAYER S**

Applicant

AND: **FIJI REVENUE & CUSTOMS AUTHORITY**

Respondent

Counsel: **Ms V Lidise, Young and Associates for the Applicant**

Ms I Ratuvuku, FRCA Legal Unit, for the Respondent

Date of Hearing: **Wednesday 4 September 2013**

Date of Decision: **Tuesday 15 October 2013**

DECISION

Background

1. The Applicant Taxpayer S, is a director of Company G and resides in Lautoka, Viti Levu, Fiji.

2. During an audit conducted by the Respondent, the Applicant was assessed as failing to declare income for the Financial Years 31 December 2008 to 31 December 2011.[1] Amended assessments were issued by the Respondent on 31 August 2012, that had the effect of: -

[1] In the *Closing Submissions on Behalf of the Applicant* dated 14 October 2013 at Paragraph 10, it is said that this non declared income arises out of the "repayment(s) made by the company to (the Taxpayer) in respect of the loan rendered to the company in about 1998 of approximately one million dollars".

(i) requiring the Taxpayer to pay an additional $100,276.42 as taxation imposed on income not earlier declared; and

(ii) imposing penalties under Section 46 of the *Tax Administration Decree* 2009 for making false or misleading statements, when lodging the original income tax returns.

3. The issue in dispute does not relate to the Amended Assessment that required the payment of taxation on the income not previously declared. The sole basis of the review application is to challenge whether or not, the Taxpayer should have been penalised for the purposes of Section 46 of the *Tax Administration Decree* 2009, on the basis that she did not knowingly or recklessly make false or misleading statements warranting the imposition of a penalty.

Grounds of Application for Review

4. The Grounds of the Application are set out as follows:

"(a) The decision imposes a 75% penalty pursuant to section 46 of the Tax Administration Decree 2009 ("the Decree") against the Applicant without any or sufficient evidence that the Applicant's purported omission in declaring the additional income for the income years ending 31st December 2008 – 2011 ("the tax period") were made, knowingly or recklessly;

(b) The Applicant's purported omission in failing to declare the additional income received during the tax period was the result of a genuine misunderstanding as to how the respective remittances (which the Respondent has determined as omitted income) would be classified by the Respondent, in that the bulk of the respective remittances were remittances paid in respect of term deposits that had matured and

reimbursement payments to the Applicant in respect of advances granted to (Company G) in which company the Applicant is a director;

(c) The decision failed to properly consider that the Applicant or any reasonable taxpayer could reasonably have held the position that the respective remittances which the Respondent has determined to be income omitted by the Applicant, were not capital in nature;

(d) Alternative, that a tax penalty of 20% of the shortfall instead of 75% ought to have been imposed as there was no or insufficient evidence that the Applicant's purported omission was either made knowingly or recklessly;

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(e) The decision imposed an additional penalty of 10% pursuant (to) section 43(3) of the Decree when the Applicant has never been previously penalized under section 43(3) of the Decree."

5. It should be noted during the course of proceedings, Ms Ratuvuku advised the Tribunal that there had been agreement reached in relation to paragraph (e), so that it was recognised that no additional penalty for the purposes of Section 43(3) of the Decree, should have been imposed.

Case of the Applicant

6. According to Counsel Lidise, the Applicant was unable to attend in person in proceedings, as she had the responsibility of caring for the welfare of her 21 year old daughter, who was attending University in Australia. The Applicant did not provide the Tribunal with any sworn statement, nor any Affidavit material from the Taxpayer. Instead, the Applicant sought to rely on the evidence of Company G's employed accountant, Mr L and of course the submissions of Counsel.

7. The central issue in this matter relates to the conduct of the Applicant Taxpayer, including her state of mind, as to whether she knowingly or

recklessly failed to make certain income disclosures for the purposes of her income tax returns.[2]

8. Those non-disclosures related to remittances made into the personal bank accounts of the Taxpayer, that have been described as "remittances comprising of term deposits that had matured and the reimbursements of advances made to (Company G)"[3]. It was understood that some of those advances had been made to the Company by the Taxpayer from proceeds of a life insurance policy following the demise of the Taxpayer's husband and some had been in place prior to that time.[4]

Evidence of Mr L (The Company Accountant)

9. Mr L has been employed with Company G since 1990. He described his duties as including being responsible for managing company cash flow, vouchers, bank matters and the joint statements of the Directors. Mr L gave evidence that until 1998, Company G operated with 2 Directors[5] and thereafter with the passing of the Taxpayer's husband and the departure of the Company's General Manager in 2003, Taxpayer S ran the business with the assistance of her two sons, who both are now also Directors.

10. According to the witness, by 2005 he was responsible for compiling the Company set of Accounts, tax returns and the personal tax returns for all 3 Directors.

11. Mr L advised the Tribunal, that he had prepared tax returns for Taxpayer S for the Years 2008 to 2011. He claimed that this involved identifying her earnings

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2 By failing to do so, the Applicant was deemed to have made false or misleading statements in a material particular.

3 See Paragraph 2A of the Closing Submissions on Behalf of the Applicant dated 14 October 2013.

4 It is also understood through the oral submissions of Ms Lidise that the Directors had made an earlier Advance as Shareholders in the vicinity of $200,00.00-$300,000.00.

5 Taxpayer S and her husband who is now deceased.

from the Company and including any proportion of interest from Term Deposits. He said that he would have Taxpayer S sign the tax return and he would lodge it with the Respondent, but that she was not otherwise involved with the return.

12. The witness indicated that Taxpayer S would sign the return "on trust". Mr L indicated that he had no idea why the Respondent had audited the Taxpayer when it did and was not involved in the audit process, other than in the provision of certain information to the Auditor. According to Mr L, the Taxpayer S was not involved in the audit process either.

13. On cross examination, Mr L indicated that he had a good knowledge of the business affairs of the Company and that he was in direct contact with all of the Company Directors. The witness said that he never asked the Directors questions in relation to the completion of the returns and that he did not look after the personal bank accounts of Taxpayer S, so would not have known what interest she was receiving into any other accounts.

14. Ms Ratuvuku for the Respondent, referred the witness to the completed Income Tax Return for 2008[6] and directed the witness to the last page of that return, where the form provides for the Taxpayer to declare that the return is true and complete.[7] It was acknowledged by the witness, that the Taxpayer had signed this declaration for each of the financial year periods in question.

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Has the Taxpayer Made a Statement that is False or Misleading in a Material Particular?

15. At issue here, is whether or not by the non-disclosure of the income received into the bank account of the Taxpayer, that she made a false or misleading statement to the Respondent.

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6 See Exhibit R1.

7 Copies of all completed returns for 2008 to 2011 have been provided to the Tribunal.

16. Section 46 of the *Tax Administration Decree* 2009 sets out the framework for the way in which penalties are imposed in the case where false and misleading statements have been made in a material particular.

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17. Section 46(1) firstly establishes who a penalty may be imposed upon. Specifically, it states:

> *46. — (1) This section applies to a person —*
>
> *(a) who makes a statement to a tax officer that is false or misleading in a material particular or omits from a statement made to a tax officer any matter or thing without which the statement is false or misleading in a material particular; and*
>
> *(b) the tax liability of the person or of another person computed on the basis of the statement is less than it would have been if the statement had not been false or misleading (the difference being referred to as the "tax shortfall").*

18. There are several issues to consider. Firstly the Taxpayer must have made a statement that is false or misleading.

19. Secondly, the statement must be false or misleading "in a material particular". In *Khoury (M&S) and Anor v Government Insurance Office of NSW*[8]*,* in the case of a contract for property insurance, such an expression was found to capture, "facts material to the risk". In the present case, the Tribunal concludes that for statements to be false or misleading in a material particular, would require those statements to be "material to the assessment". For example, the non-disclosure of approximately $160,000.00 of income in one financial year period, would if declared a true and complete return, be material to the assessment.

[8] (1984) 54ALR 639

20. Insofar as the terms false and misleading are concerned, the Decree does not define either of these expressions. Given its plain meaning, the term 'false' has been defined to mean "not true or correct; erroneous: a false statement; a false accusation". The term 'misleading' as "to lead or guide wrongly; lead astray, to lead into error of conduct, thought, or judgement".[9] (See also *Given v C.V.Holland (Holdings) Pty Ltd* (1977) 29FLR 212.

21. There is no doubt and there has been a concession already made, that the Income Tax Returns for 2008 to 2011, were incorrectly completed insofar as they did not account for all income received in each of those years. It was certainly a false statement made by the Taxpayer, that on each year so filed, that the tax return was “true and complete”.[10] The measure of whether or not, there was a deliberate or misleading quality to those declarations is clearly an issue requiring a higher threshold test.

22. In *Deery v Peek*[11], Lord Herschell characterised the consideration along these lines:

> *In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds.*

23. Unfortunately for the Taxpayer, she has not brought any evidence of what she believed whatsoever. As mentioned earlier, she could have given this

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9 See 0909278 [2012] MRTA 378 (16 February 2012)

10 Whether the Taxpayer knew that to be true and correct is a separate issue.

11 (1889) 14 AC 337 at 375

evidence by attending in proceedings, she could have done so by way of sworn Affidavit material, she could have even sought to do so, by telephone attendance.

24. There is no evidence at all, to provide the Tribunal with any understanding what the Taxpayer honestly believed at all.

25. Keep in mind; it is the Taxpayer that has the burden of proof in cases of this type. [See Section 21(1)(a) of the Decree].

Was the False or Misleading Statement Made Knowingly or Recklessly?

26. Again the Taxpayer simply has not provided any evidence on this point.

27. The only evidence that has been made available in relation to the conduct and protocols adopted in the preparation of the Income Tax Returns, was that given by Mr L.

28. The condensed version of his evidence on this point was simply, that the Taxpayer did not tell him of any deposits that went into her bank accounts and nor did he ask.

29. In my view, any qualified accountant who is charged with the task of attending to such returns would have had a duty to ask. A competent business person, or a Director of a Company would similarly be expected to have some basic appreciation of what may be required to discharge one's obligations and duties in this regard.[12]

30. These were not small amounts of money that had not been declared. In the case of the 2008 Income Tax Return, the amount of non-disclosure of

[12] But in saying that the responsibility remains that of the Taxpayer. The obligation to complete the tax return and to attest to its veracity, remains that of the Taxpayer.

deposits into the Taxpayer's bank account was in the vicinity of $160,000.00. This is not an insubstantial sum. The conduct appears reckless and there is no evidence submitted to the contrary to persuade the Tribunal.

31. Section 46(2) of the Decree provides:

> *Subject to subsection (3), a person to whom this section applies is liable—*
>
> *(a) if the statement or omission was made knowingly or recklessly, for a penalty equal to 75% of the tax shortfall; or*
>
> *(b) in any other case, for a penalty equal to 20% of the tax shortfall.*

Any Defense Available Under the Decree?

32. The Respondent in its Further Submissions, refers the Tribunal to the *Explanatory Notes* that were issued coinciding with the making of the *Tax Administration Decree* 2009.

33. Within those explanatory notes, the intended criteria for assessing whether or not any exemption for the imposition of a penalty, are set out. The present exemption provision that is Section 46(5) of the Decree, is expressed in this way:

> *No penalty is payable under subsection (2) if —*
>
> *(a) the person who made the statement did not know and could not reasonably be expected to know that the statement was false or misleading in a material particular; or*
>
> *(b) the tax shortfall arose as a result of a self-assessment taxpayer taking a reasonably arguable position on the application of a tax law to the taxpayer's circumstances in filing a self-assessment return.*

34. The words of the provision can be interpreted without need for reliance on explanatory material. They are clear words. There is no direct evidence of what the Applicant did or did not know; but I do believe that certain findings can me made as to what the Applicant could have reasonably been expected to know or not know in relation to the falsity or misleading complexion in a material particular.

35. While Counsel for the Applicant relies on the evidence of the Company Accountant in order to provide evidence as to what the Applicant did or did not know, I cannot accept this evidence as being particularly persuasive. It is what it is, hearsay evidence. What can be concluded from the evidence however, is this. The Taxpayer was the senior Company Director of Company G since 2003. According to the witness for the Applicant, she "had final decision on things in conjunction with sons". Company G had revenue in the Year 2011 of in excess of $9.4 million, with assets of $8.15 million.

36. It would seem highly improbable that the Taxpayer had no knowledge of her obligations as an income earning Taxpayer. The Taxpayer must have been aware of the flow of monies into her own personal bank account. It is hard to believe that she would not have had some knowledge of the requirement to disclose as income, such substantial sums of money.[13] The fact that the Company Accountant did not question the Taxpayer in relation to this matter, also calls into question how sincere his evidence was, in purporting to complete the task in an honest and accountable fashion.

[13] Even if there was some uncertainty, one would have expected she should have asked. There is no evidence of this.

37. The Tribunal is not satisfied that the Applicant has proved beyond the balance of probability, that she did not know and could not reasonably have been expected not to have known, that some of the remittances received into her bank account may have not possibly been regarded as income of the purposes of the *Income Tax Act* (Cap 201). Based on the case that has been mounted and the evidence before the Tribunal, the defense available at Section 46(5) of the Decree, has not been made out.

38. For the above reasons, I find that the assessment of the penalty in the amount of 75% of the shortfall was appropriate in the circumstances.

Conclusions

39. To conclude, the Taxpayer has challenged the assessment of penalty. The penalty comes about because the Taxpayer either knowingly made false or misleading statements, or would have reasonably been expected to have known such statements were either false or misleading in a material particular. The Taxpayer should have reasonably expected to have known that deposits made into her personal bank accounts, may have been relevant for the purposes of completing her income tax returns. The fact that there is evidence of absolutely no discussion at all between the Taxpayer and her accountant, is suggestive of conduct that deliberately avoids the issue. That is, ask no questions, tell no lies.

40. The Tribunal does not accept that the Taxpayer would not have known that income received into her bank account from whatever source, could not have potentially been identified 'income' for the purposes of the *Income Tax Act* (Cap 201).

41. The provision of the Tax Returns in the relevant periods 2008 to 2011, were attended by clearly false statements attesting that they were "true and

complete". Whether those statements were deliberately misleading is not something that may be capable of being conclusively determined in the absence of the Taxpayer, but given that the onus of proof rests on her, not the Respondent, then it is through her Counsel that she needs to prove on the balance of probabilities that she did not knowingly make a false or misleading statement, or that she could not reasonably have expected to know those statements were to be false or misleading.

42. It would seem that by submitting to the taxation demand of the Amended Assessments, the Taxpayer has already conceded that the earlier statements were false.[14] A person competent to be a Company Director under Fijian Company law, should have known or would have reasonably been expected to have known, that income to her personal bank account may have been subject to taxation.[15]

43. The Taxpayer has not discharged the onus of proof that she did not know or that there was not a reasonable expectation that she did not know, that the Income Tax Returns for the relevant periods, were not true and complete. For that reason, the Application is dismissed.

44. The Respondent should reissue the Assessments for the relevant periods, having regard to the terms of this decision and consistent with the concession that has been made by Counsel, that the appropriate penalty in the circumstances is 75%, not 85%.

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[14] Not that this concession was determinative in relation to the appropriateness of imposing a penalty under the Decree.

[15] The test as to what is reasonable in these circumstances is a commonsense one. The expectation would have to be based on reason. Some of these relate to the Taxpayer's role, the size of the Company she assists in controlling; the capacity she would have to access expert advice for both accounting and taxation.

Decision

It is the decision of this Tribunal, that the: -

(i) Application for review is dismissed;
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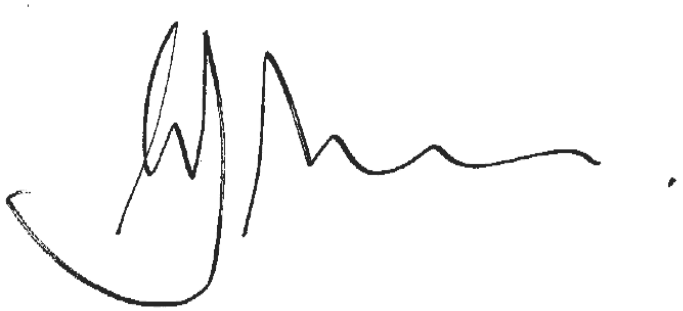
(ii) The Respondent is to reissue Amended Assessments consistent with the terms of this Decision; and

(ii). The Respondent is free to make application for costs within 14 days.



Mr Andrew J See
Resident Magistrate
15 October 2013