

FIJI TAX TRIBUNAL



Decision

Section 11 of Income Tax Act (Cap 201)

Title of Matter:	TAXPAYER L V FIJI REVENUE AND CUSTOMS AUTHORITY	(Applicant) (Respondent)
Section:	Section 11 of Income Tax Act (Cap 201)	
Subject:	Application for Review of Reviewable Decision	
Matter Number(s):	ITA Action No 1 of 2016	
Appearances:	Mr R Singh, Kohli & Singh for the Applicant Ms S Nasiga & Ms R Malani, FRCA Legal Unit for the Respondent	
Date of Hearing:	Thursday 25 August 2016	
Before:	Mr Andrew J See, Resident Magistrate	
Date of Decision:	Friday 4 November 2016	

KEYWORDS: Income Tax Act (Cap 201) – Section 11 definition of income; Capital Gains Tax Decree 2011 sale of land subdivided; meaning of scheme; Power of Attorney.

Background

1. This is an application for review of an Objection Decision of the Chief Executive Officer of the Fiji Revenue and Customs Authority dated 26 November 2015. The application for review has been made in accordance with Section 82 of the *Tax Administration Decree 2009*. The issue before the Tribunal is whether or not profits made by the Taxpayer arising out of the sale of a 1158 square metre property at Navua, Viti Levu, was 'income' for the purposes of Section 11 of the then *Income Tax Act (Cap 201)*.

The Case of the Applicant

2. The primary evidence before the Tribunal was that given orally by the Taxpayer himself. The Taxpayer had sold the property at Navua in 2015. He did so, after buying the property from his

own daughter in 2006.¹ Though that in itself was an issue of some interest, as the property had been purchased initially by the Taxpayer and then transferred to his daughter on 26 April 1999, whereupon he assumed the Power of Attorney on behalf of his daughter up and until the time of sale in 2006. According to the Taxpayer, he initially owned the property as part of a larger parcel of land containing four lots.² In response to questions from Ms Nasiga during cross examination, the Taxpayer admitted to having subdivided the land to share with his four daughters. Having said that, the Taxpayer was unable to identify any proof of proceeds. For example, the Taxpayer was asked about one of the sales of the lots (CT 31239) that he executed on behalf of one of his daughters on 6 September 2002 for \$55,000.00 and asked where there was any proof of monies paid to the daughter once received.³ The Taxpayer claimed that he would take \$10,000 cash on each occasion to his daughter in Canada. Counsel took the Taxpayer to a further transfer on 12 November 2002, involving the sale of land (CT 31203) undertaken on behalf of another daughter in the sum of \$60,000.00. The Taxpayer could not identify any payment made to the daughter from those proceeds, though indicated that she herself had come to Fiji on approximately 2 or 3 times since then and took money back to Canada on those occasions.

3. The Taxpayer was taken to Document 13 of the *Respondent's Documents* where he was shown a further undated and unstamped Transfer document for a 1702 sq m property (CT 31204), ostensibly sold in the amount of \$139,000. In regard to that sale, the Taxpayer claimed that the profit arising was only \$15,000, as an investment had been made on the property by way of a building, that included the costs of material and labour. Finally, the Taxpayer was taken to the subject land in question, a property that was sold in the amount of \$242,000.00. The Taxpayer maintained that this was the only property for which he benefitted from a capital gain and where taxation had been paid accordingly.

The Case of the Respondent

4. The Respondent called its Principal Auditor, Ms Laisa Bainarama to give evidence. She stated that the Authority had conducted an audit on the Taxpayer and found that he had been dealing in properties. Ms Bainarama was shown various documents that formed part of the original parcel of land and stated that at the conclusion of the audit, the Respondent had identified various deposits that had been made into the Taxpayer's personal bank account. Yet on questioning from the Tribunal, it seems that there was no direct evidence of any deposits made into this account from the sales of the land in question.

Analysis of the Issues

5. There are two issues that appear to emerge out of the facts of this case. The first is, whether the proceeds from any profits derived from the sale of the said property can be regarded as income for the purposes of the Income Tax Act (Cap 201) and secondly, if so, what then does that do to the capital gains taxation already paid by the Taxpayer by virtue of its own self assessment under the *Capital Gains Tax Decree 2011*.
6. The most fundamental question is whether or not the actions of the Taxpayer and the profits arising from the sale of land, amount to income. The problem for the Taxpayer, is in effect, that the sale of land was not one in isolation. As has been acknowledged by the Taxpayer and set out

¹ See Exhibit A2 (Document 15)

² The exhibit provided at A2, identifies six properties that form the basis of that parcel (CT's 31203; 31204; 31205; 31238; 31237 and 31239).

³ See Folio 10 of Exhibit A2.

within the materials of the parties⁴, the subdivision of land; its transfer into the names of children in 1999 and later sales by the Taxpayer in 2002 (CT 31239 and CT 31203); 2005 (CT 31204); 2006 (CT 36151), including one sale back to the Taxpayer himself, are all suggestive of something more. The Tribunal is mindful of the decision taken by the Tax Court in *Singh v Fiji Revenue & Customs Authority* [2016] FJHC 149 where the issue of what constituted the business of 'dealing in real property' or the 'carrying on or out of an undertaking or scheme' were considered. In *McClelland v Commissioner of Taxation*,⁵ the Privy Council concluded that a single transaction can fall within the notion of assessable income, where the undertaking or scheme exhibits features that give it the character of a business deal.⁶In *Lowe v Commissioner of Inland Revenue*⁷, Richardson J defined the words "scheme" to connote a plan or purpose which is coherent and has some unity of conception. He defined "undertaking" as a project or enterprise organized and directed to an end result.

7. The Tribunal is of the view, when the conduct of the Taxpayer is viewed in a wider context, the activities of subdividing property, transferring the ownership to his daughters, and then selling off that property, albeit with the Power of Attorney appear both as if the Taxpayer had been carrying out the business of dealing in land and involved in a scheme to that end. The onus of proof in this matter for any other conclusion, rests with the Taxpayer. The Taxpayer has been unable to satisfy the Tribunal based on the evidence, of any other result. The Tribunal determines the amount in dispute as profit from the scheme or business dealing, that is properly assessed as income for the purposes of Section 11 of the *Income Tax Act* (Cap 201).

Implication of Capital Gains Tax Decree 2011

8. For the sake of completeness it is worthwhile referring to the implication that then arises in relation to the application of the *Capital Gains Tax Decree 2011*. Section 10 of the Decree states:

(1) The capital gain made by a person on the disposal of a capital asset is the consideration received on the disposal reduced by the cost of the asset at the time of the disposal.

(2) A capital gain made by a person on disposal of a capital asset is not reduced by any capital loss on disposal of another capital asset.

(3) A capital gain made by a person on disposal of a capital asset is reduced by--

(a) in the case of a disposal of shares, the amount deemed to be a dividend under section 8(2)(a)(ii) of the Income Tax Act; or

(b) in any other case, any part of the gain that is included in the total income of the person or treated as exempt income under the Income Tax Act.

9. For the reason that the capital gain of the Taxpayer in relation to this property is now included in the total income for the purposes of the *Income Tax Act*, by virtue of Section 10(3)(b) of the *Capital Gains Tax Decree*, there is no further taxation imposed. Having paid the initial capital gains tax, the Authority was required to adjust that amount and impose the correct calculation

⁴ See for example the six transfers of land between the Taxpayer and his daughters as set out within Folios 2 to 7 of the Section 83 Documents.

⁵ (1970)120 CLR 487

⁶ At [27]

⁷ (1981) 5 NZTC 61,006 (CA).

for income taxation purposes. Based on the materials provided, this appears to have taken place correctly.

10. On that basis and for the above reasons, the application of the Taxpayer is dismissed.

DECISION

- (i) The Application for review be dismissed.
- (ii) The Respondent be free to make application for costs within 28 days.

The Tribunal orders accordingly.

A handwritten signature in black ink is written over a circular purple official seal. The seal contains the text 'TAX TRIBUNAL' at the top and 'SUVA' at the bottom, with a central emblem depicting a building and figures.

**Mr Andrew J See
Resident Magistrate**