

IN THE TAX COURT OF THE HIGH COURT OF FIJI
AT SUVA

Action No: HBT 04 of 2016

BETWEEN : SOUTHERN HORIZONS S. A.

Applicant

AND : CHIEF EXECUTIVE OFFICER, FIJI REVENUE &
CUSTOMS AUTHORITY

Respondent

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr R. Krishna with Ms. M. Vasiti for the Applicant
Ms S. Nasiga with Ms. F Gavidu for the Respondent

Date of Hearing : 16 February 2017

Date of Judgment : 28 February, 2017

JUDGMENT

1. This is the Applicant's Application for Review of the decision of the Respondent (Revenue) partially disallowing the Applicant's objection to the Revenue's assessment of the Capital Gains Tax (CGT) payable by the Applicant on the deposit of US \$1,000,000 forfeited by it under a Sale and Purchase Agreement (SPA).

2. The Applicant seeks from the court, inter alia, the following orders:
 - (1) To revise or set aside the Respondent's decision (Objection Decision).
 - (2) For the Revenue to refund the CGT, after objection, of \$184,321.57.

3. The grounds for the Application are that the Objection Decision is wrong in law:
 - (i) In holding the forfeited deposit is captured under section 2 of the CGT Decree 2011 when it is not caught in the definition of "capital asset".
 - (ii) In failing to identify the right or other interest in a capital asset that was disposed.
 - (iii) In failing to take into account the fact that no right or interest in land or other capital asset was disposed of by the Applicant on either the entry into the SPA or the forfeiture of the deposit.
 - (iv) In failing to take into account that the Applicant had not made a disposal of a capital asset and did not receive any consideration for any disposal.

4. The Statement of Agreed Facts and Issues include the following:

Agreed Facts

- (1) The Applicant entered into a SPA to sell the property held under Certificate of Title No. 4455 (the Land) to Ever Prosper International (Fiji) Limited (EPIL).
- (2) A deposit of USD 1 million was paid by EPIL (Deposit).
- (3) On 17 December 2014 the Deposit was forfeited pursuant to the SPA.
- (4) The Revenue informed the Applicant that CGT would be charged on the Forfeited Deposit.

Agreed Issues

- (1) Whether the Forfeited Deposit is a capital asset under the CGT Decree.
- (2) Whether the Applicant has disposed of a capital asset for the purposes of the CGT Decree.

5. The Tax Tribunal by its Order dated 6 July 2016 referred this Application to this Court for the hearing and determination of the matter, in accordance with s. 88 (1) of the Tax Administration Decree 2009.
6. The hearing commenced with the Revenue's witness giving evidence. He was Navitalai Biukoto, principal auditor in Revenue. He said they felt under the laws of Fiji, the forfeited deposit is subject to CGT. As there was no cross examination, Revenue closed its case.
7. Counsel for the Applicant then submitted. He said the forfeited deposit (FD) is liquidated damages. It is not an interest in land and it is not within the CGT net. In s. 2 of the CGT Decree (Decree) the word "means" means nothing else e.g a FD can be included.
8. Counsel for Revenue submitted that the FD is caught by the Decree as a gain is made under s.2 (h) of the Decree. She said the \$1 million FD is a payment by the purchaser to give up some entitlement to the land. She concluded by referring to s. 4(1) (b) of the Decree.
9. Counsel for the Applicant in his reply said there was no option here and the FD is not a capital asset.
10. At the conclusion of the arguments, I said I would take time to consider my decision. Having done so, I shall now proceed to deliver my judgment.
11. This matter stems from the forfeiture of a deposit pursuant to clause 16. 1(b) of the SPA dated 19 June 2014. This provides for the deposit to be forfeited to the Vendor (Applicant) as liquidated damages in the event of the Purchaser's (EPIL) default.

12. I turn now to consider the CGT Decree's treatment of the FD. The Revenue considers the FD is captured under s. 2 (h) of the Decree read together with paragraph (a). I paraphrase the relevant words of both paragraphs and s. 2 as follows:
a right or other interest in land is a capital asset.

13. By s. 1(2), the Decree applies to capital gains arising on the disposal of capital assets. I consider section 4 (3) as the pivotal section. It reads as follows:
"If a person creates a capital asset in another person being an asset that did not previously exist, the first-mentioned person is treated as having made a disposal of the asset to the second-mentioned person and the disposal occurs when the asset is created".
I paraphrase it as follows: If the Applicant creates a capital asset in EPIL, which previously did not exist, then the Applicant is treated as having made a disposal of the asset to EPIL and the disposal occurs when the asset is created. I consider that the capital asset here is the right or other interest in the Land and the disposal occurred when the right or interest was created by the SPA.

14. S. 4(1) states a person make a disposal of a capital asset if he parts with its ownership (by the SPA) including when the asset is cancelled [s. 4 (1) (b)].

15. According to s. 4(1) (a) it can be seen that by the SPA the Applicant is disposing (selling) the Land to EPIL. The Applicant cancelled the sale of the Land (the asset) when it rescinded the SPA and forfeited the deposit, by its solicitors' letter dated 17 December 2014.

16. Even if that right or interest (Asset) was cancelled by the Termination Notice, the lawmaker considers the disposal as a fait accompli under s. 4(1) and (b) because the disposal is made even if the right or interest to the land is cancelled as has happened here.

17. I am fortified in my decision by Lawton LJ's, dicta in: *Macarthy's Ltd v Smith* [1979] 3 All ER at 332 that "As the meaning of the words ... is clear, and no ambiguity, whether patent

or latent, lurks within them, under our rules for the construction of Acts of Parliament the statutory intention must be found within those words”.

I would pause here to state that I am not advised that a Decree is ipso facto to be construed in some other way than an Act. Therefore I would substitute “lawmaker’s intention” for “statutory intention”.

18. In the light of the decision I am arriving at, it is inexpedient to refer to the authorities cited by Counsel on both sides. Suffice it to say I am able to reach my decision on a straightforward consideration of the wording in the Decree.
19. I therefore uphold the Objection Decision dated 25 May 2016 and dismiss the Application for Review but shall make no order as to costs.

Delivered at Suva this 28th day of February, 2017.



David Alfred
JUDGE
High Court of Fiji.