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GOVERNMENT OF FIJI

CAPITAL GAINS TAX DECREE 2011
(DECREE NO. 23 OF 2011)

IN exercise of the powers vested in me as President of the Republic of Fiji and Commander in Chief of the Republic of Fiji Military Forces by virtue of the Executive Authority of Fiji Decree 2009, I hereby make the following Decree—

TO IMPOSE A CAPITAL GAINS TAX ON DISPOSALS OF CAPITAL ASSETS

PART 1—PRELIMINARY

Short title and commencement

1.—(1) This Decree may be cited as the Capital Gains Tax Decree 2011.

(2) The Decree shall come into force on 1st May, 2011 and applies to capital gains arising on the disposal of capital assets on or after that date.

Interpretation

2. In this Decree, unless the context requires otherwise—

“Acquisition” has the meaning in section 3;

“Capital asset” means—

- (a) land, a structural improvement to land, or an interest in land or including a lease;
- (b) a vessel of over 100 tonnage;
- (c) yacht;
- (d) a share, security, equity, or other financial asset;
- (e) an intangible asset;
- (f) an interest in a partnership or trust;
- (g) an airplane, helicopter or other aircraft; or
- (h) an option, right, or other interest in an asset referred to in the foregoing paragraphs, other than an asset that is trading stock for the purposes of the Income Tax Act;

“Capital gain” has the meaning in section 10;

“Capital Gains Tax” means the tax imposed under section 6;

“CEO” means the Chief Executive Officer appointed under the Fiji Revenue and Customs Authority Act;

“Company” has the meaning in the Income Tax Act;

“Disposal” has a meaning in section 4;

“Executor” means in the context of a deceased estate includes any person appointed under the laws of intestacy to administer that estate;

"Exempt capital gain" has the meaning in section 7;

"Fair market value" has the meaning in section 5;

"Fiji asset" means —

- (a) land, a structural improvement to land, or an interest in land or structural improvement to land, including a lease, where the land is located in Fiji;
- (b) a share in a company, or interest in a partnership or trust, if the assets of the company, partnership, or trust are solely or principally Fiji assets under paragraph (a);
- (c) a capital asset of a fixed place of business in Fiji;
- (d) a share, security, equity, or other financial asset issued by a resident person;
- (e) an interest in a resident partnership or resident trust; or
- (f) an option, right, or other interest in an asset referred to in the foregoing paragraphs;

"Income Tax Act" means the Income Tax Act (Cap. 201);

"Non-resident person" means a person who is not a resident person;

"Person" means an individual, trust, partnership, or company;

"Received" includes receivable;

"Resident partnership" means a partnership—

- (a) that is formed in Fiji; or
- (b) the practical management and control of which is located in Fiji;

"Resident person" means—

- (a) a person who is a "resident" within the meaning in the Income Tax Act;
- (b) a resident trust; or
- (c) a resident partnership;

"Resident trust" means a trust—

- (a) settled or established in Fiji; or
- (b) in respect of which a trustee is a resident person;

"Share" includes a unit in a unit trust and any other ownership interest in a company;

"Spouse", in relation to an individual, includes another individual who, although not legally married to the individual, lives with the individual on a genuine domestic basis in a relationship as a couple;

"Structural improvement", in relation to land, includes any building, road, driveway, car park, pipeline, bridge, tunnel, airport runway, canal, dock, wharf, retaining wall, fence, power lines, water or sewerage pipes, drainage, landscaping, or dam;

"Trust" includes the estate of a deceased person, but does not include a unit trust; and

"Unit trust" has the meaning in the Unit Trusts Act (Cap. 228).

Acquisition

3.—(1) A person acquires a capital asset if the person begins to own the asset, including, in the case of an asset that is a right or option, the granting of the right or option to the person.

(2) A person acquires a capital asset at the time the person begins to own the asset, including, when a person acquires legal title to the asset and, in the case of an asset that is a right or option, when the person is granted the right or option.

Disposal

4.—(1) A person makes a disposal of a capital asset if the person parts with the ownership of the asset, including when the asset is—

- (a) sold, exchanged, transferred, or distributed; or
- (b) cancelled, redeemed, relinquished, destroyed, lost, expired, or surrendered.

(2) A person disposes of a capital asset at the time the person parts with the ownership of the asset, including when a person ceases to have legal title to the asset and when the asset is sold, exchanged, transferred, distributed, cancelled, redeemed, relinquished, destroyed, lost, expired, or surrendered.

(3) 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.

(4) The transmission of a capital asset by succession or under a will is treated as a disposal of the asset by the deceased and the disposal occurs at the time the asset is transmitted.

(5) A disposal includes the disposal of a part of a capital asset.

Fair Market Value

5.—(1) The fair market value of a capital asset at a particular time is the ordinary open market value of the asset at that time.

(2) If it is not possible to determine the fair market value of an asset at a particular time under subsection (1), the fair market value is the consideration a similar asset would ordinarily fetch in the open market at that time, adjusted to take account of the differences between the similar asset and the actual asset.

(3) If the fair market value of an asset cannot be determined under subsection (1) or (2), the fair market value is the amount determined by the CEO.

PART 2—CAPITAL GAINS TAX*Imposition of Capital Gains Tax*

6.—(1) Subject to this Decree, a tax to be known as “capital gains tax” is imposed on a person who has made a capital gain, other than an exempt capital gain, on the disposal of a capital asset.

(2) The capital gains tax payable by a person on the disposal of a capital asset is 10% of the amount of the capital gain arising on the disposal.

(3) If the person who has made a capital gain is a non-resident person, subsection (1) applies only if the capital asset is a Fiji asset.

Exempt Capital Gains

7.—(1) The following capital gains are exempt capital gains—

- (a) a capital gain made by a resident individual or a Fiji Citizen that does not exceed twenty thousand Fiji dollars;
- (b) a capital gain made by a resident individual or a Fiji Citizen on disposal of the individual's principal place of residence, provided the residence has been the individual's principal place of residence during the whole of the period in which the individual owned the residence;
- (c) a capital gain made by a person on the disposal of shares listed on the South Pacific Stock Exchange; and
- (d) a capital gain made on disposal of an asset that is used solely to derive income exempt from tax under the Income Tax Act.

(2) If the CEO is satisfied that a capital asset has been disposed of in two or more parts for the purpose of taking advantage of subsection (1)(a), any capital gain arising from the disposals is exempt under subsection (1)(a) only if the total gain from the disposal of all parts does not exceed twenty thousand Fiji dollars.

(3) For the purposes of subsection (1)(b)—

- (a) the principal place of residence of an individual is the residence where the individual mainly lives, and an individual and their spouse must have the same principal place of residence;

- (b) the principal place of residence of an individual includes any form of residential accommodation, but does not include land that is adjacent to the residence; and
- (c) if a building of an individual is used partly as a principal place of residence of the individual and partly for some other use, the capital gain on disposal of the building must be apportioned between the two uses on any reasonable basis and only that part of the gain relating to use as a principal place of residence is exempt under subsection (1)(b).

(4) In this section, "resident individual" means an individual who is a "resident" within the meaning in the Income Tax Act.

(5) In this section, "Fiji citizen" means an individual who is a Fiji Citizen within the meaning of the Citizenship of Fiji Decree 2009.

Deferral of recognition of Capital Gain

8.—(1) For the purposes of this Decree and subject to subsection (2), no capital gain is taken to arise on the disposal of a capital asset—

- (a) between spouses as part of a divorce settlement or under an agreement to live apart;
- (b) by reason of the transmission of the asset on the death of a person to an executor or beneficiary; or
- (c) by reason of the loss or destruction, or compulsory acquisition of the asset (referred to as the "replaced asset") if the consideration received for the disposal is reinvested by the recipient in an asset of a like kind (referred to as a "replacement asset") within one year of disposal.

(2) If the person acquiring an asset referred to in subsection (1) (a) or (b) is a non-resident person at the time of the acquisition, subsection (1) applies only if the asset is a Fiji asset.

(3) If subsection (1)(a) or (b) applies, the person acquiring the asset is treated as acquiring the asset for an amount equal to the cost of the asset for the person disposing of the asset at the time of the disposal.

(4) If subsection (1) (c) applies, the cost of the replacement asset is the cost of the replaced asset at the time of disposal—

- (a) increased by the amount by which any consideration given by the person for the replacement asset exceeds the consideration received by the person for the replaced asset; and
- (b) reduced by the amount by which any consideration received for the replaced asset exceeds the cost of acquiring the replacement asset.

Foreign Capital Gains

9.—(1) If a resident person has made a capital gain on disposal of a capital asset in respect of which foreign tax has been paid, the person is allowed a tax credit of an amount equal to the lesser of—

- (a) the foreign tax paid in respect of the disposal of the asset; or
- (b) the Fijian capital gains tax payable in respect of the disposal of the asset.

(2) A tax credit allowed under subsection (1) reduces the amount of capital gains tax payable under section 6 in respect of the disposal of the capital asset.

(3) In this section, "foreign tax" means income tax or capital gains tax imposed by the government of a foreign country or a political subdivision of a government of a foreign country.

PART 3—COMPUTATION OF CAPITAL GAIN

Capital Gain

10.—(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.

Cost

11.—(1) Subject to this Decree, this section establishes the cost of a capital asset for the purposes of the Decree.

(2) Subject to this section, the cost of a capital asset of a person, other than an intangible asset, is the sum of the following amounts—

- (a) the total consideration given by the person for the asset, including the fair market value of any consideration in kind determined at the time the asset is acquired and, if the asset is constructed, produced or developed, the cost of construction, production or development;
- (b) any incidental expenditure incurred by the person in acquiring or disposing of the asset; and
- (c) any expenditure incurred by the person to install, alter, renew, reconstruct, or improve the asset.

(3) Subject to this section, the cost of a capital asset of a person that is an intangible asset is the total expenditure incurred by the person in acquiring, creating, improving, and renewing the intangible asset, and any incidental expenditure incurred in acquiring or disposing of the intangible asset.

(4) The cost of a capital asset of a person includes any amount given for the grant of an option to the person to acquire the asset.

(5) The cost of a capital asset of a person is reduced by the amount of any deduction allowed to the person under the Income Tax Act in respect of amounts included in the cost of the asset, other than a depreciation deduction.

(6) An amount is included in the cost of a capital asset on the date that it is paid.

(7) If a person disposes of a part of a capital asset, the cost of the asset is apportioned between the part of the asset retained and the part disposed of in accordance with their respective fair market values determined at the time the person acquired the asset.

(8) The cost of a capital asset of a person does not include the amount of any grant, subsidy, rebate, commission, or other assistance received or receivable by the person in respect of the acquisition of the asset, except to the extent to which the amount is included in the total income of the person under the Income Tax Act.

(9) The reference to “other assistance” in subsection (8) does not include a loan repayable with or without interest.

(10) If the acquisition of an asset by a person is—

- (a) the derivation of an amount included in the total income of the person under the Income Tax Act, the cost of the asset is the amount so included plus any amount paid by the person for the asset; or
- (b) the derivation of an amount that is exempt from tax under the Income Tax Act, the cost of the asset is the exempt amount plus any amount paid by the person for the asset.

Consideration received

12.—(1) Subject to this Decree, this section establishes the amount of consideration received on disposal of a capital asset for the purposes of the Decree.

(2) The consideration received by a person on disposal of a capital asset is the total amount received by the person for the asset, including the fair market value of any consideration received in kind determined at the time of the disposal.

(3) The consideration received by a person on disposal of a capital asset includes the consideration received by the person on the grant of an option in relation to the asset if the person has not been subject to tax in respect of any capital gain made on the grant of the option.

(4) If a capital asset has been lost or destroyed by a person, the consideration received for the asset includes any compensation, indemnity, or damages received by the person as a result of the loss or destruction, including amounts received as a consequence of—

- (a) an insurance policy, indemnity, or other agreement;
- (b) a settlement; or
- (c) a judicial decision.

(5) If two or more assets are disposed of by a person in a single transaction and the consideration received for each asset is not specified, the total consideration received by the person is apportioned among the assets disposed of in proportion to their respective fair market values determined at the time of the disposal.

(6) An amount is included in the consideration received on disposal of a capital asset on the date that it is received.

Non-arm's length transaction

- 13.—(1) If a capital asset is disposed of by a person in a transaction that is not an arm's length transaction—
- (a) the person disposing of the asset is treated as having received consideration equal to the fair market value of the asset determined at the time the asset is disposed of; and
 - (b) the person acquiring the asset is treated as having a cost equal to the amount determined under paragraph (a).

(2) A transaction is a non-arm's length transaction if the dealing is other than what would reasonably be expected between independent persons dealing with each other at arm's length.

PART 4—ANTI-AVOIDANCE

Avoidance of Capital Gains Tax

14. If there are reasonable grounds for the CEO to believe that any dealings have the direct or indirect effect of—

- (a) altering the incidence of capital gains tax that is payable or suffered by, or which would otherwise have been payable or suffered by any person;
- (b) relieving any person from any liability that has arisen or which would otherwise have arisen to pay capital gains tax or file a capital gains tax return;
- (c) evading or avoiding any liability which is imposed or would otherwise have been imposed on any person under this Decree; or
- (d) hindering or preventing the operation of this Decree in any respect,

the CEO may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the dealings and make such assessments as the CEO considers just and proper in the circumstances.

PART 5—CAPITAL GAIN TAX PROCEDURE

Filing of Capital Gains Tax Return and Payment of Capital Gains Tax

15.—(1) A person liable for capital gains tax in respect of the disposal of a capital asset must file a capital gains tax return within thirty days after the disposal of the capital asset.

(2) The capital gains tax payable by a person on the disposal of a capital asset is due on the due date for filing the taxpayer's capital gains tax return in respect of the disposal.

Collection of tax payable by partnerships or trusts

16.—(1) Each trustee of a trust is responsible for performing any duties or obligations imposed by this Decree on the trust, including the payment of capital gains tax.

(2) Each partner in a partnership is responsible for performing any duties or obligations imposed by this Decree on the partnership, including the payment of capital gains tax.

(3) The duties and obligations imposed under this section on the trustees of a trust or the partners in a partnership apply jointly and severally to the trustee or partners, as the case may be, but may be discharged by any of them.

(4) In this section, "trustee" includes the executor of a deceased's estate.

Records

17.—(1) A person must keep such accounts, documents, and records as to enable the computation of the capital gains tax payable by the person in respect of the disposal of a capital asset.

(2) A person must retain the records required under subsection (1) for five years after the date of disposal of the capital asset.

(3) The CEO may disallow the inclusion of the amount of expenditure in the cost of an asset if a person is unable, without reasonable excuse, to produce a receipt or other record of the expenditure.

PART 6—MISCELLANEOUS PROVISIONS

Joint owners

18.—(1) For the purposes of this Decree, if a capital asset is jointly owned by two or more persons, any capital gain made on disposal of the asset must be apportioned among the owners according to their respective interests in the asset.

(2) If the interests of the owners of a jointly owned capital asset cannot be ascertained, the owners of the asset are treated as having an equal interest in the asset.

(3) In the case of the disposal of a capital asset that is jointly owned, section 7(1)(a) applies only if the total capital gain made by all owners of the asset on disposal of the asset does not exceed twenty thousand Fijian dollars.

Currency translation

19.—(1) An amount taken into account under this Decree must be expressed in Fijian dollars.

(2) If an amount is in a currency other than Fijian dollars, the amount must be translated to Fijian dollars at the Reserve Bank of Fiji exchange rate applying between the foreign currency and Fijian dollars on the date the amount is taken into account for the purposes of this Decree.

Capital Asset Registration and Renewals

20. The Registrar of Titles must not register an instrument relating to the transfer of a capital asset under the Lands Transfer Act or renewal of a capital asset, unless the transferor or transferee has furnished the Registrar of Titles with a certificate from the CEO stating that the capital gains tax due on the transfer has been paid or satisfactory arrangements for payment of the tax have been made, or that no such tax is payable.

PART 7—CONSEQUENTIAL AMENDMENTS AND REPEALS

Tax Administration Decree amended

21. The Tax Administration Act is amended—

(a) in section 2—

(i) by inserting the following definition in the correct alphabetical order – “Capital Gains Tax Decree” means the Capital Gains Tax Decree 2011; and

(ii) by deleting the definition of “Lands Sales Act”

(b) in paragraph (d) of the First Schedule, by deleting “land sales tax” and substituting “capital gains tax, including a self-assessment under section 5”;

(c) in paragraph (e) of the Second Schedule, by deleting “Land Sales Act” and substituting “Capital Gains Tax Decree”;

(d) in the Third Schedule—

(i) in Part A, by inserting after paragraph (4)—

“(5)A return required under section 15 of the Capital Gains Tax Decree.”

(ii) in Part B, by inserting after “Value Added Tax Decree” the following “and a return required under section 15 of the Capital Gains Tax Decree”.

Land Sales Act amended

22.—(1) Sections 3, 4, 5, 9, 10, and 13 of the Land Sales Act (Cap 137) (referred to as the “repealed sections”) are hereby repealed.

(2) The repealed sections continue to apply to dealings prior to the date on which this Decree comes into force.

PART 8—FINAL PROVISIONS

Regulations

23.—(1) The Minister responsible for finance may make regulations—

(a) prescribing forms or other matters as required under this Decree; or

(b) for the proper and efficient administration of this Decree.

- (2) Without limiting the general effect of subsection (1), regulations made under that subsection may—
- (a) contain provisions of a saving or transitional nature consequent on the making of this Decree; or
 - (b) prescribe penalties for the contravention of the regulations.

(3) If regulations made under this section are of a transitional nature and are made within six months after the commencement of this Decree, the regulations may provide that they take effect from the date on which the Decree comes into force.

GIVEN UNDER my hand this 16th day of May 2011.

EPELI NAILATIKAU
President of the Republic of Fiji