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**INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW**

*Pacific Civil Society Law Programme*

***COMPARATIVE TAX REGIMES in the SOUTH PACIFIC  
And IMPLICATIONS for CIVIC ORGANISATIONS***

**Review Report**

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## **I INTRODUCTION**

This report presents an overview of the tax laws in the South Pacific which directly or indirectly affect civic organisations established for charitable, educational, benevolent, religious, and other public benefit purposes. Tax regimes of the following jurisdictions are thus the subject of this review: Cook Islands, Fiji, Kiribati, Niue, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, and Vanuatu.

The scope of this review focuses on income tax exemptions, tax deductions rebates and relief to donors, stamp duty exemptions, special treatment relating to public fundraising activities, duty payable on gifts made to civic organisation, exemptions under customs and excise laws, privileges under goods and services tax, and the tax treatment of income or profit derived from business activities operated by or on behalf of civic organisations. Some of the findings in this review may not be conclusive, thus, should only be taken as pointing to the direction or trend of legal development in the region. But in any event, taxation laws in the region undergo ongoing *overhauls* and reforms to reflect contemporary socioeconomic circumstances.

## **II TAXATION ISSUES**

### **A Exemption on Income**

As the standard approach, the income of organisations established for specified purposes are statutorily exempted from income tax, and the trend in the region is generally uniform. This is not the case however with the income of cooperative societies registered under cooperative societies' legislation to which the approach varies from one jurisdiction to another. In other words, the tax regimes in most South Pacific jurisdictions do not give special treatment to the income of cooperative societies. Exceptions are however found

in Fiji,<sup>1</sup> Niue<sup>2</sup> and Solomon Islands<sup>3</sup> in which *absolute* or *qualified* exemption applies to the income of such societies.

Reverting to organisations other than cooperatives societies, variations are however present as to the eligibility requirements for statutory exemption. A purposive approach is adopted in most or all reviewed legislation in defining the types of purposes thus organisations that may qualify for enjoying tax exemption benefit. Thus, by virtue of income tax legislation an organisation will qualify for exemption if is established for a public benefit purpose which may fall under any of the following broad categories: benevolence,<sup>4</sup> religion,<sup>5</sup> education,<sup>6</sup> sports,<sup>7</sup> charity;<sup>8</sup> culture,<sup>9</sup> science music art and literature,<sup>10</sup> relief of poverty sickness or disability<sup>11</sup> and distress of the public.<sup>12</sup> There is however absence in all regional legislation of provisions requiring, as prequalification for tax exemption, the status of an organisation to be assessed and certified by an independent body.

Generally, the incorporation status of an organisation<sup>13</sup> does not necessarily entitle the same to automatic exemption. A purposive approach, as earlier highlighted is adopted to determine the types of organisations and incomes that are subject to tax exemption. This does not necessarily apply however to statutory exemptions that clearly defines the specific bodies or organisations

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<sup>1</sup> s.16 of the *Income Tax Act* [Cap 201] of Fiji limits exemption to a period of 8 years

<sup>2</sup> Exemption is absolute and permanent by virtue of s.49 of the *Income Tax Ordinance*

<sup>3</sup> Exemption is absolute but subject to a society having as its principal object the development of agricultural land

<sup>4</sup> s.81, *Income Tax Act 1990* (Kiribati); Sch.1, *Income Tax Act 1992* (Tuvalu); s.16, *Income Tax Act [Cap 123]* (Solomon Islands)

<sup>5</sup> Kiribati, Tuvalu, and Solomon Islands. s.25, *Income Tax Act 1974* (PNG); s.7, *Income Tax Act 1974* (Samoa); s.17, *Income Tax Act [Cap 201]* (Fiji)

<sup>6</sup> Kiribati, PNG, Samoa, Solomon Islands, and Fiji

<sup>7</sup> Tuvalu and PNG

<sup>8</sup> Kiribati, PNG, Samoa, Tonga, Samoa, Solomon Islands, and Niue. s.42(1)(g), *Income Tax Act 1997* (Cook Is)

<sup>9</sup> Tuvalu

<sup>10</sup> PNG

<sup>11</sup> Samoa and Fiji

<sup>12</sup> Fiji

<sup>13</sup> As referring to the statute under which an organisation is incorporated such as the *Charitable Trusts Act*

the incomes of which will be exempt from tax.<sup>14</sup> In this respect, some organisations are specifically exempted in tax legislation by reference to their registered names. In relation to *general* exemption provisions, the formal approval of State authorities is required to grant an organisation tax exempted status which can either be permanent<sup>15</sup> or for a specified period<sup>16</sup> and activity. In the South Pacific, the power to grant formal approval to tax exempted status is vested either in the Board,<sup>17</sup> Minister,<sup>18</sup> Collector,<sup>19</sup> Commissioner,<sup>20</sup> Treasurer<sup>21</sup> or His Majesty in Council.<sup>22</sup>

Whatever the criteria may be for determining eligibility for income tax exemption, the most fundamental determinant is the *public benefit* element of a purpose. Not surprisingly, all Pacific jurisdictions reviewed have maintained the traditional position as first developed in western legal systems. In this connection, it is worth noting that the concept of *public benefit* as considered from a cultural perspective<sup>23</sup> has over the years systematically given way to its western or modern definition and understanding. This is manifested in the proliferation of community-based organisations the membership and activities of which are beyond traditional precincts or limitations such as tribal or kinship-based institutions and polities.

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<sup>14</sup> In such cases, the determinant factor is the object of an organisation as set out in its constitution upon incorporation.

<sup>15</sup> As would have been the case in PNG in which a body deemed charitable is prescribed by name in the income tax legislation, thus, granting the same a presumably permanent tax exempted status.

<sup>16</sup> The tenure of exemptions, whilst not defined in the relevant provisions, is normally left to be prescribed by the Minister or Commissioner of Inland Revenue in the order granting the exemption to a specified body. See e.g. Schedule to s.16 of the *Income Tax Act* of Solomon Islands

<sup>17</sup> Kiribati,

<sup>18</sup> Tuvalu, Solomon Islands, Fiji

<sup>19</sup> Cook Islands

<sup>20</sup> Samoa and PNG

<sup>21</sup> Niue

<sup>22</sup> Tonga

<sup>23</sup> *Public benefit* as understood in contemporary Pacific societies is alien to Pacific cultures of prehistoric times when acts of generosity that benefit strangers (who, in this context are non-tribal members) are a rarity, if at all. Thus, the scope of generosity is traditionally confined to tribal circles or rendered in the course of honoring existing tribal or kinship alliances.

## **B Deduction, Relief & Rebates**

Nearly all South Pacific jurisdictions do acknowledge to varying degrees the generosity of donors and philanthropists by providing for deductions and rebates vis-à-vis assessment of taxable incomes of the same. The approach in Kiribati and Tuvalu is however an exception in the region as a charitable donation does not attract any form of recognition in neither country's tax legislation. In those jurisdictions with tax deduction mechanisms, the scale or rate of deduction is somewhat dictated by certain factors including the relatively small size of an economy thus small revenue base for the state through taxation. This can also be influenced by the willingness or otherwise of governments to forego much needed revenue for service delivery and supporting burgeoning bureaucracies. With the exception of a few jurisdictions,<sup>24</sup> only donations by way of gifts in cash assume greater recognition in the law. In this connection, donations *in kind* have yet to be statutorily acknowledged in most South Pacific jurisdictions.

The most important qualifying factor for invoking this tax benefit mechanism is that a donation must be made to a body established for purposes of sport,<sup>25</sup> charity,<sup>26</sup> religion,<sup>27</sup> education,<sup>28</sup> benevolence or assisting relief operations.<sup>29</sup> Other statutory requirements include the need to produce documentary evidence of such donations,<sup>30</sup> minimum cash donations,<sup>31</sup> and the making of such donation by a donor within a specified period of time. The approach in Papua New Guinea as to the latter criterion is unique as s.21 of the *Income Tax Act* requires a gift in kind so donated to be acquired by the donor no earlier than '12 months immediately preceding the making of the gift'.

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<sup>24</sup> PNG

<sup>25</sup> PNG, Solomon Islands

<sup>26</sup> Cook Islands, Fiji, Niue, PNG, Samoa, Tonga, Solomon Islands

<sup>27</sup> Cook Islands, Niue, and Solomon Islands

<sup>28</sup> Fiji and Solomon Islands

<sup>29</sup> Solomon Islands

<sup>30</sup> A receipt is required for cash donations made in the Cook Islands (s.70, *Income Tax Act*) and Niue (s.47B, *Income Tax Ordinance*)

<sup>31</sup> K50 in PNG

As a fundamental issue to this tax benefit mechanism, the rates of deduction coupled with prescribed ceilings often dictate the extent to which philanthropy is promoted in any jurisdiction. But having such an objective will only need to be balanced with the small economies of most South Pacific jurisdictions which directly impinge on the revenue base of governments. Such influencing factor is reflected in the rates of deduction prescribed in each jurisdiction. Set out below in Table 1 is a summary of the tax deduction rates and ceilings prescribed for each jurisdiction.

**Table 1 Tax Rebate & Deduction Rates<sup>32</sup>**

Country	Rebate or Deduction Rate		Minimum Donation	Maximum Deduction in one year
	Gift in Kind	Gift in Cash		
Cook Islands	<i>No provision</i>	Value of gift	\$200	\$5'000
Fiji	<i>No provision</i>	Value of gift	Not specified	100'000 <sup>33</sup>
Kiribati	<i>No provision</i>	<i>No provision.</i>	----	-----
Niue	<i>No provision</i>	20¢ in every \$1	Not specified	\$100
Papua New Guinea	Value of gift	Value of gift	K50 <sup>34</sup>	Unlimited
Samoa	<i>No provision</i>	<i>No provision</i>	Not specified	\$104
Solomon Islands	<i>No provision</i>	Value of gift	Not specified	\$5'000 <sup>35</sup>
Tonga	<i>No provision</i>	Value of gift	Not specified	\$750
Tuvalu	<i>No provision</i>	<i>No provision</i>	-----	-----
Vanuatu <sup>36</sup>	<b>Not applicable</b>			

Additional to the general provisions on tax deduction which, albeit of general application refers nonetheless to specific bodies or trust funds,<sup>37</sup> special

<sup>32</sup> All rates are quoted in local currencies

<sup>33</sup> *Income Tax (Budget Amendment) Act 2005*

<sup>34</sup> *Kina* is the local currency

<sup>35</sup> *Income Tax (Amendment) Act 1995*

<sup>36</sup> The country is one of the few tax havens in the South Pacific and has introduced a VAT system in 1998.

<sup>37</sup> For instance, s.21 of the Fiji *Income Tax Act* makes special reference to donations being made towards the University of the South Pacific Endowment Fund, Fiji Red Cross Society, St John's Ambulance Brigade, Fiji Crippled Children's Society and the Fiji Blind Society.



amendments which are ad hoc were introduced as part of national fundraising drives towards specific events. Notable examples are the amendments in Fiji<sup>38</sup> and Samoa<sup>39</sup> geared towards procuring financial support from donors towards the 2003 and 2007 South Pacific Games respectively. Relatively higher rates of deduction were prescribed to attract corporate sponsorship of the prestigious Pacific event. It is worth highlighting that such event-specific amendments normally incorporate multiple factors and criteria which include minimum cash donations, timelines, recipient authorities, and specified trust accounts into which payment must be made. Table 2 below provides a summary of the substance of the amendments in Fiji and Samoa.

**Table 2 Special Amendment Deduction Rates in Fiji and Samoa**

<b>Country</b>	<b>Timeline</b>	<b>Beneficiary</b>	<b>Minim. Gift</b>	<b>Deduction Rate</b>
Fiji	Made between 1 Jan. 1998 and 31 Dec. 2001	South Pacific Games Infrastructure Fund	Not specified	1.5X amount of cash donation
	Made between 1 Jan. 2002 and 31 Dec. 2003	SPG Infrastruc. Fund, 2003 SPG Organising Committee, SPG Organising Comm. Ltd		2X amount of cash donation
Samoa	Paid bef. a date determined by Notice by the CEO of the Min. of Finance	South Pacific Games Authority via such account as approved by the CEO Ministry of Finance	\$104	2X amount of cash donation

### **C Public Fundraising, Licenses & Permits**

Financially sustaining the operations of charitable or public benefit organisations requires a legal regime that recognises thereby providing a flexible environment for such bodies to engage in or be beneficiaries of public fundraising activities. Two common approaches are characteristic of legislation

<sup>38</sup> *Income Tax (Budget Amendment) Act 2002*

<sup>39</sup> *Income Tax (South Pacific Games Donations) Amendment Act 2003*

in the region that fall under this sub-head. The first approach provides special treatment to the organisation undertaking a regulated fundraising activity. Such treatment is normally accorded on basis of the *charitable* or *public benefit* status of the organisation. The privileges and special treatments prescribed under this approach vary from one jurisdiction to another and may be in the form of exemption from certain statutory requirements, waiver of permit or license fees, or being the recipient of a special permit to engage in what is otherwise a restricted or *monopolised* activity. The second approach shifts focus to the proceeds of a regulated or licensed activity such as a lottery. By operation of this approach, the determinant factor is whether proceeds of the activity will be applied for certain public benefit purposes such as education, sports or charity. Thus, the status of the fundraiser is immaterial as it can either be a private business or profit-oriented establishment. Benefits prescribed under this approach include exemption remission or waiver of permit fees,<sup>40</sup> exemption from distribution of gaming proceeds, or the issuance of a special permit to engage in what is otherwise a restricted or monopolised trade or activity.

Further, adopting a purposive approach in defining the purposes that will qualify an organisation for the prescribed benefits and privileges, the following categories are statutorily recognised in the region: charity,<sup>41</sup> education,<sup>42</sup> religion,<sup>43</sup> culture,<sup>44</sup> sport,<sup>45</sup> philanthropy,<sup>46</sup> or any public purpose.<sup>47</sup>

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<sup>40</sup> Such as the fee payable for a special permit to sell liquor or the exhibition of films

<sup>41</sup> s.5 *Gaming Act*, s.72 *Liquor (Licensing) Act* (PNG); s.27 *National Lotteries Act*, s.16 *Gaming Act*, s.10 *Film Control Act* (Samoa); s.5 *Dances Act* (Tonga); s.15 *Gaming & Lotteries Act*, ss.4 and 9 *Cinematograph Act* (Solomon Islands); s.4 *Films & Public Entertainment Act* (Niue); s.7 *Films & Censorship Act* (Cook Islands); s.4 *Cinematographic Films Act* (Fiji)

<sup>42</sup> Papua New Guinea, Samoa, Cook Islands, Niue, Solomon Islands, Fiji

<sup>43</sup> *ibid*

<sup>44</sup> Papua New Guinea, Samoa, Solomon Islands,

<sup>45</sup> Fiji, Cook Islands, Niue, Solomon Islands, Papua New Guinea, Samoa

<sup>46</sup> Samoa, Cook Islands, Niue, Fiji

<sup>47</sup> Fiji, Solomon Islands, Cook Islands, Niue, Samoa

## **D Stamp Duty**

Tax in the form of stamp duty is an inalienable component of the whole tax regime of most, if not, all South Pacific jurisdictions. Whilst revenue is an underlying rationale of this tax approach, causes for charitable or public benefit purposes were nonetheless given recognition by the State by way of statutory and ministerial or discretionary exemptions. Stamp duty exemption is thus approached in general from two sources in the region: (i) exemptions provided under special or general enabling legislation<sup>48</sup> and (ii) exemptions provided in stamp duties legislation<sup>49</sup> by way of reference to *exempted* categories of bodies or transactions. As to the first source, the scope or range is relatively narrow and limited to a few specified instruments such as those executed for or on behalf of a registered society. A notable example is the exemption provided to societies registered under the *Cooperative Societies Act*<sup>50</sup> and *Incorporated Societies Act*<sup>51</sup> of certain jurisdictions. The second category is broader in scope and adopts a more purposive approach in defining the purposes and types of instruments and transactions that may entitle an organisation to exemption.

The regional legislative approach towards cooperative societies is uniform as registered societies may enjoy special privilege either through statutory exemption or the use of discretionary power to exempt remit or waive stamp duty by the Minister, Controller or Commissioner of stamp duty, or Head of State.<sup>52</sup> Note however that such exemption applies principally to instruments executed for or on behalf of a cooperative society in relation to the business of such society. Furthermore, stamp duty exemption is similarly prescribed for

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<sup>48</sup> See for e.g. s.58 of the *Cooperative Societies Ordinance* of Kiribati

<sup>49</sup> Most or all jurisdictions reviewed do have a Stamp Duties Act.

<sup>50</sup> r.54, (Cook Islands); s.55, (Samoa); s.60, (Tonga); s.56, (Vanuatu); s.49, (Solomon Islands); s.58, (Tuvalu); s.58, (Kiribati); s.157, (Papua New Guinea)

<sup>51</sup> s.38, Cook Islands; s.34, Samoa; s.35, Tonga; s.35, Niue

<sup>52</sup> Samoa, Tonga, PNG, Kiribati, Solomon Islands, Cook Islands and Tuvalu

bodies registered under the *Incorporated Societies Act*,<sup>53</sup> *Charitable Trust Act*<sup>54</sup> and the *Savings and Loans Societies Act*<sup>55</sup> of certain Pacific jurisdictions.

The principal source of stamp duty exemption is found in the Stamp Duties legislation of all South Pacific jurisdictions. In any such statute, the approach is twofold as it focuses on (i) specified types of bodies and (ii) specific instruments and transactions. In terms of (i), bodies established for the following purposes are, subject to sub-item (ii), recognized as qualified for exemption: religion,<sup>56</sup> philanthropy,<sup>57</sup> charity,<sup>58</sup> community service,<sup>59</sup> and education.<sup>60</sup> As the other determinant, exemption may be enjoyed by bodies established for the above purposes if they are beneficiaries of or parties to the following instruments and transactions: cheques orders or drafts,<sup>61</sup> conveyance or transfer of real property,<sup>62</sup> deed of gift of property,<sup>63</sup> deeds of settlement,<sup>64</sup> transfer or assignment of leases,<sup>65</sup> receipts given for donation to charitable institutions,<sup>66</sup> and instrument for declaring or defining the trust or for appointing new trustees in respect of such property.<sup>67</sup> Whilst all stamp duties legislation of the jurisdictions reviewed provides with clarity the types of CSOs and instruments or transactions to which exemption waiver or remission will apply, the approach in the *Stamp Duties Act* of Samoa is ambiguous as the Act is rather silent on this vital issue.

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<sup>53</sup> Samoa, Tonga, Cook Islands and Niue

<sup>54</sup> Tonga

<sup>55</sup> PNG

<sup>56</sup> s.5 *Stamp Duties Act* (PNG); s.3 *Stamp Duties Act* (Tonga); s.3 *Stamp Duties Act* (Solomon Islands); s.3 *Stamp Duties Act* (Fiji)

<sup>57</sup> PNG

<sup>58</sup> PNG, Tonga, Solomon Islands, Fiji; s.4 *Stamp Duties Act* (Vanuatu); s.59 *Stamp Duties Act* (Cook Islands)

<sup>59</sup> PNG

<sup>60</sup> Solomon Islands and Fiji

<sup>61</sup> Sched.1 *Stamp Duties Act* (PNG)

<sup>62</sup> PNG; s.59 *Stamp Duties Act* (Cook Islands); Schedule to *Stamp Duties Act* (Solomon Islands)

<sup>63</sup> PNG

<sup>64</sup> PNG

<sup>65</sup> PNG

<sup>66</sup> Tonga

<sup>67</sup> Solomon Islands

## **E Customs & Excise**

As import-based economies, customs laws undoubtedly ranked highly within the tax regime affecting civic organisations in any South Pacific jurisdiction. However, the extent to which customs laws manifestly recognise the role of civic organisations is an issue that is addressed with great diversity throughout the region. To comprehend this point, one only needs to draw comparison between the regional approaches to income tax and customs duty respectively. There is appreciable uniformity in terms of the former whilst otherwise for the latter.

In a nutshell, both statutory (mandatory) and discretionary (ministerial) exemptions are characteristic of the legislative approach in the region. But of both approaches, the use of discretionary exemptions is predominant in a majority of jurisdictions reviewed.<sup>68</sup> And as manifestation of this predominant *discretionary approach*, most jurisdictions have shied away from expressly providing for statutory exemptions specifically applying to civic organisations of such descriptions and with such purposes. The consequence therefore is that civic organisations established for charitable or public benefit purposes are by implication subjected to the same regime applying to private sector organisations and other profit-making bodies. Kiribati, Vanuatu, and to some extent, Fiji, are exceptions as, in prescribing exempted classes of imports or goods, specific reference is made to imports or exports made for purposes including religion, education, charity, sport, community services, and youths.<sup>69</sup>

Employment of the discretionary approach entails applications for exemption being considered on a case by case basis.<sup>70</sup> In all South Pacific jurisdictions, the power to exercise discretion in the consideration of applications for

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<sup>68</sup> Jurisdictions falling within this category include the Cook Islands, Fiji, Papua New Guinea, Samoa, Solomon Islands, Tuvalu, and Tonga

<sup>69</sup> s.4 *Customs Act* (Kiribati); s.10 *Customs Tariff Act* (Fiji); sched.3 *Import Duties (Consolidation) Act* (Vanuatu);

<sup>70</sup> No blanket exemption is prescribed as such are normally one-offs.

exemption is vested in the Minister,<sup>71</sup> President,<sup>72</sup> Cabinet,<sup>73</sup> Head of State,<sup>74</sup> or a special committee.<sup>75</sup> Whilst the procedures and guidelines for consideration of applications are prescribed in statute for certain jurisdictions,<sup>76</sup> the rest adopt a system whereby the exercise of discretion is guided, if at all, by arbitrary or ad hoc procedures and policy guidelines. A classic illustration of a jurisdiction with a statutorily prescribed procedure is Solomon Islands by virtue of the *Customs & Excise (Amendment) Act 2002* which establishes a stringent exemptions regime. Novel mechanisms of the amendment include:

- (i) a requirement for a memorandum of understanding to be concluded between the Government and applicant as prerequisite for an exemption application;
- (ii) the transfer of functions formerly vested in the Minister to a special exemptions committee;<sup>77</sup> and,
- (iii) Minister to endorse decision of the committee unless he or she decides otherwise on basis of one prescribed factor.<sup>78</sup>

The transfer of the substantive decision-making process from a single authority (Minister) to a body of persons (committee) by way of legislation is a commendable initiative which as yet is not widely practiced in the region. Without doubt, the strength of the approach in Solomon Islands lies in the argument that the Minister's power and discretion to grant exemptions is systematically controlled and regulated. This in effect prevents arbitrariness and the abuse of power by those in authority. Moreover, the exercise of discretion by the Minister is subject to one paramount consideration which is

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<sup>71</sup> *Customs Tariff Act* (Fiji), *Customs Tariff Act* (Samoa), *Customs & Excise Act* (Solomon Islands), *Imports Levy (Special Fund) Act* (Tuvalu), *Import Duties (Consolidation) Act* (Vanuatu)

<sup>72</sup> *Customs Act* (Kiribati)

<sup>73</sup> *Customs Tariff Act* (Cook Islands)

<sup>74</sup> *Customs Duty (Rebate) Act* and *Customs Tariff Act* (Papua New Guinea)

<sup>75</sup> *Customs & Excise (Amendment) Act* (Solomon Islands)

<sup>76</sup> Such as Solomon Islands and to some extent, Fiji

<sup>77</sup> The Committee comprised representatives of the Departments of National Planning, Commerce, Customs and Inland Revenue, as well as the Chamber of Commerce and the Central Bank of Solomon Islands. Where necessary, a representative from the department regulating the export or import commodity will also be invited on an ad hoc basis.

<sup>78</sup> By virtue of s.8(7) of the Act, endorsement of the Minister may only be withheld if the exemption is not in the best interest of the country's economy.

statutorily prescribed in two other jurisdictions<sup>79</sup> besides Solomon Islands. Thus, the decision of a minister to grant or refuse an exemption must take into account the economic and development interest of the country<sup>80</sup> as well as the extent to which it will contribute, if at all, an identifiable benefit to the country.<sup>81</sup>

## **F Sales & Purchases**

The preliminary issue is whether the tax regime of the jurisdictions reviewed provides special treatment to civic organisations vis-a-vis purchases or sales of goods and services domestically. In other words, are civic organisations exempted from tax payable on the supply of goods and services domestically? Whilst the retail price of goods and services normally incorporate a type of tax referred to as GST<sup>82</sup> or VAT,<sup>83</sup> there are certain jurisdictions which exempt public benefit organisations from paying this tax. What is then paid is the normal price less the imposed tax.

In general, not all South Pacific jurisdictions have legislative provisions catering for this special tax benefit. And with the absence of any such legislation, the position of certain jurisdictions<sup>84</sup> is uncertain. The notable exception however is the bigger jurisdictions in the region, viz. Fiji, Papua New Guinea, Samoa, Solomon Islands and Vanuatu, all of which have GST or VAT legislation.<sup>85</sup> As is conventional, qualification for exemption under this regime of tax is not arbitrary but based on the recognised status of an organisation or the purposes for which it is established. The *Goods & Services Tax Act* of Papua New Guinea provides for instance that a zero rate will apply to goods and services supplied to or by a non-profit body being a religious charity or

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<sup>79</sup> Fiji and Vanuatu

<sup>80</sup> sched.3 *Import Duties (Consolidation) Act* (Vanuatu); s.8 *Customs & Excise Act* (Solomon Islands)

<sup>81</sup> s.10 *Customs Tariff Act* (Fiji)

<sup>82</sup> Goods and Services Tax

<sup>83</sup> Value Added Tax

<sup>84</sup> Such as the Cook Islands, Kiribati, Tuvalu, Niue and Nauru

<sup>85</sup> *Value Added Tax Decree 1991* (Fiji), *Goods & Services Tax Act 2003* (PNG), *Value Added Goods & Services Tax Act 1992/93* (Samoa), *Goods Tax Act 1993* and *Sales Tax Act 1990* (Solomon Islands), *Value Added Tax Act 1998* (Vanuatu)

community organisation.<sup>86</sup> The *Value Added Tax Decree* of Fiji similarly exempts from tax the supply by a non-profit body of donated goods and services.<sup>87</sup> Moreover, the Solomon Islands' *Goods Tax Act* exempts from goods tax equipment and material used by a religious, charitable, benevolent, educational or sporting institution.<sup>88</sup> The *Value Added Goods & Services Tax Act* of Samoa makes reference only to the supply of donated goods by a non-profit body, the latter being defined as<sup>89</sup>

any society, association, or organisation, whether incorporated or not which is carried on other than for the purposes of profit or gain to any proprietor, member, or shareholder and which is, by the terms of its memorandum, articles of association, rules or other document constituting or governing the activities of the society, association, or organisation, prohibited from making any distribution whether by way of money, property, or otherwise howsoever, to any such proprietor, member, or shareholder.<sup>90</sup>

No ministerial or discretionary exemption is exercised under the above legislation as the exemptions are statutory and determined primarily by the status and purpose of an organisation, or the nature of the goods and services supplied. The only piece of legislation that takes a *discretionary* approach, whilst similarly shying away from making any reference to non-profit bodies, is the *Sales Tax Act* of Solomon Islands. The only general provision that may be invoked by a non-profit body seeking exemption is s.6 of the Act which empowers the Minister to determine by notice '*any persons entitled to relief from sales tax...subject to any conditions the Minister may impose*'. 'Person' is defined in the *Interpretation & General Provisions Act 1978* as also including bodies corporate.<sup>91</sup>

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<sup>86</sup> s.21

<sup>87</sup> para.4, Sched.2

<sup>88</sup> s.37

<sup>89</sup> s.2

<sup>90</sup> The same definition is adopted in s.2 of the *Goods & Services Tax Act* of PNG

<sup>91</sup> s.16



## **G Gift Duty**

This section looks briefly at the tax regime governing gifts by way of dispositions of property in favour of charitable or public benefit organisations. Of the jurisdictions reviewed, only two (2) have statutes dealing with the payment of duty on property disposed of by way of gift, viz. Fiji and Samoa.<sup>92</sup> For purposes of comprehension, it would be worthwhile gaining insight into what is meant by ‘gift’ being the subject of this tax regime. Section 2 of the *Estate & Gift Duties Act* of Fiji defines the term as meaning ‘*any disposition of property which is made otherwise than by will, whether with or without an instrument in writing, without full adequate consideration in money or money's worth*’. If gift is in essence property, inference can then be drawn from the definitions of ‘personal’ and ‘real’ property in the Act that property being the subject of duty payable under the Act includes both real and personal property. What then is the statutory position relating to property being gifted to public benefit or charitable bodies?

The legislative approach in both Fiji and Samoa is unequivocal as s.63(a) for instance of the *Estate & Gift Duties Act* (Samoa) stipulates that no duty will be payable on any ‘*gift creating a charitable trust, or establishing any society or institution exclusively for charitable purposes, or any gift in aid of any such trust, society or institution.*’ Similarly, s.37(a) of the *Estate & Gift Duties Act* of Fiji exempts from gift duty ‘*any gift to any institution, organization or body of persons, whether corporate or unincorporated, operating for charitable purposes in Fiji and not formed or carried on for the profit of any individuals, such gift being for use within Fiji*’. These are statutory exemptions determined primarily on basis of the charitable status and purpose of a recipient organisation.

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<sup>92</sup> *Estate & Gift Duties Act 1966* (Fiji), *Estate & Gift Duties Act 1978* (Samoa)

## **H Non-Profit Company & Profits**

Whilst charitable or public benefit organisations in the region are at liberty to have business interest, the crucial issue however is the extent to which the profit gained from any such interest is treated at law. The fundamental question therefore is whether the profit gained from the business interest of a charitable or public benefit organisation is exempt from tax. To be so treated, the logical construction would be that such profit or gain must be treated in law as constituting an integral part of the income of such organisation. Determining this issue entails revisiting the income tax legislation of South Pacific jurisdictions.

With the exception of the Cook Islands, Fiji, PNG and Samoa, the income tax legislation of all other jurisdictions is rather silent or ambiguous on this issue. In other words, there is total absence of reference or definition of the income of charitable or public benefit organisations as comprising for instance various sources or components including that derived from the business interest of any such organisation. Of the above four (4) jurisdictions, the *Income Tax* legislation of both Samoa and Cook Island contains the most clear-cut provisions which unequivocally exempts from tax the<sup>93</sup>

income derived directly or indirectly from any business carried on by or on behalf of or for the benefit of trustees in trust for charitable purposes...or derived directly or indirectly from any business carried on by or on behalf of or for the benefit of any society or institution established exclusively for such purposes....

The *Income Tax Act* of Fiji adopts a similar approach albeit stated in negative language in the proviso to s.17(5) of the Act. Thus, the profits or gains from a business which constitutes the income of a charitable or public benefit organisation will not be exempt from tax '*unless such profits or gains are applied solely for...the relief of poverty or distress of the public, or for the*

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<sup>93</sup> s.7(1)(h) *Income Tax Act 1974* (Samoa); s.42(1)(h) *Income Tax Act 1997* (Cook Islands)

*advancement of religion or education*'.<sup>94</sup> In spite of the absence of words that draw an explicit link between the business and organisation, the provision when given a liberal construction would lean in favour of a conclusion that supports such a link.

Further, the *Income Tax Act* of PNG is structured in such a manner that provides separate treatment to the income of non-profit companies from that of charitable or public benefit organisations. This it does by, first, shying away from drawing any special or intrinsic link between non-profit companies and charities per se, and second, subjecting the income of both groups to two distinct exemption regimes. As to the first point, the Act does not define the income of a charitable body as comprising profits or gains made from a business operated by or on behalf of such body as a *non-profit* company. The second point deserves more elaboration as, whilst the income of charitable or public benefit organisations enjoy full exemption, this is otherwise for the income of a non-profit company. Thus, *'[w]here the taxable income of a non-profit company does not exceed K6,000, the maximum amount of tax payable is 50% of the amount by which taxable income exceeds K4,000'*.<sup>95</sup> This provision demonstrates an approach that treats non-profit companies as more or less *near-equals* of profit making enterprises.

## **CONCLUSION**

Tax regimes in the South Pacific cannot be described as grossly inadequate, let alone, irrelevant. For such would be an understatement that disregards the realities on the ground dictated principally by small economies or markets, and, for most small jurisdictions, a relatively small tax base for purposes of state revenue. And in countries in which governments are often the sole providers of essential services, having in place tax regimes that greatly reduce or undermine the revenue raising capacity of governments may not be desirable as yet. The bottom line therefore is that current tax regimes are reasonably adequate. But yet again this is not to say that they are problem-

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<sup>94</sup> s.17(5)

<sup>95</sup> s.16

free. Improvements are needed on various fronts, a few of which are generalised below.

First, there is need to breed or culture philanthropy in the region through manifestly attractive tax incentives. With the exception of Fiji and Papua New Guinea, current tax regimes of most other jurisdictions failed to promote this goal at least at a progressive level. With the resource and financial capacity of civic organisations being strengthened through a vibrant philanthropic movement, there is every potential for governments to be relieved of the burden of providing certain basic services. In other words, given the right framework for cooperation and partnership between governments and civic organisations, most services can be provided by well-resourced organisations. The key point therefore is that philanthropic culture needed to boost the work of civic organisations in the region has to be promoted by operation of a country's tax regime. Current approaches unfortunately fall short of providing the right incentives for achieving this purpose. Supplementary to this issue, and as evidently highlighted in *Table 1*, is that of the non-recognition of *gifts in kind* in all reviewed jurisdictions but PNG. Future law reform initiatives must therefore take into account and appreciate donations in kind as just as valuable as gifts of money. And from the perspective of certain potential donors such as business houses, this option is more preferable.

Secondly, most decision-making processes required under the tax regime of most, if not, all South Pacific jurisdictions are underpinned by the exercise of discretion. In simple, ministerial or discretionary exemptions are more common than statutory exemptions. Whilst not so much of a problem on face value, this approach nonetheless becomes an issue notably when legislation falls short of prescribing guidelines and safeguards for the exercise of discretion in relation to ministerial exemptions. Such an approach provides room for arbitrariness and potential abuse of power, thus, needs to be prevented through clear guidelines or criteria prescribed in the statutory provision granting the power.

Finally, the financial sustainability of civic organisations needs tax regimes that provide special treatment to the business interest of such organisations. Only Cook Islands, Fiji, PNG and Samoa currently give recognition to this important area by exempting to various degrees the income and profit of non-profit companies and businesses operated by or on behalf of civic organisations. If profit derived from the business interest of a civic organisation provides a vital source for financing and sustaining the *public benefit* causes of such organisation, tax laws of all other jurisdictions should accordingly provide recognition of commensurate value to this significant area.

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## **Table of Legislation**

### **Cook Islands**

*Cooperative Societies Regulations*

*Customs Tariff Act*

*Income Tax Act 1997*

*Films & Censorship Act*

*Stamp Duties Act*

### **Fiji**

*Cinematographic Films Act*

*Estate & Gift Duties Act 1966*

*Cooperative Societies Act*

*Customs Tariff Act*

*Income Tax Act [Cap 201]*

*Income Tax (Budget Amendment) Act 2005*

*Income Tax (Budget Amendment) Act 2002*

*Stamp Duties Act*

*Value Added Tax Decree 1991*

**Kiribati**

*Cooperative Societies Ordinance*

*Customs Act*

*Import Levy (Special Fund) Ordinance*

*Income Tax Act 1990*

**Papua New Guinea**

*Income Tax Act 1959*

*Cooperative Societies Act*

*Customs Tariff Act*

*Customs Duty (Rebate) Act*

*Gaming Act*

*Goods & Services Tax Act 2003*

*Liquor (Licensing) Act*

*Stamp Duties Act*

**Niue**

*Income Tax Ordinance 1961*

*Customs Tariff Act 1982*

*Films & Public Entertainment Act*

**Solomon Islands**

*Income Tax Act [Cap 123]*

*Cooperative Societies Act*

*Customs & Excise Act*

*Customs & Excise (Amendment) Act 2002*

*Income Tax (Amendment) Act 1995*

*Gaming & Lotteries Act*

*Goods Tax Act 1993*

*Sales Tax Act 1990*

*Cinematograph Act*

*Stamp Duties Act*

**Samoa**

*Income Tax Act 1974*

*Cooperative Societies Ordinance*

*Customs Tariff Act*

*Estate & Gift Duties Act 1966*

*Income Tax (South Pacific Games Donations) Amendment Act 2003*

*National Lotteries Act*

*Gaming Act*

*Stamp Duties Ordinance*

*Film Control Act*

*Value Added Goods & Services Tax Act 1992/93*

**Tonga**

*Income Tax Act [Cap 68]*

*Customs & Excise Act*

*Dances Act*

*Raffles Act*

*Stamp Duties Act*

*Cooperative Societies Act*

**Tuvalu**

*Income Tax Act 1992*

*Cinemas & Films Ordinance*

*Import Levy (Special Fund) Act*

*Sales Tax Ordinance*

**Vanuatu**

*Cooperative Societies Act*

*Customs Act*

*Gambling Control Act*

*Gambling Prohibition Act*

*Import Duties (Consolidation) Act*

*Stamp Duties Act*

*Value Added Tax Act 1998*