IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU 0009 of 2017
High Court Civil Action No. HBT 06 of 2014

BETWEEN	:	**LIFE INSURANCE CORPORATION OF INDIA**
		Appellant
AND	:	**CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS**
		Respondent
Coram	:	**Basnayake, JA** **Lecamwasam, JA** **Dayaratne, JA**
Counsel	:	**Mr. B Solanki for the Appellant** **Ms. R Malani for the Respondent**
Date of Hearing	:	**13 November 2019**
Date of Judgment	:	**29 November 2019**

JUDGMENT

Basnayake, JA

[1] I agree with the reasons and conclusions of Dayaratne JA.

Lecamwasam, JA

[2] I agree with the reasons and the conclusion reached by Dayaratne JA

Dayaratne, JA

[3] The High Court of Suva sitting as the Tax Court heard the Appellant's application for review against an Objection Decision made by the Respondent with regard to the payment of Branch Profit Remittance Additional Normal Tax (BPRANT). The High Court dismissed the application for review and this appeal is against that Judgment dated 16.01.2017.

The facts in brief

[4] This matter pertains to the applicability of BPRANT in respect of the after tax profits earned by the Appellant Company.

[5] The Appellant contends that it earned after tax profits of $3,556,392 in 2008 and $5,267,447 in 2009. Of the said after tax profits, the Appellant had remitted 5% to its Head Office in India. The balance 95% had been credited to its policy holders in Fiji as bonuses. Since it had remitted only 5% of its after tax profits to the Head Office in India, in 2012 the Appellant paid $192,582.10 being the applicable BPRANT for the said 5% of its after tax profits.

[6] On 31.01.2014, the Respondent issued a letter to the Appellant stating that $1,230,993.75 was payable as BPRANT for profits earned by the Appellant in 2008 and 2009. The Appellant objected to the said imposition of BPRANT and the Respondent in its Objection Decision dated 25.09.2014 declined the said objection.

[7] The Appellant then filed an application for review on 22.10.2014 in the Tax Tribunal. The matter was then transferred to the High Court sitting as the Tax Court. The High Court

dismissed the application for review and the Appellant has filed this appeal against that judgment of the High Court.

The position taken up by the parties in the High Court

[8] In the High Court, the Appellant led evidence to explain that the parent company of the Appellant was a fully owned company of the Government of India and that the Respondent was a Branch operating in Fiji. The Appellant's witness had explained that the parent company in India had been set up under an Act of Parliament of India and that in terms thereof, the Branch in Fiji can remit only 5% of its after tax profits to India. In the years 2008 and 2009 the Appellant had remitted only 5% of its after tax profits. The balance 95% had been credited to its policy holders in Fiji as bonuses. He has further explained that once the profits are distributed among the policy holders, the parent company in India has no right to such monies.

[9] The witness also explained that crediting of the after tax profits did not amount to re-investing such profits in Fiji and hence the Appellant had not claimed any deductions in terms of section 21(1)(zg) of the Act. He took up the position that according to section 7C of the Act, BPRANT would become applicable only in respect of the portion of the profits that had been 'paid or credited for remittance" to the Head Office. On the basis that the Appellant had remitted only 5% of its profits to the Head Office in India, he said that BPRANT would become only in respect of that 5%.

[10] The position of the witness of the Respondent was that 'credited for remittance' as found in section 7C (5) would mean 'earmarked to be sent to India' as far as the Appellant was concerned and that there was no necessity for an actual remittance to be done in order for BPRANT to become applicable. Therefore he said that the entire profits (100%) would become liable for BPRANT.

[11] The Acting Chief Assessor of Revenue who testified stated that he had undertaken an independent review and relied on the 'single entity' concept. He said that the Branch and the Head Office have to be considered as one entity. On that premise he explained that BPRANT had to be applied to the entirety of the after tax profits. He also took up the position that there was no necessity for an actual remittance to take place.

The judgment of the High Court

[12] In his judgment, the learned High Court judge has discussed the respective positions taken up by the parties and opined that the resolution of the matter depended entirely on the interpretation of section 7C of the Act. He has thereafter gone on to analyze the provisions contained in the said section.

[13] The learned High Court judge considered section 7C (5) to be pivotal to the issue and concluded that the proper interpretation would mean that the tax is based on the profits 'paid *or* credited for remittance'. His position was that the word *'or'* is to be construed as being disjunctive. On that basis he said that the tax would become applicable in either of those situations, viz when *'profits are paid'* or when *'profits are credited for remittance'.*

[14] He then went on to deal with the term 'paid' and states that the Appellant's witness has admitted that 95% of the profits have been paid or distributed to the policy holders. By recourse to the dictionary meaning, he states that the word 'distribute' would mean 'give'. On that premise he takes the view that 95% of the profits have been 'paid' (to the policy holders), thereby attracting the payment of BPRANT. He then goes on to express the view that there was no requirement for an actual remittance to the Head Office in India for the provisions for BPRANT to trigger. He therefore concluded that the provision was clear and unambiguous and that the Appellant was liable to pay BPRANT on the entirety of its profits. On that basis he dismissed the Appellant's application for review.

Grounds of Appeal of the Appellant

"1. The Trial Judge erred in law in holding at paragraph 26 of his judgment that section 7C (5) of the Fiji Income Tax Act 1974 (the Act) should be interpreted as providing two scenarios where Branch Profit Remittance Additional Normal Tax (the tax) is payable, namely, (a) profits paid; and (b) profits are credited for remittance; and in reaching that conclusion the Learned Trial Judge failed to consider the following:

(a) That section 7C (5) of the Act expressly states that "… the tax shall be based on profits paid or credited for remittance;

(b) That section 7C (2) of the Act expressly states that "…the tax shall be recovered from the company paying or crediting branch profits to a non-resident, in this case the non-resident is the Appellant Branch's head office in India;

(c) That section 7C (3) of the Act states that the tax shall be paid to the Commissioner of Inland Revenue may specify, of the payment or crediting of the branch profits;

(d) That in order for the tax to apply or be payable, one of two actions are required as per section 7C of the Act:

(i) That profits be paid to the non-resident; or

(ii) That profits be credited for remittance to the non-resident.

2. *The learned Trial Judge erred in law in holding at paragraph 26 of his judgment that the tax is payable even if the profits have not been remitted to the Appellant's head office in India, when he failed to consider the following:*

   (a) That section 7C (5) of the Act requires that profits be paid or credit for remittance;

   (b) That section 7C (2) of the Act expressly states that '… the tax shall be recovered from the company paying or crediting branch profits to a non-resident, in this case the non-resident being the Appellant Branch head office in India;

   (c) That section 7C (3) of the Act states that the tax shall be paid to the Commissioner of Inland Revenue within 30 days or such period as the Commissioner of Inland Revenue may specify, of the payment or crediting of the branch profits;

   (d) That the heading of section 7C of the Act and the name of the tax expressly refers to the word 'Remittance';

   (e) That section 7CA (3) of the Act states that notwithstanding the repealing of section 7C, the tax will be applicable even if the remittance is made after 1 January 2010.

   (f) That in order for the tax to apply, one of two actions are required as per section 7C of the Act:

      (i) That profits be paid to the non-resident; or

      (ii) That profits be credited for remittance to the non-resident.

   (g) That section 7C and 7CA of the Act when read in plain English, confirms that a remittance takes place when the profits are paid to a non-resident or credited for remittance to a non-resident.

3. *That the learned Trial Judge erred in law and fact at paragraph 29 of his judgment in holding that the Appellant Branch in paying 95% of the profits to the life*

insurance policy holders in Fiji, had come within the ambit of section 7C (5), when he failed to consider the following:

- *(a) That the learned Trial Judge at paragraph 29 of his judgment had accepted and held that the 95% profits were paid to the life insurance policy holders in Fiji;*
- *(b) It was an agreed fact between the Appellant and Respondent that the 95% profits was credited to the policy holders account in Fiji;*
- *(c) That the uncontroverted evidence of Appellant witness Mr Ashok Kumar Soni was that this 95% profit was credited as vested bonuses' towards each individual life insurance policy holder's account in Fiji and the bonuses together with the sum insured would be paid out once the individual policies matured or when the policy holder dies.*
- *(d) That by way of operation of section 28 of the Life Insurance Corporation of India Act of India 1953 which governs the administration of the Appellant Fiji Branch, the 95% profit cannot accrue to the Appellant's head office / non-resident in India and instead must be allocated or reserved for life insurance policy holders in Fiji of the Appellant Branch which it has duly done so as reflected in the financials tendered in evidence and was shown as 'liabilities'.*
- *(e) In light of (a), (b), (c) and (d) above, the said 95% profits was not paid or credited for remittance to the Appellant Branch's head office / non-resident in India.*
- *(f) That section 7C of the Act requires that profits be paid or credited for remittance to a non-resident and since the profits were paid to the life insurance policy holders in Fiji and not to the head office / non-resident in India, the 95% profits do not come within the ambit of section 7C (5) of the Act.*

4. That the learned Trial Judge erred in law and fact at paragraph 30 of his judgment in stating that the Appellant cannot now say its head office had reinvested the profits in the Fiji Branch when he failed to consider the following:

- *(a) That the Appellant's evidence and submissions during the hearing in the Tax Court was primarily that the 95% had not been paid or credited for remittance to its head office/non resident in India.*
- *(b) That the Appellant had not claimed a deduction under section 21(1) (zg) of the Act as the deduction was specific to capital related expenditure;*
- *(c) That the issue of reinvestment of profits in the Fiji Branch is irrelevant in the consideration of this matter as no profits had been paid or credited for*

remittance to the head office/non resident in India, therefore the second sentence in section 7C (5) of the Act has no relevance to this matter.

5. *That the learned Trial Judge erred in law and fact at paragraph 31 of his judgment when he stated that '…the wording of sub-section (5) does not require that there has to be an actual crediting for remittance to the head office in India before the provisions of BPRANT is triggered', when he failed to consider the following:*

   (a) *That the Appellant had not credited the 95% profits (actual or otherwise) to the head office in India;*
   (b) *That the Appellant had not paid any profits to its head office in India;*
   (c) *That the learned Trial Judge at paragraph 29 of his judgment had accepted and held that the 95% profits were pad to the life insurance policy holders in Fiji; and*
   (d) *It was an agreed fact between the Appellant and Respondent that the 95% profits was credited to the policy holders accounts in Fiji;*
   (e) *That section 7C (5) of the Act expressly states that 'Tax shall be based on profits paid or credited for remittance.'*
   (f) *That section 7C (2) of the Act expressly states that '…the tax shall be recovered from the company paying or crediting branch profits to a non resident, in this case the non-resident being the Appellant Branch head office in India;*
   (g) *That section 7C (3) of the Act states that the tax shall be paid to the Commissioner of Inland Revenue within 30 days or such period as the Commissioner of Inland Revenue may specify, of the payment or crediting of the branch profits;*
   (h) *That the heading of section 7C of the Act and the name of the tax expressly refers to the word 'Remittance';*

   (i) *That section 7CA (3) of the Act states that notwithstanding the repealing of section 7C, the tax will be applicable even if the remittance is made after 1 January 2010;*

   (j) *That in order for the tax to apply, one of two actions are required as per section 7C of the Act;*

      (i) *That profits be paid to the head office or non-resident; or*

      (ii) *That profits be credited for remittance to the head office or on-resident.*

6. *That the learned Trial Judge erred in law when he failed to look fairly at the language of section 7C and 7CA of the Act which is contrary to the common law principles established in Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 KB at page 71.*

7. *That the learned Trial Judge erred in law when he failed to consider the legislative objective of section 7C of the Act, which is clearly to impose a withholding tax on branch profits remitted to non-residents, and specifically head offices, and in so doing failed to adhere to the accepted approach to statutory interpretation generally and tax statutes in particular: Commissioner of Inland Revenue v Alcan New Zealand Limited [1994] 3 NZLR 439 (CA).*

8. *That the learned Trial Judge erred in law when he failed to consider and hold that the words of section 7C and 7CA of the Act did not unambiguously impose a tax on the Appellant in accordance with the common law principles established in Russell (Inspector of Taxes) v Scott [1948] AC 433.*

9. *That whilst interpreting section 7C of the Act, the learned Trial Judge erred in law when he failed to consider the following:*

   (a) *The learned Trial Judge is permitted, by common law, where statutory provisions are ambiguous or obscure, to refer to materials such as Budget Announcements or Parliamentary material: Bull v Commissioner of Inland Revenue, Unreported, Fiji Court of Appeal, Civil Appeal No. ABU 0017 and ABU 0018 of 1997S and Pepper and Hart (1993) 1 All ER 42; [1993] AC 593;*

   (b) *The 2008 Budget Address of the Minister of Finance of Fiji clearly stated at page 59 of the Address: 'that Tax treatment of repatriation of profits by foreign companies incorporated in Fiji and by branch operations will be aligned;*

   (c) *The 2010 Budget Address of the Prime Minister of Fiji and the Minister of Finance stated at page 20: 'My government will continue to support foreign investment by reducing barriers to investments. Accordingly, Government will repeal the Branch Profit Remittance Tax for the repatriation of profits derived in 2010 and beyond.*

   (d) *That the emphasis in both Budget Addresses was the use of the word repatriation which is analogous to the use of the word remittance as contained throughout sections 7C and 7CA of the Act.*

10. *That the learned Trial Judge erred in law when he failed to properly read section 7C(5) of the Act in context with the other subsections of section 7C, thereby misinterpreting the law and arriving at an incorrect conclusion on the applicability of the tax to the Appellant's profits.*

11. *That the learned Trial Judge at paragraph 34 of his judgment erred in law and fact in holding that the Respondent was entitled to charge BPRANT on the Appellant on the 95% profits for the grounds set out in 1 to 10 above of this Notice of Appeal."*

Analysis of the Legal provisions

[15] I observe that the above harangue was needlessly set out as grounds of appeal by the Appellant when the simple issue to be decided was as to whether the BPRANT applies to the entirety of the after tax profits of the Appellant or whether it applies only to the portion that has been credited for remittance. It must be stated here that the learned High Court judge clearly understood that the matter revolved around the interpretation of Section 7C of the Act. However, what this court has to determine is whether his interpretation of the said section was correct.

[16] Since this court on two previous occasions in the recent past, dealt with the identical issue, I do not consider it necessary for me to engage in a deep analysis of the matter. I entirely concur with the reasoning contained in the said judgments and hence wish to rely on them.

[17] In the case of **New India Assurance v Fiji Revenue and Customs Services,** [2018] FJCA 151,(5 October 2018) and **Scipio Investment v Fiji Revenue and Customs Services**, [2018] FJCA 214 (30 November 2018), Basnayake JA and Almeida Guneratne JA respectively dealt with the provisions contained in Section 7C of the Act in great detail. In doing so they have followed the judicially accepted canons of interpretation and had adverted to judicial precedents pertaining to the interpretation of revenue statutes. Therefore, I do not consider it necessary for me to refer to the large number of authorities that have been cited by the parties in their written submissions.

[18] Rules of interpretation require the examination of the entire section rather than pick particular portions in order to properly understand and interpret the legislative intent. Basnayake JA in **New India Assurance** **(supra)** analyzed Section 7C of the Act as follows;

> *"There is no doubt that BPRANT is an additional tax. The section itself states so. This tax is imposed in addition to the normal tax. That is why it is called additional tax. This applies to non-resident companies where the Head office is located overseas, the branch located in Fiji. When a branch makes a profit, it may do various things with those profits. It may reinvest in the branch, invest elsewhere or remit the profits to the parent company overseas. Profits could be either paid or credited for remittance. The law (section 7C and 7CA) covers branch profit remittances, and captures both monies remitted as well as monies credited for remittance.*

The branch is liable for normal income tax. In addition to this, the branch is liable for BPRANT, if it comes within section 7C of the Act. The question is when or under what circumstances BPRANT is payable. Now we will examine Section 7C. The heading under section 7C is 'Branch Profit Remittance.' Remittance means a sum of money sent in for payment or the action of sending money (Oxford Dictionary). According to Collins English Dictionary remittance means "money sent as payment".

The additional tax is 15% of any profit that a branch company (non-resident) makes in Fiji. This is in addition to the normal tax. Now under what circumstances is the respondent entitled to recover these taxes? Section 7C (2) states, "Tax shall be recovered from the company paying or crediting branch profit to non-resident". The simple meaning is that after paying normal taxes, if the branch company pays or credits the profits to its non-resident (Head office) those payments would be subject to BPRANT at the rate of 15% additional tax. Section 7C (5) states that, the "tax shall be based on the profits paid or credited for remittance. Thus, the sum remitted or credited for remittance is the basis on which the 15% is calculated."

[19] It is unfortunate that the learned High Court judge failed to look at Section 7C as a whole. A perusal of the judgment makes it clear that the learned High Court judge considered Section 7C (5) in isolation and sought to interpret '*Tax shall be based on the profits paid or credited for remittance'* by breaking it up and concluding that the word '*or*' made it disjunctive.

[20] The learned High Court judge also failed to consider the provisions contained in Section 7CA which actually sheds light on what Section 7C actually intended. The word 'remitted' is contained in sub section (2) of 7CA. In fact 7CA (3) explicitly says that even though section 7C has been repealed, BPRANT is payable regardless of whether the *remittance* is made after 1st January 2010. Thus section 7CA (3) recognizes that BPRANT was payable only when there was a remittance.

[21] Basnayake JA in **New India Assurance** (supra) has approached the issue by recourse to the provisions contained in the preceding sub sections and has interpreted the provision as follows:

> *"To my mind the meaning of section 7C (5) is that if the profits after tax are either **paid or credited for remittance**, 15% of that is taxable. In the event the above payment or credit is cancelled and such amount reinvested in the branch company, the appellant is entitled to a refund. The payment of 15% additional tax is based on the remittance paid or credited. The tax is in reference to remittances. They have to be either paid or credited. If there is no payment made or money credited for remittance, BPRANT has no application".*
>
> *"I am of the view that the learned Judge has erred in stating that it is not necessary for there to be a remittance to impose the tax. I am also of the view that the learned Judge has erred in holding that it is an additional tax imposed on branch profits. The learned Judge has further erred by saying that tax is imposed on branch profits that do not invest to the branch. BPRANT is based on remittances either paid or credited. It is simple as that".*

[22] The Appellant has explained that it remitted only 5% of its profits to the Head Office and that the balance 95% was paid to the policy holders in Fiji as bonuses. This has been recorded as an agreed fact in the High Court. Needless to say these were clearly payments made within Fiji and they cannot be construed to come within the expression "paid or credited for remittance". Once the monies are paid out to the policy holders as bonuses, they no longer belong to the Appellant.

[23] Considering the facts in the **New India case** (supra) where the branch had re-invested profits in term deposits, Basnayake JA made the following observation:

> *"When a branch reinvests profits in term deposits in Fiji that is not a remittance. BPRANT applies to non-residents. When profits are made in Fiji, those profits, after tax should be free for any other use. Only if the profits are either paid or credited for remittance does it become subject to this 15% additional tax. That is the only interpretation one can give to this section and no other". He further said "I am of the view that the learned Judge has erred in stating that it is not necessary for there to be a remittance to impose the tax. I am also of the view that the learned Judge has erred in holding that it is an additional tax imposed on branch profits"*

The above is a lucid interpretation of Section 7C and it applies with equal vigor to this case.

[24] The Respondent had taken up the 'single entity' concept as well but the learned High Court judge has not dealt with that since he had come to a conclusion on a different footing without having to pursue that argument. The Head Office and the Branch in Fiji are clearly two different legal entities and it was in my view a completely untenable proposition that the Respondent had taken. Even this aspect had been considered in the **New India** case (supra) where it was held that:

> *"The position taken by the Respondent and accepted by the learned High Court Judge, amounts to adding words into the Act. The "single entity' argument i.e. treating both the Head office and the branch as a single entity. This is fundamentally or essentially counter to the words in the Act which draws a clear distinction between the office and the branch".*

[25] This issue was discussed in the **Scipio Investment** case (supra) as well. Almeida Guneratne JA said:

> *"The ghost of 'the single entity' that loomed large in the New India Case re-appeared in the instant case as well in the submissions of the Respondent's counsel. That is, treating both "head office" outside the country and "the branch in Fiji" as one single entity. In my view, that would amount to doing violence to language, in as much as, the statute in question draws a distinction between the two".*

[26] The above makes it clear that BPRANT would apply to after tax profits only in instances where a remittance has been made. The learned High Court judge had erred in the interpretation of section 7C of the Act and as a result arrived at a wrong conclusion. Therefore, I set aside the judgment of the learned High Court judge dated 16 January 2017 and allow the appeal. I direct that the tax imposed by letter dated 31 January 2014 and paid by the Appellant to the Respondent amounting to $1,230,993.75 be refunded. The Appellant is also entitled to costs in a sum of $5000 payable by the Respondent.

Orders of Court are:

1. Appeal is allowed.
2. Judgment of the High Court dated 16 January 2017 set aside.
3. The Respondent to refund $1,230,993.75 to the Appellant.
4. The Respondent to pay $5000 as costs of this appeal to the Appellant.

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Hon. Mr. Justice E. Basnayake
JUSTICE OF APPEAL

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Hon. Mr. Justice S. Lecamwasam
JUSTICE OF APPEAL

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Hon. Mr. Justice V. Dayaratne
JUSTICE OF APPEAL