

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

Action No: HBT 16 of 2013

BETWEEN : NEW INDIA ASSURANCE COMPANY LIMITED

Appellant

AND : CHIEF EXECUTIVE OFFICER, FIJI REVENUE &  
CUSTOMS AUTHORITY

Respondent

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr B. Solanki for the Appellant  
Mr S. Ravono for the Respondent

Date of Hearing : 11 September, 2015

Date of Judgment : 24 February, 2017

**JUDGMENT**

1. This is the Appellant's Appeal, against the decision of the Tax Tribunal (Decision), seeking for the following orders:
  - (1) That the Appeal be allowed.
  - (2) That the sum of \$1,112,261.85 be refunded by the Respondent (Revenue) to the Appellant (Applicant).

2. The grounds of the appeal are, inter – alia, that the Tribunal erred when he refused the Application for Review in that:
  - (1) He misconstrued s. 7C (5) of the Income Tax Act 1974 (ITA) which states that the BPRANT is based on profits paid or credited for remittance.
  - (2) He wrongly held that nowhere in s. 7C is there a requirement that the profits be remitted, prior to being amenable (sic) to taxation.
  - (3) He wrongly held that once the profits have been applied for some use other than reinvestment in the Fiji Branch, then they are regarded as paid or credited.
  - (4) He failed to consider the evidence of the Respondent's witness that the Applicant had not paid or credited any profits for remittance to its head office.
  
3. The Statement of Agreed Facts and Issues include the following:

Agreed Facts

  1. The profits earned by the Applicant for 2008 and 2009 have been kept as part of the retained earnings of the Applicant Fiji Branch.
  2. The said profits were re – invested in interest bearing deposits with financial institutions in Fiji.

Issues

  1. Is Branch Profit Remittance Additional Normal Tax (BPRANT) applicable to the aforesaid profits.
  2. Have the said profits been paid or credited to a non – resident.
  3. Is the Respondent correct to say BPRANT is not payable if the Applicant incurs (sic) capital expenditure in Fiji, from profits earned in Fiji.
  
4. The hearing commenced with the Appellant's Counsel submitting. He said the Tribunal's view was the tax has to be paid even if there was no remittance. He contended the payment or remittance of the profits is the pre condition for BPRANT to kick in. The Tribunal was wrong in saying that profits if available are taxable.

5. Counsel for the Revenue submitted their stand is the Head Office and the Fiji Branch are one entity. There is no dispute that there was no actual remittance of the retained profits for 2008 and 2009 and that these were reinvested in fixed deposits in Fiji. If there is no reinvestment in the Branch, then BPRANT kicks in.
6. The Appellant's Counsel in his reply said the Court should not accept Revenue's stand that the Applicant was one entity. The Appellant should not suffer from the poor draftsmanship of the legislation.
7. At the conclusion of the arguments. I said I would take time to consider my decision. Having done so, I now proceed to deliver my judgment.
8. This Appeal stems from the Decision of the Tribunal that if the after tax earnings are not reinvested in the Fiji Branch, then they are deemed to be profits.
9. So the sole issue for me to decide is when is BPRANT payable. It is common ground between both sides that the after tax profits were kept as part of the retained earnings of the Branch and reinvested in interest bearing deposits with Fijian financial institutions.
10. At the outset, I shall repeat the words of Lord Simonds in: *Russell (Inspector of Taxes) v. Scott* [1948] AC 433. He said: "There is a maxim of income tax law which, though it may sometimes be overstressed, yet ought not to be forgotten. It is that the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him".
11. With the above in mind, I turn now to the legislation which is the pivot on which the sole issue in this Appeal turns. This is section 7C of the ITA, which is the charging section for BPRANT. The relevant operative words therein are paraphrased below. Subsection (1) provides that notwithstanding any other taxes imposed BPRANT shall be paid at the rate of 15% of any branch profits derived in Fiji by a non – resident.

In my opinion the clearly expressed intention of the lawmaker is that in spite of other taxes, there shall be an additional tax imposed on the branch profits made by a non – resident. Although "remittance" is part of the appellation of this tax, the definitive word



is the word "additional" which means "extra". This is because if indeed "remittance" were the definitive term, then "additional" would not have been included.

12. Thus the legislative tax regime here, did not contemplate nor envisage any requirement that there any be any remittance at all, in the first place, for it to be imposed. It was in reality an additional tax which had to be paid when there were branch profits. However the lawmaker provided an exemption, from this tax, in subsection (5).
13. Subsection (5) states the profits (on which BPRANT is imposed) applies to the after tax earnings which the head office does not reinvest to the Fiji Branch.  
The Oxford Dictionary defines "reinvestment" as "the action of putting the profit made on a previous investment back into the same scheme".  
Merriam Webster defines "reinvest" as "to invest (earnings) in a business rather than distribute as dividends or profits".  
Thus the lawmaker's intention was, if the profits from the insurance business are reinvested into that same insurance business, then the after tax earnings will not be pulled into the extended net of the tax gatherer. But this the Appellant did not do. Instead the after tax earnings / profits were paid / invested in deposits in financial institutions. Consequently these profits could not be excluded from coming within the ambit of s. 7C (1).
14. What the Appellant did was a far cry from what the lawmaker had in mind for it to do if it did not want to pay BPRANT. Having made its choice the Appellant cannot now be heard to cry that it is not subject to BPRANT.
15. In short, the lawmaker laid down that the profits to be subject to BPRANT are the after tax earnings that are not reinvested to the Branch. It is the duty of the Court to give effect to the lawmaker's intention.

16. In this I am fortified by the words of Rowlatt J in Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 K.B at page 71 where he said "It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used".
17. In the light of the decision I have reached it is inexpedient to consider the many authorities that Counsel on both sides have cited. It was also not necessary to consider s. 21 (1) (zg) which I consider to be irrelevant and a distraction.
18. I therefore hold that the Revenue are entitled to charge BPRANT on the Appellant on the profits for 2008 and 2009. I consequently uphold the Tribunal's Decision, and dismiss the Appeal but shall order the parties to bear their own costs both here and before the Tribunal.

Delivered at Suva this 24<sup>th</sup> day of February, 2017.



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David Alfred  
**JUDGE**  
**High Court of Fiji.**