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

Action No: HBT 06 of 2014

BETWEEN	:	LIFE INSURANCE CORPORATION OF INDIA
		Applicant
AND	:	CHIEF EXECUTIVE OFFICER, FIJI REVENUE & CUSTOMS AUTHORITY
		Respondent
Coram	:	The Hon. Mr Justice David Alfred
Counsel	:	Mr B. Solanki for the Applicant Mr S. Ravono for the Respondent
Dates of Hearing	:	24th and 28th August, 2nd and 30th September and 18th November, 2015
Date of Judgment	:	16th January, 2017

JUDGMENT

1. This is an Application by the Applicant [Branch] for the Court to revise or to set aside the Respondent's (Revenue) decision dated 25th September, 2014 (Objection Decision) wholly disallowing the Applicant's objection to the tax assessment issued on 31st January, 2014

and requiring payment of the sum of $1,230,993.75 [Disputed Sum] being the balance of the Branch Profit Remittance Additional Normal Tax (BPRANT). This is now reduced to $1,130,993.75 for the purposes of this Application.

2. The grounds of the Application are that the Objection Decision is wrong in law and in fact because:

   a) BPRANT is not applicable to the profits of the Applicant because that has not been paid or credited for remittance to a non resident.
   b) The profits for 2008 and 2009 are not subject to BPRANT.
   c) Section 28 of the Life Insurance Corporation Act of India 1956 limits to 5% the profits that the Applicant can repatriate to its Head Office in India and the balance of 95% cannot be paid or credited to a non – resident, within the meaning of section 7C and 7CA of the Income Tax Act 1974 (ITA).
   d) Section 21 (1) (zg) of the ITA is not applicable as the Applicant has not sought a deduction

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

AGREED FACTS:

1) In 2008 and 2009, the Applicant remitted only 5% of its surplus income to the Government of India and the balance 95% was credited to the policy holders accounts in Fiji.
2) The Applicant paid BPRANT on 5% of the above mentioned surplus income.
3) Revenue wrote to the Applicant and stated that BPRANT is payable on the profits earned by the Applicant.
4) Revenue provided an objection finalization letter and demanded payment of $1,130,993.75 in BPRANT (15%) on the profits earned for 2008 and 2009 less BPRANT paid of $192,582.10.

ISSUES:

1) Is BPRANT applicable to the profits [2008 and 2009] of the Applicant.
2) Has the profits for 2008 and 2009 been paid or credited for remittance to a non resident.
3) According to section 7C and 7CA of the ITA are the profits for 2008 and 2009 subject to BPRANT.
4) Is Revenue correct in saying BPRANT is payable when the profits are earned by the Applicant as the parent company / head office is entitled to request for the money to be sent to it.
5) Is Revenue correct to say BPRANT would not be payable if the Applicant incurs capital expenditure in Fiji from profits earned or derived in Fiji in accordance with section 21(1) (zg) of the ITA.

4. The hearing commenced with the Applicant's first witness, Ashok Kumar (PWI) giving evidence. He is a Chartered Accountant and Manager in the Finance, Investment and Human Resources department of the Applicant since 10th June, 2012. He said the Applicant (branch) is 100% owned by the Government of India (G of I) through an Act of the Indian Parliament of 1956 (the Act).

5. It is in Fiji, a branch of the Indian Company selling Life Insurance here since 1956. After tax clearances were received, they transferred the 5% surplus to the G of I. When Revenue wrote stating there was a discrepancy they told Revenue that 95% of the profits had been distributed as bonuses to policy holders in Fiji.

6. He said the parent company cannot request for the money to be sent to them as section 28 of the Act applies to them. He also said that the money had been invested in the Branch and they did not claim for capital investment. The amounts payable to the policy holders cannot be paid to the G of I and are contractually due to the policy holders.

7. PW1 said the 95% profit was not credited to, nor paid to the G of I, but have been credited to the policy holders and they (Applicant) never claimed under section 21(1) (zg) of the ITA.

8. Under cross examination PW1 said the G of I is in control of the Applicant and the Act applies to the Applicant in Fiji. The Applicant never claimed any deductions under section 21(1) (zg) because it did not invest under that sub section. He agreed that Revenue could change its position. He concluded by saying before the allocation of 95% there was a 100% profit.

9. In re – examination, PW1 said the Applicant did not seek deduction under section 21 (1) (zg). The profit was credited to the policy holders and not to the G of I.

10. The next witness was Jerome Kado (PW2). He is a Chartered Accountant working with Price Waterhouse Coopers (PWC). He said the Applicant only remits 5% of its profits and this is consistent with the Act which provides the Applicant cannot remit more than 5% to the G of I and must remit 95% to the policy holders. By distributing to the policy holders it means the funds are retained in Fiji. The parent company had no rights at all to the 95% distributed to policy holders.

11. Under cross - examination PW2 said the Applicant can only qualify if it reinvests what belongs to it, not, as here, what belongs to the policy holders. BPRANT should not apply if the Applicant reinvests funds belonging to it.

12. With that, the Applicant closed its case.

13. Revenue now opened its case by calling Mahendra Singh (DW1) an Auditor with Revenue. He said that BPRANT is payable as the parent in India fully owns the Applicant. If the profits are reinvested in the Branch they are not taxable. The Applicant

does not qualify under section 21(1) (zg). The Branch in Fiji is one entity with the parent and the parent is entitled to the money.

14. DW1 said that Revenue reviewed their position and BPRANT is now assessed on 100% of the profit and not 5%, which Revenue has the right to do. He concluded by saying that profits invested in the Branch are not taxable, Government Bonds are not Capital Investment and the Act is not applicable in Fiji.

15. Under cross-examination, DW1 said he did not accept that there has to be a payment or crediting before tax is payable. It is not necessary that there has to be a remittance before tax is payable. He said under section 7C (5) credited for remittance means earmarked to be sent to India. It does not require to be actually sent to India. If it is not reinvested it is subject to BPRANT.

16. In re – examination DW1 said the Applicant did not claim for exemption because it did not reinvest in capital investment under section 21 (1) (zg).

17. The next witness was Mohit K Raj (DW2), presently acting Chief Assessor at Revenue. He said he was asked to do an independent review. The tax is based on the entity concept. The Head Office and the Fiji Branch are considered as one entity. It is based on 100% not on 95% because the Act does not apply in Fiji. The law of the land supersedes the Act which is not applicable and therefore BPRANT of 15% is chargeable.

18. Under cross – examination DW2 said the tax is imposed whether the money is sent out of Fiji or not and remittance is not necessary. BPRANT is payable on 100%. With that the Respondent closed its case.

19. Thereafter, Counsel on both sides made their oral submissions.

20. Counsel for the Applicant said the only issue is regarding the 95% profit. The G of I cannot on the present law ever ask for 95% of the profits from the Fiji Branch.

21. Counsel for Revenue submitted that the Applicant is treated as one entity. Revenue takes no cognizance of the Act and even if not remitted and not credited the profit still attracts BPRANT as the Indian (Head Office) and the Fijian (Branch) are one entity.

22. At the conclusion of the arguments, I informed I would take time for consideration. Having done so, I now proceed to deliver my decision.

23. In my opinion the only issue for me to decide is whether Revenue can levy BPRANT on the balance 95% of the profits earned by the Applicant for the years 2008 and 2009.

24. 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".

25. With the above in mind, I turn now to the pivotal section on which the sole issue in this Application turns. This is section 7C of the ITA, which is the charging section for BPRANT. I shall only refer to the relevant operative words therein:

    (1) BPRANT is imposed at the rate of 15% on any branch profit derived in Fiji by a non – resident.

    (2) The non – resident company carrying on business in Fiji shall be liable for the tax.

    (5) Tax shall be based on the profits paid or credited for remittance. Profits refer to the after tax earnings that are not reinvested to the Fiji branch.

26. I shall now proceed to interpret the above:

    (1) This requires the Applicant to pay BPRANT on the profits earned by it in Fiji.

    (2) The Applicant is liable to pay BPRANT.

(5) BPRANT is payable on the 95% balance of the profits. Profits are either paid or credited for remittance. I construe the word "or" to be disjunctive. My reason for saying this is because the converse would mean the draftsman had engaged in tautology which the Oxford Dictionary defines as "needles repetition".

So there are 2 scenarios here viz:

(a) profits are paid.

(b) profits are credited for remittance.

In my opinion BPRANT is payable in either scenario. Consequently it is chargeable even if the profits have not been remitted to the Applicant's head office in India.

27. The Applicant's case throughout has been that it has paid the 95% balance of the profits to its Policy holders. This is stated with utmost clarity by the General Manager of the Applicant in his letter dated 18th February 2014 to Revenue (Exhibit P11). On page 2 thereof he states "More over, the profit has already been distributed to the policy holders in Fiji".

28. This is confirmed by PW1, the Applicant's Manager Finance etc, in his evidence that "We told Revenue 95% distributed as bonus to policy holders in Fiji.

29. The Oxford Advanced Dictionary of Current English defines "distribute" as "give" and gives the apposite example of "The firm distributed its profits among its workers". Thus having given the profits to its policy holders the Applicant has paid the profits to them and therefore has come within the ambit of section 7C (5).

30. By the same token the Applicant cannot now say it's Head Office has reinvested the profits in the Fiji branch.

31. Because I construe "or" disjunctively, it therefore follows that the wording of the sub – section (5) does not require that there has to be an actual crediting for remittance to the Head Office in India before the provision for BPRANT is triggered.

32. 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".

33. At the end of the day I am of opinion that the intention of section 7C has been expressed clearly and unambiguously.

34. I therefore hold that the Revenue are entitled to charge BPRANT on the Applicant on the balance 95% of the profits. Consequently, I dismiss the Application but shall make no order as to costs.

Delivered at Suva this 16th day of January, 2017.

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David Alfred
JUDGE
High Court of Fiji.