IN THE STATUTORY TRIBUNAL, FIJI ISLANDS
SITTING AS THE TAX TRIBUNAL

Matter No 11 of 2011

BETWEEN: **A NEW ZEALAND HOLDING COMPANY**
Applicant

AND: **FIJI REVENUE & CUSTOMS AUTHORITY**
Respondent

Counsel: **Messrs R Krishna and R Naidu, Munro Leys Solicitors, on behalf of the Applicant**

Ms F. Gavidi, FRCA Legal Unit, for the Respondent

Date of Hearing: **Monday 17 September 2012**
Wednesday 19 September 2012

Date of Judgment: **10 October 2012**

JUDGMENT

NON RESIDENT DIVIDEND WITHHOLDING TAX – Section 8(2)(a)(ii) – Income Tax Act (Cap 201); Income Tax (Dividend) Regulations 2001;

Background

1. The Applicant is a New Zealand incorporated company and a non-resident for Fiji Income tax purposes.

2. On 15 September 2010, the Applicant entered into a share sale agreement to sell all its shares in two Fiji incorporated companies, hereinafter referred to as Company T and Company G.

3. Companies T and G are accepted to be resident companies for the purposes of the income tax law.

4. At the time of sale, the shareholding structure of Companies T and G, were as follows:

Company	Total Issued Shares	Shareholders	Shares Held	Percentage Shareholding
Company T	80,000	Company G	40,000	50%
		The Holding Company	40,000	50%
Company G	25,000	The Holding Company	25,000[1]	100%

5. At the time of settlement of the share sale agreement, the retained earnings balances of the companies were as follows:

Company	Retained earnings
Company T	$1,279,705
Company G	$880,739

6. On 14 December 2011, the Respondent issued Notices of Assessment to Companies T and G for Non-resident dividend withholding tax in accordance with Section 8(2)(a)(ii) of the Income Tax Act.

7. In the case of Company T, that sum was applied to 52.31% of the deemed distribution to the Holding Company and was assessed in the amount of $50,206.03.

8. In the case of Company G, that amount was calculated based on half or the calculated retained earnings of Company T and the retained earnings of Company G. The assessed amount charged in accordance with Regulation 6 of the Income Tax (Dividend) Regulations 2001, was $182,470.98.

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[1] It is accepted that one share was held by an individual in trust for the Holding Company, but accepted for the purposes of this Application, that the share was beneficially owned by the Holding Company.

9. The calculations undertaken by the Respondent, did not allow for any tax credits[2] for corporate taxes paid by either company, made prior to 2001.

10. On 13 May 2011, the Holding Company lodged an objection against the Notices of Assessment on the grounds that:

    (i) The Notices of Assessment failed to take into account all corporate taxes paid by Companies T and G in accordance with the Dividend Regulations; and

    (iI) In the case of Company G, had included part of Company T's retained earnings to Company G, for the purpose of taxation under Section 8(2)(a)(ii) of the Income Tax Act.

11. On 29 July 2011, the Respondent wholly disallowed the Applicant taxpayer's objection.

12. On 26 August 2011, the Applicant filed its Application for Review.

Application of Section 8 of the Income Tax Act (Cap 201)

13. Section 8 of the Income Tax Act, sets out the provision dealing with Non-resident dividend withholding tax.

14. Specifically, it provides:-

    8.(1) Notwithstanding anything to the contrary in the other provisions of this Act, there shall be paid a tax, to be known as "non-resident dividend withholding tax" in respect of a dividend specified in subsection (2) at the rate of 15 percent of the gross amount payable.

    (2) Such tax shall be payable in respect of-

[2] For the meaning of ":tax credit" refer to Regulation 4 of the Income Tax (Dividend) Regulations 2000.

(a) the portion of a dividend declared, paid or credited by a company incorporated in Fiji and which has been paid or credited, either wholly or partly, from chargeable income upon which no tax has been paid by that company.

15. Relevantly within Section 8(2)(a) of the Act, two further definitions are given:

“dividend” means any amount distributed by a company, whether carrying on business in Fiji or not , to its shareholders;

“amount distributed” shall be deemed to include-
(aa).........
(ii) in the case of a sale of a company, the total value of retained earnings shall be deemed to be dividends distributed to shareholders.

Has there been a Sale of a Company T ?

16. The first issue I am being asked to consider, is whether there has been a sale of a company for the purposes of Section 8(2)(a)(ii) of the Act, where in the case of Company T, only 50% of its issued shares were sold.

17. The Applicant submits that a ‘sale of company’ only occurs when all its shares are sold.[3]

18. The argument here appears to be, that no direct sale of the 50% shares held by Company G in Company T was undertaken, so defeating Section 8(2)(a)(ii).

19. It is true as Counsel for the Applicant contend, that no meaning for the term “ sale of company” is easily found.[4]

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[3] See Applicant’s Written Submissions at Paragraph 6.3.2

[4] The expression is not defined within the Income Tax Act, nor is it easily located as an expression that has been judicially considered in other settings.

20. In *Gartside v Inland Revenue Commissioner*[5], Lord Reid said

> *It is always proper to construe an ambiguous word or phrase in light of the mischief which the provision is designed to prevent, and in light of the reasonableness of the consequences which follow from giving it a particular construction*

21. For that reason, I will give the words their plain and ordinary meaning and find for this purpose that the term means, to dispose of the entity by sale.

22. To determine whether or not that has taken place, one needs to look no further than the Share Sale Agreement entered into between the Holding Company and its purchasers on 15 September 2010.[6]

23. The sale agreement was for the sale of a business. So much is clear from the language of Clause 5 to that agreement. The Holding Company agreed to manage and conduct Companies T and G as going concerns, until the transfer of all of their shares to the purchaser took place. Company T was sold to the purchasers.

24. This is not an argument in relation to the disposition of 50% share ownership in Company T, but whether or not there has been a sale of a company. I find that there has been.

Understanding the meaning of Section 8(2)(a)(ii)

25. The next issue that I am being asked to consider is what is meant by and is the effect of Section 8(2)(a)(ii) of the Act.

26. That is, what should constitute the total value of retained earnings, that are to be deemed to be dividends distributed to shareholders.

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[5] [1968] AC 553 at 612

[6] See Exhibit R 1

Retained Earnings of Company T

27. In the case of Company T. The retained earnings were apportioned against the shareholdings based on an equal 50% split. That is 50% attributed as deemed dividends to the Holding Company and 50% to Company G.

28. As Company G is a resident company and exempt from paying income on those dividends by virtue of Section 17(37) of the Act, then only that quantum of retained earnings deemed as distributed to the Holding Company would be subject to Section 6 of the Income Tax (Dividend) Regulations 2001.

Retained Earnings of Company G

29. The retained earnings of Company G were identified at the time of settlement of the Share Sales Agreement as $880,739.00

30. To that amount, a further $639,852.50 was added. This being the 50% 'deemed distribution' of Company T's retained earnings to Company G.

31. The Applicant argues that the deeming provision must be construed narrowly and the Respondent has no entitlement to deem amounts that would otherwise be exempt income for the purposes of the Act.[7]

32. The issue to be determined is whether this amount of $639,852.50[8] can be viewed as a class of income as found in Section 17 of the Act, or whether it should be regarded as deemed dividend for the purposes of the non-resident dividend withholding tax regime.[9]

33. At the time of the sale of Company G, what were the retained earnings?

[7] Paragraph 6.3.9 of the Applicant's Witten Submission.

[8] And the subsequent implications caused by the formula contained within the Regulation

[9] See Section 8 of the Act.

34. It is noted within the Objection Decision, that the Respondent argues:

> *Retained earnings of a company, is generally made up of the accumulated profits of the company which includes dividend received from other companies.*[10]

35. That may be true, however at the time of sale, Company G had not received any dividends from Company T. Company T's retained earnings were deemed as dividends for the purpose of Section 8(2)(a)(ii) of the Act. They cannot be deemed as dividends for the purposes of the retained earnings of Company G. There is simply no foundation for doing that.

36. The Respondent relies on Section 11(f) of the Act, where it provides:

> *Dividend shall, if received from a resident company, have the same meaning as in paragraph (a) of subsection (2) of section 8;*

37. The meaning of dividend at Section 8(2)(a) is defined as:

> *any amount distributed by a company, whether carrying on business in Fiji or not, to its shareholders;*

38. There has been no dividend distributed or received. The retained earnings of both Company G and Company T can be 'deemed' as dividends by virtue of Section 8(2)(a)(ii) at the time of their sale, however the legislation goes no further.

39. What is to be captured by Section 8(2)(a)(ii) is the value of retained earnings, otherwise capable of being distributed as returns to shareholders. The Authority cannot thereafter manufacture the move of those 'deemed dividends' into the retained earnings account of Company G[11] and seek to reapply the effect of that provision.

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[10] See correspondence date 29 July 2011 at paragraph 4.

[11] As if the 'deemed dividends' were then paid to Company G and then retained as profit

40. The specific purpose of Section 8(2)(a)(ii) that was introduced to take effect from 1 January 2010, is not to be compromised by the earlier and wider provision that is Section 11(f) of the Act.[12] There is simply no statutory support for such an interpretation.

41. The retained earnings of Company G at the time of sale, can only be regarded as $880,739.

Implication of Corporate Tax Credits and the Dividend Regulations

42. The final issue that I am being asked to consider, is that pertaining to the manner in which corporate tax credits can be taken into account, when assessing the pool to be taxed for the purposes of the non-resident withholding tax.

43. Regulation 4(1) of the Income Tax (Dividend) Regulations 2001, sets out the formula for calculating both the qualifying divided to be allowed as income tax deduction under Section 21(A) of the Act and also as the basis for calculating the portion of the dividend liable to withholding tax under Section 8(2).

44. That formula is as follows:

$$P= [(A +S/(B-S) \times [(1-C)/C] \times 100$$

Where,

P= percentage of divided subject to corporate tax.

A= corporate tax paid including excess tax credits from previous years and income tax paid on dividends received from other companies.

B= dividends paid.

C= company tax rate in the year of distribution.

S= deemed tax paid.

[12] This is a well understood syntactical presumption, referred to as the *Generalia specialibus non derogant* maxim. (See for example *McLean v Kowald* [1974] SASR 384.)

45. The parties are in dispute as to the meaning of the term “tax credits from previous years” for the purpose of the definition of “A” and when they can be relied on within the formula found in Regulation 4.

46. The Applicant argues that tax credits, includes those credits arising prior to 1 January 2001.[13]

47. The Respondent argues that the legislation should act prospectively.

48. Legislation is presumed to have a prospective effect. There is a presumption against the retrospectivity of a statute.

49. For example, in *Silatolu v The State*[14], the Fijian Court of Appeal cited Wright J in *Re Lord Athlumney* [1898] 2 Q.B. 547, 551, where it was said*:*

> *'No rule of construction is more firmly established than this; that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.*

50. Similarly, Dixon CJ in *Maxwell v Murphy*[15]*,* was of the view that:

> *The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.*

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[13] Being the commencement date of the Regulation [See Section 1(3)].

[14] [2006] FJCA 13 at [147]

[15] (1957) 96 CLR 261

51. The rebuttal against that presumption, may exist where there is an express provision[16], by a necessary implication or intendment[17], or if the legislation so passed was either a validating[18], declaratory[19] or procedural arrangement[20].

52. In the case of the Income Tax (Dividend) Regulations 2001, there is no express provision or necessary intendment. Nor were the Regulations introduced to validate, declare or provide for a procedural arrangement.

53. Within the Applicant's Supplementary Written Submissions/Submissions in Reply, reference is made to the 2001 Budget Speech, in which the then Minister for Finance stated inter alia, "as from next year a 100% exemption or deduction will be allowed on any distribution that has been fully subjected to company tax".[21]

54. I note too the majority judgment of Lord Cooke of Thorndon and Sir Anthony Mason in *Bull v Commissioner for Inland Revenue,*[22] where their Honours opined, that the rule against reliance on parliamentary extrinsic materials[23] was relaxed in cases where:

> *(1) the legislation is ambiguous or obscure or leads to absurdity,*
>
> *(2) the material relied upon consists of statements by a Minister or other promoter of a Bill together with such other Parliamentary material as is necessary to understand such statements, and*
>
> *(3) the statements are clear.*

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16 See *R v Kidman* (1915) 20 CLR 425 at 442-443

17 See for example *Worrall v Commercial Banking Co of Sydney Ltd* (1917) 24 CLR 28 at 30-33.

18 See *Taylor v Antsis* [1940] VLR 300

19 See *Re Gardiner* [1939] SASR 6 at 11.

20 See *Rodway v R* (1990) 169 CLR 515 at 518; See also *Singh v The State* [2004] FJCA 27.

21 See paragraph 8.8 of the Supplementary Submission.

22 [1999] FJSC 5

23 Or other sources

55. To my mind there is nothing illuminating within the statement of the Minister of Finance that unequivocally demonstrates the intention of the law makers when issuing the Regulation.

56. The language of Regulation 4(4) appears to reinforce that fact. Here the concept of tax credit (as any excess tax paid that would otherwise have resulted in the percentage of dividend subject to corporate tax being greater than 100%) is clarified.

57. Further, it specifically provides what shall be done in such circumstances, is that it will be:

> *"carried forward to the following year".*

58. The initial expectation by the use of such language when the Regulation came into effect, was that the value of "corporate tax paid" did not account for excess tax credits from the previous years.

59. If these tax credits later emerged out of the formula at Regulation 4 (1), then as Regulation 4(4) provides, they shall thereafter be carried forward to the following year. How that happens, is provided for at Regulation 7.

60. Having regard to the definition of "corporate tax" at Regulation 2, which supports the view that the tax paid on the chargeable income of a company and the calculation of total income is assessed at the completion of the year of assessment, leads me to conclude that any calculation of tax credits envisaged by virtue of Regulation (4) cannot be computed until at least the expiry of the first full year.

61. The carrying forward of the tax credits by virtue of the formula that is Regulation 4(1) can only take place after that formula is allowed to apply to the first completed income year. That can only be some time after 1 January 2002.

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62. The concept of the tax credit is only introduced following the application of the formula.[24] It can only be assumed that at the base year, no tax credit reliant on this formula can be calculated.

63. For the above reasons, I reject the Applicant's contentions pertaining to that aspect of its application.

Conclusions

64. Having regard to the above, I find that the Applicant has failed on the first tranche of its application, that is, pertaining to the applicability of Section 8(2)(a)(ii) of the Income Tax Act (Cap 201). I find that the sale of Company T did take place and the retained earnings, were amenable to the non-resident withholding tax.

65. In the case of Company G, I concur with the Applicant, that the retained earnings of Company G cannot be increased by a further 'deeming' of those earnings of Company T. As said earlier, the legislation does not intend for such a consequence to occur.

66. Finally, insofar as the Dividend Regulations should be applied, I reject the Applicant's arguments that in the calculation of liability for withholding tax under Section 8(2) of the Act, that regard can be had to tax credits arguably achieved prior to 2001. I find that there is no such intention of the law maker to provide that result. The intention and structure of the Regulations, was to allow tax credits to be calculated, following implementation of the regime.

67. As a result, the matter should be now remitted to the Respondent, so that an Amended Assessment in the case of Company G, can be issued.

68. As neither party has been successful in their case before me, I am not prepared to award costs to either side.

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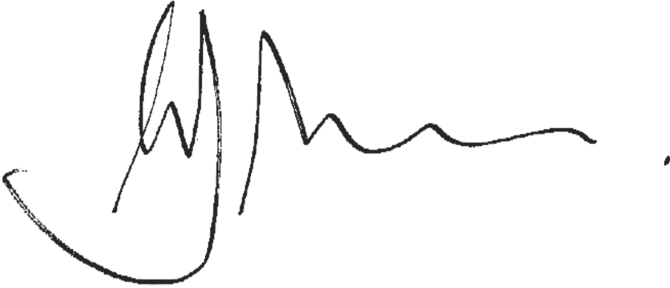
[24] See the deliberate language of Regulations 4(3) and 4(4).

DECISION OF THE TRIBUNAL

The Tribunal orders that the Respondent reissue a Notice of Assessment to Company G, according to the above determination.



Mr Andrew J See
Resident Magistrate