HIGH COURT OF SOLOMON ISLANDS]

NATIONAL BANK OF SOLOMON ISLANDS LIMITED -V- COMISSIONER OF INLAND REVENUE

SOLOMON TELEKOM COMPANY LIMITED -V- COMMISSIONER OF INLAND REVENUE (First Respondent) SOLOMON ISLANDS NATIONAL PROVIDENT FUND BOARD (Second Respondent) AND INVESTMENT CORPORATION OF SOLOMON ISLANDS (Third Respondent)

Civil Case No. 020 of 2003
Civil Case No. 255 of 2001

Honiara: **Brown PJ**

Date of Hearing: 8 September 2003
Date of Judgment: 8 October 2003

Mr. Sullivan for the Plaintiff
Attorney General for the Commissioner
Mr. Apaniai for the Fund
Mr. Radclyffe for the Investment Corporation

Income Tax - *Declaratory relief sought in relation to pending assessment by Commissioner of Inland Revenue – powers of the court to entertain application short of assessment for tax – Commissioners exclusive power to assess – Position of Telekom*
Income Tax Act (Cap. 123) Part X, Part XI

Income Tax - *Appeal under Part XI of Income Tax Act against Commissioner's disallowance of the Bank's objection against notice of amended assessment – objection relates to the Commissioner's application of the provisions of S.36 (1) of the Act dealing with the company obligation (if any) to deduct "withholding tax" - assessment for tax relating to 1999 tax year -- proper construction of S.36 (1) Income Tax Act (Cap. 123) SS.3,7, 16(1), 17, 18(1), 18(2)(m), 33(1), 36(1), 36(6), 40(12), 76(1,2), 79(5,6).*
The Third Schedule
Solomon Islands National Provident Fund Act (Cap 109) SS 23, 36
Investment Corporation of Solomon Islands Act (Cap 143) S.19 (1), First Schedule

On consideration of questions of law concerning the appropriateness of the Commissioner's assessment in bringing to tax, the whole amount of dividends of the company from which the company had deducted "withholding tax", purportedly in accordance with S.36(1) of the

Income Tax Act, from those dividends paid to the company shareholders who were "tax exempt". With the consent of the parties, agreed facts and issues were given the court, and the court asked to answer the questions posed by the issues.

Held 1. The originating summons by Telekom seeking declarations before assessment was incompetent for the court has no jurisdiction to rule on matters not yet addressed by the Commissioner pursuant to Part X of the Act.

2. The appeal by the National Bank of Solomon Islands was competent since it arose out of the fact of the amended assessment.

3. On a proper construction of the law appertaining to S.36 (1) (the withholding tax section) the company cannot deduct tax in reliance on the section, from dividends paid to its shareholders, where such shareholders are, by law, free of any tax on income. The questions raised by the issues were answered with this finding in mind.

4. The Commissioner's power to impose penalties cannot be reviewed by virtue of a discretionary power, in fact or presumed, where the regime of the Act is in form, a Code. A specific power must be found for the court to vary or extinguish the Commissioner's award.

Cases cited

1. *Dorney –v- Commissioner of Taxation (1980) 1 NSWLR 404*

2. *F.J. Bloemen Pty Ltd;*
Simons --v- Commissioner of Taxation
55 ALJR451

3. *Dewar –v- Commissioner of Inland Revenue (1935) 2 K.B.351*

4. *St. Lucia Usines and Estates Co. Ltd. -v- Colonial Treasurer of St. Lucia (1924) A.C.508*

5. *Inland Revenue Commissioner -v- City of London Corp (1953) 1 All.E.R.1075*

6. *Leigh –v- Inland Revenue Commissioners (1928) 1 K.B. 73;*

7. *Solomon Islands Plantation Ltd –v- Commissioner of Inland Revenue (1999) Unreported Court of Appeal 12/98 (Mason P., Kapi JA., Casey JA)*

8. *Bailey –v- Federal Commissioner of Taxation (1977) 136 CLR 214*

These proceedings (which have been heard by consent with those in civil proceedings 065/2003 brought by Solomon Telekom Co. Ltd) are an appeal pursuant to Part XI of the Income Tax Act (the Act) by the appellant against the Commissioner of Inland Revenue's

disallowance in the case of NBSI, of the companies objection against notices of amended assessments

NBSI's objection (relating to the year ending 31 December 1999), is referred to in para 15 of the agreed facts

Telekom's notice of assessment for the year ended 3 March 2000 has not yet issued, for it would seem, resolution of these objections by the court may enable the Commissioner to assess. (para 25 of agreed facts refers). Telekom, then seeks a declaration, as to whether or not the applicant is required to deduct withholding tax from dividends paid to Solomon Islands National Provident Fund Board and to the Investment Corporation of the Solomon Islands. In Telekom's case, the Commissioner accepted moneys purportedly deducted for that year on account of withholding tax under S.36 (1) of the Act

NBSI paid withholding tax in an amount of $2.499m to the Commissioner for the 1st quarter, 1999 and the balance of $1.372m in November 1999. The $1.372m together with the net dividend paid to SINPF totaled $6.890m and by way of the amended assessment, increased NBSI's taxable income by $6.860m (claimed as a deduction by NBSI under S.18 (2)(m) of the Act.

As well, the Commissioner imposed penalties in respect of the additional tax found to be due under the amended assessment under appeal.

Telekom lost money in 2001, but in 2002 declared dividends, deducted withholding tax but did not claim the dividends as an allowable deduction under S.18 (2)(m). The moneys tendered on account of withholding tax were returned by the Commissioner.

Telekoms application for a declaration

So far as the declaration sought by Telekom is concerned, I adopt the reasoning of Hutley J A and say that the originating summons instituted by Telekom is incompetent, for the court has no jurisdiction to make declaratory orders in terms of the Income Tax Act. The regime of the Act reflects the regime which Hutley JA addressed in *Dorney –v- Commissioner of Taxation* (1). But in that case the Commissioner of Taxation had made an assessment, and Dorney and Simons (whose factual cases did not differ significantly) sought, by way of declaration that the assessments were void. Here, no assessment has been made. Counsel has not addressed the jurisdiction of this court to make declarations of the kind sought, but nevertheless, this court should not presume jurisdiction. The High Court of Australia (*F.J. Bloemen Pty Ltd/Simons –v- Commissioner of Taxation(2)*) affirmed the decision of the N.S.W. Court of Appeal (Hutley JA with Glass JA; Mahoney JA dissenting).

At 408. Hutley JA said:

(6) There is a further restriction on the effectiveness of a declaration namely that, as its name indicates, it is not a constitutive legal act as is, for example, a judgment for debt or damages, and, except by giving to existing legal relations the status of a *res judicata,* it cannot change them. This was pointed out by the Court of Appeal in

England in Punton –v- Ministry of Pensions and National Insurance (No. 2) (22a), ...,"

at 410

(13) The Commissioner can take any ultimately valid step in an assessment only in reliance on a power given him by law, and his powers are found in the Income Tax Assessment Act. If he does anything which is not to be justified by that Act, he is failing to comply with the provisions of the Act, but what he does, even though not in compliance with the provisions of the Act, is still valid until set aside by an appeal in accordance with the Act. There can be acts which are legally unsustainable, but valid in the sense that they are not void. Nullification is a particular kind of sanction which the law does not always apply, and s 175 excludes it in relation to assessments.

In our Income Tax Act, the powers of the Commissioner to make assessment for tax are set out in Part X. They reflect the powers of the Federal Commissioner in Australia at that time. The powers of this court are found in Part XI S.79 (5 and 6).

There are no provisions for declaratory orders and consequently nothing in the Act which confers any supervisory or directory power in this Court to determine questions of law, short of proceedings which fall to be decided by Part XI, after assessment.

The powers and the duty of the Commissioner to assess are not fettered by any other authority. To seek, then (by way of declaratory orders) to affect the Commissioner's authority under the Act, is not available, and outside the appeal procedure found in Part XI. The Act is in form, a Code.

The case of NBSI, however, does have the necessary assessment by which the appeal comes to this court. No doubt the Commissioner will have regard to the decision in the NBSI case when he comes to assess the liability in Telekom, for there will have been, then a finding or determination on the factual matters of the objection.

Reference, then to "the company" hereafter, shall be reference to NBSI.

Issues

1. Whether withholding tax is deductible under s.36 (1) of the Income Tax Act (cap. 123) from dividends paid by NBSI and Telekom to NPF.

2. Whether withholding tax is deductible under s.36 (1) of the Income Tax Act (cap.123) from dividends paid by NBSI and Telekom to ICSI.

3. Whether the dividends paid by NBSI and Telekom to NPF are allowable deductions under s.18 (2)(m) of the Income Tax (cap.123).

4. Whether the dividends paid by Telekom to ICSI are allowable deductions under s.18 (2) (m) of the Income Tax (cap.123).

5. If withholding tax is not payable in respect of dividends paid to NPF, whether NBSI is entitled to a refund or credit for the withholding tax paid in the sum of $1,372,000.00 or whether NPF is entitled to the payment thereof by the Commissioner.

6. Whether in the circumstances of the case the Commissioner was correct in imposing penalties on NBSI, and if so whether the penalties should be varied.

Facts and the particular sections of the Income Tax Act (cap 123) are annexed to avoid making the reasons for judgment prolix.

Reasons for decision

The Plaintiffs argument

Mr. Sullivan for the plaintiffs says that the dividends paid by NBSI and Telekom are "dividends" defined in S. 2(1) of the Act.

The general scheme of the Act in relation to dividends.

Mr. Sullivan says that, in the usual company situation, when a dividend is to be paid out of profits by a resident company, to a shareholder, the company first deducts withholding tax, pursuant to S. 36(1). The withholding tax is then remitted to the Commissioner under S. 36(1) and the balance of the dividend (net dividend) is then paid to the shareholder.

He says that the net dividend when received by the shareholder is income in the hands of the shareholder in accordance with the terms of S. 7(a).
He also dealt with the meaning of "income" in relation to dividends. He was at pains to show that "income" must be a "receipt" before it can be brought to account for the tax purposes of a recipient under S. 7(a).

Mr. Sullivan argued that the payment of the dividend under S.36 (1) was that gross dividend, the greater amount of two, (the gross dividend declared for payment and the net dividend, or lesser amount after withholding tax has been deducted). As a consequence, he says, the payment referred to in S.36 (1) or gross dividend and the amount received by the shareholder under S7 (a) are quite different. Therefore since the dividend in the hands of the shareholder is income for the purposes of the Act, only at the point in time when it is "income" can the taxable liability (or not) of the recipient be addressed. For notwithstanding S. 36(6), payment must precede receipt so that the hiatus between payment and receipt, however slight, obliges the company declaring a dividend to deduct withholding tax in these circumstances. Not until "receipt" can the recipients claim the exemption.

He started with *Dewar –v- Commissioners of Inland Revenue* (3), where the Court of Appeal, affirmed the earlier decision that "as the respondent had not received any of the interest there was no income in respect of it on which he could be charged to tax". The Master of the Rolls, Lord Hanworth at 357 found facts:

> "Therefore, the position on the 12 April 1931, was that the respondent was entitled to receive his legacy and if and so long as the payment of the legacy or a part of it was in default, he would be entitled to ask for and to receive under the role interest n the delayed portion of the legacy at the rate of 4%... But in spite of that, in this assessment, which his made upon him for the year ending April 5, 1933, an assessment to sur tax, he is treated as having received 40,000 ld., representing the interest on the total value of the legacy delayed for a total time of 12 months. Now in fact the respondent, as is found in the case, has not received any sum in account of interest on the legacy".

Mr. Sullivan referred me to 365 where Lord Hanworth found support for his reasons, quoting passages from other decisions, which spoke of tax on some amount, while not actually in the pocket of the subject, but received under his control and in his agent's hands.

These cases, as well as *St. Lucia Usines and Estates Co. Ltd. -v- Colonial Treasurer of St. Lucia* (1924) A.C.508 (4) and *Inland Revenue Commissioner -v- City of London Corp* (1953) 1 AU.E.R.1075 (5) all look to the liability to tax, where sums due but unpaid or other moneys in the nature of income, were considered.

The principle liability to tax section of the Act is S.3

In *Leigh -v- Inland Revenue Commissioners* (1928) 1 KB73 (6) the head note says:

> *Revenue – Super Tax – Interest on Bonds – Arrears paid in one sum – Income of year in which payment made – Income Tax Act, 1918 (8 & 9 Geo. 5, C.40), S.5, Sub-sec 3(c).*

Mr. Sullivan referred me to Rowlatts J's decision at 77 where he said.

> "Before a good debt is paid there is no such thing as income tax upon it. The meaning of the section must be "receivability" speaking of a debt, which has been received, and means the date on which it is paid as distinct from the date on which it was accruing.

The Courts view of this argument

These cases clearly deal with the liability to tax in a recipient and fall, if you like within the charging section of our Act, Section 3. There is no talk (or facts similar to those here) of an obligation in the payer to withhold tax on account of the Commissioner for income tax subsequently due by the payee. Section 3 and Section 36 deal with entirely different obligations falling on different persons.

The Attorney's submissions

The Attorney, in his argument said the Court of Appeal in the *SIPL Case* (7) in this case had settled the issues.

Mr. Sullivan's argument in relation to the SIPL case.

He referred to the fact that, both at first instance and on appeal, that case proceeded on a concession that the dividends paid to both ICSL and CDC were exempt from tax, for while he criticized the manner in which the Court of Appeal viewed the concession (by not going behind it) he said, the dividend at point of payment was not income in the hands of NPF or ICSL. It only becomes income, and therefore exempt from tax, at a later point in time, when received by the shareholders. The Court of Appeal did not face this argument, (because of the concession) so while the SIPL case was concerned with similar facts, (for SIPL was in much the same position as Telekom, here, in that it had a shareholder (ICSL) entitled to the benefit of an exemption under now S.16 and the Third Schedule), the trial judge did not have to decide the issue before me. In other words, the dividend needs to be in the pocket or control of the shareholder before it may be categorized as "income" which attracts the exemption under the Act, to tax. Certainly the Court of Appeal did not address the point raised by Mr. Sullivan for it said "to the extent that *any dividend* is not exempt from tax, S.36 (1) make it clear beyond any question that the regime introduced by the two provisions, S.18 (2)(m) and S.36 (1) deals with non-exempt dividends" (SIPL at 13).

So Mr. Sullivan argues, the treatment *of dividends* in S.36 (1) requires there to be an express exemption of the dividend being paid, and this is not determined by looking at the tax status of the shareholder. The exemption may only apply when the dividend become "income" by reaching the shareholder entitled. But before then, the Bank and Telekom are entitled to ignore the natural result of the effect of the exemption to tax provisions in the Act as they affect NPF and ICSI.

The Attorney has not addressed this hiatus, which Mr. Sullivan seeks to introduce between the payment of the dividend and its receipt. The Attorney said the dividends paid to NPF, (for instance) are exempt under S.16 (1) as read with para.28 of the third schedule to the Act, as well as S.36 of the Solomon Islands National Provident Fund Act (Cap 109) but does not address the distinction which Mr. Sullivan seeks to make when he points to the "income and revenue" as exempt on a reading of these parts of the Act. They need to be received, or in the pocket of the shareholders to become income, thereupon exempt.

The introductory phrase in S.36 (1)

The section must be read in its entirety to afford a proper interpretation of its meaning. Mr. Sullivan has referred to this introductory phrase – to the extent than any dividend is not exempt from tax in the context of the SIPL case and sought to distinguish the effect of the natural meaning of that phrase on two bases. The first is that hiatus, (which I have so called) and coincidentally, the fact that the Court of Appeal did not have the issue before it. He pointed to the Companies Act, S.7 where a trust holding is not recognized, (so there is no way of showing a tax exempt shareholder, for instance). He pointed to S.37 (1) of the Act (which deals with withholding tax on gross payments made to residents) where the section speaks of the "recipient of income specified in subsection (1)..." in support of the distinction that he seeks to draw between dividend and income. Section 36(1) deals with a regime about non-exempt dividends, not one about non-exempt income. He further pointed to Mr. Apaniai's argument, agreeing that the declaration of the dividend gives rise to a debt due, but the case law Mr. Sullivan relied upon makes clear that "income" does not arise until received by the shareholder. Mr. Apaniai had asserted that dividends paid are "income" of

the shareholder, he said that the property in the dividend becomes vested in the NPF, for instance – Mr. Sullivan took issue, pointing to the definition of "paid" in S.36 (6) which says:

Subsec (6) For the purposes of this section, the word "paid" in relation to a dividend, includes the distribution, crediting, or dealing with such dividend in the interest of, or on behalf of, a shareholder, and the word "payment" shall be construed accordingly.

Mr. Sullivan was at pains to explain that all the arguments of respondents counsel talked about the obligation on the Bank and Telekom in advance of receipt by the shareholders, rather at point of payment. By analogy, the tax liability can only accrue when income is in the hands or pocket of the shareholder, and consequently the exemption to tax only arises at the time of receipt of income. But Mr. Sullivan accepts that by S.36 (6) the meaning of *"paid"* used in S.36 (1) is very wide and extends, he says to the mere drawing of a cheque for the dividend in favour of the shareholder. That act, alone, he says, could never be a *"receipt"* by the shareholder, without a similar deeming provision. Thus, perforce by these authorities, the dividend cannot be "income" until *received,* and thus, the dividend cannot attract the tax-exempt status at the time when "paid". Of course, Mr. Apaniai's argument about the wide meaning of *"paid"* given by S.36 (6) accords with Mr. Sullivans'

Mr. Radclyffe for the 3rd Respondent raised the point that the Court of Appeal, accepting the concession that "the amount of dividends paid to CDC and ICSI by the tax payer are exempt from tax" could not be presumed to have given judgment based on a misstatement of the law through counsel's concession. For, Mr. Radclyffe is impliedly saying, if this court accepts the applicant's argument, then this court must find the Court of Appeal has proceeded on a misstatement of the law. Mr. Radclyffe says there was no misstatement in any even, for both the Income Tax Act and the ICSI Act both exempt the CDC and ICSI from tax. He said all the income of ICSI was tax exempt, the dividend receivable was income on any interpretation of S.3 of the Act and consequently caught by the introductory words of S 36(1).

Mr. Radclyffe supported the Attorney's arguments, and went on to deal in his written submissions, with the effect of the applicants approach to Section 36(1). Once the applicants (the Bank and Telekom) deduct and pay withholding tax from dividends, it follows pursuant to S. 18(2) that in computing their assessable income chargeable to tax pursuant to S.3 (9) the applicants may deduct (by virtue of S.18 (2) (m)) the amount of any dividends paid in any year as a company resident in Solomon Islands from which withholding tax has been deducted. This has the effect of reducing the applicant companies' assessable income by the amount of the dividends. The Commissioner will, by virtue of the tax exemption afforded the NPF and ICSI, refund to those two entities, the amount of the withholding tax remitted by the Bank and Telekom.

On this approach, however the applicants have a tax advantage in so far as their own assessable income is concerned for that is the effect of the plaintiff's view on S.36(1) when dealing with the dividends.

Reasons for decision

I disagree with Mr. Sullivan's reliance on those English decisions for they relate to the primary taxing provisions in the English scheme then imposed (and in New South Wales, Scott's case was decided on similar principles). This court cannot transpose this line of reasoning, based principally on the primary taxing provisions, in effect our S.3, and apply it to the provisions of S.36 of our Act. Section 36 is not concerned with income of the company; rather it deals in a sophisticated way, with an administrative approach to the collection of income tax from dividends on account of liability to tax in the shareholder recipient. Section 36 then, is not a taxing provision *per se.*

I am supported in this reasoning by Barwick CJ where the Australian High Court, in *Bailey -v- Federal Commissioner of Taxation (8)* at 251, 252

> "The assessment to which, for example SS.161, 168, 169, 170{2} and 190(b) of the Income Tax Assessment Act 1936 as amended {"the Act") refer, is not the notice of assessment served upon the taxpayer pursuant to S.174 or the amount of money of which payment is required by such a notice. *The assessment of income tax is the process of applying the Act to a state of fact.* The duty of the Commissioner is to assess the tax upon the material contained in the return or otherwise in the possession of the Commissioner ...." (my emphasis).

The fact of the recipient's exemption from tax is evident. The process of receiving dividends and bringing such dividends to account for the purpose of "tax" under S.3 does not arise in so far as these respondent beneficiaries are concerned. That being so, the plaintiff cannot ignore the fact of exemption to seek the reciprocal benefit of a deduction from taxable income in the amount of the dividends which have been treated as if the need to deduct part of the dividend on account of tax. S.36 1) was applicable. The first step is to apply the fact of the exemption to tax.

Section 36(1) provides, in particular circumstances, for withholding part of such dividends from the shareholder entitled, on account of tax payable or to be paid by the recipient. It is an administrative provision.

The section does not speak of that part withheld, as "income tax" *per se,* but the obligation in the latter part of under S.36 (1) to with-hold that part of the dividend payable, falls on the company resident paying the dividend. It is not tax in the sense of income tax envisaged by S.3. Consequently, while the line of overseas authorities may help in deciding some question about the liability to tax on income of the recipients, Mr. Sullivan has not convinced me of their relevance in determining the plaintiff companies' obligations (if any) under the introductory phrase of S.36 (1). To the extent that these cases illustrate the need to carefully consider whether and when, "income" is actually received for the tax purposes, I accept they reflect the law in this jurisdiction.

Section 36 is not a provision of the Act where one needs focus on the income that was to be charged to tax under the general provision, S. 3. This separate provision deals with a company's obligation, in circumstances where it has declared a dividend. The section seeks to administratively deal with the distribution of the dividend. It is not a taxing provision rather an administrative provision to further the interest of the Commissioner to moneys, which may or may not be taxed in the hands of the dividend recipient. There is no real need

to exhaustively consider the position of recipients of dividends for tax purposes, or the characterization of such dividends in the hands of such recipients, for the responsibility of the paying company must be to address the administrative intent. The section is not concerned with the tax liability of a shareholder once in receipt of income, hence neither need the dividend paying company be. There is consequently a two step process, and the emphasis by the plaintiff has, though-out been on the second step.

The construction that the Commissioner sought to put on the section was that which provided a sensible or rational meaning, for otherwise the introductory phrase would be superfluous.

It is important to consider the effect of the extended meaning given to the word "paid" by S.36 (6). I am satisfied the obligation to deduct withholding tax on behalf of the Commissioner attaches to a company (if there is to be a hiatus between the companies "dealing with" and the shareholders "receipt"), at that earlier point of time. That seems to be accepted by the applicants and certainly by Mr. Apaniai. It does not, however, avoid what Mr. Sullivan implies, is the need in the company to consider the tax status of the individual, *per se*, at that earlier point in time and since it has not then achieved the status of "income" in the hand of the shareholder, it cannot be categorized as tax exempt, therefore the company is obliged to deduct withholding tax. In those circumstances there is no need for the company to consider the tax status of the shareholder, or its income, for that consideration would only arise once the dividend is "received". This is the attractive argument of the applicants.

Were the section to remain, unamended, then this attractive argument may have resonance, but to give the amending words their natural meaning, *the introductory phrase requires the paying company to address the question.*

In SIPL, the Court of Appeal saw the dividends paid to CDC and ICSI as exempt from tax. The Appeal Court pointed to the statutory provisions (coupled, in CDC's case, with the United Kingdom/Solomon Islands Double Taxation Arrangement). I have reproduced the appropriate tax sections, the statutory provisions which exempt income from tax, both for ICSI and NPF. Were these provisions conditional on particular circumstances (the source of the income for instance), then consideration of the circumstances may come into play, but that is not the case. The legislation is plain; the income of the 2nd and 3rd respondents is exempted from all tax. I am not minded to reconsider the fact of the accepted concession by the Appeal Court, and say, in this case, that I am not satisfied of the tax free status of these two respondents, in the face of the legislation.

Section 36(1), has an asymmetry to it. In 1979, as the Attorney pointed out, the section was amended by including, in part, "*To the extent that any dividend is not exempt from tax, ...*"

The case law relied on by the plaintiffs clearly relate to the principal tax liability imposed on persons in receipt of income by sections similar to our S.3, and do not help with the issues before me. The governing phrase in S. 36(1) is the introductory "To the extent that any dividend is not exempt from tax ...". Income of NPF or ICSI is never taxable. That is the question in issue, and the plain answer is that the dividend does not fall to be considered for tax, it is specifically provided for in the statutory exemption.

The opening phrase of S.36 (1) attracts these dividends; the consequential obligation found in the section, is discharged for the whole of the dividend, (income in the hands of the shareholder) is tax-free. It is this asymmetry which immediately categorizes the dividends, and thus further consideration of the section by the paying company is avoided. The dividends are not affected by the remaining part of the section and may be paid in their entirety.

It is a relatively straightforward exercise in this case for the shareholding of both applicants is only spread between three other companies, and these two respondent companies (as are others with tax exemptions) are named in the Third Schedule to the Act. The tax-exempt status is apparent for all to see. In the absence of the amendment in 1979, the section provided that "every company shall deduct from the amount of any dividend paid ..." and the symmetrical nature was made plain. The appellants have sought to address the symmetry, or latter part of the section, but the introductory phrase has changed the tenor of the section, to one of asymmetry, thus requiring an answer to that initial question.

I answer the issues thus:

1. No, insofar as the company is concerned.

2. No, insofar as the company is concerned

3. No, insofar as the company is concerned

4. Not necessary to answer.

5. Yes, the bank is entitled to the refund. In seeking to disallow the objection, the respondent should not refund to the shareholder tax erroneously or irregularly deducted from the dividends paid by the company. The correct principle is to credit or refund the amount paid to the Commissioner under s. 36(1) to the company making payment which has been found to be in error. It is a matter between the company and its shareholders as to the ultimate disposition of the moneys.

6. Yes. The assessment, then, upon a proper construction of the law, has not been shown to be erroneous. It follows, the assessments shall stand unaffected. The Commissioner's power to impose a penalty in reliance on the power given him also remains unaffected. There is no power in this court to waive or interfere with the Commissioner's power to penalize in these circumstances, for only the assessment under S.79 (5) may be affected.

Orders

In the Bank proceedings, challenging the Commissioner's determination of objection, the appeal is allowed in part in so far as issue (5) is concerned otherwise dismissed. Costs of these proceedings shall be in the Commissioner's favour 2/3 / 1/3

In the Telekom proceedings the summons shall be dismissed (with costs) as incompetent.

The parties shall agree a form of order and settle the order for perfection by the court.

Agreed facts for the purposes of the argument

1. National Bank of Solomon Islands Limited ("NBSI") is and was at all material times a company duly incorporated in Solomon Islands.

2. Solomon Telekom Company Limited ("Telekom") is and was at all material times a company duly incorporated in Solomon Islands.

3. Solomon Islands National Provident Fund Board ("NPF") is and was at all material times a statutory corporation duly incorporated under the Solomon Islands National Provident Fund Act (cap 109) and manages the investment portfolio of the fund constituted under that Act.

4. Investment Corporation of Solomon Islands ("ICSI") is and was at all material times a statutory corporation duly incorporated under the Investment Corporation of Solomon Islands Act (cap.143) and manages the investment portfolio of the Solomon Islands Government.

5. At all material times the members of NBSI were –

Bank of Hawaii International Inc. ("BOHI")	102,000 (51%)
NPF	98,000 (49%)

6. The members of Telekom were –

NPF	15,446.625 "A" Class (51%)
ICSI	2,149,875 "A" Class (7.1%)
Cable & Wireless plc ("C & W")	12,691,000 "B" Class (41.9%)

7. NPF is entitled to the benefit of s.16 (1) and paragraph 28 (1) of the Third Schedule of the Income Tax Act (cap.123) and s.36 of the Solomon Islands National Provident Fund Act (cap.109).

8. ICSI is entitled to the benefit of s.16 (1) and paragraph 35 of the Third Schedule of the Income Tax Act (cap.123) and s.19 (1) of the Investment Corporation of Solomon Islands Act (cap.143).

9. NBSI, before the declaration and distribution of dividends but after other adjustments, had a taxable income of $27,022,093.00 for the financial year ended 31 December 1999.

10. NBSI declared a gross dividend of $14,000,000.00 payable out of NBSI's profits for the financial year ended 31 December 1999.

11. The portion of such gross dividend payable to NBSI to –

(a) BOHI was $7,140,000.00;
(b) NPF was $6,860,000.00

12. By letter dated 16 December 1998 the Commissioner of Inland Revenue ("the Commissioner") required NBSI to deduct withholding tax from dividends paid to NPF – **Document 1.**

13. In accordance with Document 1, NBSI –

(a) deducted and paid withholding tax to the Commissioner in the sum; of $2,499,000.00 and paid the net dividend of $4,641,000.00 to BOHI – **Documents 2A** and **3B.**

(b) deducted and paid to the Commissioner the sum of $1,372,000.00 by way of withholding tax and paid the net dividend of $5,488,000.00 to NPF – **Documents 3A** and **3B.**

(c) claimed the said gross dividend of $14,000,000.00 as an allowable deduction under s.18 (2)(m) of the Income Tax Act (cap.123) on the basis that withholding tax had properly been deducted under s.36 (1) of that Act, and accordingly lodge a return of income for the year ended 31 December 1999 showing a taxable income of $13,022,093 – **Document 4.**

14. By amended assessment No. C98 the Commissioner disallowed the deduction for dividends in so far as it related to the dividend paid to NPF and increased NBSI's taxable income by $6,860,000.00 to $19,882,093.00 – **Document 5.**

15. NBSI objected to such disallowance – **Document 6** – and the Commissioner disallowed such objection – **Document 7** – against which determination NBSI now appeals – see Notice of Appeal in c.c. 255/01.

16. The Commissioner has also imposed penalties in respect of the additional tax, which he alleges is owing as a result of the amended assessment.

17. Notwithstanding the Commissioner's determination not to allow a deduction for the dividend paid by NBSI to NPF, the Commissioner has not refunded the said sum of $1,372,000.00 paid by NBSI in respect thereof.

18. Telekom, before the declaration and distribution of dividends but after other adjustments, returned a taxable income of $23,149,544.00 for the financial year ended 31 March 1999 (in lieu of 31 December 1998 – see s.26 (1) Income Tax Act (cap. 123).

19. Telekom declared a gross dividend of $6,110,971.00 payable out of Telekom's profits for the financial year ended 31 March 1999.

20. The portion of such gross dividend payable by Telekom to –

(a) C & W was $2,560,497.00;

(b) ICSI (NPF was not a member at the time) was $3,550,474.00

21. The said dividends were paid or credited by Telekom to the respective members during the following financial year.

22. Telekom, before the declaration and distribution of dividends but after other adjustments, had a taxable income of $14,473,487.00 for the financial year ended 31 March 2000 (in lieu of 31 December 1999).

23. Telekom has never deducted withholding tax from dividends paid to Cable & Wireless plc on the basis that the same are expressly exempt from tax pursuant to the United Kingdom – Solomon Islands Double Taxation Arrangements and ss 45 and 155 of the Income Tax Act (cap.123).

24. Telekom in respect of the financial year ended 31 March 2000 –

(a) deducted and paid to the Commissioner withholding tax in the sum of $710,094.00 from the dividends declared in respect of the previous financial year and paid to ICSI the net dividend of $2,840,380 – **Document 8**

(b) claimed the gross dividend of $3,550,474.00 (including withholding tax) paid to ICSI as an allowable deduction under s.18 (2) (m) of the Income Tax Act (cap. 123) on the basis that withholding tax had properly been deducted under s.36 (1) of that Act, and accordingly lodge a return of income for the year ended 31 March 2000 showing a taxable income of $10,923,013.00 (i.e. $14,473,487.00 less $3,550,474.00) – **Document 9**

25. The Commissioner accepted the said sum of $710,094.00 although he has not yet issued an assessment for the year ended 31 March 2000.

26. Telekom declared a gross dividend of $5,722,146.00 payable out of Telekom's profits for the financial year ended 31 March 2000.

27. The portion of such gross dividend payable by Telekom to –

(a) C & W was $2,397,579.00

(b) NPF was $902,411.00 (NPF became a member during the year and became entitled to a pro rata share of the dividend declared);

(c) ICSI was $2,422.156.00

28. Because of cash flow uncertainties caused by the ethnic tension, Telekom did not pay or credit such declared dividends until during the financial year ended 31 March 2002, when it paid the declared dividends to NPF and ICSI but not to C & W.

29. Telekom suffered a loss and accordingly no dividend was declared or paid by Telekom for the financial year ended 31 March 2001.

30. Telekom, before the declaration and distribution of dividends but after other adjustments, had a taxable income of $9,110,504.00 for the financial year ended 31 March 2002 (in lieu of 31 December 2001).

31. Telekom during the financial year ended 31 March 2002 –

(a) deducted and paid to the Commissioner withholding tax in the sum of $484,431.20 from the dividends declared in respect of the financial year ended 31 March 2000 and paid to ICSI a net dividend of $1,937,724.80.

(b) deducted and paid to the Commissioner withholding tax in the sum of $180,482.20 from the dividends declared in respect of the financial year ended 31 March 2000 and paid to NPF the net dividend of $721,758.80

(c) lodged a return for the financial year ended 31 March 2002 showing the dividends paid during that year to NPF and ICSI for the financial year ended 31 March 2000, but did not claim an allowable deduction and thus returned a taxable income of $9,110,504.00 - **Document 10** (in the event that Telekom is successful in the current application it reserves the right to lodge an amended return claiming the deduction.

32. The Commissioner accepted the said sums of $484,431.20 and $180,482.20 although he has not yet issued an assessment for the year ended 31 March 2002.

33. Telekom declared a gross dividend of $3,491,615.00 payable out of Telekom's profits for the financial year ended 31 March 2002.

34. The portion of such gross dividend payable to Telekom to –

(a) C & W was $1,462,986.60

(b) NPF was $1,780,723.70

(c) ICSI was $247,904.70

35. Telekom has not yet paid or credited the said dividend payable to C&W, but did pay an interim dividend equal to half the dividend declared to NPF and ICSI during the financial year ended 31 March 2003.

36. Telekom during the financial year ended 31 March 2003 and in respect of the payments to NPF and ICSI referred to in paragraph 34 –

(a) deducted and tendered to the Commissioner withholding tax in the sum of $178,072.37 from one half the dividend declared in respect of the financial

year ended 31 March 2002 and paid to NPF a net dividend of $712,289.48 – Document 11

(b) deducted and tendered to the Commissioner withholding tax in the sum of $24,790.37 from one half the dividend declared in respect of the financial year ended 31 March 2002 and paid to ICSI a net dividend of $99,161.88 – Document 12.

37. The Commissioner initially accepted the tender of the said sums of $178,072.37 and $24,790.37 and issued receipts therefore, but later returned Telekom's cheques for those amounts on the basis that withholding tax was not payable – Documents 11 and 12 (the cancellation of the cheques was completed by the Commissioner.

Relevant statutory provisions referred to in the reasons.

The Income Tax Act (cap 123)

"3. Tax shall, subject to this Act, be charged for each year upon the income for that year of any person which:-

(1) accrued in, was derived from was or was received in Solomon Islands, in the case of a resident person.

(2) accrued in or was derived from Solomon Islands in the case of a non-resident person,

in respect of –

(a) gains or profits from

(i) any business, for whatever period of time carried on;

(ii) any employment or services rendered;

(iii) any right granted to any other person for the use or possession of any property;

(b) dividends, interest or discounts

(c) any amount deemed to be his income under this Act.

7. For the purposes of section 3(b) –

(a) a dividend received by a shareholder in a resident company shall be deemed to be income of the year, in which it is payable and to be of such gross amounts as, after deduction of the tax which the company is required to deduct.

16(1) Notwithstanding anything in Part II, the income specified in the Third Schedule which accrues in, or is derived from Solomon Islands shall be exempt from tax to the extent specified.

17. Where an allowance granted in any respect is specified or deemed to be specified in the Third Schedule, no deduction shall be allowed under section 18 for any expenditure which, had such allowance not been specified, would have been deductible in ascertaining the income, if any, derived from such allowance.

18(1) In ascertaining for any year the income of any person which is chargeable to tax in respect of any of the subject of section 3 there shall be deducted all expenditure .... Wholly and exclusively incurred by him in the production of such income....

(2) Without prejudice to the operation of subsection (1), in computing the gains or profits of any person for any year chargeable to tax under section 3(a), the following amounts shall be deducted.

(m) the amount of any dividends paid in any year by a company resident in Solomon Islands from which tax has been deducted in accordance with section 36.

33(1) Subject to section 36, tax upon the chargeable income, other than income specified in section 38 (3), of a person other than an individual or a company not incorporated in Solomon Islands, shall for any year be charged at the rate of thirty-five cents for every dollar of such chargeable income".

[NB. Rate reduced to 30% for 2000 onwards – Act 12/99 s.33]

36(1) To the extent that any dividend is not exempt from tax, every company resident in Solomon Islands shall deduct from the amount of any dividend paid to any shareholder out of any profits, whether or not charged to tax under section 3, tax at the rate of twenty cents in the dollar for persons who are resident in Solomon Islands and at the rate prescribed in section 33(1) for persons who are not resident in Solomon Islands.

(6) For the purpose of this section, the word "paid" in relation to a dividend, includes the distribution, crediting, or dealing with such dividend in the interest of, or on behalf of, a shareholder, and the word "payment" shall be construed accordingly.

40(1) Subject to subsection (2), the amount of tax which has been deducted under section 36(1) shall be deemed to have been paid by the person receiving or deemed to have received the dividend and shall be set off for the purpose of calculating such set-off the income from dividends shall be deemed to have been taxed at the highest rates of tax applicable to the person receiving them.

(2) Where dividends are chargeable to tax in accordance with section 32, the set-off shall be limited to the tax so chargeable and for the purpose of calculating such set off the income from dividends shall be deemed to have been taxed at the highest rates of tax applicable to the person receiving them.

76 (1). No assessment, warrant or other document purporting to be made, issued or executed under this Act shall be quashed, or deemed to be void or voidable for want of form, or be affected by reason of a mistake, defect or omission therein, if it is in substance and effect in conformity with or according to the intent and meaning of this Act and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.

76 (2) An assessment shall not be impeached or affected –

(a) by reason of a mistake therein as to –

(i) the name of the person assessed; or
(ii) the description of any income; or
(iii) the amount of tax charged; or

(b) by reason of any variance between the assessment and the duly served notice thereof.

79(5) In determining the appeal the Court may confirm, reduce, increase or annul the assessment or make such order thereon as may be thought fit, whereupon, subject to any appeal under section 80, the Commissioner shall make such adjustments thereto as are consequent upon such determination.

79(6) The decree following the decision of the Court shall have effect, in relation to the amount of tax payable under the assessment as determined, as a decree for the payment of such amount, whether or not the amount of such tax is specified in the decree.

90(1) If …., any person …., paid tax, by deduction of otherwise, other tax deducted from a dividend paid to a non-resident person, in excess of the amount chargeable under this Act, such person shall be entitled to have the amount so paid in excess refunded.

Third Schedule

28(1) The income of the Solomon Islands National Provident Fund

35. The income and revenue of the Investment Corporation of Solomon Islands.

The Solomon Islands National Provident Fund Act (cap.109)

"23. ..any other sums which shall from time to time become payable to the Board otherwise than on account of contributions ….shall be credited to the general revenues of the Fund.

36. All the income of the Fund .... Shall be exempted from all taxes ..."

The Investment Corporation of Solomon Islands Act (cap.143)–

19(1) The income and revenues of the Corporation shall not be subject to taxation under any law.

First Schedule

3 (1) The expenses of the Corporation .... Shall be defrayed out of the income of the Corporation.

(2) In this paragraph "income" means interest or dividends earned or obtained on loans or investments made by the Corporation.

BROWN PJ