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

CIVIL APPEAL NO. ABU 25 of 2017
(On appeal from HBT No. 16 of 2013 which was on appeal from the Tax Tribunal in Matter No. 7 of 2013)

BETWEEN	:	**NEW INDIA ASSURANCE COMPANY LIMITED**
		Appellant
AND	:	**CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND CUSTOMS SERVICES**
		Respondent
Coram	:	**Basnayake JA** **Almeida Guneratne JA** **Jameel JA**
Counsel	:	**Mr. B. Solanki for the Appellant** **Mr. S. Ravono for the Respondent**
Date of Hearing	:	**14 September 2018**
Date of Judgment	:	**5 October 2018**

JUDGMENT

Basnayake JA

[1] This is an appeal against the judgment dated 24 February 2017 of the learned Judge of the Tax Court of the High Court of Fiji. This judgment was pursuant to an appeal against the decision of the Tax Tribunal with regard to the imposition of $1,112,261.85 as Branch

Profit Remittance Additional Normal Tax "(BPRANT)" on the appellant by the respondent.

[2] The respondent had informed the appellant by letter dated 19 December 2012 (pg. 325 (vol. 2) of the Record of the High Court (RHC)) requiring the appellant to pay the respondent, $1,112,261.85, before 28 December 2012. The letter states that, *"Branch Profit Remittance Tax is an additional Tax on branch profits paid or credited for remittance..."*. The appellant filed objections to payment (pg. 331 to 339 of the RHC).

[3] On 23 May 2013 the respondent disallowed the objections (pg. 330 of the RHC). The respondent has given the following reasons for the refusal, namely;

> *"1. The Branch Profit Remittance Additional Normal Tax is payable when the profits earned by the branch as the parent company is entitled to request for the money to be sent to them.*
>
> *2. The branch profit tax would not be payable if the funds are reinvested in the branch.*
>
> *3. The funds were placed in fixed deposits with the bank and this does not qualify for capital investment under section 21 (Zg) of the Income Tax Act."*

[4] The appellant filed an application for review (pgs. 5-6 vol.2 RHC) before the Tax Tribunal. On 25 November 2013 the Tax Tribunal dismissed the application for review (pg. 22-30 vol. 2 of the RHC). The appellant appealed against the decision of the Tax Tribunal to the High Court. On 24 February 2017 the High Court dismissed the appeal.

The Agreed Facts

[5] The following facts have been recorded as agreed facts on 29 August 2013 before the Tax Tribunal (pgs. 17 & 18 of vol. 1 of the RHC), namely;

1. 1, 2, and 3 not reproduced.

4. The applicant company (appellant) was assessed BPRANT by the respondent for the years 2008 and 2009 for the sum of $1,112,261.85. Nos. 6, 7, 8 and 9 not reproduced.

10. That the said profits have been kept as part of the retained earnings of the Applicant (appellant) Fiji Branch.

11. The said profits have been re-invested by the Applicant Branch in various interest bearing term deposits with various financial institutions here in Fiji.

The Issues

[6] The following issues too had been raised before the Tax Tribunal of which I reproduce four, namely;

1. Is BPRANT applicable to the profits for 2008 and 2009 of the applicant branch?

2. Has the profits (for 2008 and 2009) been paid or credited for remittance to a non-resident? (It should be noted here that this issue is not necessary in view of the admission No. 11. In addition to that there is an admission by an officer of the respondent to the effect that no remittances were either paid or credited to the parent company).

3. According to the terms of section 7C and 7CA of the Income Tax Act, are the profits for the years 2008 and 2009 subject to BPRANT? (This issue could be coupled with issue No. 1).

4. Is the respondent correct in saying that BPRANT is payable when the profit is earned by the branch as the parent company is entitled to request for the money to be sent to it? (This ground is based on one of the reasons given in the letter dated 23 May 2013 which is reproduced

in paragraph 3 above. This issue may not arise due to the answer that would be given to issues 1 and 3 above).

Judgment of the High Court

[7] The learned Judge has stated that the 1st, 2nd and 4th issues are what require consideration. The learned Judge summarizing the submissions of the learned counsel for the respondent state that it is undisputed that there is no actual remittance of the retained profits for 2008 and 2009. These were reinvested in fixed deposits in Fiji. The argument of the respondent had been that if there is no re-investment in the Branch, then BPRANT becomes chargeable.

8] The learned Judge had identified the issue as to when BPRANT is payable. The learned Judge states that the sole issue is based on section 7C of the Income Tax Act (ITA). Section 7 C is as follows:-

> ***"7C Branch Profit Remittance-Additional Normal Tax***
>
> 1. *Notwithstanding any other taxes imposed under this Act, there shall be paid a tax known as branch profit remittance additional normal tax equal to fifteen percent (15%) of any branch profits derived in Fiji by a non-resident;*
>
> 2. *The non-resident company carrying on business in Fiji shall be liable for the tax and the tax shall be recovered on business in Fiji shall be liable for the tax and the tax shall be recovered from the company paying or crediting branch profits to non-resident;*
>
> 3. *The company which, in accordance with the provision of subsection (2), is required to pay the tax shall remit the same to the Commissioner of Inland Revenue within 30 days, or such period as the Commissioner of Inland Revenue may specify, of the payments or crediting the branch profits;*
>
> 4. *For the purpose of this section, the branch profit remittance tax shall be levied on the branch profits paid or credited by the company to the extent that it has not been paid or credited from income which has been charged to tax.*

5. *Tax shall be based on the profits paid or credited for remittance. Profits refer to the after tax earnings to the extent that the head office does not reinvest such amount to the Fiji Branch".*

[9] The learned High Court Judge while interpreting (pg. 14 of the RHC) section 7C (1) states as follows:-"Inspite 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 application of this tax, the definitive word is the word additional which means "extra". This is because if indeed "remittance" were the definite term, the "additional" would not have been included." The learned Judge further held that, "the legislative tax regime here, did not contemplate nor envisage any requirement that there 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 law maker provided an exemption from the tax in sub section (5) of Section 7(c) which states the profit (on which BPRANT is imposed) applies to the after tax which the office does not reinvest in the Fiji Branch.

[10] The learned judge further held that, "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 applicant did not do. Instead the after tax earnings/profits were paid/invested in deposits in financial institutions. Consequently these profits could not be excluded as coming within the ambit of S. 7 (C) (1)" (pg. 15 RHC). The learned Judge further held that, "the profits to be subject to BPRANT are the after tax earnings that are not reinvested in the branch". While holding that the respondent is entitled to charge BPRANT on the appellant on the profits for 2008 and 2009 the learned High Court Judge dismissed the appeal.

Grounds of Appeal

[11] *"1. The Learned Judge erred in law in failing to correctly interpret the words of section 7C of the Income Tax Cap 201 ("the Act") when he failed to consider the following:*

(a) That section 7C (5) of the Act expressly states that "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 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 Commission of Inland Revenue may specify, of the payment or crediting of the branch profits;

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

i. That branch profits be paid to the non-resident; or
ii. That branch profits be credited for remittance to the non-resident.

2. *The Learned Judge erred in law in holding at paragraph 11 that if "remittance" were the definitive term in section 7C, then "additional" would not have been included, when he failed to consider the following:*

(a) That the "additional" tax, being the BPRANT, is only imposed where branch profits have been paid or credited for remittance to a non-resident in accordance with section 7C(2), (3) and (5).

(b) That the imposition of the "additional" tax is subject to the requirements in section 7C(2), (3) and (5).

(c) That, accordingly, the use of the word "additional" signifies that BPRANT is an additional tax in that it applies on top of other taxes to branches or non-residents, but only where they have paid or remitted profits to their non-resident head office and – if they have so paid or remitted profits that head office has not reinvested the profits in the Fiji branch.

3. *The Learned Judge erred in law in holding at paragraph 11 that "the clearly expressed intention of the lawmaker is that inspite [sic] of other taxes, there shall be an additional tax imposed on the branch profits made by a non-resident", when;*

If that had been the legislature's intention, it would have said so in as many words;

a) *Instead the legislature has carefully qualified the application of BPRANT by stating:*

   i. *That it applies only to those profits which the non-resident branch has made and then paid or credited for remittance to the non-resident and;*

   ii. *Even if such payment or crediting for remittance has taken place, it still does not attract BPRANT if those profits have been reinvested to the Fiji branch.*

4. *The Learned Judge erred in law in holding at paragraph 12 of his judgment in saying that the legislative tax regime did not envisage any requirement that there be any remittance at all in the first place, for it (the BPRANT) to be imposed, when he failed to consider the following*

   (a) That section 7C (2) refers to the Fiji Branch paying or crediting branch profits to a non-resident;

   (b) That section 7C (3) provides that BPRANT is payable within 30 days or other period as the Commissioner may specify, of the payment or crediting of branch profits. As stated in 7C(2) the payment or crediting of profits is to the non-resident.

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

   (d) That section 7CA (3) specifies that BPRANT is payable even if the profits are remitted after 1 January 2010;

   (e) That a "remittance" takes place by either (1) a payment of profits to the non-resident, or (2) a crediting of profits for remittance to the non-resident.

   (f) That the order for the tax to apply one of the two actions are required as per section 7C(5) of the Act:

      i) That branch profits be paid to the non-resident; or
      ii) That branch profits be credited for remittance to the non-resident.

5. *That the Learned Judge erred in law and fact at paragraph 13 of his judgment in holding that the lawmaker's intention was, if the profits from the insurance business are reinvested into that same insurance business, then the tax earnings will not be pulled into the extended net of the tax gatherer, when he failed to consider the following:*

   (a) That the second sentence of section 7C(5) of the Act relates to the conduct of the head office where they reinvest profits which have already been paid or credited to them for remittance, in the Fiji Branch. As stated in the first sentence of section 7C (5), the profits must first be paid or credited for remittance to the head office/non-resident before any consideration of reinvesting in the Fiji Branch arises.

   (b) That as the Appellant did not pay or credit profits to its head office being the non-resident, the issue of reinvesting is irrelevant in the determination of the matter.

6. *That the learned Judge erred in law and fact in holding at paragraph 14 that 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 and that having made its choice the Appellant cannot now be heard to cry that it is not subject to BPRANT and at paragraph 15 of his judgment, in holding that the lawmaker laid down that profits to be subject to BPRANT are the after tax earnings that are not reinvested to the Branch, when he failed to consider the following:*

   (a) That the determination of whether BPRANT applies, depends firstly on whether branch profits have been paid or credited for remittance to a non-resident;

   (b) That if the branch profits have been paid or credited for remittance to a non-resident, the portion, if any, which the non-resident, being the head office in India, has been reinvested in the Fiji Branch, will be rebated from BPRANT.

   (c) That in the proceedings in the Tax Tribunal there was agreed facts between the Appellant and the Respondent that the profits had been kept as a part of the retained earnings of the Appellant branch and the said profits were reinvested in term deposits here in Fiji under the Appellant Branch name.

   (d) That the evidence in the Tax Tribunal showed that no profits were paid or credited for remittance to the head office/non-resident in India and that this was also admitted by Mr Mahendra Singh, witness and auditor with the Respondent. This admission by Mr

Mahendra Singh was also repeated in the judgment of the Tax Tribunal dated 25 November 2013 at paragraph 28.

(e) *That the Appellant Branch is not required by section 7C of the Act to make a "choice" on whether to reinvest in the branch or not before BPRANT can apply.*

(f) *That in the case of the Appellant, the decision to reinvest in the branch is irrelevant in the consideration of this matter when, in the first place, no profits have been paid or credited for remittance by the Appellant Branch to the non-resident in India.*

7. *That the learned 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 on statutory interpretation established in* ***Cape Brandy Syndicate v Inland Revenue Commissioners*** *[1921] 1 KB at page 71.*

8. *That the learned 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).*

9. *That the learned Judge erred in law when he failed to consider that 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.*

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

(a) *The learned 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 or 1997S and Pepper and Hart (1993) 1 All ER 42 [1993] AC 593;*

(b) *The 2008 Budget Address of the Minister of Finance which clearly stated at page 59 of the Address: "that Tax treatment on repatriation*

of profits by foreign companies incorporated in Fiji and by branch operations will be aligned";

(c) That 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 similar to the use of the word "remittance" as contained throughout section 7C and 7CA of the Act."

Submissions of the learned counsel for the appellant and the respondent

[12] The submissions and all the grounds of appeal revolve around the interpretation of the word, "*remittance*". BPRANT is about remittance. BPRANT stands for Branch Profit Remittance-Additional Normal Tax. Sections 7C and 7CA are the relevant provisions of law that have been considered. The learned counsel for the respondent's submissions based on the same explanation given in the letter dated 23 May 2013 disallowing the objections of the appellant. This letter is reproduced in paragraph [3] above. The respondent considered the parent company in India and the branch in Fiji as a single entity.

The Legal Matrix

[13] 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.

[14] 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".

[15] 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.

[16] 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. Section 7C (5) further states that, "profits refer to the after tax earnings to the extent that the head office does not reinvest such amount to Fiji Branch". This is the phrase that has created the problem. The learned High Court Judge has interpreted this phrase to mean that the branch profits have to pay the 15% extra tax unless those profits are reinvested in the branch itself. This is the interpretation given by the respondent in his letter dated 23 May 2013 (vide paragraph [3] above). According to this letter, BPRANT is payable on the profit that the branch makes, as the parent company is entitled to request for the money sent to them. The respondent thus considered the parent company and the branch as one unit. The mere fact that the profits of the branch are 'available' to

the Head office for its use or that it can compel or call upon the branch in Fiji to remit its profits to the Head Office, does not come within the words 'remitted' or 'credited for remittance', contained in section 7C(5) of the Act. Therefore the argument of the Respondent is untenable. If that is the meaning of this provision (7C (5), what would be the meaning of the first sentence of section 7C (5) which states, "**Tax shall be based on the profits paid or credited for remittance**."

[17] 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.

[18] 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.

[19] 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.

[20] My attention has been brought to several authorities by both parties. The learned Judge himself has referred to some of them. Lord Simonds in **Russel (Interpretation of Taxes) v Scott** (1948) AC 422 at 433, Rowlatt J in **Cape Brandy Syndicate v Inland Revenue Commissioners** [1921] 1 KB 71, **Anderson v C of T** (Vic) (1937) 57 CLR 233 AT 243 with regard to the clarity of tax laws. Rowlatt J in **Cape Brandy Syndicate v Inland**

Revenue Commissioners (supra) approved the submissions of the learned Counsel Sir William Finlay that "in a taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown, or that there is to be any discrimination against the Crown in those Acts. 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."

[21] With regard to the language in tax laws in **Anderson vs Commissioner of Taxes** (Victoria) Rich J and Dixon J states in *"**Brunton v. Commissioner of Stamp Duties** [1913] AC 747 at p.760, Lord Parker of Waddington, speaking for the Privy Council, says: "The intention to impose a tax or duty, or to increase a tax or duty already imposed, must be shown by clear and unambiguous language and cannot be inferred from ambiguous words." This rule he again emphasized in **Attorney-General v. Milne** [1914] AC 765, at p.781, where he said, in the House of Lords: "The Finance Act is a taxing statute, and if the Crown claims a duty thereunder it must show that such duty is imposed by clear and unambiguous words." In **Ormond Investment Co. v. Betts** [1928] AC 143 at p.162, Lord Buckmaster, although differing from the majority of their Lordships and holding that in the particular case the Crown had satisfied the burden lying upon it, described the rule as a "cardinal principle . . . a principle well known to the common law that has not been and ought not to be weakened – namely, that the imposition of a tax must be in plain terms." He added: "The subject ought not to be involved in these liabilities by an elaborate process of hair-splitting arguments." Lord Atkinson, who agreed in the decision of the House, expressed the rule as follows: "It is well established that one is bound, in construing Revenue Acts, to give a fair and reasonable construction to their language without leaning to one side or the other, that no tax can be imposed on a subject by an Act of Parliament without words in it clearly showing an intention to lay the burden upon him, that the words of the statute must be adhered to, and that so-called equitable constructions of them are not permissible [1928] AC, p.162."*

[22] The interpretations given to section 7C are further amplified by section 7CA introduced by Income Tax (Amendment) (No. 2) Decree 2012. Sub section (3) of section 7CA states that, "*Notwithstanding the repeal of section 7C of the Act, any branch profit remittance additional normal tax liable to be paid, levied or assessed under section 7C for any period before the 1st day of January 2010 shall be payable, regardless of whether the remittance is made after the 1st day of January 2010*".

[23] It is admitted that no profits were paid or credited for remittance to head office. Therefore I am of the view that the appeal should succeed. The appeal is thus allowed and the judgment of the learned High Court Judge is set aside. The tax imposed by letters dated 19 December 2012 and 23 May 2013 and paid by the appellant to the respondent amounting to $1,112,261.85 is ordered to be refunded. The appellant is also entitled to costs in a sum of $5000 of this court payable by the respondent.

Almeida Guneratne JA

[24] I agree with the judgment, the reasoning, conclusion and the proposed orders of Basnayake JA.

Jameel JA

[25] I have read the draft judgment and agree with the reasoning and conclusions of Basnayake JA.

Orders of the Court are:

1. *Appeal allowed.*
2. *Judgment of the High Court set aside.*
3. *The respondent to refund $1,112,262.85 to the appellant with prejudgment legal interest.*
4. *The Respondent will pay to the Appellant $5,000.00 as costs in this appeal.*

Hon. Justice E. Basnayake
JUSTICE OF APPEAL

Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL

Hon. Madam Justice F. Jameel
JUSTICE OF APPEAL