

MOONTIDE SOUTH PACIFIC LIMITED

v.

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THE COMMISSIONER OF INLAND REVENUE

[HIGH COURT, 1999 (Shameem J) 1 December]

Civil Jurisdiction

B *Income tax- tax free zone- non resident dividend withholding tax- shift in revenue- whether exemption confined to payments to immediate recipient- Tax Free Zones Decree 571991 Sections 7 (2), 11 and 17; Income Tax Act (Cap 201) Section 8 (1).*

C The Plaintiff owned a garment factory in a tax free zone. He sought tax clearance to enable dividends to be paid to a non resident shareholder in the Plaintiff. The shareholder was itself a company and it appeared that in due course the dividends would be distributed by that company to an Australian share-holder who would be subject to tax. The CIR contended that this involved a "shift in revenue" and that accordingly the Plaintiffs dividends were not exempt from withholding tax. The High Court HELD: a payment is exempt so long as the immediate payee is itself exempt in the place of payment whether or not there is a subsequent distribution to another non exempt payee.

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Cases cited:

Anderson v. Commissioner of Taxes (Victoria) [1937] AC 747
Attorney-General v. Milne [1914] AC 765
 E *Brunton v. Commissioner of Stamp Duties* [1913] AC 747
Commonwealth of Australia v. Bank of New South Wales [1950] AC 235
Hawtrey v. Beaufront Ltd [1946] KB 280
R v. Chief National Insurance Commission ex-parte Connor [1981] 1 QB 158
Saraswati v. The Queen (1990-1991) 172 CLR 1

F *P.I. Knight* for the Plaintiff
A. Bale for the Defendant

Shameem J:

On 11th June 1999 an originating summons was issued by Moontide South Pacific Limited, seeking determination of the following question:

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"Is the Plaintiff liable to pay non-resident dividend withholding tax under section 8 of the Income Tax Act Cap. 201 on dividends declared and payable to Oldtex Pty Limited a company incorporated in New South Wales, Australia and the sole beneficial owner of all the issued shares in the Plaintiff?"

The originating summons were supported by the affidavit of Sydney Leonard Schneider sworn on 8th June 1999. The affidavit sets out the matter for determination. Sydney Schneider states that Moontide South Pacific Limited is a company incorporated in Fiji and carries on business as garment manufacturers. The sole beneficial owner of the issued capital in Moontide South Pacific Limited is Oldtex Pty Limited, an Australian company. Oldtex Ltd. owns 431,745 shares of \$1.00 each in Moontide Ltd. The sole beneficial owner of the issued capital in Oldtex Ltd. is Tolric Pty Limited, another Australian company. The sole shareholder in Tolric Ltd. is Philip James Bart, an Australian citizen.

In October 1988, Moontide Ltd. was designated a Tax Free Factory by the Fiji Trade and Investment Board. In his letter to the Plaintiff Company the Director of the Board granted, inter alia, the following concessions to the Plaintiff:

- “(a) total waiver of licencing for import of capital goods and other production materials;
- (b) duty free import of capital goods and equipment from any source;
- (c) exemption from customs duty on the importation of raw materials, components, spares and packaging materials;
- (d) exemption from excise duty on products manufactured for exports;
- (e) income tax concessions under the 5th Schedule of the Income Tax Act i.e. no income tax payable on corporate profits for a period of 13 years provided that all provisions of the schedule of the Income Tax Act are met;
- (f) no withholding tax on interest, dividends and royalty paid abroad provided there is no shift of revenue abroad;
- (g) no restrictions to repatriate capital and after tax profits;
- (h) freedom to import specialist personnel for the enterprise subject to fulfilment of requirements under the Immigration Act;
- (i) accelerated depreciation allowance on plant and machinery and new factory building;
- (j) final dividend tax of 5% on dividends paid to resident shareholders.”

(My underlining)

In 1991 the Tax Free Zones Decree 1991 was passed. The Title reads:

“A Decree to provide for the establishment, management, control,
licensing and registration of Tax-Free Zones and related matters.”

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The Decree provides for the creation of “tax-free zones” and lays down conditions for eligibility of businesses. Section 7(2) of the Decree provides:

“Any company seeking an operating licence for the carrying on of any trade, business or manufacture in a Tax-Free Zone shall be required to -

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- (a) derive all of its chargeable income from export sales, which may include sales for a company licensed under subsection (1) of this section;
- (b) generate employment opportunities for the people of Fiji;
- (c) enhance, expand and improve the technological and trading capability and capacity of the economy of Fiji; and
- (d) comply with any other condition deemed by the Minister to be appropriate under the circumstances.”

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Section 11 of the Decree provides:

“A licence granted by the Minister shall provide, for a period of thirteen consecutive fiscal years from the commencement of such a licence, the exemption of the licensee in accordance with the Customs Tariff Act, the Excise Act and the Income Tax Act, from payment of the following -

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- (a) duties leviable on the importation or purchase ex bond or excise duty leviable on purchase ex-excise factory of machinery and equipment (including parts and materials) insofar as they are required for the establishment and factory operation of the trade, business or manufacture to be carried out in a Tax Free Zone;
- (b) taxes normally leviable under the Income Tax Act in respect of chargeable income of a company licensed under subsection (1) of section 7;
- (c) taxes leviable under the Income Tax Act, excepting dividend tax, on dividends derived by a resident shareholder in companies licensed under subsection (1) of section 7;
- (d) withholding taxes leviable on income under the Income Tax Act:

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Provided that where such income is subjected to tax under the laws of the State of that person, then tax exemption under this paragraph will not apply.”

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Section 17 of the Decree provides that “the Decree applies to tax-free factories approved by the Minister of Finance before the commencement of the Decree.”

Section 8(1) of the Income Tax Act Cap.201 provides:

“(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 the payments specified in subsection (2) at the rate of 15 per cent of the gross amount payable.

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

(a) a dividend declared, paid or credited by a company incorporated in Fiji;

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For the purpose of this paragraph -

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

In 1998, the Plaintiff sought tax clearance from the Commissioner of Inland Revenue to enable dividends declared by the Plaintiff to be paid to the Plaintiff’s non-resident shareholder. The Plaintiff said in a letter from its accountants, G. Lal & Co. to the Inland Revenue Department (Annexure ss2), that no withholding tax was payable on the dividends.

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The Commissioner replied on 11th February 1998 (Annexure ss3) seeking confirmation that there would be no shift in revenue. On 30th June 1998 G. Lal & Co. replied enclosing a letter from the Australian Tax Office dated 23rd June 1998 confirming that the dividends received by Oldtex Pty Ltd. from the Plaintiff are exempt from tax in Australia (Annexure ss4).

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On 24th July 1998 the Commissioner wrote to G. Lal & Co. informing them that dividend withholding tax was payable on the dividends (Annexure ss5). In that letter the Commissioner wrote:

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“The letter from the Australian Taxation Office only states that the dividends received by the Australian company from Fiji will be exempt from tax. However it does not state the status of the dividends when it will be finally distributed by Oldtex Pty Limited to the Australian shareholders. In our view the dividends when declared will be subject to tax.”

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On 4th August 1998 G. Lal & Co. wrote back to the Commissioner disputing his decision, and saying that to trace the “shift in revenue” to the eventual distribution of the dividends by the non-resident shareholder company “would be far-fetched

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and would not be in conformity with the real intention and spirit of the TFZ Decree.”

- A On 23rd November 1998, the Commissioner informed G. Lal & Co. that “... tax clearance will only be issued upon payment of the 20 per cent Dividend Withholding Tax.”

These are the facts which are not in dispute. The Commissioner for Inland Revenue chose not to file any affidavit in reply, and submissions by counsel were heard on 10th November 1999.

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- C Mr P. Knight for the Plaintiff submitted, in essence, that the effect of the words “shift in revenue” referred to in the FTIB letter of October 1988 meant that dividend income is not taxable in the hands of the recipient in his country of residence. He submitted that the words “that person” in the proviso to section 11 of the Decree meant the immediate recipient of the dividends, on a strict interpretation of the section. He submitted that if one would require tax exemption from the eventual individual recipient of the dividend, then it make a nonsense of the purposes of the legislation, since the exemption would never apply because all eventual recipients are individuals who are liable to tax.

- D Mr A. Bale for the Defendant submitted that it was necessary to consider the protection and concessions granted by the Decree. He said that the Decree intended to give tax concessions to companies, and not to individuals. In this case, he submitted, the ultimate beneficiary was not a tax-exempt company, but was Philip James Bart. He further submitted that under the Double Taxation Agreement between Australia and Fiji Article 10 provided that dividends paid by a company resident in one State, to residents in the other, may be taxed in the other State. He submitted that Philip James Bart was therefore subject to tax on the dividends payable to him, and that the proviso therefore did not apply. He said that tax was payable somewhere in the law of taxation. In this case, it was payable on the dividends when they were paid to Philip James Bart, and after appropriate adjustment to prevent discriminatory double taxation, payable as withholding tax in Fiji.

- F The submissions of counsel were clear and helpful, and the Court was greatly assisted by them.

- G The issue in dispute is a narrow one. Firstly, the words “that person” in the proviso of section 11(d) of the Decree mean “immediate recipient” or does it mean “eventual recipient” of dividends payable to non-Fiji residents? Secondly, in interpreting these words, should the court consider their meaning on a strict interpretation, or is the court entitled to consider the effect of taxation law generally in assessing the true intention of the legislature?

According to the Interpretation Act Cap.7, the word “person” includes a body of persons corporate or incorporate. A principle of statutory interpretation is to

ascertain the intention of the legislature as expressed in the statute, considering it as a whole and in its context. If the words are plain and unambiguous, they apply as they stand, even if the result does not represent the true intention of Parliament (Commonwealth of Australia -v- Bank of New South Wales [1950] AC 235 at 307). A

Where, however, the words are ambiguous, the intention of Parliament must be sought first in the statute itself, then in other legislation and contemporaneous circumstances and in the common law before the legislation was passed which the legislation was intended to remedy. (*Halsbury's Laws of England* Vol. 44, 4th Ed. Para 858). Furthermore the courts must construe statutes on the assumption that that Parliament intended them to be construed according to the principles of natural justice and public policy (R -v- Chief National Insurance Commissioner ex parte Connor [1981] 1 QB 158). Finally statutes must be construed to give them a sensible meaning which does not defeat the manifest intentions of the legislature (Hawtrey -v- Beaufront Ltd [1946] KB 280, Saraswati -v- The Queen (1990-1991) 172 CLR 1). B C

In respect of tax legislation specifically, the rules of interpretation have developed considerably since the Lord Treasurer reportedly said in 1679, to the Chief Justice for Chester and the Welsh Marshes in relation to the interpretation of stamp duty law. D

“.... all disputes ... will find the most favourable construction for the King that the words and intention of the act will reasonably bear” (Edwards and Pares (eds) “*The English Historical Review* (Longmans, Green & Co. 1941 Vol.LVI).

In Anderson -v- Commissioner of Taxes (Victoria) (1937) 57 CLR 233, Rich and Dixon JJ in a joint judgment said: E

“In Brunton -v- Commissioner of Stamp Duties [1913] AC 747 at 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 emphasised in Attorney-General -v- Milne [1914] AC 765 at 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’.” F

I note however that section 11(d) of the Tax Free Zone Decree is not a taxing statute, it is a tax-exempting statute. As such in my view, the ordinary principles of statutory interpretation apply. G

Applying these principles, what therefore is the ordinary meaning of the proviso to section 11(d)? On a reading of the proviso to section 11(d), it is not clear whether the person who must be exempt from tax is the income of the immediate

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recipient of the dividends (in this case Oldtex Pty Ltd) or whether all income of all recipients including the individuals who eventually receive the dividends from Tolric Pty Ltd., must be so exempt.

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Further, the definition of "shareholder" in the Income Tax Act is a broad one. Section 2 of the Act states:

" 'shareholder' includes any registered holder or beneficial owner of a unit in a unit trust."

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In the absence of a clear and unambiguous construction of the proviso to section 11(d), I now turn to the purpose of the legislature. It is clear from section 7(2) of the Decree that the intention of the legislature was to create a business-friendly environment which would provide incentives for investment in Fiji. Thus the exemption from taxation on withholding dividends, is to provide a tax concession.

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Counsel for the Defendant submits that the court should look at taxation principles generally, and to consider the need to ensure that tax on dividends must be payable somewhere, either in Fiji or in Australia.

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If his submission is correct, and the dividends are inevitably subject to tax in Australia because dividends are always eventually payable to individuals who are not tax-exempt, then the concession provided under section 11(d) of the Decree would never be available to any tax-free business in Fiji. This cannot be the intention of the legislature. The section and the proviso must be presumed to have a practical and sensible effect.

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In order for section 11(d) of the Decree to provide a concession as envisaged by the Tax Free Zone Decree, the company applying for the concession must satisfy the Commissioner for Inland Revenue that the immediate non-resident recipient of the dividends is exempt from tax. Although the Double Taxation Treaty between Australia and Fiji certainly was intended to prevent double-taxation, I do not read it as intending to usurp the purpose of tax concessions and exemptions under the Tax Free Zone Decree.

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As such, I find that on a construction of section 11(d) and of the proviso to section 11(d) of the Tax-Free Zone Decree, the Plaintiff is exempt from paying withholding tax in Fiji on dividends payable to a tax exempt "person" in Australia, namely Oldtex Pty Limited. The Defendant is to pay the Plaintiff's costs of the proceedings, to be taxed if not agreed.

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(Judgment for the Plaintiff.)