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

Income Tax Appeal No 4 of 2011

BETWEEN: **Company H**

Applicant

AND: **FIJI REVENUE & CUSTOMS AUTHORITY**

Respondent

Counsel: **Ms S Tinaikoro, Cromptons Lawyers for the Applicant.**

Mr S Vukica, FRCA Legal Unit, for the Respondent

Date of Hearing: **Monday 20 August 2012**

Date of Judgment: **24 September 2012**

JUDGMENT

BRANCH PROFIT REMITTANCE – Section 7C Income Tax Act (Cap 201) – Tax of branch profits of non-residents; Income Tax (Amendment) No 2 Decree 2012; Threshold Issue; Retrospective Legislation.

Background

1. This an application for review against the decision of the Respondent Authority in assessing $133,893.15 as branch profit remittance tax on the Applicant's profits, which it sought to remit from its Fiji Branch, to its head office in Australia.

2. The brief history of the matter can be found in the Agreed Statement of Facts, filed by the parties on 3 November 2011, as follows:-

- Company H is a privately owned civil contracting and dredging business located in Queensland, Australia.
- The company is registered under Part X of the Companies Act 1983.
- On or about 16 September 2010, the Applicant through their accountants lodged an application to remit profits made in the years 2008 to 2009, to its Head Office in Australia.
- On 21 October 2010, the Respondent advised the Applicant that it would be taxed a branch profit tax in accordance with the former provision Section 7C of the Income Tax Act (Cap 201).
- Those provisions were inserted into the Act by Income Tax Act (Budget Amendment) Promulgation 2007.
- The provisions were further amended by the Income Tax Act (Budget Amendment) Promulgation 2008 and repealed in their entirety by the Income Tax Act (Budget Amendment) Decree 2010.
- On 10 November 2010, the Applicant lodged a notice of objection of Assessment with the Authority.
- On 25 February 2011, the Respondent provided the Applicant with an Objection Finalisation letter.
- It is against that letter, that the Applicant initiated its review application, on 25 February 2011.
- For the sake of completeness and for reasons that will became apparent shortly, on 19 January 2012, a further amendment to the Income Tax Act (Cap 201) came about by virtue of the Income Tax (Amendment)(No2) Decree 2012.

The Branch Profit Remittance Tax

3. The relevant provision the subject of this application for review, was repealed with the Income Tax (Budget Amendment) Decree 2010.[1]

[1] Decree No 8 of 2010.

4. Section 7C of the Income Tax Act (Cap 201) in its originally inserted form read:

(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 per cent (15%) of any branch profits derived in Fiji (sic) 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 from the company paying or crediting branch profits to a non-resident.

(3) The company which, in accordance with the provision of sub-section (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 payment or crediting of the branch profits;

(4) For the purposes 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. That provision was further amended by the Income Tax (Budget Amendment) Promulgation 2008[2], as follows

(i) under subsection 7C(l) by inserting the word "by" after 'Fiji"; and

(ii) by inserting a new subsection 7(C)(5) with the following;

"(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."

6. The consolidated provision thereafter read

7C (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 per cent (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 from the company paying or crediting branch profits to a non-resident.

(3)The company which, in accordance with the provision of sub-section (2), is required to pay the tax shall remit the same to the Commissioner of Inland

[2] Promulgation No 35 of 2008.

Revenue within 30 days, or such period as the Commissioner of Inland Revenue may specify, of the payment or crediting of the branch profits;

(4)For the purposes 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.

7. On 6 January 2010, the Income Tax (Budget Amendment) Decree 2010[3], came about with a date of effect of 1 January 2010. The Decree repealed Section 7C of the Income Tax Act (Cap 201) in its entirety.

8. No further amendments to the Act in this regard, took place until a further two year period, when the Income Tax (Amendment)(No2) Decree 2012[4] was issued.

9. The effect of that amendment was a clarifying provision, creating a new Section 7CA as follows:

"Branch profit remittance additional normal tax

7CA.—(1) Notwithstanding the repeal of section 7C of the Act by the Income Tax (Budget Amendment) Decree (No. 8 of 2010), any branch profit remittance additional normal tax payable, paid, levied, or assessed under section 7C for any period before the 1st day of January 2010, shall be made without regard to subsection (4) of section 7C.

(2) For the avoidance of doubt, subsection (4) of section 7C shall not apply to any branch profit paid, credited or remitted pursuant to section 7C for any period before the 1st day of January 2010.

(3) 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,

[3] Decree No 8 of 2010

[4] Decree No 13 of 2012

regardless of whether the remittance is made after the 1st day of January 2010. "

10. It is against the above backdrop, that the present application for review is before me.

Threshold Matter

11. At the commencement of proceedings, I have invited the parties to make submissions in relation to the effect of the Income Tax (Amendment)(No2) Decree 2012[5].

12. The reason for doing so is because of the fact that the issue in dispute at the time of lodging the application[6] on 23 March 2011, appears now to have been superseded by the amending law.

13. The Notice of Appeal states relevantly at Para 1

Section 7C in its original and amended form is clear; the Tax was to be paid when a company was remitting its profits to a non-resident. This meant that from the time Section 7C came into force, on 1 January 2008, until it was repealed, on 1st January 2010, any company that applied to remit its profit within that period, was required to pay the Tax. The Appellant did not make any application to remit its profits in the period of 1st January 2008 to 31st Decemeber, 2009.

14. Unfortunately for the Applicant, the consequential amendment of the Income Tax Act by the Income Tax (Amendment)(No2) Decree 2012, has now cast the utility of pursuing the review application, into some doubt.

15. Given new provision Section 7CA states:

Notwithstanding the repeal of section 7C of the Act, any branch profit remittance additional normal tax liable to be paid, levied or assessed under

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5 Decree No 13 of 2012

6 The parties should note, that this should be commenced as an Application for Review, not a Notice of Appeal.

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,

the fate of the Taxpayer's application may prove to be somewhat academic.

16. Clearly the intention of the Respondent Authority has now been crystallised.

17. What remains for the parties before me to consider, is what should be the effect of the application in such circumstances.

Submissions of the Applicant

18. Quite correctly, the Applicant has referred me to Section 18 (3)of the Interpretation Act (Cap 7) that reads relevantly:

Where a written law repeals in whole or in part any other written law, then, unless a contrary intention appears, the repeal shall not:

(a) Revive anything not in force or existing at the time at which the repeal takes effect; or
(b) Affect the previous operation of any written law so repealed or anything duly done or suffered under any written law so repealed; or
(c) Affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed; .....

19. Counsel for the Applicant has also relied on the Australian authorities of *Phillip Antony Samson Felman v Law Institute of Victoria*[7] and *Esber v Commonwealth of Australia*[8] in support of the view that the 'accrued right' referred to within the Interpretation Act, should include the right to continue proceedings. I accept that submission.

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7 (1997) 159 ALR 363

8 [1992] HCA 20

20. The further problem remains, whether or not I should proceed to deal with the substantive issue pertaining to the application for review that is on foot, against the backdrop of amended legislation that seeks to correct any uncertainty that may have been present within the former provision that was Section 7C. .

21. At issue is whether or not the Income Tax (Amendment)(No2) Decree 2012 can act in a retrospective fashion, that not only cures any uncertainty in the language of the earlier provision, but imposes a positive obligation on the taxpayer to pay the branch profit remittance additional normal tax for any period before 1 January 2010, regardless of whether the remittance was made after that date.

22. The Applicant relies on the case of *Barclays Bank v Tichawana Nyahuama*[9] as support for the principle that "retrospective law in its operation is not to be treated in any way affecting acts and transactions which have been completed or which are to be completed shortly or are pending".[10]

Submissions of the Respondent

23. The case of the Respondent is that there is little utility in the Applicant pursuing the review application, on the basis that the new law is in place and will render any hearing of the substantive matter as a largely academic exercise.

24. The Respondent has nonetheless acknowledged that the Notice of Assessment may need to be reissued by the Authority, so as to have taken place, reliant on Section 7CA of the Act.

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9 Supreme Court of Zimbabwe, Civil Appeal No 299/03.

10 Further Submissions of Counsel for the Appellant dated 18 August 2012.

25. If that be the case, the Applicant would be thereafter free to have that position reviewed in accordance with Section 17 of the Tax Administration Decree 2009.

26. This to my mind seems the most logical approach to follow.

27. Like the United Kingdom and Australia, the Republic of Fiji is not constrained by constitutional restrictions that impose any constraint on the passing of 'ex post facto law'.[11]

28. While the general principle of law making may well be that statutes are made prospectively and that there is a strong presumption against retrospective legislation[12], where the language is clear and unambiguous, such power is nonetheless recognized and often brought about with good cause.[13]

29. I am satisfied that the Income Tax (Amendment)(No2) Decree 2012 is valid law that corrects any defects that may have been caused by either an unintended consequence, or for the sake of clarifying the former provision.

The Way Forward

30. In light of the above, it would seem that the most efficient way of dealing with this matter, is to direct that the Respondent reissue its Objection Finalisation Decision, having regard to Section 7CA of the Act.

31. Should after that time, the Applicant wish to review its position, either by way of amending the Notice of Appeal or by seeking an application to discontinue the matter, it will be free to do so.

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[11] Unlike the case of the United States where the Constitution of 1787, prohibits the passing of retrospective law.

[12] See for example *Maxwell v Murphy* (1957) 96 CLR 261

[13] See *Polyukhovich v Commonwealth of Australia* (1990-1991) 172 CLR 500.

32. This I believe, will provide a more appropriate backdrop for the legal issues to be considered and will allow that to be done, having regard to the views of the tribunal that the Income Tax (Amendment)(No2) Decree 2012 has in effect, rendered the application of the Taxpayer without an effective purpose.

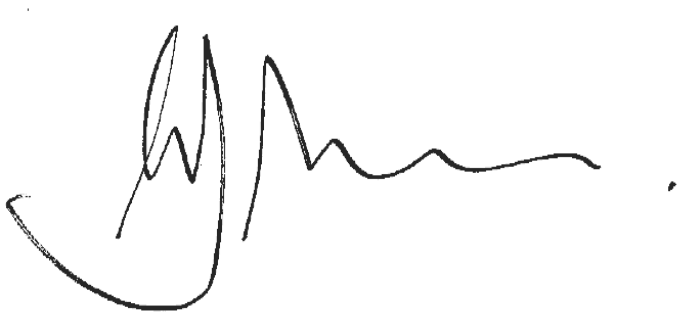
DECISION OF THE TRIBUNAL

The Tribunal orders that:

(i) The Respondent reissue its Objection Finalisation Decision, having regard to Section 7CA of the Income Tax Act (Cap 201) within 21 days.

(ii) That following receipt of that decision, the Applicant be given leave to amend the Notice of Appeal dated 23 March 2011, should it wish to do so, within 28 days.

I order accordingly.



Mr Andrew J See
Resident Magistrate