



2. As a pre-condition to issuing the tax clearance, the Respondent authority demanded the payment of non-resident dividend withholding tax (NRDWT) in the amount of \$329,183.09. That amount was paid by the Applicant on or about 20 December 2011.<sup>1</sup>
3. Despite that payment, on 9 January 2012, Company R filed a Notice of Objection against the original demand, though that objection was disallowed on 4 July 2012 ("the Objection Decision"). As part of that Objection Decision, the Respondent Authority issued a further demand on the Applicant, seeking an additional NRDWT of \$124,827.33.
4. On 2 August 2012, the Applicant filed an Application for Review against the Objection Decision and paid the additional demand of \$124,827.33.<sup>2</sup> On 13 August 2012, the Applicant filed a Notice of Objection against the additional demand for payment. That objection was disallowed on 13 February 2013. ("The Second Objection Decision"). With the leave of the Tribunal, on 30 April 2013, the Applicant filed an Amended Application for Review incorporating both Objection Decisions, seeking the refund of the NRDWT paid and costs. The application is heard in accordance with the relevant provisions of the *Tax Administration Decree 2009* and the *Magistrates Court (Amendment) Decree 2011*.

#### What is An Assessment for the purpose of Section 8(2) of the Income Tax Act?

5. The combined effect of the Income Tax Act (Cap 201) and the *Tax Administration Decree 2009* means that the terms 'tax assessment' or 'assessment' can have different meanings and usages. For example, Section 2 of the *Decree* defines "tax assessment" to mean(s) an assessment or determination listed in the First Schedule. The First Schedule provides

*"The following are tax assessments for the purposes of this Decree —*

- (a) an assessment of income tax, including a nil or loss notice;*
- (b) the ascertainment of provisional tax or advance payments of tax under Part XII of the Income Tax Act;*
- (c) an assessment of VAT, including a self-assessment under section 5;*
- (d) an assessment of land sales tax;*
- (e) an assessment of penalty or additional tax under a tax law;*
- (f) a default assessment of tax under section 9;*
- (g) an advance assessment of tax under section 10;*
- (h) an assessment including a self-assessment of gambling Turnover Tax under section 5; and*
- (i) an amendment of an assessment referred to in paragraph (a) to (g);*
- (j) an assessment including a self-assessment of the Hotel Turnover Tax under section 5.*

<sup>1</sup> See Agreed Statement of Facts as filed by the parties on 6 August 2013.

<sup>2</sup> That figure appears to have been moderated down to \$119,859.62, as contained within the supplementary document provided to the Tribunal by the Respondent, supportive of the Demand Letter of 31 July 2012. In the event that this issue warrants further clarification, or where the parties are unable to agree on the resultant calculations, they are free to seek assistance from the Tribunal.

6. A distinction of course needs to be drawn between the process of assessment<sup>3</sup> and the Notice of Assessment and this is made apparent within Sections 11 and 12 of the Decree for example, where reference is made to the physical 'notice of assessment' as opposed to the process of assessment.
7. Part III of the Income Tax Act, is entitled *Imposition of Tax* and thereafter sets out the different sub-classes of income that are subject to the imposition of tax. Part VII of the Act, under the heading *Returns and Information* sets out the requirements for how NRDWT should be paid and reported. For example, Section 44 of the Act refers to "assessments, notices and other documents (that) may be posted or served". The presumption here is that the term 'assessment(s)' is more than a process. That is, it refers to a physical document or advice of some description.

8. Section 54 of the Act on the other hand states as follows:

*Any taxpayer or agent who deducts withholding tax or dividend tax on payment of income under sections 8, 8A, 9, 9A and 10, 10A shall, not later than the last day of February each year deliver to the Commissioner details of such payments made in the previous year of assessment on a form approved by the Commissioner.*

9. In that context, the 'assessment' is regarded as a process.
10. Once the taxpayer has complied with the requirement at Section 54 of the Act, then Section 55 of this specific taxation law comes into play. Section 55 provides:

*(1) After examination of the taxpayer's return, or, in the case of a taxpayer who has applied to be dealt with through an agent appointed under the provisions of section 56, of the agent's report, the Commissioner shall send or cause to be sent a notice of assessment to the taxpayer stating therein the date by which the amount of such assessment is to be paid.*

11. While the Act assumes that a Notice of Assessment will be in a form as approved by the Commissioner, a demand for payment, in the absence of anything further, would be sufficient for the purposes of Section 55.<sup>4</sup> A tax clearance is not a tax assessment. It has no place in the imposition process. It is a precondition to the release of monies out of the economy.<sup>5</sup>
12. It is accepted that Section 11 of the *Tax Administration Decree 2009*, applies to alterations or additions sought by the Commissioner after that time.

#### **How is the NRDWT to be Calculated?**

13. In *A New Zealand Holding Company v Fiji Revenue & Customs Authority*,<sup>6</sup> this Tribunal dealt with the manner in which corporate tax credits can be taken into account, when assessing the pool to be taxed for the purposes of the non-resident withholding tax. The conclusion of the Tribunal was that Regulation 4(1) of the Income Tax (Dividend) Regulations 2001 had a prospective effect. There is

---

<sup>3</sup> Note also the distinction set out by Owen J in *Batagol v Federal Commissioner of Taxation* (1963) 109 CLR 243 at [3].

<sup>4</sup> There is no dispute between the parties that demands (reliant on an assessment process) have been made.

<sup>5</sup> See Section 72A of Part X of the Act.

<sup>6</sup> [2012]FJTT 10 at [42]-[62]

nothing within the arguments of the Applicant that would cause the Tribunal to depart from this approach.

**Can the Tax Assessment be Amended ?**

14. The Applicant states at Paragraphs [62]-[65] of its Submission dated 21 October 2013, that the liability on dividends for which tax clearances were given more than six years ago, cannot be disturbed. The argument relies on the fact that if the method of calculation of those assessments (the demand and amended demand) relates to excess tax credits outside of the six year window, then such a situation is ultra vires the powers of the Commissioner.
15. Subject to Section 11 of the *Tax Administration Decree 2009*, the Respondent is entitled to amend or alter a Tax Assessment within a six year window.
16. In this regard I accept the alternative argument that is made by the Respondent within its *Outline of Submissions* filed on 30 August 2013 that the assessments within the period 2006, 2009 and 2010 are within that statutory window, even if some of the basis for the formula that was used in part for their ultimate calculations were not. The critical issue is that the assessments fall within that window. A variable within a formula that has not been correctly sourced, is no shield to immunity.

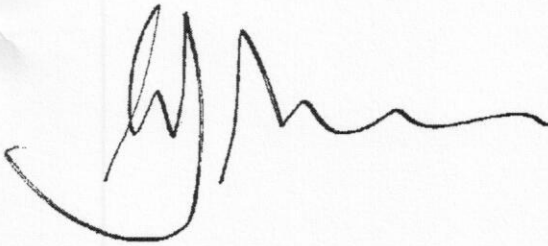
**Conclusions**

17. The Tribunal finds that the Applicant has not made out its case and the application must fail on that basis.

**Decision**

This Tribunal Orders that:

- (i) The Application is dismissed.
- (ii) The Respondent is free to make an application to the Tribunal for Costs within 28 days.



**Mr Andrew J See**  
**Resident Magistrate**