

**IN THE COURT OF APPEAL, FIJI**  
**[ON APPEAL FROM THE HIGH COURT]**

**Civil Appeal No. ABU 0055 of 2017**  
**High Court Civil Action No. HBT 0002 of 2014**

**BETWEEN** : **SCIPIO INVESTMENTS LIMITED**

*Appellant*

**AND** : **FIJI REVENUE & CUSTOMS AUTHORITY**

*Respondent*

**Coram** : Basnayake, JA  
Lecamwasam, JA  
Almeida Guneratne, JA

**Counsel** : Ms. P. Low for the Appellant  
Mr. S. Ravono for the Respondent

**Date of Hearing** : 13 November 2018

**Date of Judgment** : 30 November 2018

**JUDGMENT**

**Basnayake, JA**

[1] I agree with the reasoning and the conclusion of Almeida Guneratne, JA.

## Lecamwasam JA

[2] I too agree with the reasons and the conclusions of Almeida Guneratne, JA.

## Almeida Guneratne, JA

[3] When this matter was taken for hearing both counsel moved that the date of hearing be vacated in terms of joint motion dated 5<sup>th</sup> November, 2018 filed on behalf of the parties. The reason urged was that the Appellant was considering whether to appeal the judgment of this Court in *New India Assurance Company Limited v. Chief Executive Officer, Fiji Revenue And Customs Services*(ABU 25 of 2017) decided on 5<sup>th</sup> October 2018) which appeared to have covered the same ground as in the instant appeal. Upon the court indicating that a postponement would be granted only on payment of costs jointly to be paid by the parties to Court, both counsel resiled from their joint application to have the date of hearing vacated and informed Court that they were ready to proceed with their arguments. Accordingly the matter was heard.

[4] The matter for determination in this appeal is as to whether, in addition to the normal tax paid by the Appellant, it was liable to pay BPRANT (Branch Profit Remittance Additional Normal Tax) as well. That legal issue required an examination of the factual content and the applicable statutory provisions against the background of that content.

### The Factual Content

[5] The Appellant is a branch of a New Zealand Company owned by an international investment Company headquartered in Singapore the ultimate holding company of which is a company incorporated in Malaysia.

[6] The Appellant made profits in the year 2009 which were never remitted to its head office in Singapore or other offices abroad but retained and utilized them towards its business expenses and commitments in Fiji and settling its debts.

[7] On 20<sup>th</sup> September, 2013 the Respondent issued a Notice of Assessment for Branch Profit Remittance Additional Normal Tax in relation to the profits made by the Appellant for 2009. The Appellant's objection to the said notice of assessment was disallowed by the Respondent purporting to do so on the basis of a previous ruling by the Tax Tribunal. Against the Respondent's decision disallowing the Appellant's objection to the notice of assessment the Appellant appealed to the Tax Tribunal which transferred the matter to the High (Tax) Court for a determination. By its judgment dated 28<sup>th</sup> April, 2017 the High Court held in favor of the Respondent. This appeal is against that Judgment.

[8] The learned judge "summed-up" the rival contentions as follows (modified by me for determination of this appeal)

The Appellant's contention in the High Court may be summarized as follows:

- (1) That, profits' are to be taxed only if they are remitted abroad and not as capital investment (the emphasis is mine) for the reason that the object of the Government is to keep money within the country and therefore not to bring into the net of "BPRANT" any profit it earned. The Income Tax Act must be read by treating "a branch" as separate from the "head office" for that reason and further,
- (2) that the decision in Punjas Ltd v. Commissioner of Inland Revenue [2006] of FCA 66 is no authority for the Commissioner to change his mind or his decision as he pleases to treat "a branch" and "head office" as one entity (the emphasis is mine).

The Respondent's argument in the High Court in Summary.

- (1) That, the Respondent could change a position taken by him earlier and

(2) That in the eyes of the Revenue “a branch” and a “head office” is one entity and further,

(3) That an applicant’s claim for exemption under the Act any investment had to be of a capital nature.

[9] The said rival contentions were very much the same as that which were urged in Appeal before this Court with some adjunct submissions, which if necessary I shall refer to in my final determination. At this point I proceed to look at the High Court judgment to ascertain whether it bears scrutiny.

Analysis of the principal findings made by the High Court in the light of the grounds of appeal.

[10] The judgment of the High Court is at pages 4 to 9 of the Copy Record and the grounds of appeal are contained at pages 1 to 2 thereof. I shall take the principal findings made by the High Court seriatim against the grounds of appeal urged in relation to each of them in the ensuing analysis.

(A)

[11] The learned judge held that; *“the said Revenue C.E.O is free to change his position, his view and his judgment in an unfettered manner. The authority for this principle is the decision of the Court of Appeal in the Punja’s case” (at paragraph 47 thereof) (Vide: paragraph 7 of the High Court judgment)*

[12] The Punjas case was approved recently by this Court in Reddy’s Enterprises Limited v Chief Executive Officer, Fiji Revenue And Customs Authority [ABU 0049 of 2016, decided on 05 October, 2018] subject to the qualification that, “that can be done only in certain circumstances” (per Jameel JA at paragraph (27) of that Judgment).

[13] While I echo Jameel JA's said qualification, from that it is inferable that there cannot be anything called unfettered power or discretion." Power implies discretion. But that discretion in turn implies a duty to exercise it reasonably and fairly. This has been an established principle in Public Law ever since the seminal decision in the Wednesbury Corporation Case [1948] 1 KB 223. Indeed, if a statutory functionary such as the C.E.O of the Respondent who exercises power and discretion in trust for the public and if he/she were to take decisions at his or her whim and fancy without regard to the principles of Judicial review in making such decisions then, as Lord Donaldson in R.V. Civil Service Appeal Board, Ex Parte Cunningham has said, that " would reduce the decision- maker to the status of a free-wheeling palm tree" (1992) ICR 816. Surely it cannot and indeed should not be allowed to be so, for, as Professor Wade laments it will reduce the Rule of Law to a Rule of administrative discretion, like rock being reduced to sand (see: Wade & Forsythe, Administrative Law, (9<sup>th</sup> Ed.), in the several Chapters on the exercise of statutory discretion.

[14] However, I shall not dwell on that aspect any further for two reasons. The first is that it will not have a bearing on the conclusion I have reached in this appeal. The second is that in their oral submissions the parties did not urge that point before this Court though mentioned in their written submissions.

(B)

[15] Regarding Section 7C of the Income Tax Act as the pivotal provision, which is the Charging Section for BPRANT the learned judge proceeded to hold that, "*...the clearly expressed intention of the lawmaker is that in spite of other taxes, there shall be an additional tax imposed on the branch profits made by a non-resident. Although "remittance" were the definitive term then "additional" would not have been included.*" (at page 4 – paragraph 11 of the judgment).

The ensuing analysis by this Court of that finding

- [16] In a recent decision of this Court (vide: New India Assurance Company Limited v. Chief Executive Officer, Fiji Revenue And Customs Services, ABU 25 of 2017, decided on 5<sup>th</sup> October, 2018), the import to be accorded to the terms “additional” and “remittance” was gone into. Writing for the full court (of which I was a concurring member) His Lordship, Justice Basnayake deriving guidance from dictionary meanings (as per the Oxford Dictionary and the Collins English Dictionary) laid down that “Remittance means a sum of money sent in for payment or the action of sending money” or “money sent as payment” I found that the definition given to the word remittance/remit is Webster’s Compact English Thesaurus is in consonance with the aforesaid incorporation of Basnayake, JA’s adoption of the aforesaid definitions in the said New India Assurance Case (supra) (see: Webster’s, at page 391). I found that the meaning accorded to the term remittance in step with the Legal dictionary meaning given to it in which context I refer to “the Judicial Dictionary of Words and Phrases by Stroud as ‘remit’ to mean “sent” (at page 2261).
- [17] In so far as the interpretation to be given to the words “additional tax” and “paid or credited for remittance” I adopt what was articulated in the said New India Assurance case (supra) at paragraph (15) thereof. *“The additional tax is 15% of any profit that a branch company (non-resident) make in Fiji. This is an 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, “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.” (per Basnayake, J.A.)*

[18] Perhaps, had the determination in the New India Assurance Case been before the High Court, the High Court might have been inclined to hold a different view. It is evident that, the said decision had been very much in the mind of the Respondent's as stood revealed from the joint motion filed which I referred to earlier in this judgment. (vide: paragraph 3 of this judgment).

[19] But, this court not being inclined to vacate the hearing fixed for the due date consequently heard the respective Counsel on the matter and having so heard them I find myself unable to agree with the learned High Court Judges interpretation placed on the words "remittance", and "additional".

(C)

[20] Referring to and dealing with the Section 7(C) 5 as the applicable provision to seek exemption from BPRANT the High Court is seen holding thus: "*But Section (5) states the profits (on which BPRANT is imposed) applies to the after tax earnings which the head office does not reinvest to the Fiji Branch. This lawmaker's intentions was, if the profits from the business are re-invested into that same business, then the earnings will not be pulled into the extended net of the tax gatherer. In other words the lawmaker laid down that the profits to be subject to BPRANT are the after tax earnings that are not re-invested to the Branch*" (vide: paragraph 13 of the High Court judgment at page 4 thereof)

The ensuing analysis by this Court on that finding of the High Court

[21] Dissecting the said finding I found the following aspects flowing therefrom:

(1) Admittedly, the Appellant had earned profits liable no doubt to have been regarded as after tax earnings.

(2) But, the same was not "remitted" to the "head office" (in Singapore).

(3) Consequently, there was no question of the said head office reinvesting the profits so earned in the Appellant Company (Fiji branch).

(4) If the lawmaker's intention was that "if the profits from the business are re-invested into that business, then the earnings will not be pulled into the extended net of the tax gathered , then how could the said earnings be subjected to BPRANT?

[22] In that scenario, the High Court could not have found the Appellant liable for BPRANT.

(D)

Re: The High Court's views on the Appellant using the after tax earnings for

- (i) operational expenses as opposed to re-investment.
- (ii) the interpretation to be placed on the words "paid or credited for remittance"
- (iii) The "single entity" argument.

[23] The High Court opined thus: "*the Appellant did not engage in any re-investment. What they engaged in were truly using profits to pay operational expenses which are ongoing costs for running the .....business.....I turn finally to the words paid or credited for remittance within the Context of Section 7 (C)(5) .....where as in this case, the profits were paid for the operational expenditure of the Branch and not re-invested, there was no requirement for any actual remittance to the Head Office in Singapore before BPRANT is triggered. "Credited for remittance means the earnings (profits) have been received by the Head office. It therefore follows that BPRANT has been triggered". (at page 5 of the High Court Judgment)*



Analysis by this Court of the said Findings

- [24] Taking paragraph (D) (i) to (iii) cumulatively, I agree with the argument of learned Counsel for the Appellant that, the overriding consideration for BPRANT to apply is that re-investment from profits earned by a branch Company must be made outside the Country. On the application of that consideration, the use of profits for operational purposes within the branch cannot attract BPRANT.
- [25] Relying on the decision of this Court in the New India Assurance Company Limited case (supra) the Appellant's Counsel contended that, in that case the company concerned had placed the profits earned in fixed deposits with a bank. Thus the profits so earned never left the branch and therefore the Country. Likewise, in the instant case, the profits earned never left the branch nor the Country. In fact given the fact that in the New India Case the profits earned had been placed in fixed deposits, (and therefore generating a further income), in the instant case the Appellant was using the money for its operational purposes and as paying off its debts. Consequently if BPRANT was not applicable as held in the New India Case, *a fortiori*, it could not have been made applicable to the instant case.
- [26] In my view, the very definitions of the word "re-investment" relied upon by the High Court (at paragraph 14 of its judgment) support the arguments advanced by the Appellant's Counsel.
- [27] Remaining in the same mind set, I echo the words of Basnayake, JA in the New India Case (supra) that, ".....*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 re-invested in the branch company, the appellant is entitled to a refund. The payment of 15% additional tax is based on 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” (paragraph (17) of the said judgment).*

[28] In sum, when a branch re-invests profits in term deposits in a bank in Fiji that is not a remittance, (Vide: The New India Case), *a fortiori*, when a branch uses profits for operational purposes of its business (the issue in the instant case). But to say (as the learned Judge did, in effect) that it is not necessary for there to be a remittance to impose BPRANT is *non-sequitur*. Indeed, there being, in my view, no “capital investment” involved either.

[29] The ghost of ‘the single entity’ that loomed large in the New India Case re-appeared in the instant case as well in the submissions of the Respondent’s counsel. That is, treating both “head office” outside the country and “the branch in Fiji” as one single entity. In my view, that would amount to doing violence to language, in as much as, the statute in question draws a distinction between the two.

#### Judicial approach in interpreting revenue Statutes

[30] “The true principle.....” says Bennion on Interpretation of Statutes “...applying to taxing statutes and other onerous enactments is that persons should not be subjected to a detriment on the authority of a doubtful law. And the paramount principle of construction is of course that the intention of Parliament should be implemented” (at page 351).

[31] In ascertaining the intention of parliament several competing principles of interpretation are resorted to by the Courts, mainly, the literal as opposed to the purposive construction rules.

#### The Ramsay approach

[32] Lord Wilberforce said in W T Ramsay v. IRC [1982] AC 300, that,  
“*A subject is only to be taxed on clear words, not on intendment... ..*”

- [33] As sought to be demonstrated earlier in this Judgment, the words of the statute in question are clear, particularly what has been articulated in paragraphs (26) to (27) above.
- [34] Even assuming that there is some doubt in interpreting as to the circumstances in which BPRANT applies, then that doubt is to be resolved in favour of the subject (tax payer).
- [35] That is an inveterate principle which has been consistently followed and applied across the globe by Courts. In that regard several authorities were referred to in the New India Case (supra) (see also Reddy's Enterprises Limited v. Chief Executive Officer, Fiji Revenue And Customs Authority ABU 0049/2016, Judgment dated 05<sup>th</sup> October 2018 per Jameel, JA; Southern Horizons S. A v. Chief Executive Officer, Fiji Revenue And Customs Authority ABU 27/2017, judgment dated 05<sup>th</sup> October, 2018 per Almeida Guneratne, J.A).

#### Conclusion

- [36] For the aforesaid reasons I set aside the judgment dated 28<sup>th</sup> April, 2017 and allow the appeal.

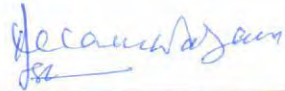
#### Orders of Court:

- (1) *The appeal is allowed and the Judgment of the High Court dated 28<sup>th</sup> April, 2017 is set aside.*
- (2) *The Respondent shall refund the moneys charged as BPRANT from the Appellant with pre-judgment legal interest.*
- (3) *The Respondent shall pay to the Appellant \$5,000.00 as costs of this appeal.*



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**Hon. Justice E. Basnayake**  
**JUSTICE OF APPEAL**



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**Hon. Justice S. Lecamwasam**  
**JUSTICE OF APPEAL**



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**Hon. Justice Almeida Guneratne**  
**JUSTICE OF APPEAL**