

4. The argument of the Taxpayer is that the payment of BPRANT only comes about, once the profits earned have been paid or credited for remittance to the non-resident.¹ It has claimed that as the profits earned during 2008 and 2009, still remain within the 'retained earnings' of Company N, that they are not amenable to taxation under Section 7CA of the *Income Tax Act* (Cap 201) until such time as they are physically remitted.
5. It is against the Respondent's decision that the tax is due and payable, that the Applicant Taxpayer brings this application for review.

Branch Profit Remittance Additional Normal Tax

6. The history of the introduction and subsequent repeal of the Branch Profit Remittance Additional Normal Tax (BPRANT) was set out within *Company H v Fiji Revenue and Customs Authority*². It is the case that the relevant provision the subject of this application for review, was repealed with the Income Tax (Budget Amendment) Decree 2010.³
7. 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;*

¹ In this case, the Head Office company.

² [2012] FJTT 5

³ Decree No 8 of 2010.

(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.

8. That provision was further amended by the Income Tax (Budget Amendment) Promulgation 2008⁴, 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.”

9. 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 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.

10. On 6 January 2010, the *Income Tax (Budget Amendment) Decree 2010*⁵ was introduced with a date of effect of 1 January 2010. The Decree repealed Section 7C of the *Income Tax Act (Cap 201)* in its entirety.

⁴ Promulgation No 35 of 2008.

⁵ Decree No 8 of 2010

11. 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*⁶ was issued.
12. 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, regardless of whether the remittance is made after the 1st day of January 2010. "

13. Counsel for the Applicant has conceded during these proceedings, that there is no question that the Taxpayer will be required to meet the tax obligation at that time when the branch profits have been physically remitted to the head office.

The Case of the Taxpayer

14. The first witness called by the Taxpayer to give evidence was Mr K, the Assistant Manager Accounts who has worked for Company N for 33 years.
15. Mr K was tasked with explaining the Profit and Loss Statements of the Taxpayer for 2008 and 2009 as contained within the *Applicant's Bundle of Documents*,⁷ in order to illustrate how remittance of profits ordinarily took place. He was also asked to show the manner in which retained earnings were maintained within the Owners Funds.⁸

⁶ Decree No 13 of 2012

⁷ See Tab 8 at Folio 30; Tab 9 at Folio 38 and also Tab 10

⁸ See Folio 34 of Tab 8 for example.

16. When asked by the Tribunal why the 2004 profits were remitted to India in 2007, the witness advised, that this was to protect those funds against the speculated devaluation of the Fiji dollar, coinciding with that period.
17. The witness attributed some of the rationale for the Taxpayer wishing to retain the 2008 and 2009 after tax earnings as undistributed profit, to the fact that the Taxpayer needed to retain funds in Fiji to ensure it could meet any claims being made by members.⁹ Though when pressed upon this issue, the relevant monetary amounts did not of themselves appear to be the sole reason justifying a change in position.
18. The second witness called by the Taxpayer was a Director of the Fijian office of Ernst and Young Accountants, Ms K.
19. Ms K expressed various views in relation to why the BPRANT had been introduced; the fact that the Taxpayer had not sought to make any claim for deductible expenses under the former provision that was Section 21 (zg) of the Act¹⁰ and the likelihood that some component of the retained earnings would be a form of hedging against overseas markets.

The Case of the Respondent

20. The case of the Respondent was underpinned by the evidence of its witness Mr Faktaufon, who has worked as a Chief Auditor with the Respondent for the past 7 years.
21. Mr Faktaufon was asked to explain the rationale underpinning the application of the BPRANT and was taken to correspondence he had prepared to the Taxpayer, in which

⁹ Note for example the impact of Section 31 of the *Insurance Act 1998*.

¹⁰ Section 21 (zg) provided an available deduction for one and one half times of capital expenditure (excluding motor vehicles, furniture and fittings) incurred in Fiji by a non-resident company carrying on business in Fiji from profits earned or derived in Fiji. If the non-resident company carrying on business in Fiji sells or otherwise disposes of the capital asset, the amount of deduction allowed under this section is deemed to be income of the company in the year that the sale or disposal took place;||

the arguments justifying payment of the tax were set out.¹¹ The witness made some general comments relating to the possible application of Sections 34¹² and 108¹³ of the Act, though did not elaborate as to how these were to apply in such circumstance.

22. On cross examination, the witness conceded that the anti-avoidance provisions were not invoked.
23. The witness was of the view that once the profits were earned, they were credited. When questioned by the Tribunal, as to what would happen if the profits were never remitted, it was claimed that the taxation would be refunded.¹⁴
24. The second witness called by the Respondent, was a Mr Singh who has worked in the Audit Compliance Section of the Authority for 38 years. Mr Singh was charged with task of looking at the objection from the Taxpayer.
25. His clarification of the Respondent's position is set out within the Tab 5 of the *Applicant's Bundle*.
26. The witness also agreed that the Taxpayer had not asked for any deductions in accordance with the former Section 21(zg) of the Act.
27. The witness explained that there would be no taxation in the case where the profits were reinvested in the branch.
28. Mr Singh conceded that no payment or credit for remittance had taken place.

Analysis of the Section 7C

29. Counsel for the Taxpayer has provided comprehensive submissions in relation to the way in which Section 7C of the Act should be interpreted. Pages 4 to 6 of the

¹¹ See for example Tab 3 of the Applicant's Bundle.

¹² Transfer pricing provisions.

¹³ Anti-avoidance provisions.

¹⁴ This would appear to be an arrangement fraught with administrative problems.

Applicant's Submission dated 4 October 2013, illustrate the emphasis that the Taxpayer gives to certain words within the relevant statute. The submissions deliberately highlight and underline certain key words so as to support the favourable outcome for which the Taxpayer seeks.¹⁵ The dispute between the parties can be brought down to this. Should the taxation occur when the profits have been physically remitted or when they have been paid or credited ? And what constitutes payment or credit to the head office?

30. The Tribunal has had regard to the well presented submissions of both parties. The critical issue appears to be what was the real effect of the *Income Tax (Budget Amendment) Promulgation 2008*¹⁶, when it introduced a new subsection 7(C)(5) as follows:

“(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.”

31. The language of this amendment suggests that remittance does not need to take place before the tax is imposed;¹⁷ that only profits need to be paid or credited. Clearly in the first place, this was an effort to define profits. I note the submission of the Applicant that it is agreed between the parties that the “said profits have been reinvested by the Applicant Branch in various interest bearing deposits with various financial institutions here in Fiji”,¹⁸ though that would not be the same thing as reinvesting in the Branch.¹⁹
32. The after tax earnings of Company N are the profits referred to in this sub-section.

¹⁵ Note for example the emphasis on the word “remittance” or on the term credit for remittance.

¹⁶ Promulgation No 35 of 2008.

¹⁷ Otherwise the provision would read, “tax shall be based on profits remitted”.

¹⁸ See Page 2 of the Applicant's Submission as filed on 4 October 2003.

¹⁹ When questioned by the Tribunal, Ms K made it clear, that the treatment of a capital purchase, such as a building would have a different impact on the manner in which those retained earnings, were thereafter shown.

33. The next question is whether those profits have been paid or credited for remittance? They are certainly available for remittance. Nowhere within Section 7C is there a requirement that the profits be remitted, prior to being amenable to taxation.

34. At best Section 7C(3) provides:

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;

35. If it is recognised and accepted that the Taxpayer is required to pay the tax,²⁰ it is required to do so within 30 days of the payment or crediting of the profits, or in such period as the Commissioner may specify. Once those profits have been applied for some use other than reinvestment in the Fiji branch, then they would be regarded as paid or credited. By electing not to reinvest those profits into the Branch, is the trigger in which the assessment for BPRANT can take place.

36. That appears to be the purpose of the amending provision that gave rise to Section 7(C)(5) of the Act. It attempted to define when profits could be evaluated. If they were to be reinvested in the Branch, then they would remain exempt from taxation. If they were to be applied for some other use, then they would be regarded as profits paid or credited. The fact that they remain shown as retained earnings, is of little import in the case where the head office and branch office are one and the same. The payment would be made as soon as those funds are available for use. This is when they are available for remittance. In the case where according to the evidence of the Applicant's witnesses, those funds were ultimately deployed into interest bearing term deposits, is a clear illustration of the utilisation of those profits for purposes other than reinvesting into the Fiji branch. As Mr Faktaufon observed, if the Respondent was subsequently advised that after tax earnings otherwise treated as profits were later to be reinvested, then a recalculation of obligations would take place.²¹

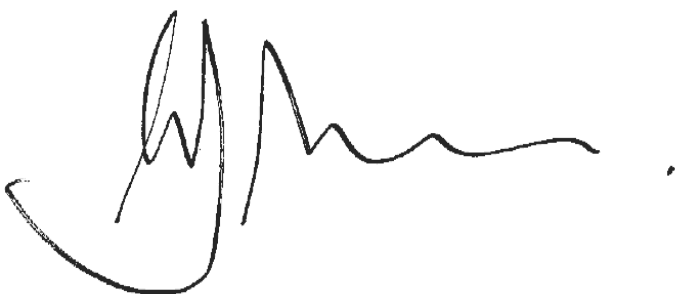
²⁰ A situation that was conceded by Mr Solanki.

²¹ One would expect thought that the need for some certainty of approach would be required.

37. While it may be arguable that some window needed to be given to allow the head office to make a reinvestment decision for the purposes of Section 7(C)(5) of the Act, on the basis that the profits arose out of the 2008 and 2009 financial years, that window would appear to have been well and truly opened. There was clearly no decision to reinvest those after tax earnings into the Fiji branch.
38. For that reason as a question of statutory construction only, I am not prepared to allow this review application. The later amending provision that is Section 7(C)(5) must be allowed to do its work. The language of the provision is clearly to clarify the manner in which profit was to be treated under the preceding sub-sections. The formula becoming quite binary. If the after tax earnings are not reinvested into the Fiji branch, then they are deemed profits paid or credited to the non-resident. The statute must determine the formula for calculating the taxation, not the manner in which the accountants locate the company's "retained earnings". The profit is regarded as being paid or credited to the head office, when it is available to the head office for purposes other than for reinvesting in the Fiji branch office.

DECISION

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

A handwritten signature in black ink, appearing to read 'A. See', with a large, sweeping flourish at the end.

Mr Andrew J See
Resident Magistrate