

9th July, 2013

DECISION OF THE PRIVY COUNCIL

IN

APPEAL COMMISSIONERS V. BANK OF NOVA SCOTIA

BANK OF NOVA SCOTIA WINS IN THE PRIVY COUNCIL

1. The Bank of Nova Scotia prevailed in the Privy Council when the Board dismissed the Appeal by the Government of Grenada against the decision of the Court of Appeal of Grenada.
2. It will be recalled that the case involved a dispute as to whether withholding tax was payable on payments made by the Grenadian branch of the bank to its head office in Canada by way of reimbursement of expenses.
3. On the first level of adjudication before the Appeal Commissioners in Grenada, the Bank's appeal was dismissed and withholding tax was held to be payable. That decision was upheld by the Chief Justice of the Eastern Caribbean Supreme Court. However on appeal to the Court of Appeal that Court decided in favour of the Bank and held that no withholding tax was payable.
4. When the matter came up before the Privy Council in May 2013 on an appeal from the Government of Grenada, the Board had to consider 2 issues. First, whether the funds from the branch office in Grenada to the head office in Canada constituted a payment from one person to another for the purposes of withholding tax. Secondly, whether withholding tax was chargeable in respect of repayment or reimbursement of expenses by the branch office in relation to its share of the cost of expenses incurred by head office.
5. In relation to the first issue, the Board unequivocally upheld the judgment of Mitchell J.A. in the Court of Appeal, and held that the transfer of funds within a single organization could not constitute a payment by one person to another person so as to trigger an obligation to deduct withholding tax.
6. As regards the second issue in relation to withholding taxes the Privy Council was more circumspect. Whilst recognizing that a repayment of expenses does not constitute income generated within the particular jurisdiction, the Board declined to pronounce further on the issue because it was not necessary to do so.
7. In view of the foregoing, there are two things which are clear. First, the judgment of the Court of Appeal that a payment by way of reimbursement of expenses is not of an income nature on which withholding tax is payable remains the prevailing law in almost all Commonwealth Caribbean

jurisdictions, with the possible exception of Antigua. Secondly, the full meaning and scope of the withholding tax legislation in the Caribbean is still to be pronounced upon definitively by the Courts.

8. In view of the prospect of this matter being the subject of further litigation, it would be prudent for those entities for whom this withholding tax issue is of great importance to review the structures which they have in place for reimbursement of expenses to head office.
9. A copy of the judgment is attached hereto.

Claude H. Denbow S.C.

9th July, 2013

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