[2013] UKPC 19
Privy Council Appeal No 0065 of 2012

JUDGMENT

The Appeal Commissioners (Appellant) *v* The Bank of Nova Scotia (Respondent)

From the Court of Appeal of Grenada

before

Lord Hope
Lady Hale
Lord Kerr
Lord Reed
Lord Carnwath

JUDGMENT DELIVERED BY
LORD CARNWATH
ON

9 July 2013

Heard on 14 May 2013

Appellant
Martin Griffiths QC

(Instructed by Stephenson Harwood LLP)

Respondent
Dr Claude Denbow SC
James Bristol
(Instructed by Blake Lapthorn)

LORD CARNWATH

Introduction

1. This appeal concerns the scope of "withholding tax" under the Income Tax Act (No. 36 of 1994) of Grenada. The dispute relates to payments made by the Grenadian branch of a Canadian bank to its head office by way of reimbursement of expenses.

2. Withholding tax is a familiar feature of Caribbean taxing Acts. Richard Toby, in "The Theory and Practice of Income Tax" p 111ff, traces it back to the first provisions for deduction of tax introduced in England in 1803. In more recent times the term withholding tax has been used more narrowly to refer to withholding of tax on income accruing to foreign investors, for which purpose it has been found to be "an efficient collecting device for minimising or arresting evasion by the non-resident". Toby describes its general nature:

> "Most countries require that the tax be withheld at a fixed rate from all gross payments and distributions made to non-residents. These outflows include interest, dividends, royalties, management charges and other fees. The Revenue is not normally concerned whether the income has actually been remitted to the non-resident. It is sufficient that income accrued and that income was paid or credited at the direction of the payee..." (p 113)

3. It should be emphasised that in this case there is no suggestion of tax evasion or avoidance by the Bank. The issue is simply whether the particular payments are caught by the relevant tax provisions. Furthermore, although we have been shown examples of similar statutory provisions in other Caribbean statutes (including Antigua and St Lucia), it is apparent that apart from similarities in structure there are significant differences in the detail of the relevant provisions.

The Income Tax Act

4. Section 1 provides:

> "This Act may be cited as the Income Tax Act and shall apply to –

(a) the assessment of income for the year of assessment 1994 and subsequent years of assessment; and

(b) the deduction of withholding tax from payments made on or after the date on which the Act is passed."

Section 2, which applies "unless the context otherwise requires", defines "tax" as "income tax imposed by this Act . . .", and "withholding tax" as "any tax deducted or deductible pursuant to section . . . 50 . . ."

5. The definition of "person" is important:

"person includes an individual, a trust, the estate of a deceased person, the company, a body of persons, a partnership and every other juridical person."

There is a definition of "permanent establishment", which includes "(b) a branch or office". However, it is common ground that it is of no direct relevance to the provisions before us. The only reference in the Act to "permanent establishment" is in section 43 dealing with "international agreements for the avoidance of double taxation".

6. Part V of the Act deals with the ascertainment of assessable income. Section 29 provides that the assessable income of any person shall include "the gains or profits" from or by way of a number of sources including –

"(a) any business…

(e) premiums, commissions, fees and licence charges…

(i) any other gains or profits accrued to that person which are not included under any other paragraph of this subsection".

Section 29(2) provides that nothing in subsection (1) shall be construed so as to bring within the meaning of assessable income –

"... any amounts accrued to a non-resident (other than from the carrying on of a business or the exercise of employment) which are liable to withholding tax under section 50."

7. Section 50(1) is the principal provision we have to construe. It provides:

"50(1) Where a person whether or not engaged in a business in Grenada makes payments to a non-resident person of interest... discounts, commissions, fees, management charge, rent, lease premium, license charge, royalties or other payment whether or not the payer is entitled to deduct such payment in computing chargeable income of a business, the payer shall deduct tax at the rate specified in the third schedule and pay the amount of tax so deducted to the Comptroller within seven days after the date of payment or credit to the payee."

By the third schedule, tax is to be deducted (except as otherwise provided) at the rate of 15% from the actual amount paid.

Facts and issues

8. The relevant facts can be taken from the agreed statement.

"Between 2001 and 2006, the Bank's branch office in Grenada paid seven amounts of money to its head office in Canada, for services the cost of which was incurred outside Grenada.

The payments made by the Respondent's branch office in Grenada to its head office in Canada were as follows:

(1) Computer expenses (IBM contract) - $2,289,780.65

(2) Data centre cost cited in error as Special Service Misc. - $2,609,132.40

(3) Data centre charge out costs - $678,758.00

(4) Card allocations - $418,169.00

(5) Master Card fees - $127,541.00

(6) Visa Merchant transaction fees - $324,686.00

(7) Head Office charges - $6,162,153.98

Total: $12,610,220.03

These amounts were accepted by the Grenada Branch Office as its share of Head Office expenses incurred on its behalf in Canada during the years 2001-2006.

It is not disputed by the Comptroller that these amounts were entirely a reimbursement of a share of expenses and did not include any element of profit to Head Office."

9. In February 2008 the Comptroller of Inland Revenue assessed the Bank to pay withholding tax on all of these payments under section 50(1). That assessment was upheld by the Appeal Commissioners on 24 November 2009, and by the Chief Justice on 30 March 2011. On 19 September 2011 the Court of Appeal of the Eastern Caribbean Supreme Court allowed the Bank's appeal. The Court of Appeal granted final leave to the Commissioners to appeal to the Privy Council on 13 June 2012.

10. The appeal raises two distinct issues under section 50(1):

i) whether the bank's branch in Grenada and its head office in Canada were both "persons";

ii) if so, whether the payments made by the branch fell within the expression "fees, management charge . . . or other payment".

The judgments below

11. On the first issue, the Chief Justice distinguished the decision of the High Court of Antigua in the case of *British American Insurance Co Ltd v Commissioner of*

Inland Revenue, 8 July 2002. In that case, on similar facts, the court had set aside an assessment under section 39(1) of the Income Tax Act of Antigua and Barbuda, which applied –

> "where any person pays to *any other* person not resident in Antigua and Barbuda mortgage or debenture interest or any rent, annuity or any other annual payment…" (emphasis added)

The Chief Justice held that the difference in wording was critical. He said:

> "On the other hand by its specific terms section 50(1) of the Income Tax Act of Grenada charges the payments, provided in that section, that any person who is engaged in business in Grenada makes to a non resident company if the local branch is a company engaged in business in Grenada. It made the payments in issue to a bank that is non resident as it was incorporated in Canada. In my view the Comptroller was correct when he determined that withholding tax is chargeable on the payments which the appellant made to the Canadian bank". (para 25).

On the second issue he held that there was nothing in the words "other payment" to limit it to payments of the same nature as the specific items or to payments in the nature of income (para 19).

12. In the Court of Appeal the leading judgment was given by Mitchell JA (who had also given the leading judgment in the Antigua case). He noted (para 3) that it was not disputed by the Comptroller that the amounts were "entirely a reimbursement of a share of expenses and did not include any element of income or profit to head office". Having reviewed a number of authorities from different jurisdictions, he concluded that the Comptroller lacked statutory authority to assess the seven payments as attracting withholding tax, saying:

> "35 I am satisfied that the provisions of the Act dealing with withholding tax are an integral part of the Act and constitute no more than a mechanism for the purpose of collecting taxes on income flows to non-resident persons from income earned within Grenada. The withholding tax provisions do not create some special form of taxation which can be levied upon payments which are not of an income nature. Withholding tax is not a separate and discrete form of taxation which is not governed by the fundamental principles of income tax law. It is an integral part of income tax legislation, providing a mechanism for the collection of taxes on income payments before those payments are

handed over to a resident or non-resident and to remit the sums deducted or withheld to the Inland Revenue.

36. There was only one legal entity involved in this case, the Bank of Nova Scotia. It operated in Grenada through a Branch Office. Its Head office was in Canada. The Branch Office could not as a matter of fundamental corporate law be regarded as a legal person engaged in business on its own account in Grenada. The Income Tax Act of Grenada could and did provide for the Grenadian income of the separate Branch Office to be subject to income tax. Those taxes had been paid and no issue arose concerning them. The issue is whether the Branch Office was required by the statute to deduct withholding taxes from a payment made by way of reimbursement of expenses paid or credited to the account of its Head Office in Canada. That it would be obliged to do so if the Grenada branch was a separately incorporated company and if the payments were in the nature of income there can be no doubt. As we have seen in the cases cited above, the distinction between a subsidiary company and a Branch Office is recognised in tax law. A country's parliament may choose to tax a Branch Office in the same way as a subsidiary company, or to tax them differently. The question whether this has been done in a particular country is to be answered only by looking at the plain meaning of the tax law of that country. If there is any ambiguity, recourse can be had to the general purpose and intent of the Act and to other sections that may be helpful. In this case there is no ambiguity. Section 50 of the Grenadian Act is clear and in need of no assistance from other sections of the Act. The definition of "person" in section 2 is clear and does not admit of including the unincorporated Head Office of a foreign bank operating in Grenada. The payments in question, having been a reimbursement of expenses and not having been of income, are not subject to deduction of withholding tax. In any event, the payer and the payee being the same person, section 50 has no application. The payments had not been made to a person within the meaning of that word in the Act."

The submissions

13. Mr Griffiths QC for the Appeal Commissioners submits that the payments come clearly within the words of the subsection. In relation to the first issue, he relies particularly on the agreed facts which include agreement that there were "payments". The word payment implies more than a mere transfer by the same person from one hand to another, or from one account to another. The definition of "person" is inclusive, and is not confined to entities with separate legal personality. As Lord Macmillan said in *Income Tax Commissioners v Gibbs* [1942] AC 402, 418-9, the word "person" in the income tax acts is –

> "most generally used to denote what may be termed an entity of assessment, ie the possessor or recipient of an income which the Acts required to be separately assessed for tax purposes."

What matters in the present context is whether one finds a payment being made with a payer and a payee. The branch office was separate from the head office, and required to be registered as such under the companies legislation. It is no misuse of language to describe it as a "person" making a payment. Like the Chief Justice, he distinguished the decision of the High Court of Antigua in the *British American Insurance* case on the basis of the different wording of the statute. By contrast, he says, the Grenadian statute takes a more flexible approach which is directly applicable to the present situation.

14. In relation to the second issue he says that the payments came clearly within the words of the statute, because they were either "fees" or "charges", as described in the agreed statement, or within the broad term "other payments". There is nothing in the Act to require or justify a separate inquiry as to whether they were in the nature of "income", nor whether they involved any element of "profit or gain". In any event the payments in this case would fall within any such limitation.

15. Dr Denbow SC for the respondents argues that the wording of section 50 requires that there should be payments by one person to another person. The definition of person, albeit inclusive, indicates that the term is used in its ordinary legal meaning except so far as extended by the specific inclusions. It extends to a company or any other "juridical person", but not to something which neither in law nor in ordinary language would be so described. Had it been intended to include a mere branch of a company, that would have been specifically referred to, as indeed it was in the definition of "permanent establishment". The reasoning of the *Antigua* case, albeit on different wording, is persuasive.

16. On the second issue he relies on a number of authorities in which the fact that the statutory language appears to cover the particular payment has not been conclusive. For example, in *British Salmson Aero Engines Ltd v Commissioner Inland Revenue* [1938] 2 KB 482 it was not determinative that a payment was a "royalty" and therefore apparently within the statutory words "payment of any royalty". It was still necessary to consider whether on the facts of the particular case the payment was of a capital or income nature that being a question of fact (see p 495, per Sir Wilfred Greene MR).

17. He accepts that the issue here is not, as in that case, the distinction between capital and income. Nonetheless the definition section makes clear that withholding tax is not a separate species of tax but is a tax on "income". That term has to be

understood in the context of the Act as a whole which is generally concerned with "profits and gains" (see section 29). He refers by analogy to *Pook v Owen* [1970] AC 244, where it was held that payments by way of reimbursement of expenses were not "emoluments" within the relevant UK taxing statute. Similarly in the present context reimbursement of expenses is not in the nature of profits or gains taxable under section 29.

Discussion

18. On the first issue the Board is satisfied that the Court of Appeal reached the correct conclusion for the correct reasons. The natural meaning of the words used by section 50(1) is that there must be a payment by one person to another. Mr Griffiths QC suggested that a transfer of funds by one person from one account to another could be described as a payment by a person to a person. In the Board's view that is not a natural use of language. Nor does he gain any support from the acceptance in the agreed statement that what happened in this case was "a payment". That is a perfectly apt word to use to describe a transfer of funds within a single organisation, but that does not make it a payment by a person to a person. The Board agrees with Dr Denbow SC that the terms of the definition of "person" run counter to the Appeal Commissioners' arguments. The specific inclusion of a "company" makes it difficult to argue that the draftsman intended without express reference to include a mere part of a company. Although the words used are not identical to those used in the Antigua case, the sense in the view of the Board is the same.

19. That is sufficient to decide the appeal in favour of the respondent. The second issue in the Board's view raises more difficult questions both as to the nature of withholding tax, and its application to the facts of this case. These issues were not fully explored in the courts below, and they may have wider significance than the ambit of this case, or indeed of the Grenadian tax legislation.

20. Mitchell JA's view that withholding tax is not a separate form of taxation, but no more than a mechanism for the collection of income tax, is not self-evident. Although withholding tax is included in the income tax legislation, a distinction is drawn in the opening of section 1 between (a) "the assessment of income" and (b) the deduction of withholding tax from "payments". The payments in question are defined by section 50, which contains no reference to the description of assessable income in section 29. Indeed, the contrast is to some extent underlined by section 29(2), which specifically excludes amounts subject to withholding tax from the scope of assessable income. As Mr Griffiths QC submits, part of the purpose of the separate treatment of withholding tax may be to avoid arguments about the precise nature of the payments.

21. On the other side, Dr Denbow can point to the definition of tax even in this context as meaning "income tax", and raise objection to such a tax being imposed on something which shows no element of profit or gain. It may be said that the common feature of the items listed in section 50(1) is that they arise from income generating activities in Grenada, and do not naturally extend to repayment of expenses necessarily incurred in generating income. To that extent *Owen v Pook*, though on different statutory words, can be said to provide some persuasive support.

22. In the Board's view, since it is not necessary to decide this point, it is preferable not to do so without a more thorough exploration of the issues and of their implications in this and other jurisdictions. We note that in Antigua, following the decision to which we have referred, the statute was amended to bring such payments expressly within the scope of withholding tax. By the Income Tax (Amendment) Act 2003, section 39 was amended by substituting a direct reference to "expenses allocated to a resident branch or agency by a non-resident company" and inserting a new subsection (5):

> "for the purposes of this section a resident branch of a foreign company and its headquarters and other non-resident branches shall be regarded as separate persons carrying on separate businesses."

Without reaching a final view on the meaning of the unamended Grenadian statute, the Board observes that, if payments of this kind are to be brought within the scope of withholding tax, it is preferable that it should be done by specific legislation in order to avoid disputes of the kind that have arisen in this case.

Conclusion

23. For these reasons the Board will humbly advise Her Majesty that the appeal from the Court of Appeal of Grenada should be dismissed. Subject to representations to the contrary, to be submitted in writing within 28 days, the costs of the appeal are to be paid by the appellant.