

CARIBBEAN TAX LAW UPDATE

NOVEMBER 2014

The Scope of Withholding Tax

Introduction

1. This is a publication which will be disseminated quarterly among professionals involved in the practice of income tax in the Commonwealth Caribbean. The purpose of the Caribbean Tax Law Update (“**CTLU**”) is to discuss recent decisions and legislative changes which impact on the administration and the practice of tax law in the Commonwealth Caribbean.
2. The CTLU will be of primary interest to Accountants as opposed to Lawyers. This is because in the real world, as has been stated by the Supreme Court in England in the recent **Prudential** case, most tax advice is given by Accountants as opposed to Lawyers.
3. However, it is important to emphasize that the publication does not constitute and is not intended to constitute legal advice. No one should rely on what is stated in the CTLU as representing the legal position in any particular case.
4. This publication is to be found on the website of www.denbowlawoffice.com.

Withholding Tax

5. The liability to deduct withholding tax from various types of payments made by a taxpayer from any Caribbean country to a non-resident person is a continuing source of debate and contention between taxpayers and Revenue authorities across the English speaking Caribbean.
6. The foregoing contention would appear to arise from the fact that the liability to deduct withholding tax is invariably with respect to multi-national corporations, which are seen as having deep pockets by Revenue authorities in the Caribbean with the capacity to pay substantial sums of money to the coffers of the Treasury in these islands. It is therefore a focal point of the audit and assessment exercise of the Revenue authorities and consumes substantial attention as well as the initiation of litigation.
7. The most recent decision on withholding tax emanates from the Tax Appeal Board of Trinidad and Tobago (“**the Tax Court**”) in the case of **Shell Trinidad Limited v. Board of Inland Revenue**¹. That case represents a helpful restatement of the underlying principles of the withholding tax regime which exists in the income tax law

¹ Appeal No. 3 of 2011

of not only Trinidad and Tobago, but also the islands of the English speaking Caribbean in varying degrees.

The Shell Trinidad Case

8. The taxpayer was a company incorporated and resident in Trinidad and Tobago (“**T&T**”) during the income year in question. It sought to deduct the sum of \$1,765,283.53 paid to its associated company Shell Trinidad and Central America Limited for the provision of management advisory services.
9. Such a deduction to a non-resident person was prohibited unless withholding tax had been paid, which it had not been. The question which arose for decision was whether withholding tax ought to have been deducted from the aforementioned payment made to a non-resident person.

The Relevant Legislation

10. **Section 50 of the Income Tax Act of Trinidad and Tobago** provides as follows:

“50. (1) There shall be levied and paid income tax, in this Act referred to as withholding tax, at the rate set out in Part II of the Third Schedule –

(a) on any distribution made to any person not resident in Trinidad and Tobago and to every non-resident company;

(b) on any payment made to any person not resident in Trinidad and Tobago or to any person on behalf of such non-resident person, and to every non-resident company (where such person or company is not engaged in trade or business in Trinidad and Tobago), so however that in the case of a payment arising outside Trinidad and Tobago to such a person or company withholding tax shall not be payable.”

11. The relevant part of the foregoing provision for the purpose of the **Shell** case is to be found in the proviso which states:

“...so however that in the case of a payment arising outside Trinidad and Tobago to such a person or company withholding tax shall not be payable.”

12. The clear intention of the foregoing proviso is that certain payments made by a person

in or from T&T out of funds generated in that country to a non-resident, can be regarded in law as arising outside of T&T so as to be exempt from the charge to withholding tax. In the case of **Board of Inland Revenue v. William H. Scott**², the Court of Appeal in T&T held that where the activities and services performed by a non-resident took place outside of T&T that income was from a source outside of T&T. Consequently there was a payment of income arising outside of T&T within the meaning of the proviso and no withholding tax was chargeable.³

13. The decision in the **William H. Scott** case is but one example of the general principle in income tax law, that when the question arises as to where income has been earned, one has to look to see what the taxpayer has done to earn the income and where he has done it.
14. In the **Shell** case the non-resident person performed the activities to earn the payment in question outside of T&T. Hence the payment arose outside of T&T. It was in accordance with this principle that the Tax Court in the **Shell** case had no difficulty in following the precedent established by the Court of Appeal in the **William H. Scott** case. In that regard the following statements of the Tax Court are instructive.

“36. This interpretation is supported by the analysis of the Court of Appeal in the William H. Scott case, in that the incidence of withholding tax is on the earner of the income and in this regard, we must bear in mind that a non-resident can only be taxed on income earned within the jurisdiction.

37. In this matter, it is therefore the income of the recipient company, Shell Caribbean and Central America Limited, which has to be examined to determine whether that payment for certain services arises within or outside of Trinidad and Tobago.

38. In making that determination we have considered what has the recipient company done to earn the income in question. The recipient company has provided a series of services to the Appellant and these services were provided outside of Trinidad and Tobago...”

The Implications of the Shell Decision for the Wider Caribbean

15. It should be noted that the decision in the **Shell** case is on the surface unique to T&T. This is because T&T is the only country with the express proviso in the context of

² Civil Appeal No. 50 of 1988

³ See *Income Tax Law in the Commonwealth Caribbean* 2nd edition by Dr. Claude H. Denbow S.C. at paragraph 7.8

withholding tax legislation which stipulates that in the case of a payment made from one jurisdiction to a non-resident person with respect of services performed outside of that jurisdiction, is not subject to withholding tax.

16. In the absence of such an express proviso, there is a continuing doubt in the income tax laws of the Eastern Caribbean as to the legal position in relation to withholding tax on payments made from any one of those countries to a non-resident person, in respect of services performed abroad or outside of those countries.
17. It is the writer's view that the same obtains in the Eastern Caribbean as it does in T&T. However to arrive at that conclusion in the case of the former, it requires reference to a number of sections dealing with the imposition of income tax in order to establish the underlying principles of the withholding tax regime. It becomes a matter of statutory construction and the articulation of the basic principles of income tax law in terms of jurisdiction. It is an exercise which has not as yet been the subject of judicial adjudication.

What does the Future Hold

18. In the interim, it is clearly desirable that the countries of the Eastern Caribbean should seriously consider enacting legislation in the same terms as exists in T&T. This would provide certainty and uniformity in a region where multinational financial services corporations operate in most of the territories. It is highly undesirable that the law should be different in one country as opposed to another, in relation to such a fundamental issue as payments made from these territories to their head offices in terms of allocation of shared expenses. This is a goal in respect of which a veiled suggestion has been made in the judgment of the Privy Council in the most recent case of **Appeal Commissioners v. Bank of Nova Scotia**⁴ on appeal from Grenada.

Claude H. Denbow S.C.

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This publication was prepared in conjunction with Mrs. Donna Denbow and Mr. Jerome Rajcoomar.

The publisher is involved in the practice of tax law in the Caribbean and is the author of *Income Tax Law in the Commonwealth Caribbean* (2nd edition) published by Bloomsbury Professional in October 2013.

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