

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT

Civil Appeal No. ABU 0049 of 2016
(On Appeal from HBT 4 of 2014
which was on Appeal from the Tax
Tribunal in Matter No. 7 of 2012)

BETWEEN : **REDDY'S ENTERPRISES LIMITED**
Appellant

AND : **CHIEF EXECUTIVE OFFICER, FIJI REVENUE AND
CUSTOMS AUTHORITY**
Respondent

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

Counsel : **Mr. M. Lennard & Mr. R. Krishna for the Appellant
Mr. S. Ravono for the Respondent**

Date of Hearing : **14 September 2018**

Date of Judgment : **05 October 2018**

JUDGMENT

Basnayake, JA

[1] I agree with the reasoning and conclusions of Jameel, JA.

Almeida Guneratne, JA

[2] For the reasons set out in Madam Jameel JA's judgment, I agree that the appeal should be partly allowed.

Jameel, JA

(a) Introduction

- [3] This is an appeal from the Judgment of the Tax Court of Fiji at Suva, dated 18 April 2016 dismissing the Appellant's appeal, from the decision of the Tax Tribunal, upholding the decision of the Respondent.
- [4] The appeal relates to the interpretation of the Income Tax Act Cap. 201 Cap 201, Tax Administration Act 2009 and the Income Tax (Dividends) Regulations 2001 (**"the Dividends Tax Regulations"**).
- [5] The essence of the matter for determination by this court is whether taxes paid by the Appellant on its corporate profits *prior to* January 2001, can be given credit or reckoned, for the purposes of computing its liability in respect of Withholding Tax on dividends distributed by it, to its shareholders *after* 1 January 2001.
- [6] For the reasons I will set out below, I am of the opinion that on a true construction of the relevant provisions of the Income Tax Act Cap 201 as amended, and the Dividends Tax Regulations, taxes paid prior to 1st January 2001 can be given credit in respect of dividends distributed after 1 January 2001; and that such an interpretation does not amount to an unwarranted or, retrospective application of the Dividends Tax Regulations. Accordingly, for the reasons set out below, the Judgement of the High Court dated 18 April 2017 must be partly set aside on the issue of the liability of the Appellant to Non- Resident Dividends Withholding Tax (**"NRDWT"**) based on the computation arrived at by the Respondent.
- [7] The Appellant is a limited liability company registered under the laws of Fiji. It had paid corporate tax on its profits. In certain years, it distributed its profits in the form of dividends to its resident, as well as non-resident shareholders. The shareholders being separate legal entities from the company, and as the law originally stood, were liable to pay dividends tax upon receipt of the dividends. The result was that there was double taxation: in the first instance when the company paid tax on its own corporate profits, in the second instance when the dividends paid to

shareholders which were sourced from profits on which the company had already paid tax, were once again taxed in the hands of the shareholders.

- [8] It is undisputed that there was an intentional shift in policy and that the legislature amended the law so as to exclude dividends tax, in respect of those dividends that had been distributed from the profits on which the company had paid income tax prior to the distribution of dividends. Thus, the intention was to henceforth tax only dividends that were sourced from profits on which taxes had *not* been paid by the company, before it distributed dividends.
- [9] The central matter for determination by this court is whether taxes that were in fact (and this is undisputed), paid prior to 1 January 2001, can be taken into consideration in calculating tax due on dividends distributed after 1 January 2001, and thereby exempt those dividends from tax. In other words, the matter for this court is the interpretation of the amending law, read with the Dividends Tax Regulations.

The facts and chronological sequence of events

- [10] The facts are undisputed. Finegrand Limited (“**Finegrand**”) was a non-resident shareholder of the Appellant Company, incorporated and resident in Hong Kong. Between 2001 and 2011, the Appellant had distributed dividends to its non-resident shareholders. In terms of the prevailing exchange control regulations, the remittance of monies had to be done with the permission of the Reserve Bank of Fiji (“**the Bank**”). The Bank required the tax payer to first obtain what is referred to as a ‘Tax Clearance’ from the Respondent, in order for the Bank to approve the remittance of foreign exchange. This ‘clearance’ addressed to the Bank is given in the form of a letter addressed to the Bank, but is in respect of the applicant who makes the request to the Respondent. The applicant tax-payer is required to fill in a standard form, described as “I, T. 102” (RHC 513), which contains information necessary to enable the Respondent to decide whether clearance is to be granted. This then becomes the basis for the Bank to grant permission to the tax payer to remit funds overseas in ensuring compliance with the law relating to exchange control. The clearance given

by the Respondent was on the basis that the Appellant had no outstanding NRDWHT tax liability.

- [11] Between 2001 and 2011 the Appellant had remitted funds to its non-resident shareholders after having obtained approval from the Bank who, in turn relied on the 'clearance' given by the Respondent, certifying that the Appellant had no outstanding tax liabilities. In the case of Withholding tax, liability to pay the tax is on the recipient shareholder, though it is the duty of the company distributing the dividend to withhold it at source, and remit it to the Revenue. Sections 10 (4) and (5) provides as follows: -

“(4) The person liable for the tax shall be the person to whom or in whose favour the dividend accrues.

(5) Notwithstanding the provisions of subsection (4), the tax shall be recoverable from the company paying or crediting the dividend”.

- [12] It is significant to note at the outset that the “clearance” originally given to the Appellant between January 2001 (the time at which the Dividends Tax Regulations came into effect), and 2011, was based on the Respondent’s interpretation and application of the said Regulations, upon its introduction on 1 January 2001.
- [13] After the Dividends Tax Regulations first came into operation, the Respondent had permitted the Appellant to take credit for taxes already paid by them prior to 1 January 2001, in computing NRDWHT, and this admitted practice continued until 2011. This signifies, and the evidence reveals that the Respondent’s understanding, interpretation, and unequivocal position in respect of the implementation of the amending law was that taxes paid during the period prior to 1 January 2001, (when the amending law commenced operation) could, and were taken into consideration in computing NRDWHT liability of the company distributing dividends. This was the *status quo ante* until the Appellant, in 2011 sought tax clearance to remit dividends to its non -resident shareholder, when, for the first time in eight years, the Respondent resiled from its previous position, and now took the position that pre-2001 taxes paid could *not* be given credit for the purpose of computing NRDWHT, which was payable by the Appellant to the Respondent, of course on behalf of the

shareholder. It was the reversal of this position on the part of the Respondent that gave rise to this dispute between the parties.

The first demand by the Respondent

- [14] On 19 September 2011, the Appellant sought to pay dividends of \$ 1,321,428 (which had been declared previously in its financial year ending 30 April 2009), but remained unpaid. Of this, a sum \$ 1,178,407.12 was payable to its non-resident shareholder Finegrand. Therefore, the Appellant applied to the Respondent for tax clearance, in order to proceed to obtain exchange control permission from the Bank. At this point, the Respondents demanded a sum of \$329,183.09 in order for clearance to be given for remittance of the dividend.
- [15] This 'First demand' was based on a computation which now, unlike previously, excluded corporate taxes already paid by the Appellant during the period prior to 1 January 2001. The new computations reached back to dividends distributed from 2001, in respect of which the Respondent had previously granted clearance. On 20 December 2011, the Appellant paid the sum demanded by the Respondent, and on 23 December 2011, tax clearance was given by the Respondent to remit the sum of \$ 1,178, 396.63. The Appellant filed its Objection to this demand, on the basis that the Respondent's calculation of qualifying dividend was contrary to the Income Tax Act Cap. 201 and the Dividends Tax Regulations.
- [16] On 4 July 2012 the Respondent disallowed the Objection of the Appellant on the basis *inter-alia*, that the Dividends Tax Regulations became effective only from 1 January 2001, and that only corporate taxes paid in the year of distribution of the dividend could be considered, under Regulation 4 of the Dividends Tax Regulations. In other words, the position now taken was that corporate taxes *paid*, prior to 1 January 2001, would be excluded in computing NRWHT liability.

The second demand by the Respondent

- [17] Subsequently, by letter dated 31 July 2012, the Respondent demanded (the 'Second demand') an additional sum of \$124,872.33 as NRWHT. The basis of the

additional sum demanded was identical to that of the first sum demanded. On 13 August 2012, the Appellant paid the additional sum demanded, and on the same date, filed a notice of Objection to the additional sum demanded.

[18] The basis of the Appellant's Objection was that: the Respondent was not empowered to amend a demand (which it had first made demanding \$ 329,183.09); and if it did have the power to do so, then the demand amounted to an "assessment" for the purposes of the Tax Administration Act 2009, because the first "assessment" was the "tax clearance" which had been given more than six years before this demand, and being an 'assessment', was therefore time-barred in terms of the Tax Administration Act 2009; the additional sum was not in accordance with the Dividends Tax Regulations, and the Additional Demand had failed to take into account matters set out in the Second Objection.

[19] On 13 February 2013, the Respondent disallowed the 'Second Objection' on the basis of the reasons set out in its decision in respect of the 'First Objection'.

The Application for Review to the Tax Tribunal

[20] Aggrieved by these decisions, the Appellant invoked the jurisdiction of the Tax Tribunal, by applications for Review against the decisions of the Respondent, dated 4 July 2012 in respect of the First Objection, and 15 July 2014 in respect of the Second Objection. The applications were eventually amalgamated. The Appellant sought a revision of the decisions, and a refund of the sums paid.

Decision of the Tax Tribunal

[21] The application was heard before the Tax Tribunal; a Statement of Agreed Facts and Issues was filed, and both oral and documentary evidence was led. The Tribunal dismissed the application with costs, and its Order in summary, was that;

- a) subject to section 11 of the Tax Administration Decree 2009, the Respondent is entitled to amend or alter a Tax Assessment within a six-year window;

- b) the amendments within the period 2006, 2009 and 2010 are within the statutory window, and;
- c) *“even if some of the basis for the formula that was used in part for the ultimate calculations was not”*.
- d) *“a variable within a formula that has not been correctly sourced is no shield to immunity.*

The Judgment of the High Court

- [22] The matters challenged could be categorized broadly under two heads; the first was the basis of the computation; the second was the characterization of the demand made by the Respondent, and whether it amounted to an assessment and was therefore time – barred, or whether it was not in law an “assessment” and was therefore not subject to the provisions relating to limitation.
- [23] In the Tax Court, the matter that took centerstage was the distinction between an assessment issued, and a tax clearance given by the Respondent. However, in my view, had the computation issue been answered first, the answer to the second question would have been, if at all, only academic.
- [24] The Court correctly found that since the ‘tax clearance’ (letter) was addressed to the Bank to enable it to grant permission for the remittance of foreign exchange by the Appellant tax payer, it did not have the character of an assessment. The learned Judge relied on the dicta of Issacs J. in **R v DCT (SA) ex parte Hooper** (1926) 37 CLR 368, who said that an assessment is:

“the Commissioner’s ascertainment, on consideration of all relevant circumstances, including sometimes is own opinion, of the amount of tax chargeable to a given taxpayer”.
- [25] In reaching this conclusion, the learned Judge, at paragraph 33 of his Judgment, held that because sections 34(1) (b) and 109 (3) of the Income Tax Act Cap 201 require the tax payer to preserve its business documents for a period of seven years from the end of the tax year, (and in this case the Respondent had done so), the

impugned 'amendments' had been made within six years, and therefore were not time-barred. At this point it must be noted that the power to issue amended assessments is not dependent on the duration of the duty of the tax payer to preserve its documents, and therefore the basis of the seven-year rule relied on by the learned Judge, does not reflect the correct legal position, although eventually, for the reasons I set out below, nothing turns on that finding.

- [26] The learned Judge correctly held that the "tax clearance" given was not a notice of assessment. He held that the demand made in September 2001, was 'tantamount' to the first notice of assessment and therefore, the Appellant's objection that the second demand amounted to an 'amendment' of an assessment after six years is without basis. However, this runs counter to the argument of the Respondent that the demand for NRWHT was not an 'assessment'. I must state at this point that I agree with the conclusion reached by the learned trial Judge in regard to the distinction between an assessment and a tax clearance. However, I do not think that the first demand was an 'assessment', and will set out below the reasons for my conclusion.
- [27] The learned Judge then considered the issue of whether the Respondent is bound by his previous ruling to allow tax credits. In other words, the question was whether the Respondent is in law entitled to resile from the previous position taken on the same issue. In arriving at the conclusion that the Respondent was in law entitled to do so, the learned Judge relied on judgement of the Court of Appeal in Punja's v Commissioner of Inland Revenue [2006] FJCA para [88], in which that court relied on the judgment in Commissioner of Inland Revenue v Lemington Holdings Ltd. [1982] 1 NZLR 517. Once again, I must state that I agree with the learned Judge's view that the Revenue is entitled to change its position on a matter. However, this can be done only in certain circumstances, which are not relevant to my final conclusion on the matters under appeal.
- [28] Finally, the learned Judge considered the issue of whether the Appellant is entitled to tax credits for taxes paid prior to 1 January 2001. In this respect, the learned Judge held that the question of whether the Regulations are retrospective or prospective was not relevant, because the words used in the Regulations reveal that

they were intended to apply only prospectively from 1 January 2001. However, to my mind, in view of the language contained in the formula set out in Regulation 4 (1), the matter in issue could not have been determined by labelling the Regulations as prospective or retrospective. However, as I have said before, it was the basis of the computation itself, as set out in the formula in the Dividends Tax Regulations, that remained for determination. The learned Judge also relied on the fact that Regulation 4(1) stated that no penalty may be imposed unless the act or omission occurred on or after the date of publication of the Regulations in the Gazette, and found that this indicated that the Regulations were meant to operate prospectively only. In the opinion of the learned Judge therefore, the Regulations were intended to apply only to acts or events after 31 December 2000, and not to those before 1 January 2001. On this basis, the learned Judge held that corporate taxes paid prior to 1 January 2001 could not be given credit for the purposes of computing NRDWHT, and the appeal of the Appellant was dismissed with costs of \$1000.00.

The Appeal before this Court

- [29] The Appellant has raised nine grounds of appeal, which can be broadly divided under two heads. The first is the chargeability of NRDWHT in the light of the amendment to the law introduced by the amendment introducing Section 21A of the Income Tax Act and the Dividends Tax Regulations. The second is whether a tax clearance issued by the Respondent in terms of section 72A of the Income Tax Act Cap 201 Cap 201, amounts to an assessment, and is therefore subject to the limitation provisions contained in the Tax Administration Act 2009.

The grounds of appeal

- [30] The grounds of appeal raised by the Appellant are reproduced below: -
- 1. The learned Judge erred in law in failing to correctly apply the words of section 8 (2) (a) of the Act in interpreting the Dividends Tax Regulations.*
 - 2. The learned Judge erred in law in failing to consider or apply himself to the Appellant's submission that on ordinary principles of interpretation corporate tax paid before the 2001 income tax year could be used for the*

purpose of calculating NRDWT under section 8 of the Act and the Dividends Tax Regulations.

3. The learned Judge erred in law as follows:

(a) he correctly held that Regulations 1 (3) and 1(4) of the Dividends Tax Regulations explained the intent that the Dividends Tax Regulations apply only to acts or events after 31st December 2000 (i.e. they bring to tax dividends paid after that date);

(b) however he wrongly concluded that the consequence of (a) was to prevent pre -2001 tax credits from being taken in to account for the purposes of calculating available tax credits after 31 December 2000 (i.e. he wrongly found that Regulations 1(3) and 1 (4) of the Dividends Tax Regulations restrict the ordinary meaning of section 8 (2) (a), which - correctly interpreted- has no limitation as to the date in which tax has been paid by that company in relation to the relevant taxable income from which dividends are paid.)

Whether a tax clearance is an assessment

4. The learned Judge erred in law in finding that, since the First Schedule of the Tax Administration Act 2009 did not include a tax clearance, a tax clearance certificate could not be a tax assessment.

5. The learned Judge erred in law in holding that the tax clearance certificates issued to the Appellant were not notices of assessment.

6. The learned Judge erred in law in failing to consider that:

- (a) the Respondent would not issue a formal notice of assessment, tax demand or other notice if no NRDWT was payable on a dividend to be paid to a non-resident by a company in the position of the Appellant and*
- (b) for the purposes of section 11 of the Tax Administration Act 2009 a tax clearance is the only document issued by the Respondent which evidences the Respondent's ascertainment of the amount of NRDWT chargeable and*
- (c) in section 2 of the Tax Administration Act 2009 the term "tax assessment" is defined as "an assessment or determination listed in the First Schedule" and*
- (d) paragraph (a) of the First Schedule of the Tax Administration Act 2009 lists "an assessment of income tax, including a nil or loss notice" and*

- (e) *in section 2 of the Tax Administration decree, "income tax" means income tax imposed under the Income Tax Act Cap 201 (Cap 201) and*
 - (f) *in section 2 of the Income Tax Act Cap 201 (Cap 201) "tax" means every tax or levy imposed in that Act and*
 - (g) *Withholding tax is a tax on income and it is imposed under the Income Tax Act Cap 201 (Cap 201) and*
 - (h) *an assessment is a decision of the Respondent, as to the amount (if any) of any particular type of tax which is chargeable against or in respect of any particular taxpayer for any particular revenue period and*
 - (i) *the tax clearance certificate notifies the recipient(s) of the Respondent's decision that no NRDWT is payable and*
 - (j) *as such the tax clearance is a "notice of assessment" in terms of section 11 of the Tax Administration Act 2009.*
7. *The learned Judge erred in law and fact in holding that no evidence or contention had been raised by Appellant that any of the amended assessments were served on Appellant on a date later than six years for the service of the "original demands / notices". In doing so he appeared to believe that original demands for withholding tax had at some time been made – when the Appellant's Point on Appeal as that, no demand having been made, the relevant tax clearances must be the starting points for the purposes of section 11 of the Tax Administration Act 2009.*
 8. *The learned Judge erred in failing to consider or apply himself to the authorities submitted in support of the principle of finality in taxation.*
 9. *The learned Judge erred in law in failing to consider that the Respondent's right to change its position on matters of taxation (following the case of *Punja v CIR* [2006] FJCA 66) did not in these circumstances override the limitation of the Respondent's right to amend a tax assessment issued more than six years previously."*

The first, second and third grounds of appeal

Calculation of NRDWHT under the Act and Regulations

- [31] The first, second and third grounds of appeal can conveniently be considered together. They relate to the computation of NRDWHT as reflected in the amendment to section 21 of the Income Tax Act Cap 201, introduced on 1 January 2001, read with the Income Tax (Dividends) Regulations, and the Tax Administration Act 2009. Computation of NRWHT was to be done by applying the formula prescribed in the Regulations.

Legislative Framework and History

- [32] As the Income Tax Act Cap 201 (Cap.201) stood prior to the amendments which are the subject matter of this appeal, a company which had paid corporate income tax on its own profits was also liable to deduct NRDWT on the payment of dividends to its shareholders. As described above, this resulted in double taxation.
- [33] The charging section is section 8. Permissible deductions are contained in section 21. Section 8 of the Income Tax Act Cap 201 was amended in 2001. The Dividends Tax Regulations came into effect from 1 January 2001, to provide for the implementation of the Principal Act.

The Income Tax Act Cap 201 (Cap. 201)

- [34] Section 8 of the Income Tax Act Cap 201 (Cap 201) as amended, provides as follows:
- 8. - (1) Notwithstanding anything to the contrary in the other provisions this Act, there shall be paid a tax to be known as "non-resident dividend withholding tax", in respect of the payments specified in subsection (2) at the rate of 15 per cent of the gross amount payable.*
- (2) Such tax shall be payable in respect of-*
- (a) the portion of a dividend declared, paid or credited by a company incorporated in Fiji; and which has been paid or credited, either wholly or partly, from*

chargeable income upon which no tax has been paid by that company; (emphasis added).

if the person in whose favour or to whom any dividend has been declared, paid, or credited, is –

(i) A non-resident; or

For the purpose of this paragraph-

"dividend" means any amount distributed by a company, whether carrying on business in Fiji or not, to its shareholders;

Introduction of the concept of Qualifying Dividend

[35] The Income Tax (Budget Amendment) Act 2001 introduced section 21A to the Principal Act, (the Income Tax Act Cap 201 Cap 20). Section 21A is titled "Deductions". This was aimed at removing the effect of double taxation. The new provision came into effect from 1 January 2001, and section 21A provided as follows:

(1) "In determining total income, a deduction shall be allowed in accordance with this section for a qualifying dividend included in a tax payer's total income.

(2) For the purposes of this section, "qualifying dividend" means a dividend paid or credited by a company from income which has been charged to tax.

(3) The amount of the deduction is the amount of the qualifying dividend.

(4) A deduction shall not be allowed unless the tax payer provides to the Commissioner a certificate issued by the Company paying or crediting the dividend in accordance with the regulations".

The Income Tax (Dividends) Regulations 2001

[36] The Income Tax (Dividends) Regulations 2001 came into operation on 1 January 2001. The provisions relevant to this appeal are reproduced below: -

"1-(1) These Regulations may be cited as the Income Tax (Dividend) Regulations 2001.

(2) In these Regulations, "the Act", means the Income Tax Act Cap 201 (Cap. 201)

(3) Subject to paragraph (4), these Regulations are deemed to have come into force on 1st January 2001.

(4) If a person would be subject to a penalty in respect of any act or omission under

these Regulations, no penalty may be imposed unless that act or omission occurred on or after the date these Regulations were published in the Gazette.

Interpretation

2. In these Regulations, unless the context otherwise requires-

"appropriate form" means a form approved by the Commissioner [which may

include an electronic version,] for use in any particular case pursuant to these

Regulations;

"corporate tax" means tax paid on the chargeable income of a company

"deemed tax paid" means a credit for taxes that would otherwise have been payable on that portion of income that would normally be subject to tax but for a concession granted under [section 21(1) (v), section 21(1) (w), section 21B, section 21C, section 21E, and 6th Schedule of the Income Tax Act Cap 201, section 6 of the Eleventh Schedule to the Income Tax Act Cap 201, and Table C6 C(c) of the Fourth Schedule of the Income Tax Act Cap 201.

Record of dividend distribution

3.- (1) Every company shall make and keep a record of dividend distribution under

these Regulations as if it were a book of account under section 109 of the Act.

(2) A record of dividend distribution shall contain the following information-

(a) the total income tax paid by the company in each year of assessment;

(b) the date on which a dividend is paid or credited each year;

- (c) the cut-off date for determining the entitlement to a dividend;
- (d) the amount of total dividends paid to shareholders;
- (e) the balance of retained earnings together with opening and closing balances from previous years;
- (f) the percentage of each dividend subject to corporate tax, calculated in accordance with regulation 4;
- (g) the dollar amount of excess tax credits that can be carried forward;
- (h) the total dividends paid to other resident companies;
- (i) the total income tax previously paid on dividend received from other companies and
- (j) in the case of non – resident shareholders, all other information that will help to ascertaining the correct amount of withholding tax that should be paid on the dividend; and
- (ii) in the case of resident individual shareholders, all other information that will assist in ascertaining the correct amount of qualifying dividend that can be claimed as a deduction.

The percentage of dividends subject to corporate tax

4. (1) The percentage of dividends subject to corporate tax shall be calculated

in accordance with the following formula

$$P = [(A+S)/(B-S) \times (1-C)/C] \times 100$$

Where

P = percentage of dividend subject to corporate tax

A = corporate tax paid including excess tax credits from previous years and income tax paid on dividends received from other companies

B = dividend paid

C = company tax rate in the year of distribution

S = deemed tax paid.

(2) The Formula set out in paragraph (1) is used as the basis for calculating both the qualifying dividend to be allowed as an income tax deduction under section 21(A) and also as the basis for calculation the portion of the dividend liable to withholding tax under section 8(2).

(3) *The percentage of dividend subject to corporate tax that is calculated in paragraph (1) cannot exceed 100%.*

(4) *Any excess tax paid that would otherwise have resulted in the percentage of dividend subject to corporate tax being greater than 100% shall be carried forward to the following year.*

(5) *A tax credit referred to in paragraph (4) may not be refunded in any circumstances.*

Order of distribution of retained earnings

8. *For the purpose of regulations 4 to 7 all distribution of dividends are deemed to have been paid from retained earnings in the chronological order that such profits have been accumulated". (Emphasis added).*

Discussion

The Principles governing the interpretation of an amending Act

[37] To guide me in determining this matter I consider it necessary to look at a rule of statutory interpretation which I consider relevant to the determination of this appeal; the 'Mischief rule'.

[38] It was undisputed that the law as it existed imposed double taxation, and that there was a definite shift in policy to remove this. This fact is specifically conceded in the written submissions of the Respondent before this Court, in paragraph 18 and it is stated as follows:

"The Dividends Tax Regulations came into force with effect from 1st January 2001 with the intention to provide a 100% exemption or deduction will be allowed (sic) on any distribution of dividend that has been fully subjected to tax" (vide Regulation 1(3) Income Tax (Dividend) Regulations 2001."
(Emphasis added).

[39] In the court's task of interpreting legislation, it is proper to assume that Parliament does not legislate in vain, or in a vacuum, and that all words in an Act must be given a meaning. If it perceives a defect or mischief in an existing Act, and it seeks to remedy that defect or mischief by way of an amendment, it then becomes the duty of the court to bear that in mind in interpreting the amendment, and this court must

therefore proceed to interpret the amendment so as to give effect to the ‘mischief’ sought to be remedied, bearing in mind the object of the legislature in enacting the amending legislation. Although the word ‘mischief’ was the word originally used by courts to describe the rule it formulated, the modern trend has been to substitute it with the words “object of the legislature”. The Rule demonstrates the existing ground situation, problem or defect in the law, which necessitated and triggered the amendment.

- [40] The rule in Heydon’s Case (1584) 3 Co Rep.7a (cited in Bennion on Statutory Interpretation, Lexis Nexis, 6th ed. 2017, para 10.01) is a well-known authority that exemplifies this rule, and hardly needs repetition. However, in view of the arguments advanced by both parties, I consider it appropriate to reproduce it here, to assist in the discussion and determination of the matter under appeal. In Heydon’s Case(*supra*), the Barons of Exchequer resolved as follows:

“That for the true interpretation of all statutes in general, (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and considered:

- 1. What was the common law before making the Act?*
- 2. What was the mischief and defect for which the common law did not provide?*
- 3. What remedy the Parliament hath resolved and appointed to cure the diseases of the commonwealth; and mischief?*

4. the true reason for the remedy,

And then the office of all judges is always to make such construction as shall:

- (a) Suppress the mischief and advance the remedy, and*
- (b) Suppress subtle inventions and evasions for the continuance of the mischief and pro bono commodo(for private benefit), and*
- (c) Add force and life to the cure and remedy according to the true intent of the makers of the Act pro bono public (for the public good).”*

- [41] In this context, text writers say that:

“The reference to the common law should nowadays be treated as widened to include statute law, and indeed all forms of law”. See Code s 24.5 (cited in Bennion on Statutory Interpretation, Lexis Nexis, Seventh Ed. 2017, p.331).

[42] In the instant appeal, the undisputed reason for the amendment was the removal of double taxation, which was the known effect of the law as it existed.

[43] Once the ‘mischief’ (or, as is known in modern parlance, the ‘statutory objective’ or ‘purpose’) is identified, it becomes, as set out in Heydon’s case (supra), necessary for the court to construe the provision so as to give effect to ‘*suppress the mischief and advance the remedy*’. It can be presumed that once Parliament has identified the mischief and introduced a remedy, it expects the remedy to be implemented so as to give effect to its intention, as expressed in the legislation. In adopting this rule of construction to the matter at hand, I now turn to the provisions of the Dividends Tax Regulations.

The Dividends Tax Regulations and the principles governing the interpretation of delegated legislation

[44] The Dividends Tax Regulations were introduced in terms of section 107 of the Income Tax Act Cap 201. Regulations being delegated legislation, provide the machinery for the implementation of the Act.

[45] Delegated legislation must be consistent with the enabling Act, and be interpreted in the light of the enabling Act, and in a manner that renders effective, the provisions of the enabling Act. Macfisheries (Wholesale & Retail) Ltd. v Coventry Corporation [1957]3 All ER229.

[46] It is the intention of the legislature as indicated in the enabling Act that is the prime guide to ascertaining the meaning of delegated legislation. R v Secretary of State for Social Security; ex parte Sarwar [1997] 3 CMLR 648, 651-652; Secretary of State for Work and Pensions v Deane [2010] EWCA Civ 699 at [37], (cited in Bennion on Statutory Interpretation, Lexis Nexis, Seventh ed.2017, p.98).

[47] Just as much as the delegatee is not expected to travel outside the parameters of the enabling Act in creating delegated legislation, an interpretation that narrows and renders the delegated legislation ineffective, is equally unacceptable. Delegated legislation is intended to serve and promote the object of the Act, and not to thwart

the objectives of the legislature, whether intentionally or otherwise. This will be even more significant in a situation in which delegated legislation follows closely on the heels of an amendment in the enabling Act, as was the case here.

[48] Section 8(2) (a) of the Income Tax Act Cap 201 as amended, provides that NRDWHT shall be paid in respect of the portion of a dividend declared, paid or credited by a company incorporated in Fiji and which has been paid or credited, either wholly or partly, from income upon which *no tax has been paid by that company*.

[49] Therefore, in terms of the amendment NRDWT would not be payable to the extent that a company has paid corporate tax, and dividends were distributed from those profits. However, if the full corporate tax has not been paid, for any reason whatsoever such as because the company received an exemption under another provision of law, then NRWHT would be payable on the dividends to the extent that those dividends arose from profits on which corporate tax has not been paid.

Retrospectivity: generally

[50] The general principle of law in respect of legislation is that current law should govern current activities, the justification being that persons who have arranged their affairs on the basis of a long-standing past practice or undertaking, are entitled to assume that the *status quo ante* will not be changed without reasonable notice. Legal certainty has hardened into a right and the justification for a radical change in position, imposes a heavy burden on the decision-maker.

[51] Retrospective legislation is not regarded with favour because it can result in disruptive and unfair consequences. There is no doubt that Parliament can and does enact retrospective legislation, but when it imposes penal consequences, affects basic human rights or imposes the burden of taxes, it is interpreted restrictively, unless the statute itself expressly provides for retrospectivity. However, in this case, the legislation is not retrospective, and therefore the Respondent's arguments are not acceptable.

- [52] When legislation changes the past character of transactions carried on, on the basis of existing law, it is often rejected. In this case, the application of the Dividends Tax Regulations 2001, as the Respondent did, since the commencement of the Regulations for several years, did not amount to changing the past character of the activities of the Appellant. It was the sudden change in application of the Regulation that gave rise to the dispute.

Retrospective operation-Does the recognition of past events amount to retrospective application of the law?

- [53] A distinction can be drawn between legislation which affects past events, and legislation which has future consequences, but takes account of past events. This is what happened in this case. Legislation that will affect only the future, but necessarily draws upon or takes cognizance of past events, is not retrospective legislation.
- [54] One of the earliest reported cases on this aspect of interpretation is The Queen v The Inhabitants of St Mary Whitechapel (1848) 12 QB 120, cited in Bennion(*supra*), at paragraph5.12, pp182, 183).
- [55] The matter for consideration in that case was section 2 of the Poor Removal Act 1846 which provided that:
- “no woman residing in any parish with her husband at the time of his death shall be removed ... from such parish, for twelve calendar months from his death, if she so long continue a widow”*
- [56] In that case, until the Act was passed, the appropriate authority had the right to remove the widow immediately after the death of her husband. The effect of section 2 operated over a period (“the relevant period”) consisting of 12 months from the death unless shortened by the remarriage, death or departure from the parish of the widow. In one case the relevant period had begun but not ended when section 2 came into force. The authority argued that at commencement of the Act they had a vested right to remove the widow. The court held that the removal itself was the

substance of the matter. Since it had not been carried out before commencement, section 2 applied and was not to be treated as retrospective.

[57] In accepting this principle, text writers say that:

“ A change in law is not objectionable merely because it takes note of a past event that has happened, and bases new legal consequences upon it.”, Bennion (*supra*), p.5.12, p.182, cited with approval in Waitakere City Council v Bennet [2008] NZLR 428, [52].

Does the Appellant’s argument render the Dividends Tax Regulations retrospective?

[58] The Appellant in this case argues that the presumption against retrospective legislation does not necessarily apply to an enactment merely because ‘a part of the requisites for its action is drawn from time antecedent to its passage’. It therefore contends that the existing qualifying credits from pre-2001 profits, can be considered in its favour.

[59] The application of section 8(2) of the Income Tax Act Cap. 201 is provided for in Regulation 4 of the Dividends Tax Regulations, which sets out the formula that must be used in order to calculate the percentage of dividends subject to corporate tax. This has already been set out above. What is important to note in respect of Regulation 4(1) is Variable ‘A’, is that the legislature itself contemplates that this could originate from any one of three different sources. They are; (i) corporate tax paid, (ii) excess tax credits from previous years, and (iii) income tax paid on dividends received from other companies.

[60] A plain reading of the words in Variable A in Regulation 4(1) does not reveal that it was not intended to subsume taxes paid prior to the Regulation coming into operation. Unless the words used expressly exclude the consideration of the years preceding the year of commencement in considering what comes under Variable ‘A’, would not be open to this court to so interpret it.

[61] To start with, grammatically, ‘paid’ is the past tense of ‘pay’. To my mind, this indicates at once, that it contemplates and refers to payments in the past, and no words used in the enabling Act or the Regulations itself, indicates that a restricted

meaning is to be given to the word 'paid'. On the contrary, following the word 'paid', are the words "*including excess tax credits from previous years and income tax paid on dividends received from other companies*".

- [62] Regulation 4(1), despite being extremely detailed, does not expressly or impliedly in any way restrict the word 'paid' so as to exclude taxes paid in the past. I therefore find that the argument urged by the Appellant reflects the correct interpretation of the legislation.
- [63] The amendment to section 8 was intended to remove double taxation on the distribution of dividends. Accordingly, section 8(2) provides that NRDWHT shall be '*paid only in respect of the portion of a dividend declared, paid or credited by a company incorporated in Fiji; and which has been paid or credited, either wholly or partly, from chargeable income upon which no tax has been paid by that company.*' (Emphasis added).
- [64] In the light of this language, it would not be reasonable to argue that the legislature intended tax payers to wait for one or more years after the enactment of the amendments to the Act and the introduction of the Regulations, before they could reap the benefit of the clearly remedial provisions of the amendment removing double taxation on the distribution of dividends. That, in effect would be the result of the Respondent's argument, and I do not think that that was the intention of the legislature. Thus, in my view, in computing NRDWHT, the language in section 8(2), taken in conjunction with Regulation 4(1) of the Dividends Tax Regulations, contemplates the inclusion of taxes which had *already been paid*. The Respondent's argument thus fails.
- [65] The Respondent's contention that 'taxes paid' must only mean taxes from the year in which the dividends are distributed is untenable because in the first place, companies do not record profits every year, nor do they declare dividends every year. Therefore, the interpretation sought to be placed on the Regulations by the Respondent, in effect amounts to reading into the Act, words which are not contained in the Act, and which will prevent the benefit of the amendment from

being received by the persons for whom the amendment was introduced. This approach is to be rejected, in the context of the amending legislation.

[66] The specific provision of exemption given in section 21A of the Income Tax Act as amended would be rendered nugatory if the interpretation urged by the Respondent is accepted. I am therefore of the view that the contention of the Appellant is correct, and that for these reasons, the learned Judge erred when he held that the Regulations are intended to apply only to acts or events after 31 December 2001.

[67] Customs & Excise Commissioners v Thorn Electrical Industries Ltd. [1975] 1 WLR 166, was a case in respect of the imposition of Value Added Tax ("VAT") when it was first introduced in England in 1972. The tax was to become effective from 1 April 1972. The appellant was engaged in the business of hiring out television sets under agreements entered into between the appellant and the customer. The sets were installed in the customer's home before 27 July 1972, when the Finance Act received the Royal Assent. The Commissioners assessed VAT on the payments received on and after 1 April 1973, in respect of periods of hire falling due after that date. The appellants contended that if payments received under the agreements were taxed, it would amount to applying the legislation retrospectively. In dismissing the appeal, Lord Morris of Borth-y-Gest said:

"The fact that as from a future date a tax is charged on a source of income which has been arranged or provided for before the date of the imposition of the tax does not mean that the tax is retrospectively imposed".

[68] The Appellant relied on the case of Reid v Secretary, Department of Family and Community Services (2001) 109 FCR 477, which related to an individual's right to receive workplace injury pension. In arriving at the conclusion that there was no retrospectivity involved in the construction adopted by the lower court, at paragraph 20 of the Judgement the Federal Court of Australia said:

"In our view, where Parliament has intended to limit the operation of a provision of the Act by reference to an event which occurred before a certain date, this has been done explicitly."

- [69] The Appellant drew the attention of this court to the judgment of the Federal Court of Australia in Reid (supra), in which that court cited with approval the dicta of Jordan CJ in Coleman v Shell Company of Australia Ltd. [1943] 45 SR (NSW) 27 at 31, where he said:

“As regards any matter or transaction if events have occurred prior to the passing of the Act which have brought into existence particular rights or liabilities in respect of that matter or transaction, it would be giving a retrospective operation to the Act to treat it as intended to alter those rights or liabilities, but it would not be giving it a retrospective operation to treat it as governing the future operation of the matter or transactions as regards the creation of further particular rights or liabilities” (Emphasis added).

- [70] If in giving effect to the amendment, it resulted in circumstances from the past being captured, namely taxes paid in the past, that *per se*, did not amount to giving either the Act or the Dividends Tax Regulations, an unwarranted or retrospective operation. The only relevant criterion in order to benefit from the amendment was whether the dividends were *sourced* from profits on which corporate tax had been paid, and this was not in doubt.
- [71] Authority shows that the interpretation of retrospective legislation, or the application of legislation which takes into consideration past circumstances would not, *per se*, be objectionable, unless to do so would be clearly contrary to the express words of the legislation, or result in unfair penal consequences. This is because the alternate view would be manifestly unjust, and would in all probability affect the liberty of the subject and, in general be violative of Constitutional norms. In the absence of a clear legislative intention expressed in, and discernible from the legislation itself, the presumption against retrospective applicability of legislation will, in most cases, be applicable.
- [72] The Appellant’s argument is that the fact that the calculation formula contained in Regulation 4(1) contemplates the consideration of circumstances that existed before the legislation became operative, does not by itself render the Act retrospective in

operation. The operation itself is prospective. The essence of the point made by the Appellant is that relief will be available only from 1 January 2001 onwards, and therefore it is not a retrospective application of the Act or Dividends Tax Regulations, to continue the application of the Regulations as the Respondent had done since its inception in 2001. In my view this reflects the correct application of the law.

The Appellant's challenge – the Respondent's new interpretation of the formula in Regulation 4 (1) of the Income Tax (Dividends) Regulations

[73] The Respondent challenges the Respondent's position and explains its argument, the Appellant in paragraph 122 of its written submissions as follows:

"122. REL submits that this is incorrect:

"(a) the effect of the re-calculation is that the tax (NRDWHT) becomes payable for the years 2006, 2009 and 2010. But that effect arises only because FCRA has recalculated the NRDWHT liability on all dividends since 2001.

(b) REL's original credits position (that is, before FCRA changed its mind) shows that REL had, for the tax year ended 30 April 2002, excess tax credits of more than \$ 2.7m (refer Record, pages 613-618). Had those excess tax credits remained available to REL there would be no NRDWHT for REL to pay in any of 2006, 2009 or 2010.

(c) It is those extra tax credits (i.e. the credits which are more than six years old) which have been affected.

(d) FCRA's actions in re-calculating those (more than six years old) excess tax credits is clearly against s. 11(2) (b) of the TAD and the principle of finality. As above, s. 14(1) of the TAD prevents that sort of approach."

[74] The Respondent, did not offer any explanation, as to why after more than ten years after the Regulations came into effect, and it had been applied so as to permit taking into account taxes paid in previous years, there was a sudden change in application. The Respondent pointed to section 11 of the Dividends Tax Regulations which provides for the issue of an additional assessment. However, to my mind, this power only refers to the making of an assessment on the correct legal basis. The power to

make and issue and additional assessment does to extend to making assessments on an incorrect application of the law.

- [75] In my view, neither section 21A as amended, nor Regulation 4(1), draws a distinction between pre-and post-1 January 2001 taxes, and there is nothing in the Regulations which restricts the year from when taxes paid prior to 1 January 2001, being considered in calculation NRDWHT. On a fair and true construction of these provisions, I consider this to be the correct position. The Appellant's argument therefore succeeds.

Interpretation of fiscal statutes

- [76] A general principle of law in respect of the interpretation of fiscal statutes is that the subject is not to be taxed except by express words, and ambiguities must be resolved in favour of the subject. However, this refers only to the charging provisions of the statute and not to the machinery provisions. The recovery provisions have to be interpreted so as to facilitate the collection of the tax, rather than hinder or obstruct collection.
- [77] The approach that is to be followed in the interpretation of fiscal statutes has been expressed from very early times. The authority that is most frequently cited is the dictum of Rowlatt J in Cape Brandy Syndicate v IRC(1921) 12 T.C., which is as follows:

"Now of course it is said and urged that in a taxing Act clear words are necessary to tax the subject. But it is often endeavoured to give to that maxim a wide and fanciful construction. It does not mean that the words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in such Acts. It means this, I think; it means that in taxation you have to look simply at what is clearly said. There is no room for intendment; there is no equity about a tax; there is no presumption as to a tax; you read nothing; you imply nothing, but you look fairly at what is said clearly and that is the tax. (Emphasis added).

- [78] In **Inland Revenue Commissioners v Westminster (Duke)** [1936] AC 1, where the House had to rule on whether the payments under deeds executed by the Duke in favour of his workers covered remuneration for services rendered or not. The deeds recited that the payments were made in recognition of past services rendered to the Duke. It was incontrovertible that the deeds were brought into existence so as to permit the Duke to reduce his tax liability. The Crown's argument of substance over form was rejected and Lord Russell of Killowen at p.25 said:

"I confess that I view with disfavour the doctrine that in taxation cases the subject is to be taxed if, in accordance with a court's view of what it considers the substance of the transaction, the court thinks that the case falls within the contemplation or the spirit of the statute. The subject is not to be taxable by inference or by analogy, but only by the plain words of the statute applicable to the facts and circumstances of the case. As Lord Cairns said many years ago in Partington v Attorney – General [1903] A.C. 299, 'As I understand the principle of all fiscal legislation it is this: If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be'. (emphasis added)

- [79] This trend was followed several years later, by Evans LJ in **Ingram (executors of the estate of Lady Ingram) v IRC** [1997] 4 All ER395 at 414 (cited in Bennion, (*supra*), p. 729) when he said:

"... in the context of tax legislation, it is necessary to consider the legal analysis with the utmost precision, so that the tax payer shall not become liable to tax unless this is clearly and unequivocally the effect of the statutory provisions".

- [80] Relevant to this appeal is the concept of double taxation, on which, writers have this to say:

"There is a general presumption against taxing a person twice in respect of the same matter. IRC v Clifforia Investments Ltd. [1963] 1 WLR 396 at 402

(“double taxation patently unjust”); IRC v FS Securities Ltd (formerly Federal Securities Ltd) [1964] 1 WLR 742; R (on the application of Edison First Power Ltd) v Central Valuation Officer [2003] UKHL 20, [2003] 4 All ER 209 at [25], [26]. The presumption against double taxation may be viewed as a particular application of the wider principle of legal policy that law should be fair and just. As noted in Code s. 26.3, the strength of the presumption that law should be fair and just will vary according to the degree to which the consequences are unreasonable.”

[81] Applying this dictum to the facts of this appeal; the words used in Regulation 4 (1) setting out the formula for calculation are clear. Past corporate taxes paid are included in the definition. When one looks fairly at what is said, the irresistible conclusion is that the inclusion of past taxes can fairly be considered. This view does not in any way unduly restrict the power of the Respondent to impose tax according to the correct application of the law.

[82] Accordingly, for the reasons set out above, I am of the view that the Judgment of the Tax Court must be partly set aside, and I therefore allow the first, second and third grounds of appeal.

The Fourth, Fifth, Sixth and Seventh grounds of appeal

Tax assessment, tax clearance, and limitation

[83] The essence of these grounds relates to the difference between a tax clearance and a tax assessment. The Appellant contends that the tax clearance given earlier was the “assessment”. Therefore the “First Demand” is time-barred in terms of section 11 of the Tax Administration Act 2009. However, this contention is contrary to the language of the legislation.

[84] The Income Tax Act Cap 201 is the charging Act. Under this, NRDWHT was charged under section 8(1) which provided as follows:

. - (1) Notwithstanding anything to the contrary in the other provisions of this Act, there shall be paid a tax to be known as "non-resident dividend

withholding tax", in respect of the payments specified in subsection (2) at the rate of 15 per cent of the gross amount payable.

- [85] The duty to submit Returns was provided for under section 44 of the Act, and the power to issue assessments is set out in section 55 and provides as follows:

55.- (1) After examination of the taxpayer's return, or, in the case of a taxpayer who has applied to be dealt with through an agent appointed under the provisions of section 56 of the agent's report, the Commissioner shall send or cause to be sent a notice of assessment to the taxpayer stating therein the date by which the amount of such assessment is to be paid. (Emphasis added).

- [86] The power to issue additional assessments was provided for in section 59 of the original Act. However, the Tax Administration Act 2009 which came into operation on 1 January 2010, superseded the Income Tax Act Cap 201, and the impugned demands were made under the Tax Administration Act 2009.

- [87] The Respondent contends that both demands were made under section 11 (2) of the Tax Administration Act 2009. As will be seen, the power of assessment, and the discretion of issuing tax clearance are distinct.

The Tax Administration Act 2009

- [88] The Long Title to the Act states that it is to ensure the efficient collection of tax. It is not the charging statute, and as its title itself states, it provides the mechanism for the collection and recovery of tax.

- [89] The following definitions under section 2(1) of the Tax Administration Act are relevant to this appeal:

"income tax" means income tax imposed under the Income Tax Act Cap 201
tax assessment" means an assessment or determination listed in the First Schedule;

"tax decision" means –

(a) a tax assessment; or
(b) in relation to a tax law, a decision on any matter left to the discretion, judgement, direction, opinion, approval, consent, satisfaction, or determination of the CEO, other than such decision made in relation to the making of a tax assessment; (emphasis added)

"tax law" means a law listed in the Second Schedule;

tax period", means —

(a) in the case of the income tax —

(i) for the purposes of withholding tax, the period to which the withholding relates; or

(ii) for the purposes of provisional tax or advance payments of tax, the period to which the provisional tax or advance payments relates; or

(iii) for any other purposes, the year of assessment;

(b) in the case of VAT, the taxable period; or

(c) in any other case, the period for which the tax is reported;

"tax return" means a return, statement, or other document listed in Part A of the Third Schedule;

8. For the purposes of this Act —

(a) a self-assessment taxpayer who has filed a self-assessment return is treated as having made an assessment of the amount of tax payable for the tax period to which the return relates being that amount as set out in the return; and

(b) a self-assessment return filed by a self-assessment taxpayer is treated as a notice of the assessment served by the CEO on the taxpayer on the date that the return was filed.

[90] The power to amend an assessment is provided for in section 11 of the Tax Administration Act 2009 and is as follows:

11. — (1) Subject to this section, the CEO may amend a tax assessment by making such alterations or additions to the assessment as the CEO considers necessary to ensure that a taxpayer is liable for the correct

amount of tax payable in respect of the tax period to which the assessment relates.

(2) The amendment of a tax assessment under subsection (1) may be made –

(a) in the case of fraud, wilful neglect, or serious omission by or on behalf of the taxpayer, at any time; or

(b) in any other case, within 6 years of the date the CEO served the notice of assessment on the taxpayer.

(3) As soon as practicable after making an amended assessment under this section, the CEO must serve the taxpayer with notice of the amended assessment.

(4) Subject to subsection 2(b) if a notice of assessment (referred to as the "original assessment") has been amended under subsection (1), the CEO may further amend the original assessment or an amended assessment within 6 years or as the CEO deems fit after serving the notice of the original or amended assessment on the taxpayer.

(5) An amended assessment is treated in all respects as a tax assessment for the purposes of this Decree (other than subsection (1) or (2)) and the tax law under which the original assessment has been made.

(6) The making of an amended assessment does not preclude the liability for penalty from arising from the date that tax was due under the original assessment.

The Appellant's arguments- a tax clearance amounts to an assessment and is therefore subject to the rules of limitation

[91] The Appellant argues that a "tax clearance" amounts to an assessment, it is issued after the Respondent assesses the Appellant's liability in respect of NRDWHT, and therefore, in terms of section 11(2) of the Tax Administration Act 2009, it could be amended only within six years from the date of the notice of assessment.

[92] The Appellant submits that for the purposes of the Tax Administration Act 2009, a tax clearance which confirms that no tax is payable (the tax clearance issued), is a "tax assessment" for the purposes of the Tax Administration Act 2009. It contends that the term 'Notice of Assessment' is not defined in the Legislation and that

therefore an 'assessment' could be contained in any document giving notice of the act of assessment having occurred, and that therefore a tax clearance is an assessment.

[93] In this respect, the Appellant relies on the principle of finality in taxation, and contends that an assessment is not merely a piece of paper, but a process by which tax payable is ascertained, R v DCT (SA): ex parte Hooper (1926) 37 CLR 368.

[94] The Appellant submits that a tax clearance is a mechanism under section 72A of the Income Tax Act Cap 201 which enables permission to be obtained from the Bank before remittances are made overseas, and it allows the Respondent to ascertain whether a person seeking to remit funds abroad has first met its own tax obligations. Therefore, it is for all purposes 'an assessment'.

The Respondent's arguments

[95] The essence of the Respondent's argument is that the law draws a clear distinction between a 'tax assessment', and a 'tax clearance', which was correctly upheld by the Tax Court.

[96] The argument of the Respondent is justified by an examination of the relevant provisions of the Income Tax Act Cap 201. Section 72A of the Income Tax Act Cap 201, provides as follows:

"Notwithstanding the provisions of any other written law, the Commissioner may issue instructions to the The Bank requiring the The Bank to seek and procure tax clearances prior to the Reserve Bank giving approval of exchange control applications."

[97] Section 44(1) provides as follows:

44. (1) Every person liable to taxation under the provisions of this Act shall (subject in the case of a company, to the provisions of section 53, and in the case of a business, to the provisions of section 52) on or before 31 March in

each year without notice or demand deliver to the Commissioner a return, in such form as may be approved by the Commissioner of his total income for the immediately preceding year. In such return, there shall be stated an address for service in Fiji to which all assessments, notices and other documents may be posted or served.”

- [98] The Respondent may extend time for submission of a return, and sections 48 and 50 provide as follows;

“48. The Commissioner may, at any time, extend the time for making any return”.

50. - (1) If the Commissioner, in order to enable him to make an assessment or for any other purpose, desires any information or additional information or a return from any person who has not made a return or a complete return, he may, by registered letter or by personal service of a notice in writing, demand from such person such information, additional information or return, and such person shall deliver to the Commissioner such information, additional information or return within the period of time determined by the Commissioner in such registered letter or notice”.

- [99] The words ‘notice of assessment’ contained in section 55 of the Income Tax Act Cap 201 require the Respondent to follow a particular process, and provides as follows:

“55. - (1) After examination of the taxpayer's return, or, in the case of, a taxpayer who has applied to be dealt with through an agent appointed under the provisions of section 56 of the agent's report, the Commissioner shall send or cause to be sent a notice of assessment to the taxpayer stating therein the date by which the amount of such assessment is to be paid. (Emphasis added).

- [100] An examination of the provisions set out above reveals that the procedure required to be followed, the nature of the powers of the Respondent to call for information, and the discretion to grant an extension of time for the submission of returns, indicate that these are mandatory provisions, combined with discretion in the hands of the Respondent.

[101] The tax clearance given under section 72A of the Income Tax Act Cap 201, contemplates a very different situation. The discretion provided in section 72A, is different from the duty in section 55. The Respondent states that the process followed in the case of an application for tax clearance is different from the process followed in respect of issuing an assessment under section 55 of the Income Tax Act Cap 201.

[102] The Respondent contends that a tax clearance is not an 'assessment', and instead falls within the description of a '*tax decision other than an assessment*' within paragraph 2(1) (b) of the definition of 'tax decision' in the Tax Administration Act 2009 (the relevant portion of which has been reproduced in paragraph [91] above; and which provides that:

"tax decision" means –

(a) a tax assessment; or

(b) in relation to a tax law, a decision on any matter left to the discretion, judgement, direction, opinion, approval, consent, satisfaction, or determination of the CEO, other than such decision made in relation to the making of a tax assessment;
(emphasis added)

[103] In paragraphs 14 to 16 of its written submissions before the Tax Tribunal (RHC 291-295) the Respondent has set out the procedure followed in issuing a tax clearance. It is triggered by the Applicant's tax clearance application. The Applicant must specify the sum to be transferred overseas, the country of destination, the source of funds from which the money is to be transferred, and the nature of the payment. As a matter of practice, the application is usually processed without further clarification of the information contained in the form.

[104] However, the Respondent has the discretion to issue a tax clearance even if the Applicant (for tax clearance) has not lodged a Return, or the due tax has not been paid, or even if an extension of time for payment of taxes due has been granted, which is done on a case-by-case basis. In other words, the duty to examine a return is not a condition precedent to the issuing of a tax clearance, whereas it is necessary before issuing an assessment under section 55 of the Income Tax Act Cap.201.

[105] In some cases, an application for tax clearance may go through the process of audit and verification of the contents of the Application, before the tax clearance is issued. This may involve carrying out what is called a 'desk-audit' to ascertain the truth of the information provided, in relation to the source of funds and tax implications.

[106] In meeting the Respondent's argument, the Appellant relies on the case of Hooper(supra). However, my understanding of Hooper (supra) is that it does not assist the Appellant in the argument it seeks to make. I refer in particular to the following passages on page 373 (supra):

"It is as to the nature of an assessment. An "assessment" is not a piece of paper: it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called "a notice of assessment." And then, says the Act (sec. 54), "income tax shall be due and payable sixty days after the service by post of a notice of assessment." The section adds that, where by amendment of an assessment additional income tax is thereby payable by a taxpayer, it is due and payable thirty days after notice of amended assessment. But neither the paper sent nor the notification it gives is the "assessment." That is and remains the act or operation of the Commissioner". (emphasis added). But what assessments may be made must depend on other sections of the Act. Sec. 35 places a statutory duty on the Commissioner to make assessments.

Collecting, so to speak, the points of the matter, it appears there is one main or basic assessment which is amendable. If any amendment increases the liability, that is separately open to objection and appeal".

[107] Accordingly, on a true construction of the relevant legislation, taken in conjunction with the procedure followed in the application of it, establishes that the Respondent's argument is correct in respect of the distinction between a tax clearance and a tax assessment.

- [108] Having considered the relevant provisions of the Income Tax Act Cap 201 and the Tax Administration Act 2009, the only reasonable conclusion that can be reached is that, an 'assessment' by the Revenue, follows the return of the tax payer, the act of assessing, is different from the act of notification of the tax due, and that the assessment of a tax payer under section 55, and the tax clearance under section 72A are completely different matters.
- [109] The ready conclusions that can be drawn from the express statutory language cannot be marred by a semantic exercise. Therefore, the Appellant's contention that the demands are time -barred in terms of section 11 of the Tax Administration Act 2009 cannot be accepted, nor does the Respondent have to rely on this section, because to begin with, the tax clearance was never an assessment.
- [110] Accordingly, I hold that a tax clearance issued under section 72A of the Income Tax Act Cap 201, is not an assessment within the meaning of the provisions of section 55 of the Income Tax Act Cap 201, as well as the provisions of the Tax Administration Act 2009. I therefore dismiss the fourth, fifth, sixth and seventh grounds of appeal.

The Eight and Ninth Grounds of Appeal

Finality in taxation

- [111] The essence of the eighth and ninth grounds of appeal is that the Learned Judge failed to consider the law relating to finality of assessments in tax. Having raised this issue, the Appellant in effect withdrew it. During the course of the hearing in this court, Mr. Lennard, learned Counsel for the Appellant submitted that if the issue of chargeability of NRDWHT is decided in the Appellant's favour, it would not be necessary to pursue the other grounds. In support of this position, I also find that in paragraph 25 (a) of its written submissions in this court, the Appellant states that it is not challenging the right of the Respondent to change its interpretation of the law (which I understand to be a reference to the Income Tax (Dividends) Regulations). Accordingly, I dismiss the eighth and ninth grounds of appeal.

Conclusions


[112] The application of the Income Tax (Dividends) Regulations 2001, permits the inclusion of corporate taxes paid in preceding years, including excess tax credits from previous years, as well as income tax paid on dividends received from other companies. In view of my conclusion that the Appellant was entitled to take credit for corporate taxes paid in the years preceding the distribution of dividends, the Appellant will be entitled to a refund of the monies paid to the Respondents on the basis of the impugned demands which were made on an incorrect application of the law.

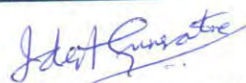
[113] An assessment issued under section 55 of the Income Tax Act Cap 201, is distinct from a tax clearance issued under the discretion of the Respondent provided for in section 72A of the Income Tax Act Cap 201. Therefore the statutory limitation contained in section 11 of the Tax administration Act 2009 has no application to a tax assessment.

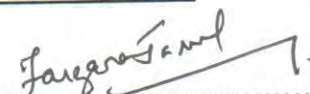
The Orders of the Court are:

1. *The judgment of the Tax Court dated 18 April 2016 is partly set aside, and the appeal is partly allowed.*
2. *The Respondent is ordered to refund to the Appellant the sums of \$329,183.09 and \$124,872.33, being the sums paid to the Respondent in terms of the demands made by the Respondent.*
3. *In all the circumstances of this case, the parties will bear their own costs.*




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Hon. Justice E. Basnayake
JUSTICE OF APPEAL


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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL


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Hon. Madam Justice Farzana Jameel
JUSTICE OF APPEAL