GRENADA

IN THE COURT OF APPEAL

GDAHCV 2009/0533

BETWEEN:

THE BANK OF NOVA SCOTIA

Appellant

and

THE APPEAL COMMISSIONERS

Respondents

Before:

The Hon. Mr. Hugh A. Rawlins — Chief Justice

Appearances:

Mr. James Bristol, with him Ms. Dia Forrester, for the Appellant
Ms. Karen Samuel, Senior Crown Counsel, for the Respondents

2010: November 25;
2011: March 30.

Withholding tax charged on payments by a local branch to its head office – decision confirmed by Appeal Commissioners – appeal – whether payments must be in the nature of income and made to another entity to be chargeable to withholding tax - sections 25, 50 and 51 of the Income Tax Act.

The Comptroller of Inland Revenue ("the comptroller") determined that seven payments which the appellant, the Bank of Nova Scotia ("the Bank"), made to its head office in Canada during the years 2001 and 2006, were chargeable to withholding tax under section 50 of the Income Tax Act of Grenada. The Bank appealed to the Appeal Commissioners. The Bank contended that the Comptroller failed, *inter alia*, to examine the nature of the payments in issue to ensure, as a matter of law and fact, that they were payments in the nature of "income" before determining that they attracted withholding tax. The Appeal Commissioners dismissed the appeal.

In dismissing the appeal the Appeal Commissioners held that the payments attracted withholding tax because they were made by a local entity to a non-resident under section 50(1) of the Income Tax Act. The Bank appealed to the court pursuant to section 91(1) of the Income Tax Act. The Bank has contended, in effect, that the Appeal Commissioners erred in failing to realize that under the Income Tax Act only payments in the nature of "income" are chargeable to tax; that it follows that only such payments could attract withholding tax under section 50 of the Income Tax Act; that

the 7 payments in issue are not payments in the nature of income tax because they were made within the same entity, and, accordingly, there was no payer and payee from and to whom income was paid so as to attract tax.

Held: dismissing the appeal and affirming the decision of the Appeal Commissioners and making no order as to costs:

1. Neither section 1 of the Income Tax Act, which states that the Act applies to the assessment of income, and to the deduction of withholding tax from payments; nor any other provision of the Income Tax Act stipulate that payments must be in the nature of income in order to be chargeable to tax under the Act. It is necessary to interpret section 50(1) of the Act, which stipulates the payments that are chargeable to withholding tax. Section 50(1) of the Income Tax Act is clear in its terms. There is nothing in the provision which requires "other payments" to be read *ejusdem generis* to render the provision applicable only to payments in the nature of income. It is intended to catch all payments which are sent by a person or concern, whether or not engaged in business in Grenada, to a non-resident person or concern. By interpretation, a non-resident company, in the context of the present case is one that is not incorporated in Grenada.

   British American Insurance Company Ltd. v The Commissioner of Inland Revenue, ANUHCV No. 2002/0001; Well Services v Board of Inland Revenue (1997) 52 W.I.R. 440, distinguished.

2. The local branch which made the 7 payments in issue is a person engaged in a business in Grenada. It made the payments in issue to a non-resident person of interest, to wit, the office of the Bank of Nova Scotia which is incorporated in Canada. Since none of these payments is exempt under section 25(1)(aa) of the Income Tax Act they are chargeable to withholding tax under section 50(1) of the Act.

JUDGMENT

[1] RAWLINS, C.J.: This is an appeal by the Bank of Nova Scotia ("the Bank") from a decision by the Tax Appeal Commissioners ("the Commissioners"). The central question for determination is whether the Bank is liable for withholding tax on certain payments which it made during the years 2001 and 2006. The Comptroller determined that the Bank was liable to pay withholding tax for those years on the following payments which it made to head office in Canada:

(1)	Computer expenses (IBM contract)	$2,289,780.65
(2)	Data centre costs 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	$6,162,152.98

[2] The Bank appealed to the Commissioners on the following 4 grounds:-

1. No payments were made by the appellant Bank that attracts withholding tax under section 50 of the Income Tax Act 1994.

2. The said payments, if made, which is denied, were not made to a third party but by the appellant Bank to itself.

3. The amounts which the Comptroller decided were payments, were in fact acceptance by the Bank of its share of the expenses incurred on its behalf at the head office of the appellant Bank in Canada.

4. The nature or character of the payments, if the transactions can be so called, would not be chargeable income under the Income Tax Act such as to attract withholding tax.

The basic legislation

[3] The principal legislation for the purpose of these proceedings is the Income Tax Act, 1994[1]. Section 50 of the Principal Act falls under Division II of Part II of the Act. Division II is under the rubric "Withholding Tax on Payments and Deduction of Tax by Employers". The side-note to section 50 of the Principal Act is under the rubric "Deduction of tax from payments made to non-residents". Subsections (1) and (2) of section 50 of the Principal Act provided as follows:

> "(1) Every person who makes any payments to a non-resident, shall deduct tax from such payments in accordance with and in the manner specified in the Third Schedule and shall carry out such other obligations as are imposed by that Schedule."
> "(2) For the purpose of this section, a person to whom any payment is made to which this section applies shall be presumed, unless the contrary is proved, to be non-resident if such payment is made to an address outside Grenada."

[1] No. 36 of 1994 of the Laws of Grenada; referred to hereinafter as "the 1994 amendment Act" or "the Principal Act".

Subsection (3) of section 50 of the Principal Act, which became section 50(5) by virtue of section 25(b) of the 1996 amendment Act enables the comptroller to deduct lesser amounts than provided for in the Third Schedule in certain circumstances, which are not relevant to the present case.

[4] Section 50(1) of the Principal Act was amended by section 24 of the Income Tax (Amendment) Act, 1996.[2] The 1996 Act thereby repealed section 50(1) of the Principal Act and inserted instead new subsections (1), (2) and (3) of section 50 and renumbered subsections (2) and (3) of the Principal Act. The present section 50(1) imposes withholding tax on payments made by a person engaged in business in Grenada that are made to a non-resident. The payments that are targeted are "…discounts, commissions, fees, management charge, rent, lease premium, licence charge, royalties or other payment".

[5] Section 25 exempts specified incomes and payments from tax. Section 25(1)(aa), which is referred to in section 50(1) forgoing, was enacted as an amendment to section 25 of the Principal Act. Section 25(1)(aa) of the Principal Act exempted from tax the first six hundred dollars of interest that accrued to a resident from deposits in banks in Grenada. Section 8(d) of the 1996 amending Act repealed and replaced this provision with another section 25(1)(aa) which exempts from tax:

> "… interest accruing from deposits to an individual who is resident or ordinarily resident in Grenada with effect from 31st March 1995".

The Commission's decision

[6] In dismissing the appeal, the Appeal Commissioners held that the Comptroller had correctly identified the 7 transactions as payments on which withholding tax is payable. The Commissioners found that there was a payer and payee within the meaning of section 50(1) of the Income Tax Act. They stated that although it is indisputable that the local branch of the bank and its head office in Canada is one and the same entity, it was nevertheless possible for the branch operations in Grenada to be clearly distinguished so that such transactions are subject to assessment for the payment of withholding tax.

[2] No. 5 of 1996.

According to the Commissioners, the Grenada Income Tax Act contemplated this when they provided in section 2 of the Act for the interpretation of "permanent establishment" to include a branch or office.

[7] The Commission stated the reasoning by which they arrived at their decision as follows:-

> "The Appellant contends that the wording of Section 50(1) of the Income Tax Act as amended by Section 24 of the Income Tax (Amendment) Act No. 5 of 1996 requires the existence of two entities for the section to be applicable, that is, there must be a payer and a payee. The Commission finds that although it is indisputable that the branch of the Bank of Nova Scotia and its Head Office in Canada is one and the same entity, it is nevertheless possible for the branch operators in Grenada to be clearly distinguished and as such subject to assessment by the Respondent for payment of Withholding Tax as provided for in the Act. The draughtsmen of the Income Tax Act of Grenada clearly contemplated this as an issue which was likely to arise when they made provision in Section 2 of the Act for the interpretation of "permanent establishment" to include a branch or office.
>
> The case of British American Insurance Company Limited and the Commissioner of Inland Revenue, the Attorney General Civil Suit No. ANUHCV2002/0059 hereinafter (the British American Insurance Company case) wherein Justice Mitchell acknowledged that there was no distinction between the branch of the company in Antigua and that of the Bahamas based on the words of the statute is therefore distinguishable from the circumstances in this appeal based on the provision in section 2 of the Income Tax Act of Grenada which makes provision for the definition of a "branch" as aforesaid.
>
> The wording in Section 39(1) of the Income Tax Act of Antigua to wit, "where any person pays to any other person ..." is distinguished from the wording in Section 24 of the Income Tax Amendment Act No. 5 of 1996 of Grenada which provides that, "where a person whether or not engaged in a business in Grenada makes payment to a non-resident person...". In the Antigua Act the draughtsmen clearly intended to distinguish between the payer and the payee as two (2) distinct persons. In the Grenada Act on the other hand the draughtsmen did not intend to distinguish a payer from a payee as two distinct persons. The Commission therefore finds that given the wording of the Income Tax Act of Grenada as aforesaid it is possible for the payer and the payee to be the same entity as in the circumstances in this appeal. That is, the Appellant herein operating as a branch here in Grenada paying to the Head Office which operates in Canada."

[8] The Commission then set out section 50(1) of the Income Tax Act and continued as follows:

> "The Commission finds that the Appellant's operations in Grenada conducted at its branch have to be construed in accordance with the provision in Section 2 of Act No. 36 of 1994 as being operations of a permanent establishment and further the branch having made payments identified within the categories in Section 50(1) as amended in Section 24 of the Income Tax Amendment Act No. 5 of 1996 to a non-resident person being the head office of the Appellant, withholding tax must in accordance with the said provision of the Act be deducted from the said payments and paid to the Respondent in accordance with the Act. None of the payments identified by the Appellant as aforesaid qualifies for exemption under Section 25 of the Act 36 of 1994, therefore all the payments which were made by the branch to the head office of the Appellant being a non-resident person are subject to the payment of Withholding Tax."

The Appeal

[9] The Bank appealed mainly on grounds that the payments in issue were not in the nature of income and could not therefore attract withholding tax, and, in the second place, a payment could only attract withholding tax if there is a payer and a payee. The Bank insisted that in order for a payment to attract withholding tax under section 50 of the Income Tax Act, the payer and the payee cannot be the same entity. The Bank further contended that the payments in issue were not made in a payer and payee relationship because the Bank and the entity to which the payments were made were the same entity, the payee being the Bank's parent company.

Submissions by the Bank

[10] Mr. Bristol, learned counsel for the Bank, noted that the long title to the Income Tax Act states that it is "[a]n Act to provide for the imposition of income tax and to regulate the collection hereof". He then referred to section 1 of the Act which states that the Act 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.

The Act came into effect on 18th November 1994.

[11] Mr. Bristol argued that the Act is applicable only to payments that are in the nature of income and an entity cannot pay income to itself. He invited me to look at section 50 of the Act, as well as sections 51(1) and 51(A)(1).

[12] Section 50(1) states as follows:

> "(1) Where a person whether or not engaged in a business in Grenada makes payment to a non-resident person of interest, not exempt under section 25(1)(aa), discounts, commissions, fees management charge, rent, lease premium, licence charge, royalties or other payment whether or not the payer is entitled to deduct such payment in computing the 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."
> "(2) In any case where such a payment as describes in subsection (1) accrues but is not paid as at the accounting date for the basis period, the person liable to make such payment shall make an advance payment to the Comptroller of the appropriate amount of tax payable under subsection (1) at the time when the return for the business in respect of the basis period is submitted and shall be entitled to recover the tax so paid when the amount accrued is paid or credited to the payee."
> "(3) Where the tax in respect of payment made under this section by a person engaged in a business is not paid to the Comptroller in accordance with subsection (1) or (2) the Comptroller shall disallow the amount claimed as if it were an expense not wholly, exclusively and necessary incurred in the production of the income". [Emphasis added by Mr. Bristol]

[13] Mr. Bristol submitted that the words highlighted, in section 50(2) above, emphasize that the legislators intended that there must be a payer and payee in order for a payment to attract any tax under the Income Tax Act, including withholding tax. He added that an interpretation that holds that such a tax cannot be paid by a person to him or her self or within the same entity would avoid an absurd result.

[14] Section 51(1) provides as follows:

> "Notwithstanding any other provision in this Act, where a person engaged in a business in Grenada pays to a non-resident person employment income which is allowed as a deduction in computing the chargeable income of the business for the basis period, the payer shall deduct from the amount of employment income

tax at the rate specified in the third Schedule and shall pay the tax so deducted to the comptroller within seven (7) days after the date of payment of the employment income."

Section 51(A)(1) provides as follows:

> "Where income from a partnership accrues to a non-resident partner the precedent partner or the agent shall deduct tax from such income at the rate specified and shall pay the amount of tax so deducted to the Comptroller within seven days from the date of payment or credit to the non-resident partner."

[15] Mr. Bristol submitted that the reference in sections 51(1) and 51(A)(1) to income and in relation to tax to be deducted are references to income tax, and, likewise, the payments and taxes under section 50(1) must also be taxes on payments in the nature of income. He further asserted that withholding tax under section 50(1) imposes a charge to income tax on various items of income at source, before any payments are made abroad to non-residents. The legislature, he said, thereby asserted taxing jurisdiction over the flows of various items of income which are remitted to non-residents in the form of dividends, royalties, management charges or other similar charges for the provision of personal services, technical and managerial skills, interest and other payments. He insisted that withholding tax imposes a charge to income on these items at base because the Income Tax Act deals with tax on income. Mr. Bristol was confirmed in this view by the reference in section 50(1) to section 25(1)(aa) of the Income Tax Act. He submitted, in effect, that inasmuch as section 25 relates to income that is exempt from tax, the reference to exemptions from tax under section 25(1)(aa) confirms that only income tax is chargeable on withholding tax under section 50(1). He argued that the reference to section 25(1)(aa) in section 50(1) of the Act would otherwise be absurd.

[16] Mr. Bristol further contended that withholding tax under the Act can only attach to payments that are in the nature of income, which always require a payer and a payee. He cited as authority Claude H. Denbow's Income Tax Law in the Commonwealth Caribbean[3]; British American Insurance Company Ltd. v The Commissioner of Inland Revenue[4], and Well Services v Board of Inland Revenue[5]. He noted that the

[3] He referred in particular to pages 2, 97 and 98.
[4] ANUHCV No. 2002/0001 (8th July 2002).
[5] (1997) 52 W.I.R. 440.

payment in issue in Well Services was only subject to withholding tax because it was income.

[17] With specific reference to the items of payment in issue, Mr. Bristol submitted that under section 2(1) of the Income Tax Act, 'management charges' are defined to mean 'charges made for the provision of management services and includes charges made for the provision of personal services and technical and managerial skills'. These, according to Mr. Bristol, include charges for technical, managerial and advisory services provided by the non-resident parent company pursuant to an agreement. He asked me to note, on the other hand, that 'management services' are not the same and should not be treated in the same way as 'Head Office Expenses'. The latter, he said, connotes the recurring costs incurred by the head office of the parent company related to the parent company's administration of a number of branches or subsidiaries in countries such as Grenada. Such costs, said Mr. Bristol, run the whole gamut from promotional advertising to house rentals, salaries, utility bills, vehicle maintenance, office equipment rental and other such expenses, which according to Mr. Bristol, are allocated among the various branches of the parent Bank in accordance with a set formula. Mr. Bristol said that he was confirmed in this view because the legislature of Grenada, like that of Antigua, has not provided that 'person' for the purpose of withholding tax includes a branch or agent.

[18] In conclusion, Mr. Bristol urged me to find that the payments in issue are transactions in which a branch is merely paying expenses incurred for or on its behalf by its head office. In effect, argued Mr. Bristol, there is no payer and payee relationship because the local branch made the payments to the same entity since the Bank of Nova Scotia in Canada and the said Bank in Grenada are one and the same. According to Mr. Bristol, the Bank of Nova Scotia in Canada is a bank that is incorporated in Canada; registered as an external company under Companies Act of Grenada and licensed to do business in Grenada under the Banking Act. He noted that the Appeal Commission accepted that the Grenada branch and the head office in Canada are one and the same entity. This, he said, is in keeping with the decision by Mitchell J in the British American Insurance case, which is on a statutory provision that is similar to the present relevant Grenada provision.

Findings

[19] In my view, it is first necessary to construe section 50(1) in order to determine whether the Appeal Commission, and, by extension, the comptroller, erred in their decision. In my view, this subsection is clear in its terms. It is intended to render the items specified therein, to wit, "…discounts, commissions, fees, management charge, rent, lease premium, licence charge, royalties or other payment …", chargeable to withholding tax. These items are chargeable "…whether or not the payer is entitled to deduct such payment in computing the chargeable income of a business …". I do not agree, with respect, that these are all items in the nature of income. In my view discounts are not in that nature. I am therefore inclined to agree with Mr. Samuel, Senior Crown Counsel, that items of "other payments" would not necessarily constitute income. In short, the general words "or other payment", in section 50(1) are not limited to the particular words which precede them to yield an interpretation, by way of the *ejusdem generis* rule, that the general words may only connote items in the nature of income.

[20] In my view, Well Services renders no assistance in resolving the question whether withholding tax is only chargeable on income in the present case. Well Services was primarily concerned with the interpretation of a provision in a double taxation treaty, which, in effect, subjected "… [i]ncome from the rental of tangible (movable) property" to tax in the country in which the property was located.

[21] I have also considered the reference that was made to Dr. Denbow's Income Tax Law in the Commonwealth Caribbean. I think that it is similarly unhelpful. The essential aspects of the areas identified in that text are captured in pages 97 and 98 in which the author sets out aspects of the structure of withholding tax legislation in the Commonwealth Caribbean in general terms. He states, in effect, that it is intended to constitute the resident payer of the income as a local agent of the non-resident payee, so that the payer is liable to pay the tax and to comply with all local requirements to ensure that the Inland Revenue collects it. It seemed to me that there was a particular interest in the following passage from page 98 and the reference to withholding tax being in the nature of a tax on income:

> "Since withholding tax by its very nature is a tax on income flowing out of the country, it is only chargeable when the recipient of that income is a non-resident person or company. In the normal course of events, the statutory obligation imposed upon the payer to deduct withholding tax and account for the same to the Inland Revenue only arises in the event of a remittance being made by the payer of income arising [locally] to a non-resident person or company. In the absence of the recipient of the payment being non-resident, there is no question of any liability to deduct withholding tax ever arising."

[22] It seems to me that any payment by one concern or company to another concern or company would be income in the hands of that concern in the wider sense. It is important, however, to be cognizant of the actual words of the provision, section 50(1) in this case. Section 50(1) does not appear to be limited to income in the strict sense. I do not think that the Income Tax Act provides only for taxes on incomes. This seems clear in that while section 1(a) of the Act states that the Act shall apply to the assessment of income, section 1(b) states that the Act also applies to the deduction of withholding tax from payments. The chargeable payments under section 1(b) are those that are specified in section 50(1) of the Act, and which are not exempt under section 25(1)(aa). It is common ground that none of the payments at issue are exempt under section 25(1)(aa).

[23] Under section 50(1), withholding tax is chargeable on payments made from Grenada by any person or concern, whether or not engaged in business in Grenada, to a non-resident person. The local branch, which made the payments in issue, is engaged in business in Grenada. It made those payments to the Bank of Nova Scotia in Canada. The latter, the payee, is non-resident for the purpose of section 2 of the Income Tax Act because it was incorporated in Canada and not in Grenada.

[24] This brings me to the question whether the local branch of the Bank and the Bank in Canada is the same entity so as to obviate the incidence of withholding tax. In this regard, it seems to me that the British American Insurance case is distinguishable from the present case. In my view, the Appeal Commissioners correctly distinguished it on the basis of the differences between Antigua statute and Grenada's section 50(1). The

Antigua provision is section 39(1) of the Income Tax Act[6], which states as follows so far as it is here relevant:

> "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 … the payor shall upon paying such interest [etc] … deduct therefrom tax [and] … shall forthwith render an account to the Commissioner of the amount so deducted …".

[25] The critical question on this aspect of the case was whether the words "… where any person pays to any other person" included a payment by an Antigua branch of an insurance company of its share of head office expenses. On the section 39(1) formulation, the question whether the local branch and its Bahamian non-resident company were one and the same entity was critical to the chargeability of withholding tax on the head office expenses. Mitchell J held that they were. The result was that the payment in issue was not chargeable because one person (the branch) did not pay the expenses to another person. 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. 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. The Appeal Commission correctly upheld that decision.

[26] In the foregoing premises, I dismiss the appeal on all of the grounds and affirm the decision of the Appeal Commission. I make no order as to costs.

Hugh A. Rawlins
Chief Justice

[6] Cap. 212 of the Revised Laws of Antigua and Barbuda.