

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVP2022/0007

BETWEEN:

BANK OF NOVA SCOTIA

Appellant

and

COMPTROLLER OF INLAND REVENUE

Respondent

Before:

The Hon. Mr. Eddy D. Ventose

Justice of Appeal

The Hon. Mr. Gerard St. C. Farara

Justice of Appeal [Ag.]

The Hon. Mde. V. Georgis Taylor-Alexander

Justice of Appeal [Ag.]

Appearances:

Mr. Barrie Attzs and Mr. Thomas Theobalds for the appellant

Mr. Seryozha Cenac and Mr. George K. Charlemagne for the respondent

2024: March 14;
May 24.

Civil appeal – Tax law – Income Tax Act Cap 15.02 – Statutory interpretation – Meaning of ‘income’ in relation to income tax – Whether the appellant was liable to pay withholding tax in respect of the Payments – Whether the Commissioners were correct in determining that ‘cost of sales’ in section 39 of the ITA included interest payments

The appellant, Bank of Nova Scotia (“BNS”), was registered as an external company in Saint Lucia in 1998 (“BNS Saint Lucia”). BNS is incorporated in Canada and has its head office in Toronto, Canada. BNS Saint Lucia benefits from services provided to it by BNS’ head office in Toronto as well as other BNS subsidiaries in the Commonwealth Caribbean, namely, Barbados, Jamaica and Trinidad and Tobago. BNS Saint Lucia makes payments to BNS’ head office and the BNS Caribbean subsidiaries in respect of these services (the “Payments”). These Payments include head office support services expenses and head office expenses.

The respondent, the Comptroller of Inland Revenue, assessed the Payments and levied a withholding tax in the sum of \$2,142,376.80. BNS disputed the assessment and filed an

objection before the Income Tax Appeal Commissioners (“the Commissioners”) arguing essentially that the Payments were reimbursements and therefore not liable to withholding tax. The Commissioners decided that the Payments were subject to withholding tax under the Income Tax Act (the “ITA”) because they were made for management charges in respect of BNS’ banking business in Saint Lucia, other than as a result of carrying on business in Saint Lucia through BNS Saint Lucia. The Commissioners also decided that in calculating the withholding tax, the parties must be guided by Schedule 3 and section 39(1)(b) of the ITA and that ‘cost of sales’ in section 39(1) is merely a form of calculation in arriving at the cost of service.

BNS appealed the decision of the Commissioners to the High Court where the learned trial judge upheld the decision of the Commissioners and held, *inter alia*, that the Payments constitute ‘income’ which is liable to withholding tax under the ITA.

By notice of appeal filed on 14th April 2022, BNS appealed against the decision of the learned judge on 7 grounds and by counter notice of appeal filed on 9th May 2022, the respondent challenged the decision of the learned judge on two grounds. However, two main issues fell to be decided by this Court: (i) whether BNS was liable to pay withholding tax in respect of the Payments; and (ii) whether the Commissioners were correct in determining that ‘cost of sales’ in section 39 of the ITA included interest payments.

Held: dismissing the appeal, allowing the cross appeal in part and making the orders set out at paragraph 55 below, that:

1. In determining whether the Payments are subject to any withholding tax, it is necessary to ascertain whether they fell within any of the categories mentioned in paragraph 1(1) of Schedule 3 of the ITA. Section 2 states that ‘management charges’ means charges made for the provision of (a) management services; (b) personal services; (c) technical services. It cannot be disputed that some of the services provided by the BNS head office and the BNS Caribbean subsidiaries fall within the categories of management services and technical services. It is important to make the distinction between head offices expenses and ‘management charges’ – for the provision of management and technical services. It is no answer that the services provided are labelled ‘reimbursements’ because that is exactly what ‘management charges’ are. They are reimbursements for the management and technical services provided by the BNS head office and the BNS Caribbean subsidiaries to BNS Saint Lucia. BNS has not provided any evidence to contradict the self-evident nature of those services as technical or management services. Consequently, the Payments made in respect of those services were properly subject to withholding tax under paragraph 1(1)(b) of Schedule 3 of the ITA.

Section 2 of the **Income Tax Act** Cap 15.02 of the Revised Laws of Saint Lucia applied; Paragraph 1(1) of Schedule 3 of the **Income Tax Act** Cap 15.02 of the Revised Laws of Saint Lucia applied; **The Appeal Commissioners v The Bank of Nova Scotia** [2013] UKPC 19 considered; **Bank of Nova Scotia v The Appeal**

Commissioners GDAHCVAP2011/012 (delivered 19th September 2011, unreported) considered.

2. Prior to 2006, withholding tax was payable only by '[e]very person who makes payments to a non-resident' but this was expanded in 2006 to include a branch of a non-resident company which makes payments to its head office or to some other branch or associate outside Saint Lucia. There cannot be any clearer intention of Parliament in making the 2006 amendment to the ITA now reflected in section 76(1). Also, section 39(1)(b) expressly contemplates the application of paragraph 1(1)(a) and 1(1)(b) of Schedule 3 relating to expenditures made by a branch of a non-resident company to its head office or to some other branch outside Saint Lucia of such a company. If Schedule 3 did not apply in such circumstances, section 39(1)(b) would be completely unnecessary.

Section 76(1) of the **Income Tax Act** Cap 15:02 of the Revised Laws of Saint Lucia applied.

3. The Court has the power to correct obvious drafting errors and in appropriate cases, in discharging its interpretative function, can add words, or omit words or substitute words in a statute. In this case, there is a plain drafting mistake in not adding the words 'or branch' after the word 'person' as it appears in paragraph 1(1) of Schedule 3. The Court is satisfied that: (1) the intended purpose is to ensure that Schedule 3 applies in the circumstances outlined in section 76(1)(b); (2) by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question by not including the words 'or branch' after the word 'person' in paragraph 1(1) of Schedule 3; and (3) the Parliament would have made that change in paragraph 1(1) of Schedule 3 had the error been noticed before the 2006 amendment was made to the ITA. To give effect to the intention of Parliament in extending the application of Schedule 3 to payments made under section 76(1)(b), it is necessary to add the words 'or branch' after the word 'person' where it appears in paragraph 1(1) of Schedule 3.

Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586 applied; **Attorney General's Reference (Saint Lucia)** SLUHCVP2012/0018 (delivered 24th May 2013, unreported) followed.

4. Section 7(5) of the ITA states that where income ascertained in accordance with Part 5, accrues directly or indirectly to a non-resident person, from any source, other than from the exercise of employment or the carrying on of business through a permanent establishment, such income shall not form part of the assessable income of such person and the gross amount of such income is liable to withholding tax in accordance with sections 76 and 80. The important point here is that section 7(5) relates to income from any source that accrues directly or indirectly to a non-resident person which, subject to two exceptions, is in effect subject to withholding tax. Section 8(1) relating to the scope to tax is made expressly subject to section 7(5). It

is section 7(5) that makes clear that such income is liable to withholding tax in accordance with section 76. Since there is no territorial limitation on the word 'source' in section 7(5) the learned trial judge was correct to find that to attract withholding tax the services need not have been performed in Saint Lucia.

Section 7(5) of the **Income Tax Act** Cap 15.02 of the Revised Laws of Saint Lucia applied.

5. The effect of section 39(1)(b)(ii) is to remove the 'cost of sales' from the amount by which the taxpayer can reduce its assessable income for the purposes of determining the withholding tax that is payable on management charges. In the modern day of commerce with complex financial and banking products, there is no good reason in principle to limit the word 'sale' only to goods. It cannot seriously be doubted that services are traded on the marketplace and have been for decades. Cost of sales in the banking sector reflect the cost related to the services that are provided by banks. Once it is accepted that costs of sales are applicable to the banking and financial sector, it follows that interest expense is a cost of BNS in providing the banking services. The Commissioners were therefore correct in their assessment and the learned trial judge erred in rejecting their conclusion and in adopting a different approach.

Section 39(1)(b)(ii) of the **Income Tax Act** Cap 15.02 of the Revised Laws of Saint Lucia applied; **Bank of New South Wales v The Commonwealth** (1948) CLR 1 distinguished.

JUDGMENT

- [1] **VENTOSE JA:** This is an appeal by the appellant, the Bank of Nova Scotia (the "BNS"), and a cross appeal by the respondent, the Comptroller of Inland Revenue (the "Comptroller"), against the decision of the learned trial judge dated 16th March 2022 in which she upheld, in part, the decision of the Income Tax Appeal Commissioners (the "Commissioners") dated 11th November 2020. In that decision, the Commissioners agreed with the decision of the respondent dated 26th January 2012 to assess certain payments made to the appellant as subject to withholding tax and to disallow the deduction of interest expense.

Background

- [2] BNS was registered as an external company in Saint Lucia since 1998 (the "BNS Saint Lucia"). The BNS is incorporated in Canada and has its head office in Toronto,

Canada. BNS Saint Lucia benefits from services provided to it by BNS' head office in Toronto as well as other BNS subsidiaries in the Commonwealth Caribbean, namely, Barbados, Jamaica and Trinidad and Tobago. BNS Saint Lucia makes payments to BNS' head office and the BNS Caribbean subsidiaries in respect of these services (the "Payments"). These Payments include head office support services expenses (the "HOSSE") and head office expenses (the "HOE"). The learned trial judge summarised the services provided for both these expenses as follows:

"[15] The HOSSE include costs incurred by the Head Office on behalf of the entire group of companies in respect of loan credit review, analysis of credit risk, computer support, legal services, audit assistance with ATM capital expenditure funding, and compliance and treasury support. These costs are allocated to the various BNS branches and subsidiaries based on the number of hours spent by Head Office staff in performing the services. There is no markup of the cost of the services and only the actual calculated expenses incurred are allocated to the Saint Lucia Branch which reimburses the Head Office for such costs. The services rendered by the Head Office are performed outside of Saint Lucia in Toronto.

[16] The HOSSE also pertains to the services provided to the Saint Lucia Branch by the Caribbean branches and subsidiaries of BNS. The Trinidad and Tobago subsidiary provides processing support services which include reconciliation and settlement of the general ledger, SWIFT processing, term deposits and loan maintenance, operations support services related to real estate and equipment requirements, policy and procedure guidance, operational reviews, and project implementation support. These costs are allocated based on time spent on volume processing for the Saint Lucia Branch based on an annual time study.

[17] The Jamaica subsidiary operates a contact center, providing services related to inbound and outbound service calls. Personnel also make sales calls in order to drive business. The costs are allocated based on the amount of time the contact center staff spends handling the various calls. The Barbados Branch provides credit card operations, operations support and international employee-relations services. These fees are based on the number of branches that are supported. All of the above-mentioned services are performed outside of Saint Lucia in the usual course of these entities' business operations. They are performed in the aforementioned countries in support of the operations of the Saint Lucia Branch in order to take advantage of the economies of scale.

[18] In respect of the HOE, BNS states that these are costs charged because of the requirement of the Canadian Revenue Agency that foreign

branches, including the Saint Lucia Branch, absorb a portion of executive office expenses and international bank unit expenses as they indirectly benefit from the services provided by and expertise of the Head Office's Executive Office and International Banking Head Office staff. Again, there is no markup on the HOE as it is only the apportioned costs required to be borne by the Saint Lucia Branch that are reimbursed to the Head Office."

- [3] The Comptroller assessed the Payments and levied a withholding tax in the sum of \$2,142,376.80. BNS disputed the assessment and filed an objection before the Commissioners arguing essentially that the Payments were reimbursements and therefore not liable to withholding tax. The Commissioners decided that the Payments were subject to withholding tax under the **Income Tax Act**¹ (the "ITA"), because they were made for management charges in respect of BNS' banking business in Saint Lucia, other than as a result of carrying on business in Saint Lucia through BNS Saint Lucia. The Commissioners also decided that in calculating the withholding tax, the parties must be guided by Schedule 3 and section 39(1)(b) and that 'cost of sales' in section 39(1) is merely a form of calculation in arriving at the cost of service.

The judgment in the court below

- [4] BNS appealed the decision of the Commissioners to the High Court where the learned trial judge upheld the decision of the Commissioners. The trial judge held that: (1) it is income that is liable to withholding tax under the **ITA**; (2) section 76 of the **ITA** is a charging provision; (3) to attract withholding tax the service need not have been performed in Saint Lucia; (4) withholding tax applies to payments, and not only where a profit or gain has been made; (5) Schedule 3 of the **ITA** applies in the circumstances as set out in section 76(1)(b) of the **ITA** such that where a payment is made by a branch to its head office, withholding tax is payable on such payments as long as they fall within the list of categories in paragraph 1(1) of Schedule 3; (6) withholding tax applies to the Payments irrespective of whether BNS is carrying on business in Saint Lucia, as long as the Payments do not accrue from the carrying on of business in Saint Lucia; (7) the services provided to BNS Saint Lucia by the head

¹ Cap. 15.02 of the Revised Laws of Saint Lucia.

office and the Caribbean BNS offices are technical services and or management services which fall within the definition of management charges to which withholding tax applies; and (8) interest expenses are not to be included in 'cost of sales' for the purposes of section 39(1) of the **ITA**.

The appeal and counter notice of appeal

- [5] On 14th April 2022, BNS filed a notice of appeal against the decision of the learned trial judge on the following grounds, in summary, that the learned trial judge erred when she: (1) concluded that section 76 of the **ITA** is a 'charging provision' as distinct from a 'machinery provision' to facilitate the deduction of tax from payments to non-residents; (2) failed to recognise that the recognised source of income of a non-resident tax payer must accrue directly or indirectly in Saint Lucia; (3) accepted that the Payments were not sums accruing from the banking business carried on by BNS Saint Lucia but nonetheless held that the Payments were subject to withholding tax; (4) failed to consider that a reimbursement of an expense previously incurred is not 'income' and/or 'income from a source of assessable income' in the hands of the recipient; (5) found that Schedule 3 'applies in the circumstances set out in Section 76(1)(b)' of the **ITA**, as opposed to finding, as is expressly stated in the legislation, that section 76 of the **ITA** must be applied 'in accordance with and in the manner specified in Schedule 3'; (6) held that withholding tax does not only apply where profit or gain has been made, notwithstanding her earlier finding that only assessable income (as set out in section 32(1)) is subject to withholding tax; and (7) misdirected herself on the meaning of management and/or technical services.
- [6] In the counter notice of appeal filed by the respondent on 9th May 2022, the decision of the learned trial judge was challenged on the following two grounds: (1) that the learned trial judge erred in law when she held that the Commissioners were wrong to hold the view that the **ITA** is broader than just income tax in the ordinary sense and that withholding tax is not to be treated purely as a tax on income; and (2) that the learned judge was correct to find that interest expenses could not amount to 'cost of sales' within the meaning of the **ITA** and that there was no basis for the conclusion

that interest expenses are part of cost of sales for the purposes of section 39 of the **ITA** or that cost of sales is merely the form of calculation in ascertaining the cost of service.

The income tax regime

- [7] The parties differ on whether withholding tax is separate tax or whether it is simply a mechanism by which income tax is collected from a non-resident. It is not necessary to answer this question because an answer is not determinative of any of the issues raised in this appeal. It is however necessary to examine the overall scheme and key provisions of the **ITA**. Before doing so, it is necessary to refer to the well-known statement of Lord Dunedin in **Whitney v Inland Revenue Commissioners**² where he stated at page 52 that:

“My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now, there are three stages in the imposition of a tax: there is the declaration of liability, that is the part of the statute which determines what persons in respect of what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay.”

- [8] The first stage is the charge to tax, the second stage is the assessment to tax and the third stage is the recovery of tax.
- [9] Tax is defined in section 2(1) as ‘the tax charged under this Act ...’. Under the **ITA**, Division 1 – Charge to Tax (sections 7-11) and Division 2 – Persons Chargeable to Tax (sections 12-14) contain the charging provisions. Section 7 of the **ITA** is the main charging section of the **ITA**. Section 7(1) states that subject to subsections (5) and (6), tax shall be charged for each year of income on the chargeable income for that year of every person. Section 7(2) states that the persons chargeable to tax shall be

² [1926] AC 37.

those persons specified in Division 2 of this Part. Section 22(1) provides that the chargeable income of a non-resident, where it is not charged to tax directly on him or her, is charged to tax on his or her agent in the same amount as would have been charged on the non-resident. This section is not applicable here.

- [10] Section 7 brings Parts 5, 6, 7 and 8 into its orbit. Part 5 deals with the ascertainment of assessable **income**, namely, Division 1 which relates to gains or profits forming assessable income (sections 32-36) and Division 2 which relates to deductions allowable in ascertaining assessable income (sections 37-43). Part 6 deals with deductions and allowances. Part 7 concerns special provisions relating to certain taxpayers. Division 1 relates to variation of normal bases of taxation and Division 2 relates to withholding tax on payments to non-residents and deduction of tax by employers, by companies and from payments to contractors.

- [11] The second stage, namely, the assessment of tax, is found in Part 10 aptly entitled 'assessment of tax' and the third stage, namely, the recovery of tax, is found in Part 12 entitled 'payment, recovery and refund of tax'.

The withholding tax

- [12] Withholding tax is defined in section 2(1) as 'any tax deducted or deductible under sections 53(5), 63(13) or 76'. By including the word 'tax' as part of the definition of withholding tax, it follows that withholding tax is a tax charged under the **ITA** that is deducted under various sections including section 76. The definition alone should have dispelled the notion that withholding tax is a separate form of tax that operates outside the scope of the charging provisions of the **ITA**. Section 7(5) provides that:

"Where income ascertained in accordance with Part 5, accrues directly or indirectly to a non-resident person, from any source, other than from the exercise of employment or the carrying on of business through a permanent establishment, such income shall not form part of the assessable income of such person and the gross amount of such income is liable to withholding tax in accordance with sections 76 and 80."

- [13] It is important to make some observations about section 7(5). First, that section is found in section 7 which deals generally with the charge to tax. Section 7 is found in Division 1 – Charge to Tax which itself is found in Part 3 of the **ITA** which is headed as ‘Imposition of Income Tax’. Second, it relates to **income** that is ascertained in accordance with Part 5 of the **ITA**. Third, it applies to income accruing directly or indirectly to a non-resident. Fourth, that income must be from any source. Fifth, income from the exercise of employment or the carrying on of business through a permanent establishment is excluded from consideration. Sixth, that income ascertained shall not form part of the assessable income of such a person. Seventh, the gross amount of such income is liable to withholding tax in accordance with sections 76 and 80. There should be no doubt that withholding tax relates specifically to income. This does not change whether one describes it as a separate tax or not.
- [14] Section 7(5) makes clear that any income must be ascertained in accordance with Part 5. Section 32 deals generally with ascertaining income. It is found in Part 5 which is entitled ‘ascertainment of assessable income’ and Division 1 relating to gains or profits forming assessable income. Section 32(1) states that the assessable income of any person includes the gains or profits from or by way of: (a) any business; (b) any employment; (c) rentals and royalties; (d) interest or discounts; (e) premiums, commissions, fees and licence charges; (f) annuities and other periodic receipts, including receipts by way of alimony or maintenance; and (g) any other gains or profits of an income nature which accrued to that person which are not included under any other paragraph of this subsection. Section 32(2)(b) states that subsection (1) shall not be construed so as to bring within the meaning of assessable income liable to assessment under Part 10, any amounts accrued to a non-resident, other than from the carrying on of a business or the exercise of employment, which are liable to withholding tax under section 76. In other words, assessable income does not include any income that is subject to withholding tax in respect of a non-resident.
- [15] The wording of section 32(2)(b) is curious. It specifically excludes amounts accrued to a non-resident from: (1) the carrying on of a business; or (2) the exercise of

employment, from being part of assessable income that is liable to assessment under Part 10. Section 2(1) defines 'assessable income' as 'assessable income as defined in section 8 and as ascertained in accordance with Part 5'. It will be remembered that section 7(5) excluded from withholding tax any income accruing directly or indirectly to a non-resident from: (1) the exercise of employment; or (2) the carrying on of business through a permanent establishment. Two points are worthy of note. The first is section 7(5) excludes the carrying on of a business 'through a permanent establishment' but this qualification is absent from section 32(2)(b). The second one is a minor one in that section 7(5) speaks to 'carrying on of business' whereas section 32(2)(b) speaks to 'carrying on of a business' (emphasis added).

- [16] Section 8 deals with the scope of charge to tax. Section 8(1)(b) states that where the taxpayer is a non-resident, subject to section 7(5) all amounts ascertained in accordance with Part 5, accrued directly or indirectly from all sources in Saint Lucia, which are not exempt from tax. Some observations are necessary here. First, the amount must be ascertained in accordance with Part 5. Second, this is subject to the charge to tax provisions of section 7(5). Third, this relates to all amounts accrued directly or indirectly from all sources in Saint Lucia. Fourth, these amounts must not be exempt from tax. While section 8(1)(b) applies only to 'all sources in Saint Lucia', section 7(5) applies only to income (ascertained in accordance with Part 5) 'from any source'.
- [17] Section 76 is entitled, 'Deduction of tax from payments made to non-resident'. It is found in Division 2 of Part 7. Part 7 is entitled, 'Special Provisions Relating to Certain Taxpayers' and Division 2 is entitled, 'Withholding Tax on Payments to Non-Residents and Deduction of Tax by Employers, by Companies and from Payments'. What is clear from Division 2 is that the withholding tax provision found in section 76 is not essentially different in its wording from the other similar provisions found in section 77 ('Deduction of tax by employers') and section 78 ('Deduction of tax from payments to contractors').

- [18] Section 76(1) states that where a: (a) person makes payment to a non-resident; or (b) branch of a non-resident company makes payments to its head office or to some other branch or associate outside Saint Lucia, tax shall be deducted from such payments in accordance with and in the manner specified in Schedule 3 and the person or branch shall carry out such other obligations as are imposed by that Schedule. The section applies where a *payment* has been made. That payment can be made in two circumstances that are captured by that section. The first is where a *person* makes a payment to a *non-resident*. The second is where a *branch of a non-resident company* makes payments to its *head office* or to *some other branch or associate* outside Saint Lucia. In these two circumstances, *tax* shall be deducted from such payments *in accordance with and in the manner specified in Schedule 3*.
- [19] It is important that the tax that must be deducted is defined in section 2(1) as mentioned earlier to mean the 'tax charged under this Act' and withholding tax, for current purposes, to mean the 'tax deducted' under section 76. Two important considerations are imposed regarding Schedule 3. The tax deducted from the payments must be done: (1) in accordance with; and (2) in the manner specified in, Schedule 3. What therefore do these two phrases mean in respect of Schedule 3? That issue will be discussed later. For now, it is necessary to outline the requirements of Schedule 3.

Schedule 3

- [20] Paragraph 1(1) of Schedule 3 states that this Schedule applies to every person who makes *any payment* by way of — (a) royalty; (b) **management charges**; (c) commission or fee, not being in respect of an employment to which section 77 applies; (d) interest or discount; (e) the distribution of income of a trust being income of the kind specified in paragraphs (a) to (d); (f) premiums including insurance premiums but excluding re-insurance; (g) any other payments of an income nature and excludes the following payments — (i) dividends, (ii) lease, premium or licence, (iii) annuities or other periodic payments such as payments by way of alimony or maintenance, to a non-resident, and subject to subparagraph (2) does not apply to

any other payments to a non-resident carrying on business or exercising employment in Saint Lucia. Paragraph 1 makes clear that the Schedule applies to **every person** who makes any payment in the listed categories. A 'person' in paragraph 2(1) includes 'an individual, a trust, the estate of a deceased person, a company, a partnership and every other juridical person'. While paragraph 1 of Schedule 3 applies to any payment, sub-paragraphs (a)-(f) identify specific types of payments to a non-resident to which it relates. However, sub-paragraph (g) relates to 'any other payments of an income nature', but excludes dividends, lease, premium or licence, or annuities or other periodic payments such as payments by way of alimony or maintenance, to a non-resident.

[21] It is not technically correct to state that the payments identified in sub-paragraphs (a)-(f) are specific instances of income and that sub-paragraph (g) is the catch-all provision that is intended to cover any other payments not specifically identified but are nonetheless of 'an income nature'. While the scheme of the legislation, being an income tax legislation, relates to income, there are instances in Schedule 3 where it seems there is a departure from this. Assessable income is defined in section 32(1) of the **ITA**. There are some similarities between section 32(1) (assessable income) and paragraph 1(1) of Schedule 3 (payments subject to withholding tax). Management charges are a prime example – they are not income per se but are included in the list of payments for which withholding tax applies in paragraph 1(1)(b) of Schedule 3. Similarly, (i) dividends, (ii) lease, premium or licence, (iii) annuities or other periodic payments such as payments by way of alimony or maintenance, are clearly to be regarded as 'income' but are excluded from the scope of withholding tax by virtue of paragraph 1(1)(g) of Schedule 3.

[22] In summary, paragraph 1(1) of Schedule 3: (1) includes items that are of an income nature (sub-paragraphs (a) and (c) to (g) first part of paragraph); (2) excludes items that are of an income nature (sub-paragraphs (g), second part (i) to (iii)); and (3) includes an item that is not properly of an income nature (sub-paragraph (b) – management charges).

[23] To the extent to which this Court in **Bank of Nova Scotia v The Appeal Commissioners**³ stated at paragraph [35] that the withholding tax provisions do not create some special form of taxation which can be levied upon payments which are not of an income nature, it is doubtful that this is the correct approach since the Privy Council on appeal from the decision of this Court did not agree with the dicta in that paragraph. As was just explained, being of an income nature does not explain all the payments which are subject to withholding tax because some are not income at all, and some of which are income are themselves excluded from the scope of the withholding tax provisions. The Court stated:

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

[24] The entire paragraph seems problematic, but it is not necessary in this judgment to explore fully its implications. However, it must be noted that the Privy Council⁴ had the following to say in respect of paragraph [35] of the decision of this Court in **Bank of Nova Scotia**:

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

³ GDAHCVP2011/012 (delivered 19th September 2011, unreported).

⁴ See *The Appeal Commissioners v The Bank of Nova Scotia* [2013] UKPC 19.

purpose of the separate treatment of withholding tax may be to avoid arguments about the precise nature of the payments.”

- [25] Like sections 7(5) and 32(2)(b), Paragraph 1(1) also states that subject to sub-paragraph (2), the application of Schedule 3 does not apply to any other payments to a non-resident carrying on business or exercising employment in Saint Lucia.

Cost of sales

- [26] Section 39 relates to restrictions of certain deductions and provides as follows:

“39. Restrictions on deductions: management charges and certain payments by controlled companies to shareholder

(1) Despite section 37, where a person carrying on business in Saint Lucia incurs expenditure by way of paragraph 1(1)(a) and 1(1)(b) of Schedule 3, or by way of head office expenses being expenditure payable—

(a) to a non-resident (such non-resident not being engaged in a business in Saint Lucia giving rise to such management charges);
or

(b) by a branch of a non-resident company to its head office or to some other branch outside Saint Lucia of such company, a deduction shall be allowed of the lesser of—

(i) the aggregate of such charges, or

(ii) ten per cent of the deductions (exclusive of such charges) allowable under section 37 (excluding cost of sales) and the provisions of section 38(1) other than section 39(1)(a), or such higher amount as in the opinion of the Comptroller is reasonable. (Amended by Act 7 of 2006)

...”

- [27] Section 39(1)(b) as applicable makes clear that where a person carrying on business in Saint Lucia incurs expenditure in respect of royalties and management charges, or by way of head office expenses being expenditure payable by a branch of a non-resident company to its head office or to some other branch outside Saint Lucia of such a company, a deduction shall be allowed of the lesser of either the total of such charges, or ten percent of the deductions (without the charges) allowable under section 37 (excluding the cost of sales). Section 37 makes provision for the allowable deductions that must be taken in account in ascertaining the assessable income of every person for each year of income.

Conclusions

- [28] A convenient starting point is the determination of the core issues that are central to this appeal as explained by the learned trial judge, namely, first, whether BNS was liable to pay withholding tax in respect of the Payments, and second, whether the Commissioners were correct in determining that 'cost of sales' in section 39 of the ITA included interest payments.

Nature of Income and Withholding Tax (Ground 1 and Counter Notice 1)

- [29] Both the Commissioners and the learned trial judge spent a lot of time determining whether withholding tax is separate from income tax and whether section 76 is a charging provision or a machinery provision. In my view, the answers to these questions are not necessary to determine any of the issues in this appeal.

Management Charges (Grounds 3, 4 and 7)

- [30] The central starting point is whether withholding tax is payable on the Payments. These Payments, BNS argues, are simply reimbursements for services provided to BNS Saint Lucia by the Head Office and other BNS subsidiaries in Barbados, Jamaica and Trinidad and Tobago. Before the Commissioners, the appellant submitted that the Payments are not income from trade or business. The respondents also submitted that withholding tax is a tax on payments made rather than on income *per se* and that the Payments could be regarded as 'payments of an income nature' under paragraph 1(1) (g) of Schedule 3. The Commissioners' reasoning in respect of this issue as follows:

"[55] Schedule 3 of the Act speaks to the deduction of tax from payment on specific items to non-residents pursuant to, *inter alia*, section 76. Among these are management charges.

[56] Management charges, as defined in section 2 of the Act, are charges for the provision of management services, personal services and technical services. In other words, these are costs of providing the goods or services, more commonly used in the accounting sphere as 'cost of sales', 'direct costs' or 'cost of service'. This is the cost of providing the service of a business.

[57] The Tribunal's assessment in relation to the listed payments made by BNS Saint Lucia to its head office in Canada is that these are management charges as listed in Schedule 3 and as defined in section 2 of the Act. Management services in the banking sector could have a very wide definition to include, but not limited to compliance and risk, information technology services, procedure and policies, etc. These services would attract the necessary charges. In the case at bar, the Appellant asserts that these charges were incurred for the provision of management, technical and/or other services in the form of legal services, audit services, computer support, among other things. If, as the Tribunal concludes, were provided for BNS Saint Lucia, then they are fully captured by the schedule and attract withholding tax."

[31] The learned trial judge accepted at paragraph [75] of her judgment that the services performed by BNS head office and BNS Caribbean subsidiaries fall within the categories of technical services and or management services and that, consequently, the payments in respect of them are properly regarded as 'management charges' to which withholding tax applied. The appellant submits that the learned trial judge, first, failed to consider that a reimbursement of an expense previously incurred is not 'income' and/or 'income from a source of assessable income' in the hands of the recipient and, second, failed to recognize that a reimbursed expense is neither a gain nor profit for the purposes of section 32(1) of the ITA.

[32] The decision of this Court in **Bank of Nova Scotia v The Appeal Commissioners** and the decision of the Privy Council on appeal in **The Appeal Commissioners v Bank of Nova Scotia** concerned payments by a BNS branch in Grenada to BNS head office in Canada. On appeal from this Court, the Privy Council had to consider two issues under section 50(1) of the Grenada Income Tax Act, namely: first, whether the BNS branch in Grenada and its head office in Canada were both 'persons'; and, second, if so, whether the payments made by the BNS branch in Grenada fell within the expression 'fees, management charge... or other payment'. The payments in respect of which it was alleged that the BNS was liable to pay withholding tax were for: (1) computer expenses; (IBM contract); (2) data centre costs cited in error as special service misc.; (3) data centre charge out costs; (4) card allocations; (5) master card fees; (6) visa merchant transaction fees; and (7) head office charges.

The parties agreed that the payments were entirely a reimbursement of a share of expenses and did not include any element of profit to BNS head office.

[33] On the first issue, the Privy Council agreed with this Court that section 50(1) requires payment from one person to another and a branch is not included in the definition of person as defined in the Grenada Income Tax Act. On the second issue, the Privy Council noted that it raised more difficult questions both as to the nature of withholding tax, and its application to the facts of this case. The second issue is not analogous to the one presented in this appeal as the services provided to BNS Saint Lucia by BNS head office and the BNS Caribbean subsidiaries fell squarely within the definition of 'management charges' in the **ITA**.

[34] The difficulty for the appellant in its oral and written submissions before this Court is that management charges are simply not income as that term is commonly understood. Management charges in this context represent the commercial value of services provided by BNS head office and the BNS Caribbean subsidiaries to BNS Saint Lucia. While it is true that some of the matters itemized at sub-paragraphs (a)-(f) of Paragraph 1(1) of Schedule 3 are properly regarded as income, it is not correct that they all must be of an income nature. Management charges are, by definition, not of an income nature. What matters for present purposes is that the Parliament of Saint Lucia included 'management charges' in the list of payments that are subject to withholding tax in Paragraph 1(1) of Schedule 3. In a proper case, it might be appropriate to assess whether a particular payment is of an income nature for the purpose of determining whether it properly falls within the categories identified at sub-paragraphs (a)-(f) of Paragraph 1(1) of Schedule 3. This is not such a case. It is not necessary to make that assessment in respect of 'management charges' for the purposes of this appeal.

[35] It is no answer that the services provided are labelled 'reimbursements' because that is exactly what 'management charges' are. They are reimbursements for the management and technical services provided by the BNS head office and the BNS

Caribbean subsidiaries to BNS Saint Lucia. In determining whether the Payments are subject to any withholding tax, it is necessary to ascertain whether they fell within any of the categories mentioned in paragraph 1(1) of Schedule 3 of the **ITA**. As mentioned above, the Commissioners accepted that the Payments were ‘management charges’ under paragraph 1(1)(b) of Schedule 3 and this was upheld by the learned trial judge. Section 2 states that ‘management charges’ means charges made for the provision of (a) management services; (b) personal services; (c) technical services. It cannot be disputed that some of the services provided by the BNS head office and the BNS Caribbean subsidiaries fall within the categories of management services and technical services. It is important to make the distinction between head offices expenses and ‘management charges’ – for the provision of management and technical services. BNS has not provided any evidence to contradict the self-evident nature of those services as technical or management services. Consequently, the Payments made in respect of those services were properly subject to withholding tax under paragraph 1(1)(b) of Schedule 3 of the **ITA**.

Payments to head office or other branches (Ground 5)

- [36] This Court in **Attorney General’s Reference (Saint Lucia)**⁵ at paragraph [8] cited with approval the following passages⁶ from the decision of the House of Lords in **Inco Europe Ltd v First Choice Distribution**:⁷

“... It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross’s admirable opusculum, *Statutory Interpretation*, 3rd ed. (1995), pp. 93–105. He comments, at p. 103:

“In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.”

⁵ SLUHCVP2012/0018 (delivered 24th May 2013, unreported).

⁶ At pp. 592-593.

⁷ [2000] 1 WLR 586.

This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105–106. In the present case these three conditions are fulfilled.

Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v. Schindler* [1977] Ch. 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature.”

[37] Section 64(1) (section 76 of the **ITA**) of the Income Tax Act of 1989 was amended in 2006 by the **Income Tax (Amendment) Act**,⁸ (the “**2006 Amendment**”) to reflect the current formulation of section 76(1). Prior to the 2006 Amendment, section 64(1) stated as follows:

“Every person who makes 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.”

[38] The current formulation of section 76(1) is as follows:

“Where a—

(a) person makes payment to a non-resident; or

⁸ Act No. 7 of 2006.

(b) branch of a non-resident company makes payments to its head office or to some other branch or associate outside Saint Lucia,
tax shall be deducted from such payments in accordance with and in the manner specified in Schedule 3 and the person or branch shall carry out such other obligations as are imposed by that Schedule. (Amended by Act 7 of 2006)”

[39] The intention of the **2006 Amendment** was to specify that where a branch of a non-resident company makes payments to its head office or to some other branch or associate outside Saint Lucia withholding tax must be deducted or paid on those payments. The problem arises because Schedule 3 to which section 76(1) refers states in paragraph 1(1) that ‘[t]his Schedule applies to every **person** who makes any payment by way of ...’ (emphasis added). By stating that Schedule 3 applies to a ‘person’, Schedule 3, at first blush, seems to limit the application of its paragraphs only to ‘persons’. As mentioned above, section 2 defined a ‘person’ as including ‘an individual, a trust, the estate of a deceased person, a company, a partnership and every other juridical person’. The effect of this omission would be to negate the effect of section 76(1)(b) which states clearly that Schedule 3 applies in respect of payments made by a branch of a non-resident company to its head office or to some other branch or associate outside Saint Lucia.

[40] The appellant prefers the literal interpretation of paragraph 1(1) without reference to the application of section 76(1)(b). In the appellant’s view, since section 76(1) states expressly that withholding tax must be paid ‘in accordance with and in the manner specified in Schedule 3’ this means that any requirement in Schedule 3 must be complied with. Since paragraph 1(1) applies only to a ‘person’, it means that any payment made in the circumstances outlined in section 76(1)(b) must necessarily be excluded from any deduction of withholding tax. The Commissioners applied section 76(1)(b) without reference to the inconsistency just mentioned. The learned trial judge accepted that the clear words of section 76(1)(b) apply to a branch in respect of payments to its head office, noting that ‘any other interpretation would make section 76(1)(b) completely null and void, as there would be no instance in which it could apply’. The learned trial judge was correct in her conclusion as to the effect of

accepting the argument of the appellant. The learned trial judge however did not resolve the issue based on the clear wording of paragraph 1(1) of Schedule 3.

[41] Parliament, in making the **2006 Amendment**, intended to create a new category to which withholding tax applied. Prior to 2006, withholding tax was payable only where '[e]very person who makes payments to a non-resident' but this was expanded in 2006 to include where a branch of a non-resident company makes payments to its head office or to some other branch or associate outside Saint Lucia. There cannot be any clearer intention of Parliament in making the **2006 Amendment** now reflected in section 76(1). Also, section 39(1)(b) expressly contemplates the application of paragraph 1(1)(a) and 1(1)(b) of Schedule 3 relating to expenditures made by a branch of a non-resident company to its head office or to some other branch outside Saint Lucia of such a company. If Schedule 3 did not apply in such circumstances, section 39(1)(b) would be completely unnecessary.

[42] There is an obvious omission by Parliament to add the words 'or branch' after the word 'person' appearing in paragraph 1(1) of Schedule 3. I am mindful of the words of the House of Lords in **Inco Europe Ltd**. The Court has the power to correct obvious drafting errors and in appropriate cases, in discharging its interpretative function, the court can add words, or omit words or substitute words in a statute. In this case, there is a plain drafting mistake in not adding the words 'or branch' after the word 'person' as it appears in paragraph 1(1) of Schedule 3. No doubt I have exercised considerable caution before adding the words 'or branch' and I am satisfied that: (1) the intended purpose is to ensure that Schedule 3 applies in the circumstances outlined in section 76(1)(b); (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question by not including the words 'or branch' after the word 'person' in paragraph 1(1) of Schedule 3; and (3) the Parliament would have made that change in paragraph 1(1) of Schedule 3 had the error been noticed before the **2006 Amendment** was made.

- [43] To give effect to the intention of Parliament in extending the application of Schedule 3 to payments made under section 76(1)(b), it is necessary to add the words 'or branch' after the word 'person' where it appears in paragraph 1(1) of Schedule 3. During the hearing, counsel for the appellant was questioned as to whether this would resolve the inconsistency. While not disagreeing that it would, counsel for the appellant cautioned that any such reading may potentially affect other sections that may not immediately be clear. A review of the applicable sections revealed that this fear is not well founded. By adopting this approach, it would avoid rendering section 76(1)(b) inapplicable to Schedule 3 contrary to the clear intention of Parliament.
- [44] In accepting that Schedule 3 applies where a branch of a non-resident company makes payments to its head office or to some other branch or associate outside Saint Lucia, it is not necessary to address the issue concerning self-dealing. There is no need to address in detail the submissions made in respect of **International Computers Limited v Board of Inland Revenue**⁹ where the Tax Appeal Board of Trinidad and Tobago accepted that 'shared office costs' is not the same as provision of a 'management service' because a person cannot provide a service to itself. Section 76(1)(b) is a complete answer to that reasoning and the statement by the Tax Appeal Board that the non-resident company doing business in Trinidad and Tobago through its branch was not supplying services to itself. Simply naming a particular cost or costs as 'shared office costs' does not make it so; regard must be had to the nature of the services provided and whether they properly fall within the definition of 'management charge' which according to section 2 of the **ITA** includes 'management services' and 'technical services'.

Source of income (Ground 4)

- [45] In relation to determining the source of the income, section 7(5) governs. Section 7(5), as mentioned above, states that where income ascertained in accordance with Part 5, accrues directly or indirectly to a non-resident person, **from any source**, other than from the exercise of employment or the carrying on of business through a

⁹ Appeal Nos. I26-I29 of 1987.

permanent establishment, such income shall not form part of the assessable income of such person and the gross amount of such income is liable to withholding tax in accordance with sections 76 and 80. The important point here is that section 7(5) relates to income from any source that accrues directly or indirectly to a non-resident person which, subject to two exceptions, is in effect subject to withholding tax. Section 8(1) relating to the scope to tax is made expressly subject to section 7(5). It is section 7(5) that makes clear that such income is liable to withholding tax in accordance with section 76. Since there is no territorial limitation on the word 'source' in section 7(5) I agree with the learned trial judge that to attract withholding tax the services need not have been performed in Saint Lucia.

[46] There is also no need to address in detail the submissions made in respect of the decisions of the Tax Appeal Board of Trinidad and Tobago¹⁰ and the Court of Appeal of Trinidad and Tobago in **William H. Scott Ltd. v The Board of Inland Revenue**¹¹ which concerned whether a sum was a payment of interest within the meaning of the Income Tax Ordinance of Trinidad and Tobago and therefore liable to withholding tax. In respect of the levy of withholding tax, the Tax Appeal Board explained that the question was whether there was income earned by a non-resident in Trinidad and Tobago in relation to which payment is being made. It held that the payments, whether described as 'interest' or otherwise, were made for services outside of Trinidad and Tobago and earned income in its own country in the course of its normal trading operations there and were therefore not subject to income or corporation tax in Trinidad and Tobago.

[47] On appeal, the Court of Appeal of Trinidad and Tobago accepted the finding of the Tax Appeal Board that the payment was not in fact a payment of interest but was part of a payment made by the appellant to the confirming house for service rendered. The Court of Appeal accepted that withholding tax is payable where that payment arises within Trinidad and Tobago. Consequently, the Court of Appeal

¹⁰ No. 180 of 1983, dated 16th July 1987.

¹¹ Civil Appeal No. 50 of 1988, dated 11 November 1992.

agreed with the Tax Appeal Board that the income giving rise to the payment was generated from a source outside Trinidad and Tobago and could not therefore be subject to withholding tax. However, section 50(1) of the Income Tax Ordinance of Trinidad and Tobago expressly stated that ‘... so however that in the case of a payment arising outside Trinidad and Tobago to such a person or company withholding tax shall not be payable’. On this basis only this decision cannot apply to the facts underlying this appeal.

Cost of Sales (Counter Notice)

- [48] The last matter to consider is whether ‘cost of sales’ is synonymous with cost of services when used in the banking or financial services sector. The Commissioners were of the view that any calculation of withholding tax must be guided by paragraph 3 of Schedule 3 and section 39(1)(b) of the **ITA**. The Commissioners noted that the term ‘cost of sales’ is not a term ordinarily used by financial institutions and that the normal terminology used is ‘interest income’ less ‘interest expense’. The Commissioners concluded that their understanding of the phrase ‘cost of sales’ in section 39(1)(b) is that it seems to be merely a form of calculation in arriving at the cost of service. The learned trial judge relying on dicta from the decision of the High Court of Australia in **Bank of New South Wales v The Commonwealth**¹² noted that the bank is not engaged in the sale of anything and that she was unable to understand how interest expenses could be classified as ‘cost of sales’. The learned trial judge consequently held that: (1) there is no basis for the conclusion that interest expenses are included in ‘cost of sales’ for the purposes of section 39(1) of the **ITA** or that it is merely a form of calculation in arriving at the cost of service and the Commissioners erred in that regard; and (2) any such interpretation would be to attribute an expanded meaning to ‘cost of sales’ which does not apply to banks or financial institutions which are not engaged in sales.

- [49] The respondent submits that the ‘cost of sales’ is nothing more than a cost of doing business and that since a banking institution does not have stock but provides a

¹² (1948) CLR 1.

service, the cost of sales is the costs to the bank in providing that service. The respondent further submits that the costs of this service, in respect of some aspects of the bank's business, is the interest expense to provide that service. The learned trial judge relied on the following two passages from the decision of the High Court of Australia in **Bank of New South Wales** in arriving at her conclusion that banks or financial institutions are not engaged in sales:

"The argument of the plaintiffs is that a banker buys and sells credit and that for this reason banking is trade and commerce. But a banker does not buy or sell credit in the same way as a trader buys or sells goods. When it is said that a banker deals in credit the fact is that he receives deposits which he engages to repay or that he lends or agrees to lend money. A loan transaction is a business transaction but is not therefore itself trade or commerce...

The word "sale" is used in various metaphorical senses. When a man enters into a contract of employment he is sometimes said to "sell his labour," but really there is no transaction of sale; the contract is a contract of employment, but not a contract of sale. Similarly, when a banker "deals in credit" he makes loan contracts and does not sell anything."

- [50] The decision in **Bank of New South Wales** concerned whether it was lawful for the government of Australia under the Banking Act of 1947. In answering that question the High Court of Australia had to consider whether banking is trade or commerce and, if so, whether the challenged provisions restrict the freedom of inter-State trade or commerce. The focus of the High Court was whether a banking institution was engaged in selling or buying credit in the same way a trader purchases and sells goods. In any event, the High Court of Australia adopted an extremely narrow definition of the word sale. I have no doubt that in the past 'costs of sales' referred exclusively to the sale of goods.
- [51] The effect of section 39(1)(b)(ii) is to remove the 'cost of sales' from the amount by which the taxpayer can reduce its assessable income for the purposes of determining the withholding tax that is payable on management charges.
- [52] In the modern day of commerce with complex financial and banking products, there is no good reason in principle to limit the word 'sale' only to goods. It cannot seriously

be doubted that services are traded on the marketplace and have been for decades. In this regard, the Organisation for Economic Cooperation and Development (the “OECD”) notes that:¹³

“Services are a major part of the global economy, generating more than two-thirds of global gross domestic product (GDP), attracting over three-quarters of foreign direct investment in advanced economies, employing the most workers, and creating most new jobs globally. Services have always been traded. International transportation is as old as trade itself, and financial and insurance services followed shortly after.”

- [53] Cost of sales in the banking sector reflects the cost related to the services that are provided by banks. Once it is accepted that costs of sales are applicable to the banking and financial sector, it follows that interest expense is a cost of BNS in providing the banking services. The Commissioners were correct in their assessment and the learned trial judge erred rejecting their conclusion and in adopting a different approach.

Costs

- [54] CPR 65.13(1) states that the general rule is that the costs of any appeal must be determined in accordance with rules 65.5, 65.6 and 65.7 and Appendix B but the costs must be limited to two thirds of the amount that would otherwise be allowed. However, CPR 65.13(2) states that (2) The Court of Appeal may, if the circumstances of the appeal or the justice of the case require, depart from the general rule and, in such a case, it may - (a) make an order for budgeted costs whether on an application made in accordance with rules 65.8 and 65.9 or otherwise; or (b) make such other order as it sees fit. There is an express provision for departing from the general rule in CPR 65.13(1) where the circumstances of the appeal or the justice of the case requires. The trial judge, having found that prescribed costs were applicable, awarded the sum of \$4,500.00. Applying the general rule, the costs of this appeal will be two thirds totaling \$3,000.00. This does not seem adequate in an appeal that raised rather complex issues of tax law. Consequently, the circumstances of this case and certainly the justice here requires a departure from the general rule. The costs therefore shall be assessed in the usual manner if not agreed by the parties.

¹³ See <https://www.oecd.org/trade/topics/services-trade/>.

Disposition

[55] Accordingly, I would dismiss the appellant's appeal against the decision of the learned trial judge that the Payments were subject to withholding tax and allow respondent's appeal only in respect of the decision of the learned trial judge that interest expenses are not to be included in the cost of sales for the purposes of section 39(1) of the **ITA**. I would make the following orders:

- (1) The appellant's appeal is dismissed, and the order made by the learned trial judge in sub-paragraph 2 of paragraph 91 of the learned trial judge's judgment is affirmed.
- (2) The respondent's appeal is allowed in part, and the orders made by the learned trial judge in sub-paragraphs 1, 3 and 4 of paragraph 91 of the learned trial judge's judgment are set aside.
- (3) The respondent shall have: (1) 100 per cent its costs in respect of the appeal; and (2) 50 per cent of its costs in respect of the counternotice, to be paid by the appellant which costs are to be assessed if not agreed within 21 days of today's date.

[56] I am grateful for the assistance provided by learned counsel.

I concur.

Gerard St. C. Farara
Justice of Appeal [Ag.]

I concur.

Georgis Taylor-Alexander
Justice of Appeal [Ag.]

By the Court

Chief Registrar