GRENADA

IN THE COURT OF APPEAL

HCVAP 2011/012

In The Matter of the Income Tax Act No. 36 of 1994

BETWEEN:

BANK OF NOVA SCOTIA

Appellant

and

THE APPEAL COMMISSIONERS

Respondents

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Don Mitchell, QC	Justice of Appeal [Ag.]

Appearances:

Dr. Claude Denbow SC, Mr. James A.L. Bristol with him, instructed by Henry, Henry & Bristol, for the Appellant
Mr. Darshan Ramdhani Solicitor General, Mr. Adebayo Olowu Crown Counsel with him, for the Respondent

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2011: June 21;
September 19.

Civil Appeal – Income tax – Withholding tax – Income Tax Act No. 36 of 1994 of the Laws of Grenada, as amended by the Income Tax (Amendment) Act No. 5 of 1996 of the Laws of Grenada – Whether the Comptroller of Inland Revenue was entitled under the Act to charge withholding tax on a payment of expenses, or whether the tax was limited to income only – Whether this obligation to pay withholding tax applied to payments made by the appellant's Branch Office in Grenada to its Head Office in Canada, or whether it was limited to payments made by one individual or juridicial entity to a separate individual or juridicial entity – Whether income tax and withholding tax are two different types of taxes

The Grenada Branch Office of the appellant bank, Bank of Nova Scotia, had sent seven separate amounts of money to its Head Office in Canada, these amounts being its share of Head Office expenses incurred during the years 2001-2006. On 8th February 2008, the

Comptroller of Inland Revenue came to a determination that the Branch Office in Grenada was required under the provisions of section 50(1) of the Income Tax Act 1994 (as amended by the Income Tax (Amendment) Act No. 5 of 1996) ("the Act") to pay withholding tax on the seven amounts. The appellant however, was of the view that it was not required to pay any withholding tax on these amounts, in light of the fact that they were entirely a reimbursement of a share of expenses and did not include any element of income or profit to the appellant's Head Office.

The appellant appealed to the Income Tax Appeal Commissioners, who upheld the Comptroller's decision. The appellant then appealed to the High Court, where the learned Chief Justice also ruled in favour of the respondent. This gave rise to the present appeal.

Held: allowing the appeal, setting aside the decision of the learned Chief Justice, and awarding the standard assessed costs to the appellant, that:

1. The payments in question, having been a reimbursement of expenses and not having been of income, are not subject to deduction of withholding tax. 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.

2. Section 43(1) of the Act is an enabling section, as it permits the Minister to determine by agreement with any foreign Government, how branches are to be taxed in Grenada so as to avoid the imposition of double taxation. However, no such agreement applies in this case. If and when profits are remitted by the Branch Office in Grenada to the Head Office in Canada, income tax may be payable in Canada as well as in Grenada.

3. The expression "permanent establishment" is a term used in international agreements dealing with double taxation relief. Section 50(1) of the Act does not apply to a permanent establishment. On a reading of section 50(1) of the Act, the Comptroller lacked the statutory authority to assess the seven payments in question as attracting withholding tax.

4. There was only one legal entity involved in this case, the Bank of Nova Scotia. It operated in Grenada through a Branch Office, and its Head Office was in Canada. The Branch Office could not as a matter of fundamental corporate law be regarded as a legal person engaged in business on its own account in Grenada. The

Income Tax Act of Grenada could and did provide for the Grenadian income of the separate Branch Office to be subject to income tax, which had been paid.

5. The definition of "person" in section 2 of the Act is clear and does not admit of including the unincorporated Head Office of a foreign bank operating in Grenada. In any event, the payer and the payee being the same person, section 50 of the Act has no application. The payments had not been made to a person within the meaning of that word in the Act.

6. The distinction between a subsidiary company and a Branch Office is recognized in tax law. The question whether a particular country's parliament has chosen to tax a Branch Office in the same way as a subsidiary company, or to tax them differently, is to be answered only by looking at the plain meaning of the tax law of that country. In this case however, there is no ambiguity in relation to this. Section 50 of the Act is clear and in need of no assistance from other sections of the Act.

JUDGMENT

[1] **MITCHELL, JA [AG.]**: This appeal concerns the application of the **Income Tax Act**[1] of Grenada. In particular, was the Comptroller of Inland Revenue entitled under the Act to charge withholding tax on a payment of expenses, or was the tax limited to income only? And, two, did the obligation apply to payments made by a Branch Office in Grenada to its Head Office in Canada, or was it limited to payments made by one individual or juridical entity to a separate individual or juridical entity?

[2] There were seven separate amounts of money in issue. These amounts had been accepted by the Grenada Branch Office as its share of Head Office expenses incurred on its behalf in Canada during the years 2001-2006. They were:

(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

[1] No. 36 of 1994 of the Laws of Grenada, as amended by the Income Tax (Amendment) Act No 5 of 1996.

(6) Visa Merchant transaction fees $ 324,686.00

(7) Head Office charges $6,162,152.98

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

[3] The Comptroller, on 8th February 2008, came to a determination that the Branch Office in Grenada was required under the provisions of section 50(1) of the Act to pay withholding tax on the seven amounts. The appellant appealed his decision to the Income Tax Appeal Commissioners. They, in a written decision dated 22nd September 2009, upheld the Comptroller's decision. This in turn was appealed to the High Court. There the learned Chief Justice also ruled in favour of the respondent. It is this last decision that has now been appealed to the Court of Appeal.

[4] The basis of the finding by the Comptroller, upheld by the Commission and by the High Court, is 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 legal entity, it is nevertheless possible for the branch operations in Grenada to be subject to assessment by the Comptroller for payment of withholding tax as provided for in the Act. The draughtsmen of the **Income Tax Act** of Grenada, they found, 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 office. They found that the bank's operations in Grenada conducted at its branch have to be construed in accordance with the provision in section 2 of the Act as being the operations of a "permanent establishment". Further, the branch having made payments identified within the categories in section 50(1) to a non-resident person, being the head office of the appellant, withholding tax must in accordance with the provisions of the Act be deducted from the payments and paid to the Comptroller.

[5] There are six grounds of appeal. They are to a large extent intertwined and repetitious. Both counsel argued them together. For the sake of brevity, I will summarise them as follows: They are to the effect that the learned Chief Justice in the High Court erred in:

(i) failing to take into account that the evidence was that the seven payments were reimbursements of expenses incurred by Head Office in relation to its Branch Office in Grenada and were not of an income nature;

(ii) failing to hold that the seven payments were reimbursements of the Branch's share of costs;

(iii) holding that withholding tax could be levied under the **Income Tax Act** on payments whether they were of an income nature or not;

(iv) failing to find that withholding tax is a form of income tax on payments to non-residents which cannot be levied unless such payments are of an income nature;

(v) failing to construe section 50 in a strict manner; and

(vi) holding that the payments in issue were capable of giving rise to a charge of withholding tax when both the payer and the payee were one and the same person.

These six grounds fall naturally into three separate groups, grounds (i) to (iv), ground (v), and ground (vi). I propose to deal with the grounds of appeal under these three groupings. First, we shall look at the law.

The Income Tax Act of Grenada

[6] The **Income Tax Act** of Grenada describes itself in its long title as being "An Act to provide for the imposition of income tax and to regulate the collection thereof." Section 2 of the Act defines "person" as including "an individual, a trust, the estate of a deceased person, a company, a body of persons, a partnership and every

other juridical person." The expression "juridical person" is not defined, but its meaning is well known. It refers to a person created by law, as distinct from a natural person. The same section defines "withholding tax" as meaning "any tax deducted or deductible pursuant to sections 46, 48(13), 50, 51, 52 or 53." The same section defines "permanent establishment" to include:

> "(a) a place of management;
> (b) a branch or office;
> (c) a factory or workshop;
> (d) premises used as a sales outlet;
> (e) a building site or construction or assembly project;
> (f) the maintenance of plant and machinery for rental;
> (g) a mine, quarry or any other place of extraction of natural resources."

Section 42 defines "chargeable income". It provides that the chargeable income of a person for any year of assessment is the aggregate amount of the assessable income of that person for that year of assessment from the sources specified in section 29.

[7] The respondent placed reliance on section 43(1) of the Act. This provides where relevant that:

> "(1) The Minister may enter into an agreement with the Government of any other country or group of countries with a view to -
> …
> (b) determining the assessable income to be attributed to any agency, branch or other permanent establishment in Grenada, of a resident of that other country or to any agency, branch or other permanent establishment in that country, of a resident of Grenada;
> …
> (e) the rendering of reciprocal assistance to facilitate the administration of this Act and the income tax laws of that other country and any agreement for the avoidance of double taxation or the exchange of information."

This is the only section in the Act, other than the definition section, that mentions a "permanent establishment".

[8] The section of the Act upon which the Comptroller relies is section 50(1).[2] This is the section of the Act which imposes an obligation on a Grenadian taxpayer to deduct and pay a withholding tax. It reads:

> "50(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."

[9] The first area of contention between the parties was what exactly the nature of a withholding tax was. Counsel for the respondent urged that a withholding tax and income tax are two different taxes. They are separately defined in section 2 of the Act. The two taxes, he submitted, were treated differently throughout the Act. Counsel for the appellant submitted that the Act provided one integrated regime for the imposition of income tax. The withholding tax provisions were no more than a collection mechanism where the payer of income accruing to a non-resident was placed under a duty to collect the tax.

[10] **Toby's Theory and Practice of Income Tax**[3] is helpful in tracing the history and meaning of withholding tax. We learn that:

(i) The term "withholding tax" may be used in a broad sense to cover all forms of deduction of tax at source. It was first introduced in England by Chancellor of the Exchequer Henry Addington in 1803 as one of two innovations after he had reintroduced income tax which had been earlier introduced and abandoned by William Pitt. Addington introduced a scheme for the deduction of tax at source which was to be applied to interest, dividends, rents, income from funds, and the emoluments of Crown Servants.

[2] As amended by s. 24 of the Income Tax (Amendment) Act, No. 5 of 1996.

[3] Richard Toby, The Theory and Practice of Income Tax (Sweet & Maxwell, 1978) at p.111-114.

(ii) In a general sense, the withholding of tax at source was introduced because of the widespread evasion which was then being practised against all forms of direct taxes. It is understandable that such a mechanism should have been developed almost with the inception of direct taxation, and the fact that its use has had to be extended to various forms of income is evidence that the reasons which necessitated its introduction in the first place have not disappeared, and if anything, are today even more convincing.

(iii) The term "withholding tax", though applicable to all forms of deduction at source, is here used in its narrower sense to refer to withholding on the various types of income accruing from investments which have been made in a taxing jurisdiction.

(iv) It is different however where the income arises to a foreign investor, since the taxing jurisdiction is not normally concerned with the income arising or accruing to a non-resident outside that jurisdiction. It is in this case that the withholding tax has been found to be an extremely effective mechanism and an efficient collecting device for minimising or arresting evasion by the non-resident.

(v) Developing countries with their mostly unsophisticated systems of assessment and collection are worse off in the matter of the collection of tax than the developed countries because of the ability of the developed countries over the years to experiment and perfect various devices for collecting the tax and generally for improving their administrative machinery.

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

(vii) The withholding tax imposed on remittances to foreign residents is now widely used as a collection mechanism by developed and developing countries alike. This mechanism while in use in many developed countries for centuries has only recently been introduced in developing countries. This fact is not surprising as the developing countries lacked the statutory machinery and the techniques for its effective use.

Grounds (i), (ii), (iii) and (iv)

[11] Learned senior counsel for the appellant submitted that the seven payments in issue should not have been subject to withholding tax because they were not of an income nature, and withholding tax is only chargeable on payments of an income nature. Reimbursements of expenses, he submitted, are as a matter of tax law not receipts of income or profits.

[12] Counsel relied on the English authority of **Owen v Pook (Inspector of Taxes)**.[4] In that case, a medical practitioner who practised both at his residence and also at a hospital some 15 miles away was paid travelling expenses. He was assessed to income tax on the amounts received as travelling expenses as being emoluments of his office. He claimed to deduct from his income the expenses that he had incurred. It was held by a majority of the House of Lords that so far as the taxpayer's actual travelling expenses were reimbursed they were not emoluments as defined in the Act and accordingly were not chargeable.

[13] Counsel also relied on the authority of **The London County Council and Others v The Attorney-General**,[5] a House of Lords decision of 1900 reversing the Court of Appeal. The Council had raised money by loans and had lent money on

[4] [1969] 2 All E.R. 1.
[5] [1901] A.C. 26.

interest to local authorities. The Revenue argued that when the enactment spoke of "interest of money or annuities charged with income tax under Schedule D" this must mean that the interest was to be charged with income tax in full even if it meant that the Council might be paying the tax twice. The court rejected that argument holding that there was really no such thing as income tax under Schedule D. The expression only meant "assessed to income tax in accordance with the provisions in Schedule D." As Lord MacNaghten put it:

> "Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Sched. D and those assessed under Sched. A or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all."

[14] Learned senior counsel for the appellant submitted that since withholding tax is a tax on income, and since no income payments were ever made from the Branch Office in Grenada to the Head Office in Canada, no withholding tax could be chargeable. He submitted that no analysis of the seven payments had ever been undertaken in order to determine whether they were of an income nature or not, indeed they had been accepted as expenses. He relied on the **British Salmson** case,[6] which he submitted shewed that in order to determine whether withholding tax was chargeable upon a payment to a non-resident, the first question to be determined by the Revenue and by the court was whether the payment was of an income nature or not.

[15] In that case, a British company held a licence from a French company permitting it to use its patent to manufacture and sell airplane engines. Under the terms of the licence the British company was required to make certain payments to the French company. The payments were in two classes, the first was a lump sum as consideration for the licence. The second involved an additional payment by way

[6] British Salmson Aero Engines Limited v Commissioners of Inland Revenue [1938] 2 K.B. 482.

of royalty of £2,500 a year. The assessments by the Inland Revenue were of both those classes of payments. The relevant rule under the UK **Income Tax Act** of 1918, provided:

> ”Upon payment … of any royalty or other sum paid in respect of the user of a patent, not payable, or not wholly payable out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.”

The question before the English Court of Appeal was whether the tax was due in respect of both classes of payments. The Revenue argued that both classes were paid in respect of the user of a patent, and the effect of the language of the section was that, whether or not a sum paid in respect of the user of a patent is in reality of a capital or of an income nature, the language of the legislature has definitely attributed to it the latter characteristic for tax purposes. In other words, any sum paid in respect of the user of a patent, whether it is called a royalty or not, and whether it be a lump sum or not, is of necessity stamped with the character of income because it is paid in respect of the user.

[16] The Court of Appeal rejected the Revenue's argument. It held that the statutory provision did not make tax payable on royalties or other sum paid in respect of the use of the patent. What was required to be determined on the facts of the particular case was whether the payment was of a capital or income nature, since income tax was only payable on payments of an income nature. The court held that the lump sum figure was of a capital nature and therefore not subject to the withholding of tax. On the other hand, the sums paid annually in respect of the user of the patent were of an income nature and subject to withholding tax. The use of the general words “or other sum” did not absolve the court from analyzing the nature of the payments involved. The court would only uphold the imposition of withholding tax where such other sum was of an income nature.

[17] In the **Dunlop Rubber** case,[7] an English company had a worldwide network of research establishments for the entire Dunlop organisation throughout the world. The English company communicated the latest information, processes and inventions relating to goods manufactured by them to its subsidiaries and associated companies on certain terms and conditions. One of these subsidiary companies was the Indian company in which it held a 51% majority shareholding. By agreement between them, the Indian company had the sole right to manufacture certain goods in various countries of the Far East. The Indian company was required to pay the English company a proportionate part of certain costs. The Indian Revenue attempted to tax the share of costs remitted by the Indian company to the English company. The question before the Indian court had been whether on the facts of that case the amounts received by the English holding company from its Indian subsidiary company constituted income assessable to tax.

[18] As Mukharji J stated at the penultimate paragraph of the judgment,

> "… The Tribunal was of the view that the Revenue was not justified in taxing the English Company in respect of the payments made to it by the Indian Company as what was recouped by the English Company was part of the expenses incurred by it. We must determine the true nature of the receipt from the clauses of the agreement, the object and the manner of the receipt and also taking into account the previous document. It appears to us that the Tribunal was right in arriving at the view that it was the recoupment of expenses incurred for the technical data for which a research Department was maintained in London. The result of the research was for the benefit of all concerned including the head office and the subsidiary concerns. It was for sharing of the expenses of the research which was utilized by the subsidiaries as well as the head office organisation that the payments were made by the Indian Company and received by the London Company".

The court found that the Revenue was not justified in taxing the English company in respect of the payments made to it by the Indian company as what had been recouped by the English company was part of the expenses incurred by it.

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[7] Commissioner of Income Tax v Dunlop Rubber Co Ltd (1982) 29 CTR (CAL) 25; (1983) 142 ITR 493 (CAL); (1982) TAXMAN 179.

[19] Counsel for the appellant also referred to the **British American** case[8] from Antigua. This was a High Court judgment at first instance, and in any event, the words of the section in the Antigua statute are slightly different and may be distinguished.

[20] The learned Solicitor General submitted that on a strict interpretation of section 50(1) the Branch Office in Grenada is bound to deduct the withholding tax once the payments to Head Office fall within one of the statutory categories even if these payments comprised in whole or in part expenses. Every payment under section 51 is referenced as income but not those under section 50(1). All monies going overseas to pay for services rendered is taxable. In fact, it does not matter to the Comptroller whether or not any of these payments constitute reimbursements for expenses incurred on behalf of the Branch Office. The Act does not distinguish between payments of income and payments by way of reimbursement of expenses. The determining factor is whether they fall under section 50(1) as being one of the captured payments. The expression "other payments" in the section is at large.

[21] The learned Solicitor General urged the court to be careful in applying the cases cited by the appellant. He submitted that authorities from India are not helpful. The Indian **Income Tax Act** is distinguishable in that it specifically mentions profits, while our **Income Tax Act** does not refer to profits. Our Act does not distinguish, he submitted, between income and expenses when money is being shipped overseas. It is all to be treated as income for the purpose of imposing withholding tax. The nature of our taxing regime, he submitted, recognises that we have no administrative mechanism to assess the payments made overseas. It is now to be a flat 15% of all payments made overseas whether it is income or not. This compares favourably, he urged, with the level of 30% payable by the resident.

[8] British American Insurance Company Limited v The Commissioner of Inland Revenue and Another, ANUHCV2002/0001 (unreported).

Ground (v)

[22] Counsel for the appellant submitted that both the Appeal Commission and the High Court had erred in law in failing to construe section 50 in a strict manner as is mandated by the fundamental principles in relation to the construction of taxing statutes.

[23] The learned Solicitor General asked this court to find by inference that the reference in section 43(1)[9] of the Act to the Minister being enabled to enter into an agreement with the Government of any other country with a view to determining the assessable income to be attributed to any agency, branch or other permanent establishment in Grenada of a resident of that other country, to be an indication that the appellant's Branch Office in Grenada was to be treated as a permanent establishment and subject to payment of a special withholding tax on all payments made to it by the Branch Office whether they were payments of income or of a reimbursement of expenses.

[24] The law on this point of what parliament intended is well expressed by Rowlatt J in the **Cape Brandy Syndicate** case[10] where he said,

> "... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Ground (vi)

[25] The final ground of appeal was that the learned Chief Justice erred in law in holding that the 7 payments in issue made by the Branch Office of the appellant in Grenada to its Head Office in Canada were capable in law of giving rise to a charge of withholding tax when both the payer and the payee were one and the same legal entity.

[9] Supra at paragraph 7.
[10] Cape Brandy Syndicate v Inland Revenue Commissioners [1921] 1 K.B. 64.

[26] The Appeal Commission had found that it was indisputable that the Grenadian branch of the Bank of Nova Scotia and its head office in Canada was one and the same entity. It had held, nevertheless, that it was possible for the branch operations in Grenada to be distinguished and as such subject to assessment by the respondent for payment of withholding tax as provided by the Act. The draughtsmen of the **Income Tax Act** of Grenada, the Commission found, had 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.

[27] Similarly, the learned Chief Justice in upholding the decision of the Appeal Commission found[11] that by its specific terms section 50(1) of the Act charged the payments, provided in that section, that any person who was engaged in business in Grenada made to a non-resident company. The local branch, he held, was a company engaged in business in Grenada. It made the payments in issue to a bank that was non-resident as it was incorporated in Canada, i.e., the Head Office. He concluded that the Comptroller was correct when he determined that withholding tax was chargeable on the payments which the Branch Office made to Head Office.

[28] The Solicitor General urged that it was a well established canon of construction that one was entitled to look at other sections of the Act for guidance. He relied on the Court of Appeal case from Trinidad and Tobago of **Board of Inland Revenue v Young.**[12] In that case, the **Income Tax Act, Ch 75:01** exempted 'management charges' which it defined at section 2(1) as meaning charges made for the provision of management services and including charges made for the provision of personal services and technical and managerial skills. The Tax Appeal Board had allowed a claim by the taxpayer on the footing that the challenged expenses constituted management charges paid to non-resident companies or persons who were not engaged in trade or business in Trinidad and Tobago. The question was

[11] At paragraph 26 of the judgment.
[12] Board of Inland Revenue v Young (Selwyn) (1997) 53 WIR 335.

whether the words 'and includes' had the effect of extending the definition of management charges to charges that were not for the provision of management services, but were for the provision either of personal services or technical or managerial skills. In giving the decision of the Court of Appeal, de la Bastide CJ had reason to look at section 51 of the Trinidad and Tobago Act as assisting in determining whether the Revenue could extend management charges as defined in section 2(1) to charges that were paid for services that had no connection whatever with the management of the company. He agreed with the decision of the Tax Appeal Board and dismissed the Inland Revenue's appeal with costs.

[29] The learned Solicitor General submitted that the contention of the appellant that a charge of withholding tax cannot arise between a payer and a payee who are one and the same legal entity is an overly simplistic argument and ignored the realities of the modern taxing world. He urged that it was widely accepted that a branch office of a foreign company can be regarded as a separate taxable entity from the foreign company for the purpose of withholding tax.

[30] The Solicitor General relied on **National Westminster Bank v United States**.[13] This was a double taxation treaty case. It dealt with the attribution of capital to branches of foreign banks under the US-UK **Convention for the Avoidance of Double Taxation** of 1975. National Westminster Bank (NatWest) claimed that the IRS had wrongfully rejected its interest deduction for interest paid on funds it had received from NatWest headquarters and other non-US branches to conduct its banking operations. It claimed it was entitled to do so under the "separate entity" provisions of Article 7 of the US-UK Treaty. Article 7 provided in sum that the business profits of an enterprise of a Contracting State (in this case the UK) should be taxable only in that State unless the enterprise carried on business in the other Contracting State (in this case the USA) through a permanent establishment situated therein. The profits of the enterprise might be taxed in the USA but only so much as was attributable to that permanent establishment. There was to be attributed to that permanent establishment the profits which it might be

[13] National Westminster Bank PLC v The United States No 965-758T at pages 10-11.

expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment. The judgment recognises that the regulation of branches of foreign banks is different from the regulation of separately-incorporated foreign bank subsidiaries. Branch banks had only to file quarterly reports and were not subject to minimum capital requirements. In contrast, branches of foreign banks separately-incorporated as subsidiaries of the foreign bank were regulated like any other US bank. They were subject to the same minimum regulatory capital requirements applicable to US banks, and could face sanctions from bank regulators if they fail to meet regulatory requirements. This case arose under the provisions of a double taxation treaty, which does not apply to our situation in Grenada. It cannot help the respondent.

[31] The learned Solicitor General submitted that the concept of a permanent establishment in taxing regimes was a feature of the OECD model laws on international taxing regimes. Article 5 of the OECS Convention, he urged, defines the term "permanent establishment" as a fixed place of business through which the business of an enterprise was wholly or partly carried on. Article 5 together with Article 7 of the Model Tax Laws had the combined effect, he submitted, that profits from services performed in a territory of a contracting State by an enterprise of the other contracting state are not taxable in the first mentioned State if they are not attributable to a permanent establishment situated therein. It was consistent with the principles of Article 7 that until an enterprise of one State had set up a permanent establishment in another State, it should not be regarded as participating in the economic life of that State to such an extent that it comes within the taxing jurisdiction of that other State.

[32] The learned Solicitor General submitted that having regard to the use of this term, which had developed into a term of art, it should be obvious that the definition of "permanent establishment" included a "branch" and clearly this branch should be subject to the taxing regime of Grenada independent of and apart from the Head Office in Canada. He urged that the taxing authority of Grenada had no authority

to subject the Head Office in Canada to Grenada's taxing regime. There was no power in the Comptroller to call for the books of Head Office, nor was there any power to investigate Head Office, nor to reassess Head Office as he would a resident. It would be absurd, he urged, to find that a permanent establishment did not fall to be considered as any resident person of Grenada and to be fully subject to the taxing regime.

Additionally, the learned Solicitor General submitted on behalf of the respondent that a Branch Office was clearly a permanent establishment under the Act for the purpose of imposing tax. There was no requirement that there be a double taxation agreement in place for a branch office to be ascribed as a permanent establishment under the laws of Grenada for the purpose of treating it as a taxable entity. This appellant has always been treated as a separate entity under the **Income Tax Act**.

[33] Senior counsel for the appellant relied on the decision of the House of Lords in the **Ostime case**[14] in dismissing any suggestion that the appellant's Branch Office was to be treated as a "permanent establishment" for the purpose of imposing the withholding tax. In that case, an Australian insurance company had carried on business through a branch in the United Kingdom. It had been assessed to pay UK income tax on the notional amount of its profits in the UK. The company contended that it was assessable not under the **Income Tax Act** but only under the **Double Taxation Relief (Taxes on Income) (Australia) Order 1947**. This had given effect to the Australian double taxation relief agreement that was set out in the schedule to the Order. Lord Radcliffe giving the majority decision (Lord Denning dissenting) suggested that the question for the court was how the Income Tax Act method of attributing a profit to a company whose head office was outside the UK stood up against the provisions of the Double Taxation Relief Agreement. He was not surprised to find that the Income Tax method had been superseded. He goes on to relate some of the history. Bilateral agreements for regulating some of the problems of double taxation had begun in the UK in 1946. The form and the

[14] Ostime (Inspector of Taxes) v Australian Mutual Provident Society [1959] 3 All E.R. 245.

language employed in the agreement in question were similar to the forms and language in all such agreements. They are derived from a set of model clauses that had originally been proposed by the financial commission of the League of Nations. The aim had been to provide by treaty for the tax claims of two governments both legitimately interested in taxing a particular source of income either by resigning to one of the two of them the whole claim or else by prescribing the basis on which the tax claim is to be shared between them. The language employed, he explained, was what may be called international tax language. Such categories used in the agreement as “enterprise”, “commercial or industrial profits” and “permanent establishment” had no exact counterpart in the taxing code of the UK. The claim of the Revenue was not allowed and the appeal was dismissed.

Conclusion

[34] Section 43(1) of the Act is an enabling section. It permits the Minister to determine by agreement with any foreign Government how branches of foreign establishments are to be taxed in Grenada so as to avoid the imposition of double taxation. No such agreement applies in this case. If and when profits are remitted by the Branch Office in Grenada to Head Office in Canada income tax may be payable in Canada as well as in Grenada. The expression “permanent establishment” is a term used in international agreements dealing with double taxation tax relief. Section 50(1) does not apply to a permanent establishment. I am satisfied on a reading of section 50(1) of the Act that the Comptroller lacked the statutory authority to assess the seven payments in question as attracting withholding tax.

[35] I am satisfied that the provisions of the Act dealing with withholding tax are an integral part of the Act and constitute no more than a mechanism for the purpose of collecting taxes on income flows to non-resident persons from income earned within Grenada. The withholding tax provisions do not create some special form of taxation which can be levied upon payments which are not of an income nature. Withholding tax is not a separate and discrete form of taxation which is not

governed by the fundamental principles of income tax law. It is an integral part of income tax legislation, providing a mechanism for the collection of taxes on income payments before those payments are handed over to a resident or non-resident and to remit the sums deducted or withheld to the Inland Revenue.

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

[37] In the case before us, both the Appeal Commission and the High Court gave too expansive an interpretation to section 50 of the Act by reading into section 50 the term "permanent establishment" which had no application whatever to that section. They suffered under the disadvantage of not having sight of the legal authorities presented to this court.

[38] For these reasons I would allow the appeal, set aside the decision of the learned Chief Justice, and award the standard assessed costs to the appellant.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal