IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

APPELLATE JURISDICTION

2021-HC-DEM-CIV-HCA-2

In the matter if an appeal to the Judge under section 86 of the Income Tax Act.

BETWEEN:

GUYANA SHORE BASE INC. a company duly incorporated under the Companies Act 1991, with its registered office situate at Plantation 'A' Houston, Georgetown, Guyana.

Applicant

-and-

1. **THE COMMISSIONER-GENERAL OF THE REVENUE AUTHORITY**

2. **REVENUE AUTHORITY**

Respondents

BEFORE: **The Hon. Justice Roxane George**

APPEARANCES: **Mr. Devendra Kissoon and Ms. Natasha Vieira** *for the applicant*

Ms. Fiona Hamilton and Ms. Ornise Gordon *for the respondents*

Dates of hearing: 29 June 2021; 26 October 2021

Delivery Date: 17 November 2025

J U D G M E N T

Introduction

[1] The appellant challenges an assessment dated 17 February 2020 for the payment of $35,496,147 in withholding tax on payments for management and professional services made to three companies, Pacific Rim Constructors Singapore Pte Ltd

(Pacific Rim), LED Offshore Ltd (LED), and LEAD Engineering Inc (LEAD) for year of assessment (YA) 2018 to 2019.

[2] Ms. Yolander Persaud, Corporate Secretary and In House Counsel of the appellant swore to the affidavit on behalf of the appellant. Ms. Luana Wyatt, Assistant Commissioner, Inland Revenue, Petroleum Revenue Audit Department deposed to the affidavit in defence on behalf of the respondents. Ms. Wyatt's affidavit does not differentiate between LED and LEAD. However, the assessment relates to these two companies as well as Pacific Rim.

[3] The appellant contends that these companies are all overseas based, have no offices or personnel based in Guyana, that the payments arose overseas since they were made overseas for services executed or rendered overseas, and that therefore no withholding tax is payable in relation to payments made to the companies. The parties rely on s 39 (1)(b) of the Income Tax Act, Chapter 81:01 (the Act), with the appellant also referring to s 40 (d) of the Act in relation to the definition of 'payment'.

[4] Section 39 (1) (b) of the Income Tax Act, Chapter 81:01 states:

> "39(1) There shall be levied and paid income tax (in this Act referred to as withholding tax) at the rate set out in the Third Schedule –
> …
> (b) on any gross payment not being interest referred to in paragraphs (c), (d) and (e) made to any person not resident in Guyana or to any person on behalf of such non-resident person, where such person is not engaged in trade or business in Guyana, so, however, that in the case of payment of income arising outside Guyana to such a person withholding tax shall not be payable."

[5] 'Payment' as relevant to this case is defined *inter alia* in s 40 (d) to mean "management charges or charges for the provision of personal services and technical managerial skills". There appears to be no dispute regarding the nature of the payment.

[6] Ms. Persaud, in her letter of objection to the respondent, which was exhibited, stated as follows:

> "Where the payment relates to income arising outside Guyana, it falls within the proviso to section 39 (1)(b) and consequently no withholding tax is payable.
> The companies with which we have not remitted withholding taxes were companies which were consulted for various services, of which were conducted outside Guyana. For example, Leader Engineer Inc. was consulted for recruitment of expatriates around the world, and therefore conducted and executed their services in the United Kingdom."

[7] Despite the objection, the Commissioner-General maintained the assessment resulting in this appeal. The sum of $35,496,147 was lodged, as required, to prosecute the appeal.

[8] Ms. Persaud further deposed that the three companies "provided services in some form to the applicant outside of Guyana. Leader Engineering UK provided the appellant with placement and recruiting services, LED Offshore Ltd, provided the appellant with overseas engineering consultancy services, and Pacific Rim provided the appellant with offshore procurement and project management services."

Appellant's case

[9] The appellant relies on the decision of the Court of Appeal of Trinidad and Tobago in *The Board of Inland Revenue v Williman H Scott Ltd*,[1] (*Scott 1988*) where the court construed s 50 (1)(b) of the Income Tax Act of Trinidad and Tobago which is almost identical to that of s 39 (1)(b) in an appeal against a decision of the Tax Appeal Board (the Board). The Board had allowed the respondent's claim to "a deduction in the computation of its chargeable income". The Court concluded that "the legislature intended the incidence of withholding tax to be applied to payments arising within Trinidad and Tobago, and to be excluded from the incidence of such tax payments arising outside of Trinidad and Tobago." The Court went on to hold that the Board "rightly directed its mind to the question, namely, what was meant by the phrase 'payments arising outside of Trinidad and Tobago, and concluded that if the income giving rise to the payment was generated from a source outside of Trinidad and Tobago, then payments made by a resident of Trinidad and Tobago

[1] Civil Appeal No. 50 of 1988

in such circumstance, could not be subject to withholding tax. The obligation to pay in fact arose from a transaction taking place outside of Trinidad and Tobago."

[10] The appellant also cited Denbow's text, 'Income Tax in the Commonwealth Caribbean'.[2] Analysing s 50 (1)(b), the author explained as follows:

> "… it is quite clear that the following five elements must be established in order for a charge to withholding tax to be made:
> 1 The recipient of the payment on which withholding tax becomes chargeable must be a non-resident person or a non-resident company.
> 2 The money upon which withholding tax is to be levied must come within the definition of payment contained in the statute.
> 3 The recipient of the payment must no be engaged in trade or business in Trinidad and Tobago during the year in question.
> 4 The payment upon which withholding tax is to be levied must actually be made to the taxpayer in the year in question.
> 5 In order for withholding tax to be chargeable, the payment must not be income arising outside of Trinidad and Tobago so as to come with the exemption contained in the proviso set out in s 50 (1)(b) above."[3]

[11] It is evident that the three companies with which the appellant contracted are non-resident. There is no evidence establishing that they are resident in Guyana. From the contracts and other documentation, the sums paid to the companies come within the definition of payment pursuant to s 40(d) as outlined above. As regards the third element, there is no evidence that the three companies are engaged in any business or trade within Guyana. Fourthly, there is no dispute that the payment in issue occurred in YA 2018 – 2019. If the case were to rest on these four limbs, withholding tax would be chargeable.

[12] However, the fifth factor is determinative. For withholding tax to be charged, the payment cannot relate to income that is derived outside of Guyana. The tax can only be applied to income payable in Guyana which derived from business engagements or activities within Guyana. So, the issue is whether the payments subject of this appeal relate to income that arose outside Guyana for services provided outside Guyana. This is to say, is there evidence that the payment relates to income derived from business engagements or activities within Guyana.

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[2] Claude H. Denbow, *Income Tax Law in the Commonwealth Caribbean,* (Bloomsbury Professional, 2013)
[3] Ibid 96 - 97

[13] Denbow cited the Privy Council decision in *Inland Revenue Commr v Hang Seng Bank*[4] in which it was held that –

> "But the question whether the gross profit resulting from a particular transaction arose in or derived from one place or another is always in the last analysis a question of fact depending on the nature of the transaction. It is impossible to lay down precise rules of law by which the answer to that question is to be determined. The broad guiding principle, attested by many authorities, is that one looks to see what the taxpayer has done to earn the profit in question."

The Respondents' case

[14] The respondent argues that one has to consider the appellant's source of income, this is to say, its contracts with companies related to the appellant's Haliburton project and other contractual engagements in Guyana from which the appellant derived its source of income. It is contended that it is this income that was used to pay the three companies in order that the appellant could in turn generate or earn income in Guyana. On the latter issue of the appellant generating income, the respondent argues that the payments for the services provided by the three companies allowed the appellant to generate income in Guyana, and therefore the payment to the three companies would be subject to the withholding tax.

[15] I do not agree with the respondent's assertions in these regards. To so conclude would be to misapply the clear intent of s 39 (1)(b). The focus has to be on where the income to which the payment relates is derived and for what purpose. The income of the paying entity, in this case the appellant, more especially how and where such income is generated, is irrelevant.

[16] The respondents also contend that the appellant has failed to provide evidence that the services provided by LEAD and Pacific Rim were derived from activities outside Guyana so as to fall within the exception of s 39(1)(b). It is baldly deposed that "the transactions, which gave rise to the payments made by the applicant to the non-resident companies (Led Engineering and Pacific Rim Constructors) for services rendered, took place within the jurisdiction of Guyana and therefore, withholding tax is exigible." In my view, the appellant has produced

[4] Ibid p 100, [1990] STC 733, 739 0 740

sufficient evidence of the nature of the engagements with the three companies such as that the respondents should provide rebuttal evidence. The respondents conducted an audit of the appellant's tax filings. The findings must have produced evidence to support their contention that the appellant's assertions are not to be accepted.

[17] The submissions on behalf of the respondents also advance an erroneous premise, that is, that the main issue is where the payments arose. The submissions further stated that "the fact that those services might have been as a result of work done in the jurisdiction of the service provider is not relevant as the issue is where the payment arose." The respondents appear to be contending that the payments arose in Guyana and so withholding tax would be chargeable.

[18] From the quote above, *Scott (1988)* clearly establishes that the origin of the payments is not relevant. The submission also illogically questions how it was "possible that services had been performed [by the three companies] without the presence of staff in Guyana." Simply, it was possible since the evidence is that the contracts were not performed in Guyana. In this regard, there seems to be a tacit, if grudging acknowledgement by the respondents that the services were provided overseas. And the fact that the contracts with the three companies may have been executed in Guyana does not change this fact.

[19] That part of *William H Scott Ltd v The Board of Inland Revenue*[5] (*Scott 1983*), cited for the respondents, in support of their contention that withholding tax can be charged on payments to non-residents does not in fact support their argument. The facts in this case were that "in the relevant year, the appellant had utilised the services of a confirming house in the UK and had incurred certain handling and finance charges on goods ordered on its behalf and shipped to [Trinidad and Tobago]. One of the charges took the form of interest on money laid out for goods ordered. Interest was computed for the period commencing with payment by the confirming house and ending with recovery from the appellant."

[5] Appeal No. I 80 of 1983, Trinidad and Tobago

[20] The Tax Appeal Board (the Board) in *Scott 1983* came to the same conclusion as the Court of Appeal in *Scott 1988* when interpreting s 23A(1)(b) which is equivalent to s 39(1)(b). The Board determined that "two principal considerations arise in deciding whether a transaction is or is not subject to such tax. Firstly, whether it is a payment within the definition of s 23B of the Ordinance and secondly the more basic test - is it a 'payment arising' outside of Trinidad and Tobago – pursuant to section 23A(1)(b) of the Ordinance." Section 23B which is equivalent to our s 40.

[21] The Board held that –

> "In regard to income, one can perceive where it arises by looking at the source where it is earned. A similar approach to the word 'payment' might lead to a conclusion that any payment made by a person in Trinidad and Tobago is one that arose here. If so what could be the meaning of section 23A(1)(b) of the words 'so however that in the case of a payment arising outside Trinidad and Tobago …
>
> The clear intention is that certain payments made by a person in Trinidad and Tobago (out of funds in Trinidad and Tobago) to a non-resident can be regarded as arising outside Trinidad and Tobago."

It was further noted that "the incidence of the tax is on the earner of the income and in this regard, we must bear in mind that a non-resident can only be taxed on income earned here."

[22] The Board went on to state that:

> "… we conclude that the expression payments arising outside of Trinidad and Tobago must mean payments relating to income arising outside of Trinidad and Tobago. So that the first test to be applied in respect of the levy of withholding tax is whether there is income earned by a non-resident in Trinidad and Tobago in relation to which a payment is being made."

The Board concluded that "on the facts … the confirming house performed services outside of Trinidad and Tobago and earned income in its own country in the course of its normal trading operations there."

Accordingly, the income was not subject to the withholding tax.

Discussion

[23] The documentation in the case at bar indicates that the payments related to income arising overseas. The fact that the payment was made from Guyana to accounts overseas is immaterial. Both *Scott* cases confirm this. And to quote Denbow:

> "What is of crucial importance is whether the transaction or activity which has given rise to the payment has been effected or performed outside Trinidad and Tobago. If it has, then the income has arisen outside Trinidad and Tobago so as to come within the terms of the proviso set out above with the result that no withholding tax is chargeable."[6]

[24] Section 86 (5) of the Act provides that "The onus of proving that the assessment complained of is excessive shall be on the person assessed." Thus, it is the evidence of the appellant that has to be considered to determine whether it establishes that the income cannot be said to have been earned in Guyana, and that the purpose of the payment was for services provided outside Guyana. The only evidence that the persons were recruited from outside Guyana comes from Ms. Persaud's affidavit and there is no contradictory evidence. As noted earlier, Ms. Persaud's evidence that the contracts were performed overseas has not been rebutted in any way by the respondents.

[25] The contracts exhibited for Pacific Rim and LED Offshore are not specific regarding where they are effective, that is, they do not refer to the services provided being performed exclusively outside of Guyana. However, from the bank transfer of funds documents exhibited, the payments were made overseas for performance of the contracts overseas. As regards LEAD, while there is no written contract with this company, the payment documentation produced reveals that the payments were also made overseas and speaks to recruitment of employees.

[26] I have concluded that although the contracts are not specific, as outlined above, the appellant has provided sufficient evidence to support the conclusion that income relates to the provision of services outside of Guyana and the income that

[6] Ibid 101

led to the payment arose outside of Guyana, such that withholding tax would not be chargeable.

[27] As a consequence, the appeal is allowed.

[28] Pursuant to s 86 (6) "If the judge is satisfied that the appellant is overcharged he may reduce the amount of the assessment by the amount of the overcharge … and where a judge has reduced the amount of the assessment the Commissioner-General shall forthwith refund the amount of the overcharge to the appellant together with interest calculated at the rate of twelve percent of the amount of the overcharge."

[29] The sum of $35,492,147 is therefore to be repaid forthwith with interest at the rate of 12 percent of this sum as stipulated.

[30] Section 86 (9) provides that "The costs of the appeal shall be in the discretion of the judge hearing the appeal and shall be in the sum fixed by the judge." Applying the provisions on fixed costs of the Civil Procedure Rules 2016 as a guide, costs are assessed based on $35,492,147. The Respondents are to pay costs to the appellant in the sum of $1,000,000 to be paid on or before December 29, 2025.

/s/ Roxane George
Hearing Judge
November 17, 2025