

Bhurtun Chambers

Monthly newsletter

Issue No 5: December 2021

Introduction

This month is marked by the launching of Bhurtun Tax Training Institution, which is an MQA¹ approved training institution.

The training institution will offer training principally in the field on taxation and will address various areas such as value added tax, taxation of employment income, taxation of businesses conducted by individuals, international aspects of taxation, tax planning, statutory interpretation and practical training on the conduct of cases before the Assessment Review Committee.

The list of the courses will be published soon with all relevant details. In parallel, our free webinars on interesting and useful topics will continue as usual.

¹ Mauritius Qualifications Authority

Table of Contents

Decision Delivered by the Assessment Review Committee	3
Decisions delivered by the Supreme Court	4
Some aspects of international taxation	8

Decision Delivered by the Assessment Review Committee

1. Smit Salvage v The Director General, Mauritius Revenue Authority ARC/VAT/102-20

The Applicant entered into an agreement with the Mauritius Police Force for the leasing of helicopters. In relation to the VAT chargeable on the fees payable by the Applicant, latter applied for a ruling from the Respondent. The Ruling was to the effect that the supply of the helicopter services was taxable at standard rate.

A preliminary objection was taken by the Respondent to the effect that the Committee had no jurisdiction to review its Ruling.

The Committee considered that its jurisdiction under section 40 of the VAT Act was in relation to an instance where there had been an assessment, an objection to the assessment and a determination of the objection.

In the circumstances, the Committee concluded that it had no jurisdiction to review a Ruling delivered by the Respondent and upheld the preliminary objection taken by the Respondent.

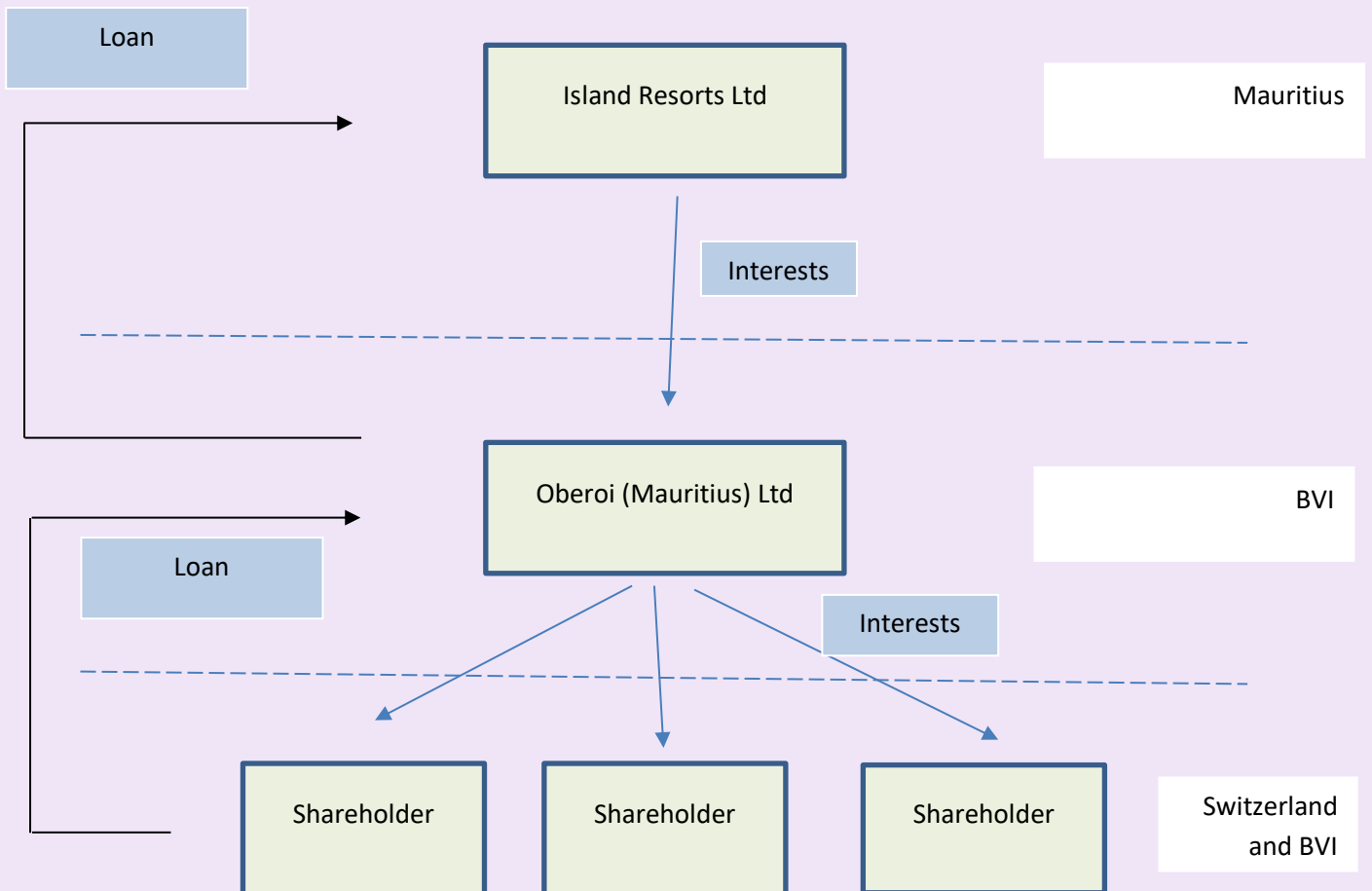
An appeal is being lodged before the Supreme Court against this Finding.

Decisions delivered by the Supreme Court

1. Oberoi (Mauritius) Ltd v Assessment Review Committee & Anor 2021 SCJ 396

This case relates to the interest expenses incurred by the Appellant. The Appellant borrowed money from its shareholders and advanced same to Island Resorts Ltd. Interests received by Appellant from Island Resorts Ltd was taxable in Mauritius. The issue was whether the interests paid by the Appellant to its shareholders were deductible.

The different transactions are illustrated below.



This judgment is highly interesting given that it covers numerous aspects of law.

a. A special law prevails over a general law.

Section 18 of the Income Tax Act is a general provision which deals with the deduction of expenditure incurred in the production of gross income other than gross income under section 10(1)(a).

Section 19 is a special provision which deals specifically with expenditure incurred on interest. This section contains an exception under subsection (3) where the said type of expenditure may not be allowed.

It was argued by the Appellant that section 18 was applicable, and in that case, there would be no exception.

The Supreme considered that there was no question about choosing between sections 18 and 19. Whenever there is expenditure incurred on interests, section 19 was applicable and not section 18 given that the legislator has provided for a specific section to deal with expenditure on interest.

b. Statutory interpretation

Once the Supreme Court had decided that section 19 was applicable, it then had to decide whether the deduction was excluded given subsection (3) which reads as follows:

The Director-General may refuse to allow a deduction on expenditure incurred as interest where he is satisfied that -

(a) the interest is payable to a non-resident who is not chargeable to tax on the amount of the interest; or

(b) the interest is not likely to be paid in cash within a reasonable time.

The precise question was whether the legislator imposed a requirement that “the interest was not chargeable to tax” or “the interest was not chargeable to tax in Mauritius.”

The Court addressed this issue by applying the presumption against extra-territoriality. As such, the exception would apply in the event the interests paid would not be taxable in

Mauritius. If the Parliament intended to exclude interests not chargeable to tax abroad also, it would have enacted section 19 to reflect such intention.

The Supreme Court therefore concluded that the Assessment Review Committee was right to apply section 19 and to have disallowed the expenditure on interest.

Given that the Appellant is in the process of appealing before the Judicial Committee of the Privy Council, I will not provide, at this stage, my views about the different aspects of the law involved.

2. Bayanne Cie Ltée & Oths v The Independent Commission against Corruption 2021 SCJ 405

The Respondent had previously made applications for attachment orders with regard to various properties of the Applicants. The orders were made by the Judge in Chambers and subsequently renewed.

The Applicants subsequently move for orders directing the Respondent to communicate copies of the applications made.

The Supreme Court analysed section 56 of the Prevention of Corruption Act and observed that the said section allowed the Respondent to make *ex parte* (in absence of other parties) applications for attachment orders.

The Supreme Court concluded that the affidavits of the Respondent which supported the applications for the attachment orders and their subsequent renewal “may contain information on third parties, names of possible witnesses or other suspects other than the applicants which the respondent may have obtained during the investigation and which may have a direct or indirect bearing on the investigation; hence, the qualm of the respondent to ensure that the investigation is not compromised by any disclosure at this juncture.”

The Court however observed that the renewals cannot be granted such that the attachment orders would remain in force for indefinite periods.

The application made by the Applicants was therefore set aside.

3. Laser Informatics Ltd v RBRB Construction Ltd 2021 SCJ 407

The Appellant had lodged an application before the Judge in Chambers for the appointment of an arbitrator. The matter was set aside given that the Judge ruled that the representative of the Appellant did not have the proper authority to enter the action on behalf of the Appellant.

Now, on appeal before the Supreme Court, the decision of the Judge in Chambers was upheld.

The Supreme Court referred to the following extract from Ramaiya's guide to the Companies Act, 14th Edition 1998:

Power to institute suits/legal proceedings.- Unless the power to institute a suit is specifically conferred on a particular director, he has no authority to institute a suit on behalf of the company. Needless to say that such a power can be conferred by the Board of directors only by passing a resolution in that regard.

....

Individual directors have only such powers as are vested in them either under the company's memorandum or articles or otherwise authorised by the board of directors. Hence, the managing director, does not, much less the ordinary directors, have the power to engage the company in the serious task of litigation without specific authorisation either under the constitutional documents or by a resolution of the board. Any suit or proceeding on behalf of the company not so authorised is liable to be dismissed.

In the absence of any Board resolution and given that the constitution of the Appellant was not produced as evidence, the Court concluded that the representative of the Appellant did not have authority to represent the Appellant before the Judge in Chambers.

Some aspects of international taxation

During the year 2020, Mauritius had a total of 7 cases at the level of the Mutual Agreement Procedure (MAPs). One of these cases was closed in 2020 and required 19 months to be closed.

The number of months required by jurisdictions to close MAPs varied between 0.5 months to 86.9 months.

Ahmed Richard Bhurtun

Barrister and Founder of Bhurtun Chambers

Email: ahmedbhurtun@gmail.com

Phone: +230 59045181