Bhurtun Chambers

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Introduction

Ignorance of the law is not an excuse and as far back as in 1716, it was mentioned by Christopher Bullock that "tis impossible to be sure of anything but Death and Taxes."

The Finance (Miscellaneous Provisions) Act 2021 has brought numerous amendments to the Revenue Laws as detailed in our previous issue. The amendments brought by Finance Acts and other enactments are often and numerous and may in certain instances affect the effectiveness and coherence of the Revenue Laws.

In addition to the enactments, Rulings and Statements of Practice of the Director General of the Mauritius Revenue Authority are also important documents to consider. The most recent Statement of Practice was issued in relation to Trusts and Foundation and it gave rise to interesting comments, especially, the rule of non-residence contained in section 73A of the Income Tax Act.

This issue contains my analysis, which was circulated earlier, of the said Statement of Practice. It also contains an analysis of the procedure of appeal by way of case stated and other matters relevant to the field of taxation.

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Response to the Statement of Practice issued by the Director General of the Mauritius Revenue Authority, dated 24 August 2021, relating to Trusts and Foundations

Introduction

The Statement of Practice was issued presumably under section 159A of the Income Tax Act. For ease of reference, a copy is annexed.

A Practice Statement generally sets out the interpretation of a particular section of the Income Tax Act and the manner in which it is applied. A taxpayer may however have a different interpretation and he would be entitled to challenge the interpretation of the Director General of the Mauritius Revenue Authority before proper forum.

We must say right from the outset that the purpose of issuing the statement of practice remains quite unclear, coupled with the fact that it addressed a very important aspect of statutory interpretation without setting out a full reasoning, as will be illustrated below. After a thorough analysis of the Statement of Practice, I have come to identify some complex issues which are exacerbated by the Finance (Miscellaneous Provisions) Act 2021.

The concept of "company" under the Income Tax Act

The term "company" has a very specific meaning under section 2 of the Income Tax Act. However, one should be very careful to the fact that such definition is dependent on the context. This is so for two reasons. The first one being that the definition under section 2 starts by making reference to the context as follows:

> In this Act, unless the context otherwise requires –
>
> "company" -
>
> (a) means a body corporate, other than a local authority, incorporated in Mauritius or elsewhere; and

(b) includes a non-resident société, a cell of a protected cell company, a foundation, a trust or a trustee of a unit trust scheme; but

(c) does not include a Land Area Management Unit;

The second reason being that the Interpretation and General Clauses Act provides in subsection 5(8) that:

Effect shall be given to each enactment according to its true intent, meaning and spirit.

Therefore, normally the term "company" in the Income Tax Act includes Trust and Foundation. However, the said term must be read in its context in sections 73 and 73A. We say so for the obvious reason that specific rules of residence are set out separately for "company", "trust" and "foundation". The term "company" obviously does not include Trust and Foundation and has to be given its ordinary meaning.

Similarly, section 73A, which contains a proviso to the residence of "company", in the particular context, can only refer to company in the ordinary sense. This is firstly because section 73A is connected to section 73 which speaks only of company in its ordinary sense. Secondly, section 73 speaks of "incorporation" which cannot be linked to a Trust or Foundation. Thirdly, section 73A(2) refers to section 116, which upon a close reading, and for the same reason as mentioned earlier, refers to "company" in the ordinary sense only.

The rule of non-residence set out in section 73A can therefore only apply to "company" in its ordinary meaning and does not apply to "company" as defined in section 2 of the Income Tax Act.

The Concept of "central management and control"

Although as stated above, the "central management and control test" does not form part of the test of non-residence for Trusts and Foundations, it does remain an important concept in light of the residence test of Foundations and in connection with other matters, including the application of Article 4(3) of Double Taxation Agreements which follow the OECD or UN Model Convention in relation to the place of effective management.

Now the central management and control of a Trust is set out by the Director General as follows and I have also set out the definition of a resident trust for ease of reference:

Central management and control	Residence
When (i) the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius; (ii) the settlor of the trust was resident in Mauritius at the time the instrument creating the trust was executed or at such time as the settlor adds new property to the trust; and (iii) a majority of the beneficiaries or the class of beneficiaries appointed under the terms of the trust are resident in Mauritius.	(i) where the trust is administered in Mauritius and a majority of the trustees are resident in Mauritius; or (ii) where the settlor of the trust was resident in Mauritius at the time the instrument creating the trust was executed

It appears that for the central management and control, all three criteria have to be met, including the residence of beneficiaries, whilst they normally are not involved in the management of a Trust.

Coming to the central management of Foundations, it is set out in the Statement of Practice as follows and for ease of reference, the residence test is also set out:

Central management and control	Residence
(iii) The Founder is resident in Mauritius; and (iv) A majority of the beneficiaries appointed under the terms of a charter or will are resident in Mauritius	(i) is registered in Mauritius; or (ii) has its central management and control in Mauritius

It is here observed that, in relation to the central management and control, there is no requirement pertaining to the Council which administers the property of the Foundation and carries out its objects.

The tax treatment, in particular the exemption, of Trusts and Foundations prior to the amendments brought by the Finance (Miscellaneous Provisions) Act 2021.

Subsections 46(2) and (3) and 49A(2) and (3) read as follows:

(2) A trust (a) of which the settlor is a non-resident or holds a Global Business Licence under the Financial Services Act 2007 or another trust which qualifies under this subsection; and (b) (i) of which all the beneficiaries appointed under the terms of the trust are, throughout an income year, nonresidents or holds a Global Business Licence under the Financial Services Act 2007; or (ii) which is a purpose trust under the Trusts Act 2001 and whose purpose is carried out outside Mauritius, shall be liable to income tax on its chargeable income at the rate specified in Part IV of the First Schedule. (3) Where a trust which qualifies under subsection (2) deposits a declaration of non-residence for any income year with the Director- General within 3 months after the expiry of the income year, it shall be	(2) A Foundation of which - (a) the founder is a non-resident or holds a Global Business Licence under the Financial Services Act ; and (b) all the beneficiaries appointed under the terms of a charter or a will are, throughout an income year, non-resident or hold a Global Business Licence under the Financial Services Act, shall be exempt from income tax in respect of that year. (3) For the purpose of the exemption specified in subsection (2), any Foundation which qualifies under subsection (2) shall deposit a declaration of non-residence for any income year with the Director- General within 3 months from the expiry of the income year.

exempt from income tax in respect of that income year.	

The rule relating to the exemption is quite different. It is worth noting that the concept of "Foundation" was introduced into the Mauritian Law in 2012 which the concept of "Trust" existed well before. Section 49A was added much after section 46, but it did not follow the same wording, and this gives rise to some important considerations.

Section 46(2) provides for a particular type of Trust, whilst section 49A (2) provides that a particular type of Foundation is exempt. This is a fundamental difference. Section 49A(2) is not subject to section 49A(3). It appears to be arguable whether section 49A(2) contains an implied rule of non-residence.

The amendments brought by the Finance (Miscellaneous Provisions) Act 2021.

Now the grandfathering rule set out in the new section 161A(71) provides as follows:

Notwithstanding the repeal of subsection 46(3), the exemption provided under that subsection shall continue to apply up to Year of Assessment 2024-2025 to any trust which – (i) is set up before 30 June 2021; (ii) qualifies under subsection 46(2); and (iii) deposits a declaration of non-residence for any of the income year covered by the grandfathering period with the Director-General within three months after the expiry of that income year.	Notwithstanding the repeal of subsections (2) and (3) of section 49A, the provisions of these subsections shall continue to apply up to Year of Assessment 2024-2025 to any Foundation which – (i) has been set up before 30 June 2021; (ii) qualified under the repealed subsection 49A(2); and (iii) deposits a declaration of non-residence for any of the income year covered by the grandfathering period with the Director-General within 3 months after the expiry of that income year.

The grandfathering rule therefore not only provides that the repealed subsections will apply during a specific defined period, but goes further to set out further conditions that are comparable for Trusts and Foundations, whilst as seen above, subsections 46(2) and (3) and 49A(2) and (3) are not comparable. It is therefore reasonably foreseeable that the application of the grandfathering rule may, in some instances, not be straightforward.

Concluding note

Amendments are brought at least each year to the Revenue Laws. These amendments are made mainly by the Finance Acts and to a lesser extent by other enactments during the Financial Year.

These regular amendments pose a high risk to the coherence of the Revenue Laws and at times, give rise to complex issues of statutory interpretation. We should not lose sight of the principle that a good Tax Law should meet the criteria of simplicity, fairness and efficiency.

It is also important to bear in mind that Statements of Practice and Rulings of the Director General are not binding upon a taxpayer, the Assessment Review Committee and any other appellate body, although they do offer valuable guidance.

Appeals by way of Case Stated and the Derek Case[1]

Appeals from decisions of the Assessment Review Committee (ARC) are made to the Supreme Court by way of case stated by virtue of the Assessment Review Committee (Appeal) Rules 2007. It is therefore not by way of a "normal appear" as in appeals from lower courts to the Supreme Court.

The appeal process by case stated is initiated by making a request, within 21 days of the decision, to the Clerk of the ARC to state a case. The case stated is normally signed by the same persons who formed part of the Panel which delivered the decision of the ARC.

The case stated contains:

1. The names and addresses of the parties;
2. the nature of the matter on which the Committee was required to give its decision;
3. the facts which were proved or admitted before the Committee;
4. the submissions, if any, made to the Committee by the parties, their legal or other
5. representatives;
6. the decision arrived at by the Committee;
7. the questions of law on which the opinion of the Supreme Court is required.

The Appellant must then, within 14 days of the receipt of the case stated, lodge the appeal with the Master and Registrar of the Supreme Court.

The decision of the Supreme Court in the case of **Dereck J J R v Assessment Review Committee & Anor 2021 SCJ 288** highlights the importance of following the proper procedure to appeal from a decision of the ARC.

In this case, when the appeal was lodged with the Master and Registrar, no case stated was filed. The Supreme Court analysed the Assessment Review Committee (Appeal) Rules 2007 and observed that, on appeal, the Supreme Court was supposed to decide on questions of law specified in the case stated. There was therefore no question of law before the Supreme Court. The Supreme Court was therefore not validly seized and could not exercise its discretion to allow the Appellant to file the statement of case belatedly. The Court went on

[1] 2021 SCJ 288

to remark that, even if it did have a discretion, in the circumstances, it would not have exercised same in favour of the Appellant.

The chronology of event also showed that the legal advisers of the Appellant mentioned that they were not aware that the Committee had provided the case stated. They made no attempt to retrieve same after the Director General confirmed that a case stated was indeed sent by the Committee. In the event the Committee did not provide such case stated, the Appellant should have made a motion to the Supreme Court for the Committee to state a case.

The Supreme Court also highlighted the principle that the appeal from a decision of the Committee can only be on points in law, although in certain specific instances, points of fact may also be considered. We may refer to the case of **Tropical Submarine Safari Ltd v The Director General, Mauritius Revenue Authority & Anor 2021 SCJ 83** on this aspect. The Supreme Court went on to confirm that the procedure of appeal by way of case stated remains the most convenient means to appeal on points in law, making reference to the case of **Jauffur v Commissioner of Income Tax [2006] UKPC 32.**

The Supreme Court, in its reasoning, did make reference to some of its previous decisions on the same issue.

In **FURB Ltd v Assessment Review Committee & Anor 2009 SCJ 254, (judgment delivered by 2 judges)** the appeal was in relation to a decision given by the Committee on 13 November 2006. The Assessment Review Committee (Appeal) Rules 2007 were made on 20 April 2007. When the case came for Hearing on 24 March 2008, the one of the Respondents raised a preliminary objection based on the fact that no case stated was filed. The case stated was then later filed by the Appellant. Given that the case stated was lodged after the objection was taken, and that the Appellant took no step to file the case stated after coming into force of the Assessment Review Committee (Appeal) Rules 2007, the Supreme Court upheld the objection and dismissed the appeal.

In **Oberoi (Mauritius) Ltd v Assessment Review Committee & Anor 2019 SCJ 51 (judgment delivered by 2 judges)**, the decision of the Committee was given on 03 June 2016 and the appeal was lodged on 26 July 2016. Attorney for the Appellant noticed that the statement of case was not in the original case file of the Supreme Court and caused a copy to be filed on

03 September 2017. The Attorney also put in an affidavit to explain that the case stated was filed at the time of lodging the appeal.

The Supreme Court analysed that the term "appeal" in the Assessment Review Committee (Appeal) Rules 2007 referred to the Notice of Appeal together with the case stated. It furthermore adopted a "*a contrario*" application of the case of **FURB** (supra), that is, in a case where the case stated is filed before an objection is made by the Respondent, then the Supreme Court is properly seized. The objection in the present case was made on 25 October 2017, that is, after the filing of the case stated. Taking into consideration also the affidavit of the Attorney, the Supreme Court concluded that there were exceptional circumstances warranting the Appeal to proceed.

In the case of **Cie Shako Ltd v The Registrar General 1997 SCJ 50 (judgment delivered by 2 judges),** the Appellant did not file a case stated with the appeal. In fact the Committee refused to state one. The Supreme Court concluded that:

1. The Committee had no right to refuse to state a case;
2. In the event the Committee refuses to state a case, the proper remedy was to apply to the Supreme Court for the Committee to state a case;
3. The appeal, in the circumstances, could not be allowed to proceed.

In **S Uppiah v The Tax Appeal Tribunal & Anor 2002 SCJ 68 (judgment delivered by 2 judges),** no case stated was filed and the appeal was set aside.

A few other pronouncements of the Supreme Court, not referred to in the **Dereck case (supra)** are as follows:

In the case of **Sky Auto Ltd v The Assessment Review Committee 2008 SCJ 280 (judgment delivered by 2 judges)**, the Notice of Appeal was dated 20 April 2007. The Committee stated a case on 24 April 2007 which was subsequently filed. Given that the Assessment Review Committee (Appeal) Rules 2007 were made available on 28 April 2007, the Appeal was allowed to proceed.

In **Lam Po Tang v The Commissioner of Income Tax 2001 SCJ 39 (judgment delivered by 2 judges)**, the Supreme Court did not agree that the procedure of appeal by case stated had few virtues and that it was proper to limit such appeals on points of law.

In **Hurhangee Deoraj v Commissioner of Income Tax 2002 SCJ 100 (judgment delivered by 2 judges)**, the Supreme Court took a different view and characterized the procedure of appeal by case stated as a "cumbersome" one.

Our observation: According to the doctrine of precedent, or case law, a higher jurisdiction can bind a lower one. Decisions of the Supreme Court, delivered by a bench of two Judges, will not bind another bench consisting of two judges. In the same manner, a Panel of the Committee will not bind another Panel.

It is observed that in the Derek case (supra), it seems that the Court concluded that there is an absolute bar to the filing of the case stated after lodging the Notice of Appeal. However, earlier decisions seem to establish the trend that the Supreme Court has a discretion to allow the filing after the Notice of appeal if exceptional circumstances are present.

It is also debatable whether the procedure by way of case stated remains a good one for appeals on points in law. It does place an additional task on the Committee to state the case and the door remains open for the Appellant to request for a further and better case, thereby, increasing the length of the appeal process.

ARC decisions delivered in August 2021

Mr Said Hassennally & Anor v Registrar-General ARC/RG/60/21 & ARC/RG/61/21:

The matter concerned the valuation of a portion of agricultural land. Given that it had a potential for development, it was compared with residential lots by the Government Valuer and an allowance was given based on the fact that it was a back land.

The potential for development must be taken into consideration. However, the costs to be incurred for converting agricultural land into residential one have also to be taken into consideration. Consequently, the Committee gave an allowance on that basis.

Some aspects of International Taxation

Mauritius was one of the numerous jurisdictions which undertook to have first exchanges under the Automatic Exchange of Information by 2018. The Income Tax (Common Reporting Standard) Regulations 2018 were made on 02 April 2018 for the purpose of implementing the obligations under the Multilateral Competent Authority Agreement on the Automatic Exchange of Financial Account Information and the Competent Authority Agreement on Automatic Exchange of Information.

The Minister responsible for the subject of Finance also made the Income Tax (Convention on Mutual Administrative Assistance in Tax Matters) Regulations 2015 to give effect to the Convention on Mutual Administrative Assistance in Tax Matters entered into by the Government of Mauritius on 23 June 2015.

It is worth noting that apart from Double Taxation Agreements, Mauritius is a party to various other tax agreements, pertaining, for example, to the exchange of information, administrative assistance or transfer pricing.

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