Volume 1 / Issue 3

THE J.D.
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J.D. NEWS

CONGRATULATIONS

Nickardo Lawson, (Associate, Litigation and Dispute Resolution) was Called to the Bar Friday 15th November 2013, presented by Managing Partner Dennis Gurley SC

EVENTS

J.D.'s OSH Committee, as part of its efforts to encourage and foster a safe and healthy work life is hosting a walk/jog/Run around the QPS every Tuesday and Thursday.

Clients Welcome!!!!

Payments to Non-Residents, Legal Minefields, the Management Charge Restriction, and Canons of Statutory Interpretation.

Given the current backlog of cases at the Tax Appeal Board, the length of time it takes for decisions to be issued, the even greater amount of time it takes for those decisions to be published,[1] the dearth of local legal and academic commentary, the reluctance of the Board of Inland Revenue (the "Board") to issue interpretation bulletins or advance rulings, taxpayers often have little else to navigate them safely through the minefield that is the Trinidad and Tobago ("T&T") Tax legislative compliance regime, than a rudimentary understanding of the canons of statutory interpretation.

One such legal minefield is: when does a payment to a non-resident constitute a management charge? A wrong step can have very expensive consequences for a taxpayer.

Specifically, through the construct of the management charge restriction, the Income Tax Act, Chap. 75:01 ("ITA") limits the deductibility of expenses as they relate to charges for services payable to a non-resident of T&T. Section 10 of the ITA provides as follows:

[1]Published Tax Appeal Board volumes 1 and 2 relate to appeals filed no later than 1984.

> 10. (1) In computing the income of any person for a year of income from any source specified in section 5 for the purpose of ascertaining the chargeable income of a person for that year, there shall be allowed to that person all outgoings and expenses wholly and exclusively incurred during the year of income by that person in the production of the income from that source, so however that—
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> . . .
>
> (b) in the case of outgoings and expenses in respect of management charges paid to or for the benefit of a person not resident in Trinidad and Tobago and to every non-resident company (such person or company not being engaged in a trade or business in Trinidad and Tobago giving rise to such management charges) the expenses allowable shall, subject to subsection (2), be the amount of the management charges or two per cent of the outgoings and expenses (exclusive of such management charges) allowed under this section and section 11(1), other than paragraph (a) or (b) thereof, whichever is the lesser.

What is a management charge?

Prior to 2006 the definition of "Management Charge" in T&T was:

> Management charges mean charges made for the provision of management services and includes charges made for the provision of personal services and technical and managerial skills.[2] [Formatting Added]

This is still the current definition in most of the rest of the Caribbean Commonwealth.

The Initial Debate: Are Non-Management Services Included?

For many years this definition was the source of much angst and uncertainty. Taxpayers and their advisors were of the view that the intrinsic quality of a management charge is that it be on account of a 'management service'. The Board, however, took a more expansive interpretation: that a management charge includes charges for personal

[2] The Income Tax Act, Chap. 75:01, s2(1)

ABOUT J.D. Sellier + Co.

J.D.Sellier+Co. was founded by Jean-Baptiste Denis Sellier who was admitted to practice as a Solicitor and Conveyancer in Trinidad and Tobago in 1882. He practiced on his own until 1916 when he invited his colleague and friend George Cecil Pantin to join him in a partnership.

Today, J.D.Sellier+Co. has expanded to approximately 20 attorneys-at-law and 77 employees and offers its clients quality legal services. Our clients include industrial, commercial and financial enterprises, domestic and foreign, public and private, ranging in size and complexity from small single location business enterprises to large diverse, multinational corporations.

Our firm is a general practice law firm divided into four areas of civil practice, namely: Corporate + Commercial (including banking + finance; energy + regulated industries; probate; estate planning + administration; mergers + acquisitions; tax), Real Estate, Intellectual Property, and Litigation + Dispute Resolution (including admiralty + shipping).

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and technical skills, irrespective of whether they would properly be considered a 'management service'.

This was the subject of judicial consideration by the T & T Court of Appeal in *The Board of Inland Revenue* v. *Young (Selwyn*) (1997), 53 WIR 335 ("*Young*"). In *Young*, the question, according to de la Bastide CJ, was whether " 'and includes' [has] the effect of extending the definition of management charges to charges that are not for the provision of management services".

The Appeal before the Tax Appeal Board had been raised in *Young* following a query by the Board with respect to payments for 'outside engineering services' and related to assessment of tax and unemployment benefit for 1979. The subject of the major query appears to have centred around the contract with a UK Engineering firm for 'Assistance in the designs of the ISCOTT Terminal and other marine projects at Point Lisas'.

In *Young* the court held the view that 'the charges in question cannot even on a liberal interpretation of the phrase, be properly described as charges incurred for the provision of management services.' The court considered that:

> "if what follows the word 'includes' can sensibly and reasonably be treated as subject to the constraints imposed by whatever defining words precede the word 'includes' or 'including', then that is the proper way of construing the definition".[3]

The Court had regard to what it viewed to be the classic and most orthodox use of the term, and that while 'includes' could be used to achieve a more radically expansive definition, this should only be adopted if no other sensible meaning is possible.

The Court concluded that, among other things, if personal services or technical and managerial skills are provided for purposes which would qualify as purposes connected with the management of the taxpayer company or firm, they are properly to be regarded as services, the charges for which will be treated as management charges for the purposes of ITA.

The definition of management charge in the ITA was subsequently amended by the *Finance Act 2006*. The definition chosen was that which was then (and currently) used by the *Petroleum Taxes Act 1974*, Chap. 75 (the "PTA") at s. 17A(2):

[3] *Young* at p. 337d

> Charges made for the provision of management services and ~~includes~~ charges made for the provision of personal services and technical and managerial skills, head office charges, foreign research and development fees and other shared costs charged by head office. [Formatting added]

The Current Debate: Are Third Party Services Included?

This new definition is unfortunately not without ambiguity of its own. Indeed, upon a first reading of the new definition, one may consider that the fears of the then Opposition Senator the Honourable Seepersad Bachan may have been realised. Speaking in the Senate debate on the Finance Act 2006 in January 2006, Senator Bachan's concern was that by broadening the definition, as had been done, there was the danger that genuine third-party services may be caught by the definition (the "expansive interpretation"). There does not appear to have been a reply from the government on this point.

This article, however, shall posit an alternate view: that the new definition is more expansive in scope than its predecessor, but is more restrictive in the context of its application.

Specifically, it is more expansive in that personal services etc. no longer have to be "connected with the management of the taxpayer company or firm" as under the previous definition. It is more restrictive, however, in that intrinsic to the new definition is that charges must be "shared costs charged by head office". Consequently, genuine "third-party" services are in fact expressly excluded from the definition (the "restrictive interpretation").

By removing the words 'and includes', but adding the phrase '*and other shared costs charged by head office'*, the drafters made the words that preceded it, subject to its operation. Specifically, 'other' as used in this context acts as an adjective and, pursuant to the 5th Edn of the Shorter Oxford English Dictionary (Vol 2), the adjectival use of 'other' exists

TAX MATTERS

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We work closely with several of the country's leading accounting firms to develop tax strategies for our clients.

We represent clients in appeals of the Board of Inland Revenue decisions on matters of corporation tax, value added tax, withholding tax, double taxation relief, business levy and stamp duty.

'...besides or distinct from that or those already specified or implied' and 'that [which] remains from a specified or ***implied group*** of two or (later) more' [Emphasis Added].

It would appear therefore, that by the use of the word "other" the drafters have classified the foregoing enumerations as "shared costs charged by head office". This complies with the conventional rule of statutory interpretation, *Ejusdem Generis.*

Ejusdem Generis

Ejusdem Generis literally means 'of the same kind'. As a general rule of interpretation it deals with the manner of statutory construction where, as in this circumstance, there are general words at the end of an enumeration and all the items in the preceding list fall into one clear and definite class. In this context, the general words must be restricted to the class of the preceding list.[4] According to *Halsbury's Laws of England*, the association may apply whatever the form of the association, but the most usual form is a list or string of genus-indicating terms followed by wider residuary or sweeping-up words; such as *'and other shared costs charged by head office.'*

Crucially, in *Halsbury's* the point is made that where the legislative drafters do not intend for this rule of interpretation to apply, they qualify the residuary or sweeping-up words with a suitable generalisation such as 'or things of whatever description'.

It must however be noted that this is only a general rule of interpretation. Therefore, where there are good reasons (i) in policy, or (ii) from the context of the ITA, to attribute the expansive interpretation, the Court will so do.

Are There Good Reasons to Attribute the Expansive Interpretation?

Policy?

It is noteworthy that in *Young,* neither the Tax Appeal Board nor the Court of Appeal, advanced any reasons in support of attaching the expansive interpretation to management charge. On the contrary, de la Bastide CJ in

[4] *How Laws are Written & Applied?* Simamba, B. (2010)

support of the more restrictive interpretation opined that it is "quite understandable and reasonable that the legislature should have intended to impose that limitation only on management charges strictly so called."[5]

Furthermore, upon perusal of the Hansard records from the parliamentary debates leading to the enactments of the *Finance Acts 2005* and *2006*, which made the change to the definition of Management Charge in the PTA and ITA respectively, it is noteworthy that no clear rationale for the change was proffered in Parliament.[6] It is apparent from the parliamentary debates leading up to the amendment of the PTA, however, that the context of the discussions was multinational companies, not unrelated or third parties.

Does the ITA Provide Contextual Clues?

Finally, it must be assessed whether, in the wider context of the ITA, there is any support for employing the expansive interpretation. In the words of de la Bastide CJ:

> "It is, of course, a well-established canon of construction that in construing any section in an Act, one is entitled to look at other sections of the same Act for guidance."[7]

In the lexicon of the canons of statutory interpretation, this is referred to as *noscitur a sociis*: when a word is ambiguous, its meaning may be determined by reference to the rest of the statute.

In respect of this, section 51 of the ITA lists a number of items that constitute a "payment" for the purpose of

[5] *Young*, at p. 338c
[6] Thursday, January 26, 2006, per Senator C. Enill
[7] *Young*, at p338c

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withholding tax computation, one being at sub paragraph (d), "management charges or charges for the provision of personal services and technical and managerial skills". The effect of the expansive interpretation is to render the underlined words entirely redundant, because charges for the "provision of personal services and technical and managerial skills" are *already* included in the definition of management charge.

In *Young*,[8] de la Bastide CJ applied similar reasoning as follows:

> "Now, the definitions contained in section 2(1) apply "in this Act", that is throughout the Act, whereas the definition in section 51 applied for the purposes of sections 49 and 56 only. If the expression "management charges" was intended to include *all* charges for the provision of personal services and technical and managerial skills wherever the term "management charges" appeared in the Act, the words in section 51(d), "or charges for the provision of personal services and technical and managerial skills," would have been otiose.
>
> But the fact that they have been inserted makes it clear that the intention of the legislature was that, in construing payment for the purposes of section 49 and 56, there should be included not only payments made for management charges, but also payments made for charges for the provision of personal services and technical and managerial skills, regardless of whether or not they could properly be regarded as management charges."

Further on, de la Bastide CJ continued to reason that:[9]

> "It is again quite understandable and reasonable that the legislature should have intended to impose that limitation only on management charges strictly so called. It is, of course, a well-

[8] *Supra* at p. 337 g-j
[9] *Supra* at p. 338 c-d

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> established cannon of construction that in construing any section in an Act, one is entitled to look at other sections of the same Act for guidance.
>
> In my view, section 51(d) does assist, and points strongly in the direction of not extending management charges as defined in section 2(1) to charges that are paid for services that has no connection whatever with the management of the company."

Applying de la Bastide CJ's reasoning, the very existence of s. 51(d) of the ITA implies that management charges are not the same as personal services. If they were the same, the "or" and successive words would be redundant or, in de la Bastide CJ's words, they would be 'otiose'.

Consequently, "management charge" must mean something different from charges for the provision of personal services and technical and managerial skills. The difference, in accordance with the restrictive interpretation, is that management charges are "shared costs charged by head office".

Unresolved questions remain as to whether "head office" and "associated company" are interchangeable terms, and whether a cost can be classified as 'shared' if it is exclusively borne by the T&T taxpayer. It is our view that the phrase "shared costs charged by head office" should not be interpreted so broadly. Accordingly, where a T&T resident company pays a fee for services specifically provided to it by a non-resident sister company, for example, this should be treated as outside the scope of the definition in s. 2 and/or the management charge restriction contained in s. 10 of the ITA.[10] This appears to be a view taken by Mr. Gerald Yetming, the then opposition Member of Parliament for St. Joseph, when the matter was debated on its Second Reading on Friday, July 15, 2005:

> "A lot of companies are going to begin to have agreements among themselves for some of these services, which would not fall under the management charges ..."

[10] Assuming that withholding tax is due on the gross payment to the non-resident, there does not appear to be a sound basis in policy for also restricting the taxpayer's ability to deduct the payment in the calculation of its chargeable profits in T&T. Head Office allocations, however, may not fall within the definition of 'payment' for the purposes of the ITA and, as such, may not be subjected to withholding tax (see *Esso Standard Oil and Board of Inland Revenue*, I114-125 of 1982 and I24-25 of 1985). In this latter circumstance, the policy basis for the ITA restricting the taxpayer from claiming a deduction in T&T for a management charge allocation is a lot clearer as it prevents multinationals from stripping otherwise taxable profits from their T&T business operations.

Conclusion

While there is no definite presumption that ambiguity in the interpreting of tax statutes will be determined in favour of the taxpayer, in interpreting the definition of 'Management Charges' the Court has in the past been slow to give the expansive, more onerous interpretation, sought out by the Board.

It has been suggested here, that the legislature, by way of the *Finance Acts 2005 and 2006*, defines 'Management Charges', fundamentally and intrinsically, as '[S]hared costs charged by head office', but also, for the sake of clarity, provided a non-exhaustive list of qualifying shared costs including: 'charges for the provision of management services; charges for the provision of technical and managerial skills; head office charges; foreign research and development fees'.

Notwithstanding the views put forward here, we consider that it is almost inevitable that the interpretation of this definition will continue to be the source of much angst and uncertainty amongst taxpayers. Accordingly, and until definitively determined in the Court, taxpayers must continue to tread very carefully before making payments for services rendered by non-residents, particularly where the non-resident is a related party.

[*N.B. This is not legal advice. You should contact an attorney-at-law if legal advice is required.*]

The authors gratefully acknowledge the invaluable assistance of Adelle Browne (Librarian), Marc Lequay and Bryan Mc Cutcheon (In-Service Trainees).