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No abusive treaty-shopping of Caricom multilateral tax treaty

Jonathan Schwarz (Temple Tax Chambers; King's College London) · Thursday, May 22nd, 2025

The Judicial Committee of the Privy Council (the highest appeal court for a number of Commonwealth countries) ruled last month that payment rapid payment of dividends by a Trinidadian company through a chain of intermediate holding companies as required by the ultimate parent company in Canada was not artificial or fictitious for purposes of Trinidad's domestic anti- avoidance rule in Methanex Trinidad (Titan) Unlimited v The Board of Inland Revenue (Trinidad and Tobago) [2025] UKPC 20.

Methanex Corporation a company resident in Canada was the ultimate indirect parent company of Methanex Trinidad (Titan) Unlimited, a company resident in Trinidad and Tobago. The Trinidadian company was wholly owned by an International Business Company (IBC) incorporated in Barbados, which was in turn a wholly owned subsidiary of a Cayman Island company, itself wholly owned by the Canadian parent.

The Canadian company demanded payment of substantial dividends as a "cash repatriation" by specified dates which where duly paid by the Trinidadian company to the Barbadian IBC which shortly thereafter paid a divided of the same amount to the Cayman company which then paid the same amount as a dividend to the Canadian parent. The Barbadian IBC's and the Cayman company's bank account in Canada were at the same bank branch and under the sole control of the Canadian parent.

CARICOM tax treaty

Article 11 of the multilateral CARICOM tax treaty, to which Trinidad and Tobago and Barbados are parties, grants exclusive taxing rights over dividends to the residence state of recipient of the dividends. The Canada-Trinidad treaty permits source state taxation at 5% of the gross dividend.

The Court of Appeal (Methanex Titan (Trinidad) v BIR TT 2020 CA 42) held that the dividend payments were artificial and fictitious because of the "extraordinary rapidity" of the chain of payments and that which meant that the Barbados company did not retain or exercise ownership over the funds, as the funds were received in Canadian bank accounts controlled by Methanex Canada which acted in accordance with email requests from Methanex Canada. The intermediate payments were thus to be disregarded under s. 67 of the Income Tax Act.

Artificial transaction

The Privy Council considered that a transaction is 'artificial' if, compared with normal transactions

of an ostensibly similar type, it has features that are abnormal and appear to be part of a plan which "would not happen in the real world. It held that payment of dividends up a corporate chain at the request of the ultimate holding company is a commercial and common in corporate groups as the only lawful means by which distributable profits can be brought up from subsidiaries.

Fictitious transaction

A fictitious transaction, it said, is similar to a sham. In other words, it is intended by the parties "to give to third parties the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations, if any, which the parties intend to create".

The court noted that "the fact that a payment is made by A to B with the intention that it should be paid by B to C does not of itself render fictitious the payment from A to B." Similarly, that Methanex Barbados was not the "ultimate intended beneficiary" did not make the dividends fictitious. The fact that the that the authorised signatories on the Methanex Trinidad were employees of Methanex Canada did not mean that Methanex Canada was entitled to treat the funds paid to that account as the Canadian company's property. In managing the account the employees acted as agents of the Trinidad company, unless there was evidence to the contrary.

Beneficial ownership

Although beneficial ownership was not in issue in the case, the court said that the fact that the account of Methanex Trinidad was managed by employees of the Canadian ultimate parent did not mean that money paid into the subsidiaries' bank accounts was beneficially owned by the Canadian company.

Treaty interpretation

The court rejected the tax authorities' arguments about the interpretation of the CARICOM treaty:

Resident of a contracting state

Methanex Barbados was held to be a resident of Barbados within Article 4(1) of the Treaty, even though it was licenced as an IBC which meant that it paid tax on its profits at very reduced rates and was exempt from tax on foreign dividends. The court rejected the argument that full liability to tax as discussed in the OECD Commentary meant at the full rate applicable generally and not at a substantially reduced rate. It decided that full liability meant nothing more than taxing worldwide income of a person.

The court concluded that the purpose of the treaty, as reflected in its preamble, did not alter the analysis. Thus the fact that the treaty was concluded for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income, profits or gains and capital gains and for the encouragement of regional trade and investment with a view to encouraging the regulated movement of capital within the Caribbean Common Market, did not prevent companies set up by nationals of third states the sole or major purpose of obtaining preferential tax treatment at negligible rates from benefiting from the treaty. Similarly, there was no implied restriction on treaty benefits for companies benefiting from a special taxing regime on that basis that it could not be intended that one member state would cede its taxing rights jurisdiction where the other member state imposed tax on special entities at a negligible rate.

"paid … to a resident of another Member State"

The court also rejected the argument that the words "paid … to a resident of another Member State" in article 11 of the Treaty should be interpreted to mean that any dividends must in substance be received and used by a resident of a member state. It said that having rejected the notion of group control meant that the dividends were paid to the Canadian company, the Barbados company did make a profit which was essential for the dividends to then be paid up the chain of ownership. Consequently the dividends were on the ordinary meaning of the words "paid to" the Barbados company and received by it.

Observations

The GAAR found in section 67 of the Trinidad Income Tax Act is representative of such provisions that have been found in the tax laws of a number of Commonwealth countries. It is often regarded and limited and old-fashioned and has been replaced in many cases with more modern version that resemble the Post-BEPS PPT in art 29 of the OECD and UN Models.

Some similarity may be found in the EU's ATAD GAAR. Article 9 authorised the disregard of a "non-genuine" transaction. A transaction is not genuine if it is not put into place for valid commercial reasons which reflect economic reality. Such language is not far from the artificial and fictitious concepts in section 67 above.

While Barbados is a party to the MLI and has listed the CARICOM multilateral tax treaty as a Covered Tax Agreement, Trinidad and Tobago has not signed the MLI.

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This entry was posted on Thursday, May 22nd, 2025 at 5:41 pm and is filed under Abuse of law, Anti-tax avoidance, ATAD, Beneficial ownership, BEPS, Canada, Company, Developing Countries, Directive, Double non-taxation, Double Taxation, Holding company, International Tax Law, MLI, OECD MC Convention, Principal purpose test, Tax Avoidance, Tax haven, Tax Treaties, Treaty shopping, Withholding Taxes
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