REALITY VS ILLUSION: LESSONS IN ANTI-AVOIDANCE FROM THE CARIBBEAN

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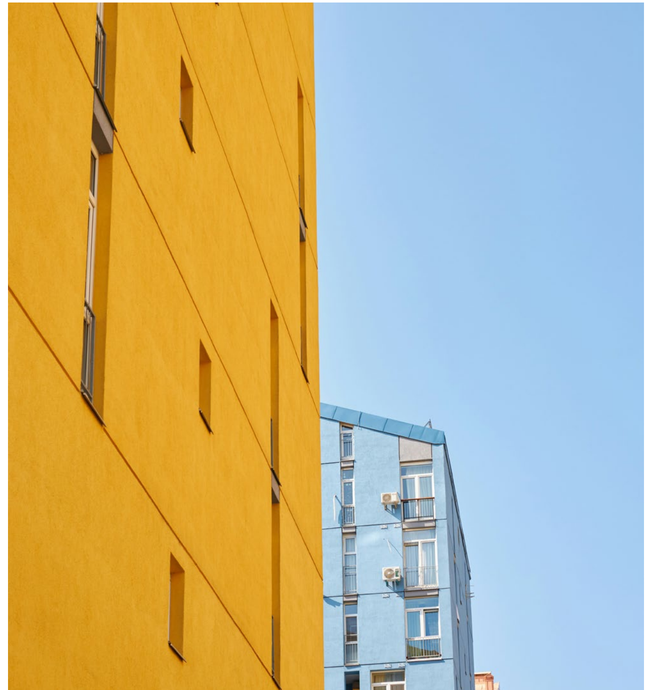

INTRODUCTION

"If I had a world of my own, everything would be nonsense. Nothing would be what it is, because everything would be what it isn't." These words from Alice's Adventures in Wonderland set the perfect tone for examining the decision of the Judicial Committee of the Privy Council delivered on April 22, 2025 in Methanex Trinidad (Titan) Unlimited v The Board of Inland Revenue [2025] UKPC 20; a case where the themes of reality and illusion take centre stage in the context of corporate tax law.

A TALE OF THREE COMPANIES

The case arose out of a multi-stage dividend payment between three companies– one incorporated in Trinidad and Tobago called Methanex Trinidad (Titan) Unlimited ('Methanex Trinidad'), one incorporated in Barbados called Methanex Trinidad Holdings Limited ('Methanex Barbados') and one incorporated in the Cayman Islands called Methanex International Holdings Ltd ('Methanex Cayman'). Methanex Trinidad is a wholly-owned subsidiary of Methanex Barbados which in turn is a wholly-owned subsidiary of Methanex Cayman which in turn is a wholly-owned subsidiary of Methanex Canada.

Over the period July to November 2007, Methanex Trinidad declared and paid dividends totalling US$85.4 million to Methanex Barbados in three tranches of US$25.4 million, US$20 million and US$10 million. Shortly thereafter, Methanex Barbados declared and paid dividends in identical amounts to Methanex Cayman, which then declared and paid these dividends to Methanex Canada.

The payment of dividends by a subsidiary to its parent company is a routine matter of profit distribution. Furthermore, under the 1994 CARICOM Double Taxation Treaty, to which both Trinidad and Tobago and Barbados are parties, dividend payments made by a company resident in a CARICOM Member State to a resident of another Member State are taxable only in the first Member State at a rate of 0% withholding tax. How then did these dividend payments become the precursor to an epic legal battle spanning six years, ultimately engaging the attention of the apex appellate court for Trinidad and Tobago? The answer lies in section 67 of the Income Tax Act of Trinidad and Tobago.

SECTION 67 OF THE INCOME TAX ACT OF TRINIDAD AND TOBAGO]

Section 67 of the Income Tax Act, ('ITA') provides that where the Board of Inland Revenue ('BIR') is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious, it may disregard any such transaction and the persons concerned shall be assessable accordingly. This general anti-avoidance provision finds expression in income tax legislation throughout the Caribbean.[1] It requires an evaluative assessment by the BIR as to whether a transaction aimed at reducing tax should be deemed fictitious or artificial. Both are distinct concepts, courts having long rejected the notion of pleonastic drafting.[2]

A fictious transaction is one which is a sham. In Snook v London and West Riding Investments[3] Lord Diplock explained a fictitious transaction as one which is intended to give the appearance of creating between the parties legal rights or obligations which are different from the actual legal rights and obligations which the parties intend to create. Think the caucus race in Alice's Adventures in Wonderland which gives the illusion of a formal race but in reality the animals run in a circle, starting and stopping wherever they please.

Artificiality is a term of wider import, describing a transaction which has unusual features as compared with normal transactions of a similar type. In Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica Ltd Lord Walker described it as evoking "features which are abnormal and appear to be part of a plan. They are the sort of features of which a well informed bystander might say 'This simply would not happen in the real world'."[4] Think the Cheshire Cat who disappears leaving behind only his grin, causing Alice to exclaim that she has often seen a cat without a grin but to see a grin without a cat is the most curious thing she ever saw in all her life.

Although both artificiality and fictitiousness are distinct notions, in essence they both require a judgment call on where illusion ends and reality begins. It is a fundamental principle of law that a taxpayer is entitled to structure his/her affairs to minimise tax liability.[5] Anti-avoidance rules rest, somewhat uneasily, alongside this foundation. They enable the BIR to deem certain arrangements as artificial or fictious based on an evidential evaluation of substance over form; an assay which is no tall order. And therein lies the conundrum. This is patently evident in the stark divergence between the local courts and the Privy Council's treatment of the dividend payments in Methanex.

METHANEX AT THE LOCAL COURTS

In Methanex, the BIR invoked section 67 of the ITA after forming the view that that the dividend payments though purporting to be made in Methanex Barbados were in fact paid to Methanex Canada. It therefore determined that the payments should attract 5% withholding tax pursuant to the Double Taxation Relief (Canada) Order 1996, rather than the 0% under the 1994 CARICOM Double Taxation Treaty. Methanex unsuccessfully challenged this assessment before the Tax Appeal Board ('TAB'). The TAB similarly found the payments to Methanex Barbados to be artificial and fictious. This conclusion was driven by the facts and evidence, chief amongst these being an email sent by Methanex Canada to Methanex Trinidad prior to the second and third dividend payments requesting cash repatriation of those exact sums by specific dates. The TAB also found that the board of directors of Methanex Trinidad and Methanex Barbados did not exercise any independent discretion in resolving to declare and pay the dividends which was done as part of a preconceived plan. Other significant factors included that within days of the dividends being received from Methanex Trinidad, dividends in those exact amounts were declared by Methanex Barbados and paid to Methanex Cayman and that the dividends were paid into accounts in the name of Methanex Barbados and Methanex Cayman but which were under the sole control of Methanex Canada.

The fact that the payments were in the exact amounts requested, were made by the specific dates requested, were made pursuant to a request from Methanex Canada and were rapidly declared and paid between the three companies led the TAB to conclude that the payments, though purporting to be made to Methanex Barbados, were in reality made for the ultimate benefit of Methanex Canada as part of a preconceived plan. The TAB reasoned that Methanex Barbados was used merely as a conduit to achieve a tax-free result. Thus viewed, the payments were properly disregarded under section 67 and withholding tax correctly applied.

The decision of the TAB was upheld on appeal. The Court of Appeal ('CA') held that the factual findings of the TAB were not plainly wrong. Much store was placed on the rapidity of the dividend payments and the email correspondence predating their initial declaration. Whilst acknowledging that that Methanex Trinidad was entitled to use its corporate structure to facilitate tax planning and efficiency and that Methanex Canada was entitled to request dividend payments from its subsidiaries, the CA emphasised that the tax consequences of the actual transaction would apply that and not that of any disguised or fictitious one.

METHANEX AT THE PRIVY COUNCIL

The Privy Council took a different view, driven by driven by corporate realities of a multi-jurisdictional group of companies. Lord Richards, delivering the opinion of the Board, deftly manoeuvred the fact that the appeal involved concurrent findings of fact by the lower courts. His Lordship reasoned that the conclusions of the TAB and CA that the dividend payments were artificial and fictitious were evaluative judgments based on the primary facts found by the TAB. Furthermore, where such evaluative judgments have no proper basis in the findings of fact, they constitute errors of law warranting appellate intervention. His Lordship found that the evidence was incapable of supporting the findings that the payments were artificial and fictitious.

On the question of whether the payments were artificial, the Privy Council focused on the practicalities underlying the dividend payments. It noted that Methanex Trinidad could not lawfully declare and pay a dividend directly to Methanex Canada; a fact which was conceded by BIR. Therefore, in reality, the only way to facilitate the payment was by the declaration and payment of dividends up the corporate chain from Methanex Trinidad to Methanex Barbados to Methanex Cayman and ultimately to Methanex Canada. Lord Richards explained that "it cannot be artificial to execute a legitimate commercial decision by the only available legal means."[6] His Lordship also noted that the payments did not lack a sound commercial purpose, noting that "the payment of dividends up a corporate chain at the request of the ultimate holding company is a commercial commonplace in national and international groups, not least because it is the only lawful means by which distributable profits can be brought up from subsidiaries."[7]

On the question of whether the payments were fictitious, the Privy Council again grounded its analysis in the practical realities of the operations of an international group of companies. It emphasised that there was no evidence showing that the payments made were not in fact dividends. Furthermore, the fact that a payment is made by A to B with the intention to be paid by B to C does not render the payment fictitious. Additionally, there was nothing unusual about the ultimate holding company requiring subsidiaries to pay dividends up the corporate chain. Moreover, the fact that the payments were made into accounts held by Methanex Canada did not mean it was the beneficial owner of the sums and could do with it as it wished. In the case of Methanex Cayman, the payments were first applied to debt obligations and investments. In making the payments, the authorised signatories on the accounts, who were employees in the treasury department of Methanex Canada were to be taken as acting as the agents of the subsidiary companies. Ultimately, the Privy Council concluded

that "the evidence was incapable of supporting the conclusion that the dividend payments were fictitious."[8] Thus, the appeal was allowed.

CONCLUSION

What then can we learn from the Methanex saga? First, on a philosophical level, it is evident that there is a divergence in judicial philosophy as between local courts, on the one hand and the foreign based apex court on the other, given their diametrically opposed conclusions on the same transaction. It appears that the Privy Council leans in favour of upholding the right of taxpayers to utilise legitimate corporate structures for the upstreaming of profits; hardly surprising given London's reputation as a top-tier global financial hub.

Second, on a macro level, the case raises questions about legislative reform such as whether targeted anti-avoidance rules should be enacted in the Commonwealth Caribbean such as exists in the United Kingdom.[9] There is also the issue of the CARICOM Double Taxation Treaty which has not been revised in over 30 years. Recent engagement with regional tax and financial sectors by the CARICOM Secretariat signals that reform is underway.[10] It is hoped that such efforts bear fruit and that they account for the rapidly changing landscape of regional legislation promoting international trade and business such as the International Business Companies Act of Barbados which featured heavily in Methanex.

Third, on a micro level, the case underscores the fact that a transaction with a valid commercial purpose and which has actually occurred is not artificial or fictious merely because it involves multi-stage payments though several subsidiary companies. Put simply, the corporate structure of a group of companies and the consequent tax advantages cannot make illusory that which is real.

Ria Mohammed

[1] Antigua and Barbuda: Income Tax Act s 53(3); Barbados: Income Tax Act s 29(2); Dominica: Income Tax Act s 23; Grenada: Income Tax Act s 23; Guyana: Income Tax Act s 74; Jamaica: Income Tax Act s16(1); St. Kitts and Nevis: Income Tax Act s 55; St. Lucia: Income Tax Act ss23 and 99; St. Vincent and the Grenadines: Income Tax Act s 23.
[2] Seramco Ltd Superannuation Fund Trustees v Income Tax Commissioners [1976] 2 All ER 28 at 35.
[3] [1967] 2 QB 786, 802.
[4] [2012] UKPC 9 at [22].
[5] Bradford (City) v Pickles [1895] A.C. 587 and Inland Revenue Commissioners v Duke of Westminster [1936] A.C. 1.
[6] Methanex, note 1 at [43].
[7] Ibid at [48].
[8] Ibid at [38].
[9] Dr. Claude Denbow SC, Income Tax Law in the Commonwealth Caribbean 2nd Edition at para. 8.7 (Bloomsbury 2013). See also Elizabeth Keeling 'Wide of the Mark: Are Targeted Anti-Avoidance Rules in UK Legislation Doing Their Job?' (2022) Statute Law Rev 43(2) 153.
[10] CARICOM Secretariat 'CARICOM aligning tax treaty with international standards' (Press Release, March 31, 2025) https://caricom.org/caricom-aligning-tax-treaty-with-international-standards/