THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. P197 of 2019

Tax Appeal No. I 102 of 2015

BETWEEN

METHANEX TITAN (TRINIDAD) UNLIMITED

Appellant

AND

THE BOARD OF INLAND REVENUE

Respondent

Panel:

A. Mendonça JA

P. Rajkumar JA

V. Kokaram JA

Date of Delivery: 16 November 2021

Appearances:

Mr. A. Meghji, Mr. J. Walker instructed by Mr. M. Vasquez for the Appellant

Dr. C. Denbow S.C, Mr. D. Punwasee, Mr. J. Rajcoomar instructed by Ms. A. Scott for the Respondent

I have read the judgment of Rajkumar JA. I agree with it and have nothing further to add.

…….

Justice of Appeal

Allan Mendonça

I have read the judgment of Rajkumar JA. I agree with it and have nothing further to add.

……

Justice of Appeal

Vasheist Kokaram

JUDGMENT

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Delivered by Rajkumar JA

Background

1. This is an appeal from a decision of the Tax Appeal Board (TAB) or the Board wherein it held the Appellant Methanex Trinidad Unlimited (hereinafter called Methanex Trinidad) liable to withholding tax on four dividend payments it made amounting to U.S $85.4 million for the income year 2007. Those dividends, (the dividends) were paid to Methanex Trinidad Holdings Limited (hereinafter referred to as Methanex Barbados).

2. The tax on the dividends was assessed by the Board of Inland Revenue (BIR) at the rate of five per cent, which was the rate of withholding tax applicable under the Double Taxation Relief (Canada) Order 1996 on dividends paid by a Trinidad resident to a Canadian resident[1].

3. Methanex Barbados is a company incorporated in Barbados (under the International Business Companies Act of Barbados (IBC Act). It is the sole shareholder of the appellant, Methanex (Trinidad).

4. The Double Taxation Relief (CARICOM) Order, 1994, (the CARICOM Order or the Order), incorporated into domestic law arrangements made on July 6, 1994 among CARICOM member state governments (the CARICOM Double Taxation Treaty or the Treaty) with respect to avoiding double taxation. Under that Treaty payments of dividends by a company which is a resident of a CARICOM member state to a resident of another are to be taxed only in the first such state and are subject to withholding tax thereon at a rate of zero per cent. Barbados is a member state of the Caribbean Community (CARICOM) and acceded to the Treaty in July 1995.

[1] Accordingly the dividends were assessed as subject to withholding tax at the rate of 5% pursuant to the Double Taxation Relief (Canada) Order 1996 (see record of appeal volume 1 pages 251 paragraphs 32 and 33, at page 233 Judgment of TAB)

5. After Methanex Trinidad paid the dividends to its sole shareholder Methanex Barbados, Methanex Barbados paid equivalent dividends to **its** parent company, Methanex International Holdings Limited, (hereinafter called Methanex Cayman), of which it was a wholly owned subsidiary. Methanex Cayman in turn declared and paid equivalent dividends to Methanex Corporation, (hereinafter called Methanex Canada), of which it was a wholly owned subsidiary.

6. In the case of the instant dividends, the TAB found that though paid to Methanex Barbados, a company it found was resident in a CARICOM member state, they were actually for the benefit of Methanex Canada. Therefore, the transactions under which those dividends were paid by Methanex Trinidad to Methanex Barbados were held to be **artificial and fictitious** within the meaning of section 67 of the Income Tax Act (ITA)[2]. The TAB accordingly upheld the decision of the BIR to assess withholding tax on those dividends at the rate of five per cent. This was the rate of withholding tax on a dividend paid by a Trinidad resident company to a Canadian company, rather than zero per cent which was the rate that would have been payable on dividends paid simpliciter to a Barbados resident company.

7. The Appellant appeals on the following bases namely that:
    i. As a result of section 93 (1) of the Income Tax Act[3], Article 4 of the CARICOM double taxation treaty is incorporated into domestic legislation by the Double Taxation Relief CARICOM Order 1994, (the CARICOM Order).

[2] 67. (1) Where the Board is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is **artificial or fictitious**, or that full effect has not in fact been given to any disposition or settlement within the meaning of section 72 the Board **may disregard any such transaction** or disposition or settlement within the meaning of section 72 and the persons concerned **shall be assessable accordingly.**

[3] RELIEF IN CASES OF DOUBLE TAXATION 93. (1) If the President by Order declares that arrangements specified in the Order have been made with the Government of any country with a view to affording relief from double taxation in relation to income tax and any tax of a similar character imposed by the laws of that country, and that it is expedient that those arrangements should have effect, then subject to section 95 the arrangements shall, notwithstanding anything in any written law, have effect in relation to income tax in so far as— (a) they provide for relief from tax; or (b) they provide for— (i) charging the income arising from sources in Trinidad and Tobago to persons not resident in Trinidad and Tobago; or (ii) determining the income to be attributed to such persons and their agencies, branches or establishments in Trinidad and Tobago; or (iii) determining the income to be attributed to persons resident in Trinidad and Tobago who have special relationships with persons not so resident.

ii. Methanex Trinidad is a **resident** of a member state under Article 11 of the CARICOM Order, and, as expressly found by the TAB, Methanex Barbados was also a resident of a CARICOM member state, within the meaning of Article 4 (1) of the CARICOM Order.

iii. Section 93(1) of the Income Tax Act (ITA) expressly precluded the application of any domestic law, including section 67 of the ITA, from overriding the outcome under the CARICOM Order.

iv. Those findings were sufficient to dis-apply section 67 (1) of the ITA and preclude the **jurisdiction** of the Board to investigate, (as it had done pursuant to section 67 (1) of the ITA), whether the transactions by which the dividends were declared by Methanex Trinidad and paid to Methanex Barbados, were **artificial** or **fictitious**.

v. Therefore under the Treaty as incorporated in the CARICOM Order by section 93(1) of the ITA the rate of withholding tax applicable to the dividend payments to Methanex Barbados, being a payment by a CARICOM resident company to another CARICOM resident, was zero percent[4].

It contends that in the circumstances, the appeal should be allowed and the assessment set aside.

8. The Respondent has filed a counter notice and contends in summary:

i. that section 67 of the ITA is not displaced by section 93. It therefore has jurisdiction to investigate whether a transaction is “artificial or fictitious”,

ii. that on the evidence the TAB was entitled to conclude that the transactions were artificial and/or fictitious,

[4] Article 11 of the CARICOM Treaty DIVIDENDS 1. Dividends paid by a company which is a resident of a Member State to a resident of another Member State shall be taxed only in the first-mentioned State. 2. The rate of tax on the gross dividends shall be zero percent. 3. The provisions of paragraph 1 of this Article shall not affect the taxation of the company in respect of the profits out of which the dividends are paid. 4. In this Article, the word "dividends" means income from shares, mining shares, founders' shares or other rights, not being preference shares or debt claims, participating in profits, as well as income from other corporate rights which is subjected to the same taxation treatment as income from shares by the laws of the State of which the company making the distribution is a resident. 5. The rate of tax on gross dividends from preference shares shall not exceed the rate specified in Article 12.

iii. that the TAB should have found that Methanex Barbados could not have obtained the benefit of the CARICOM Double Taxation Treaty because Methanex Barbados was not a **resident** of a member state. This was because it was not subject to the full taxing regime under the Barbados ITA, being incorporated as an International Business Company under the IBC Act Barbados,

iv. further, that the TAB should have found that a **purposive interpretation** of the Treaty must be adopted. A purposive interpretation thereof would require its dis-application in cases where dividend payments are made for a **purpose** incompatible with the stated purpose of the Treaty, (such as further onward remittances to non-CARICOM member states, of dividends paid within CARICOM to a CARICOM resident).

Issues

9.

i. Whether the **jurisdiction** of the BIR under Section 67 of the ITA to investigate whether the challenged dividend payments were artificial or fictitious, and if so, to apply and assess withholding tax thereon, is **excluded** by section 93 thereof.

ii. Whether there is any basis for reversing or overturning the conclusions of the Tax Appeal Board that the payments of the challenged dividends by Methanex Trinidad, were **artificial or fictitious** because, though purporting to be payments to Methanex Barbados simpliciter, they were actually intended to be, and were in fact, payments to and/or for the benefit of Methanex Canada.

iii. Whether Methanex Barbados was **resident** in Barbados for the purposes of Article 11 of the CARICOM Double Taxation Treaty so as to entitle payments of dividends to it to be exempt from withholding tax.

iv. Whether the challenged dividend payments by Methanex Trinidad to Methanex Barbados were incompatible with a purposive construction of the CARICOM Double Taxation Treaty, so as to preclude their entitlement to exemption from withholding tax.

Conclusion

10.

i. The **jurisdiction** of the BIR under Section 67 of the ITA is not excluded by section 93 thereof. The BIR retains its power and jurisdiction to investigate the **substance** of a transaction and determine whether it even qualifies as one contemplated by the CARICOM Double Taxation Order, or whether it is artificial or fictitious.

ii. There is no basis for reversing or overturning the conclusions of the Tax Appeal Board that the payment of the instant dividends, (purporting to be to Methanex Barbados), were actually intended to be, and were in fact, payments to Methanex Canada, which would attract withholding tax at a rate of five per cent. It was therefore entitled as a matter of law to consider them artificial and/or fictitious and assess withholding tax on the actual substantive transaction at the rate applicable thereto.

iii. There is no basis for overturning the finding by the TAB that Methanex Barbados is resident in Barbados for the purpose of the CARICOM Treaty.

iv. There is no basis in law or on the evidence for concluding, on the very limited material proffered by the Respondent, that **all** dividend payments by Methanex Trinidad to its parent Methanex Barbados, are incompatible with a purposive interpretation of the CARICOM Double Taxation Treaty so as not to qualify for exemption from withholding tax if they are intended to be remitted to a non-CARICOM member state. In any event, there is no basis for departing from the literal interpretation adopted by the TAB.

Orders

11. The Appeal and Cross Appeal are therefore dismissed.

Analysis

Issue I. – Jurisdiction of BIR to investigate whether a transaction under the Treaty is artificial or fictitious

The CARICOM Order

12. Section 93(1) of the Income Tax Act provides as follows:

> "If the President, by Order declares that arrangements specified in the Order have been made with the Government of any country with a view to affording relief from double taxation in relation to Income Tax and any tax of a similar character and any tax imposed by the laws of that country, and that it is expedient those arrangements should have effect, then subject to Section 95 the arrangements shall, **notwithstanding anything in any written law**, have effect in relation to income tax insofar as - a) they provide for relief from tax…" (All emphasis added)

13. Such an order was made. Article 11 of the CARICOM Order provides as follows:

> "1. Dividends paid by a company which is **a resident of a Member State** to a **resident of another Member State** shall be taxed only in the first-mentioned State. 2. The rate of tax on the gross dividends shall be zero per cent". (All emphasis added)

14. The respondent accepts[5] that by virtue of that provision, the CARICOM Double Taxation Treaty is incorporated into domestic law.

15. The appellant asked the court to place great weight on the words '*notwithstanding anything in any written law*' and to find that those words must be given effect to the exclusion of Section 67 of the Income Tax Act.

> 67. (1) Where the Board is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is **artificial or fictitious**, or that full effect has not in fact been given to any disposition or settlement within the meaning of section 72 the Board **may disregard any such transaction** or disposition or settlement within the meaning of section 72 and the persons concerned **shall be assessable accordingly.** (All emphasis added)

[5] At paragraph 75 of its submissions

16. The question arises therefore whether Section 67 of the Income Tax Act has been dis-applied by Section 93 of the Income Tax Act, which by the CARICOM Order has incorporated the CARICOM Double Taxation Treaty. Further, the respondent has argued that the CARICOM Order was misconstrued by the TAB.

17. Section 67 provides that a transaction may be disregarded by the BIR if it is deemed artificial or fictitious. The appellant contended that Section 93 of the Income Tax Act precluded the application of any domestic law, including Section 67 of the Income Tax Act, from overriding the outcome under the CARICOM Double Taxation Order, (an arrangement entered into with the Government of another country). It therefore contends that there is no power in the BIR to deem a transaction, which is subject to that Order, to be artificial or fictitious since that in itself would be to override that Order, which is expressly made paramount. In fact, as a matter of logic, the outcome under the CARICOM Tax Order would apply to bona fide transactions which are not artificial or fictitious.

Section 67 of the Income Tax Act

18. Nothing in the language of section 67 of the Income Tax Act prevents the TAB from **examining** whether the transaction was, as it purported to be, a **dividend** paid by a company, resident of a member state **to a resident** of another member state. If it were, then it would attract withholding tax at the rate of 0%. If it were not then withholding tax at the rate of 5% would apply to such a payment to a Canadian company.

19. By examining the substance of the transaction there is no issue of the CARICOM Double Taxation Treaty being overridden or superceded or not given effect. In order for the treaty to apply, a transaction must be one which falls within its ambit. It cannot logically be the case that the BIR has no power to examine the substance of a transaction to first determine if that is indeed the case, or is precluded from so doing by section 67. The effect of any argument to the contrary would be that there was a deliberate choice by

the Trinidad legislature or the Trinidad executive to allow an abuse of that tax treaty by precluding examination of any transaction once the CARICOM order was invoked by a taxpayer. It cannot be a sensible or logical interpretation of section 93 that the mere **claim** by the Appellant, that the dividend payments were to a parent resident in Barbados, would as a matter of law preclude the BIR from examining under section 67 whether those payments were either artificial or fictitious. Nothing in section 93 would preclude such an examination.

20. Section 67 is a section that may be utilized in first determining whether in substance a transaction is one to which section 93 of the Income Tax Act, (and the CARICOM Double Taxation Treaty and Order) apply. As a matter of logic the BIR cannot be precluded from examining the substance of the transaction to determine whether it actually is one covered by section 93, that is, a bona fide payment of dividends made by a company resident in Trinidad, intended to be and in fact received bona fide by a company resident in Barbados. If upon examination that is determined to be the reality of the transaction then the rate of withholding tax thereon would be 0% as specified by the Treaty and CARICOM Order.

21. In this regard, section 67 is not therefore inconsistent with the CARICOM Double Taxation Treaty. Section 67 does not override the CARICOM Double Taxation Treaty. Rather it enables an examination as to whether that Treaty is **applicable**, a matter that must be open to examination by tax authorities in this jurisdiction.

22. The fact that it is claimed that, because the (CARICOM resident) intermediary Methanex Barbados was used that the payment was not subject to withholding tax, could not possibly be conclusive. Such an interpretation would permit abuse not only of the CARICOM Double Taxation Treaty but in fact of any treaty incorporated under section 93 of the Income Tax Act which has similar effect.

23. If that argument were to be accepted the mere fact of incorporation of a double taxation treaty into domestic law under section 93 would automatically dis-apply the Board's powers under section 67 to determine if a transaction even fell within the terms of any such treaty once this was **claimed**. That would be an absurd result.

24. Further, the respondent contends that the treaty override provision in Section 97 of the Income Tax Act is specifically qualified by what follows the words "in so far as". Those words, and the matters set out after them, specify the provisions that are overridden. There is not therefore a general override of all domestic legislation, but rather only an override of those matters, which appear after the words "*in so far as*", *namely …a. they provide for relief from tax; or b. they provide for –*

    i. *charging the income arising from sources in Trinidad and Tobago to persons not resident in Trinidad and Tobago or*

    ii. *or*

    iii. *…*

25. The Respondent's contention is that only those specified matters would be displaced by the provision in section 93 for arrangements to provide for relief from double taxation. Section 67, which empowers the Board to examine whether any transaction is artificial or fictitious is not such a specified matter, and is not therefore dis-applied by section 93. In fact that is the reasonable logical and natural construction of both section 93 and the statutory context within which it appears.

26. Whether or not the double taxation agreement with CARICOM or the double taxation agreement with Canada **applies** to any transaction is a matter which requires examination of the actual transaction. The Appellant sought to rely upon another decision of this Court in **Unilever** to contend otherwise. This court found in **Unilever Caribbean Ltd v BIR Civ App 041/2015** delivered December 14, 2016, that the words "Notwithstanding any provision of this Act to the contrary" evidenced a legislative

intention to adopt a special and exclusive code for taxation. In that case, the special code was provided by section 99(1) of the Income Tax Act and related to the person **providing** an emolument. This was separate from the provisions made under section 83 of the Income Tax Act which provided separately for assessment of the emolument earner. Nothing in that decision however detracted from the ability of the BIR to examine the question of whether matters subject to that exclusive code actually fell within the exclusive code.

27. Nothing in the CARICOM treaty requires that the BIR ignore the actual substance and effect of the transaction, that it allow the payment of dividends, purportedly to Methanex Barbados, to be considered as conclusive, or that it be precluded from investigating whether the transaction was actually a payment to Methanex Canada.

Commentaries

28. The Respondent referred to the case of **Fowler v Commissioners for Her Majesty's Revenue and Customs** [2020] 1 W.L.R. 2227, [2020] UKSC 22 at Paragraph 18 as authority for the proposition that OECD commentaries may be utilized as an aid to double taxation treaties.

> *18. The OECD Commentaries are updated from time to time, so that they may (and do in the present case) post-date a particular double taxation treaty. Nonetheless they are to be given **such persuasive force as aids to interpretation as the cogency of their reasoning deserves**: see Revenue and Customs Comrs v Smallwood (2010) 80 TC 536, para 26(5) per Patten LJ. Existing UK authority gives some relevant general guidance on the interpretation of double taxation treaties. In Comrs for Her Majesty's Revenue and Customs v Anson [2015] STC 1777 this court was considering the UK / USA Treaty. It was common ground that article 31 of the Vienna Convention applied. At paras 110-111, giving the leading judgment, Lord Reed said:*
> *"Article 31(1) of the Vienna Convention requires a treaty to be interpreted 'in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. It is accordingly the ordinary (contextual) meaning which is relevant. As Robert Walker J observed at first instance in Memec [1996] STC 1336 at 1349, 71 TC 77 at 93, a treaty*

should be construed in a manner which is 'international, not exclusively English'.
[111] That approach reflects the fact that ***a treaty is a text agreed upon by negotiation between the contracting governments****. The terms of the 1975 Convention* ***reflect the intentions of the US as much as those of the UK****. They are intended to impose* ***reciprocal obligations****, as the background to the UK/US agreements from 1945 onwards makes clear."* (All emphasis added)

29. The Respondent refers to the OECD Commentaries on Article 1 of the model tax exemption[6]. It contends that the commentaries specifically answer the question as to whether or not the anti-avoidance, anti-abuse provisions in domestic law can be utilized to prevent an abuse of the provisions of a tax convention. They specifically provide that *"the answer to that second question is that to the extent that these anti-avoidance rules are part of the basic domestic rules set by domestic tax laws* ***for determining which facts give rise to a tax liability****, they are not addressed in tax treaties and are therefore not affected by them".* It concludes, *"thus as a general rule there would be no conflict between such rules and the provisions of Tax Conventions".*

30. The reasoning in the commentaries is logical. It is consonant with the reasoning of the Tax Appeal Board. Accordingly, section 93 of the Income Tax Act, and the CARICOM Order embodying the CARICOM Double Taxation Treaty do not conflict with Section 67 of the Income Tax Act.

The TAB's Findings

Issue ii – Whether artificial or fictitious

31. The Board did not accept that it had no jurisdiction to assess whether a transaction was artificial or fictitious. It found in effect that it was entitled to examine the substance of the transactions, and to determine whether they were in fact bona fide payments of

[6] The commentaries are set out in the respondent's reply submissions dated 31st of July 2010 in particular paragraphs 25 and 26. The Commentaries on the articles of the model tax convention are found at item 2 of the list of authorities filed on 31 July 2020 see commentary on article 1 at page 60, paragraph 9.1 and 9.2.

dividends to a Barbados resident company, or were instead, in so purporting to be, artificial or fictitious. It found that section 67 of the Income Tax Act could apply, and in the instant case did apply.

32. Having so found the Tax Appeal Board proceeded to examine the dividend payments as to their substance and effect. The TAB's reasoning was that Article 11 of the Order (i) did apply to dividend payments made to Methanex Barbados by Methanex Trinidad but (ii) that was not what the four dividend payments, which were made by Methanex Trinidad in income tax year 2007, actually were. They were not, as they purported to be, simply payments to Methanex Barbados. Rather they were intended to be payments for the benefit of Methanex Canada made pursuant to its requests, and Methanex Barbados' accounts and corporate structure were simply used as a conduit for those specific payments.

33. The Board, in analyzing the specific impugned transactions, did not seek to dis-apply the CARICOM Double Taxation Treaty in relation to **all** dividend payments made to Methanex Barbados by Methanex Trinidad. Rather it attempted to examine the substance of the **specific** impugned transactions as it was entitled to do under Section 67, to determine whether the CARICOM Double Taxation Treaty even applied to them. Those transactions purported to be payment of dividends by Methanex Trinidad to its parent company Methanex Barbados simpliciter. In the instant case where the transactions were analyzed by the Tax Appeal Board, it found in effect that, for the several reasons discussed hereinafter, that the dividends that were sent by Methanex Trinidad to Methanex Barbados, purportedly for the use and benefit of Methanex Barbados, were in substance payments to Methanex Canada.

34. It so found because the dividends that were paid by Methanex Trinidad to Methanex Barbados, (The Trinidad Dividends) were exactly the same amounts that were declared and paid by Methanex Barbados to Methanex Cayman. The sole accounts of Methanex

Barbados and Methanex Cayman were both held at RBC's main branch Vancouver Canada[7]. In substance therefore, although they appeared to be dividends paid by a company resident in Trinidad to a company resident in Barbados they resided in the accounts of Methanex Barbados for less than 48 hours before being transmitted to Methanex Cayman. They were transmitted onwards, with extraordinary rapidity, in the exact amounts to Methanex Canada who received them.

35. Not only did Methanex Cayman receive dividends in exactly the same amounts as those dividends paid by Methanex Trinidad, but as reflected in the Chow and Owens emails dated July 27, 2007 and October 31, 2007 respectively, there was documentary evidence that payments had been **requested directly by Methanex Canada before they had been declared[8]**. Methanex Canada received, via Methanex Cayman, in an account in Vancouver under its sole and direct control, dividend payments from Methanex Trinidad in the amounts of $85.4 million US dollars for the income year 2007. In three out of the four dividend payments, there was documentary evidence that it received those amounts by the target dates set by it. The TAB found that the fact of transmission **via** Methanex Trinidad's parent company Methanex Barbados, or transmission from Methanex Barbados to Methanex Cayman (the parent company of Methanex Barbados), did not detract from this fact.

36. In effect the Tax Appeal Board found that, based on inter alia, the emails from Methanex Canada, that payment of those dividends was **directed by Methanex Canada**. Although the dividends paid by Methanex Trinidad were passed through the accounts of Methanex Barbados and then Methanex Cayman, ultimately they were received (i) by the dates specified by Methanex Canada in the accounts of Methanex Cayman which were under the sole and direct control of Methanex Canada, and (ii) in the exact amounts that Methanex Canada had requested for at least three of them.

[7] Page 1365 volume 3 Record of Appeal, see also paragraphs 108 and 114 – Findings of Fact of TAB.
[8] See paragraph 36, 7, 100 and 101 of judgment of TAB

37. It was on that basis that it found therefore, as a question of fact, that Methanex Canada was the beneficial owner of those dividends rather than Methanex Barbados (as the transaction purported to reflect). The Tax Appeal Board analyzing the evidence as to the substance of the purported payment of dividends by Methanex Trinidad to Methanex Barbados, found that in relation to those **particular** payments Methanex Barbados exercised no independent discretion[9].

38. In the normal course of events Methanex Trinidad would be entitled to repatriate dividends to its parent Methanex Barbados and pay no withholding tax thereon. However in the circumstances referred to above the instant payments reflected that additionally the entire series of transactions was intended to, and did, result in those specific dividends being transmitted to an account in Canada under the sole and direct control of Methanex Canada.

The TAB's Conclusions

39. The TAB therefore concluded in effect that in the case of the instant payments, the transactions did not end with the payment of dividends by Methanex Trinidad to Methanex Barbados. Rather the payment of those dividends continued in a seamless series of transactions to Methanex Cayman and its bank account in Vancouver Canada under the control of Methanex Canada. If the transaction had been from Methanex Trinidad directly to Methanex Canada then withholding tax at 5% would have been payable. The interposition of Methanex Barbados and Methanex Cayman was examined by the BIR under Section 67 of the ITA. The BIR could legitimately do so without contradicting or contravening the CARICOM Double Taxation Treaty or Order. These apply if the transaction is legitimately, (not artificially, and not fictitiously), a bona fide transaction between a Trinidad resident company and a Barbados resident company.

[9] Paragraph 114 c TAB judgment

There can be no breach of any treaty obligation if the BIR is permitted to examine under Section 67 (1) of ITA, whether or not the dividend payments were bona fide so as to determine whether the CARICOM Double Taxation Treaty or Order even apply. Any construction otherwise would not be justified on the basis of either the construction of Section 93 of the ITA, the CARICOM Double Taxation Treaty itself, the CARICOM Order, or any other law.

Factual Background

40. A review of the findings of the TAB as follows reveals no error. The facts surrounding the transactions are set out at paragraphs 36 to 40 of the appellant's submissions as follows: (All emphasis added)

i. During the 2007 taxation year the appellant declared and paid four separate dividends (collectively referred to as "the dividends") to its sole shareholder **Methanex Barbados** in the aggregate amount of US $85.4 million dollars as follows:
   a) US $30 million dollars declared on July 17 2007 and **paid on July 23 2007;**
   b) US $25.4 million dollars declared on July 25 2007 and **paid on August 9 2007;**
   c) US $20 million dollars declared on August 24 2007 and **paid on September 4 2007;** and,
   d) US $10 million dollars declared on October 23 2007 and **paid on November 1 2007**.
ii. The dividends were paid pursuant to written resolutions of the Directors of the Appellant, each one affirming that they had been advised that there were no reasonable grounds to believe that the solvency test would not be satisfied.
iii. At paragraph 39 of the appellant's written submissions the transactions are further detailed as follows: -
   During the 2007 taxation year **Methanex Barbados** paid four separate dividends to its sole shareholder **Methanex Cayman** in the aggregate amount of $85.4 million US dollars as follows:
   a) US $30 million dollars on **July 24 2007;**

b) US $25.4 million dollars on **August 13 2007;**

c) US $20 million on **September 5 2007;** and,

d) US $10 million dollars on **November 1 2007**.

Those dividends were paid by Methanex Barbados pursuant to written resolutions affirming that the Directors had confirmed that there were sufficient retained earnings as at the date of the resolution.

41. It is noteworthy, and the Tax Appeal Board so noted, that these amounts paid by Methanex Barbados to Methanex Cayman, were in the **identical** amounts paid shortly before from Methanex Trinidad to Methanex Barbados. In the case of the first payment the dividend was declared the following day. In the case of the second dividend the dividend from Methanex Barbados paid to Methanex Cayman was four days thereafter on Monday August 13th – two business days after the Thursday August 9th 2007 payment by Methanex Trinidad to Methanex Barbados. In respect of the third dividend paid by Methanex Barbados to Methanex Cayman it was made one day after. In the case of the fourth dividend payment made by Methanex Barbados to Methanex Cayman, it was made on the same day as it had received an equivalent payment from Methanex Trinidad.

The Emails

42. In addition the BIR had available to it emails from Methanex Canada to Methanex Trinidad. Those emails were significant items of evidence upon which the Tax Appeal Board grounded its findings of fact. The first email is dated 20 July 2017 from Ena Chow, a member of Methanex Canada[10]. It provides: "Based on the Q3 2007 **cash repatriation** forecast, **we will require funding from Methanex Trinidad in the form of dividend payments as follows:**

    A. August 10th 2007 $25.4 million (US dollars)

[10] Record of Appeal - volume 2 at page 638

B. September 4th 2007 $20 million (US dollars)

…Please note these dates on the calendar and ensure the dividend resolutions are ready in time. Please note that the global MIKE calendar will confirm the timing of any ELT or other meetings where Jorge Yanez or Randy Milner may be unavailable". (All emphasis added)

43. Pursuant to that email by letter dated of 25 July 2007, the appellant's company secretary provided the members of its Board with a draft resolution approving the payment of a dividend to Methanex Barbados in the sum of $25.4 million US dollars on or before 1 August 2007 for the Board's consideration. The Board approved the payment of the dividend pursuant to that resolution. By letter dated Friday 9 August 2007 the appellant provided instructions to its bankers, (Toronto Dominion Bank New York), to wire U.S $25.4 million dollars to the account of Methanex Barbados at RBC's main branch Vancouver, Canada. That dividend was paid to Methanex Barbados on 9 August 2007[11].

44. A third dividend of U.S $20 million, (again in the identical sum as that requested in the Chow email), was declared and paid on September 4 2007. Again, the Appellant's company secretary provided the Board with a draft resolution by letter dated August 24, 2007. That dividend was in fact paid to Methanex Barbados on 4 September 2007[12].

45. Those payments were a) in the identical **amounts** requested and b) were made by the specific **dates** requested and c) were made pursuant to the **request** by **Methanex Canada** for the payment of **dividends**.

[11] Record of Appeal - volume 2 pages 649 to 643.
[12] Record of Appeal - volume 2 pages 646-650

46. Despite the submission of the Appellant that Methanex Trinidad could not legally make dividend payments to Methanex Canada the fact is that the Chow email specifically states that "we will require funding", ("we" being Methanex Canada), from Methanex Trinidad in the form of dividend payments as follows:…. This email clearly contemplates that those payments requested were for funding, and were being requested in the form of dividend payments to **Methanex Canada.**

47. There was no subtlety in that email. i. It specified the **amounts** requested ii. the **dates** by which those payments were required, iii. the **form** in which those payments were to be made, iv. the fact that it was for the purpose of **cash repatriation** to **Methanex Canada** and v. it did not suggest any discretionary element as to whether those payments could be made. Rather it was in peremptory terms.

48. The evidence reveals that it was given effect by the **transmission** of the **funds** requested, by the **dates** requested, in the **form** requested, (dividends), to the **party** requesting it.

49. There was a further email dated 30 October 2007[13] from Larry Owens from Methanex Canada, wherein he queried of the appellant's Lisa Pariagh *"will the 10 million US dollars **dividend** be paid on October 31st?"*The response was that the resolution was missing one signature. His further response was "Lisa - was the wire executed?" In fact a resolution was approved by the appellant's Board for the payment of a dividend of US $10 million dollars on or before the 31st of October 2007 as demanded, and instructions to wire transfer that amount to Methanex Barbados were given by the Appellant on the 1st of November 2007[14]. The email thread from and to Mr. Owens clearly indicates that he was following up a request for a dividend in the specific amount of U.S $10 million on behalf of Methanex Canada, and that Methanex Trinidad was taking steps to ensure

[13] See record of appeal - volume 2, page 652
[14] See record of appeal - volume 2, page 657

that this sum requested was going to be paid by the requested date. These emails are not from Methanex Barbados, or its own parent Methanex Cayman. They are **from** Methanex Canada and the payments requested were pursuant to the requests by Methanex Canada.

50. The transactions as set out above revealed that the dividend payments by Methanex Trinidad did not long remain with its parent Methanex Barbados. It was contended by the respondent that they were not simply payments of dividends from Methanex Trinidad to Methanex Barbados as they purported to be, but rather were payments for the ultimate benefit of Methanex Canada at its request for dividend payments in those exact amounts, all be it that they were first routed through Methanex Barbados and then Methanex Cayman.

51. The transactions required very little analysis, as they disclosed on their face what they were. To contend therefore that a. the Tax Appeal Board was not permitted to analyze the transaction, and b. that the Tax Appeal Board was required to accept at face value that, despite those emails, those dividend payments were simply **dividend payments to Methanex Barbados simpliciter,** would not be fair criticism.

52. The emails spoke for themselves. The transactions which followed them spoke for themselves. Both the language in the emails and the actions which followed were consistent with the Tax Appeal Board's findings that i. those dividend payments were intended to be for the benefit of Methanex Canada, ii. that Methanex Barbados and Methanex Cayman were used as conduits for the transmission of dividends from Methanex Trinidad, iii. that no element of discretion arose with respect to those payments by the Boards of Methanex Trinidad or Methanex Barbados and iv. that this transaction was, as it purported to be, and made little effort to conceal, a payment to Methanex Cayman to an account under the sole and direct control of Methanex Canada

from Methanex Trinidad via the declaration of dividends, which payment attracted withholding tax at the rate of 5%.

53. The Tax Appeal Board noted that according to the evidence of Mr. David Roberts at page 100 of its judgment the income received by Methanex Cayman in 2007 was used to pay expenses, repay loans, invest in subsidiaries and also pay a dividend to its sole shareholder. Those matters are not in dispute. The evidence however is that Methanex Cayman in that Income Year received dividends of US $85.4 million from Methanex Barbados, and those payments were made to an account under the sole control of Methanex Canada which had requested those payments from Methanex Trinidad.

Whether the TAB lifted the corporate veil

54. The appellant's contention that the TAB impermissibly lifted the corporate veil ignores the fact there was no question of piercing the corporate veil and ignoring the separate legal identity of Methanex Barbados or Methanex Cayman. The Tax Appeal Board recognized that in relation to Methanex Barbados there were reasons apart from the holding of the entire equity of the appellant for its existence[15]. At paragraph 114 (c) it recognized that "whilst the directors of both the Barbados and Cayman Islands holding companies may exercise independent thought in other matters of strategic decision making relating to those entities, as it related to the remittances **in this instance**, they exercised no independent discretion or judgment…".(Emphasis added)

55. The basis of its finding was that the dividends were intended from inception to be received by Methanex Canada. It is the request by Methanex Canada to Methanex Trinidad for the dividends themselves, and the payments of those dividends thereafter to accounts controlled by Methanex Canada, utilizing the intermediaries of Methanex Barbados and Methanex Cayman, together with the surrounding circumstances,

[15] Paragraph 111 TAB judgment

documentation, and banking trail, that resulted in those payments being identified as payments to Methanex Canada and therefore subject to withholding tax.

56. It was emphasized in **Ramsay v IRC [1982] A.C. 300 at 323b - 324d** per Lord Wilberforce that "it is the task of the Court to ascertain the legal nature of any transaction to which it is sought to attach a tax or tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded". See also page 325d "The court could on the basis of the findings made and or its own analysis in law, consider the scheme as a whole and was not confined to a step by step examination. See also page 325e. A court is not confined to a single step approach.

> "In these circumstances, your Lordships are invited to take, with regard to schemes of the character I have described, what may appear to be a new approach. We are asked, in fact, to treat them as fiscally, a nullity, not producing either a gain or a loss. Mr. Potter Q.C. described this as revolutionary, so I think it opportune to restate some familiar principles and some of the leading decisions so as to show the position we are now in.
>
> 1. A subject is only to be taxed upon clear words, not upon "intendment" or upon the "equity" of an Act. Any taxing Act of Parliament is to be construed in accordance with this principle. What are "clear words" is to be ascertained upon normal principles: these do not confine the courts to literal interpretation. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and its purpose may, indeed should, be regarded: see Inland Revenue Commissioners v. Wesleyan and General Assurance Society (1946) 30 T.C.11, 16 per Lord Greene M.R. and Mangin v. Inland Revenue Commissioner [1971] A.C. 739, 746, per Lord Donovan. The relevant Act in these cases is the Finance Act 1965, the purpose of which is to impose a tax on gains less allowable losses, arising from disposals.
>
> 2. A subject is entitled to arrange his affairs so as to reduce his liability to tax. The fact that the motive for a transaction may be to avoid tax does not invalidate it unless a particular enactment so provides. It must be considered according to its legal effect.

3. It is for the fact-finding commissioners to find whether a document, or a transaction, is **genuine or a sham**. In this context to say that a document or transaction is a **"sham" means that while professing to be one thing, it is in fact something different**. **To say that a** document or **transaction is genuine**, **means that, in law, it is what it professes to be**, and **it does not mean anything more than that**. I shall return to this point.

Each of these three principles would be fully respected by the decision we are invited to make. Something more must be said as to the next principle.

4. Given that a document or transaction is genuine, the court cannot go behind it to some supposed underlying substance. This is the well-known principle of Inland Revenue Commissioners v. Duke of Westminster [1936] A.C. 1. This is a cardinal principle but it must not be overstated or overextended. **While obliging the court to accept documents or transactions, found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs. If it can be seen that a document or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded**: to do so is not to prefer form to substance, or substance to form. **It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions, intended to operate as such, it is that series or combination which may be regarded.** For this there is authority in the law relating to income tax and capital gains tax: see Chinn v. Hochstrasser [1981] A.C. 533 and Inland Revenue Commissioners v. Plummer [1980] A.C. 896.
For the commissioners considering a particular case it is wrong, and **an unnecessary self limitation**, to regard themselves as **precluded** by their own finding that documents or transactions are not "shams," **from considering what**, as evidenced by the documents themselves or by the manifested intentions of the parties, **the relevant transaction is**. They are not, under the Westminster doctrine or any other authority, bound to consider individually each separate step in a composite transaction intended to be carried through as a whole. ....In such cases (which may vary in emphasis) the commissioners should find the facts and then decide as a matter (reviewable) of law whether what is in issue is a composite transaction, or a number of independent transactions.
…

5. Chinn v. Hochstrasser [1981] A.C. 533. This again was a prearranged scheme, described by the special commissioners as a single scheme. …**This case shows, in my opinion, that although separate steps were "genuine" and had to be accepted under the Westminster doctrine, the court could, on the basis of the findings made and of its own analysis in law, consider the scheme as a whole and was not confined to a step by step examination.**

To hold, in relation to such schemes as those with which we are concerned, that the court is not confined to a single step approach, is thus a logical development from existing authorities, and a generalisation of particular decisions.

….”

These principles have been applied in several subsequent cases, for example **Barclays Mercantile Business Finance Limited v Mawson (Inspector of Taxes) (2005) STC 1**.

57. Accordingly, even without giving the CARICOM Treaty a purposive construction, nothing in law prevented the BIR’s determining the nature of the transactions and deciding whether the **actual** dividend payments, which might involve considering the **overall effect** of a number of elements intended to operate together, answered to the statutory description in the CARICOM Order and Treaty. It was therefore entitled to examine:
(a) whether actually and in substance the specific payments of those four dividends by Methanex Trinidad to Methanex Barbados, fell within the definition of the CARICOM Double Taxation Treaty as being payments of dividends to a resident of a member state, or
(b) whether they were a disguised payment of dividends to Methanex Canada pursuant to a pre-ordained plan and so intended from inception.

Artificial or Fictitious - The analysis and findings of the Tax Appeal Board

58. The question of whether a transaction is artificial or fictitious necessarily involves a factual assessment of the transaction. The facts which the Tax Appeal Board took into account were set out comprehensively in its judgment[16]. Regard must be paid to the

[16] In particular at paragraphs 99 to 115

fact that the Board is a specialized Court comprising members with expertise in the area of taxation. Its findings of fact would be reversed by an appellate court only if it can be shown that the court from which the appeal lies was "plainly wrong" in the sense more fully explained in several well known cases for example **Beacon Insurance Company Limited v Maharaj Bookstores Ltd [2014[UKPC 21** and most recently reiterated by the Privy Council in **Pleshakov v Sky Stream Corporation and Ors [2021] UKPC 15**. Those well-known principles do not here require repetition.

59. There is no basis on a review of its reasoning to conclude that the TAB was plainly wrong in its determination that: i. the transactions which purported to be payment of dividends by Methanex Trinidad to its parent Methanex Barbados (which would attract withholding tax at the rate of 0%), were actually **payments of dividends to Methanex Canada at its request and direction**, ii. they were **artificially routed** through Methanex Barbados **in accordance with a preconceived plan** to avoid the 5% withholding tax payable thereon if those payments had been transmitted directly from Methanex Trinidad to Methanex Canada.

60. The evidence is that:

    i. At least three of those payments were **requested** by Methanex Canada **in advance of the declaration** of the dividends in the **exact** amounts requested **before** any discretion was required to be exercised by the Boards of Methanex Trinidad or Barbados to declare dividends in those amounts. Methanex Canada is not the direct parent company of Methanex Trinidad. Yet Methanex Canada requested those dividend payments from Methanex Trinidad.

    ii. This was more than sufficient to support the TAB's view that **no independent discretion** was being exercised by the boards of Methanex Trinidad or Methanex Barbados in declaring dividends which had been pre-determined in form, amount and time of payment by Methanex Canada.

In relation to these payments the TAB was therefore entitled to find that the declaration of solvency by the Directors of both Methanex Trinidad and Methanex Barbados prior to their declaration of dividends did not establish conclusively that those declarations were the product of their own independent discretion.

This was not displaced by the fact that the boards of the companies had to consider the liquidity ratios of their respective companies before declaring those dividends. While any board declaring a dividend would be expected to first ensure that the statutory solvency requirements are satisfied, the TAB further found that that exercise in the case of Methanex Barbados was academic because that company "*was lowly geared and had limited insolvency risk during the material times*[17]*.*

iii. The dividends paid to Methanex Barbados were to an account in Vancouver, Canada under the sole control of Methanex Canada.

iv. After the dividends were paid by Methanex Trinidad to Methanex Barbados, dividends in those exact amounts were also declared by Methanex Barbados and transmitted to Methanex Cayman.

v. The dividends paid by Methanex Barbados to Methanex Cayman were transmitted to an account in Vancouver Canada under the control of Methanex Canada.

vi. The rapidity with which that request was given effect and its facilitation by Methanex Barbados were also matters that the TAB was entitled to take into account in its assessment of whether in fact the payments of dividends to

[17] See paragraph 114 e of TAB judgment

Methanex Barbados were actually payments of dividends from Methanex Trinidad intended from inception to actually be for the benefit Methanex Canada.

61. In a situation where the funds received by the company resident in Barbados from the company resident in Trinidad are transmitted immediately upon receipt, without any time being afforded for the use or disposition of those funds by the Barbados CARICOM resident, there was no reason why that fact should be disregarded by the BIR.

62. Therefore, the TAB was entitled to conclude that the beneficial ownership of dividends in the exact amounts declared by Methanex Trinidad, and paid to Methanex Barbados, lay, not with Methanex Barbados, but with Methanex Canada. In each case Methanex Canada received in an account under its sole control in Vancouver, very shortly thereafter the exact amounts of four dividends declared by Methanex Trinidad. In effect, the TAB attributed greater significance to its conclusion that it was not coincidental that the amounts of dividends declared by Methanex Barbados were in equivalent amounts to the amounts requested by Methanex Canada of Methanex Trinidad.

63. The facts actually bear no other logical interpretation. It was entitled to conclude that the decision had been previously taken by Methanex Canada to receive dividends in the amount that it directed Methanex Trinidad to make, notwithstanding that Methanex Canada is not the direct parent company of Methanex Trinidad. The Tax Appeal Board could not possibly be said to have erred in its assessment of the facts before it, or in relation to its assessment of the law applicable to those facts.

64. In those circumstances, the transactions in so far as they purported to be simply payments to Methanex Barbados, attracting zero per cent withholding tax, could legitimately be characterized as artificial and fictitious. The TAB could not be faulted for doing so.

65. The Appellant contends that the balance sheet for the year ending December 31st 2006 showing that Methanex Barbados had retained earnings of 27 million plus dollars and that the evidence was that over the course of time the directors in Methanex Barbados considered and exercised their discretion in determining what **portion** of Methanex Barbados's earnings it was to distribute in the form of dividend and what **portion** to retain. However, that was not what the evidence disclosed **in relation to the instant dividend payments**, and the TAB confined its judgment to those particular dividend payments.

66. The appellant complains[18] that the dividends paid by the appellant in 2005 were not considered "artificial or fictitious". However the reasoning of the TAB was in relation to an accumulation of matters, namely:

    i. the equivalence of the amounts paid by Methanex Trinidad to Methanex Barbados and the amounts in turn remitted by Methanex Barbados to Methanex Cayman,
    ii. the two emails referred to previously which predated the declaration of three of the dividends,
    iii. the timing of the payments,
    iv. the fact that the documented requests were made to Methanex Trinidad by a company, Methanex Canada, which was not its parent,
    v. the fact that the Tax Appeal Board labelled as an academic exercise the consideration by the Board of Methanex Barbados of the solvency test in relation to the particular dividends under consideration,
    vi. its conclusion that on the entirety of the evidence that the plan by Methanex Canada to receive $85.4 million US dollars had been **predetermined**.

[18] At paragraph 136 of its submissions.

67. The contention by the Appellant that it was entitled to utilise its corporate structure to facilitate tax planning and efficiency is not disputed. Neither can it be contested that Methanex Canada can request and expect dividend payments from its subsidiaries as a return on its investment and capital. However if it does so then the tax consequences of the actual transaction would apply, and not the tax consequences of any disguised or fictitious transaction. This is so whether or not Methanex Canada, Ms. Chow, or Mr. Owens, were performing a treasury function for the Methanex Group[19].

Artificial - Law

68. Whether a transaction is **artificial** has been addressed in the cases of **Seramco Ltd Superannuation Fund Trustees v Income Tax Commissioners [1977] A.C. 287 at 298 a-d,** and in the case of **Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica [2012] UKPC delivered 13 March 2012** (In ***Seramco*** Lord Diplock explained that "artificial" is not a term of legal art and had a meaning separate from the word "fictitious". Lord Walker at paragraph 21 of the ***Cigarette Company*** case cited Lord Diplock's observation to that effect and noted further at paragraph 22 that "*a transaction is **artificial** if it has, as compared with normal transactions of an ostensibly similar type, features that are **abnormal** and **appear to be part of a plan***." Paragraphs 21 to 23 are set out hereunder:-

> *[21] It is common ground between counsel that in s 16(1) "artificial" has a meaning different from,* and *wider than, "fictitious" (the latter expression approximating in meaning to "sham"). Counsel accepted that authoritative guidance has been given (in relation to an earlier provision in the same terms as s 16) by Lord Diplock in* Seramco Ltd Superannuation Fund Trustees v Income Tax Commissioner *[1977] AC 287, 298:*
> *"'Artificial' is an adjective which is in general use in the English language. **It is not a term of legal art**; it is capable of bearing a variety of meanings according to the context in which it is used. In common with all three members of the Court of Appeal their Lordships reject the trustees' first contention that its use by the draftsmen of the subsection is pleonastic, that is, a mere synonym for 'fictitious'. **A fictitious transaction is one which those who are ostensibly the parties to it never intended should be***

[19] See paragraph 13 **Cigarette Company of Jamaica** infra.

> ***carried out**. **'Artificial' as descriptive of a transaction is, in their Lordships' view a word of wider import**. Where in a provision of a statute an ordinary English word is used, it is neither necessary nor wise for a court of construction to attempt to lay down in substitution for it, some paraphrase which would be of general application to all cases arising under the provision to be construed. **Judicial exegesis should be confined to what is necessary for the decision of the particular case**. Their Lordships will accordingly limit themselves to an examination of the shares agreement* and *the circumstances in which it was made* and *carried out, in order to see whether that particular transaction is properly described as 'artificial' within the ordinary meaning of that word."*
>
> *[22] As Lord Diplock indicates, context is very important. … But a transaction is an abstract construct. Every transaction is in a sense artificial in that it is put together by two or more parties in order to create or alter legal rights* and *obligations as between them. While mindful of Lord Diplock's warning against too much judicial exegesis **the Board consider that in this context a transaction is "artificial" if it has, as compared with normal transactions of an ostensibly similar type, features that 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." Recognising a transaction as artificial in this sense is an evaluative exercise calling for legal experience** **and** **judgment. It is certainly not an ordinary question of primary fact,** as Mr McCall acknowledged in abandoning one of the main points in his written case.*
>
> *[23] A transaction is not artificial merely because it is not commercial, or not fully commercial. Income tax affects transactions by way of bounty as well as commercial transactions. But if a transaction effected in a commercial context is attacked as uncommercial that may be a reason for looking at it closely. To repeat what Lord Diplock said in the passage quoted above, it is necessary to examine the particular transaction and the circumstances in which it was made and carried out.* (All emphasis added)

69. The features in the instant transactions that are abnormal were those identified by the TAB itself as set out above. The overall overriding abnormalities were that four dividend payments purporting to be made from Methanex Trinidad to Methanex Barbados, though routed through Methanex Barbados and Methanex Cayman Islands, were received **within two business days** at accounts under the sole control of **Methanex Canada,** in three cases in identical amounts as sums which had been previously **requested** by Methanex Canada. These matters suggested a preconceived **plan** by Methanex Canada to request the receipt of payments by specified dates, and direct the form in and mechanism by which those payments were to be made. Those were

matters that did not suggest the exercise of independent discretions by the Boards of Methanex Barbados or Methanex Trinidad.

70. In **Aiken Industries v Commr of Internal Revenue [1971] 56 TC 925 at 933** "*As utilized in the context of article 9 (of the US-Honduran Income Tax Convention) we interpret the terms "received by" to mean interest received by a corporation by either of the contracting states as its own and* ***not with the obligation to transmit it to another****. The words "received by" refer to not merely to the obtaining of physical* ***possession on a temporary basis*** *of funds representing interest payments from a corporation of a contracting State, but contemplate* ***complete dominion and control*** *over the funds. The Convention require more than a mere exchange of paper between related corporations to come within the protection of the exemption from taxation granted by article 9 of the Convention…"* (All emphasis added)

71. In the instant case, the dividends paid to Methanex Barbados could not be said to have been received by it in this sense. It did not retain those funds. Further, for the several reasons set out previously, it did not in fact exercise ownership of those funds. Rather it merely acted as a conduit for and transmitted those funds to an account under the sole control of Methanex Canada in accordance with the latter's previous request to Methanex Trinidad to do so.

72. There was sufficient and in fact overwhelming evidence, for the TAB to have concluded that the dividend payments from Methanex Trinidad to Methanex Barbados were artificial because they were actually, in reality and in substance, payments to Methanex Canada, despite being passed through Methanex Barbados to Methanex Cayman.

73. In **Cigarette Company of Jamaica**[20] it was explained that "a transaction is artificial if it has as compared with normal transactions of an ostensibly similar type **features that**

[20] At paragraph 22

are abnormal and appear to be part of a plan and 'which a well-informed bystander might say' this simply **does not happen in the real world**". It is necessary to examine the particular transaction and the circumstances in which it was made and carried out[21].

74. Accordingly the submission that the case ends with the findings of the Tax Appeal Board that a payment of dividends was made by Methanex Trinidad to Methanex Barbados, would be an erroneous limitation on the TAB's discretion, entitlement, and in fact duty to examine the transaction and see whether it was simply a one-step transaction, (namely payment of dividends to Methanex Barbados simpliciter as contended by the appellant), or whether it was **in substance**, a payment to Methanex Canada. The payments to Methanex Barbados clearly did not end with those payments. They were clearly only one stage in a transaction that concluded within two business days whereby Methanex Trinidad paid dividends for the ultimate and actual benefit of Methanex Canada on the basis of the latter's prior request.

75. The Tax Appeal Board further found that those dividends, which emanated from Methanex Trinidad, did not remain in the accounts of Methanex Barbados or Methanex Cayman Islands. Any commingling of funds from the dividends originating from Methanex Trinidad was found by the Tax Appeal Board to be merely transitory in nature and not for a sufficient period for Methanex Barbados to have derived any benefit from those funds. Whether they were called cash repatriations, or dividends, or otherwise, the fact is that the mechanism that Methanex Canada itself directed was the declaration of dividends by its subsidiaries, and the subsidiaries of those subsidiaries, starting with Methanex Trinidad from which the payments originated.

76. While the appellant contends that it was legally impossible to pay a dividend from an indirect subsidiary to an ultimate parent in the absence of a direct shareholding, that

[21] See Paragraph 23

alleged legal impossibility was clearly overcome and given effect. The reality is that Methanex Canada received the payments that it requested from Methanex Trinidad. That being the case those payments under the Canada-Trinidad Double Taxation Treaty would attract withholding tax at the rate of 5%. It is far too late therefore for the appellant to take any comfort from the technicality that Methanex Trinidad could not pay a **dividend** to Methanex Canada when the evidence is that that is actually what it set out to and did achieve.

Abnormal Features

77. Accordingly, Methanex Trinidad's payments of dividends which were received within two business days in accounts under the sole control of Methanex Canada, fall well within the description of the Privy Council in **Cigarette Company of Jamaica** of an artificial transaction because "as compared with normal transactions of an ostensibly similar type, it has features that are **abnormal** and appear to be part of a **plan**", and which a well-informed bystander might say "this would not happen in the real world".

78. The declaration of dividends in general by Methanex Trinidad would not by itself be either artificial or fictitious. The corresponding receipt of dividends in general by Methanex Barbados would not by itself be either artificial or fictitious. What was artificial or fictitious in relation to this transaction was that these four payments for income year 2007 included payments that were requested by Methanex Canada and which, though paid to Methanex Barbados, were efficiently and effectively routed to Methanex Canada, albeit via Methanex Barbados and Methanex Cayman Islands. In this case the **abnormal** feature is that the dividend payments ostensibly to Methanex Barbados, were paid out in the identical amounts within forty eight business hours to Methanex Cayman to an account solely controlled by Methanex Canada.

79. A well-informed bystander might well say that if these were actually genuine payments of dividends to Methanex Barbados, then **in the real world** those payments would not

be transmitted so readily in the exact corresponding amounts to Methanex Canada via intermediaries.

80. Further, **in the real world** if the dividend payments by Methanex Trinidad to Methanex Barbados were solely genuine payments of dividends to **Methanex Barbados**, then the emails from **Methanex Canada** to Methanex Trinidad, which **predated** the declaration of those dividends, would require explanation. A genuine payment of dividends to Methanex Barbados (the parent company of Methanex Trinidad), solely, would hardly be at the direction of Methanex Canada. Methanex Canada would hardly be in a position to **require** a dividend payment from an entity of which it is not a shareholder, (whether or not it was exercising a treasury function under an undisclosed treasury agreement), if those dividends were to be immediately repatriated to Methanex Canada via Methanex Cayman. It would hardly be in a position to direct that those payments be made by a particular date. It would hardly be likely that within a very short space of time after the dividends were received by Methanex Barbados that dividends in the exact amounts would be declared by Methanex Barbados and paid to Methanex Cayman to an account under the sole control of Methanex Canada.

81. The Tax Appeal Board could hardly be faulted for concluding on those facts that the characterization of the dividends paid by Methanex Trinidad to Methanex Barbados as simply a dividend payment to Methanex Barbados, would be **artificia**l.

Fictitious

82. The payments were **fictitious** simply because they were not, as they purported to be, actual dividend payments to Methanex Barbados as its ultimate intended beneficiary. The intended and actual beneficiary was Methanex Canada. U.S $85.4 million was declared as dividends paid by Methanex Trinidad to Methanex Barbados. U.S $85.4 million was remitted by Methanex Barbados via Methanex Cayman to an account under the sole control of Methanex Canada within two business days. Therefore, the Tax

Appeal Board could not be said to have erred in its assessment of the evidence before it.

83. The broader issue of the entitlement of the appellant to engage in tax planning is not an issue in this appeal. The issue is whether the impugned transactions have the hallmarks of being artificial or fictitious when examined as to their substance. When examined as to their substance the evidence clearly revealed these transactions did not simply end with the payment to Methanex Barbados.

84. Whether it was normal practice for declaration of dividends from companies within the corporate structure, and payment to the ultimate parent, whether by Methanex Barbados or Methanex Cayman Islands is not in issue.

85. Nothing prevented those corresponding declarations of dividends by Methanex Barbados or Methanex Cayman and transmission thereof to their respective ultimate parents. Nothing prevented the companies being structured for efficient tax planning. However equally nothing prevented the tax consequences being applied to the substance of the transactions – reasonably found by the TAB on the evidence to have been payments by Methanex Trinidad, from inception intended for and transmitted to Methanex Canada, which attracted withholding tax at the rate of 5%.

Commercial Purpose

86. The appellant contends[22] that for a transaction to be considered artificial it must be commercially abnormal or at a minimum lack commercial purpose. In the instant case, the declaration of dividends by Methanex Trinidad and the payment thereof to Methanex Barbados could not be said to lack commercial purpose. However, the commercial purpose clearly appears on the evidence to be other than the ostensible

[22] At paragraph 124 of its submissions

commercial purpose. The evidence was that the dividends declared and paid to Methanex Barbados were intended for the benefit of Methanex Canada.

87. Methanex Barbados was entitled to declare dividends for the benefit of its own parent company Methanex Cayman, and Methanex Cayman was entitled in turn to declare dividends for the benefit of its own parent company, Methanex Canada. However, the evidence of the circumstances surrounding those specific dividends by Methanex Trinidad includes the fact that the dividends paid to Methanex Barbados were in three documented cases, previously requested by Methanex Canada and simply transmitted almost immediately in the exact amounts of each onwards to an account of Methanex Cayman under the sole control of Methanex Canada. This clearly reflects that the ostensible commercial purpose was not the actual commercial purpose. The transaction therefore was artificial in that the claimed commercial purpose of payments of dividends to Methanex **Barbados** was simply not the actual or intended commercial purpose.

88. The outcome of this appeal does not require a challenge to the structure of the Methanex group. It is accepted that: i. payment of dividends in the normal course of commercial business by a subsidiary to its parent company is not commercially abnormal, ii. within a group of companies the payment of dividends by a subsidiary in that group to the ultimate parent would not be commercially abnormal, iii. that a subsidiary may be requested by its parent company to declare a dividend in respect of surplus cash. In this case however, the request for the dividend payment came from Methanex Canada, and **not** the appellant's parent company Methanex Barbados. Further, the declarations of dividends by Methanex Barbados were in the exact total amount as the dividends it received from Methanex Trinidad and in the exact amount as requested by Methanex Canada in respect of at least three of those dividend payments. The extreme rapidity with which those payments ended up in an account under the sole control of Methanex Canada has already been noted.

89. What is in dispute is whether the impugned transactions were **artificial** or **fictitious** in the manner described previously. Methanex Barbados simply transmitted to Methanex Cayman the exact amount of the dividends declared by Methanex Trinidad as requested by a party Methanex Canada, which was not its parent. The TAB's

    i. findings that there was a **predetermined** plan for the transmission of funds from the appellant to Methanex Canada was justified on the evidence,

    ii. conclusion that there was **transitory** commingling of funds in the bank account of Methanex Barbados was justified on the evidence, and appears simply from the dates of the payments of dividends in and the payments out of its account,

    iii. conclusion that there had been limited or **no independent consideration** or judgment exercised by the Directors of Methanex Trinidad and Barbados in assessing solvency and determining to pay a dividend,

    were all justified on the evidence.

90. The evidence left no doubt that the dividend payments to Methanex Barbados were not simply dividend payments to Methanex Barbados, but rather one stage in a multistage transaction intended to secure for Methanex Canada payments from Methanex Trinidad of $85.4 million US dollars for the income year 2007. On the evidence Methanex Trinidad and Methanex Barbados were simply facilitating a cash repatriation request by Methanex Canada. In those circumstances there can be no complaint that Methanex Canada was found by the Tax Appeal Board to be the beneficial owner of those dividends, albeit that they purported to emanate from Methanex Cayman via Methanex Barbados.

91. Further, an attack on the reasoning and analysis of the TAB carries the matter no further. For example, the TAB did not treat Methanex Barbados itself as artificial, nor

did it ignore its existence. The appellant's submission[23] that it did so is without foundation. That criticism was founded upon the TAB's finding that the main purpose for Methanex Barbados was to take advantage of the conjoint effect of a. the entitlements which had been derived as a Barbados Company licensed under the International Business Corporations Act of Barbados and b. being a resident of a member state under the CARICOM Tax Treaty. The Tax Appeal Board, while noting this to be the case, did not base its decision on this broader ground but rather confined its findings to the four particular dividend payments. Its findings were directly relevant to its conclusion that the payment of those particular dividends was in the realm of an artificial and fictitious series of transactions.

Beneficial Ownership

92. Paragraph 130 of the appellant's submissions appears to be a criticism that the concept of beneficial ownership was in some way improperly considered and applied by the Tax Appeal Board. The Board did refer to beneficial ownership in relation to the shareholding of Methanex Barbados, and expressly found that this was not an **additional consideration** required under the Double Taxation Order/Treaty, which only required for its applicability that a dividend be paid by a CARICOM **resident** company to another CARICOM **resident** company[24].

93. It referred to beneficial ownership later in the judgment, in the context of ownership of the **dividends[25].** When it used the term beneficial ownership in that context, the Board was referring to the actual intended owner of the dividend being Methanex Canada rather than Methanex Barbados.

[23] At paragraph 125 continued at paragraph 127
[24] Paragraph 82 of TAB judgment
[25] See paragraph 114 f TAB judgment

94. The word “beneficial ownership” carries the argument no further and does not detract from the actual analysis of the Tax Appeal Board. It is a misconception that the TAB was engrafting on to the concept of residence the additional concept of beneficial ownership.

Consequences of transaction being artificial or fictitious

Effect of section 67 ITA – Whether re-characterization

95. The appellant contends that even if Section 67 of the Income Tax Act applied the dividends cannot be re-characterized, only disregarded. In fact, that is exactly what the Tax Appeal Board did. It disregarded the payment of dividends from Methanex Trinidad to Methanex Barbados, insofar as they purported to be solely that transaction. The Tax Appeal Board here did not re-characterize the transaction as something that it is not. It simply characterized the transaction as what it actually was, namely a payment of U.S $85.4 million directly to Methanex Canada. It therefore assessed tax on the transactions that it found were in substance the actual transactions. The assessment was on the basis that what occurred was the payment of U.S $85.4 million in the year of income 2007 in four tranches to Methanex Canada. It was in those circumstances assessable to withholding tax under the double taxation treaty between Trinidad and **Canada** at the rate of 5% as opposed to the rate of 0% if it had been simply a dividend payment from Methanex Trinidad to Methanex Barbados.

96. The appellant submits that the consequences of the transactions being artificial or fictitious must be that the dividends are to be treated as not having been paid at all. If the dividends are simply treated as not having been paid, for purposes of the Income Tax Act there would be no withholding tax. However, this is plainly illogical and must be rejected. The dividends cannot be treated as simply not having been paid when the clear evidence was that U.S $85.4 million was paid to Methanex Canada. There is no rational basis for pretending that this is not what occurred, or that the dividends must

be treated as not having been paid, resulting in no withholding tax. The TAB did not fall into error:-

i. in disregarding the transaction insofar as it purported to be a dividend payment from Methanex Trinidad to Methanex Barbados;
ii. in identifying, recognizing and confronting the fact that the actual transaction was a payment from Methanex Trinidad to Methanex Canada;
iii. in attributing the payments to Methanex Corporation Canada and therefore assessing them to withholding tax at the rate of 5% under the applicable Double Taxation Treaty;
iv. in substituting a fictional transaction under Section 67 of the Income Tax Act. In fact, it substituted the actual or real transaction and assessed it to 5% withholding tax accordingly.

97. The appellant expresses concern that the Tax Appeal Board was itself concerned that Methanex Barbados was **inappropriately** taking advantage of benefits under the CARICOM Tax Treaty[26]. In any event:

i. it found that Methanex Barbados was resident in Barbados,
ii. it found that there were reasons for its existence apart from the holding of the entire equity of Methanex Trinidad,[27]
iii. It confined its decision to consideration of the four particular dividends in this instance[28].

It did not conclude that Methanex Barbados under the CARICOM Double Taxation Treaty was not entitled generally to receive bona fide non-artificial and non-fictitious dividends from Methanex Trinidad at the withholding tax rate of 0%.

[26] At paragraph 171 of its submissions.
[27] Paragraph 111 TAB judgment
[28] Paragraph 114c TAB judgment

98. What the CARICOM Double Taxation Treaty does not provide is that Methanex **Canada** could receive dividend payments from Methanex **Trinidad** with such payments not being liable to withholding tax or being liable to withholding tax at a rate of 0%. The attempt to disguise this fact in relation to the four specific impugned dividends as payments of dividends to Methanex Barbados, as they purported to be, was found by the TAB to be ineffective.

Whether any piercing of the corporate veil

99. The case of **Prevost v Canada (2008) 5CTC 2306** Federal Court of Appeal was cited by the TAB[29]. In that case a relevant consideration as to the beneficial ownership of dividends was whether the holding company there had "*absolutely **no discretion** as to the use and application of the funds put through it as a conduit or had agreed to act on someone else's behalf pursuant to that person's instructions without any right to do other than what it had been instructed to do*". The TAB's findings of fact in relation to Methanex Barbados are to the same effect.

100. The Appellant contends[30] that there was no basis to pierce the corporate veil twice in this case on the basis of beneficial ownership, and treat the dividends paid by the appellant to Methanex Barbados, "as if they had been paid to Methanex Corporation". However, firstly the evidence is that the dividends paid by the appellant to Methanex Barbados were in fact ultimately paid into an account under the sole control of Methanex Canada. It was not a question of treating them "**as if"** they had been paid to Methanex Canada.

101. Secondly, the Tax Appeal Board did not pierce the corporate veil in determining that the dividends declared by Methanex Trinidad and paid to Methanex Barbados were actually for the benefit of Methanex Canada. It appears from the TAB's reasoning that

[29] At paragraph 96 page 255 of its judgment
[30] At paragraph 183 of the Appellant's submissions

had it not found that the dividend payments were sham or fictitious, the appellant would have established that the dividends were not liable to withholding tax under the CARICOM Order[31]. It did not rely upon the shareholdings of Methanex Barbados or Methanex Cayman to arrive at its conclusion. In fact, it expressly did not read the concept of beneficial ownership into the CARICOM Treaty or base its decision on the fact that Methanex Barbados was wholly owned by Methanex Cayman, which was in turn wholly owned by Methanex Canada. As set out extensively above, its reasons for considering the transaction artificial were otherwise. It did not need to pierce any corporate veil when the evidence was that the dividends were actually received by a separate and independent corporate entity Methanex Canada.

Legislation

Issue iii. - Whether Methanex Barbados is resident in Barbados

102. It is not in dispute that the appellant is a company resident in Trinidad. The Tax Appeal Board has found that Methanex Barbados is a company resident in Barbados[32]. The Respondent contends that it is not. If it is not, then not only would the four instant dividend payments, not qualify for the zero per cent rate of withholding tax, but **all** dividend payments to Methanex Barbados by the Appellant would similarly not qualify.

103. The Respondent claims that the Tax Appeal Board erred in law in failing to adopt a purposive construction of the CARICOM Treaty as incorporated by section 93 (1) of the ITA (TT). If it had done so it would not have determined that Methanex Barbados qualified as a **resident** of Barbados for the purpose of that treaty. Article 4 (1) of the Treaty is as follows:

> *4. (1) For the purposes of this agreement "resident of a Member State" means any person who under the law of that State is liable to tax therein by reason of that person's domicile, residence, place of management, or any other criterion of a similar nature.*

[31] See paragraph 82 of the TAB judgment page 251
[32] Paragraph 67 TAB judgment

Article 11 is as follows:
DIVIDENDS 1. Dividends paid by a company which is a resident of a Member State to a resident of another Member State shall be taxed only in the first-mentioned State. 2. The rate of tax on the gross dividends shall be zero per cent. 3. The provisions of paragraph 1 of this Article shall not affect the taxation of the company in respect of the profits out of which the dividends are paid.

Residence - The IBC Act

104. Because Methanex Barbados is incorporated as an International Business company under the International Business Companies Act in Barbados, it is entitled to repatriate dividends to its parent company resident outside of Barbados at a rate of withholding tax of 0%.

105. The respondent contends that Methanex Barbados does not qualify because it is not a **resident** of a Member State. It cites[33], Article 4 (1) of the CARICOM Treaty which provides "for the purposes of this Agreement the term "**resident** of a Member state" means any person who under the law of that State is **liable to tax** therein by reason of that person's domicile, residence, place of management or any other criterion of a similar nature".

106. The respondent submits that the CARICOM Treaty and in particular article 4 (1) and Article 11 thereof, should be interpreted 'purposively' as to the terms "**resident** of a Member State". A purposive construction was rejected by the Tax Appeal Board at paragraph 76 page 249 when it concluded that *"there is in our view no ambiguity within this Article to warrant our recourse to disregarding the clear language used therein and to have applied a purposive mode of construction thereto".*

107. The TAB adopted a strictly literal interpretation and reasoned that:

[33] At paragraph 49 of its submissions

i. The CARICOM Treaty and Order applied to payment of dividends by a resident (Methanex Trinidad) of a CARICOM state to a resident of another member state, (Methanex Barbados)[34],

ii. METHANEX BARBADOS was a **resident of a member state**, for the following reasons:

a. incorporation in Barbados[35]

b. management in Barbados[36]

c. its worldwide income was liable to tax in Barbados and it had paid corporation tax in 2004 and 2005,

d. its recognition as a resident company in Barbados by the Barbados Revenue Authority[37]. For these reasons, it held that it satisfied the requirement of residence under Article 4 of the CARICOM Double Taxation Treaty. It held accordingly, that the dividends were to be taxed only in Trinidad, and therefore the rate of tax on gross dividends pursuant to Article 11 (2) was to be 0%.

108. The TAB expressly found i. that there was no ambiguity in the language, ii. that Methanex Barbados was **liable to tax** in Barbados in income year 2007 and therefore **liable to tax** within the meaning of Article 4 (1), iii. that as the **residence** of the payer of the dividend is in a CARICOM Member State and the residence of a recipient of the dividend is another CARICOM Member State meant that the CARICOM Treaty Article 11 applied[38] , and iv. that it was not necessary to establish beneficial ownership of the dividends by Methanex Barbados before entitlement to withholding tax relief[39].

[34] Paragraph 82 TAB judgment
[35] Paragraph 64 TAB judgment
[36] Paragraph 114c TAB judgment
[37] See exhibit BA4 to the affidavit of Bernell Arrindell which is a certification from the Revenue Commissioner in Barbados that Methanex Barbados was deemed to be a resident company in Barbados (albeit for the Income Tax Year 2016) for Corporation Tax purposes and for the purpose of the (CARICOM Double Taxation Treaty).
[38] Paragraph 82 TAB judgment
[39] Paragraph 82 TAB judgment

Therefore, bona fide, non-fictitious dividends paid by Methanex Trinidad were to be taxed only in Trinidad and Tobago the rate of tax was to be 0% as provided in the CARICOM Treaty and Order.

109. On the face of it, the CARICOM Treaty applies to a resident of a Member state who is a person liable to tax under the law of Barbados by virtue of its domicile or residence or place of management. With respect to its residence the TAB found that Methanex Barbados was a **resident** of a member state namely Barbados. It found that there were reasons for the existence of Methanex Barbados apart from the holding of the entire equity of the appellant, albeit that one of those reasons included minimizing or mitigating its tax exposure[40]. The TAB accepted that the directors of Methanex Barbados exercised commercial decision-making powers, albeit not in relation to the instant transactions[41]. At paragraph 82 however it held that residence alone in Barbados by Methanex Barbados would have been sufficient to conclude that it was entitled to the benefit of tax free dividends under Article 11 were it not for the additional consideration of whether the payments of the particular dividends on the evidence were sham or fictitious.

Issue iv – whether the onward transmission of the dividends by Methanex Barbados was incompatible with a purposive construction of the Treaty so as to preclude their exemption from withholding tax

110. The respondent's further contention was that Methanex Barbados was not liable to tax within the meaning of that phrase because it was not fully subject to the usual complete tax exposure of a company incorporated in Barbados. This was because it was exposed in a limited manner to tax in Barbados by virtue of its incorporation under the IBC Act.

[40] Paragraph 114b TAB judgment
[41] 114c TAB judgment

The Treaty – Literal Construction – Resident, liable to tax

111. The TAB found that the status of Methanex Barbados as an International Business Company, subject to limited exposure to the income tax regime of Barbados, did not detract from the fact that it was a Barbados **resident** company for the purposes of the CARICOM Treaty and Order. It held that the fact that Methanex Barbados was incorporated under the IBC Act did not remove it from inclusion in the phrase "**liable to tax**" under Article 4 (1) of the Treaty[42] Since there was no qualification on "*liable to tax"* in the CARICOM Treaty the limitation contended for would have required reading into that Treaty the words '*fully liable to tax*' or "*not being a corporation with only limited exposure to the tax regime of Barbados*".

112. On its **literal** meaning, the Treaty applies simply to companies resident in Barbados. Its incorporation under the IBC Act is not a factor that excludes it from the application of the CARICOM Double Taxation **Treaty**. This is unlike the Barbados/Canada Double Taxation Treaty (referred to in ***Alberta Printed Circuits v The Queen, 2011 TCC 232*** infra.

113. A dividend payment from a company resident in Trinidad to Methanex Barbados (once accepted to be a resident of Barbados), would therefore in the normal course of things attract withholding tax at the rate of 0%.

Whether purposive interpretation applicable

114. The respondent contends that Methanex Barbados is not **resident** in Barbados for the purpose of Article 4 of the CARICOM Double Taxation Order. It so claims because the words "liable to tax" in the definition of "residence" in that order must be given a **purposive** interpretation. It contends that "liable to tax" must mean "liable to the plenary taxing powers of the CARICOM state in which it asserts residence", and not simply liable under some special and limited tax arrangements granted to international

[42] See paragraph 73 to 77 TAB judgment, page 248-249

business companies or otherwise. The respondent contends that Methanex Barbados is not subject to the full taxing powers of the State of Barbados under the Barbados Income Tax Act. It so contends because section 10 of the IBC Act provides for the imposition of a new tax on international business companies in Barbados in lieu of corporation tax replacing tax **at the rate specified** in the Barbados Income Tax Act. It contends that sections 10, 11 and 23 of the IBC Act (Barbados) expressly dis-apply the taxing jurisdiction under the Barbados Income Tax Act and substitute therefor a much more limited form of taxation, (as little as 1% in the instant case on an amount over $30 million dollars, as opposed to 25% as it would be in the case of a Barbados resident company not registered under the IBC Act).

115. Methanex Barbados is incorporated under the IBC Act. The IBC Act provides:

> *10. (1) Subject to this section and section 11, **in lieu of tax at the rate specified under the Income Tax Act**, there shall be levied and paid to the Commissioner of Inland Revenue, in respect of the income year 1991 and in each subsequent income year of an international business company, a tax on the profits and gains of the company at the following rates (a) 2.5 per cent on all profits and gains up to $10 000 000; (b) 2 per cent on all profits and gains exceeding $10 000 000 but not exceeding $20 000 000; (c) 1.5 per cent on all profits and gains exceeding $20 000 000 but not exceeding $30 000 000; (d) one per cent on all profits and gains in excess of $30 000 000. (2) An international business company may elect to take a credit in respect of taxes paid to a country other than Barbados provided that such an election **does not reduce the tax payable in Barbados** to a **rate less than one per cent of the profits and gains of the company** in any income year. (All emphasis added)*

116. Section 11 of the IBC Act provides that the IBC shall not be liable to pay any tax under the Income Tax Act except as is provided by section 10. Section 11 of the IBC Act provides as follows:-

> 11. An international business company shall not be liable to pay any tax under the Income Tax Act except as is provided by section 10 thereof in respect of an income year, nor shall it be liable under this or any other enactment to pay any other direct tax on its profits and gains in respect of that income year.

117. It further contends that section 23 of the IBC Act affirms that section 10 of the IBC Act creates a **new** tax distinct from the corporation tax, by the use of the words "*except to the extent that* ***this act operates to exempt an international business company (IBC) from tax under the Income Tax Act***", which clearly demonstrates that an IBC is not liable to tax under the Barbados Income Tax Act. Section 23 of the IBC Act provides as follows:-

> 23. Except to the extent that this Act operates to exempt an international business company from tax under the Income Tax Act, all the provisions of that Act apply with necessary modifications to an international business company.

118. The respondent submits that under section 3(2) of the Barbados Income Tax Act, **corporation tax** is imposed on **taxable income** of a company which is the **assessable income** less the deductions permitted and that that assessable income is income from all sources whether within or outside of Barbados. Section 3(2) provides as follows:

> A company that has a taxable income in any income year shall, instead of paying income tax under subsection (1) pay a corporate tax on that income in respect of that year calculated in accordance with this Act.

119. It contends therefore that if section 10 merely **varied the rate** of corporation tax under the Barbados ITA then words to that effect would have been used instead of words which clearly levy a new tax.

120. It contends[43] therefore that section 10 of the IBC Act is a tax imposing section and that tax on an IBC is not a tax imposed under the Barbados Income Tax Act. Rather, Methanex Barbados' liability to tax is by reason of its registration under the IBC Act and not by reason of the identified criteria in **Article 4** of the CARICOM Treaty. Its liability to tax under the IBC Act does not arise by reason of its **domicile**, **residence**, **place of management** or any other criteria of a similar nature. It notes that unlike sections 3 and 5 of the Income Tax Act which impose tax on the **worldwide** income of a normal corporation in Barbados, section 10 of the IBC Act does not purport to impose tax on

[43] At paragraph 22 of its reply submissions

"income from all sources, whether within or outside Barbados". This suggests that a company registered under the IBC Act is under a separate taxation regime, one not contemplated by the CARICOM Double Taxation Order. It submits that Methanex Barbados is **exempt** from taxes under the Income Tax Act, Barbados and its liability to tax arises exclusively and entirely by reason of its registration as an IBC.

121. A company registered under the IBC Act does not pay the 25% rate on worldwide income which it would pay if it were subject to the regime of the Income Tax Act of Barbados. However companies registered under the IBC Act pay a limited form of taxation imposed on **profits and gains** at a significantly lower rate than that imposed under the Income Tax Act of Barbados.

122. This submission was addressed by the Tax Appeal Board in its judgment and rejected. It found that "liable to tax" simply meant liable to tax, and that there were no basis for reading further words into it, purposively or otherwise, to exclude Methanex Barbados from the definition of 'resident of a Member State', on the basis that it was not fully liable to the normal tax regime of Barbados.

123. The reasoning of the TAB is found at paragraphs 63 to 77 of its judgment. It specifically addressed the issue of residence and found that "liable to tax" is construed as referring to an abstract liability to tax wider in scope for example than the term "subject to tax". It considered the case of **Crown Forest Industries Limited v Canada [1995] 2 SCR 802**. The TAB distinguished ***Crown Forest.*** It concluded in effect that Methanex Barbados was still "liable to tax" by reason of its "residence" within the meaning of Article 4 because although as an IBC it was subject to a variation of the rate of tax stipulated under the Barbados Income Tax Act this did not detract from the fact that, as an IBC registered in Barbados it was "**liable to tax**" on its profits and gains, albeit at a reduced rate. There is no basis for concluding from the analysis therein that it erred in its findings of fact or in law.

Purposive Interpretation – CARICOM Treaty

124. There is no ambiguity in the CARICOM Treaty. However, even in the absence of ambiguity a purposive approach may be adopted in relation to a tax treaty, (and therefore similarly by extension, a tax treaty incorporated into a domestic statute). The respondent contends that there is authority for the proposition that "the approach to interpreting tax treaties is more expansive than for domestic fiscal statutes and that courts may consider the **purpose** of provisions **even in the absence of ambiguity**". This principle is reflected in the case of **Crown Forest Industries Ltd v Canada [1995] 2 SCR 802 at 822 paragraph 44**. However, there is no **requirement** to adopt a purposive interpretation. In this case, to do so would involve rewriting the CARICOM Treaty, (a multilateral treaty) and risk creating commercial uncertainty in the face of the clear words in that Treaty.

125. The issue arises therefore as to whether the conclusion of the TAB could be revisited on the basis that it had failed to appreciate that a limited exposure to tax in Barbados could render Methanex Barbados **not a resident** of Barbados for the purpose of the CARICOM Treaty. In this regard, the Canadian cases of ***Crown Forest Industries Ltd v Canada*** and ***Alberta Printed Circuits*** were cited.

Alberta Printed Circuits

126. The case of **Alberta Printed Circuits v R 2011 TCC 232** cited in this regard is not authority for the purposive construction suggested. This is because the Canada/Barbados Treaty specifically excludes companies entitled to benefit under the IBC Act. On a **literal** interpretation of **that** Treaty such a company was specifically excluded from its application. This is not the case under the instant CARICOM order.

127. In ***Alberta Printed Circuits*** the double taxation treaty between Barbados and Canada was specifically considered. It referred to Section 10 of the **IBC Exemption from Income Tax Act** and to the Income Tax Act of Barbados. An examination of Section 10 (1) of that Act reveals that it is in identical terms to Section 10 (1) to the IBC Act under

consideration in the instant case. Section 10 (1) was as follows:- "*subject to this section and section 11, **in lieu of tax** at the **rate specified** under the Income Tax Act, there should be levied and paid to the Commissioner of Inland Revenue, in respect of the income year 1991 and in each subsequent income year of an international business company, a tax on the profits and gains of the company at the following rates*…"[44]

128. Significantly, paragraph XXX (3) of that treaty expressly excluded from the application of the Treaty companies entitled to any special tax benefit under the IBC Exemption from Income Tax Act.

129. Article XXX (3) provided as follows: *"This agreement shall not apply to companies entitled to any special tax benefit under the Barbados International Business Companies (exemption from Income Tax) Act Chapter 77 or to companies entitled to any special tax benefit under any similar law enacted by Barbados in addition to or in place of that Law".*

130. That Treaty therefore makes it clear that it did not apply to IBCs. There is no such provision in the CARICOM Double Taxation Treaty, and there is no specific exclusion of IBCs.

131. The Court in ***Alberta Printed Circuits*** summarized the position as follows[45]:- "*In summary, the tax levied under the IBCs Exemption from Income Tax Act does not count as a "tax", under the Treaty. Barbados and Canada chose to establish an inclusive, fixed list of taxes that would be considered "Barbados Tax", and that list does not include the tax levied under the IBC Exemption from Income Tax Act".* In other words although the appellant was subject to a tax, it was not subject to "tax" either as that term was defined in the treaty or within the context of the treaty requirements. Therefore, the argument that for the purpose of considering whether or not Methanex Barbados is resident in Barbados under the Treaty because it is not "liable to tax" therein needs to find support

[44] Paragraph 118 of the judgment
[45] At paragraph 125

elsewhere. The question of the applicability of the Canada Barbados Double Taxation Treaty was therefore answered by paragraph XXX (3) of that very Treaty.

132. In the ***Alberta Printed Circuits*** Case at paragraph 124 the Court stated "*In light of this it is possible to conclude that the tax provided for in the IBC Exemption From Income Tax Act is neither the "income tax" which arguably only applies (as a phrase) to individuals, nor the "corporation tax" described in subsection 3(2) and whose rate is specified in section 43, as the tax in section 10 of the IBC Exemption From Income Tax Act is levied in lieu of tax at the rate specified under the Barbados Income Tax Act*".

133. The further brief reasoning of the court as to the inapplicability of the Treaty because the IBC Act provided for taxation in substitution or **in lieu of** the taxation regime provided for by the Barbados Income Tax Act, was not necessary. It also failed to consider the effect of the words "at the rate specified under the Barbados ITA". Further, the words in section 10 (1) of the IBC Act "**in lieu of tax at the rates specified** under the Income Tax Act" do not necessarily suggest, as the ***Alberta Printed Circuits*** case seems to have concluded, that tax under the Barbados Income Tax Act was **excluded entirely.** It is equally consistent with the interpretation that taxation under the IBC Act was in lieu of tax at the **rates specified** under the Income Tax Act. In other words, that it merely adjusted the rate in relation to a special class of companies **leaving intact the liability to tax**. It is therefore of extremely limited assistance on the issue of whether full exposure to the plenary taxing powers of a treaty State is required before it can claim the benefit of any Double Taxation Treaty. It is not persuasive on such a fundamental issue as the general non-application of the instant Double Taxation Treaty to IBC Act incorporated companies in Barbados.

Crown Forest Industries Ltd v Canada [1995] 2 SCR 802

134. The respondent submits that the application of the CARICOM Double Taxation Treaty was limited to tax payers bearing full tax liability in one of the contracting states, as this

was the basis on which Canada had ceded its taxing jurisdiction. It further submits that the test of **residence** requires that the entity claiming treaty benefits should be **fully taxable** in the country of residence in the sense of being fully subject to its plenary taxing jurisdiction.

135. The respondent contends that the ***Crown Forest*** case is authority for the principle that when the Treaty speaks of liability to tax the framers contemplated that the taxpayer would be subject to as comprehensive a tax liability as imposed by the member state. It quotes page 821 paragraph 40 of the judgment of Iacobucci J as follows: "In this respect the criteria for determining **residence** in Article IV, Paragraph 1 involve more than simply being liable to taxation on some portion of income (source liability); they **entail being subject to as comprehensive a tax liability as is imposed by a state**. In the United States and Canada such comprehensive taxation is taxation on worldwide income. However, tax liability for the income effectively connected to a business engaged in the US, pursuant to section 882 of the Internal Revenue Code amounts simply to source liability". It therefore cites this as authority for the proposition that limited exposure of Methanex Barbados to tax only under the Barbados IBC Act would not suffice for Methanex Barbados to qualify as a company "resident of a Member State".

136. In ***Crown Forest*** it was expressly found that Norsk, (which together with Crown Forest were both owned by a New Zealand Company, Fletcher), was not a **resident** of the US so as to benefit from the Canada-U.S. Income Tax Convention 1980[46] Norsk was incorporated in the Bahamas but its sole office and place of business was located in the US. Accordingly, it was not entitled to benefit therefrom. It was not required to pay tax there because of the US-Bahamas Tax Treaty which exempted companies in either country from paying tax in the other[47]. There was therefore no danger of double

[46] Paragraph 47
[47] Paragraph 48

taxation in the U.S. on such payments by Crown Forest when received by Norsk. In that case it was found that application of the Canada-U.S. Income Tax Convention 1980 was limited to taxpayers bearing full liability in one of the contracting states. Norsk was not bearing full tax liability in the U.S. In fact, it was not required to pay any tax in the U.S. Therefore, unsurprisingly, it was held that Crown Forest was not entitled to claim payment of only 10% withholding tax on payments made to Norsk (and not 25% if the 1980 Tax Convention were inapplicable). The dicta in Crown Forest must therefore be understood in the context of its specific circumstances.

137. In ***Crown Forest*** the Supreme Court of Canada stated "the goal of the (Canada-U.S. Income Tax Convention 1980 (in that case) is not to permit companies **incorporated** in a third party country (the Bahamas) to benefit from a reduced tax liability on **source** income merely by virtue of dealing with a Canadian company through an office situated in the United States". (Source income was the only income that Norsk would have been taxable on if the U.S.-Bahamas tax convention did not also exempt it). Crown Forest attempted unsuccessfully to argue that Norsk's place of management in the U.S. qualified it as a U.S. resident company for tax purposes and therefore only liable to withholding tax of 10% on payments to it by ***Crown Forest***.

138. That case is distinguishable from the instant case. Methanex Barbados was not merely an office. It was a company licensed as an IBC in Barbados and required under the IBC Act to be resident therein. The Revenue Authority in Barbados, as evidenced by its certificate, (albeit for income year 2016, a period subsequent to income year 2007), clearly contemplated that it was a resident of Barbados for the purpose of the Treaty. It also paid Corporation Tax for the years 2004 and 2005. There was sufficient evidence therefore for the TAB to find that it qualified as a "**resident of a Member State**" despite its more limited tax exposure in Barbados because of its registration as an IBC.

139. Companies in Barbados which are not registered as IBCs are subject to tax at the rate of 25% of their **worldwide** income under the provisions of the Income Tax Act of Barbados. Companies registered as IBCs such as Methanex Barbados pay a substantially reduced rate of tax on profits and gains. The respondent contends that as the beneficiary of a substantially lower rate of taxation Methanex Barbados is not fully subject to the plenary tax laws of Barbados. If the reasoning in ***Crown Forest*** were to be applied therefore, it would not be a **resident** of Barbados for the purposes of the definition of "resident of a Member State" under Article 4 of the CARICOM Double Taxation Treaty. The difficulty with an argument reliant upon that dictum is that the words of the treaty are clear and not so qualified.

140. The respondent submits that Methanex Barbados's liability to tax in Barbados arose by reason of its **registration as an IBC** and **not** by reason of its **domicile**, its **residence**, its **place of management**, its **place of incorporation,** or any of the other criterion of a similar nature as required by **Article 4**. The first three are the same criteria for residence as in the US-Canada Tax Treaty in ***Crown Forest***[48].

141. However although Methanex Barbados was registered as an IBC, there are also findings by the Tax Appeal Board that Methanex Barbados did have a place of **management** in Barbados with Directors in Barbados. It was **incorporated** in Barbados, as an IBC. Its incorporation was found to be not solely for the holding of the entire equity of the appellant[49]. Under the IBC Act only a company **resident** in Barbados could be licensed as an IBC. It had paid corporation tax in Barbados for the years 2004 and 2005[50]. In light of those countervailing findings of fact, it would be difficult to contend that Methanex Barbados was not resident in Barbados for the purposes of Article 4 on the basis of its

[48] Paragraph 24
[49] Paragraph 111 TAB's judgment.
[50] Paragraph 74b TAB's judgment

more limited exposure to tax than a non IBC Barbados resident. Accordingly, the TAB's finding that Methanex Barbados was a "resident of a Member State" namely Barbados, was fully supportable. There is no basis for an interpretation of article 4 of the CARICOM Double Taxation Treaty as being limited in the manner contended for.

142. Whether liable to tax under the International Business Companies Act or fully liable to the taxing jurisdiction of Barbados, the fact is that Methanex Barbados is liable to tax in Barbados on profits and gains. Accordingly, on a literal reading of that definition it is a resident of a member state, namely Barbados. Accordingly the provisions of the CARICOM Double Taxation Treaty would apply in relation to bona fide dividend payments made by Methanex Trinidad, a "*resident of a Member State*", to Methanex Barbados, also a "***resident*** *of a Member State*", provided those payments are not artificial or fictitious. Unlike Norsk in ***Crown Forest***, Methanex Barbados was liable to pay tax in Barbados and filed corporation tax returns there. Further, it was incorporated in Barbados. This was unlike Norsk, which was incorporated in the Bahamas, and not in the U.S. which was the jurisdiction in which it sought to claim it qualified for tax residence.

143. The CARICOM treaty unlike the U.S-Canada Tax Convention 1980 in that case, is a **multilateral** treaty. Its purpose, and the intentions of each of the respective contracting parties, should not be so readily inferred by a Court in the absence of substantial materials, necessary parties, and full argument before the lower court, especially if the effect contended for would be to dis-apply the literal effect of the actual language used therein and agreed to by all the parties. In fact, in ***Crown Forest*** the government of the U.S. was an intervener. In the instant case, the Barbados government is not, and was not represented.

144. Further, the TAB distinguished ***Crown Forest***. The dicta in ***Crown Forest*** itself must be viewed in context. The dispute as to withholding tax in ***Crown Forest*** was in relation to

payments by it to Norsk, some at least of which were in relation to activities conducted in the U.S., (transport by barge of products to and from the U.S.). It was held that at most Norsk would be liable to tax on its source income and not its worldwide income[51]. In any event because of the U.S.-Bahamas Tax Treaty Norsk was not liable to tax in the U.S. even on its source income[52]. Its connection to the U.S. for tax residency purposes, (which Crown Forest sought to invoke to claim reduced withholding tax based on the U.S.-Canada Tax Convention 1980 on payments by it to Norsk), was far more tenuous than the instant connection between Methanex Barbados and Barbados.

145. The TAB found that Methanex Barbados was **subject to tax** on its worldwide income, albeit at reduced rates[53]. The IBC Act refers to liability to tax on profits and gains and does not limit those words solely to profits and gains received in Barbados. Unlike Norsk in Crown Forest Methanex Barbados was liable to tax in Barbados and it had submitted Corporation Tax returns. Further, on the facts of ***Crown Forest***, the distinction between Norsk's liability to tax on its source income, as opposed to its worldwide income, was far outweighed as a factor of significance in determining its residence for the purpose of the US-Canada Tax Treaty, by the fact that it was not even liable to tax in the U.S., whether on its source income or worldwide income. Accordingly, the TAB was entitled to find that Methanex Barbados was resident in Barbados because i. it was liable to tax, even at a reduced rate under the IBC Act, on its profits and gains, ii. it had paid Corporation Tax in Barbados, and iii. it was liable to tax on its worldwide income even as an IBC. However, even if it were only liable to tax on its source income, as opposed to its worldwide income, this factor would not disentitle it from the application of the criterion for residence under the Treaty.

[51] Paragraph 40 of TAB judgment
[52] Paragraph 48 TAB judgment
[53] Paragraph 73a page 248 TAB judgment

Whether Barbados is a member state for purposes of the order

146. The Respondent proposed to raise on this appeal the issue of whether Barbados is a member state for the purposes of the Order. The CARICOM Order incorporated the CARICOM Double Taxation Treaty initially executed by several governments, not including Barbados. The CARICOM Order incorporating the Treaty into domestic law was gazetted on December 28, 1994. Barbados acceded to that Treaty on July 7, 1995. It is not listed in the Order. However the Order gave effect to the Treaty, which included provision, by Article 29, for subsequent accession. It cannot be argued therefore that the fact that Barbados is not mentioned in the Order is of any significance.

Whether taxability under the IBC Act was within the contemplation of the Order

147. The respondent submits further that the special concessionary tax imposed by the IBC Act which came into effect on March 1, 1992, was not specified in schedule 1 of the CARICOM Order and was not similar to any tax so specified. Accordingly, it contends that Methanex Barbados was not liable to a tax contemplated by the CARICOM Order and in particular Article 4. The evidence however is the Methanex Barbados submitted Corporation Tax returns. Article 2 of the Treaty applies to, inter alia, taxes on **profits and gains**. The IBC Act also applies inter alia to taxes on profits and gains. Further, the IBC Act pre-dated both the CARICOM Double Taxation Treaty, and the accession to it by Barbados. Clearly therefore the taxes on **profits and gains** contemplated by the IBC Act were known to the parties at the time that Barbados acceded to the Treaty, and the Treaty contemplates, and was intended to address, taxes on profits and gains.

OECD Commentaries

148. The OECD's commentaries seem to suggest that an interpretation requiring exposure to the full plenitude of the member state's taxing jurisdiction should be adopted. The difficulty with such a construction is that the language in Article 4 of the Treaty are clear and the Tax Appeal Board so found. A literal **construction** was therefore quite permissible and was the one adopted by the Tax Appeal Board to conclude: i) that

Methanex Barbados was liable to tax in a Member State, that is Barbados, ii) that Methanex Barbados was a resident of Barbados, ***within the meaning of Article 4 of the Treaty***, iii) that accordingly Methanex Barbados was sufficiently resident in Barbados to benefit from the bona fide payment to it of dividends by Methanex Trinidad, free of withholding tax.

149. *i.* ***Alberta Printed Circuits*** is not persuasive authority for the Respondent's proposition (that Methanex Barbados could only be considered not a resident if the words "*liable to tax*" in Article 4 were construed as requiring exposure to the full plenitude of the Member State's taxing jurisdiction), ii. ***Crown Forest*** is distinguishable for the reasons outlined above. In any event neither is binding upon this court. iii. the TAB's findings as to the residence in Barbados of Methanex Barbados were justified on the evidence. iv. in any event the Government of Barbados was a necessary party to any argument that the CARICOM Double Taxation Treaty should be construed in a manner which dis-applied it to an IBC.

150. There is therefore no basis for departing from the Tax Appeal Board's acceptance of the residence of Methanex Barbados in Barbados. There is also no basis for departing from the TAB's conclusion that the fact that Methanex Barbados is subject to a **reduced rate** of tax would not in this case take it out of the definition "resident of a Member State" in the CARICOM Double Taxation Treaty.

151. In all the circumstances the interpretation of the words "liable to tax" by the reading into those words of further words such as "*liable to the full plenitude of the member states' taxing jurisdiction*", would not be justified, when such words do not appear in the Treaty.

152. The **purposive** construction propounded by the respondent requires:

i. the identification of the **purpose** of the CARICOM Treaty as incorporated in the local Income Tax Act. A court's identification of the purpose of the Treaty runs the risk of being subjective, based on the absence of necessary parties to the treaty, on incomplete information and understanding of the policy considerations underlying it. It risks amounting to judicial legislation, and is not **required** when a literal interpretation is equally available;

ii. a **finding** that Methanex Barbados's incorporation was not consistent with that purpose;

iii. ignoring the certificate of the Revenue Authority in Barbados, (albeit subsequent to income year 2007), confirming on behalf of the member state Barbados that Methanex Barbados was **resident** for the purpose of corporation tax and for the purpose of the CARICOM Double Taxation Treaty.

153. However, the instant case concerns four specific dividend payments. The evidence is specifically in relation to those payments. There is no basis, especially on the findings of fact of the TAB, to extrapolate those findings to dis-apply the Treaty and exclude its application to all dividend payments made by Methanex Barbados on the basis that, as an IBC, it allegedly does not qualify as a "*resident of a Member State*".

154. The respondent also contends that in addition to a purposive construction being applied to the term "residence" in the Treaty, the purpose of the Treaty as a whole must be considered. The Treaty itself must therefore be given a purposive construction and its purpose is to be found in the preamble thereto. It further contends that the **purpose** or intention of the CARICOM Treaty is that it is designed to benefit entities incorporated and operating **within CARICOM** and to prevent double taxation of those entities. It argues therefore that a purposive interpretation of the Treaty as a whole, would achieve the wider result of disqualifying **all** dividend payments to Methanex Barbados, and in fact to any IBC, which remits dividends received from a CARICOM Member State onwards to a non-CARICOM Member State.

155. Based on the material submitted on this issue, that argument would not be persuasive. It may be noted that a purposive construction of just the phrases "resident of a Member State" and "liable to tax" was rejected by the TAB. The arguments therefore as to a purposive interpretation of the Treaty as a whole would, for the same reasons, be equally unpersuasive.

Preamble

156. The preamble to the Treaty is as follows:

> "The Governments of the Member States of the Caribbean Community desiring to conclude an Agreement 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**…have agreed as follows..". (All emphasis added)

157. While the purpose of the Treaty is therefore stated to be i) to avoid double taxation ii) to prevent fiscal evasion and iii) to encourage regional trade and investment, the language of Article 11 simply provides that the preconditions of its application are the payment of dividends a) by a company which is resident of a member state b) to a resident of another member state.

158. It was submitted that i. the CARICOM Double Taxation Treaty (embodied in the Order) arose out of the Treaty of Chaguaramas and ii. Article 41 (2) dealt with interregional double taxation agreements in the following terms "with a view to encouraging the regulated **movement of capital** within the Common Market, particularly to the less developed countries, member states agreed to adopt among themselves agreements for the avoidance of double taxation". Assuming this to be so clearly the intention of both the treaty of Chaguaramas and the CARICOM Double Taxation Order was to address **movements of capital,** and to encourage regional trade and investment within the CARICOM region.

159. The respondent contends that the real intention of the parties should be sought by asking the question what did the drafters of the Treaty have within their contemplation. It submits[54] that if the Tax Appeal Board had adopted that approach it would have come to the conclusion that the tax free result achieved by a Canadian Multinational resident in Vancouver was the very antithesis of what the framers of the treaty had in mind when it was entered into and drafted. It further submits that indeed the tax-free result represents an abuse of the treaty or treaty shopping. However, that result is one which the **plain language** of the Treaty permits.

160. The CARICOM Treaty provides dividends paid by a company which is a resident of a member state to a resident of another member state shall be taxed only in the first mentioned State. The difficulty arises with respect to the words "**to** a resident of another member state" that is the payee or the recipient of the dividend. The Treaty as it stands simply refers to **dividends paid to a resident of another member state**. It is the only qualification on the recipient in order to entitle it to receipt of dividends free of withholding tax.

161. The Treaty itself cannot be ignored merely because its language permits a situation whereby a company incorporated in a CARICOM Member State, (namely Methanex Barbados), receiving dividends from a company incorporated in another CARICOM Member State, (namely Methanex Trinidad), can repatriate those profits to a parent company outside of CARICOM, once the initial recipient is based in Barbados and registered under the IBC Act. (In fact in this case the dividends were firstly repatriated by Methanex Barbados to Methanex Cayman, the Cayman Islands being an associate state of CARICOM). However even direct

[54] At paragraph 41

repatriation to Methanex Canada would have been free of withholding tax under the IBC Act.

162. For Methanex Barbados to not be encompassed within that definition, additional words would have to be inserted to qualify the words "resident of another Member State", such as for example, dividends paid to a resident of another Member State "*which are not intended to remain within that Member State"* or alternatively, "*which are not forwarded within a specified time frame to another company, person or entity outside of Barbados*". Other forms of language might equally be suggested.

163. The difficulty is that **all** forms of language which would need to be inserted or implied to qualify the clear words used in Article 11 would involve a second guessing of the treaty makers as to the intentions of each, including the Government of Barbados, when entering into the Treaty. There is therefore no basis for inserting the qualifications suggested by the respondent without a real danger of rewriting the Treaty and effectively legislating judicially. This carries the same dangers identified previously in relation to an attempt at a purposive interpretation of just the phrases "*resident of a Member State*" and "*liable to tax*"[55], but amplified when the attempt to do so is now in relation to the Treaty as a whole.

Purpose

164. It was contended that the Treaty's purpose was to facilitate the free flow of capital **within CARICOM** among member states. The respondent contends that the interposition of Methanex Barbados between Methanex Trinidad and Methanex

[55] A court's identification of the purpose of the Treaty runs the risk of being subjective, based on the absence of necessary parties to the treaty, on incomplete information and understanding of the policy considerations. It risks amounting to judicial legislation, and is not **required** when a literal interpretation is equally available.

Canada was for a purpose incompatible with the purpose of the Treaty, (namely, onward tax-free transmission to Methanex Canada of dividends received tax free by Methanex Barbados from Methanex Trinidad). This therefore is a reason for construing the payment made to Methanex Barbados as one not made to a **resident** of Barbados for the purposes of Article 4, and the Treaty benefits thereunder would not apply to it. However, the Respondents very premise is not clearly established upon examination of the Preamble itself. This is because the instant transaction does illustrate a flow of capital from one member state to another, albeit for onward transmission to a non-CARICOM country.

165. Therefore even if the purpose of the Treaty is as reflected in its Preamble, it cannot be summarily concluded that Methanex Barbados cannot be resident because its activities are inconsistent with the **presumed** purposes behind the Treaty. This is because additionally the following matters must be considered:

i. as found by the Tax Appeal Board Methanex Barbados is **taxable on its worldwide income** under the IBC Act Barbados. Even if it were taxable only on source income that factor alone could not in all the circumstances previously identified suffice to dis-apply the CARICOM Double Taxation Treaty;

ii. Methanex Barbados is the **parent company** and receives dividends from Methanex Trinidad;

iii. to the extent that Methanex Barbados receives dividends from its subsidiaries in Trinidad the **Treaty** contemplates and facilitates the **free flow of capital** by applying a zero per cent rate of withholding tax;

iv. Capital (profits and gains), received by Methanex Barbados, even taxable at a rate of 1%, would still be capital attracted into a CARICOM member state which may well not have been received otherwise;

v. the fact that Barbados chose to attract such capital by offering an extremely low rate of tax and promising in turn under the IBC Act to charge withholding tax of 0% on dividends retransmitted to a non-CARICOM State, could not be presumed,

without more, to be a purpose not contemplated as permissible by the Treaty. It may arguably, for example, fall within the category "encouragement of regional investment". To conclude therefore that Barbados did not receive the benefits contemplated in the preamble to the CARICOM Double Taxation Treaty would be speculative.

vi. It cannot be assumed without evidence from necessary parties that retransmission of dividends outside of CARICOM would by itself render Methanex Barbados or any other IBC non-resident. The onward tax-free transmission to a non-CARICOM resident of dividends received tax free by a Barbados resident company registered under the IBC Act is a matter primarily for the parties who have entered into the Treaty. It is not for courts to redraft the clear language of the Treaty so as to negate the effect of the IBC Act in Barbados on the assumption that those parties did not intend to do what the language they used clearly permitted. At the very least the official position of the signatory states would need to be before the courts determining such an issue.

166. Therefore to the extent that the respondent contends that there should be such purposive construction resulting in a wholesale disapplication of the Treaty to such payments, there would be no basis on the clear language of the statute for so doing. That is because: i. there is no ambiguity in the CARICOM Treaty to require that to be done, ii. that even if ambiguity were not required the purposive approach contended for by the respondent would require the insertion into the Treaty of words the precision of which cannot be appropriately determined by a court without running the serious risk of judicial legislation, iii. any words so inserted would require the Court making the policy choice required for the application of the Order contrary to its plain meaning and iv. the Tax Appeal Board did not do so and there is no discernable basis for considering them to have been wrong in law in so declining.

167. For the purpose of tax planning it is necessary that there be certainty in the legislative framework that surrounds the payment of tax. The Tax Appeal Board declined to introduce uncertainty by adopting a purposive approach to the Treaty to negate, after the fact, a result that is on its face permitted by the Treaty. The issues in the instant case are far narrower. They revolve around whether four specific dividend payments were actually bona fide dividend payments to the CARICOM resident company, Methanex Barbados, or whether they were instead actually a thinly veiled disguise for the actual transaction, - the payment of dividends by Methanex Trinidad to Methanex Canada in compliance with a request from Methanex Canada. It is not necessary to rewrite the Treaty or to interpret it in a purposive manner to address this issue. This is because while the Treaty and Order on a literal construction may apply to bona fide dividend payments to Methanex Barbados, nothing in the Treaty requires that the BIR be precluded from examining transactions to determine whether they were bona fide payments of dividends without more to Methanex Barbados.

168. In the instant case the Tax Appeal Board decided that the transactions were examinable under Section 67 of the Income Tax Act. In the instant case the Tax Appeal Board found that the instant transactions, though they purported to be the exercise by Methanex Barbados of its own independent discretion declaring dividends and repatriating them to its parent company, were instead a thinly disguised attempt by Methanex Trinidad to pay dividends via Methanex Barbados to Methanex Canada pursuant to its request in predetermined amounts, by predetermined dates and in a predetermined manner. Those transactions were liable to withholding tax. The purported declarations and payments of those dividends to Methanex Barbados were artificial and fictitious to the extent that they sought to disguise the real transaction identified previously. That result was arrived at by the TAB even without a purposive interpretation of the CARICOM Double Taxation Treaty and without doing violence to the language of the Order or the CARICOM Double Taxation Treaty.

169. It merely required an examination of the transactions to ascertain whether they fell within the CARICOM Double Taxation Treaty **literally** construed. It did not require a wholesale disapplication of that Treaty to **all** dividend payments made by Methanex Trinidad to Methanex Barbados because of i. any implied restriction on the **residence** of Methanex Barbados or ii. restriction on retransmission to a non-CARICOM State as permitted by the IBC Act. It did not need to rewrite the Treaty by adopting a purposive approach to its interpretation by second-guessing what the makers of the Treaty intended. This was a multilateral treaty involving negotiations among several parties. The suggested purposive interpretation, despite the unambiguous language used in the Treaty, would properly be a matter for renegotiation or supplementation or amendment of the Treaty. The approach and conclusion of the TAB on this issue could not be faulted.

Conclusion

170.

i. The **jurisdiction** of the BIR under Section 67 of the ITA is not excluded by section 93 thereof. The BIR retains its power and jurisdiction to investigate the **substance** of a transaction and determine whether it even qualifies as one contemplated by the CARICOM Double Taxation Order, or whether it is artificial or fictitious.
ii. There is no basis for reversing or overturning the conclusions of the Tax Appeal Board that the payment of the instant dividends, (purporting to be to Methanex Barbados), were actually intended to be, and were in fact, payments to Methanex Canada, which would attract withholding tax at a rate of five per cent. It was therefore entitled as a matter of law to consider them artificial and/or fictitious and assess withholding tax on the actual substantive transaction at the rate applicable thereto.
iii. There is no basis for overturning the finding by the TAB that Methanex Barbados is resident in Barbados for the purpose of the CARICOM Treaty.
iv. There is no basis in law or on the evidence for concluding, on the very limited material proffered by the Respondent, that **all** dividend payments by Methanex Trinidad to its

parent Methanex Barbados, are incompatible with a purposive interpretation of the CARICOM Double Taxation Treaty so as not to qualify for exemption from withholding tax if there are intended to be remitted to a non-CARICOM member state. In any event, there is no basis for departing from the literal interpretation adopted by the TAB.

Order

171. The Appeal and Cross Appeal are therefore dismissed.

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Peter A. Rajkumar

Justice of Appeal