

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT VINCENT AND THE GRENADINES

SVGHCVAP2021/0010

BETWEEN:

UNICOMER (ST. VINCENT) LTD.

Appellant

and

[1] APPEAL COMMISSIONERS

[2] THE COMPTROLLER OF INLAND REVENUE

Respondents

Before:

The Hon. Mr. Mario Michel

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal

The Hon. Mr. Gerard St.C Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Barrie Attzs with him, Mr. Mikhail Charles for the Appellant

Mr. Grahame Bollers for the First Respondent

Mr. Duane Daniel for the Second Respondent

2024: January 29

April 17.

Civil appeal - Evidential burden under Section 23 (1) of the Income Tax Act of Saint Vincent and the Grenadines – Whether the learned judge erred in the application of section 23 (1) of the Income Tax Act – Whether the judge erred by finding that the CPI premium payments violated section 23(1) – Whether the learned judge erred by finding that the Comptroller of Inland Revenue discharged his evidential burden of proof in order to establish that the CPI premium payments fell afoul of section 23(1) of the Income Tax Act - Whether the learned judge erred in the application of section 66 of the Income Tax Act - Whether the learned judge erred by finding that the CPI premium payments were made directly to Canterbury for withholding tax purposes - Whether the learned judge erred in the application of section 9(1)(b) of the Income Tax Act

Unicomer (St. Vincent) Ltd. (“Unicomer” or “the appellant”) is a company registered in Saint Vincent and the Grenadines which engages in the business of selling household furniture and appliances. It is a member of the Unicomer Group of Companies which operates within the Caribbean.

A significant part of the appellant’s business involves sales under a standard Hire Purchase Agreement. The business model also includes a Credit Protection Insurance (“CPI”) policy between the appellant and Massy United Insurance (“United”), a Barbados insurer conducting business through its branch in Saint Vincent and the Grenadines. The purpose of the CPI policy is to provide insurance against a number of risks associated with the hire purchase agreements between the appellant and its customers.

United in turn reinsures the risk under its existing CPI policy with the appellant, with Canterbury, an insurer incorporated in and conducting business in Bermuda. Canterbury is a member of the Unicomer Group and is therefore a related party to the appellant.

Following an audit of the appellant’s accounts for the period 2007 to 2011, the Comptroller of Inland Revenue (“the Comptroller” or “the second respondent”) by letter dated 23rd March 2015, gave notice to Unicomer of the intention of the Inland Revenue Department to raise additional assessments to tax on the appellant in the sum of EC\$12,666,798.23 inclusive of interest and penalties. These increased assessments were based on the appellant’s treatment of its CPI, hire-purchase profits and royalties. More specifically, the Comptroller claimed that the audited financial statements indicated that CPI premiums were paid to Canterbury as a related party which was also reflected in the related party transaction schedules and accounting records of the appellant. The appellant, through written correspondence disputed the Comptroller’s additional assessments.

On 26th April 2017, the appellant appealed the Comptroller’s assessment before the Appeal Commissioners (or “the first respondent”). In its decision dated 29th November 2018, the Appeal Commissioners held *inter alia* that the sums collected by the appellant in CPI were disallowed and withholding tax is chargeable on payments made to Canterbury and that the deferral of hire purchase profits is disallowed.

On 28th December 2018, the appellant filed an appeal in the High Court of Justice under claim number SVGHCV2018/0206 against the decision of the Appeal Commissioners. On 3rd January 2019, under claim number SVGHCV2019/0001 the appellant filed an *ex parte* application for an interim injunction restraining the second respondent from taking enforcement action to recover the assessed taxes. These two claims were subsequently consolidated.

On 29th April 2021, Byer J delivered judgment in the consolidated proceedings. The learned judge, in essence, affirmed the decision of the Appeal Commissioners. Among other findings, the learned judge held that United was not merely a conduit in the legal sense of the word. Notwithstanding this, the learned judge went on to find that the effect of the disputed transactions with Canterbury, which were buttressed by the information provided by the appellant by way of its financial statements, fell within the parameters of section 23 of the **Income Tax Act** (“ITA”). The learned judge also upheld the assessment of the

Comptroller disregarding the CPI payments for the purpose of calculating the tax liability of the appellant. The payments that were made to Canterbury were deemed to be income and therefore liable to the payment of withholding tax under section 66(4) of the **ITA**. The learned judge also upheld the assessment made by the Comptroller in relation to the hire purchase income of the appellant.

Being dissatisfied with the judge's decision, the appellant filed its notice of appeal on 2nd June 2021. The appellant advanced three grounds of appeal. These were that: 1) The learned judge erred in the application of section 23(1) of the **ITA**; 2) The learned judge erred in the application of section 66 of the **ITA** and 3) The learned judge erred in the application of section 9(1)(b) of the **ITA**.

Held: dismissing the appeal, awarding costs to the second respondent in the appeal, such costs to be assessed by a judge or master if not agreed within 21 days of the date of this judgment, that:

1. The Comptroller has a discretionary power under the second and third limbs of section 23(1), contingent on the Comptroller's determination that the manner in which a transaction was effected was one which would not normally be created between independent persons effecting a transaction of that nature. Section 105 (3) of the **ITA** places the burden of proof on the appellant to provide evidence to impugn the Comptroller's decision. The fact that the learned judge held that United was not merely a conduit within the legal definition of the word is not sufficient to prevent an invocation of section 23(1) of the **ITA** in this case.

Section 23 (1) and 105 (3) of the **Income Tax Act**, Cap. 435 of the Revised Laws of Saint Vincent and the Grenadines 2019 applied.

2. The judge's reliance on the financial statements does not amount to an irrelevant consideration. The learned judge's findings concerned the nature of the transaction i.e. insurance and reinsurance between United and Canterbury. Whilst there is nothing inherently abnormal about contracts of reinsurance, it is difficult to ignore the financial statements and their relevance in this matter. The appellant's explanation of the role of Canterbury is that it is simply the reinsurer of the risk insured by United as credit protection insurance. However, United, is not a related company, and this would mean that the CPI payments should not have been listed as being payable to a related company, if they were indeed paid to United. The financial statements point to the ineluctable conclusion that Canterbury, a related party to the appellant, was indeed the direct recipient of the CPI premiums in circumstances where there is no arrangement for such payments. In essence, this amounts to a self-insurance of the credit risks. The learned judge considered the totality of the evidence before the court and concluded that the Comptroller was entitled to form the opinion that the transaction was carried out in a manner which was abnormal. In the circumstances, the appellant failed to discharge the burden and the learned judge was accordingly correct in her findings. There is therefore no basis upon which this Court can or ought to disturb this critical finding.

IRC v Challenge Corp Ltd. [1987] AC 155 applied; Section 23 (1) of the **Income Tax Act**, Cap. 435 of the Revised Laws of Saint Vincent and the Grenadines 2019 applied.

3. Under section 66(1) of the **ITA**, any payment which is made to a non-resident is subject to a tax deduction in accordance with the terms of the third schedule of the **ITA** which makes provision for the exclusion of reinsurance premiums. Canterbury is a non-resident company registered in Bermuda. The financial statements provided by the appellant clearly demonstrated that over a period of eight years, CPI payments were made to Canterbury in the absence of any contract of reinsurance between the two parties. The appellant did not engage Canterbury as a reinsurer. The reinsurance was between United and Canterbury. Thus, there is no basis to find that the CPI payments fell within the exception provided for in the third schedule of the **ITA**. The learned judge was therefore correct in her finding that the CPI payments to Canterbury were subject to withholding tax under section 66 of the **ITA**.

Section 66 of the **Income Tax Act**, Cap. 435 of the Revised Laws of Saint Vincent and the Grenadines 2019 applied.

4. Section 9 (1) (b) clearly states that income accrues for the purpose of the **ITA** when it is recorded, pursuant to a recognised accounting principle, in the books of the tax-payer. There is no provision in the **ITA** for adjustments to be made or for there to be a deferral of profits specifically for the purpose of computing tax liability. Accordingly, the effect of this is that the assessable income in the taxpayer's commercial financial statements ought to mirror that which is reflected in their statements for taxation purposes. Tax Statutes are subject to the normal rules of statutory interpretation. The **ITA** of St. Vincent and the Grenadines does not provide for such adjustments to be made specifically for taxation purposes and expressly states that income shall be deemed to accrue when it is credited in the books of accounts of the taxpayer where a commercially recognised system of accounting, other than a cash received basis, is regularly followed. Therefore, it cannot be said that the trial judge erred in the application of section 9 (1) (b) of the **ITA**.

Section 9 (1) (b) of the **Income Tax Act**, Cap. 435 of the Revised Laws of Saint Vincent and the Grenadines 2019 applied; **Attorney General v Carlton Bank Limited** [1899] 2 QB 158.

JUDGMENT

Introduction

- [1] **FARARA JA [AG.]:** This is an appeal against the judgment and order of the learned judge dated 29th April 2021 in which the learned judge upheld the decision of the Appeal Commissioners (or “the first respondent”) disallowing the appellant’s claim to deduct the Credit Protection Insurance Premiums (“CPI payments” or “CPI premiums”) paid to Massy United Insurance (“United”), regarding those payments as tax avoidance transactions within the meaning of section 23 of the **Income Tax Act**¹ (or “**ITA**”) of Saint Vincent and the Grenadines and subject to withholding tax since they had been paid directly to Canterbury Insurance (“Canterbury”) as a non-resident. The learned judge also upheld the 1st respondent’s decision to disallow the appellant’s claim for deferral of hire purchase profits finding that the appellant’s income recognition practice for tax purposes was not consistent with section 9(1)(b) of the **ITA**.

Background

- [2] The relevant background to this matter has been helpfully summarised by the learned judge and the parties and I adopt much of it.
- [3] Unicomer (St. Vincent) Ltd. (“Unicomer” or “the appellant”) is a company registered in Saint Vincent and the Grenadines which engages in the business of selling household furniture and appliances. It is a member of the Unicomer Group of Companies which operates within the Caribbean.
- [4] A significant part of the appellant’s business involves sales under a standard Hire Purchase Agreement. The business model also sees a Credit Protection Insurance (“CPI”) policy between the appellant and United, a Barbados insurer conducting business through its branch in Saint Vincent and the Grenadines. The purpose of

¹ Cap. 435 of the Revised Laws of Saint Vincent and the Grenadines 2019.

the CPI policy is to provide insurance against a number of risks associated with the hire purchase agreements between the appellant and its customers.

- [5] United subsequently reinsured the risk under its existing CPI policy with the appellant, with Canterbury, an insurer incorporated in and conducting business in Bermuda. Canterbury is a member of the Unicomer Group and is therefore a related party to the appellant.
- [6] Following an audit of the appellant's accounts for the period 2007 to 2011, the Comptroller of Inland Revenue ("the Comptroller" or "the second respondent") by letter dated 23rd March 2015, gave notice to Unicomer of the intention of the Inland Revenue Department to raise additional assessments to tax on the appellant in the sum of EC\$12,666,798.23 inclusive of interest and penalties. This increased assessment was based on the appellant's treatment of its CPI, hire-purchase profits and royalties. More specifically, the second respondent claimed that the audited financial statements indicated that CPI premiums were paid to Canterbury as a related party which was also reflected in the related party transaction schedules and accounting records of the appellant. The appellant, through written correspondence disputed the second respondent's assessment.
- [7] On 26th April 2017, the appellant appealed the second respondent's assessment before the Appeal Commissioners (or "the first respondent"). In its decision dated 29th November 2018, the Appeal Commissioners held *inter alia* that the sums collected by the appellant in CPI were disallowed and withholding tax is chargeable on payments made to Canterbury and that the deferral of hire purchase profits is disallowed.
- [8] On 28th December 2018, the appellant filed an appeal in the High Court under claim number SVGHCV2018/0206 against the decision of the Appeal Commissioners. On 3rd January 2019, under claim number SVGHCV2019/0001, the appellant filed an *ex parte* application for an interim injunction restraining the second respondent from

taking enforcement action to recover the assessed taxes. These two claims were subsequently consolidated.

Judgment in the High Court

- [9] On 29th April 2021, Byer J delivered her judgment in the consolidated proceedings and in essence affirmed the decision of the Appeal Commissioners. Among other findings, the learned judge held that United was not merely a conduit as defined by the second respondent, in the legal sense of the word. Notwithstanding this, the learned judge went on to find that the effect of the disputed transactions with Canterbury and which were buttressed by the information provided by the appellant by way of its financial statements, fell within the parameters of section 23 of the **ITA**. The learned judge also upheld the assessment of the second respondent disregarding the CPI payments for the purpose of calculating the tax liability of the appellant. The payments that were made to Canterbury were deemed to be income and therefore liable to the payment of withholding tax under section 66(4) of the **ITA**. The learned judge also upheld the assessment made by the second respondent in relation to the hire purchase income of the appellant.

The appeal

- [10] On 2nd June 2021, the appellant filed its notice of appeal against the decision of the learned judge, advancing the following three grounds of appeal:
- 1) The learned judge erred in the application of section 23(1) of the **ITA**.
 - 2) The learned judge erred in the application of section 66 of the **ITA**.
 - 3) The learned judge erred in the application of section 9(1)(b) of the **ITA**.

Appellate interference

- [11] Based on the issues which fall for determination on this appeal, this matter also raises issues concerning the role of appellate courts in disturbing findings of facts made by

the judge in the lower court. In **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**² this Court stated as follows:

“46. The Court of Appeal should apply restraint not only to the judge’s findings of fact but also to the evaluation of those facts and the inferences drawn from them. It is axiomatic that the critical question which is before this Court is whether there was evidence before the learned judge from which she could properly have reached the conclusions that she did or whether, on the evidence, the reliability of which it was for her to assess, she was plainly wrong.”

[12] I bear these principles in mind when considering this appeal.

Issue 1- Whether the learned judge erred in the application of section 23(1) of the ITA.

Appellant’s Submissions

[13] The crux of the appellant’s submissions on ground one of its appeal is that the learned judge erred in holding that the CPI payments made by the appellant were in violation of section 23(1) of the **ITA**. Learned counsel Mr. Barrie Attzs, submitted that in its constituent parts, section 23(1) of the **ITA** requires two findings in order for liability to ensue under the section. Firstly, there must be a reduction in tax liability and secondly, there must be an abnormal/irregular transaction as compared to the manner parties dealing at arm’s length would conduct themselves. Learned counsel submitted that in light of the learned judge’s findings of fact, namely that United was not merely a conduit, there is no basis in fact upon which the learned judge could legitimately find, in law, that the second respondent discharged its burden of proof in order to establish that the CPI payments fell afoul of section 23(1) of the **ITA**. Mr. Attzs submitted that by placing reliance on the classification of the CPI payments as a “related party transaction” in the appellant’s financial statements, the learned judge placed undue emphasis on an irrelevant consideration.

[14] Mr. Attzs submitted further that section 23 of the **ITA** does not purport to invalidate “related party transactions” but on the contrary, an analysis under section 23(1) of

² BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

the **ITA** will only be undertaken if there is a related party transaction. As a matter of practice, Mr. Attzs argued, an analysis under section 23(1) of the **ITA** will only be undertaken if there is a related party transaction and such a finding is only the beginning of the matter. The conclusion of the matter would be to find that the related party transaction was abnormal and, in the instant matter, the learned judge did not make any findings of fact to warrant a finding that the transaction was abnormal for the purposes of section 23(1)(a) or (b) of the **ITA**.

Second Respondent's Submissions

[15] Learned counsel Mr. Duane Daniel also proffered an analysis of section 23 of the **ITA**. Counsel argued that the transaction between the appellant and United and Canterbury is one which was designed to avoid liability to tax under the **ITA**. He submitted that in the State of Saint Vincent and the Grenadines, there is no need to determine whether a reduction in assessable income was the main purpose of the transaction in question. The first limb of the provision concerns the question of whether the transaction had the stated effect of avoiding, reducing or postponing liability to tax, while the second limb is dependent on the Comptroller's opinion as to whether the manner in which that transaction was effected was one which is normal for transactions of that nature, or whether it created rights or obligations which would not normally be created between independent persons effecting a transaction of that nature. Accordingly, the question for the court is whether the transaction in dispute had the effect of avoiding, reducing or postponing the appellant's liability of tax, and whether the second respondent's opinion regarding the abnormality of the transaction was a reasonable one in all the circumstances. These principles, counsel argued, were borne in mind by the learned trial judge.

[16] Mr. Daniel submitted that the learned judge found that the first limb of the section was satisfied and that the payments in question had the effect of reducing the liability of the appellant to tax. Learned counsel argued further that the CPI payments were deducted in the accounts of the appellant as an expense, the result of which was to ultimately reduce the appellant's assessable income.

- [17] Learned counsel Mr. Daniel contended that the appellant has, in effect, been self-insuring the credit risks. He summarised the transactions as follows: The appellant charges its customers a premium for this insurance, administers the claims made and deducts for their own benefit a fee for the administration of these claims. The appellant then sends the premium payments, less the deductions for claims and its fees, either to United or to Canterbury directly. United is entitled to a commission and administration fees, after which the remaining premiums are sent to Canterbury. Since the appellant administers its own claims, the effect is that it is transferring profit to Canterbury directly or indirectly through United under the guise of credit protection insurance.

Discussion

- [18] Section 23(1) of the ITA states:

“23. Transactions designed to avoid liability to tax

- (1) Where any transaction, operation or scheme (hereinafter in this subsection referred to as “a transaction”) including a transaction involving the alienation of property, which has been entered into or carried out, whether before, on, or after the 1st January 1979, has the effect of avoiding, reducing or postponing the liability to tax of any person for any year of assessment and the Comptroller is of the opinion that the transaction—

(a) was entered into or carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction of the nature of the transaction in question; or

(b) has created rights or obligations which would not normally be created between independent persons dealing at arm’s length under a transaction of the nature of the transaction in question,

the Comptroller shall determine the liability to tax as if the transaction had not been entered into, or in such other manner as he deems appropriate to counteract such avoidance, reduction or postponement of liability as would otherwise be effected by the transaction.”

[19] Section 23(2) provides that:

“(2) Where a resident carries on business with a non-resident and, in the opinion of the Comptroller, by reason of the relationship between such persons, the course of business between them has been so arranged that the business done by the resident produces to him either more or less gains or profits than those which would be expected to arise from that business if such relationship had not existed, the Comptroller may determine in such manner as appears to him to be reasonable—

(a) whether any additional gains or profits should be deemed to be assessable income of the resident person; and

(b) whether any part of the gains or profits of the non-resident person should be deemed to have accrued from a source in Saint Vincent and the Grenadines.”

[20] A simple analysis of the provisions of section 23(1) reveals the following three constituent elements of the sub-section:

a) the transaction/operation must have the effect of avoiding, reducing or postponing the liability to tax of the appellant; and that (in the opinion of the second respondent) either:

b) the transaction was carried out in a manner which was not normal for a transaction of that nature; or

c) the transaction created rights or obligations which would not normally be created between independent persons dealing at arm's length in such transactions.

[21] A consideration of the judgment in this matter shows that the learned judge did bear the relevant principles in mind in arriving at her decision. The learned judge expressed that:

“ [51] The Defendant stated quite clearly that once the court is satisfied that the transaction entered into by the Claimant with United, by the payment over of the premiums, has the effect of avoiding, reducing

or postponing liability, then the provisions of section 23 must become operative. In this court's mind there can be no doubt that the payment of the sums to United had the effect of reducing the liability of the Claimant to taxation. However, that in and of itself is not a matter to which the Defendant can take issue. He must go further and show that in his opinion this transaction was abnormal or was one that created rights and obligations that would not normally arise if the parties were dealing at arm's length."

[22] The learned trial judge's finding as it pertains to the first limb of section 23(1) of the **ITA** is not in dispute in this appeal. In fact, it is common ground that the CPI payments were deducted in the accounts of the appellant as an expense, with the result of these deductions being to ultimately reduce the appellant's income. The disputed transactions have the effect of reducing the appellant's tax liability, and as expressed, this finding is not challenged by the appellant.

[23] The appellant's main issue is with the learned judge's affirmation of the opinion of the second respondent that the transaction was abnormal or created rights and obligations that would not normally arise if the parties were dealing at arm's length. Learned counsel Mr. Attzs placed great emphasis on the learned judge's findings that the evidence before her did not lead to a finding that United was a mere conduit. The learned judge reasoned that:

"[62]... The mere fact that United entered into business with a related company to the Claimant to re-insure all of the risk attached to the policy of insurance that the Claimant had with United and 2) that United also entered into a contract with Canterbury to pay over ninety five percent of the premiums received, collectively in this court's mind, are not sufficient for this court to come to the inescapable conclusion that United's role in the transactions was that of acting merely as a conduit. In order for this court to accept [the proposition that United was acting merely as a conduit], it was imperative for the court to have had before it, clear evidence that United acted solely at the behest of the Claimant and was under its direction. This was not the case.

[63] None of the information before this court shows even a scintilla of evidence to substantiate that claim.

...

[65] Taking all those matters into consideration, I therefore cannot agree that United was merely a conduit for the Claimants as determined by the Defendant in the legal definition of the word...”

[24] Counsel’s argument continues that in light of the learned judge’s findings of fact that there was nothing irregular concerning i) the relationship between the appellant and United, nor concerning (ii) the transaction itself, and against the finding that “the sums were not only reasonable, but they were a legitimate expense of the company”, there is no basis in fact upon which Byer J. could legitimately find, in law, that the Comptroller discharged its burden of proof to establish that the CPI payment presumptively fell afoul of sub paragraphs (a) or (b) of section 23(1) of the **ITA**.

[25] However, the learned judge, in essence, formed the view that notwithstanding her findings, the effect of the transaction ultimately fell within the parameters of section 23 of the ITA. In doing so, the learned judge relied significantly on the financial statements adduced by the appellant.

[26] The learned judge found:

“[72] When therefore the court is faced with all of the evidence and having undertaken an assessment of the same, keeping in mind that the onus lies with the Claimant to satisfy the court “that the facts of the case are such to entitle [them] to have the assessment set aside or otherwise dealt in [their] favour,” this court is satisfied on a balance of probabilities that the determination of the Defendant that the actions of the Claimant with regard to the CPI payments was a transaction that fell afoul of section 23 of the ITA and that he was entitled to disregard the same was a correct one.”

[27] The second and third limbs of section 23(1) are dependent on the Comptroller’s opinion as to whether the manner in which that transaction was effected was one which would not normally be created between independent persons effecting a transaction of that nature. This gives the Comptroller a discretionary power and is a question of fact for determination.

[28] In the persuasive authority of **Board of Inland Revenue v Maraj**³, the Trinidad and Tobago Court of Appeal, after reviewing Indian and United Kingdom authorities, provided useful guidance on both the role of the Revenue and the burden of proof of an appellant challenging an assessment. The Court stated:

“On a review of the Indian and United Kingdom cases I have come to the following conclusions:

(a) the expression “it appears” to the revenue has the same connotation as the revenue “discovers” and the revenue “has reason to believe”;

(b) the material or information or new facts before the Revenue when it forms the opinion that the person is probably chargeable to further tax may be derived or obtained from any source, including a tax audit and need not be admissible in a court of law;

(c) such information may not be correct or truthful though the Revenue must believe it to be so, and honestly arrive at its conclusion;

(d) the grounds for its belief must be reasonable though the facts on which it bases its belief or its conclusion on the law may ors (sic) appeal prove to be wrong;

...

(g) that the burden rests with the taxpayer, on his objection to his assessment before the revenue, on his appeal before the Tax Court and on the appeal by case stated before the Court of Appeal.

...

On the revenue rests only the evidential onus that it rightly “appears to the revenue to act; which it discharges by adducing evidence of the information or material which caused it to appear to the revenue that the taxpayer was under assessed. On the other hand the statutory burden on the whole case is on the taxpayer.”

[29] Section 105(3) of the **ITA** stipulates that “on any appeal the burden of proof shall lie upon the appellant.” Though that section refers to appeals to the Appeal Commissioners, undoubtedly, in appeals to the High Court and the Court of Appeal, that burden still resides with the appellant. It was therefore on the appellant to provide evidence which impugnes the Comptroller’s decision.

³ TT 1984 CA 6.

[30] With due respect to learned counsel, I am not of the view that the mere fact that the learned judge held that United was not merely a conduit in the legal definition of the word, is sufficient to prevent an invocation of section 23(1) of the **ITA**. Further, the proposition that the learned judge's reliance on the financial statements amounts to an irrelevant consideration cannot be accepted. The learned judge's findings concerned the nature of the transaction i.e. insurance and reinsurance between United and Canterbury. Indeed, there is nothing inherently abnormal about contracts of reinsurance. The courts have however, long maintained a distinction between tax mitigation and tax avoidance, with the former being acceptable while the latter is not. In **IRC v Challenge Corp Ltd**⁴, it was stated:

"Income tax is avoided and a tax advantage is derived from an arrangement when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitled him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had."

[31] It is difficult to ignore the financial statements and their relevance in this matter. Note 12 of the financial statements before the learned judge showed that in 2007 and 2008, sums of \$448,000.00 and \$579,000.00 were paid to Canterbury. At note 16, the appellant listed its transactions with "related parties" as \$610,000.00 in 2009 and \$839,000.00 in 2008 which were listed as CPI expenses net of commission. As indicated by the respondent, there was no transaction between the appellant and Canterbury which would result in the sums of \$448,000.00 and \$579,000.00 being payable to it. The appellant's explanation of the role of Canterbury is simply the reinsurance of the risk insured by United as credit protection insurance. However, United, whom the appellant claimed they made the disputed CPI payments to, is not a related company, and this would mean that the CPI payments should not have been listed as being payable to a related company, if they were indeed paid to United. The financial statements point to the ineluctable conclusion that Canterbury, a related party to the appellant, was indeed the direct recipient of the CPI premiums in circumstances where there is no arrangement for such payments.

⁴ [1987] AC 155 at 168.

[32] It was the appellant's argument in the court below that the listing of the CPI payments to Canterbury was in fact an irregularity and that these payments were incorrectly classified in the Financial Statements, by the appellant's auditors, as monies payable to Canterbury.⁵ The incorrect classification came to an end after 2014. The learned judge rejected this finding and held that:

"[71] when this court considers the evidence of Mr. Miller as to the "error" and the unsubstantiated correspondence from United in 2015⁴² which purports to show sums received as CPI from the Claimant for the period 2007 to 2014, this court must also consider that the Claimant not only in their financial statements recognized payments to Canterbury for CPI over an eight year period but that their very own employee, the OECS Finance Director of the claimant in 2015 Ian Peter, admitted to the Defendant that United was in fact the agent for Canterbury locally.

[72] When therefore the court is faced with all of the evidence and having undertaken an assessment of the same, keeping in mind that the onus lies with the Claimant to satisfy the court "that the facts of the case are such to entitle [them] to have the assessment set aside or otherwise dealt in [their] favour," this court is satisfied on a balance of probabilities that the determination of the Defendant that the actions of the Claimant with regard to the CPI payments was a transaction that fell afoul of section 23 of the ITA and that he was entitled to disregard the same was a correct one."

[33] The Court does not accept the argument of counsel in relation to the importance of the said financial statements. There was no evidence led by the appellant as to the documents which either the auditors and accountants would have relied upon in arriving at the sums which were apparently paid over to Canterbury. Further, even if the Court was minded to accept the contention that the reference to payments to Canterbury in the financial statements was a mere error, it seems nothing short of remarkable that such an error persisted for a period of eight years from 2006-2014. The Court takes note that the parties involved are well-established businesses with undoubtedly sophisticated accounting systems. It would seem strange that for almost a decade, no professional auditors or accountants identified the "error" and rectified it.

⁵ Page 61-63 of the Record of Appeal.

[34] The insurance policy between the appellant and United provides that the appellant is responsible for administering the claims made pursuant to that policy. The insurance policy also provides that premiums shall be remitted to United. United as the provider of the credit protection insurance, subsequently ceded 100% of the risk of the policy to Canterbury. In addition to this, 100% of the premiums paid by the appellant to United, less United's fee of 5% for commission and administrative expenses, were then paid over to Canterbury. No evidence was provided however of the premiums between United and Canterbury having been independently and separately negotiated, the result of which was that the premiums which were paid by the appellant to United were simply passed on to Canterbury, a related party, less United's handling fees.

[35] In the instant case, not only was the appellant aware of the reinsuring of the risk, but there is evidence that payment was made directly from the appellant to the reinsurer; who was a related company to the appellant. In essence, this amounts to a self-insurance of the credit risks.

[36] The learned judge considered all the evidence before the court in its totality and concluded that the second respondent was entitled to form the opinion that the transaction was carried out in a manner which was abnormal.

[37] In the circumstances, the appellant clearly failed to discharge the burden and the learned judge was accordingly correct in her findings. In my view, there is no basis upon which this Court can or ought to disturb this critical finding.

Issue 2: Whether the learned trial judge erred in the application of section 66 of the ITA

Appellant's Submissions

[38] Learned counsel Mr. Attzs accepts that the determination of this issue hinges on the Court's findings on the first issue in this appeal. Counsel submitted that the learned judge erred in upholding the charge of withholding tax on the alleged payment by the

appellant to Canterbury. However, such a finding could only be made if United is to be regarded as a conduit or pass-through company created to make and funnel payments from the appellant to Canterbury. As the learned judge had found that the appellant operated a legitimate insurance product, it was an error of law for the learned judge to disregard United and treat the CPI payments as though they were made directly to Canterbury for withholding tax purposes.

Second Respondent's Submissions

[39] Learned counsel Mr. Daniel maintained that the effect of the transaction in dispute was that the appellant made payments in the form of CPI premiums to Canterbury which is a non-resident entity incorporated in Bermuda and accordingly, the payments made to Canterbury are therefore subject to withholding tax pursuant to section 66(1) of the **ITA**.

[40] Counsel also submitted that the evidence in the lower court demonstrated that Canterbury is a foreign insurance company carrying on a mercantile insurance business. Thus, as Canterbury is not registered in St. Vincent and the Grenadines, the insurance premiums which were payable by the appellant to Canterbury ought to be deemed to be income and are liable to withholding tax under section 66(4) of the **ITA**. In light of the learned judge's findings of fact that the CPI payments were made directly to Canterbury, the court was entitled to find that the payments were liable to withholding tax.

Discussion

[41] Section 66 of the **ITA** provides:

"66. Deduction of tax from payments to non-residents

(1) Every person who makes any payments to a non-resident, shall deduct tax from such payments in accordance with and in the manner specified in the Third Schedule, and shall carry out such other obligations as are imposed by that Schedule.

(2) For the purposes of this section, a person, including a partnership, to whom any payment is made to which this section

applies shall be presumed, unless the contrary is proved, to be a non-resident if such payment is made to an address outside Saint Vincent and the Grenadines.

...

(4) Where a foreign insurance company, carrying on mercantile or life insurance business, is not registered in Saint Vincent and the Grenadines, the insurance premium accruing or arising in Saint Vincent and the Grenadines shall be deemed to be income and shall be liable to withholding tax under this section.”

[42] The Third Schedule of the **ITA** stipulates that:

“1. Application

(1) This Schedule applies to every person who makes any payment by way of—

...

(i) insurance premiums excluding re-insurance premiums;

to a non-resident, and, subject to subparagraph (2), does not apply to any other payments to a non-resident carrying on business or exercising employment in Saint Vincent and the Grenadines.

...

2. Deduction to be made by person making payment

Where any payment is made to which this Schedule applies, then such amount shall not form chargeable income of the person to whom the payment is made, and the person making such payment shall deduct tax from the gross amount of the income from such source at the rate specified in paragraph 3..”

[43] This issue is easily disposed of in light of the Court’s findings on section 23 and the clear wording of section 66. Under section 66(1) of the **ITA**, any payment which is made to a non-resident is subject to a tax deduction in accordance with the terms of the third schedule of the **ITA** which makes provision for the exclusion of reinsurance premiums.

[44] As is common ground and accepted between the parties, Canterbury is a non-resident company registered in Bermuda. The financial statements provided by the appellant clearly demonstrated that over a period of eight years, CPI payments were indeed made to Canterbury and in the absence of any contract of reinsurance between the two parties. The appellant did not engage Canterbury as a reinsurer. The reinsurance was between United and Canterbury. Thus, there is no basis to find that the CPI payments attract the exception provided for in the third schedule of the ITA.

[45] The learned judge was therefore correct in her finding that the CPI payments to Canterbury were subject to withholding tax under section 66 of the ITA. Accordingly, this ground of appeal also fails.

Issue 3: Whether the learned judge erred in the application of section 9(1)(b) of the ITA

Appellant's Submissions

[46] At the heart of this issue is a challenge to the learned judge's findings that the appellant's deferral of hire purchase profits should be disallowed pursuant to section 9(1)(b) of the ITA. Learned counsel Mr. Attzs submitted that in the case at bar, the commercially recognised system of accounting in St. Vincent and the Grenadines at the material time would have been the International Accounting Standards ("IAS") issued by the International Accounting Standards Board.

[47] The appellant submitted that the second respondent presented no evidence, and made no submissions, concerning the proper application of IAS 18 – the commercially recognised IAS in relation to 'Revenue Recognition' at the material time - to the facts of the case at bar, and therefore it was inappropriate, and therefore erroneous, for the learned judge to conclude that the appellant's deferral of hire purchase profits should be disallowed pursuant to section 9(1)(b) of the ITA. On the other hand, the appellant's treatment of the hire purchase profits in its income tax returns finds judicial support at the highest levels.

Second Respondent's Submissions

- [48] Learned counsel Mr. Daniel averred that whereas in the United Kingdom taxation laws, there is provision for the statutory justification for profits to be adjusted specifically for the purpose of assessing income tax, there is no equivalent provision in the income tax legislation of St. Vincent and the Grenadines. On the contrary, section 9(1)(b) of the **ITA** provides that in ascertaining when income accrues to the tax-payer, the Comptroller is required to undertake a two-pronged assessment being firstly, whether a commercially recognised system of accounting other than a cash received basis is regularly followed; and if yes, secondly, when is that income credited, or should be credited in the books of account of the taxpayer.

Discussion

- [49] This issue concerns the question of whether the appellant is allowed to argue that even if their financial statements reflect that they credited the sums earned from the hire purchase agreements, those sums have not been received and as such their tax liability is not on the statements that were produced, but can only attach when they are in fact in receipt of those funds.

- [50] The learned judge held that:

“[105] At the highest, the evidence of the Claimant’s witnesses spoke to the unreasonableness of the Claimant paying taxes that were not yet earned. However, even the expert accountant could not tell the court that the parameters of section 9(1)(b) did not capture the accounting method of the Claimant. In this court’s mind that is telling.

[106] I therefore find that the assessment made by the Defendant in relation to the hire purchase income of the Claimant stands.”

- [51] An analysis of this issue also begins with the relevant statutory provision. Section 9(1)(b) of the **ITA** is as follows:

“9. Income accruing

(1) Subject to this section, income shall accrue to a person for the purposes of this Act—

(b) in the case of a business, in relation to which the Comptroller is satisfied that a commercially recognised system of accounting other than a cash received basis is regularly followed, when it is credited, or should be credited, in the books of account of such person;”

[52] This section, properly construed, clearly provides and stipulates the point at which income is considered to have accrued for the purposes of tax liability.

[53] In the case of **BSC Footwear Ltd v Ridgeway**⁶, Lord Reid posited that a tax-payer “cannot be required to pay tax on that profit until it actually accrues”. However, when one considers that dicta, it becomes clear that his Lordship was not making a general proposition but was speaking in the context of the statutory regime, for the purposes of calculation of tax in the UK, which has fundamental differences from that in St. Vincent and the Grenadines. Indeed, in the said case, the court found that:

“There are no statutory rules about this, and it is well settled that the ordinary principles of commercial accounting must be used except insofar as any specific statutory provision requires otherwise. The question is what is fair to the taxpayer and fair to the Revenue.”

[54] In the case of **Canderel Limited v Her Majesty the Queen**⁷, which was also cited by the learned judge in the court below, the court expressly stated that:

“In the absence of a statutory definition of profit it would be unwise for the law to eschew the valuable guidance offered by well established business principles...however well accepted business principles are not rules of law and thus a given principle may not be applicable in every case. Most importantly these principles must necessarily take a subordinate position relative to the legal rules which govern.”

[55] Both cases clearly recognise that common or recognised business principles ought to take a subordinate role to rules of law. Section 9(1) (b) of the **ITA** clearly states that income accrues for the purpose of the **ITA** when it is recorded, pursuant to a

⁶ [1972] A.C. 544.

⁷ 1998 1 SCR 147.

recognised accounting principle, in the books of the tax-payer. There is no provision in the **ITA** for adjustments to be made or for there to be a deferral of profits specifically for the purpose of computing tax liability. Accordingly, and as stated by learned counsel for the second respondent, the effect of this is that the assessable income in the tax-payer's commercial financial statements ought to mirror that which is reflected in their statements for taxation purposes.

[56] While Mr. Attzs fervently argued that the accounting standard in the Caribbean was the IAS, there was no authority provided on this point. However, even if Mr. Attzs' submission were correct, the legislation itself speaks to "a recognised system" as opposed to "the recognised system". To accept the appellant's argument would in effect be importing into this section of the legislation a strained or distorted interpretation which clearly was not the intention of the drafters.

[57] Lord Wilberforce said in **W. T. Ramsay Ltd v Inland Revenue Commissioners**⁸, whilst it remains the case that 'a subject is only to be taxed on clear words, not on "intendment" or on the "equity" of an Act...What are "clear words" is to be ascertained on normal principles'. Indeed, the point that tax statutes are subject to the normal rules of statutory interpretation had been made by Lord Killowen at the end of nineteenth century in the case of **Attorney-General v Carlton Bank Limited**:⁹

"Something was said in the course of the argument on both sides as to there being special canons of construction applicable to these Revenue Acts. I confess for my part I do not accept that argument at all. I see no reason why there should be any special canons of construction in respect of any particular Acts of Parliament. The duty of the court in all cases, whether relating to taxation or to any other subject, is to give effect to the view of the Legislature, as that view is to be gathered from the language that has been employed having regard to the context in connexion with which it is employed. That is a canon of universal application, and I am not aware that there is any true authority for saying, or any reason in the nature of things for saying, that a taxing statute is to be differently construed from any other."

⁸ [1982] AC 300.

⁹ [1899] 2 QB 158 at 164.

[58] As a whole, the point is reinforced that the **ITA** of St. Vincent and the Grenadines does not provide for such adjustments to be made specifically for taxation purposes and expressly states that income shall be deemed to accrue when it is credited in the books of accounts of the taxpayer where a commercially recognised system of accounting other than a cash received basis is regularly followed.

[59] For all the above reasons, it cannot be said that the learned judge erred in the application of section 9(1)(b).

Disposition

[60] For the foregoing reasons, I would dismiss the appeal in its entirety and award costs to the second respondent in the appeal, such costs to be assessed by a judge or master, if not agreed within 21 days from the date of this judgment.

I concur.
Mario Michel
Justice of Appeal

I concur.
Margaret Price-Findlay
Justice of Appeal

By the Court

Chief Registrar