

EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**SAINT LUCIA
COMMERCIAL DIVISION**

CLAIM NO. SLUHCM2022/0008

BETWEEN:

FIRSTCARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED

Appellant

and

**(1) DIRECTOR OF FINANCE AND PLANNING
(2) ACCOUNTANT GENERAL**

Respondents

Before:

The Hon. Mde. Justice Cadie St Rose-Albertini

High Court Judge

Appearances:

Ms Diana Thomas with Mr Barrie Attzs for the Appellant

Mr Seryozha Cenac with Mrs Antonia Charlemagne for the Respondents

2022: December 12
2023: October 3

JUDGMENT

- [1] **ST ROSE-ALBERTINI, J. [Ag]:** This matter concerns an appeal filed by FirstCaribbean International Bank (Barbados) Limited ("the Bank") challenging a purported assessment done by the Inland Revenue Department (IRD) as agent of the respondents. It is brought pursuant to Part 60 of the Civil Procedure Rules 2023 which deals with appeals to the High Court, and section 16 of the Stamp Duty Act¹ (the Act) which permits an appeal to be made

¹ Cap 15.11 of the Revised Edition of the Laws of Saint Lucia

to the High Court within 7 days of the date of an assessment, where a taxpayer is dissatisfied with such assessment.

[2] The appeal raises three questions for the Courts consideration:

1. Whether an assessment has been done in relation to payment of stamp duty on a Banking Business Vesting Order dated 19th August 2019² ("the BBVO") wherein the Bank acquired the banking business of FirstCaribbean International Finance Corporation (Windward and Leeward) Ltd?

2. Based on the answer to the first question, was the appeal filed prematurely, or is in time, or is out of time?

3. If the appeal is properly filed, then what is the chargeable value and the applicable Instrument in the Schedule to the Act, to be used for the assessment of stamp duty on the BBVO.

Issue 1 : Has an assessment been done, and if so, when?

The Evidence

[3] By letter dated 11th January 2018³ the Bank's attorney informed the IRD of the proposed acquisition of loans and the mortgages owned by FirstCaribbean International Finance Corporation Limited (Leeward & Windward) Ltd and requested that the IRD assess the stamp duty payable in relation to the transaction. A schedule of the value of the loans to be transferred was enclosed with the letter.

[4] By Letter dated 22nd January 2018⁴ the IRD responded indicating that based on Instrument No. 53(b) of the Act the amount would be \$66,810.69. The letter stated that the IRD reserved the right to change its opinion on the amount stated, should there be any change of facts.

[5] The BBVO took effect on 19th August 2019 and by letter dated 5th September 2019⁵ from its attorneys, the Bank delivered a draft for the said amount, to the IRD.

² See Exhibit MV3

³ See Exhibit LD1

⁴ See Exhibit LD2

⁵ See Exhibit LD6

- [6] Subsequently, by letter dated 15th October 2019⁶ the IRD represented that stamp duty on the BBVO has been estimated to be \$668,105.90, and requested verification of the lending business being transferred under the BBVO, as the information was provided over a year ago. The letter further stated that the calculation of stamp duty remained contingent on the provision of an updated accounting of the lending business to be transferred.
- [7] Some two years later, by letter dated 10th January 2022⁷ the Bank's attorneys advised the IRD that based on the decision in **RBL v Director of Finance et al**⁸ the value of the consideration was the proper taxing basis for the BBVO, and not the value of the underlying assets, and enclosed the Net Asset Value Statement as at 19 August 2019. The letter further stated that the tax chargeable on the BBVO should be 2% *ad valorem* of the consideration of \$18,441,000.00, being the net asset value of the banking business transferred at the date of closing.
- [8] By letter dated 8th February 2022⁹ which the Bank says was received on 17th February 2022 the IRD responded stating that the assessment was done some two years ago, and has not changed, and further that non-payment of the stamp duty will attract penalties from the effective date of the BBVO.

The Bank's Submissions

- [9] The Bank submits that against the background of the statutory provisions and **RBL v Director of Finance et al**, an assessment requires (i) a definitive statement of liability and (ii) a statement that said liability is payable. The letter of 15th October 2019 does not satisfy these requirements, as it included the words "*estimate*" and "*contingent*" and made it clear that the estimate could change following the provision of additional information.

⁶ See Exhibit LD7

⁷ See Exhibit LD8

⁸ SLUHCV2020/0030 delivered on 31st May 2021

⁹ See Exhibit LD9

- [10] The Bank argued that neither the Income Tax Act¹⁰ or the VAT Act¹¹ in this jurisdiction stipulates the form which a notice of assessment should take, however the assessment form in use by the IRD, for the Income Tax Act contained all the information required for a proper assessment. Further, the VAT Act specified the information to be contained in a notice of assessment for VAT purposes. As the IRD is the administrator of the Act and all the other taxes referenced above, there is a legitimate expectation that similar information should be contained in any assessment done under the Act. Thus the letter of 15th October 2019 is at odds with the standard of assessment that taxpayers have come to expect from the IRD, in the administration of the other pieces of tax legislation.
- [11] The Bank further says that the letter dated 15th October 2019 on its own does not constitute an assessment but when read together with the letter dated 8th February 2022, the two letters convey that an assessment has been done. Moreover, it was only upon receiving this letter that the Bank understood the IRD to be saying unequivocally and definitively that an assessment of stamp duty had been done in relation to the BBVO. Up until that time what was taking place was open and fluid communication, but from this point on the IRD made it clear that the figure stated in the letter of 15th October 2019 was final, and due immediately.
- [12] Alternatively the Bank says, given that the letters of 15th October 2019 and 8th February 2022 were based on the same document or information it meant that the first letter of 22nd January 2018 was also an assessment for which Instrument No. 53(b) of the Schedule of the Act was applied for the arriving at the stamp duty payable. This amount was paid to the IRD on 5th September 2019.

The Respondents Submissions

- [13] The respondents submit that an assessment is simply a determination by the IRD of the amount due and the letter of 15th October 2019 was a record of that determination, which was communicated to the Bank's attorneys. Further the law ought not to be interpreted to prejudice the respondents by requiring precise language for an assessment. Thus, the

¹⁰ Cap 15.02

¹¹ Cap 15.42

respondents contend that they have made an assessment and a record of that assessment was communicated to the Bank. Further, whether the Bank considered it an assessment is irrelevant, and the letter of 15th October 2019 constituted a valid and effective assessment of the stamp duty payable on the BBVO.

[14] Alternatively, the respondents submit that in keeping with the Bank's own argument, if it is correct that the letter of 15th October 2019 is not an assessment, then there has been no assessment at all and the Bank is pre-mature in filing this appeal. The letter of 8th February 2022 did not state the amount to be paid and is not an assessment by the absence of a definitive figure which is immediately payable. Furthermore, that letter merely referenced the earlier communication and confirmed it was the assessment, and that assessment had not changed. Thus, if the letter of 15th October is not an assessment because of the words "*estimate*" or "*contingent*" then the letter of 8th February 2022 which relied on this letter, was equally not an assessment.

[15] The respondents argue that all the letter did was reference and confirm earlier correspondence from over two years ago, which was not an assessment. Thus, if the earlier letter is not an assessment, then the later letter falls into that same category because it merely relies on the earlier as the assessment, when it was not. The respondents contend that by the Bank's own argument there is no assessment, and as such the jurisdiction of the Court has not been triggered under Part 60. The appeal is therefore pre-mature and ought to be dismissed.

Analysis

The Law

[16] The law concerning what constitutes an assessment for the purposes of a BBVO was considered by this Court in **Republic Bank (EC) Limited v Director of Finance at al**¹² The authorities considered and applied in that case established that where the statute is silent on how an assessment should be done, as in the case of the Act, then at a minimum such

¹² SLUHCv2020/0030 delivered on 31st May 2021 at para 52-55 and 72

assessment must comprise of (i) calculation of an amount, (ii) a record of the details of the assessment and (iii) notice be given to the taxpayer of the precise amount which is due and payable. The test is an objective one of how the document or documents said to record an assessment would be understood by the reasonable reader. It has also been said that it is essential to the fair administration of a tax system, that a taxpayer should be able to know with certainty whether or not an assessment has been made, and of the amount due from him. Additionally considerable uncertainty would arise, if the question whether an assessment has been made, were to depend on the subjective intentions and beliefs of individual officers of the revenue department.¹³

- [17] This Court must determine whether from the letters issued by the IRD a reasonable reader would have understood that they recorded and notified the Bank of a conclusive determination by the IRD of the calculation and amount of stamp duty assessed as due and payable immediately, on the BBVO.
- [18] The letters which will engage the Court's attention for this exercise are as follows:
1. Letter dated 22nd January 2018 – Exhibit LD2 (“the January 2018 letter”)
 2. Letter dated 15th October 2019 – Exhibit LD7 (“the October 2018 letter”)
 3. Letter dated 8th February 2022 – Exhibit LD9 (“the February 2022 letter”)
- [19] The January 2018 letter was provided by the IRD over 12 months prior to execution of the BBVO. It cannot stand as an assessment because (i) it was equivocal and indicated that the IRD reserved the right to change its opinion on the amount of stamp duty payable, in the event of a change in the facts presented in the letter dated 11th January 2018 from the Bank's attorneys, and (ii) it was based on the assumption that what was being transferred was loans and mortgages and calculated using the *ad valorem* rate stated in Instrument No. 53(a) of the Act, which turned out to be an incorrect assumption, as the transaction under the BBVO, was the transfer of a banking business, as a going concern.
- [20] It is also trite that this letter could not have been an assessment for the purposes of the Act, unless and until the BBVO had taken effect and was presented for stamping at the IRD.

¹³Aria Technology Limited v The Commissioners for HM Revenue and Customs 2020] EWCA Civ 182

- [21] Thus, an assessment could not have been done before the BBVO took effect, and the reservations made in that letter would place it outside of the remit of an assessment, having not met the requirements of a conclusive record of an assessment, which was communicated as being an amount which due immediately.
- [22] The October 2019 letter stated that the amount given was an estimate and was contingent upon the production of further information on the banking business which was being transferred under the BBVO. There is no merit in the respondents argument that this letter was a valid and effective assessment because the IRD considered it to be so. Instead, it is a matter which must be assessed against the requirements elucidated in the relevant legal authorities. The letter is also equivocal and requested that further information be provided, and did not convey that the amount stated was due and payable immediately. It therefore did not accord with the requirements of a concise and definitive statement to constitute an assessment.
- [23] Against this backdrop, the February 2022 letter on which the Bank relies to say that when read together with the October 2019 letter would constitute an assessment, does not assist in taking the point further. The Bank says up until that time the position was fluid and conversations were held back and forth and it was only on 17th February 2022 when the February 2022 letter was delivered that the Bank understood the IRD to be saying that an assessment had been done.
- [24] In my opinion, the February 2022 letter on its own does not constitute an assessment. It does not state an amount which was immediately due and payable, but rather relies on the amount stated in the October 2019 letter, which was qualified as an estimate and was contingent upon the presentation of certain information. It merely stated what the October 2019 letter issued two years earlier should be considered the assessment, and that penalties will be applied from the date of publication of the BBVO (19th August 2019).
- [25] When read together, these letters do not constitute an assessment, as the earlier letter was an estimate, which was contingent upon the production of further information, and the later letter did not go on to state the outcome of the qualifications which were made. It simply said the assessment was done two years ago, and the payment is outstanding. It is incorrect to

say that an assessment was done two years ago, when the October 2019 letter by its very terms, was far removed from the expectation of precision and certainty, which must always be the guiding principles for such assessments.

- [26] Unlike **RBL v Director of Finance et al** where the parties had engaged in written exchanges over a continuous and prolonged period, which demonstrated that there was disagreement on the calculation of the tax, and finally in January 2020, the IRD issued the assessment letter in clear, precise and unequivocal language, the present case is devoid of such history, or such statement of an assessment. From the evidence, after the October 2019 letter from the IRD, there is no further correspondence between the parties for well over 24 months, until the letter dated 10th January 2022, from the Bank's attorneys, challenging the chargeable basis of the estimated amount stated in the October 2019 letter, which led to the IRD's response, in the February 2022 letter.
- [27] As I have concluded that the October 2019 letter does not constitute an assessment, the subsequent letter contained nothing more which could have served to perfect it, or cause the reasonable man to conclude that an assessment had been done, and that an amount was payable immediately. The authorities in relation to the characterization of the reasonable man clearly state that the views of the parties to the dispute and their Counsels cannot inform the standard for this test. It is simply what the informed and fair minded person would believe.
- [28] The end result is that none of the letter presented crystalized into the requirements of an assessment, whether taken in isolation, or collectively. To constitute an assessment such letter or document (whichever form it takes), must contain the chargeable value being used as a dollar amount, the Instrument being applied for the *ad valorem rate*, the value of the liability, and most importantly that the liability is due and payable immediately. The "*opinion*" given with reservation, as in the case of the January 2018 letter which preceded the BBVO, and the "*estimate*" or "*contingent*" amount as in the case of the October 2019 letter, all conveyed that the computation was still open ended and subject to change based on the happening of an event, or upon presentation of further information.

[29] The finality and certainty of an assessment, which ought to have been clearly communicated and understood by the taxpayer, was sadly lacking in all the letters presented.

[30] I therefore conclude that the assessment has not been done. Instead, the IRD has proceeded in an ad hoc and confusing manner, and should proceed to do the assessment in the proper way, based on the authorities distilled in **RBL v Director of Finance et al.** As an assessment must be conclusive in order to trigger an appeal under section 16 of the Act, I am constrained to find that this appeal is premature.

[31] It is worth re-stating here that such an assessment must be served promptly on the taxpayer as the time for filing an appeal commences to run from the date of the assessment, and the period for doing so is a mere seven (7) days.

Disposal

[32] In light of the foregoing the third question identified at paragraph 2 of this judgment will be premature for consideration, and the appeal will be dismissed.

Conclusion

[33] In light of the foregoing, I make the following orders:

1. The appeal is dismissed.
2. There is no order for costs.

[SEAL]

Cadie St Rose-Albertini
High Court Judge

By the Court

Registrar