

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES
IN THE HIGH COURT OF JUSTICE**

SVGHCV2018/0206

**IN THE MATTER OF THE INCOME TAX ACT CHAPTER 435 OF THE LAWS OF SAINT VINCENT AND
THE GRENADINES REVISED EDITION 2009**

AND

**IN THE MATTER OF AN APPEAL FROM AN ORDER OF THE APPEAL COMMISSIONERS DATED THE
4 DAY OF DECEMBER 2018**

BETWEEN

UNICOMER (ST. VINCENT) LTD

CLAIMANT

AND

APPEAL COMMISSIONERS

DEFENDANT

CONSOLIDATED WITH

SVGHCV2019/0001

BETWEEN

UNICOMER (ST. VINCENT) LTD

CLAIMANT

AND

THE COMPTROLLER OF INLAND REVENUE

RESPONDENT

Appearances:

Mr. Claude Denbow S.C and Ms. Paula David for the Claimant

Mr. Grahame Bollers for the Defendant in 206/2018

Mr. Duane Daniel and Ms. Jenell Gibson for the Defendant in 1/2019

Mr. Jn Charl Miller and Mr. Richard Luck representative for the Claimant

Ms. Loriele Robertson representative for the Defendant in 206/2018

Mrs. Kezi Francis, Legal Advisor, and Mr. Kelvin Pompey, for Defendant in 1/2019

2020: 2nd December

2021: 29th April

JUDGMENT

Byer, J.:

- [1] This case was the perfect example of the dicta of Lord Tomlin¹ in action, that is “every man[or business] is entitled if he can, to order his affairs so as that the tax attaching under the appropriate Act is less than it otherwise would be.” In this court’s mind that is what the Claimant did, however the question that was before this court was whether in doing so, the actions of the Claimant went beyond simply ordering their affairs to pay less tax within the provisions of the law, or did their actions go beyond what is legally allowed and trespassed into the realm of behaviour that was contrary to the law in force.

Background

- [2] The Claimant is a company registered in St. Vincent and the Grenadines and is a member of the Unicomer Group of companies which operates within the region. The Claimant engages in the business of selling household furniture and appliances.
- [3] By letter dated 23 March, 2015, the Comptroller of Inland Revenue (hereinafter referred to as “the Defendant”) gave notice to the Claimant of the intention of the Inland Revenue Department to raise additional assessments to tax on the Claimant in the sum of \$12,666,798.23 inclusive of interest and penalties². The basis of the Defendant’s increased assessment centered on the Claimant’s treatment of its credit protection premiums (hereinafter referred to as “CPI”), hire-purchase profits and royalties.
- [4] The Claimant objected to the Defendant’s assessment and provided the grounds of this objection by a letter from KPMG dated 4 June, 2015³. The Defendant responded by letter dated 29 March, 2017 rejecting the Claimant’s ground of objection and maintained his assessment⁴.
- [5] The Claimant appealed the Defendant’s assessment before the Appeal Commissioners (hereinafter referred to as “AC”) by Notice of Appeal filed on 26 April, 2017⁵. The appeal was heard

¹ Inland Revenue Commissioners v Duke of Westminster [1936] A.C. 1 at page 19

² See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked “A” (found at page 65 of Trial Bundle 5)

³ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked “B” (found at page 68 of Trial Bundle 5)

⁴ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked “C” (found at page 79 of Trial Bundle 5)

⁵ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked “D” (found at page 83 of Trial Bundle 5)

before the AC and a decision was rendered on 29 November, 2018⁶. In summary, this decision held that the sums collected by the Claimant in CPI were disallowed and withholding tax was chargeable on payments made to Canterbury; the deferral of hire purchase profits was disallowed; and royalty expenses were allowed.

- [6] The Defendant, by letter dated 4 December, 2018, demanded that the Claimant make a payment of the sum of \$13,556,007.30 on or before 14 December, 2018⁷. The Claimant responded by letter dated 13 December, 2018 declining to make the demanded payment on the basis that the AC had not upheld or confirmed the Defendant's assessment and there was, consequently, no obligation on the Claimant to comply with the Defendant's demand⁸. The Defendant responded by letter dated 18 December, 2018 indicating that the AC had in effect confirmed the assessment and demanded payment of the assessed taxes within 24 hours⁹. The Claimant repeated its position to the Defendant by letter dated 19 December, 2018¹⁰.
- [7] On 20 December, 2018, the Defendant served the managers of The Bank of Nova Scotia, CIBC First Caribbean International Bank, Bank of St. Vincent and the Grenadines and RBTT Bank Caribbean Ltd (hereinafter referred to as "the Banks") with a letter of even date. This letter demanded that the Banks pay to the Accountant General sums held on behalf of the Claimant an amount up to \$13,556,007.30¹¹. The referenced letters outlined the provisions of the Income Tax Act, CAP. 435 (hereinafter referred to as "ITA") and stated, *inter alia*, that the Banks were required to pay to the Accountant General on account of the Claimant's liability under the ITA within fifteen days of the date of service of the notice, monies payable to the Claimant which they were liable to pay. The letters also stated that payable was the amount up to and not exceeding \$13,556,007.30 by 20 December, 2018 (in the case of CIBC First Caribbean International Bank; and RBTT Bank Caribbean Ltd.) and by 21 December 2018 (in the case of Bank of St. Vincent and the Grenadines; and Bank of Nova Scotia).
- [8] The Claimant, through its legal practitioners, wrote to the Defendant by letter dated 21 December, 2018 asserting that the Defendant's letters of 20 December, 2018 were unlawful¹². The Claimant

⁶ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked "E" (found at page 100 of Trial Bundle 5)

⁷ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked "F" (found at page 104 of Trial Bundle 5)

⁸ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked "G" (found at page 106 of Trial Bundle 5)

⁹ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked "H" (found at page 109 of Trial Bundle 5)

¹⁰ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked "I" (found at page 119 of Trial Bundle 5)

¹¹ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked "J" (found at page 121 of Trial Bundle 5)

¹² See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked "K" (found at page 125 of Trial Bundle 5)

also wrote to the Banks on 21 December, 2018 instructing them that the Defendant had no power to demand the referenced payments from them until the expiry of 15 days from the date of the notice to them and that he had no lawful authority to demand immediate payment¹³.

- [9] The Bank of Nova Scotia paid to the Defendant the sum of \$198,364.04 on 21 December, 2018 and informed the Claimant of this by letter dated 24 December, 2018¹⁴.
- [10] On 28 December, 2018, the Claimant filed an appeal in the High Court under Claim Number SVGHCV2018/0206 against the decision of the AC. On 3 January, 2019 under Claim Number SVGHCV2019/0001 the Claimant filed an ex parte application for an interim injunction restraining the Defendant from taking enforcement action to recover the assessed taxes. This injunction was granted by the court and a copy of the order of court was served on the Defendant on 4 January, 2019. By letters dated 4 January, 2019, the Defendant issued letters to all of the banks withdrawing his letters of 20 December, 2018¹⁵. By order of court made in SVGHCV2019/0001 on 24 January, 2019 the injunction which was granted on 3 January, 2019 was ordered to continue until the determination of these proceedings.
- [11] By order of court made on 21 March, 2019 Claims number SVGHCV2018/0206 and SVGHCV2019/0001 were consolidated. The basis of this consolidation was that the two matters were founded on the same facts and the determination of either one would have implications on the other.
- [12] The Claimant claims the following reliefs in SVGHCV2018/0206 against the AC:
- “1. That this Appeal is to proceed by way of a re-hearing and that the Claimant be given leave to cross-examine the Comptroller of Inland Revenue on his Affidavit filed on 1st November 2017.
 2. That the decision given by the Defendant on 29th November 2018 be set aside and reversed save and except paragraph 3 of the Order allowing the deductibility of Royalty expenses.
 3. That the assessment raised by the Comptroller of Inland Revenue which was maintained in his letter dated 29th March, 2017 (and which decision triggered the appeal to the Defendant) be set aside and vacated and the liability of the Claimant for income years 2007-2011 be reduced to zero.
 4. Repayment of the sum of \$1,000,000.00 paid to the Comptroller of Inland Revenue on 7th day of December 2015 and the sum of \$2,000,000.00 paid to the Comptroller of Inland Revenue on 30th

¹³ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked “L” (found at page 126 of Trial Bundle 5)

¹⁴ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked “M” (found at page 130 of Trial Bundle 5)

¹⁵ See (Fourth) Affidavit of Jn Charl Miller filed on January 16, 2019, the exhibit marked “S” (found at page 201 of Trial Bundle 5)

day of December 2015 pursuant to the exercise of his statutory powers under Section 107 of the Income Tax Act Chapter 435 with interest at such rate as this Court shall deem fit.”

- [13] The Claimant claims the following reliefs in SVGHCV2019/0001 against the Defendant:
1. A declaration that the order dated 29 November 2018 made by the tribunal of Appeal Commissioners appointed pursuant to section 103 of the Income Tax Act Chapter 435 of the Laws of Saint Vincent and the Grenadines in Appeal Number MF/541A between the Claimant and the Defendant was not in accordance with or pursuant to section 105 of the Income Tax Act.
 2. A declaration that the absence of an order by the Appeal Commissioners upholding the assessment challenged by the Claimant in the aforementioned proceedings means that the taxes in dispute between the Claimant and the Defendant did not become due and payable as a matter of law.
 3. A declaration that the Defendant is not empowered to take enforcement action or to take any steps to recover the taxes in dispute between the Claimant and the Defendant pursuant to any provision of the Income Tax Act.
 4. A declaration that the Defendant is not empowered to issue notices in writing pursuant to section 120 of the Income Tax Act to any commercial bank to pay over to the Defendant monies held by such banks to the credit of the Claimant in any account held by the Claimant with such banks.
 5. A declaration that the notices in writing dated 20 December 2018 issued to The Bank of Nova Scotia, CIBC First Caribbean International Bank, Bank of Saint Vincent and the Grenadines and RBTT Bank Caribbean Ltd. requiring immediate payment of monies standing to the credit of the accounts of the Claimant were unlawful and outwith the statutory powers of the Defendant in the Income Tax Act.
 6. An order to restrain the Defendant from taking enforcement action to recover the taxes in dispute whether by way of notices pursuant to section 120 of the Income Tax Act or any other provision thereof.
 7. Such further or other relief as this Court may think fit.
 8. Costs.
- [14] Therefore what was before this court, were two suits dealing with two different matters- the suit 206/2018 against the AC and 1/2019 against the Comptroller of Inland Revenue. At the trial of the matter however the two matters having been consolidated the thrust of the case for the claimant was based on the decisions having been made by the Comptroller to disallow certain deductions. The legality of the actions of the AC is therefore hinged on the findings the court will make

regarding the decisions of the Comptroller. In this judgment when I therefore refer to the Defendant, I will be referring to the Comptroller of Inland Revenue in suit 1/2019.

Issues

- [15] When this court considers the background to this action and the reliefs that are prayed for by the claimant in both suits this court accepts¹⁶ that the following are the issues for determination:
- (i) Whether the order dated 29 November 2018 made by the tribunal of the AC was in accordance with the provisions of section 105 of the ITA;
 - (ii) If so, whether the AC's decision as it relates to the disallowance of CPI payments ought to be reversed;
 - (iii) Whether the AC's decision as it relates to withholding tax being chargeable on payments made to Canterbury ought to be reversed;
 - (iv) Whether the AC's decision as it relates to the disallowance of deferred hire purchase profits ought to be reversed;
 - (v) Whether the Defendant was empowered to take enforcement action or to take any steps to recover the taxes in dispute pursuant to the ITA;
 - (vi) Whether the Defendant is empowered to issue notices pursuant to section 120 of the ITA to any commercial bank to pay to the Defendant monies held by such banks to the credit of the Claimant in any account held by the Claimant with such banks; and
 - (vii) Whether the notices in writing dated the 20 December 2018 issued to the banks were unlawful and outside the scope of the statutory powers conferred on the Defendant under the ITA.

¹⁶ The issues as set out by the defendant in their submissions filed on the 30/12/2020

Issue #1 - Whether the order dated 29 November 2018 made by the tribunal of the AC was in accordance with the provisions of section 105 of the ITA

The Claimant's Argument

- [16] The nub of the Claimant's argument on this issue was indeed a brief one. Relying on the provisions of section 105(1) of the ITA the Claimant submitted, that the AC in their order did not state that they had "confirmed", "increased" or "reduced" the assessment of the Defendant. Having failed to do so, the Claimants further submitted that there was in fact no "order" that issued from the AC upon which the Defendant was entitled to take action.
- [17] This failure, in the submission of the Claimant, was therefore fatal and as such, under the scheme of the ITA, no taxes could have become due and payable without the matter being disposed of by reference to express pronouncement on the fate of the assessment¹⁷. There was none and as such the order of the AC could not stand and so did all that purported to flow from it.

The Defendant's Argument

- [18] The Defendant on the other hand submitted that the order of the AC was clear, and that the order of the AC had in effect confirmed the assessments made by the Defendant, a fact that the Defendant conveyed to the Claimant in correspondence dated 18 December 2018¹⁸.
- [19] The Defendant also submitted that in any event the provision of the ITA that governs the actions of the AC includes the power to make such order as they deem fit. The AC was therefore entitled to make any order that is additional to a confirmation, an increase or a reduction of any assessment. Therefore, the fact that the order of the AC had not specifically stated that the assessment of the Defendant was "confirmed, increased or reduced" was not fatal and as such there was a valid order upon which the Defendant was entitled to act.
- [20] Finally on this point, the Defendant submitted that in any event the Claimant could not seek to argue that the order was unenforceable yet still seek to uphold a finding of the AC in their favour with regard to the allowance for the deduction of royalty payments. For the Defendant, it was clear that the Claimants had to choose their position, either the entire order was unenforceable, or the entire order was valid.

¹⁷ Pre trial Memorandum of the Claimant filed 5/3/2020 Trial Bundle 6 page 122 Tab 34

¹⁸ Trial Bundle 5 page 109 Tab 20

The Court's Analysis and Considerations

- [21] In order for the court to make a determination as to whether the order of the AC is in keeping with the provisions of the ITA, this court must first and foremost consider the relevant provisions of the ITA and the order itself.
- [22] Section 105 of the ITA sets out the mandate of the AC in considering an appeal that has been filed with them where a tax payer is aggrieved by a decision of the Defendant¹⁹. By section 105 (1) the AC “upon every hearing of an appeal...**may** confirm, increase or order the reduction of any assessment or **make such other order as they deem fit**.”(My emphasis added)
- [23] The order which is now the centre of this controversy sets out the following (after the preamble to the same):
- “Upon hearing Counsel for the Appellant and her application that the matter be addressed on affidavits filed herein and upon being satisfied that both parties were aware of the hearing date
- It is hereby ordered that:
1. The sums collected by the Appellant in Credit Protection Insurance (CPI) be disallowed pursuant to Sections 23 (1), 23 (2), 39 (2) and 83 (1) of the Income Tax Act. It is further ordered that withholding tax is chargeable on payments made to Canterbury pursuant to S.66 of the Income Tax Act.
 2. The deferral of hire purchase profits is hereby disallowed pursuant to S. 9 (1) (b) of the Income Tax Act.
 3. Royalty expenses paid by the Appellant to Caribbean Licensing Corporation (Calicorp) for use of trademarks and trade names, such as “Courts” and “Sleep on it” logos for the Income Years 2007-2011 be allowed as the price paid by the Appellant to Calicorp is a fair price as it falls within the range of prices for similar transactions based on the arm's length principle.
 4. No order as to costs.”
- [24] It is of course undisputed that the order did not include the words “confirm”, “increase” or “reduce” and there is no reference to the assessment of the Defendant. However, in the preamble of the order²⁰ it is clear, that the entire appeal was premised on the assessment made by the Defendant

¹⁹ Section 104 ITA

²⁰ Summary: This appeal has been filed pursuant to section 104 on the Income Tax Act CAP 312 against a decision of the Comptroller of Inland Revenue as contained in a letter dated 29th March 2017 which maintained assessments to Income Tax in the sum of \$13,503,008.11 (inclusive of interest) against the income of the Appellant for the income years 2007 to 2011.

and as far as this court is concerned the emphasis of the Claimant in cross examination of the Defendant as to whether the word assessment was seen in the order of the AC is of no moment.

- [25] Of course this court is cognizant of the way in which tax legislation is to be considered by the court. Indeed, in the case of **Cape Brandy Syndicate v Inland Revenue Commissioners**²¹ the court made it clear that "...in a taxing Act clear words are necessary in order to tax a subject". However, Rowlett J also added that a "too wide and fanciful construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the Crown or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look **fairly** at the language used."(**My emphasis added**)
- [26] In utilizing that method, in this court's mind the fair interpretation to be given to section 105(1) is that the order of the AC must be referable to a decision of the Defendant and in such reference, the AC must take a decision that does one of the three things open to them or make an order of its own that they deem fit. I do not accept that in doing so, that there is a need to slavishly use the words in the Act as much as there is a requirement to in **fact** make one of the determinations open to the AC to make. In this court's mind, the Claimant would have certainly been entitled to take issue with the order of the AC if they had perhaps ordered a time frame in which monies were to be paid or any other order that took them outside of their legislative parameters. However even then the Claimant would have to have made a compelling argument that the order was not one that the AC could and did "deem fit".
- [27] Unlike the Defendant I do not find that the order was one that the AC could have made under the parameters of "deeming it fit" but I do accept their contention that the order was properly made on the basis that the order did in **fact** address both the assessment **and** made it clear what it was allowing and what it was not allowing on the appeal regarding that very assessment.
- [28] Additionally, I fully agree with the contention made by the Defendant that it was indeed more than passing strange that even though the Claimant sought by its prayers to set aside the order of the AC, that that relief was only in relation to the portions of the order that they did not agree with. The relief sought did not include the setting aside the portion of the order which allowed the appeal against the Defendant's decision regarding royalty payments. In this court's mind this is an incongruous argument and one that this court cannot accept. Either the whole order is erroneous or none of it is.

²¹ [1921] 1 K.B. 64 at 71 per Rowlett J

[29] I therefore find that the order of the AC dated the 29 November 2018 is in keeping with section 105(1) of the ITA.

Issued #2 - Whether the Appeal Commissioners' decision as it relates to the disallowance of CPI (Credit Protection Insurance) payments ought to be reversed

[30] This court having found that the order stands, must now consider whether the findings of the AC allowing the assessment of the Defendant on the disallowance of CPI payments should be reversed.

The Claimant's Submission

[31] The main arguments of the Claimant in this regard are two-fold. Firstly, that credit protection insurance is in fact a legitimate expense of the business in which the Claimant is involved to protect not just the Claimant in the event that the customer defaults on their payments, but also as a means to protect the customer in the event that their ability to pay is somehow affected. Secondly, the Claimants made it clear that the insurance that had been effected had been with a totally unrelated company, Massy Insurance formerly United Insurance and the fact that they (the insurance company) may have ceded one hundred percent of their risk with a related company of the Claimant did not mean that the Defendant could pierce the corporate veil that existed and purport to suggest that the Claimants were engaged in the criminal behaviour of tax evasion.

[32] The submissions of the Claimant in expanding these arguments were in fact quite comprehensive.

[33] As it related to the CPI being a legitimate expense of the Claimant, the Claimant submitted that the incurring of such an expense was normal in the nature of the business in which the Claimant was and is engaged. The Claimant submitted to the court that the basis of the objection of the Defendant to this expense was not that the sums were incurred per se, but rather that the payments were not genuine insurance payments. The Claimant in counter to this argument, however submitted, that there was enough evidence to indeed find that CPI was a legitimate expense²² and as such the Claimant was entitled to rely on sections 39 (2) and 40 (1) (e) (i) of the ITA²³ to claim these CPI payments as a legitimate expense for the purposes of the computation of tax liability.

²² Evidence of Brian Glasgow at TB#1 Tab 31 paragraph 11

²³ Section 39 Deductions allowable: general

... (2) Subject to subsection (3), in ascertaining the assessable income of any person for any year of assessment from any source specified in section 33 there shall, upon due claim and subject to such evidence as the Comptroller may require, be allowed as a deduction, all expenditure wholly and exclusively and, in the case of employment income, necessarily incurred by

[34] Finally on this point, the Claimant relied on the decision of the Income Tax Appeal Board in Barbados in the **Courts (Barbados) Limited and anr v Commissioner of Inland Revenue**²⁴ matter in which the Appeal Board there, considering similar expenses as undertaken by Courts (Barbados), found that:

“By taking out the insurance of their hire purchase credit portfolio, the Appellants sought to protect the businesses and the customers against risks that were clearly real; and they sought the best available insurance for those risks.

We hold the view that maintain the particular insurance of the Hire Purchase credit portfolio as a policy, was a business decision related to risks against which any properly administered business would insure.

“We are satisfied and find, from our analysis of the evidence on the issue of credit insurance, that the purpose for which the Appellants paid insurance premiums over the years 1993 to 1996, was reasonable in all the circumstance disclosed by that evidence.”

[35] In relation to the second part of the argument presented by the Claimant on the disallowance of the CPI payments, the Claimant submitted that the Defendant was clearly wrong and irrational in holding that the payments made to United Insurance (Massy Insurance) were sham payments and that United Insurance was merely a conduit for the purpose of the Claimant funneling funds out of the country to lower their tax liability.

[36] In so submitting, the Claimant relied on the evidence elicited on cross examination of the Defendant in which he said that as far as he was concerned United was used to funnel or to get money from the Claimant to Canterbury, a related company. In fact, it was clear from the questions posited to the Defendant, that the Claimant sought to elicit the evidence that the Defendant considered that United was complicit in acting in concert with the Claimant to avoid and evade taxes in St. Vincent. When his answer was yes, the Claimant has submitted that this position as taken by the Defendant was wholly ludicrous given the actual factual matrix as it existed.

that person during the basis period for that year of assessment for the purpose of producing his assessable income from that source.

40. Deductions allowable: specific

(1) Subject to sections 39 to 45 and without prejudice to section 39(2), save to the extent that any provision of this section imposes a restriction on a deduction otherwise allowable, the deductions allowable in ascertaining the assessable income of any person for any year of assessment shall include - ...

(e) any premiums incurred under a policy of insurance against damage to loss of property –

(i) where the property insured is used for the purpose of producing assessable income, and...”

²⁴ Income Tax Appeal October 2002 – before Justice E. Bishop Chairman; Mr. LeRoy Smith – member; Mr. Lloyd Campbell – member

- [37] The Claimant in their submission reiterated that United was a separate legal entity from the Claimant, a fact that was indeed accepted by the Defendant.²⁵ That being so, the Claimant maintained that it was therefore impossible for United to be a “conduit” company as suggested by the Defendant since there was no evidence that the Claimant so controlled United and were able to direct their operations to ensure that monies were paid to Canterbury at the instance of the Claimant. Rather the Claimant strenuously submitted that this could not be farther from the truth when there was in existence an intervening contract of reinsurance as between United and Canterbury under which United was obligated to make the payments.
- [38] The Claimant also argued further that there was absolutely nothing abnormal or unusual as to the existence of the contract of reinsurance. They relied on the findings of other courts that it was entirely appropriate to cede one hundred per cent of premiums to a reinsurer without there being any suggestion of impropriety.
- [39] On those bases the Claimant therefore concluded that the deduction of the CPI payments was one that should have been allowed by the Defendant and that the court should so reduce the tax liability under this head to zero.

The Defendant's Submissions

- [40] The Defendant on the other hand, made it clear that he did not accept that the payment of CPI was a legitimate expense for which the Claimant was entitled to claim as a deduction for the purposes of tax liability. The Defendant in the assessment made it clear that he did not consider the payments classified as premiums as being deductible because not only were the sums that were paid as premiums far in excess of the claims that were made on behalf of the customers of the Claimant but additionally and more importantly, he considered that the Claimant had in fact engaged in self- insurance. The Defendant defended this position by positing that since the Claimant was the party responsible for the ultimate administration of the claims themselves together with the admission that the monies that were in fact paid to United represented not the entirety of the premiums collected but those premiums less any claims paid, it was clear that there was no role for United to play in the scheme of the transactions.
- [41] In further substantiation for the decision not to allow the deduction, the Defendant also submitted that he was entitled to rely on the indications contained in the financial statements submitted on behalf of the Claimant for the period under assessment. It is in those financial statements that the Claimant had identified Canterbury as a related party and further stated in those same statements that they had in fact made the payments of CPI to the related party, Canterbury. The Defendant

²⁵ Page 29 of the submissions of the claimant filed 18/12/2020

therefore submitted that even though there was evidence presented that sought to explain that the classification contained therein was an error, the Defendant submitted that this explanation was given after some seven years in which the classification had occurred and essentially any explanation was a little too late and there was no further supporting evidence that was produced that could have satisfied the Defendant as to its veracity.

Court's Analysis and Considerations

- [42] When this court considers this ground of appeal by the Claimant, it is clear that this ground is perhaps the most substantial of all the matters that had been raised firstly before the AC and then this court, the total sum of the liability under this head having been assessed in excess of three million dollars.
- [43] Therefore it is necessary for this court, like with all the other matters raised on this appeal to take a minute trawl through the issues raised. In this regard, this court will deal with this issue in three parts, section 23 of the ITA, United as a conduit and the Claimant's financial statements.

Section 23

- [44] Section 23 of the ITA specifically empowers the Defendant to disregard transactions that may have been entered into by a tax- payer that have the *effect* of "...avoiding, reducing or postponing the liability to tax any person for any year of assessment..." and to make an assessment as if the transaction had not been entered into. It is this section that the Defendant has relied on to find the Claimant liable on the CPI payments made to United.
- [45] Since this section is central to this issue, the relevant portions of the section are set out verbatim:
- 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". (**My emphasis added**)

[46] Section 23 is therefore a classic exposition of what has been termed as anti-avoidance legislation. In the words of the learned author²⁶ who this court had the pleasure of their attendance before it in this matter, such legislation is designed to "...counteract or nullify arrangements entered into by tax payers which have the effect of avoiding tax or reducing the tax payer's liability." It is this legislation that lends itself to the ability of persons in the role of the Defendant to ensure that parties do not attempt to defraud the State of what is due to Caesar and to ensure that there has not been a creation of a "...structure and...transaction which [is] artificial and contrived and has no rationale other than the obtaining of the tax advantage." However, saying that, the Defendant and parties in similar roles must act with rationality and fairness to the tax- payer when relying on provisions of this nature.

[47] So what does section 23 state? It clearly says that where any transaction, operation or scheme has the effect – not that that has to be the purpose, but the effect is such that that tax payer's liability is avoided, reduced or postponed AND that the Defendant is of the opinion that the nature of the transaction was one that would not normally exist if the parties were dealing at arm's length, he is entitled to disregard the same and make his assessment as if it had not existed. In doing so, it is the arrangement or the transaction that must be examined.

[48] In the case of **Commissioner of Inland Revenue v Challenge Corporation Ltd**²⁷ the Privy Council considered a similar set of circumstances from New Zealand in which a tax- payer had purported to purchase all the shares in a loss -making company and then sought to make a claim to deduct the said loss from any liability for taxes. In considering this question Lord Templeman made the following pronouncement:

"The frequent argument by the tax avoider that he seeks to protect the interests of a taxpayer who does not indulge in tax avoidance requires serious but sceptical consideration. There are, however, discernible distinctions between a transaction which is a sham, a transaction which effects the evasion of tax, a transaction which mitigates tax and a transaction which avoids tax.

Evasion occurs when the commissioner is not informed of all the facts relevant to an assessment of tax. Innocent evasion may lead to a re-assessment. Fraudulent evasion may lead to a criminal prosecution as well as re-assessment.

²⁶ Dr Claude Denbow Income Tax Law in the Commonwealth Caribbean at page 116

²⁷ [1986] 1 AC 155

The material distinction ... is between tax mitigation and tax avoidance. A taxpayer has always been free to mitigate his liability to tax. In the oft quoted words of Lord Tomlin in *Inland Revenue Commissioners v. Duke of Westminster* [1936] A.C. 1, 19, "Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be." In that case, however, the distinction between tax mitigation and tax avoidance was neither considered nor applied.

Income tax is mitigated by a taxpayer who reduces his income or incurs expenditure in circumstances which reduce his assessable income or entitle him to a reduction in his tax liability. Section 99 does not apply to tax mitigation because the taxpayer's tax advantage is not derived from an "arrangement" but from the reduction of income which he accepts or the expenditure which he incurs....

Where a taxpayer pays a premium on a qualifying insurance policy, he incurs expenditure. The tax statute entitles the taxpayer to reduction of tax liability. The tax advantage results from the expenditure on the premium.

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 entitles 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."

[49] In the case at bar, the Claimant effected CPI for the benefit of themselves and their customers. In the words of the witness Brian Glasgow²⁸ CPI allows credit customers to insure the balance of their debt under hire purchase agreements. He also stated that the policy would also cover where goods are destroyed and therefore covers life and property. So up to this stage, with the provision of this service, the Defendant found no fault with the business practice.

[50] So from the effecting of insurance, the next stage is the payment of those premiums. The premiums are paid by the credit customer as a percentage of the monthly instalment payment²⁹. Once again there was no objection by the Defendant. Once the premium has been paid the same is then paid over to United Insurance under the policy of insurance which exists with the Claimant. It is at this stage of the flow in the transaction that the Defendant's objections apparently materialized.

²⁸ Evidence elicited on cross examination at trial

²⁹ Affidavit of Jn Charl Miller filed in the Appeal matter on 4/10/2017 at paragraph 10

[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.

[52] However in this court's mind that opinion must be "...honestly made on such materials as are available to the Commissioner ... [which] would be within the power conferred..."³⁰ Therefore the basis upon which the Defendant came to his opinion must also be analyzed.

[53] In the evidence of the Defendant and in particular the affidavit filed on 29th November 2019, the Defendant set out in great particularity the reasons why he disregarded the payment of the sums to United as an insurance cost that would ordinarily be a deductible expense. The Defendant had this to say:

"4. Unicomer did not provide all of the monthly declaration forms for the year ending March 31, 2007.

5. It appears therefore for the 4 years ending March 31, 2011 the claims against the CPI insurance provided to Unicomer's customers were processed and satisfied within Unicomer and made up 12.2% of the total premiums net of commission. The balance after consideration of the claims consisting of 87.8% of the premiums net of commission, were sent by Unicomer to Canterbury either directly or through United.

6. The monies sent to Canterbury and/or United were labelled as "creditor protection insurance" and deducted in the accounts of Unicomer as an expense. In addition, no withholding tax was remitted on the monies sent to Canterbury and/or United.

7. The monthly settlement declarations and other documents obtained indicate the following:

- a. All of the claims were handled by Unicomer and any monies paid to claimants came from Unicomer.
- b. The amounts sent to Canterbury and/or United were after all claims were settled.
- c. No Insurance claims were made by Unicomer with respect to the labeled "insurance" premiums paid to Canterbury and/or United and there was no need to make claims against

³⁰ **Argosy Co Ltd (in Voluntary Liquidation)v Commissioner of Inland Revenue** (1971) 15 WIR 502 at 504 per Lord Donovan

Canterbury or United as all of the claims were satisfied prior to the sending of the monies to Canterbury and/or United.

8. The conclusion that can be drawn with respect to the above facts are:
 - a. The labeling of the residual amounts after claims are satisfied as “insurance” is not in substance what has happened.
 - b. In substance Unicomer is self-insuring the CPI.
 - c. What is sent to Canterbury and/or United is the profit earned on self- insurance and thus is mislabeled as insurance.
 - d. Unicomer obtains no economic benefit from the monies sent to Canterbury and/or United.
 - e. Thus the amounts sent to Canterbury and/or United did not produce any assessable income.
9. If the money was sent directly to Canterbury, the following regulatory and taxes issues are immediately evident:
 - a. Neither Unicomer nor Canterbury are registered to sell insurance in SVG.
 - b. As Unicomer and Canterbury are related parties the value of the labelled “insurance” comes under scrutiny with Section 23 of the Income Tax Act.
 - c. As the amount paid to the non-resident Canterbury is labelled as “insurance” it is subject to withholding taxes under the Third Schedule of the Income Tax Act.United has explained that the insurance with Unicomer is what is termed “Fronting” insurance.
10. A definition of a Fronting policy is as follows:

“Fronting policy is a risk management technique in which an insurer underwrites a policy to cover a specific risk, but then cedes the risk to a reinsurer. ... Because the reinsurer takes on the entire policy risk, it has complete control of the claims process.”

Thus, United plays no actual or economic role in the insurance process but simply provides a money transfer service from Unicomer to Canterbury.
11. United has confirmed the following:
 - a. That 100% of the risk of the Unicomer policy is held by Canterbury classified as the re-insurer.
 - b. Aside from the deduction of a handling fee all of the monies received from Unicomer are transferred to Canterbury.
 - c. United plays no role in the claims process.
 - d. Unicomer has never made a claim on the policy with United.
 - e. If Unicomer had made a claim on the policy, United would call on Canterbury to reimburse United for any such claims.

12. As a result, the insertion of United between Unicomer and Canterbury does not change the substance of the transaction whereby Unicomer is paying the profits on self-insuring CPI to Canterbury.

13. The insertion of United fortifies the Department in the position it holds in that it:

- a. Provides the regulator with the false impression that United is the insurer on the CPI claims.
- b. Suggests that the payment Unicomer and United is based on an arm's length price when in fact the amount is then transferred to the related party Canterbury to avoid income taxes. In contrast the amount is exclusively under the control of the related group Unicomer and Canterbury.
- c. Suggests that the payment from Unicomer is to a resident company United when United merely facilitates the transfer to Canterbury, a non-resident to avoid withholding taxes.

14. Further to this, the Department was in receipt of correspondence from Massy United Insurance in their letter dated June 21, 2019. This helps to document the difference between the form and substance of the transactions labeled as CPI insurance.”

[54] It is therefore the management of this arrangement or transaction that the Defendant stated caused these payments to run afoul of section 23.

[55] In the case of **Newton v Commissioner of Taxation of the Commonwealth of Australia**³¹ the Privy Council considered the wording of the Australian tax legislation which stated that “every contract, agreement or arrangement ...entered into orally or in writing ...shall so far as it purports to have the purpose or effect of ...(c) avoiding any liability on any person by this Act ...be absolutely void as against the commissioner.”³² While it is clear that the wording of the Australian statute is not in the exact terms of our section 23 in that the Australian legislation requires, that any impugned transaction must have as its purpose **or** effect the avoidance of liability and the ITA only mentions effect without having to prove motive, Lord Denning made some relevant statements of law³³. In his opinion “...the word “arrangement” is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons - a plan arranged between them which may not be enforceable at law. But it must in this section comprehend, not only the initial plan, but also all the transactions by which it is carried into effect - all the transactions, that is, which have the effect of avoiding taxation, be they conveyances, transfers or anything else. It would be useless for the commissioner to avoid the arrangement and leave the transactions still standing. ... The word “effect: means the end accomplished or achieved.

³¹ [1958] AC 450

³² Section 260 of the Commonwealth of Australia Income Tax and Social Services Contribution and Assessment Act 1936-1951

³³ Op cit **Newton** at page 465

The whole set of words denotes concerted action to an end - the end of avoiding tax". In this court's mind these words are also entirely appropriate in the case at bar.

- [56] When this court considers the totality of the evidence the court accepts, as indicated earlier in this judgment, that the effect of the transaction had the result of the reduction of tax liability. Thus, the onus on the Defendant had to have been to establish that United was simply providing what he called a "fronting policy". The rationale of the Defendant was contained in this statement:

"A definition of a Fronting policy is as follows:

"Fronting policy is a risk management technique in which an insurer underwrites a policy to cover a specific risk, but then cedes the risk to a reinsurer. ... Because the reinsurer takes on the entire policy risk, it has complete control of the claims process."

"Thus, United plays no actual or economic role in the insurance process but simply provides a money transfer service from Unicomer to Canterbury."

- [57] However for the court to determine whether that was an accurate description in all the circumstances, this court must now consider whether United was a conduit for carrying into effect a tax avoidance scheme by the Claimant.

United as a conduit?

- [58] The contention of the Defendant from the start has always been that United was a conduit company simply acting as a go between the Claimant and the reinsurer Canterbury to funnel funds out of the Claimant. Upon cross examination of the Defendant, he maintained that even if United was not a related company to the Claimant that the placement of United was to assist the Claimant in syphoning the funds of self -insurance out of St Vincent and the Grenadines and claim it as an expense.

- [59] However for this court to consider this, it must first consider what exactly is the definition of a conduit company. In the case of **Velcro Canada Inc v Her Majesty the Queen**³⁴ the Canadian Tax court considered the question as to what point the corporate veil would be pierced to investigate whether the company that is inserted into the transaction is a conduit. In that court's mind the acts of a company to be qualified as a conduit must be when that "...corporation... had absolutely no discretion as to the use or application of funds through it as conduit or has agreed to act on someone else's behalf pursuant to that person's instructions without any right to do other than what that person instructs it."

³⁴ 2012 TCC 57

- [60] In the case at bar the Claimant had clearly entered into a policy of insurance with United in 2005³⁵ for credit protection insurance. Under this policy there were several express terms that were included. One was that the Claimant was to pay premiums to United net of claims paid every six months and the Claimant was expressly made responsible for the administration of claims on behalf of United.
- [61] There is however nothing in this contract which stated that United was required to re-insure the risk and additionally that they were to re insure with Canterbury, the related company. United however did effect a contract of re-insurance with Canterbury³⁶ with the proposal that United would pay ninety five percent of the net premiums to Canterbury while retaining a five per cent fee deduction. This however is not an arrangement that necessarily would run afoul of the law, indeed the Court of Appeal in the United Kingdom in the case of **Daugava v Henderson**³⁷ Maugham LJ made it clear that “a policy of re-insurance is an agreement by way of complete or partial indemnity to the insurer.”
- [62] This court accepts 1) 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 that proposition, 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.
- [64] In fact even when the court considers the correspondence from United themselves³⁸ the court accepts that the role that was played by United was as a provider for and of insurance coverage for the claimant in the form of CPI. Without that policy in effect as between United and the Claimant, the Claimant would not have in turn been able to offer the service to its customers. That in this court’s mind is integral and belies the contention of the Defendant that the Claimant was engaged in self-insurance. It cannot be simply because United does not handle the administrative duties of claims made by the Claimant that United is now magically propelled to that status of an entity that is under the control and behest of the Claimant to be considered a conduit company. This court

³⁵ Exhibit JCM4 to the affidavit of Jn Charl Miller 4/10/17

³⁶ At Tab 29 Vol 6 page 88 et seq

³⁷ [1934] All E.R. 626 at 629

³⁸ Exhibit KP 3 to affidavit of defendant filed 29/11/19 Tab 26 TB Vol. 6 at page 76 and Exhibit JCM 17 to the 6th affidavit of Jn Charl Miller filed 21/2/2020 Tab 32 TB Vol 6 at page 120

must take judicial notice of the popularity of the Claimant and the services it provides and recognize that any administrative duties attached to the processing of claims for the Claimant would become unwieldy and more likely than not, financially burdensome for United.

- [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. However, even without the court accepting the determination of the Defendant in this regard, the court accepts that the effect of the transaction fell within the parameters of section 23 and when this court considers that and the information provided to the Defendant by the Claimant itself by way of its financial statements, this court considers that the Claimant had an uphill battle on this issue.

Effect of Claimant's Financial Statements

- [66] Having perused the financial statements provided to the Defendant and his department from 2008 to 2011³⁹ it was clear that the Claimant stated that CPI payments were described as a “trading transaction with related parties”. In this court’s mind this was a clear indication by the Claimant themselves that for several years there was a direct payment of CPI premiums, not to United but to a related party, namely Canterbury.

- [67] In response to this damaging bit of information, the present Regional Tax Manager Jn Charl Miller stated in his second affidavit⁴⁰ as follows:

“7. My response to the foregoing suggestion is that the CPI premium payments were incorrectly classified in the Financial Statements of the Appellant as monies payable to Canterbury. Such a classification is wholly inaccurate and does not constitute a true reflection of what actually transpired between the relevant parties. It is this incorrect classification by the Appellant’s auditors which would have led Mr. Pompey to mistakenly conclude that the payments for CPI were made directly by the Appellant to Canterbury, when the actual reality and legal relationship between the parties established to the contrary.

9. The incorrect classification of the CPI premium payments which led to the conclusion by Mr. Pompey that they were made by the Appellant directly to Canterbury persisted in the financial statements of the Appellant until the financial year ended on 31st March, 2014. This is attested to by Notes to the Financial Statements for the Appellant for the year ended 31st March 2014 where at **Note 6** on **page 19** under the heading **“Related Party Balances”** Canterbury is listed as being entitled to a receivable for the year 2013 whereas in 2014 the figure is blank. Also, at **page 27** of

³⁹ Tab 2 TB Vol 2 pages 2-9

⁴⁰ 6/12/2017 Tab 4 TB Vol 2 page 13

the **Note 16** to the Financial Statements under Note 16 dealing with “*Related Party Transactions*” there is a line item for **CPI expense net of commission** in respect of both 2013 and 2014.

10. However, that incorrect classification of the CPI premium, expense came to an end after 2014. In the Financial Statements of the Appellant for the year ending 31st March, 2015 the position was corrected in its entirety and no longer indicated that CPI premiums were paid to Canterbury as a related party. This is attested to by the following:

(i) At **page 21** under Note 6 headed “***Related Party Balances***” the name “Canterbury” no longer appears.

(ii) In addition, at page 28 under **Note 16** to the Financial Statements headed “***Related Party Transactions***” there is no longer any line item related to **CPI expense net of commission** as appeared in the year before in 2014.”

[68] However by the admission of this same witness this classification continued until 2014, an eight year period, until the Claimant’s accountants made the “correction.”

[69] The Defendant has submitted to this court that it should completely discount this explanation as being wholly incredulous. The Defendant’s contention is that the Claimant, who bears the onus of proving that the assessment was incorrect, has failed to meet that threshold of evidence upon which the court can be expected to rely. Indeed, the Defendant identified for the court that rather than any evidence of the Claimant clarifying that this may have in fact been an error, the position taken by the Claimant, in the Defendant’s estimation, was that without more the court and the Defendant were to accept the purported re-classification and the fact that the previous classification/description was an error. However, the contention of the Defendant is that this description in the financial statements was only an error at the point when the Claimant’s exposure to tax liability became exorbitant.

[70] Indeed this court accepts that this contention of the Defendant is wholly reasonable when one considers the entirety of the evidence before it. Additionally, this court is mindful that “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 tax payer was under assessed. On the other hand, the statutory burden of the whole case is on the tax- payer.”⁴¹ This court accepts that on the evidence of the tax- payer themselves that the Defendant was entitled to hold and maintain his determination.

⁴¹ **Board of Inland Revenue and Maraj** TT 1984 CA 6

- [71] Even 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 set⁴³ 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.
- [73] For completeness and since it formed a large part of the submissions of the Claimant I wish to address the **Courts (Barbados)** case which on an issue that was similar in nature to the case at bar, the Tax Appeal Board found that the CPI payments made by Courts (Barbados) were a proper and reasonable expense. In saying so, it is necessary to examine the legislation under which Courts (Barbados) made that claim and on which they were successful.
- [74] In looking at that case, this court has borne in mind two very central differences to the case at bar. Firstly, that the jurisdiction that this case emanated from can only be of persuasive authority to this court and secondly that the tribunal that heard and determined this matter was not a judicial one.
- [75] That being said, the case was indeed instructive in how the Tax Appeal Board considered the workings of a company in all respects the same as the claimant herein.
- [76] In Barbados, the payment of CPI was disallowed, however the questions that the Tax Appeal Board considered were whether the sums expended on such insurance was reasonable pursuant to section 11(2) of the Income Tax Act of Barbados⁴⁴, whether it was a proper business expense that was deductible pursuant to section 10(1) of the Income Tax Act of Barbados⁴⁵ and whether the

⁴² Exhibit JCM3 to the 1st affidavit of Jn Charl Miller 4/10/17 at Tab 16 TB Vol 1 at page 110

⁴³ **Board of Inland Revenue and Maraj** Op cit at paragraph 46

⁴⁴ Section 11 (2) of the Income Tax Act states:

“In calculating the assessable income of a person for an income year, no deduction shall be made in respect of a disbursement of expense otherwise deductible except to the extent that:

(a) the purpose for which a disbursement or expense was made, and
(b) the amount disbursed or expended were reasonable in all circumstances”.

⁴⁵ Section 10 (1) of the Income Tax Act states:

“(c) in calculating the assessable income of a person for an income year, the following amounts shall be deducted...

(a) ...
(b) ...

transaction took place at arm's length pursuant to section 29(2) of the Income tax Act of Barbados⁴⁶ in that Courts (Barbados) insurer Phoenix had also entered into a re-insurance contract with Canterbury in similar circumstances as the Claimant herein.

- [77] The Tax Appeal Board found that the sums were not only reasonable, but they were a legitimate expense of the company. Both of those findings this court can find no fault with and indeed, if that were the nature of the contention of the parties before this court, this court would have had no difficulty in finding the same.
- [78] However the one argument that was similarly launched by Courts (Barbados) as was done by the Claimant herein was to dispute the finding that the insurance coverage and contracts did not occur at arm's-length. This is however where I cannot accept and/or adopt the findings made in the Barbados case.
- [79] In the first place the provision under which Courts (Barbados) made their complaint is fundamentally different to the case at bar⁴⁷. The legislation in Barbados clearly states that the artificial reduction of the assessable income of the tax- payer must be the main purpose. The case at bar with the ITA does not have such a hurdle, the only thing that the Defendant in my view had to prove was that one of the effects of the transaction under scrutiny had to be the reduction of tax liability. In this court's mind this was proven on the factual matrix. In this court's opinion this played a large part in the determination of the Tax Appeal Board. In the Tax Appeal Board's mind, it appears that the transaction did not amount to one that was "...conducted with an element of deceit so as to create an illusion calculated to lead the tax collector away from the tax-payer or the true nature of the transaction or simple deception whereby the taxpayer creates a façade of reality quite different from the disguised reality."⁴⁸
- [80] In the second place Courts (Barbados) had not produced financial statements showing that the said Canterbury was classified as a party to whom sums were paid directly. There was therefore no information that showed that the transaction with Phoenix and ultimately Canterbury had any other interpretation than that of independent parties. There was no evidence that Courts (Barbados) paid the claims and that the monies as premiums were collected and paid over to the insurer minus the

(c) Premiums paid by that person in the income year on an insurance policy insuring that person against loss or damage to property used for the purpose of the production of assessable income;

(d) ..."

⁴⁶ Section 29(2) of the Income Tax Act states:

"Where the main purpose of a transaction is the artificial reduction of the assessable income of a person, then, in calculating the assessable income of the person participating in the transaction and solely for the purposes of this Act and other enactments relating to income tax, that transaction shall be disregarded or shall be deemed to be modified, whichever is more appropriate to achieve the effect that the transaction no longer results in artificial reduction of the assessable income of that person".

⁴⁷ Ibid

⁴⁸ **Stuart Investments Limited v The Queen** 10 DLR (4th) 1 per Estey J

sums paid as claims. There was no evidence that Courts (Barbados) absorbed and handled all the administrative costs for the claims that were made on the insurance. It is therefore on the basis of these differences, that this court is satisfied that it should not follow the findings of the Tax Appeal Board in that regard.

- [81] This court therefore finds that the assessment of the Defendant disregarding the CPI payments for the purpose of calculating the tax liability of the Claimant stands.

Issue #3 - Whether the Appeal Commissioner's decision as it relates to withholding tax being chargeable on payments made to Canterbury ought to be reversed

- [82] At the trial of the matter and even before at case management, it was clearly accepted by the parties that if the court found that the Defendant's assessment on the CPI payments was upheld, that it followed logically that the provisions of section 66 of the ITA would apply.

- [83] Section 66 of the ITA states as follows:

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 the 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.

(3) Nothing in this section shall prevent the Comptroller from directing the deduction of a lesser amount than that provided in subsection (3) where he is satisfied that the person to whom the payment is made is a resident of a country with which an international agreement made under section 60 exists which provides for a lower rate of withholding tax than that provided in the Third Schedule.

(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.

- [84] The Claimant's case in relation to the CPI payments having been rejected by this court, it is clear that this court considers that the Claimant made direct payments to Canterbury which meets the clear definition of a non-resident entity it being operated and licensed in Bermuda⁴⁹.
- [85] That being said, those payments that were therefore made to Canterbury are deemed to be income and are therefore liable to the payment of withholding tax under section 66(4) of the ITA.
- [86] The decision of the Defendant that section 66 applied to these payments is therefore upheld and the Claimant is liable for the same.

Issue #4 - Whether the Appeal Commissioner's decision as it relates to the disallowance of deferred hire purchase profits ought to be reversed.

The Claimant's Submissions

- [87] On this issue the gravamen of the argument of the Claimant was that as a matter of commercial accounting practice, the Claimant recorded in their financial records the entire sum of the purchase price as income in the year that the hire purchase agreements were entered into, however they relied on the fact that for income tax purposes the instalments were only treated as income in the year that they were received.
- [88] In doing so, the Claimants submitted that there had to be a difference recognized between computation on commercial accounting principles and those that are applicable to the computation of income tax. Therefore, since the purchase price is in fact deferred in receipt by virtue of the hire purchase agreement, profits would in fact not be realized until the agreement comes to an end and it is therefore only then that tax would be payable.
- [89] In the Claimant's submission, the reliance of the Defendant on Section 9(1) (b) of the ITA which can only relate to the area of commercial accounting was clearly misconceived. In the submission of the Claimant, any such commercial accounting must be subordinate to the established principles of income tax law which clearly states that there can be no tax on profit that has not yet been made or received. Additionally, the Claimant made it clear that in any event the method being used by the Claimant did not result in the loss of taxes, all that the Claimant was seeking to do was to defer any such payments to the calendar year that the same were received and as such the Defendant was therefore entirely wrong in his findings on this issue.

⁴⁹ Exhibit JCM5 to the affidavit of Jn Charl Miller received 4/10/2017 Tab 22 TB Vol 1 page 129-130

The Defendant's Submissions

[90] The Defendant's submissions on the other hand were that the manner in which the Claimant dealt with the profits from the hire purchase agreements was entirely contrary to the ITA and section 9(1) (b) thereof.

[91] The Defendant's submission is that the Claimant's business deals with two separate and disparate transactions, the sale of merchandise and the financing of merchandise. In the opinion of the Defendant "the gross margin which is reflected as the sale proceeds (if it had been sold for cash) and the cost of sales is recognised at the time of the sale transaction. This is consistent with the accounting treatment in the financial statements of the Claimant for the disputed Income Years. The finance income is the difference between the total payments over time and the sale value if cash had been paid. This is income that is earned over the time of the payments. This is also consistent with the accounting treatment in the said financial statements of the Appellant. Thus, it is the Defendant's position that the financial statements of the Appellant properly reflect the earnings of the transaction with a gross margin at the time of sale and the financing income over the timing of the scheduled payments. However, the departure is where the Appellant reduces the taxable income by the gross margin that had been previously properly recognised for accounting purposes."⁵⁰

Thus, the Defendant made it clear that once the Claimant had reflected a sum for gross profit in their financial statements which they should do once a sale has been made whether the same is received or not, then the ITA immediately treats that as income that is accrued and the same is liable for the purposes of taxable income.

[92] The Defendant therefore maintained that once the Claimant had credited the sums of income to their books, then there was no provision in the ITA that allowed for that sum to be considered deferred for the purposes of the payment of tax.

The Court's Considerations and Analysis

[93] The starting point for the court on this issue must be the provisions of the ITA as set out in section 9(1) (b).

[94] Section 9(1) (b) states as follows:

"Income accruing

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

⁵⁰ Para 86 of the submissions of the defendant filed on the 30/12/2020

(a) ...

(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;”

[95] It is therefore clear that the ITA makes unambiguous provision for the point at which income is considered to have accrued for the purposes of tax liability.

[96] The question therefore must be, is it open to the Claimant to say to the Defendant, even if we have reflected in our financial statements that we have credited the sums earned from our hire purchase agreements, those sums have not been received and as such our tax liability is not on the statements that were produced but can only attach when we in fact are in receipt of those funds? The Defendant says a resounding no.

[97] Indeed at first blush when this court considers the argument of the Claimant, it seems quite clear that it cannot at all be the intention of any revenue department to tax a tax- payer on money that they have not received. In this regard, the finding of Lord Reid in the case of **B.S.C. Footwear Ltd v Ridgeway**⁵¹ that a “...tax payer cannot be required to pay tax on that profit until it actually accrues” makes perfect sense. However, having stated that, the context in which that finding was made is not one that can be applied across the board in all circumstances.

[98] Thus in the argument proffered by the Defendant to discredit the argument of the Claimant, the Defendant identified the clearly different provisions under the statutory regime in the United Kingdom that permits the adjustment of profit for the purposes of calculation of income tax⁵². This court is in agreement with the Defendant that these provisions are not present in the ITA. 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 recognized accounting principle, in the books of the tax-payer.

[99] In the case at bar, the Claimant has reflected in their financial statements that the money which they would receive under the hire purchase agreement is immediately recorded. In the evidence of the Claimant’s witness Mr. Miller, the Claimant “treats the full purchase price of the particular product as income in the year in which the hire purchase agreement is entered into. However, for purposes of income tax reporting the instalments is only treated as income in the year in which they are received.”⁵³

⁵¹ [1972] A.C. 544 at 552G

⁵² Income Tax (Trading and Other Income) Act 2005 section 25

⁵³ Affidavit of Jn Charl Miller dated 4/10/17 at para 17 TB Vol Tab 16 page 98

- [100] In this court's mind the ultimate reason for doing this is for the Claimant to present a "better picture"⁵⁴ of the operations of the Claimant to its shareholders. Indeed, in the persuasive authority of **Canderel Limited v Her Majesty the Queen**⁵⁵ the court by Lacobucci J determined that, "...well-accepted business principles will have their roots in the methodology of financial accounting, which, as was expressed in **Symes**, is motivated by factors fundamentally different from taxation. Moreover, financial accounting is usually concerned with providing a comparative picture of profit from year to year, and therefore strives for methodological consistency for the benefit of the audience for whom the financial statements are prepared: shareholders, investors, lenders, regulators, etc. Tax computation, on the other hand, is solely concerned with achieving an accurate picture of income for each individual taxation year for the benefit of the taxpayer and the tax collector. Depending on the taxpayer's commercial activity during a particular year, the methodology used to calculate profit for tax purposes may be substantially different from that employed in the previous year, which in turn may be different from that which was employed the year before. Therefore, while financial accounting may, as a matter of fact, constitute an accurate determinant of profit for some purposes, its application to the legal question of profit is inherently limited..."
- [101] In fact that court in the case cited above clearly 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."⁵⁶ (My emphasis added)
- [102] In this case, the legal rule that governs the present circumstances is the statutory provision and this is what "forms [the] very foundation"⁵⁷ of the legal determination of profit in this jurisdiction. Barbados is therefore different in this regard, it is there that the Income Tax Appeal Board in the Courts (Barbados) Case⁵⁸ were able to make a determination that the findings of the Commissioner of Inland Revenue were wrong when she:
- "(i) Decided that the yearly amounts received by Courts (Barbados) Limited from Hire Purchase transactions or contracts are required to be recognised as revenue in the accounts as from the dates the transactions were entered into, which dates she regarded – wrongly – as dates of sales;
- (ii) Failed to treat the amounts as deferred profits not liable to corporation tax until it could be concluded that Courts (Barbados) Limited had derived the benefits of the profits" as the Barbados

⁵⁴ **B.S.C. Footwear** case op cit per Lord Reid at page 555

⁵⁵ 1998 SCJ No 13

⁵⁶ Ibid per Lacobucci J at para 35

⁵⁷ Ibid per Lacobucci J at para 33

⁵⁸ Op Cit footnote 12

Income Tax act was silent on the definition of profit. In that regard, the Tribunal was entitled to find that “the method used for the appellants did not offend either the relevant statutory law or the relevant accounting principles or practices and since it was consistently used over those many years then in the absence of good and sufficient reason to do so, it ought not – of necessity – to be changed for another method.”⁵⁹

[103] This court is satisfied that the case at bar however is fundamentally different and this court accepts the submissions of the Defendant when he stated that “the non-statutory principles which the Claimant seeks to advance must take a subordinate position to the express provisions of the ITA of this jurisdiction.”⁶⁰

[104] This court is therefore satisfied, that unlike what the court found in the case of **B.S.C. Footwear**⁶¹ that the appellants method that was under scrutiny was “although liable to abuse ...it [could not] be said to be in conflict with any rule of law”, the manner in which the Claimant purported to calculate their liability was in fact in direct conflict with the ITA.

[105] At the highest⁶², 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.

Issue #5 - Whether the defendant was empowered to take enforcement action or to take any steps to recover the taxes in dispute pursuant to the ITA

Issue #6 - Whether the defendant is empowered to issue notices pursuant to section 120 of the ITA to any commercial bank to pay to the Defendant monies held by such banks to the credit of the claimant in any account held by the claimant with such banks; and

Issue #7 - Whether the notices in writing dated the 20th December 2018 issued to the banks were unlawful and outside the scope of the statutory powers conferred on the defendant under the ITA

⁵⁹ Courts (Barbados) Op cit at page 79

⁶⁰ Paragraph 100 of the submissions of the defendant filed on the 30/12/2020

⁶¹ Op cit at footnote 38

⁶² Affidavit of Brian Glasgow 4/10/17 TB Vol 1 Tab31 page 177

- [107] In considering the above three issues, the court will deal with them together as they all speak to the powers of the Defendant upon an assessment having been given and non-payment by the taxpayer.
- [108] The determination of this issue is completely linked in this court's mind to the determination that this court has already given on the efficacy of the decision of the AC. The AC having dealt with the appeal appropriately in this court's mind, the question that must then follow is on what basis is the Defendant entitled to enforce orders given on an assessment.

The Claimant's Submissions

- [109] In this regard, the Claimant in analyzing the provisions of section 120 of ITA which sets the parameters for the actions of the Defendant to recover tax due, state categorically that the manner in which the Defendant sought to recover taxes from the Claimant in December 2019 was clearly an abuse of his powers.
- [110] In fact the Claimant in their submissions, have ascribed the reason for the zealous actions of the Defendant as being solely based on his intention to ensure, that the sums collected from the Claimant, would have been part and parcel of the sums utilized for the purpose of the calculation of a year- end bonus.
- [111] The Claimant therefore submitted that the Defendant acted in breach of the provisions of section 120 of the ITA in failing to properly apply the same and the timelines contained therein. Additionally, the Defendant's motives for having acted ultra vires the ITA were improper and as such his purported demand for payment was in flagrant disregard of the rule of law.

The Defendant's Submissions

- [112] The contention of the Defendant was simply that once the assessment had been made by him, the obligation of the Claimant to pay became immediately operative. This obligation to pay had therefore not been suspended by the filing of the appeal and it was wholly within the discretion of the Defendant to determine whether he should undertake enforcement action for payment⁶³. Having taken the decision, in his discretion not to pursue payment while the appeal was pending, it was therefore also in his discretion once he was in receipt of the decision of the AC to resume his recovery efforts to obtain the payment of taxes from the Claimant.

⁶³ Section 107 ITA

- [113] Having decided to do so, the Defendant further stated that section 120 of ITA empowered him to take such enforcement action as he deemed necessary and as such, he was entitled to issue the letters to the commercial banks to have the debt of the Claimant settled.
- [114] In that correspondence, having referred to the provisions of section 120, the Defendant submitted that the banks were given the requisite fifteen day period as provided for by the statute to pay any sums due to the Claimant. The Defendant therefore defended the same day/one day pay period stated in the correspondence as being of no consequence and that in any event, regardless of what was stated in the letter, the banks would have been at liberty to pay at any time within the fifteen-day statutory period.
- [115] The Defendant therefore made it clear that regardless of what was stated in the letters, the statute was clear and the action of the Defendant in this regard could not amount to an abuse warranting the setting aside of the notices.

Court's Considerations and Analysis

- [116] The starting point for a determination of these issues must be an assessment of the provisions in the ITA upon which the Defendant relied in his dealings with the Claimant.
- [117] The relevant sections are 107 and 120.

Section 107

Payment of tax not suspended by objection or appeal

The obligation to pay-

- (a) any tax chargeable under an assessment;
- (b) any penalty imposed in an assessment for failure to lodge a return or for failure to lodge a correct return; or
- (c) any interest imposed for late payment of any assessed tax,

shall not be suspended by reason of any notice of objection or appeal having been given against an assessment, and the tax, penalty or interest charged may be recovered as if no such objection or appeal had been given, or the Comptroller **may in his discretion** and subject to such terms and conditions as he deems fit to impose, suspend recovery pending determination of the objection or appeal. (My emphasis)

Section 120

Recovery of tax from person holding money for another

- (1) For the purposes of recovery of any tax due and payable by any person, the Comptroller may, by notice in writing, declare any other person-
 - (a) from whom any money is due or may become due to the first mentioned person;

(b) who holds, or may subsequently hold, money for or on account of the first mentioned person;

(c) who holds money on account of some other person for payment to the first mentioned person; or

(d) who has authority from some other person to pay money to the first mentioned person, to be the agent of that person and to pay to the Comptroller **within fifteen days of the date of service of the notice**, or, if on such date no money is due or held to which this subsection applies, within fifteen days of the date on which money becomes due or is held in any of the circumstances referred to in this subsection, the amount specified in the notice or, if the money due or held is less than the amount specified, the whole amount of the money due or held.

(2) The payment of any money to the Comptroller by any person under subsection (1) shall, to the extent of such payment, constitute the discharge of the original liability of that person to the person from whom the tax was due and payable to the Comptroller.

(3) Where any person declared to be an agent under subsection (1), fails to make any payment within the time specified in a notice under that subsection, the provisions of this Act shall apply as if such amount were tax due and payable by the person declared to be agent on the date by which he was required to make such payment to the Comptroller.(my emphasis)

[118] It is therefore immediately clear, that similar to the Rules of Court, an appeal does not amount to a suspension of the obligation to pay the tax that has been assessed pursuant to section 107. In fact, section 107 clearly states that "...the tax, penalty or interest may be recovered **as if no such objection or appeal had been given...**"⁶⁴

[119] Therefore even if the court had determined that the decision of the AC offended section 105 and could not stand, this court accepts that the Defendant had still retained a right to either suspend the recovery under the assessment or to proceed "...if he deem[ed] fit"⁶⁵. To this court's mind the Defendant was therefore entitled, regardless of the issues that the Claimant may have raised with the AC and their concerns surrounding the decision that emanated from that tribunal, to proceed to take steps to enable recovery of those sums that were due and payable under his assessment.

[120] In this court's mind that was therefore the first stage of the process for the Defendant. Once he was satisfied that the monies were due and owing, then it is clear, that he was entitled to take the requisite action to enforce the same.

[121] It is at this stage that the powers under section 120 would become applicable.

⁶⁴ Section 107 ITA

⁶⁵ Section 107 ITA

- [122] The provisions of section 120 of the ITA make it clear that the Defendant is given a wide ambit of powers to ensure that the tax- payer is not allowed to escape their duty to pay the State.
- [123] The powers of the Defendant include the power to give notice in writing to anyone who holds money on an account for the tax- payer, who is declared an agent and to pay the sum demanded **within fifteen days of the service of such notice.**
- [124] In the case at bar, to determine whether the Defendant went outside the provisions of the ITA in this regard the letters that were sent to the commercial banks as “agent” for the Claimant need to be considered.
- [125] By letters from the Defendant dated December 20, 2018 addressed to CIBC First Caribbean International Bank and RBTT Bank Caribbean Ltd, the Defendant wrote to the referenced commercial banks requiring them to:
- “...pay the Accountant General on account of the above-named tax debtor’s liability under the Income Tax Act,*
- (1) within fifteen days of the date of service of this notice, the monies otherwise and immediately payable to the tax debtor which you are liable to pay*
- ...
- An amount up to and not exceeding \$13,556,007.30 by the 20th December, 2018...”⁶⁶*
- [Emphasis Added]*
- [126] By letters from the Defendant dated December 20, 2018 addressed to Bank of Nova Scotia and Bank of St. Vincent and the Grenadines the Defendant wrote to the referenced commercial banks requiring them to:
- “... pay the Accountant General an account of the above-named tax debtor’s liability under the Income Tax Act,*
- (1) within fifteen days of the date of service of this notice, the monies otherwise and immediately payable to the tax debtor which you are liable to pay*
- ...
- An amount up to and not exceeding \$13,556,007.30 by the 21st December, 2018...”⁶⁷*
- [Emphasis Added]”*
- [127] There is no doubt in this court’s mind that the ITA conferred on the Defendant “...broad and extensive powers in relation to the collection and recovery of outstanding taxes.” It is of course that “such provisions empower the [defendant] to exercise coercive powers and enforcement action in tax collection without having to go through the procedural steps required by the ordinary litigant in

⁶⁶ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked “J” (found at page 121 and 123 of Trial Bundle 5)

⁶⁷ See (Third) Affidavit of Jn Charl Miller filed on January 3, 2019, the exhibit marked “K” (found at page 125 of Trial Bundle 5)

obtaining a court order as condition precedent to enforcement action.”⁶⁸ So even though this power is well established the same has to be enforced reasonably and not contrary to the provisions of the statute.

- [128] When this court considers the correspondence that was sent under the pen of the Defendant it was pellucid that he sought to rely on and invoke the provisions of section 120 of the ITA by his evident reference to having declared the banks the agent of the Claimant pursuant to the section 120(1). However, the major complaint of the Claimant is that the Defendant having done so, then went on to purportedly instruct that such payment was to be made on the same day of the correspondence or the day after, in other words in a period shorter than the statutory maximum of fifteen days. Having done so, the Claimant alleges that the Defendant acted outside of his ambit and the demands were unlawful. The only defence that this court can discern that the Defendant relied on was that the letters having clearly invoked the appropriate statutory provision, that the statement of the date for payment was inadvertent and in any event since the words of the provision were within fifteen days – any day between one and fifteen would suffice for the notice to be effective.
- [129] When this court considers this argument of the Defendant, the court finds that the same is not completely without merit.
- [130] Thus even though the Claimant made no specific claim for judicial review, the Claimant has sought declaratory relief in relation to the actions of the Defendant in this regard and saying so, this court must consider whether the actions of the Defendant amounted to an abuse of the statutory powers that reside with the Defendant.
- [131] In the case of **R v Secretary of State for the Environment ex p Nottinghamshire County Council**⁶⁹ in which the issue of what constituted an abuse of power was considered, the court stated that “...power can be abused in a number of ways: by mistake of law in misconstruing the limits imposed by statute(or by common law in case of common law power) upon the scope of the power, by procedural irregularity, by unreasonableness in the **Wednesbury** sense or by bad faith or an improper motive in its exercise.”
- [132] From the tenor of the submissions it appears to the court that the Claimant is relying on ascribing an improper motive to the Defendant of seeking to include the quantum of outstanding taxes that would have been owed by the Claimant in the quantification of the bonus that would have been due to the department and its officers at the end of the fiscal year 2018.

⁶⁸ Income Tax Law in the Commonwealth Caribbean Supra. at footnote 14

⁶⁹ [1986]AC 240

- [133] It is of course not lost on the court that the Defendant sought to recover from each entity the entire sum due for taxes based on the assessment, however this court does not accept that this in effect meant that the Defendant was seeking to recover in excess of \$52 million dollars as averred by the Claimant, but rather that as in all garnishee proceedings the entire sum is claimed and paid proportionately as the entities are able to do. However, when this court considers the actions of the Defendant holistically, this court finds on a balance of probabilities that the actions of the Defendant was motivated by the desire to have the amount claimed factored into his yearend target amount. This is buttressed by the evidence of the Defendant himself when in cross examination when asked whether his target would have been at risk for 2018 if he had not collected these taxes or at least demanded them, his response was that “the amount would[have] factor[ed] into the collection for the year...”
- [134] This alone satisfies the court that that was the main motive why the Defendant acted in the manner that he did. The Defendant knowing that the banks as agent for the Claimant had a fifteen day window to pay the sums took the conscious decision to insist on a same day/one day grace period, again admitting in cross examination that the fifteen day period would have in fact taken the sum outside of the fiscal period of 2018.
- [135] It is not enough that the decision maker has the power to act, it must also be that in wielding that power, especially a coercive power, that it must be done fairly in all the circumstances.
- [136] This court finds that although there is no doubt that the Defendant had the power to issue the demand, the way he did so was wholly unacceptable and amounted to an abuse of the power imbued in him under the ITA. This court is therefore in agreement with the Claimants in this regard and I grant the declaration sought that the notices issued to the banks on 20th December 2018 are unlawful and outside the statutory powers of the Defendant under the ITA.

The order of the court is therefore as follows:

1. A declaration that the order dated 29 November 2018 made by the tribunal of Appeal Commissioners appointed pursuant to section 103 of the Income Tax Act Chapter 435 of the Laws of Saint Vincent and the Grenadines in Appeal Number MF/541A between the Claimant and the Defendant was not in accordance with or pursuant to section 105 of the Income Tax Act, is refused.
2. A declaration that the absence of an order by the Appeal Commissioners upholding the assessment challenged by the Claimant in the aforementioned proceedings means that the taxes in dispute between the Claimant and the Defendant did not become due and payable as a matter of law is refused.

3. A declaration that the Defendant is not empowered to take enforcement action or to take any steps to recover the taxes in dispute between the Claimant and the Defendant pursuant to any provision of the Income Tax Act is refused.
4. A declaration that the Defendant is not empowered to issue notices in writing pursuant to section 120 of the Income Tax Act to any commercial bank to pay over to the Defendant monies held by such banks to the credit of the Claimant in any account held by the Claimant with such banks is refused.
5. A declaration that the notices in writing dated 20 December 2018 issued to the Bank of Nova Scotia, CIBC First Caribbean International Bank, Bank of Saint Vincent and the Grenadines and RBTT Bank Caribbean Ltd. requiring immediate payment of monies standing to the credit of the accounts of the Claimant were unlawful and out with the statutory powers of the Defendant in the Income Tax Act, is granted.
6. An order to restrain the Defendant from taking enforcement action to recover the taxes in dispute whether by way of notices pursuant to section 120 of the Income Tax Act or any other provision thereof is refused.
7. That the decision of the Appeal Commissioners of 29 November 2018 is confirmed.
8. That the assessment raised by the Comptroller of Inland Revenue which was maintained in his letter of the 29 March 2017 to the Claimant is confirmed.
9. That there is to be no repayment of the sum of \$1,000,000.00 paid to the Comptroller of Inland Revenue on 7 December 2015 and the sum of \$2,000,000.00 paid to the Comptroller of Inland Revenue on 30 December 2015 pursuant to the exercise of his statutory powers under section 107 of the Income Tax Act.
10. Taking into consideration that the matters were consolidated this court has dealt with the issue of costs as if it were one matter, therefore prescribed costs to the Defendant on an unvalued claim pursuant to Part 65.5 CPR 2000 less 5% for the partial success of the Claimant is to be paid to the Defendant.

This court would like to therefore take the opportunity to thank both counsels for their immeasurable assistance to the court on this matter.

Nicola Byer
HIGH COURT JUDGE
By the Court

Registrar