

THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES



IN THE HIGH COURT OF JUSTICE

SVGHCV2017/0056

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW OF THE DECISION OF THE
COMPTROLLER OF INLAND REVENUE UNDER THE SAINT VINCENT AND THE GRENADINES VAT
ACT CAP 445 OF THE REVISED LAWS OF SAINT VINCENT AND THE GRENADINES 2009 TO
REFUSE TO HONOUR THE VAT EXEMPTED STATUS OF A EUROPEAN UNION CONTRACT
BETWEEN THE GOVERNMENT OF SVG AND THE EUROPEAN UNION AND HUTCHINSON
CONSTRUCTION COMPANY LIMITED

BETWEEN:

HUTCHINSON CONSTRUCTION COMPANY LIMITED

Through its CEO Richard Hutchinson

APPLICANT

and

COMPTROLLER OF INLAND REVENUE

1st RESPONDENT

and

THE ATTORNEY GENERAL

2nd RESPONDENT

Appearances:

Ms. Vynette Frederick for the applicant.

Mrs. Cerepha Harper-Joseph and Ms. Kezi Francis for the respondents.

2017: Sept. 27
Nov. 8

DECISION

BACKGROUND

- [1] **Henry, J.:** In 2010 Hutchinson Construction Co. Ltd. ('Hutchinson') entered into a contract¹ with the Government of Saint Vincent and the Grenadines ('the State') for the construction of certain buildings. The project was part funded under the European Development Fund (EDF). Hutchinson alleged that the contract provided exemptions from the payment of the value added tax ('VAT'). It claimed that in violation of the contract the Comptroller of Inland Revenue ('Comptroller') failed to honour the terms of the contract and has consistently garnished and purportedly applied part of the contract payments towards VAT.
- [2] Hutchinson claimed that the Comptroller has refused to acknowledge the contract. It seeks an order for leave to apply for judicial review of the Comptroller's decision and related actions including the Comptroller's decisions to assess and garnish such monies; consequential orders quashing the Comptroller's decisions, mandating that he repay all such sums and an injunction to restrain the Comptroller from interfering with any further payments. The Honourable Attorney General was named as a co-respondent.
- [3] The Comptroller refuted that the contract is VAT exempted. He and the Honourable Attorney General resisted the application for leave to apply for judicial review. They contended that Hutchinson has failed to exhaust the other available avenues for redress and has failed to apply to the court promptly. For the reasons outlined below, Hutchinson's application for leave to seek judicial review is denied.

ISSUE

- [4] The issue is whether Hutchinson should be granted leave to apply for judicial review.

¹ Contract No. 3444/2010 dated 17th September 2010.

LAW AND ANALYSIS

Issue 1 – Should Hutchinson be granted leave to apply for judicial review?

- [5] The court is authorized to grant leave to any person, to apply for judicial review of administrative action, if it is satisfied that the applicant has established a good arguable ground having a realistic prospect of success, and if there is no alternative remedy or discretionary bar.²
- [6] Hutchinson's complaint attacks the Comptroller's decision to withhold VAT from the contract sums payable under the contract. It argued that government contracts are binding on all government officers including the Comptroller. In this regard, it rehearsed article 4 of the contract which states in part:
- 'Contract price in words: Eight million, eight hundred and eight thousand, eight hundred and forty five EC Dollars and eighty cents (XCD8,808,845.80).
Or such other sum as may become payable under the provisions of the contract at the times and in the manner prescribed by the contract. **VAT shall be paid in compliance with the binding regulations, national law and international agreements concerning the execution of the program. VAT and other taxes shall not be paid on the funds originating from the EC funds.**' (bold added)
- [7] Hutchinson contended that the Comptroller acted outside the scope of his authority to unilaterally decide that the contract was subject to VAT, by deciding that 'there was an inconsistency or contradiction in the material terms of the contract between the government and the contractor' and the law. Hutchinson reasoned that the government is authorized to contract in terms which may be at variance with the national laws. It contended that in such a case the terms of the contract are paramount and any government officer acting contrary to such terms would be acting outside the scope of his authority.
- [8] It cited in support the case of **IRC v. National Employers**³ in which Lord Wilberforce opined:

² Civil Procedure Rules 2000 ('CPR'), rules 56.4 – 56.5; *Satnarine Sharma v Browne-Antoine* [2006] UKPC 75.

³ (1981) 2 WLR 722 at p. 729.

'... a taxpayer would not be excluded from seeking judicial review if he would show that the revenue ...had been guilty of some action which was an abuse of their powers or outside their powers altogether.'

- [9] The Comptroller and the Honourable Attorney General do not dispute that the Comptroller's decision is subject to judicial review in an appropriate case. They maintained that Hutchinson had other avenues of redress under the legislative regime of the VAT Act⁴. Hutchinson refuted this assertion. It alleged that it has pursued breach of contract action against the government in relation to the alleged late payments of invoices under the instant contract. However, it argued that the need to seek to judicially review the actions of the Comptroller arose independently of the purported breach of contract. It contended that there is no other available relief which would address the Comptroller's actions, the interpretation of the contract and whether they are VAT exempt.
- [10] Hutchinson indicated that the contract provides for disputes to be arbitrated prior to court proceedings being instituted. It alleged that since 2015 it has pursued unsuccessfully, every possible non-contentious approach to having the referenced issues resolved. It pointed out that the Comptroller is not a party to the contract and is only bound by the terms of the contract because he is a government officer. It reasoned that the contract's dispute resolution terms of contract do not apply in the circumstances. It maintained that the only appropriate recourse is judicial review.
- [11] The Comptroller and the Honourable Attorney General countered that in order to satisfy Hutchinson's outstanding VAT liability to the Inland Revenue Department, the Comptroller acted within the authority granted to him under section 120 of the Income Tax Act⁵, and garnished monies which were payable to Hutchinson through the Accountant General. He said that the tax debt accumulated as a result of audits and subsequent assessments conducted by the Inland Revenue Department for the tax periods 2008 to 2012 and 2012 to 2016.
- [12] The Comptroller, Mr. Kelvin Pompey explained that the Income Tax Act empowers him to recover in that manner, any tax due and payable by any person. He deposed that between 2012 and 2016, the Inland Revenue Department ('IRD') conducted VAT audits and assessments in respect of

⁴ Cap. 445 of the Revised Laws of Saint Vincent and the Grenadines 2009 Edition.

⁵ Cap. 435 of the Revised Laws of Saint Vincent and the Grenadines 2009 Edition.

Hutchinson's operations and issued letters⁶ to it regarding its VAT liability. Mr. Pompey testified further that the letters contained notification of Hutchinson's right to contest the assessments, within a statutory 30 day period, if aggrieved by the IRD's findings. He stated that Hutchinson lodged no such objection. Hutchinson did not deny this. I infer that Mr. Pompey was being truthful.

- [13] The Honourable Attorney General and the Comptroller submitted that the Income Tax Act⁷ and the Vat Act⁸ both provide a convenient and alternative right of redress to Hutchinson in connection with its complaints against the Comptroller. They argued that an applicant seeking leave to apply for judicial review must first exhaust all other adequate alternative remedies. They cited the judgments in **R (Bancourt) v Secretary of State for the Foreign Commonwealth Office**⁹ and **R v. Ministry of Agriculture, Fisheries and Food, ex p. Live Sheep Traders Ltd**¹⁰. They also indicated quite properly that CPR 56.3 (e) imposes a duty on the applicant to disclose all available forms of redress and to explain why such avenues were not pursued.

- [14] The Honourable Attorney General and the Comptroller have accurately outlined the applicable legal principles and relevant legal authorities on this point. Hutchinson did not dispute that the IRD notifications were sent and received. I therefore find that they were. Hutchinson has not acknowledged that the referenced statutory tax framework provides a comprehensive scheme for challenging unsatisfactory assessments or garnishment. Furthermore, it did not explain why that route was not explored and followed.

- [15] The court cannot ignore Hutchinson's failure to disclose this salient information. I note that the VAT Act and Income Tax Act provide a legislative procedural framework for challenging any assessment made by the IRD. I note that both Acts provide for a first appeal from the Comptroller's decision, to

⁶ Dated 19th October 2012 and 18th May 2016.

⁷ Section 101.

⁸ Section 94.

⁹ [2001] Q. B. 1076.

¹⁰ [1995] COD 106.

the Tax Appeal Commissioners and a final appeal to the High Court.¹¹ In either case, Hutchinson would be able to raise its concerns about the alleged illegality of the assessments and garnishment. Applying those details to the factual background in this matter, I harbour no doubt that Hutchinson would be able to obtain adequate redress if it pursues either option. I am satisfied that it did not utilize the legitimate and appropriate mechanisms provided by Parliament to obtain relief.

- [16] Moreover, Hutchinson's first opportunity to complain would have arisen in 2012 when it received the first letter. It has waited more than 5 years to seek to invoke the court's review discretion. The legal authorities¹² suggest that in the premises, this is an inordinate delay, and I so find. In view of the foregoing, and applying the referenced legal principles to the case at bar, it seems just in all the circumstances to dismiss Hutchinson's application for leave to apply for judicial review. Hutchinson's related application for certiorari, mandamus and injunction is accordingly dismissed.
- [17] Hutchinson made a number of additional submissions in support of its application. In this regard, it argued that the Comptroller acted outside the scope of his authority and made an error in law when he decided to interpret the contract, despite his observation that the contract contained a contradiction which was at variance with national law. It submitted further that the government waived its right to collect VAT and cannot go back and insist on its collection. It contended that no mistake arises in the contract between the parties and even if there is, such mistake is not operative because it is unilateral and exists only in the Comptroller's mind.
- [18] Hutchinson reasoned that there was no ambiguity in the terms of the contract. It asked the court to note that there are also repercussions for other companies who tender under EDF and who would be informed by how this matter proceeds. It submitted that if the government is found to be extracting VAT from contractors notwithstanding the fact that VAT is not contemplated in the contractor's rate pursuant to European Union (EU) Guidelines, this can compromise the ability of the government to successfully access EU funding under the EDF.

¹¹ Income Tax Act, sections 104 to 106; VAT Act, sections 93 to 95.

¹² Such as *Roland Browne v PSC* SLUHCVP2010/0023.

[19] The submissions summarized in the two previous paragraphs address substantive legal contentions which would have been open for determination if leave was granted to Hutchinson to proceed with judicial review. However, it is not necessary to determine those matters for present purposes.

[20] Suffice it to say that the court remains mindful of its discretion to entertain applications for the benefit of the wider public or a specific category of persons even though they are not joined as a party to proceedings. However, the instant case does not appear to be of the nature which would justify that approach. Like Hutchinson, any other contractor in a similar position would be entitled to pursue alternative remedies under the referenced legislation and ultimately appeal to the High Court if it becomes necessary.

ORDER

[21] It is accordingly ordered:

1. The application by Hutchinson Construction Co. Ltd. for leave to apply for judicial review is dismissed.
2. The application by Hutchinson Construction Co. Ltd. for an order of certiorari, mandamus and injunction is dismissed.
3. Each party to bear its or his own costs.

[22] I wish to thank counsel for their helpful submissions.

Esco L. Henry
HIGH COURT JUDGE



By the Court

Registrar