EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

COMMONWEALTH OF DOMINICA

DOMHCV2007/0420

BETWEEN:

Luke Honore	**Claimant**
and	
Comptroller of Inland Revenue	**Respondent**

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. Lennox Lawrence for Claimant
Mrs. Wynante Adrien Roberts, Solicitor General for the Respondent

JUDGMENT

[May 19th 2010]

[1] **COTTLE J:** The facts of this matter are not in dispute. H & T Agencies is a company registered under the Laws of Dominica. The claimant is a director of the company. The company defaulted in its obligations to file returns and submit remittances to the Government of Dominica in respect of sales tax. The company was audited and informed of its liability to pay the assessed sales tax. The company did not pay.

[2] Acting under section 67 (1) of the Sales Tax Act the comptroller declared the Royal Bank of Canada to be the agent of the claimant and required the bank to pay to the Inland Revenue the sales tax due out of the personal account of the claimant.

[3] Section 67 (1) of the Sales Tax (Amendment) Act 23 of 1996 provides as follows:

For the purpose 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 hold 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 die or held to which this subsection applies, within fifteen days of the date on which money become 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 help is less than the amount specified, the whole of the money die or held.

[4] At the time that the Comptroller issued his notice to the bank, there was no tax due and payable by the claimant in his personal capacity. However by virtue of Section 58 A (1) (b) of the Sales Tax (Amendment) Act:

Notwithstanding anything in other law-

b) Where there is default on the part of a company to pay the tax, the directors of the company at the time the company was required to pay are jointly and severally liable together with the company to pay the tax with interest or penalties.

The comptroller imputed personal liability to the claimant.

[5] The claimant argues that the action of the comptroller is inconsistent with the protection provided by the constitution of Dominica. He argues that section 58 (1) (b) of the act purports to create civil liability but cannot be extended to authorise the garnishing of his personal funds at the bank.

[6] As I understand the argument of the claimant it runs thus: garnishee proceedings are a judicial function as are all enforcement proceedings for enforcement of a civil liability. These are obligations of the judiciary and the exercise of judicial authority by the executive branch of government offends the principle of the separation of powers that underpins our constitutional democracy.

[7] Counsel for the claimant submits that separate legal proceedings must be instituted against the claimant and a judicial determination made of his liability to pay the tax before his funds can be garnished. He reminds the court that the claimant is a separate legal entity from his company.

[8] Counsel also cites the case of Norton v. Public Service Commission 1998 LRC 944. In that case the Privy Council struck down as ultra vires an attempt by the Public Service Commission to impose a fine without the existence a law giving power to impose a fine for breech of that law. The imposition of a fine represented an attempt to deprive the claimant of his property compulsorily and thus ran afoul of the fundamental rights provisions of the Mauritius Constitution.

[9] Similarly the claimant in the instant case says his property has been taken from him and thus contravenes section 6 (1) of the Dominica constitution which reads;

1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time, of adequate compensation.

[10] Norton's case is distinguished from the present case. There is no effort by the executive to impose a fine or other penalty on the claimant. Also the constitution of Dominica at section (6) (6) (a) (i) expressly preserves the deprivation of property in satisfaction of taxes in these terms:

Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention or subsection (1) of this section

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right-

(i) In satisfaction of any tax, rate or due;

Counsel for the claimant also cited the case of J. Astaphan & Co. (1970) Ltd vs. Controller Customs and Attorney General

[11] In that case, the Court of Appeal, in a judgment given by Sir Vincent Floissac C.J, struck down a provision of the customs legislation which permitted a customs officer to exact a 'further sum' from an importer in addition to the determined custom duty. The Court of Appeal considered that this violated the basic principle of separation of powers and infringed upon the importer's fundamental rights under Section 6 of the constitution. This was because the laws purported to give the customs officer the discretion to decide and exact an unspecified 'further sum' from an importer as a penalty.

[12] This is not the position in the instant case. The amount of the tax which is due has already been lawfully determined. The comptroller does not attempt to add any arbitrary surcharge to the tax due. He merely acts to recover the tax from the claimant.

[13] The claimant also contends that because section 49 (2) of the Sales Tax Act permits the comptroller to sue for and recover any tax unpaid in any court of competent jurisdiction, this compels the comptroller to use this method to

recover all unpaid taxes. In short the comptroller is compelled to institute legal proceedings in order to recover due but unpaid tax.

> 49. (1) Tax, when it becomes due and payable, shall be a debt due to the Government and payable to the Comptroller.
>
> (2) Any tax unpaid may be sued for and recovered by the Comptroller in any court of competent jurisdiction

[14] I have given careful consideration to the submissions of the claimant. I cannot agree with them. Section 49 (2) is not in mandatory terms. It does not require the comptroller to sue to recover unpaid tax. It permits him to do so if he wishes. A plain reading of section 38 renders the claimant, as a director of the company owing the sales tax, jointly and severally liable to pay the tax owed by the company.

[15] The canons of constitutional construction require the court to presume in favor of the constitutionality of a statute unless its violation of the constitution is clear, complete and unmistakable. This principle has been repeated and applied in many cases a few of which have been cited by counsel for the defendants. These include

Attorney General of Trinidad and Tobago vs. Mootoo 28 WIR 304, Attorney General v Antigua Times [1975] 3ALL ER 8 King v Attorney General 44WIR 52. I do not find any such violation in this case.

[16] The power conferred on the comptroller by section.67 of the Sales Tax Act is for the purpose of recovery of tax due and unpaid. It is not akin to the imposition of a fine or the exacting of a penalty for breach of a law, I do not consider that it abrogates the principle of separation of powers and it does not in my view violate the fundamental rights of the claimant as enshrined in the constitution.

[17] I therefore decline to grant the claimant the orders he seeks in his claim form. The claim stands dismissed. Under CPR 2000 part 53:13 (6) I make no order as to costs.

EASTERN CARIBBEAN SUPREME COURT
FIAT JUSTITIA
HIGH COURT OF JUSTICE DOMINICA

Brian Cottle
High Court Judge