

IN THE SUPREME COURT OF BELIZE, A.D. 2008

CLAIM NO. 464 OF 2008

BETWEEN:

BELIZE TELEMEDIA LIMITED	First Claimant
BTL DIGICELL LIMITED	Second Claimant
BUSINESS ENTERPRISES SYSTEMS LIMITED	Third Claimant/Respondents

AND

THE ATTORNEY GENERAL OF BELIZE (on behalf of the Government of Belize)	First Defendant
THE MAGISTRATE	Second Defendant/Applicants

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Ms. Lois Young SC for the applicants/defendants.
Mr. Eamon Courtenay SC for the respondents/claimants.

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DECISION

This decision arises out of proceedings commenced by the claimants on 11th July 2008 by way of a fixed date claim. On 26 September 2008, the claimants filed an amended claim form. In their amended claim form they are seeking four declarations from this Court: **first**, alleging failure on the part of the Commissioner of Income Tax to comply with the provisions of the Income and Business Tax Act - Cap. 55, in issuing certain **assessments** in respect of the claimants' business tax and that these are

consequently unlawful and void; **secondly**, that the Commissioner of Income Tax failed to comply with the provisions of the Income and Business Tax Act in filing certain **judgment summonses** in respect of business tax due from the claimants, which are consequently unlawful and void; **thirdly**, that the Commissioner of Income Tax acted irrationally and/or with improper motive in filing certain judgment summons in respect of business tax due from the claimants which are as a consequence unlawful and void; and **fourthly**, a declaration that the Magistrate of the Belize District acted unlawfully and unconstitutionally in issuing orders dated 24th June 2008, 14th July 2008 and 29th July 2008, relating to the payment of taxes due by the claimants.

2. I need not, for the purposes of this decision, set out the details of the assessment or judgment summonses the claimants seek to impugn in this case.
3. There are three claimants in this case: Belize Telemedia Ltd. and two of its affiliated companies, namely BTL Digicell Ltd. and Business Enterprises Systems Ltd. I shall in this decision refer to them collectively as the ‘taxpayer’.
4. The taxpayer’s claim was supported by two affidavits sworn to by Mr. Ediberto Tesecum, a member of its Board of Directors and of the Executive Committee of the first claimant.
5. On the 6th October 2008 at the first hearing of the claim, at the case-management stage, Ms. Lois Young SC for the defendants informed the Court that she had preliminary objections to the claims. She was then granted leave to file a written notice of the objections not later than the 10th of October. On the 7th October a notice was duly filed on behalf of the Attorney General, the first defendant in these proceedings.

6. The application in the notice was made pursuant to Rule 26.1(2)(e) and (j) of the Supreme Court (Civil Procedure) Rules 2005 and the inherent jurisdiction of the Court. The essence of the application was for a striking out of the taxpayer's case, and it was in the following terms:

“(1) An order striking out the claims by the Claimants for Declarations of unlawfulness against the Commissioner of Income Tax and Magistrate Ed Usher of the Belize Judicial District.

(2) Further or other relief.

(3) Costs.”

7. The grounds of the application were stated as follows:

“(1) An alternative remedy exists by virtue of sections 42 and 43 of the Income and Business Tax Act for resolution of the Claimants allegations including that:

(a) the Commissioner of Income Tax failed to provide sufficient particulars of the assessments raised for business tax for February, March, April, May, June, July and August of 2008; and

(b) failed to review the assessments when given a notice to review.

(2) *It is an abuse of process for the Claimants to seek redress before this Court in respect of their allegations that the Commissioner of Income Tax failed to issue a 30-day demand notice for Business Tax assessed for February, March, April, May, June and July 2008 and that the CIT's assessments did not comply with the Act, in light of the fact that these allegations are included in the grounds of appeal for three appeals already lodged in the Supreme Court by the Claimants in respect of decisions of Magistrate Ed Usher on the 24th June 2008, 14th July 2008 and 29th July 2008.”*

8. The application to strike out the claims was supported by two affidavits: i) by Mr. Kent Clare an officer in the Income and Business Tax Department; and ii) by Mr. Eric Eusey, the Commissioner of Income Tax.

9. I must before proceeding any further acknowledge here the sense of professionalism and candour exhibited by Mr. Eamon Courtenay SC, the learned attorney for the taxpayer. This is as it should be in keeping with his status as a senior counsel and an officer of this Court. It was soon established at the start of the hearing of this matter that all the three orders of the Magistrate the taxpayer had sought to impugn in these proceedings were in fact the subject of an appeal to this Court. This fact was stated in para. 61 of Mr. Tesucum's affidavit which was elaborated in para. 26 of his second affidavit in which he exhibited **ET 23, 25 and 26**, being Notices of Appeal against the Magistrate's order. Consequently, Mr. Courtenay SC informed the Court that in these proceedings the Magistrate's orders would not be pursued. Mr. Courtenay's concession

was, therefore, properly made: otherwise, it would have, in my view, smack of an abuse of process to attack collaterally by way of a declaration from the Court, the orders of the revenue magistrate against which the taxpayer had in other proceedings in this Court, formally lodged an appeal.

10. The backdrop to the taxpayer's claim in these proceedings is the attempt by the revenue authorities, in particular the Commissioner of Income Tax, to get it to pay its business tax. The taxpayer has taken serious issues with the **assessments** done for business tax purposes by the Commissioner of Income Tax, of the taxpayer; and the **judgment summonses** filed by the Commissioner of Income Tax against the taxpayer in respect of business tax due from it. The taxpayer avers that the Commissioner of Income Tax in so doing failed to comply with the provisions of the Income and Business Tax Act. The taxpayer avers as well that in filing the judgment summonses against it in respect of business tax due from it, the Commissioner of Income Tax acted irrationally and/or with improper motive.
11. Against the taxpayer's claims, Ms. Young SC on behalf of the defendant has taken objections. The grounds of the objections are set out in paragraph 7 of this decision.
12. In my view, for a proper determination of the objections regard must be had to the statutory scheme provided in the Income and Business Tax Act for the imposition, assessment and collection of business tax and the resolution of any dispute resulting therefrom between a taxpayer and the revenue authorities.

13. Chapter 55 itself is a composite Act dealing with both income and business taxes, as its name signifies. Part III of the Act is devoted to business tax.
14. **Section 106** provides for the imposition of business tax and so far as is material provides as follows:

“106.-(1) Subject to this Part, there shall be levied upon and paid by every individual, self-employed person, professional, firm, partnership or company (whether corporate or unincorporate) a tax to be known as “business tax” at the rates specified in section 107 of this Act, on all receipts as defined in this Part, whether received in Belize or elsewhere.”

15. **Section 108** provides for exemption from business tax. I do not understand and it has not been advanced in these proceedings, that the taxpayer falls into any of the exempted categories provided for in this section.
16. **Section 109** imposes a duty on taxpayers to make returns and pay their taxes, and so far as material provides:

“109.-(1) Every person or entity who is liable to be taxed under this Part shall file a return of total receipts by the 15th day following the end of every month, or at such other times as may be specified, in a form prescribed by the Commissioner and accompanied by payment of the estimated tax due for that period.”

Subsection (2) provides as follows:

“(2) Whoever fails to file a return required under subsection (1) of this section commits an offence and shall be liable on summary conviction to a fine not exceeding ten thousand dollars and in default of payment of fine, to imprisonment for a term not exceeding two years.”

17. **Subsection (2) of section 110** which provides for the Commissioner of Income Tax to make an assessment of tax payable provides as follows:

“(2) Where a return has not been delivered, the Commissioner shall use his best judgment to determine the proper amount of tax due and make an assessment accordingly.”

18. In my view, for the purposes of determining the objections raised on behalf of the Attorney General by Ms. Young SC, the provisions of subsection (5) of section 111 are pertinent and these provide as follows:

“5. The provisions relating to assessments, review, objections, appeals, collections and the recovery of income tax contained in Part I of this Act shall apply mutatis mutandis to assessments, review, objections, appeal, collections and the recovery of tax under this Part.”

19. Therefore, the provisions of sections 38 to 45 of the Act on assessment by the Commissioner of Income Tax apply to any assessment, review, objections and appeals by a taxpayer, who disputes his liability or the assessment in fact made of tax due from him.

20. In my view, sections 42 and 43 provide a code, or a road map for the resolution of any dispute or disagreement a taxpayer may have concerning the assessment of his tax liability by the Commissioner of Income Tax. More on this later.

Contention between the parties

21. Clearly, the contention between the parties is the assessment of the taxpayer by the Commissioner of Income Tax of the taxpayer, to pay business tax and the enforcement or attempts at enforcement of that liability, if any, of the taxpayer.
22. However, in all of this, in my view, is the inarticulate and suppressed premise, (so far), in the colloquial of the 1,000 lbs. gorilla or the elephant in the room: the so-called **Accommodation Agreement** allegedly between the taxpayer (or its principal) and the Government of Belize. It is this Accommodation Agreement on which the taxpayer relies to repel or abate or avoid any assessment of its liability or enforcement of that liability to pay business tax.
23. On behalf of the taxpayer, its learned counsel, Mr. Courtenay SC, went to great lengths to assure the Court that the taxpayer is not disputing its liability to pay tax; but rather, it is strenuously insisting that according to that Accommodation Agreement, the revenue authorities, in particular, the Commissioner of Income Tax, have got it all wrong. The taxpayer insists that it does not owe any tax; if anything, it is the other way round. It insists that it is in the black, in amounts sufficient to more than offset any tax liability it might owe on account of that Accommodation Agreement; see in particular, paragraphs 6, 7, 30 and 31 of Mr. Ediberto Tesucum's first affidavit and **Exhibit ET 6**. The latter is a letter dated 9th May, 2008, from the Finance and Accounting Manager of the taxpayer to the Commissioner of Income Tax disputing his estimate or assessment of tax due from the taxpayer and how the Accommodation Agreement should offset its tax liability. This is the bone of contention between the parties and is at the heart of the taxpayer's claim.
24. I referred to the Accommodation Agreement as the gorilla or the elephant in the room, because, it is undoubted that, at least from the taxpayer's

standpoint, it forms the bedrock of its disavowal of any liability to pay tax. However, this Agreement has not been put in evidence and it is not, evidently, a public document. In fact, Mr. Kent Clare in his affidavit on behalf of the Attorney General, states at para. 26 that the first time he heard of the Accommodation Agreement was on 15th February 2008 when the taxpayer filed a summary of business tax for January 2008, and claimed not to owe any tax because of that agreement.

25. However, the status effect and validity or otherwise of this Agreement is not in issue in these proceedings. I did however remarked to both sides during the hearing of the instant application that they were shadow-boxing around it. I do not know what, if anything, may turn on it. I will therefore say no more on it.
26. What the taxpayer seeks in the proceedings before me are several declarations to impugn the assessment of its liability to pay business tax and the attempts taken by the Commissioner of Income Tax to enforce that liability.
27. Against the taxpayer's claims, Ms. Young SC on behalf of the defendants has taken objections. I have set these out and the grounds at paras. 6 and 7 above of this decision. In the main, she seeks an order from this Court striking out the taxpayer's claim because an **alternative remedy** exists and is available to the taxpayer under the Income and Business Tax Act against the actions of the Commissioner of Income Tax.

Is there an Alternative Remedy Available to the Taxpayer other than recourse to the Court?

28. The taxpayer, as I have said, is seeking several declarations against the Commissioner of Income Tax, which I had set out at the beginning of this decision.

29. However, having listened carefully to Ms. Young SC for the defendants/applicants and read the affidavits filed in support of the application and having listened equally carefully to Mr. Courtenay SC for the taxpayer and carefully read the affidavits in support of its claims and after a careful perusal of the provisions of the Income and Business Tax Act, I am satisfied and convinced that, in the circumstances of this case, there **is** an alternative remedy available to the taxpayer to challenge and dispute the Commissioner of Income Tax's assessment of its liability to pay tax, and that the taxpayer has not fully availed itself of this remedy or exhausted it.
30. The taxpayer cannot therefore, in the circumstances, short-circuit, or bypass the remedial appellate processes and forums stipulated in the Act and come directly to this Court to launch a collateral attack on the Commissioner of Income Tax's assessment of its tax liability and enforcement of the same. I find that the scheme and intendment of the Act are such that the Courts are contemplated and provided to be last recourse for a taxpayer who is dissatisfied with an assessment of his tax liability by the Commissioner of Income Tax.
31. I am convinced, after a very careful study of the affidavits and exhibits in this case, that the taxpayer is not so much disputing the Commissioner of Income Tax's **assessment** but rather, is disputing **its liability** to pay business tax, because of its reliance on the undisclosed but eponymously-named "Accommodation Agreement".
32. Assessment it should be remembered, is an evaluation or estimation exercise. The 10th edition of the Concise Oxford Dictionary, being the foremost authority on current English (1999) states "*assess ... to set the value of a **tax** fine etc for (person or property) at a specified level.*"
33. From the scheme of the Act, the assessment of tax payable is the responsibility and duty of the Commissioner of Income Tax. It is expected

that the Commissioner of Income Tax will ordinarily make his assessment on return which the taxpayer would file. The Commissioner may accept the taxpayer's return and make an assessment on it; or he may refuse to accept the return, in which case, he will determine to the best of his judgment, the amount of tax payable and assess accordingly. But where no return has been delivered by the taxpayer, the Commissioner of Income Tax shall use his best judgment to determine the proper amount of tax due and make an assessment accordingly: section 110(1) and (2).

34. Section 42(1) of the Act provides that the Commissioner of Income Tax shall, after assessment, serve on the assessed taxpayer, a notice stating the amount of his chargeable income and the amount of the tax payable by him. The section also provides that the taxpayer shall as well be informed of his rights under subsections (2) and (4). That is, of his right to seek a review by the Commissioner of Income Tax of his assessment and the right to appeal by way of notice of objection to the Income Tax Appeal Board set up by subsection (3) of section 3 of the Act, if not satisfied with the result of the Commissioner of Income Tax's review.
35. I should however, point out here that a perusal of the assessment notices sent to the taxpayer in this case did not anywhere inform him of his rights under subsections (2) and (4) as section 41(1) itself requires: see **Exhibits ET 4, 16 and 20**, being assessment notices sent to the taxpayer. I am however satisfied that by the operation of section 44 of the Act, this omission did not affect or render the assessment notices void or voidable. However, best practice and conformity with the Act would require that assessment notices contain a reference to a taxpayer's right to apply to have the assessment reviewed by the Commissioner of Income Tax or his right to object therefrom to the Income Tax Appeal Board. This omission did not however, I find, vitiate the assessment of the taxpayer in this case.

However, in my view, in the light of the circumstances of this case and the statutory provisions governing assessment for tax purposes, a very serious chink in the taxpayer's armour in these proceedings is the scheme for redress or challenge the Act makes available to a taxpayer who is dissatisfied with the Commissioner of Income Tax's assessment of his liability to pay tax. This I am afraid makes Ms. Young's application irresistible. I find that on the evidence, the taxpayer has not fully availed itself of this scheme.

36. A close perusal of the Act discloses that if a taxpayer is dissatisfied with or objects to the Commissioner of Income Tax's assessment of his tax liability, there are three levels or tiers available to ventilate that dissatisfaction with a view to getting a satisfactory resolution.
37. The **first level** is by way of a **review**: if the taxpayer disputes the assessment he may apply to the Commissioner of Income Tax himself by notice in writing, to review and to revise the assessment made upon him. The notice shall state the precise grounds on which the assessment is disputed: section 42(2).

The **second tier** is by way of **objection** to the Income Tax Appeal Board: if the taxpayer fails to agree with the Commissioner of Income Tax as to the amount at which he is liable to be assessed, the Commissioner of Income Tax shall notify him in writing of the amount at which he has been assessed, and the taxpayer disputing the assessment may by a notice of objection in writing, setting out the grounds which he had stated in his application for a review, apply to the Appeal Board to hear and determine his objection. On an objection against an assessment to the Appeal Board, the onus of proving that the assessment is excessive is on the taxpayer: subsections (4) and (5) of section 42.

The **third tier** is by way of an **appeal** to a judge of the Supreme Court in Chambers. This level is accessible to both the Commissioner of Income

Tax and the taxpayer: if either is dissatisfied with the decision of the Income Tax Appeal Board, either can appeal to a judge in chambers on the ground that the decision was erroneous in point of law. The judge shall hear and determine any question of law arising on the taxpayer's objection to the Appeal Board and its decision thereon.

There is in fact yet another, a **fourth tier** available, again available to both the taxpayer and the Commissioner of Income Tax: an appeal on a case stated on a question of law for the determination of Her Majesty's Privy Council. Though the judge's decision is final, he may, on an application by either the taxpayer (called the appellant) or the Commissioner of Income Tax, so state a case.

38. I should point out that this direct access to the Privy Council, without the intermediation of the Court of Appeal is somewhat unusual. This perhaps is explicable by the fact that the Income and Business Tax Act itself became operational in 1923, when the Court of Appeal was not yet in existence. Be that as it may, the right of appeal granted however, underscores the fact that the Act provides a full panoply, a detailed code for ventilating and resolving a taxpayer's disputation of his assessment for tax.
39. I can only therefore in the circumstances say that the thrust of Ms. Young SC's application is irresistible: she argued and submitted that by the scheme and intendment and provisions of the Act, there are sufficient and ample provisions for an alternate remedy available to the taxpayer's complaints against the assessment of the Commissioner of Income Tax. Therefore, she urged that the taxpayer's claims for declarations should, pursuant to Rule 26(1)(e) and (j) of the Supreme Court Rules, 2005, be dismissed and that further under the inherent jurisdiction of the Court the claims should be dismissed as an abuse of the process of the Court.

40. I must, ineluctably, agree. I am satisfied that all the avenues or tiers of redress against assessment of a taxpayer's liability to pay tax I have outlined in paras. 37 and 38 above were and are available to the taxpayer in this case.

41. It was urged on the taxpayer's behalf however, that it tried to avail itself of these avenues – see para. 13 of Tesucum's second affidavit and Exhibits ET 6, 7, 8 and 9. The latter is a letter dated 21st August from the attorneys for the taxpayer to the Income Tax Appeal Board.

However, because of the fundamental differences between the taxpayer and the Commissioner of Income Tax, the former did not, in my view, from the evidence, purposefully and constructively engage the processes opened to it. These differences stem from the taxpayer's position, which it stood pat on, that because of an "Accommodation Agreement", no tax was due from it and that instead, it had credit on account of that Agreement against which any tax it might owe could be offset – see Exhibits ET 2, 3 of Mr. Tesucum's first affidavit, being taxpayer's summaries of business tax in which it claims settlement against sums it says were owed by the Government of Belize pursuant to the "Accommodation Agreement".

42. The void between the taxpayer and the Commissioner of Income Tax was so vast that the former did not meaningfully engage the statutory avenues that are ordinarily available to resolve and determine differences over tax assessment between any taxpayer and the Commissioner of Income Tax.

In the taxpayer's notice of objection to its assessment for tax, the grounds of objections are mainly based on the Accommodation Agreement – see Exhibit ET 21 of Mr. Tesucum's first affidavit.

It was still open to the taxpayer in my view to have appealed to a judge in chambers, especially as it claimed not to have got any satisfaction by way of its objection to the Income Tax Appeal Board.

43. I am therefore of the considered view that the taxpayer did not avail itself purposefully and constructively of the statutory alternative remedy available to it under the Act. I cannot help, from reading the papers in this case, but feel that it is not so much the assessment of the taxpayer's liability qua assessment that has agitated the taxpayer, but rather, its reliance on the "Accommodation Agreement" and the point blank refusal of the Commissioner of Income Tax to countenance this Agreement in satisfaction of any tax liability of the taxpayer.
44. At bottom, what the taxpayer is seeking in its claim for the several declarations is to attack the assessment done by the Commissioner of Income Tax of its tax liability. This the taxpayer should not be allowed to do, by means of its collateral claim for the declarations it is seeking. As Lord Scarmon stated in **Reg. v IRC Ex parte Preston (1985) AC 835** at p. 852:

"When Parliament has provided by statute appeal procedures, as in taxing statutes, it will only be very rarely that courts will allow the collateral process of judicial review to be used to attack an appealable decision."

See also the case of **Smeeton v Attorney General (1920) 1 Ch.** at p. 85 and **R v Epping and Harlow General Commissioners, ex parte Goldstraw (1983) 3 All ER** where Stephen Brown J stated:

"... The statutory machinery for an appeal from a notice of assessment is exclusive machinery, and when it has been exhausted to the point of appeal to the General Commissioners, and notwithstanding that there is a Case stated to the High Court pending it is not open to the taxpayer to dispute his liability in proceedings brought by the Commissioners to enforce the assessments against him."

And Donaldson MR stated:

“... But it is a cardinal principle that save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.”

The jurisdiction the Master of the Rolls was referring to related to granting leave to the taxpayer to seek judicial review. This was refused in that case.

45. Although the taxpayer’s claim in the instant case is not for judicial review, I think the principle of not allowing a taxpayer to attack an appealable tax assessment, except in exceptional cases, outside of the statutory appeal procedure, should hold as well for other claims, such as the present, where only declarations are sought. I find nothing exceptional or rare in the taxpayer’s assessment by the Commissioner of Income Tax of its tax liability to warrant the claim for declarations going forward outside of the statutory appeal procedure under the Act, and what the taxpayer has against the assessments could well be ventilated and resolved within the statutory processes provided for in the Act.
46. Mr. Courtenay SC for the taxpayer argued however that in the circumstances of this case, the statutory appeal procedure had broken down or was inoperative, hence the recourse directly to the Court. I am however not convinced. In my view, it was still open to the taxpayer to appeal to a judge in chambers as provided for in section 43 of the Act. The fact that the Commissioner of Income Tax might not have revised or reviewed the taxpayer’s assessment and that the Income Tax Appeal Board might not have heard and determined the taxpayer’s objections to that assessment, did not preclude the taxpayer from appealing to a judge in chambers. Any failure to hear and determine a taxpayer’s objections by the Appeal Board would, I think, be a question of law which a judge in

chambers is quite capable of hearing and determining. From the affidavit evidence of Mr. Eric Eusey, the Commissioner of Income Tax and Mr. Kent Clare of the Income Tax Department, I am satisfied that the Income Tax Appeal Board, a statutory creation, does exist and is in being.

Conclusion

47. For all these reasons, I must uphold the objections of Ms. Young SC for the defendants and strike out the taxpayer's claim for declarations of unlawfulness against the several assessments of its tax liability by the Commissioner of Income Tax and the resulting judgment summonses issued to enforce that liability.

In view of the concession made by Mr. Courtenay SC regarding the orders of the revenue magistrate in this case, I do not feel it necessary to pronounce on the issue of abuse of process by the taxpayer in commencing this litigation.

48. I will, accordingly, dismiss the taxpayer's claim in this matter, with costs in favour of the defendants/applicants. These costs to be agreed or taxed.

A. O. CONTEH

Chief Justice

DATED: 28th October, 2008.