IN THE SUPREME COURT OF BELIZE, A.D. 2012

CLAIM NO. 472 of 2010

DEAN BOYCE **CLAIMANT**

AND

THE ATTORNEY GENERAL **DEFENDANT**

Hearings
2011
21st November
22nd December
2012
29th February

Ms. Pricilla Banner for the claimant.
Ms. Lois Young, SC for the defendant.

LEGALL J.

JUDGMENT

Facts

1. There is a private company, incorporated under the Companies Act, Chapter 250 of the Laws of Belize, named ECOM Limited (the company) with registered offices at 212 North Front Street, Belize City. The claimant, whose address is given as 212 North Front

Street, Belize City was a director of the company on 31st March 2009. The company had a management contract with Belize Telemedia Ltd (BTL), a telecommunications company incorporated and registered in Belize.

2. The Commissioner of Income Tax (the Commissioner) was of the view that the company generated income from services provided by the company to B.T.L.; and therefore, by letter dated 9th September 2009, submitted to the company, a summary of business tax owing by the company for the period, April 2005 to September 2009, in the total amount of $1,170,567,68. The letter also requested the company to settle the amount "as soon as possible", and requested the company to make certain records available for inspection by the Commissioner by September 9th 2009. Lawyers for the company, by letter dated 25th September 2009, informed the Commissioner that as soon as the requested records were obtained, contact with the Commissioner would be made for the inspection of the records. But the lawyers also requested information from the Commissioner as to the rates used for the calculation of the amount of tax allegedly due, and the statutory basis for the rates used.

3. On 5th November 2009, the Commissioner was provided with the records. At paragraph 5 of the records, it is stated that "ECOM has no employees, no pay roll payments have been made, and therefore no pay roll records exist". Paragraph 6 of the records states that no directors' fees or emoluments of any type were paid, and therefore no service source documents exist. The record also states that no

employees or directors benefits have been paid. But the record also reveals that management fees paid to ECOM by B.T.L for the period March 2005 to August 2009 amounted to more than sixteen million dollars.

4. Since the records showed that ECOM had no employees, the Commissioner, by letter dated 12th November 2009, to the lawyers for the company, acknowledged that the records were made available for inspection and stated that since ECOM had no employees "please indicate to us who were providing the physical and mental management services to B.T.L. on behalf of ECOM Ltd and how this individual) s) were compensated for their services". There was no response from the lawyers to this letter, so the Commissioner wrote another letter dated 17th February 2010 requesting the information mentioned in the letter of 12th November 2009, by 28th February 2010. There was no response to this letter.

The Tax Assessment

5. The Commissioner then, in March 23, 2010, wrote another letter to the lawyers, stating that since no response was received in relation to the information requested by the Commissioner in the letter of 12th November 2009, the Commissioner would proceed to assess the company's tax liability for the period April 2005 to August 2009. The Commissioner assessed the tax liability for the company for the said period in the new amount of $1,198,859.14 on the basis of management fees submitted by, or on behalf of, the company. In the letter, the Commissioner attached a summary of the business tax

assessment of the company for the period, in the said sum of $1,198,859.14; and requested the company to settle this outstanding balance in full by 12th April, 2010.

6. The Commissioner did not get a response as to who was providing the physical and mental management services to BTL on behalf of the company. The Commissioner believed that the claimant, since he had an office at BTL, and was chairman of BTL, and a director of the company that had a management contract with BTL, was the human person providing services to BTL on behalf of the company, and therefore, the Commissioner proceeded to assess the claimant's liability to tax for January 2008 to August 2009 based on the management fees that BTL paid to ECOM for managing BTL. The question arises whether the management fees were equal to any income or salary of Mr. Boyce, the claimant, for the period January 2008 to August 2009. It must be remembered that according to Mr. Sabido, the management fees BTL paid the company were as follows:-

> "ACCORDING TO THE Revenue Accounts of ECOM, it received from Belize Telemedia the following sums of money in management fees.
>
> | | |
> |---|---|
> | 2005 to March 2006 | $2,400,000.00 |
> | 2006 to March 2007 | $5,010,000.00 |
> | 2008 to March 2009 | $5,649,000.00 |
> | 2009 to August 2009 | $3,926,000.00" |

7. How much of the management fees above, paid to the company, was used by the Commissioner as income or salary of Mr. Boyce is unknown. Did the Commissioner use the total amount of the management fees as income of the claimant? This is how the rational for the assessment of tax of the claimant was articulated by Mr. Sabido in a letter to the claimant dated 4th June 2010.-

> "Since our last letter of March 23, 2010 we have still not received a response from you regarding the individual (s) who were physically and mentally providing the management services to Belize Telemedia Ltd on behalf of ECOM Ltd. Consequently, due to your refusal to provide us with such information and since you were the executive chairman responsible for the day-to-day management of Belize Telemedia Ltd for the period January to December 2008, and from January to August 2009, we have decided to deem your services rendered to Belize Telemedia Ltd through ECOM Ltd as employment income. You have therefore been arbitrarily assessed on such employment income for the tax period January – December 2008 and January – August 2009. This is in accordance with **Sec. 31 (5)** and **55a** of the Income and Business Tax Act."

8. The amount claimed in the letter as tax owing by the claimant for the period January 2008 to August 2009 including penalty and interest, is stated as follows:

"Summary of Income Tax Owing

Mr. Dean Boyce

Tax Period 2008 and 2009

Period	**Tax**	**Penalty**	**Interest**	**Bal. Owing**
Jan – Dec 2008	$1,395,250.00	$627,862.50	$13,931.25	$2,337,043.75
Jan – Aug 2009	$1,335,000.00	$120,150.00	$60,075.00	$1,515,225.00
Totals	**$2,730,250.00**	**$748,012.50**	**$374,006.25**	**$3,852,268.75**

9. The income earned by the claimant, from which the tax is assessed, is not given in the letter. The letter concluded by informing the claimant that he was "hereby advised to settle the above outstanding balance as soon as possible to avoid further action that will be taken against you". Mr. Sabido explained that the word "arbitrarily," used in the letter above is "usually … income tax jargon" and "does not mean that the assessment was without a basis, but that the assessment is without input from the employee who has refused to file". I believe this means a refusal to file a return. Since Mr. Boyce was the executive chairman of B.T.L; had an office there; was a director of ECOM; Mr. Sabido reasoned that Mr. Boyce would have known about the above letters, requesting information as to the brains of ECOM, and their remuneration; and therefore refused to file his return. Hence Mr. Sabido's term that the claimant was arbitrarily assessed.

10. The claimant admitted that he was a director of ECOM until 27th August 2009. He also admits that from May 2007 to 25 August 2009 he was Chairman of the Executive Committee of the Board of Directors of B.T.L. He was also chairman between January 2003 and March 2004 and from August 2005 to May 2007. He says he was never a director or employee of B.T.L. He states that he is an employee of BCB Holdings Limited, which is a parent company of a group of companies, providing financial services in Belize, and the Turks and Caicos Islands. He states that he is fully paid by BCB Holdings for his services he performed for B.C.B. Holdings and he never received any payment from ECOM or BTL by way of employment. He never received income from ECOM or BTL whether by way of employment income or otherwise. He was, according to him, never employed by these companies. But the claimant admitted he provided managements services to ECOM.

11. The claimant was assessed to tax in the above amount in accordance with section 31(5) and 55(a) of the Income and Business Tax Act Chap 55, according to the Commissioner in the letter to the claimant dated 4th June 2010. Sections 31(5) and 55(a) of the Act are as follows:

> "31(5) A person who fails to deliver any return of income under this section within time specified, or within such extended period of time as the Commissioner may allow, shall pay to the Commissioner a penalty of

> three per cent tax that was unpaid when the return was required to be filed for each month or part of a month in which the return was not delivered continuing for a period of twenty months."

> "55(a) If any tax is not within the period prescribed -
> (a) A sum equal to 1 ½ per cent of the amount of the tax not paid shall be added thereto per month commencing the day following the last day of the prescribed period and continuing until the date of payment, and the provision of this Act relating to collecting and recovery of tax shall apply to the collection and recovery of such sum;"

The Ultra Vires Points

12. The claimant's first contention is that the above sections do not authorize the Commissioner to assess tax based on employment income. These sections, says the claimant, deal with penalties for none payment of tax; and therefore the Commissioner acted *ultra vires* the sections when he assessed the tax of the claimant under section 31(5) and 55(a) of the Act. The Commissioner, according to the claimant, exercised powers under the sections which the sections did not authorize. The Commissioner exceeded his jurisdiction.

13. Secondly, the claimant states that he did not file a tax return, because he received no income from ECOM or BTL; and therefore he is not

chargeable to tax. Thirdly, the Commissioner under section 31(4) of the Act may require, by notice, every person, whether or not he is liable to pay income tax, to deliver a return of his income. The claimant states that no such notice was served on him, as required by the section; and therefore the Commissioner exceeded his jurisdiction when he "arbitrarily" assessed him for tax on the basis of not filing his return.

14. Fourthly, the letter dated 4th June 2010, which assessed income tax payable by the claimant for January 2008 to August 2009 failed, according to the claimant, to inform him of his rights, as required by section 42(1)(2) (4) and (8) of the Act. Section 42 states:

> "42.-(1) The Commissioner shall cause to be served personally or sent by registered post to each person whose name appears in the assessment records, a notice addressed to him at his usual place of abode or business stating the amount of his chargeable income and amount of the tax payable by him and informing him of his rights under subsections (2) and (4), and of the provisions of subsection (8).
>
> (2) If any person disputes the assessment he may apply to the Commissioner by notice in writing to review and to revise the assessment made upon him and such notice shall state the precise grounds on which the assessment is disputed.

> (4) If any person assessed who has disputed an assessment made upon him shall fail to agree with the Commissioner as to the amount at which he is liable to be assessed, the Commissioner shall in writing notify him of the amount at which he has been assessed and the person disputing the assessment may, in writing by a notice of objection setting out as the grounds of his objection the grounds of his objection the grounds stated in the application made under subsection (2), apply to the Board requesting it to hear and determined his objection.
>
> (8) Subject to subsection (9), the notice to be sent under subsection (2) shall be sent within fifteen days from the date of the service of the notice of assessment and the notice of objection to be sent under subsection (4) shall be sent within fifteen days from the date of service of the notification of the amount of the assessment sent by the Commissioner under subsection (4).”

15. The Claimant’s submission is that the Commissioner in the letter dated 4th June 2010 did not inform him of his rights under subsection (2) (4) and (8) of section 42, and therefore failed to comply with the sections and exceeded his jurisdiction.

16. Fifthly, the claimant states that the letter of assessment dated 4th June 2010 did not contain, as required by section 44(3) of the Act, in substance and effect, the particulars in respect of which the assessment is made. Section 44(3) states:

> "(3) In case of assessment, the notice thereof shall be duly served on the person intended to be charged and such notice shall contain, in substance and effect, the particulars on which the assessment is made".

In other words, according to the claimant, the notice must contain the basis upon which the sum assessed has been made. The Commissioner must have used some base figure as the claimant's income to calculate the tax, and this base figure was not mentioned even though the income of ECOM was. The Commissioner therefore, according to the claimant, acted unfairly and unreasonably in discharging his statutory duties, and therefore *ultra vires* the Act. In effect the claimant submits that the Commissioner erred in law, exceeded his jurisdiction, and, therefore deprived him of his rights under the Act to challenge the assessment.

The Claim

17. On the basis of the ultra vires points, the claimant by fixed date claim form claims the following reliefs against the defendant:-

> "(a) A declaration that the decision by the Commissioner of Income Tax communicated in her letter of the 4th June 2010 to "… deem … services rendered [by the claimant] to Belize Telemedia Limited through Ecom Limited as employment income" (the **Decision**) is *ultra vires* the Income

and Business Tax Act and is therefore null and void and of no effect;

(b) A Declaration that the demand for payment of Income Tax (the **Demand**) alleged to be owing for the tax Period 2008 and 2009 as per the letter to the Defendant dated 4 June 2010 from the Commissioner of Income Tax for the total sum of $3,852,268.75 (including penalty and interest) is in breach of Sections 3(d) and 17 of the Constitution of Belize and is as a consequence unlawful and void:

In the alternative:

(c) A Declaration that the Commissioner of Income Tax failed to comply with the provisions of the Income and Business Tax Act in purporting to make the Decision and to issue the Demand, which are as a consequence unlawful and void.

(d) a Declaration that the Commissioner of Income Tax acted without adhering to the rule of law and/or irrationally and/or with improper motive and/or without any factual basis in purporting to make the Decision and to issue the Demand, which are as a consequence unlawful and void.

(e) A Declaration that the Commissioner of Income Tax acted in breach of Section 6(1) and /or Section 6(7) of the Constitution of Belize in purporting to make the Decision and

to issue the Demand, which as a consequence are unlawful and void.

(f) Further or other relief.

(g) Costs."

Applications

18. Before the claims came up for trial, the defendant made two applications. One application dated 12th October 2010 was for the claimant to attend the trial for cross-examination. In judicial review proceedings the court may order or allow cross-examination when the justice of the case requires it; but such an order is extremely rare, because the role of the court in such proceedings is essentially one of review often requiring the court to determine whether a public authority acted in accordance with some statutory provision. In this matter before me, the central issue is whether the Commissioner acted in accordance with sections of the Act including sections 31(5), 38(3) and 55(a) when she assessed the claimant to tax based on the income of ECOM in the above amount stated in the letter dated 4th June, 2010. I do not consider that cross-examination of the claimant was necessary to resolve this central issue. There was the factual issue whether the income paid to ECOM was used to repay a loan of ECOM. The claimant swore in his affidavit that he had no information on that issue, and therefore I did not think that cross-examination of the claimant would have been helpful in that issue. I therefore dismissed the application for cross-examination. By a written decision dated 8th April, 2011, I dismissed the second application which was for an order that the claimant must follow the statutory appeal procedures

under the Act before approaching the Supreme Court for the relief claimed.

Best Judgment

19. Let us now return to the alleged ultra vires points. The claimant states that section 31(5) and 55(a) of the Act did not authorize the Commissioner to assess him to tax. It is conceded on behalf of the defendant that the Commissioner should have referred to section 38(3) in the letter of 4th June, 2010, instead of sections 31(5) and 55(a). But learned senior counsel for the defendant submitted that the fact that the Commissioner made an error in stating sections 31(5) and 55(a) in the letter instead of 38(3) of the Act, did not invalidate the assessment. The fact that the right sections were not cited in the letter, did not, according to the submission, make the assessment void. The defendant relies on section 44(1) of the Act which states:

> "44.-(1) No assessment, warrant or other proceeding, purporting to be made in accordance with the provisions of this Act, shall be quashed, or deemed to be void or voidable, for want of form, or be affected by the reason of a mistake, defect or omission therein, if it is in substance and effect in conformity with or according to the intent and meaning of this Act or any Act amending it, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding."

The section seems to apply to the kind of error or mistake admitted above and according to the section the resulting assessment cannot be quashed or deemed void or voidable on that ground.

20. The defendant proceeded further to submit that though the claimant swore that ECOM had no employees, yet the claimant in paragraph 10 of his first affidavit admitted that he "performed the management services on behalf of ECOM." The implication of this being that the claimant had some form of employment relationship with ECOM and therefore the commissioner in exercising her best judgment under section 38(3) of the Act, took this employment relationship into consideration in assessing the claimant for tax purposes. This is what the claimant stated in paragraph 10 of his affidavit:

> "10. Since I have never been an employee of Ecom I have also never received any employment income from Ecom. As stated above at paragraph 9, I was never paid by Ecom for the services I rendered as a Director. I have also never received any payment for the services I rendered to Ecom under the Management Services agreement. My entire salary is paid by my employer, BCB Holdings Limited."

21. The claimant admits that he rendered services to ECOM as a director under the management agreement. It would be to stretch his evidence a little to hold that paragraph 10 above indicates that the claimant was an employee of ECOM, something which he has vehemently denied in his affidavits in this matter. But the defendant also states that the

fact that the claimant made the admission in paragraph 10, accompanied by the other facts, such as the management contract between ECOM and BTL where BTL paid ECOM about $16,000,000; that the claimant at the time was managing BTL at an office there and providing services under the said management agreement to ECOM; and the claimant's refusal to file a return, provide a basis upon which the commissioner properly exercised her best judgment under section 38(3) of the Act when she assessed the claimant in the above amount of tax. Though it was conceded by the defendant that ECOM and the claimant were different persons, learned senior counsel for the defendant submitted that the Commissioner was entitled to look at the income of ECOM and assess the claimant, because of the reasons in this paragraph. In such circumstances, says learned senior counsel, the Commissioner acted properly and in accordance with the best judgment provision of section 38(3) of the Act when she made the assessment in relation to the claimant. The defendant relies on ***Minister of National Revenue v. Wrights Canadian Ropes LTD., 1947 AC 109*** and ***Van Boeckel v. Customs and Excise Commissioners 1981 2 AER 505***.

22. In ***Minister of Natural Revenue*** the minister had made tax assessments against the respondents company under the Income War Tax Act 1927 and Excess Profits Tax Act 1946 (U.K.) for the years 1940, 1941 and 1942. The only matter on which the assessments were challenged by the respondents was the disallowance by the minister of part of certain sums which had admittedly been paid in the years in question by the respondents to an English company, Wrights Ropes

Ltd., of Birmingham by way of commission under an existing contract dated 12th September, 1935. These sums were claimed by the respondents to be properly deductible in computing the amount of their taxable income. The minister under the Act had a discretion to disallow a deduction that was in excess of what was reasonable or normal for the business of the tax payer. The minister in exercising that discretion determined that the sums were in excess of what was reasonable or normal for the business carried on by the respondents and disallowed the deduction.

23. The Privy Council ruled that as no material had been produced in the case on which the determination of the minister could lawfully be founded, and which could have justified any disallowance; and as the minister, not having chosen to produce any evidence of the contents of a report by a local Inspector of Income Tax submitted to the minister, the court was unable to assume in the minister's favour that he had before him sufficient facts to support his determination. In the words of Lord Greene MR, if on the facts shown before the minister there is sufficient material to support the minister's determination, the "court is not at liberty to overrule it merely because it would itself on those facts have come to a different conclusion …. There must be material sufficient in law to support his decision." His Lordship also made it clear that if the facts were in the opinion of the court insufficient in law to support the determination by the minister, the determination cannot stand. ***Minister of Natural Revenue*** did not deal specifically with the principle of best judgment as mentioned in section 38(3) of the Act. The company had submitted returns to the minister for the

years in question, attached to which were the companies' profit and loss accounts which were not submitted by the claimant in this matter before me. The case dealt with whether the minister acted lawfully in refusing a deductible claimed by the company that had submitted returns. This is, in my view, the distinguishing feature between these two cases. But as we saw above Lord Greene was of the view that the court is entitled to examined the facts that were before the minister when he made his determination and if the facts are insufficient in law to support it, the determination cannot stand; but if the facts are sufficient the court is not at liberty to overrule the determination. In this matter before me one issue is whether the commissioner had sufficient material or facts before her to support her best judgment assessment of the claimant. We will examine this issue below.

24. In ***Van Boeckel*** a tax tribunal decided that an assessment of value added tax made by the Commissioner of Customs on a tax payer had been made by the commissioners to the best of their judgment as required by section 31(1) of the Finance Act 1972 (UK) which stated:

> "Where a taxable person has failed to make any returns required under this Part of this Act or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect they may assess the amount of tax due from him to the best of their judgment and notify it to him."

Yet the tribunal reduced the amount of the assessment by £50 per week for the period of the assessment to take account of pilferage of the tax payer's stock which the commissioners did not properly consider. The tax payer appealed to the court against the tribunal's decision, on the grounds that, in making the assessment the commissioners failed to act to the best of their judgment as required by section 31(1) above and that, if in the view of the tribunal, the commissioners should have taken account of the pilferage of stock, then the assessment was invalidly made and should be set aside. The main contention of the tax payer was that the commissioners had taken insufficient steps or made insufficient investigations to ascertain the amount of tax due before making the best assessment.

25. The investigations made by the commissioners revealed that the tax payer suffered a stroke and was unable to take part in running his business, which was a public house containing two bars – a saloon bar and a public bar – called the Hop Pole; that he therefore had to rely on others for running the business and on occasion he was able to collect monies from the business and to bank it and to make out the tax returns. Officers representing the commissioners visited, as part of their investigations, the tax payer's business and noted the prices of the products advertised, and proceeded on the basis that one third of the sales, took place in the saloon bar and two thirds in the public bar. The officers over a trial period of five weeks estimated the gross takings of the bars, due to their visit, investigations and personal conversations with the taxpayer, which resulted in valuable

information, including the pilferage of stock, for the purpose of making the assessment.

26. In spite of all the above investigations by the officers, it was still contended by the tax payer that the officers made no real investigations into the manner in which the Hop Pole was run; they failed to interview the manager, or visit the business when it was open. These things, according to the tax payer, should have been done and constituted a serious omission which affected the whole assessment. The court rejected this contention and held that the commissioners had made "substantial investigations in this case." Having agreed with the tribunal above, Woolf J said:

> "In fact, quite clearly on the material which was before the tribunal the commissioners had made substantial investigations in this case. As I have indicated, unless the situation is one where no material is before the commissioners on which they can reasonably base an assessment, the commissioners are not required to make investigations. If they do make investigations then they have got to take into account the material disclosed by those investigations. Obviously, as a matter of good administrative practice, it is desirable that the commissioners should make all reasonable investigations before making an assessment. If they do that it will avoid, in many cases, the necessity of appeals to the tribunal. However to try and say that in a particular case a particular form of investigation should have been carried out is

> a contention which, in my view, as a matter of law, bearing in mind the wording of s 31(1), is difficult to establish." (emphasis mine)

27. The court agreed with what the tribunal had said, which was as follows:

> "We are in no doubt that it would have been preferable if they had interviewed the current manager and actually visited the bars at the Hop Pole when they were open; nonetheless we reach the conclusion, on balance, that they made this assessment to the best of their judgment."

The tribunal expressed a preference for further investigation to which the court seems to have agreed as they quoted in the judgment the above passage. I have had some difficulty in reconciling some comments in the judgment, but I think the general principle of the judgment is that it is desirable that tax commissioners should make all reasonable investigations before making a best judgment assessment, and should perform their functions honestly, fairly and bona fide. As I see it, to "make all reasonable investigations," ought to entail investigations which are relevant, honest and fair in relation to the facts of the case.

28. Some investigations were done by the Commissioner in this case before me. Mr. Sabido in his affidavit, exhibit at O.S. 13, gives

some financial statements of ECOM, namely ECOM Revenue accounts which show US dollars amounts under the description of management fees, and ECOM balance sheet and account in which there are items representing management fees, loan notes and loan repayments. The financial statements show amounts in relation to management fees and loan repayments. The claimant states that these statements show that no monies were paid by ECOM in salaries or directors fees, and that ECOM's receipt in relation to the management fees was used to repay a loan. Whether or not the receipt of management fees by ECOM was used to repay a loan, the claimant states that he did not prepare the accounts or financial statements and can therefore give the court no further information about them. It is not clear from the above financial statements, whether the whole amount of the management fees paid to ECOM was used to repay the loan, or part of the loan. If the management fees were used totally or partly for repayment of the loan by ECOM, then this in some evidence that the management fees or some part of them may have been income of ECOM and not the claimant.

29. The Commissioner, in my view, ought reasonably to have made investigations whether the full or part of the amount of the management fees was used to repay any loan, and if so, to which bank or person, company or institution. In this matter before me "reasonable investigations" by the Commissioner before the assessment ought, in my view, to have considered the following:

(1) Did ECOM have an account at any bank or lending institution and if so who were the

signatories to the account and was any part of the management fees deposited in the bank or institution?

(2) Did the claimant have an account at any bank and if so which bank and what are the particulars of the account?

(3) Did the claimant have access to any banking account in the name of ECOM?

(4) Who received or signed as receiving the management fees paid to ECOM by BTL and are there documents or vouchers explaining the payment?

(5) Was the claimant interviewed by the Commissioner or her officers?

The general powers given to the Commissioner under sections 33 and 34 of the Act would seem to authorize the Commissioner to obtain information or particulars in relation to the above questions or issues. And I see nothing that prevents the Commissioner or her officers from visiting the claimant before the assessment for the purpose of a conversation or an interview in relation to this matter.

30. I do not accept, on the evidence, that the Commissioner made reasonable investigations before exercising her best judgment under section 38(3) of the Act. The commissioner did have information, as we saw above, that the claimant did fail to file a return on the alleged ground that he was not given a notice. ECOM occupied an office of BTL and provided management services to ECOM. He was also chairman of BTL who paid over 6 million dollars to ECOM. These were facts before the Commissioner on which she assessed the claimant to the tax. But, in my view, reasonable investigations, on the

facts of this case, entailed seeking answers to the above questions. Section 38(3) of the Act does not authorize, in my view, the Commissioner, for assessment for tax purposes, to take the income of a company as the basis for assessment of persons who provide services to or employed by a company. Section 38(3) states as follows:

> "38.-(3) Where a person has not delivered a return and the Commissioner is of the opinion that such person is liable to pay tax, he may, according to the best judgment, determine the amount of chargeable income of such person and assess him accordingly, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return."

Directors of companies who fail to file returns might, depending on the facts of the case, find themselves being assessed to tax based on the income of the company. That could not have been the intention of section 38(3) of the Act, and the cases cited by the defendant do not, in my view, establish that proposition.

31. The claimant, I have no doubt, refused to file a return, and showed by his behaviour, disrespect for the Commissioner and the Income Tax Department and refused to cooperate for purposes of an assessment of tax. The power to make assessment of income tax and the payment of taxes, are important elements in the Act in relation to the economy of the country as a whole. Persons should be discouraged from evading

to file returns, as this is generally inimical to the collection of taxes. It is therefore imperative that income tax legislation should have stronger provisions to deter tax payers from refusing to file returns. Section 31 and corresponding sections of the Act which deal with the filing of returns, need to be strengthened by providing criminal penalties of heavy fines or imprisonment or both; and authorizing the court to impose an additional monetary fine for every day such failure to file returns continues. The sections may be further strengthened by providing that notices sent by registered post under the sections to the taxpayer shall be deemed sufficient notice to the taxpayer.

32. It was further submitted by the defendant that the Commissioner was entitled to make the assessment under section 34(4) of the Act. In order to understand the subsection, I should give the whole section as follows:

> "34(1) The Commissioner may require any officer in the employment of the government or any municipality or other public body to supply such particulars as may be required for the purposes of this Act and which may be in the possession of such officer
>
> (2) No officer mentioned in subsection (1) shall by virtue of this section be obliged to disclose any particulars as to which he is under any statutory obligation to observe secrecy.
>
> (3) Every employer, agent, contractor or other person when required to do so by notice from the commissioner shall within the time limited in the notice, prepare and deliver a return or returns containing such

> information as the Commissioner may think necessary for the purposes of this Act, and the provisions of this Act with respect to the failure to deliver returns or particulars in accordance with a notice from the Commissioner shall apply to any such return or returns.
>
> (4) Where the employer, contractor or other person is a body of persons the manager or other principal officer shall be deemed to be the employer for the purposes of this section, and any director of a company, or person engaged in the management of a company, shall be deemed to be a person employed.
>
> (5) . . . . ."

This section, as learned counsel for the claimant submitted, deals with the supply of information to the Commissioner. This section does not authorize the Commissioner to make an assessment for tax purposes, let alone imposing a tax on a person based on the income of a company for which the person provided services.

Constitutional Relief

33. The claimant claims that the assessment to tax is contrary to sections 3(d), 6(1), 6(7) and section 17 of the Constitution. Sections 3(d) and 17 deal with arbitrary deprivation of property and compulsory acquisition of property. I cannot see how a mere assessment of tax by a commissioner of taxes, which has not materialized in acquiring or taking possession of any money or property from the tax payer, could be considered compulsory acquisition of property and contrary to

those sections of the Constitution. In ***Bata Shoe Company Guyana Ltd. v. Commissioner of Inland Revenue*** 1976 ***24 WIR 172 at page 188*** Crane JA ruled that "taxation and payment of compensation are irreconcilable" under the compulsory acquisition of property provisions of the Guyana Constitution. An assessment of tax, as was done in this case before me, would seem, to use the words of Crane JA in ***Bata*** "must necessarily exclude the obligation to compensate."

34. Section 6(1) deals with equality before the law, and I do not see a valid basis for the submission that the claimant's right under the section was violated. Section 6(7) deals with the claimant constitutional rights to be heard. The Commissioner's obligation under the section is to provide the claimant with an opportunity to be heard. If the claimant refuses to take that opportunity he cannot, in my view, properly allege that his right to be heard under the section was violated by the Commissioner. On the evidence, the claimant was given an opportunity to be heard; but did not take it.

35. It is also submitted that if the court finds that the assessment was bad, the court can correct "the amount to that which the court finds to be a fair figure on the evidence before it . . . ." to use the words of learned senior counsel for the defendant, relying on section 43(7) of the Act; and ***Customs and Excise Commissioners v. Pegasus Birds Ltd., 2004 EWCA CIV 1015***. For my part, the problem with this submission is that there is absence of the claimant's income from which I could "find a fair figure" for purposes of tax; and in the absence of that income, I am not in a position to exercise the

jurisdiction conferred by section 43(7) to hold that I am satisfied that the claimant was with respect to the assessment "overcharged" or "undercharged" to use the words of the section authorizing respectively a reduction or increase in the assessment.

36. It is to be noted that in the claim form there are alternative claims which I take to mean that the claimant is asking for either alternative claims. It is also to be noted that costs follow the event. The court has a discretion as to costs, and in the exercise of that discretion the court may consider the conduct of the parties. For the above reasons I make no order as to costs.

37. I therefore make the following orders:

(1) A declaration is granted that the decision of the Commissioner of Income Tax in the letter addressed to the claimant dated 4th June, 2010 in which the claimant was assessed to income tax in the amount of $3,852,268.75 is ultra vires sections 31(5) 55(a) and 38(3) of the Income and Business Tax Act Chapter 55 and the decision is null and void and of no effect.

(2) The claim for a declaration that the Commissioner of Income Tax, in the letter dated 4th June, 2010 to the claimant which advised the claimant to settle the amount of tax mentioned at (1) above, acted in breach of sections 3(d), 6(1), 6(7) and 17 of the Constitution, is refused.

(3) There is no order as to costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
29th February, 2012