

IN THE SUPREME COURT OF BELIZE, A.D. 2010

CLAIM NO. 795 OF 2009

SANITATION ENTERPRISES LIMITED

Applicant

BETWEEN AND

THE COMMISSIONER OF SALES TAX
ATTORNEY GENERAL

Respondents

—

BEFORE the Honourable Abdulai Conteh, Chief Justice.

Mr. E. Andrew Marshalleck SC, with Ms. Naima Barrow Badillo, for the applicant.
Ms. Priscilla Banner, Deputy Solicitor General, with Ms. Magali Perdomo for the respondents.

—

JUDGMENT

In this case the claimant, Sanitation Enterprises Ltd (SEL or just “the claimant” hereafter) is seeking an order from this court quashing the decision of the Commissioner of General Sales Tax dated **26th June 2009** authorizing the Belize City Council (BCC or just “the Council” hereafter) to deduct from monies due to SEL the claimant in the amount of **\$5,736,212.76 in Sales Tax** (ST) and **\$533,711.41 in General Sales Tax** (GST). The claimant also seeks an order that the defendants pay over to it all sums collected by the first defendant, the Commissioner of General Sales Tax, pursuant to its demands contained in the letter to the BCC which is sought to be impugned in these proceedings. The claimant

therefore seeks an order striking down what in effects are garnishee orders by the first defendant to the Belize City Council in respect of monies the Council owes to the claimant.

2. The backdrop to this case, concerns two contracts for sanitation services relating to the Northside and Southside of Belize City entered into between the claimant and the BCC. The contracts related to the collection and disposal of garbage in the north and south of Belize City. The contracts had been entered into before 1999 and had pre-dated the introduction of the Sales Tax Act of that year and later the General Sales Tax Act of 2006 which replaced the former. It is the collection and payment of first Sales Tax, and later General Sales Tax on these contracts that have agitated this case.

3. *The Grounds for the Application*

The grounds for the instant application by the claimant in relation to the demand notices issued by the Commissioner of General Sales Tax (the first defendant) to the BCC to garnishee funds in its hands for the claimant may be stated as follows:

First, in relation to the demand for **Sales Tax**:

- i. That prior to **May 2006**, the first defendant had issued a demand on Third Party to the BCC (the original demand) requiring the BCC to deduct from proceeds due to the claimant sales tax then owing by the claimant amounting to approximately \$236,476.80.
- ii. That in pursuance of that original demand and in accordance with the authority thereby conferred the BCC in fact deducted from proceed due to the claimant in respect of payment under the

contracts for sanitation services, the total sum of **\$706,365.39** by the end of **December 2006** in full satisfaction of all sales tax plus interest and penalties then due and owing by the claimant.

- iii. That having deducted the said monies from proceeds due to the claimant, the BCC to the knowledge of the first defendant failed to pay over to the first defendant the amounts deducted and that the first defendant then entered into negotiations and agreement with the BCC for it to pay over the sums deducted to the first defendant.
- iv. That the deduction of sales tax owing from monies due to the claimant under the legal authority of the original demand and the conduct of the first defendant in seeking collections of sales tax from the BCC Gave rise to a **legitimate expectation** on the part of the claimant that the defendants in particular, the Commissioner of Sales Tax (the first defendant) would enforce collection of outstanding taxes plus whatever interest and penalties accruing thereon as a result of non payment or the failure of the BCC to hand over the sums deducted to the first defendant, from the BCC.
- v. Therefore, the decision to issue a **second demand** on Third Party **for sales tax** on the BCC to deduct again from further proceeds due to the claimant, was in manifest breach of the claimant's legitimate expectation that the Commissioner of Sales Tax (the first defendant, would pursue collection of outstanding sales tax together with accrued interest and penalties from the BCC on the basis of the original deductions and is therefore manifestly **unlawful**.
- vi. Further or in the alternative, the claimant avers that the decision to issue the demands to the BCC to garnishee proceeds due to the

claimant was made with an **ulterior political motive** so as to avoid the political consequences of the execution of a judgment debt in favour of the claimant against the BCC: the decision was made and the demands issued pursuant to a scheme devised by the BCC in response to the execution of a writ of execution against the BCC at the instance of the claimant to enforce the payment of a long outstanding judgment in its favour. The claimant therefore avers that the decision to issue the demand was on this basis as well unlawful.

Secondly, in relation to the demand for **General Sales Tax** the claimant avers as follows:

- i. That on the application of the BCC, the Ministry of Finance (under whose superintendence the first defendant falls) had on 25 July 2005 approved a **waiver** of all “sales tax” payable to the BCC in respect of sanitation contracts with the claimant,
- ii. That the first defendant informed the claimant that the waiver extended to include the new General Sales Tax which came into force in June 2006 and replaced the Sales Tax and that in fact over the years from 2005 through 3009, the first defendant continued to break the waiver as including the GST.
- iii. That the claimant even with the waiver granted to the BCC in July 2005, was however required by the first defendant to continue filing Sales Tax returns showing the amounts received from the Belize City Council under the sanitation contracts; and the first defendant explained that this was required so that the loss occasioned by the waiver could be accounted for. The claimant accordingly continued

to file General Sales Tax returns showing its receipts under the contracts just as it had done in relation to the replaced Sales Tax.

- iv. That even though under section 92 of the General Sales Tax, the claimant was entitled to charge the BCC the amount of GST payable on its contracts with the BCC in addition to the contract price in reliance upon the express position and conduct of the first defendant and to the knowledge of the first defendant, the claimant in fact never charged or collected any GST from the BCC.
- v. That therefore the stated position and conduct of the first defendant gave rise to a legitimate expectation on the part of the claimant that the first defendant would treat and continue to treat all GST payable by the BCC in respect of its sanitation contracts with the claimant as having been duly waived by the Ministry of Finance.
- vi. That the decisions to issue the demand on Third Party in respect of GST was therefore in breach of the claimant's **legitimate expectation** that all GST would have been treated by the first defendant as having been duly waived by the Ministry of Finance under and by virtue of the general waiver granted by the Ministry on 1st August 2005 and that the decision to issue the Demand was unlawful.
- vii. Further or in the alternative, the claimant avers that the decision to issue the demand requiring deductions for GST from monies in the hands of the BCC for the claimant, was made in **breach of natural justice** in that the claimant was never given any prior notification that the first defendant was conducting an assessment of the claimant for GST nor was any demand ever made on it to pay any GST and that it was never informed that the first defendant was

even considering issuing a Demand for GST and was never given any opportunity to be heard.

- viii. Further and in the alternative, the claimant avers that the decision to issue the Demand was made with an improper political motive, namely, to avoid the political consequences of the execution of a judgment in its favour against the BCC and that the decision was made and the Demand issued pursuant to a scheme concocted at the request of and in concert with the BCC in response to the execution of a writ of execution against the BCC at the request of the claimant and that the decision to issue the Demand was therefore unlawful as well.

4. *A disturbing feature of the case*

A striking feature of this case I cannot help noting, is that the demand notices to deduct the sums in issue (the Third Party Demand Notices) of 26th June 2009, authorizing the deduction of the two sums said to be owed by the claimant for ST and GST respectively, were issued to the BCC authorizing it to do so by way of garnishment. This arose because BCC had purchased services from the claimant and had monies in its hands on the claimant's account under the two contracts for sanitation services to the Southside and Northside of Belize City. The claimant later obtained judgment against the BCC for sums owed it by the Council.

5. It is the sale and purchase of these services and the taxes exigible thereon under the relevant applicable statutory regime that is at the heart of this case: the defendant by its demands on the BCC sought to garnishee monies owed to the claimant by the BCC for tax penalties and arrears. The claimant contends that if any tax was owed, the Council had

deducted from payment due it and should have paid over to the defendant.

6. Unarguably on any view, the BCC would be an interested party in these proceedings. Consequently, I ordered on 5th October 2009 at the permission stage commencing these proceedings, that BCC be added as an interested party. This was done in the hope that as the claimant's case is that the BCC had withheld the taxes payable on the services it had rendered to the Council, and that the Council had or should have paid over the taxes it had deducted from payments due it, to the defendant, the demands (contained in the defendant's decision letter to the Council to garnishee sums owed by it to the claimant) were improper and unfair and ought not to stand.

7. The court was subsequently informed that all the papers in this case (the Claim form and affidavits) were duly served on the BCC. But it has chosen not to take part and not even by way of affidavit. This of course is BCC's right, but in the result the Court has been denied any assistance it might have derived from any evidence by the BCC. But it cannot be denied that the BCC in the light of the issues joined between the parties, could have been of tremendous assistance. From the evidence, it is manifest that it was the various taxes plus penalties and interest exigible on the sanitation contracts the claimant had with the Belize City Council which the Commissioner of Sales Tax (the first defendant) now seeks by its notices dated 26th June 2009, to the Council to deduct from monies by way of garnishment that the BCC owes the claimant. The claimant stoutly resists this and asserts instead, that the BCC had in fact deducted the tax portions from its payments to the claimant and should have handed these, as the law allows, to the defendant. The claimant now asserts that the failure of the Council to hand over these tax portions it had deducted from

its payments to it under the contracts, should not now be visited on it by the demand notices issued by the defendant.

8. The claimant therefore complains in these proceedings that the defendant's demand notices by way of garnishment to the BCC against it are unlawful.

9. I therefore harboured no doubt that the BCC would have been of tremendous assistance to the court in coming to a resolution of this case. Alas, bereft of that assistance I can only have recourse, as perforce I must, to the evidence filed by the parties.

10. *The Evidence*

In support of its claim, the claimant relies on the First, second and Third affidavits of Mr. Rupert Marin, dated 11th September 2009, 15th October 2009 and 26th January 2010 respectively. Mr. Marin is a director of the claimant.

11. In resisting the claim, the defendants rely on the affidavit of Ms. Betty-Ann Jones, dated 30th September 2009. Ms. Jones is the Deputy Financial Secretary in the Ministry of Finance. The defendants also rely in particular, on the First, Second, Third and Fourth affidavits of Ms. Cynthia Castillo, dated 1st October 2009; 4th December 2009; 29th January 2010 and 22nd March 2010. Ms. Castillo is the Commissioner of General Sales Tax in which capacity she is the first defendant in these proceedings.

12. Most of the affidavits have exhibits material to this case. I shall refer to the affidavit evidence later and the testimony of the Commissioner of General Sales Tax, the first defendant, under cross-examination by Mr. Andrew Marshalleck SC the lead attorney for the claimant and in re-

examination by Ms. Banner, the Deputy Solicitor General, for the defendants.

13. *The Principal Contention between the Parties*

It is the principal contention of the claimant that if indeed it were liable for the taxes, either Sales Tax or GST, the BCC had in fact deducted the sums representing these taxes from payments due it under its contracts for sanitation services with the Council. Consequently, it was urged vehemently by Mr. Andrew Marshalleck SC for the claimant, that it would be manifestly unfair for the defendant to come in 2009 after the claimant, to try to exact these taxes from it when in fact, the BCC should have paid over the deducted sums representing the taxes to the defendant.

14. For the defendant, the principal contention vigorously argued by the then Deputy Solicitor General, Ms. Priscilla Banner, was that the burden of collecting and paying over first the Sales Tax, and later the GST, was statutorily on the claimant as the **tax agent**. Therefore, the claimant having not paid in full, first the Sales Tax and later the GST, due on its contracts with BCC, it was permissible for the defendant to issue the garnishment notices of 26 June 2009, to the BCC in respect of monies owed by it to the claimant, as a statutory method of recovery of taxes pursuant to **section 22** of the Sales Tax Act – Chapter 63 of the Laws of Belize, Revised Edition 2000, read along with **section 58** of the Income and Business Tax Act – Chapter 55 of the Laws of Belize, Revised Edition 2000.

15. Central to a resolution of the dispute between the parties are the two Demands on Third Parties issued by the commissioner of General Sales Tax dated 26th June 2009 sent to Her Worship, The Mayor of Belize City

Council. The claimant has in these proceedings challenged the lawfulness of these demands.

16. It is helpful I think to reproduce these Demands and I do so in respect of the one for **\$5,736,212.76** as both Demands are identical save that the other is for the smaller sum of **\$533,711.41** and issued under section 84 of the General Sales Tax Act.

BELIZE
DEPARTMENT OF GENERAL SALES TAX

DEMAND ON THIRD PARTIES

Her Worship
Mayor Zenaida Moya Flowers
Belize City Council
North Front Street
Belize City

WHEREAS it is believed that you are, or are liable to make payment to Sanitation Enterprises Limited

*AND WHEREAS the said debtor is indebted to the Crown pursuant to the provision of the Rules Governing Payment of Sales Tax in the amount of **\$5,736,212.76***

*YOU ARE HEREBY REQUIRED to deduct from the debtor and pay over to the Commissioner of General Sales Tax the sum of **\$5,736,212.76**.*

Identify your payment with the debtor's name and address and send it to the Commissioner of General Sales Tax, P.O. Box 1887, Belize City.

The receipt of the Commissioner of General Sales Tax for moneys paid pursuant to this Demand on Third Parties is a good and sufficient discharge of the original liability to the extent of the payment.

Discharge of any present or future liability to the debtor after receipt of this Demand without complying with the requirements thereof renders you liable for the amount claimed herein or the amount of the liability discharge which ever is the lesser.

This demand is issued under authority of Section 98(2) of the General Sales Tax Act being No. 49 of 2005 of the Laws of Belize.

Date 26 June 2009

Cynthia Castillo

Commissioner of General Sales Tax

17. *The Statutory Scheme for Payment and Collection of Sales Tax and General Sales Tax*

First, **Sales Tax**: the Sales Tax Act came into force on 1st April, 1999. Although there is no evidence as to when the claimant's contract, for the supply of sanitation services with the BCC came into force, it is not disputed that they pre-dated the Sales Tax Act.

18. From the coming into force of the Sales Tax Act, the sanitation services provided under the claimant's contracts with the BCC became liable to pay sales tax. **Part IV** of the Act provides for the **imposition** and **collection** of the tax under the Act. In particular section 13 of the Act provides as follows:

13.(1) Subject to this Act, every person –

(a) who imports goods or services, or

(b) who purchases goods or services locally from a sales tax agent.

shall pay tax at the rates specified in subsection (2).

Provided that, subject to section 16, no tax shall be payable where a sales tax agent imports goods or services locally, whether from a sales tax agent or from a non sales tax agent. (Emphasis added).

And subsection (2) specifies the rate of sales tax payable; and subsection (4) provides as follows:

(4) *For the purposes of this Act, **a purchase or sale takes place** when:*

(a) *an invoice is given to the purchaser by the producer or provider; or*

(b) **payment is made for the good or services;**
or

(c) *the goods are made available, or the services are rendered, as the case may be, to the recipient;*

whichever is the earlier. (Emphasis added).

19. It is not in dispute that the claimant was a **sales tax agent** for the purposes of the services it provided to the BCC registrable under Part III of the Act in particular in **section 6** and as defined in section 2.

20. **Section 19** provides for the filing of returns by sales tax agents and the penalties for non-filing and late returns and it provide in terms as follows:

19.(1) Every sales tax agent other than exempt sales tax agents shall, in respect of the month of April, 1999 and each subsequent month thereafter, deliver to the Commissioner a return, in such form as the Commissioner may approve or as may be prescribed by regulations, rendering an account for the tax, and shall, at the same time, pay over to the Commissioner the amount of tax collectible during the month for which the return is submitted.

(2) Every exempt sales tax agent shall, in respect of the month of April, 1999 and each subsequent month thereafter, deliver to the Commissioner a return, in such form as the Commissioner may approve or as may be prescribed by regulations, rendering an account for the tax exemption certificates issued during the month for which the return is submitted.

(3) A return shall be furnished to the Commissioner at the address specified on the form:-

(a) within fourteen days after the end of the tax period to which it relates; or

(b) where the person ceases to be a sales tax agent during a tax period, within fourteen days after the person ceases to be a sales tax agent;

or within such further time as the Commissioner may, in writing, allow and is not so furnished until it is received at that address.

(4) A person who fails to file a return as required by this section commits an offence and shall be liable on summary conviction to a fine which shall not be less than five thousand dollars nor more than ten thousand dollars or to imprisonment for a term not exceeding two years.

(5) Where any amount that a person is required to pay to the Commissioner is not paid within the prescribed period, the amount outstanding shall bear a penalty of five percent per day, provided that the Commissioner may, where he is satisfied that the circumstances of the case justify the reduction or waiver of a penalty arising under this subsection, recommend to the Financial secretary the appropriate reduction or waiver of the penalty, as the case may be.

(6) The provisions of this Act relating to the collection and recovery of tax shall apply to the collection and recovery of the penalty referred to in subsection (5) of this section.

21. **Sections 20, 21 and 22** of the Act provide for the Commissioner of Sales Tax to accept or refuse the returns made and where no return has been delivered to use his best judgment to determine the proper amount of tax due and make an assessment accordingly; to make additional assessment (section 21) and for the recovery of sales Tax (section 22).

22. Mr. Marshalleck SC therefore submitted on behalf of the claimant that by the operation of **section 13**, the **primary liability** for sales tax, was on the BCC as the **purchaser** of the sanitation services rendered by the claimant and that the only liability on the claimant for sales tax was to **deliver a return** to the Commissioner of Sales Tax. That is to say, the incidence of sales tax was on the **purchaser** of the goods or services in question and not their provider or supplier. There is much force in this submission and I think it is supported by an analysis of the provisions of the Act.
23. I am convinced that from the structure, intendment and the provisions of the Act, it is the **purchaser**, such as the BCC, of the services offered by the sales tax agent which the claimant undoubtedly was, on whom the incidence of sales tax was fastened: this in my view, is the clear intent of **section 13** of the Act.
24. The claimant as a **sales tax agent** for the purposes of sales tax is only, in my view, liable to file returns regarding accounts of the tax which **section 13** imposes on the importers or **purchases** of goods or services. There is a criminal liability imposed for failure to file a return – subsection (4) of **section 19**. Although subsection (1) of **section 19** provides that the sales tax agent in filing his returns in respect of sales tax, shall render an account of the tax and at the same time pay over to the Commissioner of Sales Tax the amount of tax **collectible** during the month for which the return is submitted, it does not impose a liability on the sales tax agent to pay the amount of sales tax exigible if in fact, none has been paid by the purchaser of the goods or services. There is however, liability on the sales tax agent to file a return rendering an account for the tax and failure to file this return is visited with a criminal sanction.
25. I am not convinced or satisfied that the Legislature intended the **sales tax agent**, such as the claimant, to be primarily or ultimately responsible for

the payment of sales tax. The **sales tax agent**, in my view, is an **agent** of the Commissioner of Sales Tax **for the collection of the tax** and **not an agent** of the purchaser of the goods or services, on whom the incidence of the tax is fixed for the payment of the tax. Subsection (4) of section 13 of the Act prescribes when a **purchase** or **sale** takes place for which subsection (1) imposes sales tax on the **purchaser**.

27. I am not therefore convinced that from the structure and provisions of the Sales Tax Act, in particular, **section 13** of the Act providing for the imposition and rate of the tax exigible under the Act, the liability for the tax is on the provider or supplier of the goods or services in question: it is on the **purchaser**. That at least, in my view, is the clear meaning of **section 13**.
28. I am however, satisfied that the Act does impose an **obligation** on the **sales tax agent**, such as the claimant, to file returns in respect of goods or services sold or rendered a purchaser, to render an account and pay the taxes exigible on those goods and services. This I think, it is fair to say, presumes that the **purchaser** of the goods or recipient of the services has paid the applicable tax exigible under this Act.
29. To be sure, **section 18** of the Act provides that the **sale tax agent** shall in respect of goods and services provided by it **account for and pay** tax on a monthly basis; and **subsection (5)** of **section 19** provides for the imposition of a penalty of five percent per day on the amount a person is required to pay to the Commissioner of Sales Tax if that amount is not paid within the prescribed period (that is the month for which a return is submitted by the tax against prescribed in **section 18**).
30. It is this penalty which together with the sum representing the amount of sales tax allegedly due that is said to represent the amount of

\$5,736,212.76 that is the subject of one of the demand on Third Party issued to the BCC by the defendants which the claimant seeks to impugn in these proceedings.

31. I am not, however, satisfied or convinced that either **section 18** or **section 19 imposes** sales tax on a sales tax agent. These two sections, in the main, provide in my view, for the period for filing returns in respect of sales tax and how the sales tax agent should pay over to the Commissioner of Sales Tax, the tax as reflected in his returns, he had collected as sales tax agent on the sale or purchase of goods or services in question. But the sales tax **is imposed** on the **purchaser** of the goods or services: This, I believe, is the purport and reach of **section 13**.

32. I am fortified in this view by the consideration that it is a well-settled rule of law that all charges on the subject must be imposed by clear and unambiguous language and that a subject is not to be taxed unless the language of the statute clearly imposes the obligation: **Russell v Scott (1948) AC 422**; **D'Avigdor-Goldsmid v IRC (1953) AC 347** and see generally, **Maxwell on The Interpretation of Statutes**, 12th Ed. by P. St. J. Langan, at p. 256; and **Craies on Statutes Law** 7th Ed. (1985 Fifth Impression) at p. 98.

33. I am of the considered view that as a taxing statute, the Sales Tax Act strictly construed as a whole, imposed liability for sales tax **on the purchaser of services**, in the instant case, the BCC. The obligation on the claimant as a sales tax agent, is to pay over all sales **taxes collected** to the Commissioner of Sales Tax: this is provided in the mechanics of both sections 18 and 19. I am unable to accept the submission advanced by Ms. Banner for the defendants that section 19 trumps section 13.

34. If further support is necessary for the view that the Sales Tax imposed liability for sales tax on the purchaser, the BCC, the defendants in fact expressly waived the tax in July 2005, in a letter to the BCC regarding the claimant's contract – see **Exhibit RM 5** to the first affidavit of Marin. Moreover, unlike the Sales Tax Act, when the Legislature wanted to impose liability on the **provider** of goods or services, it clearly and unambiguously so enacted in **section 10** of the **General Sales Tax Act 2005**. More on this later in this judgment.

35. **Determination**

I have at paras. 13 and 14 of this judgment set out the contentions between the parties.

36. It cannot be denied that the factual matrix of this case is a veritable triad involving first, the BCC, which purchased sanitation services from the claimant, and secondly the claimant, who as a sales tax agent should account for and pay over to thirdly, the Commissioner, the defendant, the applicable sales tax.

37. But regrettably, as I have observed at paras. 4 to 9 of this judgment, there is singularly missing from these proceedings the BCC; and it is to the BCC to whom the defendants have issued the Third Party Notices. And the claimant avers that the BCC had, on the authority of the defendants, in fact, deducted the taxes from payments due to it. And accordingly it would now be unfair for the defendants to come after it for the failure of the BCC to pay over sums representing sales taxes it had deducted from payments it made to the claimant under the contracts for the sanitation services.

38. Absent and silent from these proceedings is the BCC. There is no refutation of the statements of the claimant about the deduction first by

withholding by the BCC from payments in respect of the claimant's service contracts portions representing sales tax and secondly on authority by way of garnishment from the defendants to the BCC since 2004.

39. Mr. Rupert Marin, a director of the claimant, states in his first affidavit at paras. 5 to 7 that the defendant had garnished all sales taxes the claimant had to pay prior to 2006 by the authority it granted to the BCC which deducted from payments due to the claimant under its contracts the entire sales tax then owing. He exhibited **RM 3** showing amounts withheld from the claimant by the BCC from January 2003 to December 2005. But the BCC failed to pay over to the defendant the sums it had deducted in respect of sales tax. The defendant then had to write to the BCC on 12th May 2006, requesting the Council to enter into a payment plan to repay sums it had deducted in respect of sales tax from the claimant (see para. 6 of Marin's first affidavit and **Exhibit MR 4**). **Exhibit MR 4**, the letter from the defendant to the BCC tellingly states in its penultimate paragraph "*Grateful ... if the Belize City Council enters into a payment plan to **repay** the sum of \$616,836.69 which represents taxes **withheld from both companies** (the claimant) and owing to the Department of Sales Tax.*" (Emphasis added).
40. These statements remain unchallenged and unrefuted. But they prove that in fact deductions or withholdings representing sales tax had been made by the BCC, on authority from the defendant, from payments due to the claimant under its contracts for sanitation services with the BCC.
41. In fact, the authority from the defendant to the BCC to deduct sales tax from each payment made by the Council to the claimant is attested to in paragraph 11 of the second affidavit of the Commissioner of General Sales Tax, herself the principal and first defendant in these proceedings and **Exhibited CRC 3** annexed to the affidavit wherein she states:

*“The authority for the Belize City Council to deduct sales tax from each payment made to the debtor/claimant under the Sales Tax system is comprised in the Demand of Third Parties Notice (sic) sent to the Belize City Council on **19th November 2004** (the Original Demand). A copy of the demand of Third Parties Notice and the cover letter attached thereto ... is exhibited hereto as CRC 3.”*

CRC 3 is the original Demand on Third Party (in effect a garnishee) dated 19th November 2004 issued by the first defendant as the Commissioner of Sales Tax to the BCC requesting it to deduct from payments due to the claimant pursuant to section 22 of the Sales Tax Act. (Emphasis added).

42. The BCC from the evidence, did withhold or deduct sums in respect of sales tax from the payments due to the claimant under the contract for sanitation services: See **Exhibit RM 3** to Mr. Martin’s first affidavit showing a copy of the statement of the sums withheld by the Council.
43. It is not contested or denied that the BCC did withhold as authorized by the defendant, sums representing sales tax from payments to the claimant under its contacts with the Council.
44. But evidently, the BCC did not hand over these sums to the defendant. In fact, the Commissioner of General Sales Tax (the successor of the Commissioner of Sales Tax), the first defendant, states at paras. 15 and 16 of her second affidavit in respect of these withheld sums as follows:

“15. I attempted on several occasions to obtain information and audited statements from the Belize City Council regarding the total sums which have been deducted from the claimant

pursuant to the Demand on Third Parties which were issued both by the commissioner of sales Tax and the Commissioner of General Sales Tax.

16. *To date I have not received such audited accounts in order to verify the amounts actually withheld by the Belize City Council.”*

45. The gravamen of the claimant’s case is that all sales taxes due on its contracts with BCC had been deducted by the Council on the authority of the 1st defendant, by way of garnishment or withholdings from payments due it from the Council under its contracts, and that it would therefore now be unfair to have the 1st defendant come after it again by way of its decision of 26th June 2009 to have the Council garnish further payments due it under a court order: This was under a judgment of the Supreme Court in favour of the claimant against the BCC. It is this judgment against the BCC that triggered the decision of the defendants to issue the Notices which the claimant challenges in the present proceedings – more on this later.
46. Nothing however has been heard from the BCC in these proceedings.
47. On the evidence in this case, I am satisfied that in fact the BCC withheld from payments due to the claimant sums in respect of sales tax: see 2nd affidavit of Rupert Marin, paras. 3 and 4 and **Exh. RM 10**. Indeed in cross-examination, Mrs. Castillo, the Commissioner of General Sales Tax (the 1st defendant) stated that the Department of Sales Tax had had a garnishee order in place since 2003 to authorize BCC to withhold from payments due to the claimant sums in respect of sales tax and that though BCC was withholding taxes due on services rendered by the claimant the

Council was not remitting all of it to the Commissioner of Sales Tax and that BCC remitted only \$57,000.00. She further stated that it was recently verified that in fact BCC was withholding taxes due on payments to the claimant and that these withholdings were being done on authority of the Tax Department (represented in these proceedings by the 1st defendant).

I found Mrs. Castillo, the current Commissioner of General Sales Tax, an honest and truthful witness.

48. She also testified that it was the Sales Tax Department's responsibility to get monies withheld by the BCC but it could not be verified whether all taxes and penalties due had been recovered and that if the defendant had collected all the amounts due then the Demand on Third Party Notices of 26th June 2009 would be imposing taxes twice over on the claimant and that this would be unfair.
49. In the circumstances, it is incomprehensible why the claimant is again being mulcted, I can find no better word for it, by being pursued again by the defendants for unpaid sales tax including penalties, when the evidence shows that the defendants had authorized the BCC to deduct from payments due to the claimant, sales taxes and this was done by the BCC which has not been denied.
50. The claimant has therefore complained in these proceedings that the authority given by the defendant to the BCC to deduct sales tax from payments due it by the council gave rise to a **legitimate expectation** on its part that the deductions having been made by the Council, the defendant would not later turn round and still pursue it for the same taxes including penalties due thereon.

51. The authority from the defendant to the BCC to deduct or garnishee sums in respect of sales tax from payments due to the claimant is **not** in dispute and has **not** been denied. The deductions by the BCC of sums in respect of sales tax have been put in evidence and have **not** been contradicted.

52. Mr. Marshalleck SC for the claimant has therefore advanced both in argument and in written submissions that the decision of the first defendant (the Commissioner of General Sales Tax) to issue the Notice of Demand on Third Parties for payment over to the Commissioner of **\$5,736,212.76** in sales tax and penalties was in breach of the claimant's legitimate expectation that all outstanding sales tax and penalties would be collected directly from or paid over directly by the Belize City Council pursuant to the longstanding garnishment and practice in relation to sales tax which authority and practice had been long accepted by the Council, the claimant and the Department of Sales Tax for the Council to deduct the taxes (both arrears and current) from payments due to the claimant by the Council.

53. The then Deputy Solicitor General, Ms. Banner for the defendant, submitted however, that there was no breach of any legitimate expectation the claimant could have entertained, because in order to make a claim to such an expectation, the claimant must establish with certainty that the Belize City Council had in fact collected all the sales tax and the substantial penalties which remained outstanding; and that a legitimate expectation could only arise if it is found as a fact that the BCC had collected all the sales tax arrears and penalties owed by the claimant. Then, she submitted, only then would the Department (the defendant) would have been duty bound to pursue *only* the BCC for collection and the claimant entitled to the legitimate expectation claimed for it.

54. Admittedly, there may be some merit in Ms. Banner's submissions, and this could be fortified by factual evidence, particularly from the BCC. This is so because essentially the argument would turn on the facts in evidence in the case.

55. But I must confess to some difficulties with Ms. Banner's submissions in this respect for the following reasons:

In the first place, there is nothing in evidence from the BCC or the defendants for this matter, to contradict the authority granted by the defendants to the BCC since 2004, to garnishee payments due to the claimant in satisfaction of sales tax.

56. In the second place, there is nothing from the BCC to deny or contradict withholdings or deductions by it in respect of sales tax from payments due to the claimant.

57. Thirdly, the defendants admitted authorizing BCC to deduct sales tax from payments due to the claimant and attempted several times to get audited statements from the Council regarding the total sums representing sales tax which had been deducted from payments due the claimant, but to no avail: see paras. 15 and 16 of the 2nd affidavit of the first defendant at para. 44 of this judgment.

58. Fourth and finally, the claimant has put in evidence the authorization from the defendant to the BCC to deduct by way of garnishment, payments due to the claimant sums in respect of sales tax under the contracts and a summary of the total withheld by BCC: **Exhibit RM 10** which is a copy of the written summary with supporting documentation supplied to the claimant by the BCC stating the deductions by it from payments due to the claimant.

59. I must state therefore, that I find the coyness or reluctance of the BCC to participate, even if only as an interested party in these proceedings, in some material way bolsters, in the circumstances, the claim of the claimant to a legitimate expectation that it would not be pursued later for sales tax.
60. In addition to the serious reservations I have expressed at paras. 31 to 34 of this judgment as to the liability of the claimant for sales tax, I am convinced and satisfied that from the evidence I have recounted regarding the withholdings by the BCC from payments due to the claimant representing sales tax on the authority of the defendant; it would be manifestly unfair for the defendants now to issue the Notice of Demand on Third Party directed to the BCC to deduct the amount of **\$5,736,212.76** representing sums due for sales tax from payment due to the claimant. Such a demand would **clearly frustrate the legitimate expectation of the claimant** that the BCC had in fact deducted from payments due it in satisfaction of any sales tax.
61. I therefore find and conclude that such a demand is insupportable in law. I am satisfied, on the evidence, that the claimant has established the legitimacy of its expectation that the defendant would not change its position and policy regarding the collection and payment of sales tax and later come after it for sales tax it had authorized the BCC to deduct from payments due it.
62. I am fortified in this conclusion by the statement of Lord Woolf MR, as he then was, in **Regina v North and East Devon Health Authority, ex parte Coughalan (2001) LRC 55; (2001) QB 213** where at para. 57 of the judgment of the English Court of Appeal, in explaining the role of a court in relation to legitimate expectation, he stated in elaborating on the third possible outcome:

*“(c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a **benefit which is substantive** not simply procedural, authority now establishes that ... the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power ... once the legitimacy of the expectation is established, the Court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.”*

63. I find no overriding interest in the instant case why the defendants would now want to come after the claimant for sales tax. Indeed, as Ms. Banner for the defendants candidly but perhaps somewhat grudgingly submitted, a legitimate expectation could only arise if, it is found as a fact, that the BCC had collected all the sales tax arrears and penalties owed by the claimant and that in such a case the defendants would have been duty bound to pursue only the BCC for collection and the claimant would have been entitled to that expectation. I have found as a fact from the evidence that indeed, the BCC had in fact deducted from payments due the claimant sums in respect of sales tax.
64. I accordingly find and hold that the expectation of the claimant that it would not later be pursued by the defendants was legitimate and well-founded. It would therefore be manifestly unfair for the defendants to pursue it again for sales tax and penalties which the BCC had in fact deducted from its payments. I adopt, with respect in this regard, the statement by Lord Scarman in the House of Lords in **Regina v Inland Revenue Commissioners ex parte Preston (1985) AC 835** at p. 851:

“I must make clear my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of a power conferred by law.

First, “the Inland revenue Commissioners are not immune from the process of judicial review”: per Lord Wilberforce in the National Federation of Self-employed case, at p. 632. This proposition, if it were ever doubted, is now, as I understand it, put beyond doubt by the speeches of your Lordships in the present appeal.

The second proposition relates to the grounds upon which a taxpayer may seek judicial review of a decision taken by the Inland Revenue Commissioners. The commissioners have their statutory powers and duties, the exercise of which can be challenged by the process of judicial review only if certain principles of general application are met. The taxpayer must show either a failure to discharge their statutory duty to him or that they have abused their powers or acted outside them: Reg. v Inland Revenue Commissioner, ex parte National Federation of self-employed and Small Businesses Ltd, [1982] A.C. 617, per Lord Wilberforce, p. 632, and per Lord Roskill, p. 660.

My third proposition is that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. This was the view of the law which I expressed in the National Federation of Self-Employed case (notably at p. 650): and it remains my view.”

65. I therefore find that from my view on the liability for or incidence of sales tax and the factual evidence in relation to the collection and non-payment of sales tax from payments due to the claimant by the BCC, it would be manifestly unfair for the defendant to pursue the claimant for sales tax on its contracts with the BCC.

66. I accordingly, grant the order of certiorari the claimant seeks in respect of the Notice of demand on Third Parties dated 26th June 2009, issued by the defendant to the BCC for the sum of **\$5,736,212.76** in respect of sales tax allegedly owing by the claimant.

67. **General Sales Tax (GST)**

The second statutory regime pursuant to which the other Notice of Demand on Third Parties issued by the defendant to the BCC for the sum of **\$533,711.41** to be deducted from the claimant is the **General Sales Tax Act**. The claimant seeks as well to impugn this demand on the grounds I have recounted at second paragraph of para. 3 of this judgment.

68. The GST Act came into force on **1st July 2006** (see Statutory Instrument No. 31 of 2006). This was during the subsistence of the claimant's contract for sanitation services with BCC. It however repealed the Sales Tax Act; (section 98 which however, preserved liability incurred under the Sales Act and allowed for collection and enforcement as if that Act had not been repealed. I have already dealt with the issues of liability for sales tax in the preceding sections of this judgment).

69. The claimant's contracts for sanitation services to the BCC however, ran into difficulties due to non-payment by the BCC and in August 2006, it instituted against the BCC in Claim No. 442 of 2008 in the Supreme Court claiming payment for **\$1,771,324.22** being the amount due from the BCC

on an **account stated** between them dated 24th August 2006, together with interest and costs. On **8th October 2006** the claimant entered a default judgment against the BCC for the recovery of the said sum of **\$1,771,324.22** (see para. 6(b) of the first affidavit of Rupert Marin and para. 2 of his second affidavit on behalf of the claimant).

70. The claimant's principal contention in relation to defendant's Notice on Third Party to the BCC in respect of the sums due for GST is that first, the BCC had already deducted GST from payments due it under their contracts and that, in any event, the waiver of sales tax granted to the BCC on 25 July 2005 applied to the GST as well and of this the claimant had been assured.
71. It is therefore I think necessary, in view of the contentions between the parties, to set out the relevant provisions of the General Sales Tax Act relating to **imposition** of the tax, **the person liable for the tax, the payment of the tax** and **assessment of the tax**.
72. **Section 10** of the Act so far as relevant provides as follows:

"10 The GST payable –

- (a) on a taxable supply, is the liability of the supplier and must be accounted for to the Commissioner in accordance with the formula in section 31, unless otherwise specified." (Emphasis added).*

"GST" is defined in section 2 of the Act (the interpretation section) as follows:

“GST” or “general sales tax” means the tax imposed under this Act, and includes any amount to the extent that it is treated as GST for the purposes of this Act, including interest or a penalty payable under this Act, and the absence of a specific reference to the inclusion of such amounts in particular provisions should not be taken to imply that they are not included in the GST referred to in that section.”

73. It is common ground, I think, that the claimant’s sanitation services to the BCC are “taxable supplies” for the purposes of general sales tax.
74. I am of the considered view, that **section 10** of the Act coming under **Part II** dealing with the **imposition** of the tax clearly and unambiguous fixes the **liability for general sales tax on the supplier**. This, I find, is a paradigm shift from the regime of the **Sales Tax Act** which pins liability on the **purchaser** for sales tax.
75. **Section 22** of the Act under **Part IV Division 2** of the Act dealing with GST on taxable supplies provides for the **registration of suppliers** and others. It is common ground that the claimant was registrable as a supplier for the Act and was in fact so registered: see para. 17 of first affidavit of the Commissioner of GST (the first defendant) and paras. 25, 26 and 27 and **Exhibit CRC 4** to her second affidavit which is a copy of the claimant’s registration certificate under the General Sales Tax Act.
76. **Section 30** of the Act, still under **Part IV**, but **Division 4** provides for **payment of general sales tax**, and so far as it is material, provides.

*“30(1) **A registered person shall, in respect of supplies made by him. account for and pay tax for each***

tax period or part thereof during which the person is registered

(b) the amount specified in a GST return (which is to be made by the registered supplier under subsections (2), (3), (4) and (5) of section 30) as being the amount of tax payable ... in respect of a tax period shall be calculated in accordance with section 31.” (Emphasis added).

77. Again, it is common ground that the claimant was registered for GST with the Commissioner and did file returns until when it applied to be deregistered in 2008.
78. **Section 39** of the Act in **Division 6** under **Part IV** provides for the Commissioner of General Sales Tax, to make an assessment where a supplier fails to register or to file a GST return.
79. I am, after a close perusal of the provisions of the General Sales Tax Act as a whole, satisfied and convinced that it is the claimant, as the **supplier** of the sanitation services to the BCC, **who** is responsible for the payment of **general sales tax** on the supply of those services under its contracts with the Council.
80. In these proceedings however, the claimant has contested its liability for general sales tax and seeks to impugn the other Notice of Demand on Third Party for the sum of **\$533,711.41** issued by the defendants to the BCC on 26th June 2009, in respect of general sales tax claimed to be owed by the claimant.

81. The claimant's contention is premised principally on two grounds: the first is that **the waiver of sales tax** granted to the BCC in 2005 extended to the GST regime and accordingly, it was not liable to pay general sales tax on its supplies to the BCC and consequently did not include in its charges for its services any general sales tax elements, and that secondly, this was understood and acquiesced in by the first defendant's department. Therefore it was urged on behalf of the claimant that after two and a half years of not requiring any payment from it with its returns by the Department of General Sales Tax (for which the first defendant is responsible) there was a legitimate expectation by the claimant that the Department would treat the general sales tax as having been waived.
82. I am however, unable to accept the claimant's argument and submissions in respect of its liability for General Sales Tax for the following reasons.
83. First, I do not find that the waiver granted in 2005 to the BCC in respect of sales tax extended to those same contracts for the purposes of general sales tax. The BCC was the beneficiary of the waiver, indicating as I have concluded on the section of this judgment, that liability for the payment of sales tax was **on** the BCC as the **purchaser** of the claimant's services. Moreover, the BCC applied when the General Sales Tax Act came into force in 2006, for a waiver, but this was not granted. In any event, liability for general sales tax is unambiguously fixed under the provisions of the GST Act **on the supplier** of the services in question who must be accountable to the Commissioner. Therefore I do not find that the claimant could benefit even vicariously from any **waiver** of general sales tax when there was no waiver.

Therefore if in reliance of this non-existent waiver, the claimant did not charge the BCC the applicable general sales tax on the services it

supplied, this I find was simply a gratuitous act on its part which did not release it from or absolve it of its liability for the said tax.

84. Secondly, I can find no acquiescence on the part of the defendant amounting to a forbearance not to charge or claim from the claimant general sales tax applicable on its supply of sanitation services to the BCC. On the contrary there is in evidence notices of arrears for general sales tax owed by the claimant, which were however sent back to the defendant from the Post Office stamped "Return to Sender" (see paras. 34 to 41 of the second affidavit of the first defendant and in particular **Exhibit CRC 7** being bundle of notices of outstanding general sales tax and requests to claimant to settle same).
85. I therefore find and hold on the evidence that the claimant was liable for the period July 2006 to December 2007, a span of eighteen months, for general sales tax due on its contracts for the supply of sanitation services to the BCC.
86. The contracts themselves were concluded in January 2008.
87. Was the Demand on Third Party for an Improper Purpose or properly made?

The claimant has however further complained that the Notice of Demand on Third Party issued by the defendant on 26th June 2009 on the BCC to garnishee the amount of **\$533,711.41** in respect of general sales tax owed by it was in fact issued for an improper purpose. That is to say to extricate the BCC from political embarrassment stemming from the execution against it of judgment in the claimant's favour.

88. The claimant avers that this was motivated by political considerations and was in the result an improper exercise of statutory powers. This argument

is based on the fact that the claimant had on 8th October 2006 entered a default judgment against the BCC for the recovery of the sum of **\$1,779,484.22** together with interest thereon and costs to be taxed or agreed in Claim No. 442 of 2006.

89. The BCC failed to satisfy that judgment and made only a partial payment totaling **\$310,000.00**. In an attempt to enforce the said judgment after numerous requests for proposals from the Council to settle the balance of the judgment debt, the claimant had recourse to execution by way of a writ of *feri facias* against the Council. This writ was executed by a Marshall of the Supreme Court on 23rd and 24th June 2009. This resulted in a number of chattels belonging to the Council being marked for sale to satisfy the balance of the judgment in the claimant's favour against the Council. This amounted to a political embarrassment for the administration of the Council and the sale of its marked chattels would have manifested a failure on the part of the Council to govern the affairs of Belize City properly.
90. The claimant has further averred that in an effort to prevent the sale of the Council's marked chattels that officials of the BCC publicly and privately called upon the Government of Belize to act against the claimant for arrears of sales tax and general sales tax totaling **\$6,264,640.18** allegedly owed by the claimant to the Government of Belize. The claimant put in evidence **Exhibit RM 6**, a letter from the Mayor of Belize City to the Prime Minister dated 26 May 2009, calling upon the Government of Belize to take action against the claimant for the alleged tax arrears. (See generally paras. 13 to 19 of Mr. Marin's first affidavit).
91. The defendant admits as much that *"the Demand on Third Party in respect of GST sent to the BCC was a garnishee order in relation to a court ordered settlement between Belize City Council and SEL (the claimant) wherein Belize City Council*

was ordered to pay SEL in a separate court matter. It was with that June 2009 garnishee order that the Department of General Sales Tax sought for the first time to garnish the taxes payable by SEL” (see para. 33 of third affidavit of first defendant).

92. I have anxiously considered the arguments and submissions for the claimant that the first defendant decided to pursue it for the overdue taxes (both sales tax and general sales tax) because it wanted to save the BCC from the embarrassing consequences of the execution against it of a judgment in favour of the claimant. As foreshadowed at para. 45 of this judgment, it is the execution of that judgment obtained since 2006, that provided the trigger for the defendants to issue the Demand Notices upon the BCC dated 26 June 2006. The background to that judgment was that the BCC had defaulted on its payment to the claimant for sanitation services provided for the Council under their contracts (see paras. 2, 3, 5, 6, 7, 10, 11, 13 and 14 of Mr. Marin’s second affidavit and **Exhibit RM 7** of his first affidavit). I find that in the circumstances of this case it is not easy to avoid the conclusion that the defendants’ decisions to issue the Demand Notices **when** they did were not unconnected with the execution of the claimant’s judgment against the BCC which was then in progress when the Demand Notices were issued. I am, of course, mindful that the first defendant does have a statutory duty to pursue collection of overdue taxes as Ms. Banner correctly submitted. But the concatenation of events surrounding the issuing of the Demand Notices makes it impossible to ignore the claimant’s arguments and submissions concerning the motive and timing of the issuing of the notices. First, the execution against the chattels of the BCC was already in progress; and secondly, the Deputy Registrar of the Supreme Court received a letter from the first defendant’s department that it had received a cheque from the BCC representing payment pursuant to the notices but the sum of the cheque was exactly the sum owed by the BCC to the claimant under the latter’s judgment

against it. This brought the execution against the BCC to a halt. The question may well be asked: why did the first defendant's department choose to bestir itself into action just at the time execution was in train in favour of the claimant against the BCC who was already a judgment debtor of the claimant is now being asked by the defendants to pursue its own judgment creditor.

93. Moreover, I am not satisfied that the first defendant followed or complied with the provisions in **Part VII** of the General Sales Tax Act governing **proceedings for recovery of tax**, in particular **section 60** relating to **Notice to be given to Tax Defaulters**. This provides for the first defendant (the Commissioner of General Sales Tax) to cause to be inserted in three consecutive issues of the Gazette notice to the effect that warrants will be issued for the recovery of all tax remaining unpaid for over thirty days from the issue of notice of assessment. The first defendant says that the claimant was in arrears for general sales tax for the period of **1st July 2006** to **31st December 2007**, a period of eighteen months. Despite the fact that from the evidence the claimant paid no General Sales Tax and was therefore a tax defaulter, there is no evidence that the defendants complied with **section 60** of the Act. Instead, there was a hasty recourse to **section 84** providing for garnishment of debts by way of Demand on Third Party issued to the BCC on 26 June 2009 in respect of overdue taxes including general sales tax owed by the claimant which had been due since 2006 and December 2007.
94. The claimant has complained as well that there was no assessment made of its liability for general sales tax before the Demand on Third Party to garnish payments due it by the BCC under its judgment against the latter. What is remarkable in my view is that despite the failure of the claimant to file a return for **December 2007**, the Department of General Sales Tax conducted an assessment for that month, but this was only prepared on

24th September 2009, some two and a half years after the tax period and then **after** the Demand of Third Party for general sales tax had been issued to the BCC. (See paras. 38 and 39 of second affidavit of first defendant and **Exhibit CRC 6** Best Judgment Assessment for **December 2007** but prepared on **24th September 2009**).

95. I therefore find that that Demand on Third Party dated 26 June 2009 for the sum of **\$533,711.41** in general sales tax owed by the claimant issued to the BCC was not property made in keeping with the law.

I accordingly set it aside.

96. For the avoidance of doubt, this order does not absolve the claimant of its liability for general sales tax after proper assessment and appropriate demand for payment being made upon it.

97. Conclusion

In the light of my findings and conclusions in this judgment, I grant the following relief:

- i. I order that the decision of the Commissioner of General Sales Tax to issue two demands on the Belize City Council dated 26th June 2009 authorizing the Belize City Council to deduct from monies due to the claimant, Sanitation Enterprises Ltd., **\$5,736,212.00**, in sales tax and **\$533,711.41** in general sales tax be quashed.
- ii. I order the defendants to pay over to the claimant Sanitation Enterprises Ltd., all sums collected by the defendants in pursuance of the said demands.

iii. I award prescribed costs for these proceedings to the claimant.

A. O. CONTEH
Chief Justice

DATED: 24th September, 2010.