

IN THE COURT OF APPEAL OF BELIZE, AD 2022

CIVIL APPEAL NO 14 OF 2018

BETWEEN

MAESTRE'S INDUSTRIES LIMITED

APPELLANT

AND

COMMISSIONER OF GENERAL SALES TAX

1ST RESPONDENT

ATTORNEY GENERAL OF BELIZE

2ND RESPONDENT

BEFORE:

THE HON MADAM JUSTICE WOODSTOCK-RILEY JUSTICE OF APPEAL

THE HON MADAM JUSTICE MINOTT-PHILLIPS JUSTICE OF APPEAL

THE HON MR JUSTICE FOSTER JUSTICE OF APPEAL

E Andrew Marshalleck SC with Jaraad Ysaguirre for the appellant
S M Tucker, Assistant Solicitor General, for the respondents

15 October 2021 and 6 May 2022

REASONS FOR JUDGMENT

WOODSTOCK-RILEY, JA

[1] I have read in draft the reasons given by Minott-Phillips JA for our judgment. I concur with those reasons and Orders given.

WOODSTOCK-RILEY, JA

MINOTT-PHILLIPS, JA

[2] This appeal came before us for re-hearing on 15 October 2021. It is an appeal from a decision of the Hon Mr. Justice Courtney A Abel delivered on the 22nd March 2018 in respect of a claim filed on 25 August 2017.

[3] The matters leading up to the filing of the claim were as follows:

- a. On 12 September 2016 the Commissioner of General Sales Tax, the 1st Respondent, (“the Commissioner”) commenced an audit of the accounts of the Appellant, Maestre’s Industries Limited (“Maestre”) pertaining to General Sales Tax “GST”).
- b. The audit was concluded on the 21 October 2016 and a report of the auditor’s findings generated.
- c. After some discourse on the auditor’s findings between Maestre and the Commissioner, a notice of assessment was sent to Maestre dated 5 May 2017. The notice included assessment for GST for various tax periods in 2014, 2015 and 2016 in the total amount of \$1,172,871.36 inclusive of interest and penalty charges.
- d. Maestre opted to seek a review of the assessment made as set out in the notice. However the review never happened because Maestre disagreed with the pre-condition of having to pay a portion of the assessment prior to the review, as required by the Commissioner.
- e. Maestre filed a Fixed Date Claim Form on 25 August 2017 seeking a number of declarations challenging the constitutionality of the assessments and the requirement to pay a portion of the assessed taxes before allowing the review and seeking two injunctions restraining any further breach of its constitutional rights.

[4] It is noted that this matter came before the court by way of an action seeking constitutional redress coupled with a request for administrative orders, and not by way of an appeal to the Supreme Court from a decision of the GST Board filed pursuant to section 44 of the GST Act. Indeed, there is no indication of Maestre having appealed to the GST Appeal Board pursuant to section 43. Its failure to do so does not appear to be a procedural point ever taken by the Respondents in opposing Maestre's action, nor was it remarked upon by the court below. Given the claim sought constitutional redress, Maestre's failure to appeal to the GST Appeal Board as a pre-requisite to invoking the powers of the Supreme Court may not have been a bar to this action proceeding although the possibility exists that it could have been. It was not a point that arose either in the proceedings below or before us so I say nothing further in respect of it.

[5] In the application to the court brought by Maestre against the Commissioner and the Attorney General of Belize, the 2nd Respondent, ("the AG") under Part 56 of the Supreme Court (Civil Procedure) Rules, 2005 ("*Constitutional and Administrative Law*") for declarations and for relief under the Constitution, it sought:

- a. A Declaration that the sale of real property held as capital assets by a registered taxpayer is not a taxable supply on a true construction of the provisions of section 15 of the General Sales Tax (GST) Act when read together with section 23(2)(ii) of the Act specifically and the other provisions of the Act as a whole;
- b. A declaration that the assessment, charge, collection and/or recovery of GST on the sale by the Claimant of Parcels 5011 H2, 5011 H3, 5011 H5 and 5011 H6, Block 16 Caribbean Shores Registration Section which were held by the Claimant as capital assets is outwith the charging provisions of the GST Act and constitutes an arbitrary or unlawful deprivation and/or compulsory acquisition of property of the Claimant in breach of sections 3(d) and/or 17 of the Constitution of Belize;

- c. An injunction restraining the First Defendant and her servants or agents or otherwise howsoever from unlawfully assessing or charging and or seeking to enforce the collection of GST from the Claimant on the sales of the above-mentioned capital assets;
- d. A declaration that the assessment by the First Defendant of penalties and/or interest against the Claimant in a First Notice of assessments issued in or about May 2017, for the tax periods July 2014, October 2014, February 2015, March 2015, May 2015, June 2015, December 2015 and July 2016, are in breach of the provisions of sections 35, 39 and 58 of the GST Act and are therefore without lawful authority and constitutes an arbitrary or unlawful deprivation and/or compulsory acquisition of property of the Claimant in breach of sections 3(d) and/or 17 of the Constitution of Belize.
- e. An injunction restraining the First Defendant and her servants or agents or otherwise howsoever from unlawfully assessing or charging and/or seeking to enforce the collection of penalties and/or interest from the Claimant for the above-mentioned tax periods.

[6] The Judge below, the Hon Mr. Justice Abel, dismissed those claims by Maestre.

[7] In addition to those aspects of its decision that are the subject of this appeal, the court below also granted a declaration in Maestre's favour that the decision of the Commissioner to require Maestre to first pay 20% of the total value of taxes, penalties and/or interest before proceeding to a review of the assessments, in the circumstances of the Claimant's application for review, is unreasonable and in breach of Maestre's constitutional right guaranteed by section 6 of the Belize Constitution to equal protection of the law and to access to a court or competent tribunal to determine the existence or extent of any civil right or obligation.

[8] That declaration was not the subject of a cross-appeal by the Respondents, the Commissioner and the AG. It therefore forms no part of the subject matter of this appeal.

[9] The primary question before the court below arose out of the Notice of Assessment. Was the Appellant, Maestre, liable to pay GST in relation to the proceeds of sale it realized from its transfer of the real property comprised in the strata lots to its affiliates? To answer that question the court below had to first determine whether the transactions constituted a 'taxable supply' under the GST Act. It was the determination of the court below that they did. One of the corollary issues for the court below flowing from that determination, was whether interest and penalties were properly chargeable and due on the tax determined by the Commissioner to be payable. The 2nd Respondent, the AG, is a party to the proceedings in her capacity as the legal representative of the Government of Belize and pursuant to section 42(5) of the Belize Constitution.

[10] In his written judgment the trial judge, the Hon Mr. Justice Abel, helpfully and comprehensively, set out the background facts leading up to the filing by Maestre of its Fixed Date Claim Form (at numbered paragraphs 7-39).

[11] I hope I do no injustice to the facts in condensing them. Essentially, Maestre, subsequent to the filing of its GST returns, claimed to have been improperly assessed by the Commissioner for undeclared and unpaid GST said to result from proceeds of sale obtained by Maestre from its sale to third parties of strata properties within its building known as 'Gordon House'. Prior to selling the strata properties Maestre rented them to the purchasers. Maestre challenged the Commissioner's assessments asserting that the transactions were a sale of capital assets and, as such, the proceeds formed no part of taxable supplies within the meaning of section 15 of the GST Act. The companies to which Maestre sold the properties were affiliated entities and, according to Maestre, the sales were part of a reorganization of the group's capital assets and did not occur in the course or furtherance of its business (which was renting

residential and commercial spaces). It is not in dispute that the consideration for the sale of the strata properties represented fair market value.

[12] Under section 9 of the GST Act, GST applicable to a taxable supply is a percentage of the consideration. The GST to be remitted for each stipulated period is the total output tax payable by the person in relation to supplies made by the person during the tax period minus the total amount of input tax credits allowed to the person in respect to that tax period on acquisitions or importations made by the person during the period¹.

[13] Following our hearing of this appeal on 15 October 2021 this court made the following orders:

- a. The appeal is allowed.
- b. The orders of the trial judge appealed against are set aside.
- c. It is declared that the assessment, charge, collection and/or recovery of GST on the sale by the Appellant of parcels 5011 H2, 5011 H3, 5011 H5 and 5011 H6, Block 16 Caribbean Shores Registration Section is outwith the charging provisions of the GST Act.

We promised then to put the reasons for our decision in writing and do so now.

[14] The main plank of Maestre's appeal was the dismissal of the declarations it sought. Its appeal in relation to the declaration sought regarding the imposition of penalties and interest would fall away in the event (as happened) its appeal in relation to its assessment for tax was allowed. Maestre did, however, make submissions in relation to the dismissal of its declaration sought in relation to the imposition of penalties and interest. I address those later in this judgment on the alternative hypothesis of this

¹ Sections 31 and 32 of the GST Act.

court being wrong in its decision that the strata property sales, on the facts of this case, did not constitute a taxable supply under the provisions of the GST Act.

[15] This appeal required the court to construe certain provisions of the GST Act in determining whether, in the relevant factual circumstances, the sale of certain properties owned by Maestre to affiliated entities constituted a taxable supply of goods in respect of which GST was payable.

[16] In section 2(1) of the GST Act “**goods**” means any tangible property, whether real or personal, but does not include money.

[17] Section 5(1) defines a “**supply of goods**” as a sale, exchange, or other transfer of the right to dispose of goods as owner but does not include a supply of money.

[18] Section 8 stipulates that GST “*shall be charged in accordance with this Act on....**taxable supplies.***”

[19] Part IV of the Act addresses GST on Taxable Supplies. Within that part, section 15(1) stipulates that:

*“A supply of goods or services is a “**taxable supply**” if the supply:*

(a) is made in Belize;

(b) by a taxable person;

(c) in the course or furtherance of a business carried on by that person;

and

(d) is not an exempt supply”

[20] On the facts of this case it was not in dispute that the sale of the subject properties constituted a supply of goods that contained the characteristics set out in section 15(a), (b) and (d). The sole issue was whether it occurred “*in the course or*

furtherance of a business carried on by that person” (item (c) of section 15(1)). Maestre contended before us that, in concluding it did, the Judge below erred.

[21] The evidence adduced on behalf of the Appellant through the affidavit its director, Christopher Roe, filed on 25 August 2017, was that it engages in the business of renting office spaces within a commercial building it owns called Gordon House and in the business of rental of some 32 separate real properties in Belize. The evidence went on to aver Maestre was established in 1949 and has never engaged in the sale of real estate as a business.

[22] A person is required to be registered under the GST Act if the value of supplies made by the person meets or exceeds the threshold amount of \$75,000 during a given 12-month period (see section 23(1) of the GST Act). Significantly, from the Appellant’s perspective, section 23(2)(a)(ii) of the Act makes it clear that for the purposes of determining whether the value of supplies made by the person meets or exceeds the threshold amount of \$75,000 the value of supplies made by a person is regarded as not including the value of a supply by way of sale of one or more capital assets of the person.

[23] The Appellant posited that, when section 15(1)(c) of the GST Act is construed in that context, the inference is that the requirement for a supply to be generated in the course or furtherance of a business carried on by that person in order for it to be a taxable supply, excludes a supply generated from the sale of a capital asset. I understood the Appellant to be contending that not every transaction by Maestre that is commercial in nature will be considered as having been done in the course or furtherance of Maestre’s business. More is required in that the transaction must have been done in the course or furtherance of the business in which the taxpayer was engaged (which, in this case, was the rental of residential and business spaces). If the section of the statute was ambiguous, the Appellant continued, the court was obliged to resolve that ambiguity by construing the provision in accordance with the principle against ambiguous governmental imposition. In support of that proposition the

Appellant cited the decision of the Caribbean Court of Justice in *Speednet Communications Limited v Public Utilities Commission*².

[24] The Commissioner's positions (which prevailed before the court below) were that:

- a. Maestre's transactions in selling the strata properties to its affiliates should have been reported to the GST Department since it was outside of the scope of the business activity for which Maestre was registered and is taxable because of the input claims made pertaining to the construction of the building. Counsel for the Respondents referenced section 5 of the Act (headed "*Definition of a supply of goods or services*") as providing the foundation of that submission.
- b. The transactions were done in connection with the termination of a business (presumably the termination of Maestre's business of renting those strata properties) and, as such, are to be regarded as done in the course of, or furtherance of, the business. Counsel for the Respondents grounded this submission on section 3(3) of the Act (under the heading "*Definition of a business*").

[25] As GST, pursuant to section 8 of the Act, is charged on "*taxable supplies*" the outcome of the main issue in the appeal turns on whether or not the court below was correct in its determination that the supply generated from the sale by Maestre of the relevant properties to its affiliates constituted a taxable supply and, as such, was chargeable with GST that ought to have been reflected in the GST returns it filed covering the periods within which the sales occurred.

[26] In concluding it was, and should have been so reflected, the court below said this:

² [2016] CCJ 23

“[100] The only real question therefore for determination by this court is whether such sale was ‘in the course or furtherance of a business carried on by’ the Claimant.

[101] This court does not find any ambiguity within the terms of the charging provision (Section 15 of the GST Act); nor in its application to the facts of the present case (which is largely undisputed) as already found.

[102] This court does not consider there is any, or any reasonable, doubt about the meaning of this provision; and, in any event, would therefore determine, on balance, that the sale of the strata lots were done in the course of and/or in furtherance of a business carried on by the Claimant.

[103] This court has no hesitation in determining that the sale was clearly, and even undoubtedly, done as a business which was being carried on by the Claimant.

...

[106] The transactions was [sic.] in furtherance of a business of the Claimant as in addition to taking steps to ensure that something of a ‘fair market value’ was obtained, by getting the appraisal, the proceeds of sale were then in fact used to fund further commercial opportunities which the Claimant was pursuing, namely the building or development of further business ventures by way of property transactions for a profit. So clearly it was a part, or in the course or even in furtherance of a business, which the Claimant carrying on, pursuing or indeed operating.

[107] This court does not therefore accept the Claimants argument that there is an evident ambiguity within Section 15, the charging section, of the Act, nor in the application of this section to the facts and circumstances of the present case.

[108] With regard to the Claimant's arguments relating to the sold strata titles being capital assets, this court finds that this argument has no relevance to the issue under consideration. That indeed it is a 'red herring' or to mix metaphors, that it is a 'smoke screen' used to confuse the issue under consideration. This court, based on its interpretation of the charging provision of the Act under consideration does not therefore derive or find any assistance from any of the cases upon which the Claimants has relied, in the face of the Court's interpretation of the GST Act.

...

[111] This court does not agree with the Claimant that on the facts of the present case that the sales of the strata lots were part and parcel of a 'reconfiguration' of the Claimant's real estate investments. The evidence of such a 'reconfiguration' was to say the least thin.

...

[114] This court cannot in the circumstances of the present case find that the sales by the Claimants of the strata lots, which gave rise to the assessments, were unusual and outside the scope of its usual business activity of renting office spaces, done with a view to reorganize the Claimant's capital investments, but this court finds, as already determined by it, but that such sales were of a nature in the course of and/or in furtherance of its trade or a business."

[27] It is clear that the trial judge was of the view that once a transaction done by a taxpayer was commercial in nature that, without more, meant that it was undertaken in the course or furtherance of a business carried on by that person and thereby fulfilled the requirement set out in section 15 (1)(c) of the Act which is an essential component

of a supply of goods being a “taxable supply”. I am of the view that in so concluding he erred.

[28] Essential to the resolution of the question of whether the sale of the strata properties by Maestre was a taxable supply is the determination of what was the business carried on by the taxpayer? The admissions set out in the pre-trial memorandum signed by counsel for both sides in this case include:

- a. An admission that Maestre is the owner and developer of a commercial building in Belize City called Gordon House and has a number of other real estate holdings throughout Belize ***which it rents on a commercial basis***³ [my emphasis].
- b. Maestre is ***in the business of renting residential and commercial spaces*** including office spaces within Gordon House⁴ [my emphasis].

The Respondents even say in their written submissions, “*The evidence before the court is that the Appellant is in the business to rent building space [sic.]*.”⁵

[29] There was no evidence before the court that the business carried on by Maestre extended to anything other than renting residential and commercial spaces. In finding otherwise, the Judge below fell into error. The sale of the strata properties (part of its capital assets) at fair market value to affiliates to which it formerly rented them does not mean that Maestre carried on the business of selling strata properties. Each of these was a one-off transaction with an affiliate (not the public) that converted the capital assets of Maestre represented by those units from real property into cash that was ultimately used to acquire other capital assets.

³ Paragraph 7 i of the Pre-Trial Memorandum

⁴ Paragraph 7 ii of the Pre-Trial Memorandum

⁵ Paragraph 15 of their written submissions filed in the Court of Appeal on 1 March 2019.

[30] I accept the proposition advanced on behalf of Maestre that in order to determine whether a supply occurs in the course or furtherance of a business carried on by the Appellant one is required to look beyond the fact that the transactions in question took place for consideration or even that they were profitable (if that be the case). The wider context needs to be looked at in order to determine whether the transactions in question occurred in the course or furtherance of a business carried on by Maestre. In my view, however, that determination must be made objectively.

[31] Looked at objectively, the strata lots sold to its affiliates were capital assets of Maestre as that term is defined in section 2 of the GST Act⁶. The sale of one capital asset and its replacement with another is a reorganization of capital used in the person's business. GST is payable by a taxpayer on the income he derives from the business he conducts (which business utilizes his capital). That business constitutes the consumption of the good or service upon which the tax is payable because it is generated in the course or furtherance of the business carried on by the taxpayer. The sale of a taxpayer's capital asset or his conversion of it from one form into another does not, without more, occur in the course or furtherance of a business carried on by him. It is, therefore, not a taxable supply.

[32] The transactions did not, as was submitted by counsel for the Crown, become taxable supplies by virtue of input tax credits having been received by Maestre when Gordon House was built. Section 5 of the Act defines what a 'supply of goods' means but it is to section 15 that one must look to determine whether that supply of goods qualifies as a taxable supply. In order for it to so qualify **all** of the elements at (a)-(d) of section 15(1) must be present. I accept the position of the Appellant that, in the circumstances of this case, section 15(1)(c) is not present and that, accordingly, the supply of goods represented by the sale of the strata properties by Maestre to its affiliates is not a taxable supply.

⁶ An asset, whether tangible or intangible, acquired by a person for use in the person's business.

[33] I am unable to accept the argument of counsel for the Respondents, advanced orally before us, that the sale by Maestre of those strata properties within Gordon House to its affiliates was a termination of Maestre's business coming within section 3(3) of the Act and, as such, was to be regarded as done in the course of, or furtherance of, the business. There is no evidence before the court of Maestre having terminated its business of rental of commercial and residential spaces. The selling of 4 units that were previously rented does not mean Maestre terminated its business. The evidence was that it had other units within Gordon House that it rented and, additionally, was engaged in the business rental of some 32 separate real properties in Belize⁷.

[34] The explanation given to Maestre in its meeting held on 18 November 2016 with the GST auditor that conducted the assessment, that *"the strata units sold could not be treated as capital assets and had to be treated as a taxable supply pursuant to the Act, because the costs of the raw materials used to construct the building were filed as input claims"*⁸ is not supported by the definition of a taxable supply set out in the Act and the evidence cannot support a finding by the court that the supply is to be deemed a taxable supply.

[35] The case of **Customs and Excise Commissioners v Yarburgh Children's Trust** [2002] STC 207, relied upon by the Appellant, considered the question of whether a lease by the trust of property to a playgroup was a user in the course or furtherance of a business thereby rendering it a business activity (which would be subject to the standard rates of VAT) or was use solely for a relevant charitable purpose (which would be zero-rated for VAT). The case was brought by way of an appeal by the Commissioner to the court from the decision of the tribunal deciding that the grant of the lease by the trust did not constitute an economic activity that operated to disqualify the lease from being regarded as solely for a relevant

⁷ Paragraph 3 of the affidavit of Christopher Roe filed on behalf of the Appellant in the court below on 25 August 2017.

⁸ At paragraph 11 of the First Affidavit of Edd P Usher filed in the court below on 13 October 2017.

charitable purpose. The Commissioner's appeal to the court was dismissed. The case is mentioned in **Revenue and Customs Commissioners ("HMRC") v Longridge on the Thames** [2016] STC 2362, a subsequent decision of the Court of Appeal, as being still referred to in domestic (as opposed to EU) cases as an example of the use of the 'predominant concern' test that the decision in **Wellcome Trust Ltd. v Customs and Excise Comrs** [1996] STC 945 showed may be unhelpful in determining whether a taxpayer was engaged in economic activity that, *prima facie*, was taxable⁹. The predominant concern test was unhelpful because it was not considered to be an objective test.

[36] The Court of Appeal decision in **HMRC v Longridge** contains some helpful dicta even though the case is not on all fours with the case before us. In that case, the court was primarily engaged in determining the question, *who constitutes a taxable person?* Rather than with the question before us which is, *what constitutes a taxable supply?* In making its determination, that court had to consider whether the activity in question was economic activity. It expressed the view that,

*"the domestic [English] authorities have developed in a way which means that they now diverge in some respects from the test to be applied in determining whether an activity of providing services to a recipient who makes a payment constitutes an economic activity resulting in liability to VAT."*¹⁰

[37] It was determined by the Court of Appeal in **HMRC v Longridge** that:

- a. The character of an activity (*i.e.* whether it is an economic activity) is to be judged objectively; and

⁹ Per Arden, LJ at 2366 paras 5 & 6 and at 2380 paras 81 and 82; See too Morgan, J at 2387, paras 117 and 118.

¹⁰ At 2381, para 85, Per Arden LJ.

- b. The subjective motive of the person making the supply does not influence the identification of the objective character of the supply¹¹.

[38] It is that approach of applying an objective test that I find informative and which I've sought to take in determining whether the reorganization of the taxpayer's capital constitutes a taxable supply within the definition of section 15 of the GST Act; and in concluding that it doesn't.

[39] The point the Appellant was making about section 23 appears to have been misunderstood by the Respondents when they submit that "*section 23 is entirely irrelevant to the instant appeal*"¹². The appellant referenced section 23 as providing a guide to construing '*the course or furtherance of a business*' in section 15 as also excluding supplies derived from the sale of any capital assets of a business. I understood Maestre to be saying that the provision in the Act that excludes the value of a supply by way of a sale of one or more capital assets when ascertaining whether the value of a person's supply reaches or exceeds the threshold for his registration under the Act, is consistent with construing section 15 (1) (c) as also excluding such sales when determining whether the supply is made in Belize by a taxable person '*in the course or furtherance of a business carried on by that person*'. It urged the court to construe section 15(1) (c) of the Act in a way that is consistent with section 23(2)(a)(ii) of the Act.

[40] I find the reference to section 23(2)(a)(ii) as an aid in construing section 15(1)(c) to be helpful in eliminating any possibility of a wider than intended construction of the sub-section as encompassing a business transaction of whatever type by the taxpayer. If there is any ambiguity, I remind myself of the principle against '*doubtful penalization*' applicable to the interpretation of tax or revenue statutes and applied by the Caribbean

¹¹ At 2385-6, para 109, per Morgan, J.

¹² Paragraph 13 of the Respondent's written submissions filed in the CA on 1 March 2019 and paragraph 14 of the First Affidavit of Edd P Usher filed in the court below of 13 October 2017.

Court of Justice sitting in its Belizean jurisdiction. The principle is described by the editors of *Halsbury's Laws of England* as,

*“... legal policy that a person should not be penalized except under clear law, or in other words should not be put in peril upon an ambiguity; so the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which subjects a person to any detriment where the legislator's intention to do so is doubtful, or penalizes him in a way which was not made clear by the legislation in question”.*¹³

[41] For the above reasons I find that the court below was wrong in refusing those of the declarations claimed by the Appellant that it refused.

[42] Although the issue falls away as a result of my determination, I go on to consider whether the court below correctly refused the declaration sought by Maestre that the assessment by the Commissioner of interest and penalties on the sum found to be due upon her assessment of the GST payable, was in breach of the provisions of sections 35, 39 and 58 of the GST Act¹⁴.

[43] Maestre contended before us that the Commissioner unlawfully assessed it for interest on GST that was not due and payable over the period running from the date of the relevant tax periods (in respect of which it had filed returns) to the date of her assessments.

¹³ **Speednet Communications Limited v Public Utilities Commission** [2016] CCJ 23 (AJ), sitting in its Belizean jurisdiction, at numbered paragraph 37.

¹⁴ At paragraph 180 [d] of the judge's written reasons.

[44] According to Maestre, there were no taxes due from it until the assessment notices were served on it, and then the taxes were due no later than 30 days from the date of that service.

[45] With regard to the penalties, it was Maestre's submission that the Commissioner had no statutory basis for including penalties in the assessments because there were no taxes due that were unpaid. Further, the statutory requirements for the exercise of a discretion to impose such penalties were not present. This, it contended, is because interest can only be assessed from the period running 21 days from the end of the tax period to which the assessment relates in two exceptional cases, *viz.*:

- a. Where there is an assessment for the failure to submit a return; and
- b. Where there is an assessment for misrepresenting the nature or amount of GST charged;

neither of which applied in the instant case. *Ergo*, the doctrine of '*relation back*' which can only be applied in either scenario above (and was used by the Commissioner) does not apply in the circumstances of this case.

[46] In short, Maestre contended that if the additional taxes assessed were not due at the time the returns were filed, the penalties and interest levied in the assessments for late payment cannot be due.

[47] The response advanced on behalf of the Commissioner to those submissions, as I understood it, was that by virtue of the assessment, the difference between the amounts payable in respect of the returns filed within 15 days after the end of the tax period to which they related, and the amounts deemed payable by the Commissioner following her assessments, related back and were due no later than 15 days after the end of the tax period to which they related. Consequently, the argument ran, they were outstanding from then, and bore a penalty of 10% together with interest levied at the rate of 1½% per month or part thereof.

[48] If the taxes are payable as per the assessments, the fundamental questions in relation to the imposition of penalties and interest are:

- a. what were the due dates for payment?; and
- b. were the taxes paid by those dates?

[49] Maestre said the due dates for payment would have been within 30 days after receiving the notices of assessment.

[50] The Commissioner said the due dates for payment of the taxes arising from her assessments would have been within 15 days after the end of the tax period to which they related.

[51] In pronouncing upon the issue of interest the court below accepted the position advanced on behalf of the Commissioner¹⁵ and the AG, and said this,

[157] This court has carefully considered the facts and circumstances of the present case and has concluded that, in not furnishing a GST return for the taxable supply in relation to the strata titles, the Claimant is and was a person who failed to furnish a GST return in accordance with this Act.

...

[159] It appears to this court, upon such a careful reading of the possible applicable provisions that the due date for the filing of the tax return is indeed within 15 days after the end of the tax period to which the return relates.

...

¹⁵ Paragraph 164 of the written reasons.

[162] *In accordance with section 58, interest is chargeable within 15 days after the end of the tax period to which the return relates.*

[163] *... the Claimant falls squarely within Section 58(1) of the Act.*

...

[165] *This Court will therefore find that the interest claimed, being consistent with the determination of this court above, are lawful and due by the Claimants as stated by the Defendants.*

[52] In relation to the issue of the penalties imposed the court below said, [166] *This court has carefully looked at and considered the applicable provisions to penalties and has determined that the position in relation to interest generally applies in like manner as they relate to interest [mistake for ‘penalties’?] as they contain the same provisions principles.*

[53] The judge below then went on to invite the Commissioner to waive the penalty by exercising her power to do so in Section 58(2) of the Act.

[54] It is not in dispute that Maestre filed GST returns on time for the relevant periods in accordance with the provisions of section 30(3) of the GST Act which states, “A GST return shall be furnished to the Commissioner... within fifteen days after the end of the tax period to which it relates.” What was in issue between it and the Commissioner was whether those GST returns that it filed were correct. In reviewing the issues of the imposition of interest and penalties arising from the assessments by the Commissioner, we start by looking at the words in the Act.

[55] Section 35(4) states, “**Subject to the provisions contained in Division 6 of the Part**, the amount specified in a GST return as being the amount of the tax payable, or

*the amount of a refund due, in respect of a tax period **shall be conclusively deemed, for the purposes of this Act, to be correct.***"

[56] Division 6 has only two sections. It speaks to assessments of GST by the Commissioner- in section 39, and to refund by the Commissioner of overpayments in excess of a taxpayer's liability- in section 40.

[57] A penalty is payable in two circumstances contained in Division 6:

- a. Where a person who makes a supply makes any of three specified false representations (none of which appears to apply in this case);
or
- b. Where an assessment of the tax payable is made under section 39 wholly or partly as a result of an act or omission of that person that constitutes an offence against this Act...(which also would not apply, particularly in light of the conclusive deeming as correct the amount specified as payable in the GST return).

[58] The Commissioner's power set out in section 39(1) to assess the amount of tax that should be payable includes circumstances where the Commissioner is not satisfied with a GST return made by any person or as to any matter on the basis of which the return is prepared. This is the only available basis on these facts, and within Division 6, upon which the Commissioner could have conducted (and apparently did conduct) her assessment of Maestre for an amount that was greater than the amount specified in the GST returns it filed for the relevant periods.

[59] Sub-section (7) of section 39 speaks to what should obtain following notification to a taxpayer of an assessment by the Commissioner. It states, "*The Commissioner shall give to the person to whom an assessment relates notice in writing of the assessment, or of the amendment or vacation of the assessment, and an amount*

*required by the assessment or amended assessment to be paid by that person shall be paid **within thirty days after the notice is given.***”

[60] On the facts of this case there was no scope for the imposition by the Commissioner, post her assessment, of the doctrine of relation back in order to impose interest and penalties as of the due dates for payment stipulated in section 30(3). The relevant date would have been the later one determined in accordance with section 39(7).

[61] The provisions of section 58 of the Act are instructive. Section 58 states:

(1) Where any amount that a person is required to pay to the Commissioner is not paid by the due date, the amount outstanding shall bear a penalty of ten percent and in addition there shall be levied interest at the rate of 1½% per month or part thereof.

(2) The Commissioner may, where he is satisfied that the circumstances of the case justify the reduction or waiver of a penalty arising under subsection (1), reduce or waive the penalty accordingly.

(3) In this section “due date” is the date specified in section 30(3) as the date when the GST return for the period in question should be filed, save that where tax is assessed under section 39(1)(a) or (3), the due date is twenty-one days after the end of the tax period to which the assessment relates or in which the supply to which the assessment relates was made.

[62] Section 30(3) provides that a GST return shall be furnished to the Commissioner within 15 days after the end of the tax period to which it related. On the facts of this case, that was done by Maestre in accordance with the GST Act in respect of each of the relevant tax periods. It remitted GST in accordance with the amounts set out in those returns, which amounts were conclusively deemed correct in respect of the relevant tax periods, by virtue of the deeming provision in section 35(4) of the Act.

Those payments were made by the due dates as defined in section 58(3) of the Act. Having been paid on time the amounts could not be levied with penalty and interest under section 58(1) of the Act.

[63] Maestre's liability to pay additional sums in respect of the relevant periods did not arise until 30 days after it received notice in writing of the Commissioner's assessments. See section 39(7).

[64] It is only if Maestre had:

- a. failed to file a return in accordance with the Act (thereby making section 39(1)(a) applicable); or
- b. made one of several specified false representations (thereby making section 39(3) applicable);

that it would be liable for penalty and interest relating back to 21 days after the end of the tax period to which the assessment relates or in which the supply to which the assessment relates was made.

[65] On these facts, neither of those applied. So even if we had found that the sale by Maestre of the strata properties constituted a taxable supply, we would have found that it was not liable for the penalties and interest levied by the Commissioner for any period earlier than 30 days after it received notice of her assessments.

[66] Finally, we invited, and received, additional written submissions on costs from the parties for which we are grateful.

[67] In awarding the Respondents the costs of the proceedings below “*on the basis prescribed by Rules of Court*”¹⁶, there is no indication that the trial judge specifically took account of rule 56.13 of the Supreme Court (Civil Procedure) Rules, 2005 which states,

“The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.”

[68] Given that the fixed date Claim Form was expressly filed under Part 56, and that the decisions made by the trial judge included a declaration that the Appellant’s rights guaranteed by section 6 of the Belize Constitution were breached, it cannot be said the Appellant acted unreasonably in making the application or in the conduct of the application. There is not, therefore, any discernible reason justifying his departure from the general rule in this case notwithstanding the fact that the outcome of the proceeding before him was largely in favour of the Respondents.

[69] SCR 56.13 is applicable to applicants, not respondents. Where a claimant has been wholly successful (be it at first instance or on appeal) following a contested hearing, costs ought to follow the event, unless there is some good reason for ordering otherwise. It is the submission of the Respondents that by omitting any reference to “*capital assets*” in the declaration it made, this court did not find that the strata properties were capital assets and so did not give the Appellant all the relief it sought. The Respondents present that as a reason for this court to find the Appellant has not succeeded completely on its appeal and, accordingly, to not award Maestre its costs of the appeal or of the proceedings below.

[70] These reasons show that this court views the sale of the strata properties in the circumstances of this case as a sale of capital assets done as part of a reorganization of Maestre’s capital, even though it did not use the words “*capital assets*” in the

¹⁶ At numbered paragraph [180] (f) of the written reasons.

declaration made. I therefore do not accept the submission made on behalf of the Respondents as being a reason for not awarding the Appellant its costs.

[71] I consider the combination of the declaration by the court below of a breach by the Respondents of the Appellant's rights under section 6 of the Belize Constitution, together with this court's order allowing this appeal, as Maestre being successful against the Respondents in respect of its claim.

[72] In its submissions on costs Maestre requests an order in its favour for the costs of both appeal hearings (as this was a re-hearing of its appeal). We are not going to make an order for costs in relation to the prior appeal that was not concluded and had to be re-heard. This court, as constituted, does not know why the prior appeal was not concluded.

[73] Having considered the parties' submissions on costs, our order is that the costs of this appeal are awarded to the Appellant to be agreed or assessed. Costs in the Court below on a prescribed basis for a claim for declarations are also awarded to the Appellant.

ORDER OF THE COURT:

- a. This appeal is allowed;
- b. The orders of the trial judge appealed against are set aside;
- c. It is declared that the assessment, charge, collection and/or recovery of GST on the sale by the Appellant of parcels 5011 H2, 5011 H3, 5011 H5 & 5011 H6, Block 16 Caribbean Shores Registration Section is outwith the charging provisions of the GST Act.
- d. The costs of this appeal are awarded to the Appellant to be agreed or assessed. Costs in the Court below on a prescribed

basis for a claim for declarations are also awarded to the Appellant.

MINOTT-PHILLIPS, JA

FOSTER, JA

[74] I have read the draft judgment of my learned sister Justice of Appeal, Minott-Phillips and I concur with her reasons and the orders made.

FOSTER, JA