

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF
GUYANA
CONSTITUTIONAL AND ADMINISTRATIVE DIVISION
PROCEEDING FOR ADMINISTRATIVE ORDERS

2019-HC-DEM-CIV-FDA-1126

BETWEEN:

**DIPCON ENGINEERING SERVICES
LIMITED**

Applicant

-and-

**1. GUYANA REVENUE AUTHORITY
2. GODFREY STATIA, Commissioner
General**

Respondents

BEFORE THE HON. MR. JUSTICE NARESHWAR HARNANAN

APPEARANCES:

Mr. Timothy Munro Jonas for the Applicant

Ms. Hessaun Nandlal and Ms Judy Stuart for the Respondents

THE CLAIM:

1. By Fixed Date Application filed on 16th July 2019, the Applicant seeks the following reliefs:
 - a) A declaration that DIPCON is not and was not at any material time a person liable to make a payment of tax under the ***Income Tax Act*** within the language of ***section 102*** of the Act;

- b) A declaration that the second named respondent in his capacity as Commissioner General of the first named respondent erred in law and acted in excess of jurisdiction when he determined that DIPCON was a person liable to make a payment of tax within the meaning of **section 102** of the Act and when he purported by letter dated 8th July 2019 pursuant to **section 102** thereof to garnish the judgment sum owed to DIPCON from a third party pursuant to the judgment and Order dated 21st October 2015 of the Honourable Mr. Justice R. Persaud made in the High Court in *Action No.88-CD/2008*;
- c) An order setting aside the said determination and letter on the grounds that said determination is so flawed in law as to amount to a nullity, is improper, perverse, made in bad faith, ultra vires, contrary to the **Corporation Tax Act Cap 81:03** and **Income Tax Act, Cap 81:01**, is unreasonable, irrational and in bad faith;
- d) A declaration that the respondents are estopped from alleging that DIPCON is indebted to the respondents as alleged in the said letter of 8th July 2019 and from claiming to garnish the said judgment under **section 102** of the Act by virtue of the decision of the High Court given against the Respondents on the 12th November 2018;
- e) A declaration that the respondents are, in respect of any claim against DIPCON for tax as set out in the said letter dated 8th July 2019 or otherwise, creditors of the Applicant who rank in order of priority as unsecured creditors and therefore subsequent to the secured creditor of DIPCON who holds a debenture over all the assets of DIPCON including the said judgment;
- f) An injunction directed to the respondents and each of them restraining the respondents by themselves, servants and agents or any of them from taking any steps to garnish the said judgment sum or otherwise to interfere with the right as secured creditor in priority to the respondents to the said judgment sum;

- g) An account of all monies due to the Applicant by the State under the said judgment granted on the 21st October 2015 in Action No. 88-CD/2008 and paid to the Respondents by virtue of its said Letter of Garnishment and Order for payment by the Respondents to the Applicant of all such sums.

BACKGROUND:

2. By Order of the Honourable Mr. Justice R. Persaud, dated 21st October 2015, the State was ordered to pay USD\$2,228,400.00, with interest, to DIPCON in damages for breach of contract.
3. By letter dated 18th May 2018, the Commissioner General of the Guyana Revenue Authority (“GRA”) sought to garnish from the judgment, unpaid taxes owed by the Applicant for the years 2013 and 2014 (‘the First Garnishment Letter’).
4. On 13th June 2018, the Applicant applied to set aside this garnishment letter on the basis that it was not liable to pay taxes to the GRA within the meaning of **section 102** of the **Income Tax Act** of the **Laws of Guyana [Garnishments]**.
5. By Order of the Hon. Chief Justice (ag), dated 12th November 2018, this garnishment letter was set aside on the basis that the Commissioner General had erred in law and acted in excess of jurisdiction when he issued it, as DIPCON was not liable to pay taxes within the meaning of **section 102**.
6. By letter dated 8th July 2019, the Commissioner General of the GRA sought again to garnish from the judgment, unpaid taxes owed by the Applicant for the years 2013, 2014 and 2020 (‘the second garnishment letter’).

7. The Applicant has filed the current application challenging the second garnishment letter on the following bases:

i. First, the Applicant submitted that the assessments for the year 2013 and 2014 are subject to notices of objection dated 8th June 2018 and 5th November 2018, which are still pending, and its liability to pay tax for those years remain in abeyance under **section 97** of the **Income Tax Act**. It argues that until such time the objections are determined, it has no liability to pay taxes as contained in the second garnishment letter.

ii. Second, that it has no tax liability for the income year of assessment 2020 as the Respondents have failed to assess the taxes payable in accordance with the provisions of the **Income Tax Act**, in particular no corporation tax has been assessed and no notice of assessment has been issued by the Respondents against DIPCON in respect of the year of income 2019.

Further, that it has not earned a profit or income for the last six years and although the judgment will form part of its income, it is not subject to taxation until the year following the year DIPCON receives payment of the judgment. Since the judgment has not yet been paid, it cannot be indebted to GRA for tax in respect of that income.

iii. Third, that the first and second issues were adjudicated upon by the Hon. Chief Justice's Order dated 12th November 2018 and stands binding upon the parties unless and until it is overruled on appeal. The Applicant submits that the matters raised in the second garnishment letter are *res judicata* between itself and the Respondents.

- iv. Fourth, that the judgment amount, when paid, will form part of the Applicant's income, but will be exempted from tax pursuant to an express agreement between itself and the Government.
 - v. Last, that the Respondents are unsecured creditors and are not entitled to garnish debts owed to DIPCON by third parties.
8. The Respondents filed their Affidavit in Defence admitting that the orders sought by the Applicant in the first set of proceedings, which are identical to the orders sought in these proceedings, were granted and are subject to appeal proceedings. However, they contend that the Applicant is still liable to pay taxes for the following reasons:
- i. First, that although **section 97** operates to render the disputed taxes in abeyance, pending the hearing and determination of the objection lodged by the Applicant, the Applicant remains indebted to the Respondents for property tax for years of assessment 2014 and corporation tax for years of assessment 2013 and 2014.
It was argued that the second garnishment letter includes profits earned from the contract between the Applicant and Government, as well as property and corporation tax for the years of assessment 2013 and 2014.
 - ii. Second, that the tax exemption clause contained in the agreement is unenforceable as no exemption was granted by the Minister of Finance in accordance with **section 105** of the **Income Tax Act**.
 - iii. Third, that under the **Companies Act**, public tax must be paid in priority to all other debts.
9. Based on the submissions of the parties in this matter the issues arising for determination (as they were in **DIPCON Engineering Services Ltd v**

Attorney General et al, 2017-HC-DEM-CIV-FDA-1942 and **DIPCON Engineering Services Ltd v Guyana Revenue Authority et al**, 2018-HC-DEM-FDA-1114) are:

- a. Whether the Applicant is liable to pay taxes for the years 2013, 2014 and 2020; and
- b. Whether the GRA may garnish taxes from the judgment by way of the second garnishment letter.

LAW AND ANALYSIS:

Is the Applicant liable to pay tax for the years 2013, 2014 and 2020?

10. By the second garnishment letter, the Commissioner General claims that the Applicant is indebted to GRA in the amount of \$527,846,657.00 representing property tax for the year 2014 and corporation tax for the years 2013, 2014 and 2020.
11. With respect to the tax liability for the years 2013 and 2014, the Applicant submitted that in the circumstances where their Notices of Objection dated 8th June 2018 and 5th November 2018 are still pending, the sums claimed for those years are held in abeyance and liability does not arise until such time when those objections are determined by the GRA.
12. The Respondents have admitted that the Applicant's objection to the assessments for the above-mentioned years are held in abeyance pending the determination of the objection but contend that the Applicant is still liable to pay.
13. The legislative scheme for disputing assessments under the **Income Tax Act** is set out in **sections 78 to 97**. **Section 78** provides that a taxpayer who is dissatisfied with any assessment can apply to a Review Board to review the

assessment. If the review does not satisfy the taxpayer, he can appeal under **section 82** of the Act to a Judge or the Full Court against the assessments.

14. **Section 97(2)** provides that the collection of tax shall remain in abeyance until the objection or appeal is determined, provided that the Commissioner may enforce payment of any portion of the tax that is *not in dispute*.
15. **Section 103** provides that where payment of tax in whole or in part has been held over pending the result of a notice of objection, the tax outstanding under the assessment as determined on the objection or appeal, shall be payable within thirty days from the receipt by the person assessed of the notification of the tax payable and if the tax is not paid within that period payment thereof may be enforced under the Act.
16. In light of the foregoing provisions, this Court agrees with the Applicant that where an objection is given to an assessment, the taxes are held in abeyance and does not become due and payable until the Commissioner General makes a decision and inform the taxpayer of the outcome of the objection. [see paragraphs 13 and 14 of the decision of *Chief Justice Roxane George* in **DIPCON Engineering Services Ltd v Attorney General et al**, 2017-HC-DEM-CIV-FDA-1942].
17. In circumstances where the Applicant lodged their objection to the assessments for 2013/2014, this Court is of the view that the taxes for those years do not become due and payable until the objection is determined. It therefore follows that until the objection is determined, DIPCON does not become liable to pay taxes for the years 2013/2014 within the meaning of **section 102** and the second garnishment letter with respect to those years, as a consequence, is unlawful.

18. With respect to the tax liability for year of assessment 2020, the Applicant submitted that no corporation tax has been assessed and no assessment has been issued by the GRA in respect of the year of income 2019.
19. In the previous matters, [***DIPCON Engineering Services Ltd v Attorney General et al***, 2017-HC-DEM-CIV-FDA-1942 and ***DIPCON Engineering Services Ltd v Guyana Revenue Authority et al***, 2018-HC-DEM-FDA-1114], the Chief Justice held that in the absence of any evidence that the assessment had been delivered to the Applicant in respect of the years of assessment 2013/2014, the Applicant could not be considered as being liable to pay taxes for those years.
20. ***This Court is of the view that in the absence of any evidence of an assessment for the year 2019, the Applicant cannot be considered liable to pay taxes for the year of assessment 2020.***
21. Further, it appears that the Commission General has claimed potential corporation tax on the judgment for the year of assessment 2020. The Applicant submitted that since the judgment has not been paid, it cannot be liable to the GRA for taxes charged on the judgment sum. If and when the judgment sum is paid to the Applicant, taxes do not become payable until the year following the year in which it is received.
22. Indeed, the Chief Justice had this to say with respect to how the judgment should be treated at paragraph 11, page 3 of her decision in ***DIPCON Engineering Services Ltd v Attorney General et al***, 2017-HC-DEM-CIV-FDA-1942, thus:

since the amounts awarded in the judgment are yet to be paid, and will be paid no earlier than this year, 2018, corporation tax on that amount, if payable, can be charged no earlier than next year 2019.

23. However, the record reveals that as of today's date, that judgment remains unpaid up to the date of the last record filed before this Court in 2019. If the judgment is paid in 2020, corporation tax on that amount would not be chargeable until 2021 pursuant to **section 6(1)** of the **Corporation Tax Act, Cap. 81:03**.
24. ***This Court agrees that the Applicant cannot be considered liable for the year of assessment 2020 and the second garnishment letter with respect to 2020 in this regard, is unlawful.***

Can the judgment be garnished by the Respondents?

25. Given the above conclusion that the second garnishment letter is unlawful, it is unnecessary to consider whether taxes may be garnished from the judgment but for the sake of completeness, this will be considered.
26. The Applicant submitted that even if taxes were to become due and payable, the judgment cannot be garnished by GRA on two bases. First, that the judgment amount, when paid, will form part of its income, but will be exempt from tax pursuant to the express agreement between itself and the Government. The Applicant refers to clause 73 of the Special Conditions of the Agreement, which states that:
- profits arising from the performance of the contract shall be exempt from taxation by the country's Inland Revenue Department.*
27. The Respondents submitted that the tax exemption clause contained in the agreement is unenforceable as no exemption was granted by the Minister of Finance. The Respondent refers to **section 105** of the **Income Tax Act** and submitted that the procedure outlined therein is the only means by which a person may be exempt from the payment of income or corporation tax.

28. **Section 105** provides that:

*the Minister **may make regulations** subject to negative resolution of the National Assembly, **to provide for the remitting** wholly, or in part of the tax payable by any person or category of persons on such **income**, in respect of any year of assessment, and in accordance with such conditions as may be specified in such regulations. [emphasis supplied]*

29. However, this Court is of the view that **section 105** does not operate to render clause 73 of the Agreement between DIPCON and the Government unenforceable. The section does not speak to the grant of exemptions, but instead to the Minister's power to remit taxes.

30. Further, the Respondents' contention that **section 105** is the only means by which persons may be exempt from the payment of tax, is without basis. In looking at the **Income Tax Act** as a whole, there are various provisions indicating when persons may be exempted from tax. For example, see **sections 13-15**.

31. The Applicant has further argued that the Respondents are unsecured creditors and are not entitled to garnish any debts owed to DIPCON by third parties. The Respondents argued that under the **Companies Act**, all public taxes shall be paid in priority to all other debts. Reference was made to **section 434** of the **Companies Act** which provides that:

*all local government rates and public taxes due within the period of twelve months before the commencement of the **winding up** shall be paid in priority to all other debts. [emphasis supplied]*

32. However, this Court agrees with the Applicant that in absence of a winding up order, **section 434** cannot be invoked by the Respondents at this time. The GRA would first have to take enforcement steps provided for in the

Income Tax Act and/or petition the court for a winding up order under the **Companies Act** and then invoke **section 434**.

Res Judicata:

33. The Applicant submitted that the identical claims laid by the Respondents in the second garnishment letter were adjudicated upon by the Hon. Chief Justice (ag.) in the above referred matters, and therefore those issues of law are *res judicata* between itself and the Respondents. The Respondents contended that the doctrine of *res judicata* is inapplicable since the Order made by the Chief Justice is subject to an appeal.

34. **Halsbury's of England**, Volume 11 (2015), paragraph 1651, states that:

The law discourages re-litigation of the same issue except by means of an appeal. It is not in the interests of justice that there should be a re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions. There is a danger not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute. **The principles of res judicata, issue estoppel and abuse of process have been used to address this problem.**
[emphasis supplied]

35. Lord Denning MR in **Fidelitas Shipping v V/O Exportchleb [1965] 2 ALL ER 4** stated that:

The law as I understand it is this; if a party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that **he cannot bring another action against the same party for the same issue** ... But within one cause of action there may be several issues raised which are necessary for the determination of the whole case, the rule is that **once an issue**

has been raised and distinctly determined between the parties, then as a general rule neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them in the same or subsequent proceedings.

[emphasis supplied]

36. A statement of the principle of estoppel *per rem judicatam* as laid down in ***Spencer Bower and Turner's, The Doctrine of Res Judicata***, 2nd Edition, Butterworths, 1969, at page 9, paragraph 9 of the text is set out as follows:

The rule of estoppel by res judicata, which, like that of estoppel by representation, is a rule of evidence, may thus be stated: where a final judicial decision has been pronounced by either an English, or (with certain exceptions) a foreign, judicial tribunal of competent jurisdiction over the parties to, and the subject matter of, the litigation, ***any party or privy to such litigation, as against any other party or privy thereto, and, in the case of a decision in rem, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits, whether it be used as the foundation of an action, or relied upon as a bar to any claim***, indictment or complaint, or to any affirmative defence, case, or allegation, if, but not unless, the party interested raises the point of estoppel at the proper time and in the proper manner...

[emphasis supplied]

37. In ***New Brunswick Rail. Co. v. British and French Trust Corporation, Ltd.*** [1939] AC 1, the House of Lords, per Lord Maugham L.C. at pp 19-20 of the report said:

the doctrine of estoppel (*per rem judicatam*) is one founded on considerations of justice and good sense. If an issue has been

distinctly raised and decided in an action, in which the parties are represented, ***it is unjust and unreasonable to permit the same issue to be litigated afresh*** between the same parties or persons claiming under them... [emphasis supplied]

38. Having regard to the Hon. Chief Justice's decisions in ***DIPCON Engineering Services Ltd v Attorney General et al***, 2017-HC-DEM-CIV-FDA-1942 and ***DIPCON Engineering Services Ltd v Guyana Revenue Authority et al***, 2018-HC-DEM-FDA-1114, this Court is of the view that the matters contained in the second garnishment letter, raises issues of law which have been determined definitively in the previous Court proceedings and therefore it gives rise to a justified plea of *res judicata*.

39. The second letter is a replica of the first letter and seeks to bring into issue again the Chief Justice's finding on the issues that have already been determined between the parties. The GRA is bound by that decision unless an Appellate Court varies or sets it aside. It cannot ignore the decision of the Hon Chief Justice (ag.).

40. The Respondents contended that they have appealed against the Chief Justice's decision and therefore the principle of *res judicata* does not apply. ***This Court is of the view that the Applicant's appeal in no way gives them any legal basis for issuing the second garnishment letter.***

41. ***Unless and until the decision of the Chief Justice is overruled on appeal, the issues are settled between the parties. The second garnishment letter should not have been issued before the determination of the appeal.***

Amendment to Statement of Case:

42. On 11th September 2019, the Applicant applied for permission to amend the FDA for an account of all monies due to the Applicant by the State under

the said judgment and paid to the Respondents. There were no objections by the Respondents to this application.

43. The affidavit in support of that application indicated that sums were extracted from the judgment due to DIPCON by the Minister of Finance and paid to the GRA in accordance with the second garnishment letter, in spite of the current proceedings before the Court. ***Given the above conclusions, this Court is of the view that those payments to the GRA are unlawful.***

Disposition by the Court:

44. The Applicant is therefore entitled to the following reliefs claimed in the FDA, as amended by order dated the 17th September 2019, as follows:
- a) A declaration that DIPCON is not a person liable to make a payment of tax under the ***Income Tax Act*** within the language of ***section 102*** of the Act at the time of the garnishment letter dated the 8th July 2019 by the Commissioner General of the GRA;
 - b) A declaration that the second named respondent in his capacity as Commissioner General of the first named responded erred in law and acted in excess of jurisdiction when he determined that DIPCON was a person liable to make a payment of tax within the meaning of ***section 102*** of the ***Income Tax Act*** and when he purported by letter dated 8th July 2019 pursuant to ***section 102*** thereof to garnish the judgment sum owed to DIPCON from a third party pursuant to the judgment and Order dated 21st October 2015 of the Honourable Mr. Justice Rishi Persaud made in the High Court in Action *No.88-CD/2008*;
 - c) An order setting aside the said determination and letter on the grounds that said determination is so flawed in law as to amount to a nullity, is improper, perverse, made in bad faith, ultra vires, contrary to the ***Income Tax Act, Cap 81:01*** and ***Corporation Tax Act Cap 81:03***, is unreasonable, irrational and in bad faith;

- d) A declaration that the respondents are estopped from alleging that DIPCON is indebted to the respondents as alleged in the said letter of 8th July 2019 and from claiming to garnish the said judgment under **section 102** of the **Income Tax Act** by virtue of the decision of the High Court given against the Respondents on the 12th November 2018;
- e) A declaration that the respondents are, in respect of any claim against DIPCON for tax as set out in the said letter dated 8th July 2019 or otherwise, creditors of the Applicant who rank in order of priority as unsecured creditors and therefore subsequent to the secured creditors of DIPCON who holds a debenture over all the assets of DIPCON including the said judgment;
- f) An injunction directed to the respondents and each of them restraining the respondents by themselves, servants and agents or any of them from taking any further steps to garnish the said judgment sum or otherwise to interfere with the right as secured creditor in priority to the respondents to the said judgment sum;
- g) An account of all monies due to the Applicant by the State under the said judgment granted on the 21st October 2015 in Action No. 88-CD/2008 and paid to the Respondents by virtue of its said Letter of Garnishment and an Order for payment by the Respondents to the Applicant of all such sums.
- h) Costs to be paid to the Applicant by the 1st named Respondent are ordered to be assessed, unless agreed between the parties.



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Nareshwar Harnanan
Puisne Judge
December 16, 2019