IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE OF GUYANA

CIVIL JURISDICTION

COURT FILE NO.: **2018-HC-DEM-CIV-SA- 1 - 16**

In the matter of the Income Tax Act, Chapter 81:08 and the Corporation Tax Act, Chapter 81:03 of the Laws of Guyana.

BETWEEN:

Guyana Beverages Inc., a company incorporated under the laws of Guyana with its registered office situate at Plot 4A Area "AA1", Plantation Great Diamond, East Bank Demerara.

Appellant

-and-

The Commissioner General of the Revenue Authority.

Respondent

The Honourable Justice Navindra A. Singh, Puisne Judge

Messrs. Nikhil Ramkarran and Barrie Attzs for the Appellant

Ms. Maritha Halley for the Respondent

Delivered February 20th 2020

DECISION

BACKGROUND

The Appellant, Guyana Beverages Inc. (hereinafter referred to as GBI) is a limited liability company incorporated in Guyana which is wholly owned by S. M. Jaleel and Company Ltd. (hereinafter referred to as SMJ), a company incorporated in Trinidad.

GBI sells and distributes products manufactured by SMJ in Guyana.

An environmental tax of $10 per beverage container was levied and collected from GBI by the Guyana Revenue Authority (GRA).

GBI and SMJ filed suit against the **Co-operative Republic of Guyana** in the original jurisdiction of the Caribbean Court of Justice (hereinafter referred to as the CCJ) seeking a declaration that the collection of such taxes was a breach of the Revised Treaty of Chaguaramas and for an order that the aggregate sum collected be reimbursed by **Guyana**.

On May 9th 2017 the CCJ granted the declaration and order as prayed [see **S. M. Jaleel & Co. Ltd. and Guyana Beverages Inc. v The Co-operative Republic of Guyana [2017] CCJ 2 (OJ)**].

Subsequently the GRA examined the Corporation and Property tax returns filed by GBI for years of income 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016 and raised the assessments therein.

On March 29th 2018 GBI filed the tax appeals herein appealing the raised assessments of Corporation taxes [2018-HC-DEM-CIV-SA-1, 2, 3, 7, 9, 10, 13 and 16] and Property taxes [2018-HC-DEM-CIV-SA-4, 5, 6, 8, 11, 12, 14 and 15] by the GRA.

During the case management process GBI filed a Summons seeking a declaration of law with respect to **sections 5(a) and 10 of the Income Tax Act; CAP 81:01** and that Summons was duly determined on December 3rd 2018 whereby this Court declared;

"*that with respect to the Corporation Tax Appeals (2018-HC-DEM-CIV-SA-1, 2, 3, 7, 9, 10, 13 and 16) where section 10 of the Income Tax Act, CAP 81:01 applies, it will only apply to the year in which the sum previously expended during years of* *income 2009 through 2016 is subsequently recovered. Consequently, there can be no recovery within the meaning of section 10 of the ITA until the Respondent actually refunds the monies outstanding to the Appellant in respect of the environmental expense incurred by it during year of income 2009 through 2016 and further such monies can only be deemed profit for the purposes of section 5(a) of the ITA in the year of income in which it is refunded.*"

In these circumstances the issue relating to the environmental tax expense raised in 2018-HC-DEM-CIV-SA-1, 2, 3, 7, 9, 10, 13 and 16 has been determined.

ISSUE I

The first issue to be determined by the Court, herein, is an issue raised by the Appellant and which is common to all of the appeals, is whether the assessments were raised in accordance with the **Income Tax Act** [the ITA].

This issue can further be broken down into two parts, as follows;

ISSUE I (i)

The Appellant contends that the Original Assessments made by GRA [for years of income 2012, 2013, 2014, 2015 and 2016] are invalid under the **ITA** and therefore the Appellant should not be called upon to prove that the assessments are excessive or wrong.

FACTS

The Appellant submits that the Commissioner-General's power to raise an Original Assessment is provided for in **section 70 of the ITA**.

The Appellant argues that the condition precedent that must be satisfied in order for the Respondent to make a "best of judgment" assessment is a finding that the Appellant is in default in supplying information.

The Appellant argues that it is not disputed that the Respondent "accepted" the returns in accordance with **<u>section 70 (2) (a) of the ITA</u>** and that being the case the Respondent is not entitled to raise an assessment that is not in accordance therewith.

The Respondent does not dispute the fact that it did not request any additional documents or records from the Appellant.

The Respondent asserts that the assessments raised were made based on the records and statements submitted by the Appellant and they were raised based on the Appellant's misapplication of the law.

<u>LAW</u>

<u>Section 70 of the ITA</u>

(1) The Commissioner-General shall proceed to assess every person chargeable with the tax as soon as may be after the day prescribed for delivering the returns.

(2) Where a person has delivered a return the Commissioner-General may -

> (a) accept the return and make an assessment accordingly; or
>
> (b) refuse to accept the return and, to the best of his judgment, determine the amount of the chargeable income of the person and assess him accordingly.

<u>ANALYSIS</u>

Best of judgment assessments can be compulsory where the taxpayer fails to make a return or fails to produce documents requested by the assessing authority **<u>or</u>**

discretionary where the assessing authority is not satisfied with the correctness or completeness of the returns.

Physically accepting the returns does not mean that the assessing authority must raise an assessment as though the returns are correct and complete.

With respect to the returns that are the subject of these appeals, the Respondent found the returns to be unacceptable as a result of the Appellant's misapplication of the law and have consequently raised assessments which it finds to be correct based on the information submitted by the Appellant, it is now for the Appellant, in these appeals, to demonstrate to the Court that the assessments raised by the Respondent are erroneous or unjustified.

CONCLUSION

The Court does not find that the Original Assessments made by GRA [for years of income 2012, 2013, 2014, 2015 and 2016] are invalid under the **ITA**.

ISSUE I (ii)

The Appellant also contends that the Additional Assessments made by GRA [for years of income 2009, 2010 and 2011] are invalid under the **ITA** and therefore the Appellant should not be called upon to prove that the assessments are excessive or wrong.

FACTS

The Appellant submits that the Commissioner-General's power to raise an Additional Assessment is provided for in **section 72 of the ITA**.

The Appellant relying on **The Board of Inland Revenue *v* Roopchand** submits that for the Respondent to raise an additional assessment there must be a discovery of new information failing which the additional assessment would be invalid.

Further, the Appellant relying on **Kwality Restaurant and Ice Cream Co. *v* I.T.C.** submitted that the Respondent must, on information at its disposal, believe that income had been under-assessed by reason of the Appellant's failure to fully disclose all material facts necessary for assessment.

The Appellant, in its affidavit evidence, averred that the Respondent did not request nor examine any additional records of the Appellant.

The Respondent does not dispute the fact that they did not request any additional documents or records from the Appellant.

The Respondent again asserts that the assessments raised were based on the records and statements submitted by the Appellant and they were based on the Appellant's misapplication of the law.

LAW

Section 72 of the ITA

Where it appears to the Commissioner-General that any person liable to tax has not been assessed or has been assessed at a less amount than that which ought to have been charged, the Commissioner-General may, within the year of assessment (commencing with the year of assessment 1942) or within seven years after the expiration thereof, assess the person at such amount or additional amount as according to his judgment ought to have been charged, and the provisions of this

Act as to notice of assessment, appeal, and other proceedings hereunder shall apply to that assessment or additional assessment and to the tax charges under it;
Provided that where fraud or any gross or wilful neglect has been committed by or on behalf of any person in connection with or in relation to tax for any year of assessment, an assessment in relation to such year of assessment may be made at any time.

The Board of Inland Revenue *v* Roderick R. Roopchand (1978- 85) 2 T.T.T.C. 737 @ 746 [Trinidad & Tobago Court of Appeal]

Kwality Restaurant and Ice Cream Co. *v* I.T.C. (1974) 96 I.T.R. 530

Parkin *v* Cattell (1971) 48 TC 462 @ 474 per Denning MR

ANALYSIS

The Appellant's contention that the Additional Assessments are invalid are clearly grounded on the fact that the Respondent has not examined any further records or allege that the Appellant has failed to produce any or all materials necessary for the assessment.

The "discovery" of new information has been given a very broad interpretation. In **Parkin *v* Cattell** Lord Denning MR stated;

"*The word **discover** means simply find out … an Inspector of Taxes **discovers** (that income has not been assessed when it ought to have been) not only when he finds out new facts which were not known to him or his predecessor, but also when he finds out that he or his predecessor drew a wrong inference from the facts which were then known to him; and, further, when he finds out that he or his predecessor got the law wrong and did not assess the income when it ought to have been.*"

Therefore, contrary to the Appellant's contention, the Respondent does not have to come upon or find out new information to raise an Additional Assessment.

It follows from this that the Additional Assessment need not arise from or emanate from any nondisclosure on the part of the Appellant to be valid.

CONCLUSION

The Court does not find that the Additional Assessments made by GRA [for years of income 2009, 2010 and 2011] are invalid under the **ITA**.

ISSUE II

Whether the withholding tax deducted by the Appellants from payments made to non-residents for services provided is an allowable deduction.

FACTS

The Appellants expensed the gross value of its payment to the non-resident which included the portion that it is obligated to remit to the Respondent as withholding tax for years of income 2010, 2011, 2012, 2013, 2014, 2015 and 2016.

The quantum of the deductions that represent withholding tax were disallowed by the Respondent.

LAW

The relevant parts of the various sections are hereunder reproduced.

Section 18 of the ITA

For the purpose of ascertaining the chargeable income of any person no deduction shall be allowed in respect of -

(h) income tax, corporation tax, property tax or any other identical or substantially similar tax.

Section 39 of the ITA

(1) There shall be levied and paid income tax (in this Act referred to as withholding tax) at the rate set out in the Third Schedule -

(b) on any gross payment not being interest referred to in paragraphs (c), (d) and (e) made to any person not resident in Guyana or to any person on behalf of such non-resident person, where such person is not engaged in trade or business in Guyana, so, however, that in the case of payment of income arising outside Guyana to such a person withholding tax shall not be payable.

(2) Where, after the enactment of this section, a person makes any payment or distribution to any such person as is mentioned in subsection (1), the person shall under this subsection, within thirty days, account for and pay over withholding tax in respect of the payment or distribution aforesaid at the rate referred to in subsection (1).

(6) Notwithstanding section 5 -

(b) where a payment is subject to withholding tax, income tax under section 5 or corporation tax shall not be payable in respect of such distribution or payment.

ANALYSIS

The Appellant contends that withholding tax is not an income tax and is not in fact the Appellant's liability.

The Appellant contends that it is merely a collecting agent of the tax from the non-resident.

It is a general accounting principle that a withholding tax, also referred to as a retention tax, is an income tax to be paid to the government by the payer of the income rather than by the recipient of the income. The tax is thus withheld or deducted from the income due to the recipient. In most jurisdictions, withholding tax applies to employment income. Many jurisdictions also require withholding tax on payments of interest or dividends. In most jurisdictions, there are additional withholding tax obligations if the recipient of the income is resident in a different jurisdiction, and in those circumstances withholding tax sometimes applies to royalties, rent or even the sale of real estate.

Further, **section 39 (1) of the ITA** makes it indisputable that in Guyana withholding tax is an income tax and therefore no deduction is allowed in respect of this tax in accordance with **section 18 of the ITA**.

Further it is clear under **section 39 (2) of the ITA** that it is the payor, in this case the Appellant, who is liable for the payment of the withholding tax.

The Appellant's contention that **section 39 (6) (b) of the ITA** permits the payor to deduct the gross value of the payment, inclusive of the withholding tax, is unfounded and in fact contrary to the clear, unambiguous provisions of **section 18 of the ITA**.

CONCLUSION

The appeals, with respect to the issue of the Respondent disallowing the withholding tax/es as a deduction, [2018-HC-DEM-CIV-SA-1, 2, 7, 9, 10, 13 and 16], are disallowed.

ISSUE III

Whether the management fees paid by the Appellant to S. M. Jaleel and Company Ltd. constitute "head-office expenses".

FACTS

The Appellant claimed certain deductions under the heading "management fee".

The Respondent varied the quantum of these deductions by restricting it to one percent (1%) of the gross income of the Appellant for the particular year of income on the basis that those charges were in fact "head-office expenses" and therefore subject to the restriction under **section 18 of the ITA**.

The Appellant contends that the deductions are fees were paid to its parent company, S. M. Jaleel and Co. Ltd. and were not charges for services of a management nature and as such do not fall within the restrictions of **section 18 of the ITA**.

The Appellant contends that the charges were exclusively operational in nature and were limited to:

I. Recruiting and training services for GBI.
II. Operation and maintenance of the business which include solving technical and operational problems which arise in the ordinary course of business with a view

to improving operations, sales, maintaining product quantity and optimising efficiency of the business.

III. Advising on matters in connection with the operation of the business.

IV. Assigning trained and experienced staff for the commercial operation of the business.

V. Assisting in the preparation of financial, accounting and tax reports and forecasts when required.

LAW

The relevant parts of the various sections are hereunder reproduced.

Section 2 of the ITA

"head-office expenses" means any expenses arising from a charge by a non-resident parent company or a non-resident associate company of a company resident in Guyana, or a non-residential associate or subsidiary company of a non-resident company in respect of a branch or agency owned by the non-resident company in Guyana, or the head office of a non-resident company in respect of a branch or agency in Guyana, for any administrative, technical, professional or other like service of an essentially managerial nature, performed by such a non-resident parent or non-resident associate company or subsidiary company or head office of a non-resident company.

Section 18 of the ITA

Provided that no deduction shall be allowed as head-office expenses in excess of one percent of sales or gross income of any company.

ANALYSIS

The Court finds that by analysing the plain english meaning of the description given by the Appellant of the services provided by the non-resident parent company to the Appellant, the services were of a managerial nature.

The services listed at I and IV above were clearly of an administrative and technical nature. The fact that the non-resident parent company recruited and assigned staff to work with the Appellant displays a high degree of managerial control.

The services listed at II, III and V above were clearly of an administrative and professional nature. These acts were performed by the non-resident parent company to "optimise efficiency of the business" [of the Appellant] as stated by the Appellant. These are acts by a company to ensure its subsidiary is successful.

These are acts of management and in fact the fees associated with them were coined "Management Fees".

It is noted that the Appellant **pleaded** that **<u>section 42 of the ITA</u>** recognises payments made as "management charges" and these are different from "head-office expenses" under **<u>sections 2 and 18 of the ITA</u>**, however section 42 does not exist in the ITA.

<u>CONCLUSION</u>

The appeals, with respect to the issue of the Respondent disallowing deductions in excess of one percent of the gross income of the Appellant as "Head Office/ Management expenses", [2018-HC-DEM-CIV-SA-1, 2 and 16], are disallowed.

<u>ISSUE IV</u>

Whether the Respondent's assessments that the Appellant understated sales for the Years of Income 2013 and 2014 are just and well founded.

FACTS

The Appellants Corporation Tax Returns for Year of Income 2013 declared sales in the sum of $2,426,800,734.00 while its Value Added Tax Returns for the same year of income declared sales in the sum of $2,429,509,714.00 resulting in a discrepancy between the two returns in the sum of $2,708,980.00.

Similarly, the Appellants Corporation Tax Returns for Year of Income 2014 declared sales in the sum of $2,232,563,576.00 while its Value Added Tax Returns for the same year of income declared sales in the sum of $2,236,783,304.00 resulting in a discrepancy between the two returns in the sum of $4,219,728.00.

Based on those Tax filings by the Appellant, the Respondent found that the Appellant had understated its sales for the Years of Income 2013 and 2014 to the value of the respective discrepancy.

The Appellants contend that the Value Added Tax Returns for Year of Income 2013 contained an incorrect Standard Rated Sales figure for the month of May and that the sales reported in the Corporations Tax Returns for Year of Income 2013 is in fact an accurate reflection of the sales, therefore there was no understatement of sales in the Corporations Tax Returns for Year of Income 2013.

Similarly, the Appellants contend that the Value Added Tax Returns for Year of Income 2014 contained an incorrect Standard Rated Sales figure for the month of May and that the sales reported in the Corporations Tax Returns for Year of Income

2014 is in fact an accurate reflection of the sales, therefore there was no understatement of sales in the Corporations Tax Returns for Year of Income 2014.

ANALYSIS

It is clear that the Respondent raised an assessment based on the actual documents filed by the Appellant.

The Appellant's assertion of an inadvertent erroneous entry in the Value Added Tax Returns for Years of Income 2013 and 2014 cannot be reviewed until such time that revised Value Added Tax Returns for Years of Income 2013 and 2014 have been lodged with the Respondent.

When that is done then the Respondent can properly consider this explanation and determine whether what measures will be taken.

In the absence of such filings the Court cannot find that the Respondent has wrongfully or improperly raised an assessment as it did.

CONCLUSION

The appeals, with respect to the issue of the Respondent finding that the Appellant had understated its sales for the Years of Income 2013 and 2014, [2018-HC-DEM-CIV-SA-2 and 13], are disallowed.

ISSUE V

Whether the interest on overdue balances is an allowable expense.

FACTS

The Appellant claimed the interest on **overdue** balances due to its suppliers which the Appellant describe as trade payables as an expense.

The supplier to which the trade payables were due is a related party to the Appellant [SMJ Procurement & Marketing Inc.]

The Respondent disallowed the interest claimed by the Appellant as an expense on the basis that the Respondent was not satisfied that the interest was incurred wholly and exclusively in acquiring income.

LAW

The relevant part of the relevant section is hereunder reproduced.

Section 16 of the ITA

(1) For the purpose of ascertaining the chargeable income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year immediately preceding the year of assessment by that person in the production of the income, including -

(a) sums paid by the person by way of interest upon any money borrowed by him where the Commissioner-General is satisfied that the interest was payable on capital employed in acquiring the income.

ANALYSIS

The Respondent has not challenged whether the trade payables in issue are covered by section 16 of the ITA. This is in fact accepted.

The Respondent has asserted that it is not satisfied that the interest expenses were incurred wholly and exclusively in acquiring income.

The trade payable itself does not incur interest as per the Appellant's notes to its financial statements, it is the overdue balances that attracts the interest that the Appellant sought to claim as expenses.

In the absence of any explanation or proof that the Appellant was financially incapable of settling the trade payables as per the credit terms of their contract with SMJ Procurement & Marketing Inc. the Court must come to the inescapable conclusion that defaulting on the credit terms to allow the accrual of interest was contrived by the Appellant to benefit a related party and contrived to obtain a tax benefit to the Appellant.

In this regard it cannot be said that this expense was wholly and exclusively incurred in acquiring income.

The Court fails to see the relevance of the Appellant's reference to **section 40 of the ITA**.

CONCLUSION

The appeals, with respect to the issue of the Respondent disallowing the interest that accrued on overdue balances [due on trade payables] to be claimed as deductions, [2018-HC-DEM-CIV-SA-3, 7, 9, 10 and 16], are disallowed.

ISSUE VI

Whether the security expenses claim for security provided to the Appellant's General Manager's personal residence in Trinidad is an allowable deduction.

FACTS

The Appellant claimed as deductible expenses monies expended on security services provided to its General Manager's personal residence in Trinidad on the basis that such expense was wholly and exclusively incurred in the production of income by the Appellant.

The Respondent disallowed these deductions since it did not find that such expenses were incurred solely or for the direct purpose of producing income in Guyana.

The Respondent found that there was an insufficient nexus between the supply of security services to the General Manager's personal residence in Trinidad and the production of income in Guyana.

LAW

The relevant part of the relevant section is hereunder reproduced.

Section 16 of the ITA

(1) For the purpose of ascertaining the chargeable income of any person there shall be deducted all outgoings and expenses wholly and exclusively incurred during the year immediately preceding the year of assessment by that person in the production of the income, including -

Section 18 of the ITA

For the purpose of ascertaining the chargeable income of any person no deduction shall be allowed in respect of -

(a) domestic or private expenses;

(b) any disbursement or expenses not being money wholly and exclusively laid out or expended for the purpose of acquiring income;

(i) expenses in excess of the amount which the Commissioner-General considers reasonable and necessary having regard to the requirements to the trade and business, and in the case of director's fees or other payments for services to the actual services rendered by the persons concerned.

ANALYSIS

The ITA is very clear as to what expenses can be deducted and it is indeed very difficult to fathom how the supply of security services to the General Manager's **personal residence** in Trinidad is an expense wholly and exclusively incurred in the production of the income of the Appellant, a company incorporated and resident in Guyana.

In this regard the Court finds that this deduction cannot be claimed under **section 16 of the ITA** and further, this expense is specifically not allowed under under **section 18, subsections (a) and (b) of the ITA**.

The Court further finds that that the Commissioner-General exercised his judgment lawfully and properly in accordance with **section 18, subsections (a) and (b) of the ITA** when he disallowed the expense.

CONCLUSION

The appeals, with respect to the issue of the Respondent disallowing the security expenses incurred in providing security at the Appellant's General Manager's personal residence in Trinidad to be claimed as a deduction, [2018-HC-DEM-CIV-SA-1, 2, 7, 9, 10, and 13], are disallowed.

In the circumstances, save and except for the previous ruling of this Court in these appeals dated December 3rd 2018, the Corporation Tax appeals, [2018-HC-DEM-CIV-SA-1, 2, 3, 6, 7, 9, 10, 13 and 16], are disallowed.

ISSUE VII

Whether the Respondent was correct in adjusting/ increasing the Appellant's Net Assets as a natural consequence of the increase in the Appellant's Chargeable Income resulting from the expenses disallowed by the Respondent.

ANALYSIS

As a result of the disallowed expenses the Appellant's returns would reflect an increased profit.

Consequently the Appellant's Net Property would have increased.

CONCLUSION

In the circumstances the Property Tax appeals, [2018-HC-DEM-CIV-SA-4, 5, 6, 8, 11, 12, 14 and 15], are disallowed however the calculation of the Appellant's Net Property is subject to and must take into account the ruling of this Court in these appeals dated December 3rd 2018.

The Court awards costs to the Respondent against the Appellant in the sum of $150,000.00 in each Appeal.

Justice N. A. Singh