

IN THE FULL COURT OF THE SUPREME COURT OF
JUDICATURE OF GUYANA
APPELLATE JURISDICTION

2019-HC-DEM-CIV-FCA-118

BETWEEN:

THE COMMISSIONER GENERAL OF THE
GUYANA REVENUE AUTHORITY

Appellant

-and-

GRACE KENNEDY REMITTANCE
SERVICES (GUYANA) LIMITED

Respondent

The Honourable Justices Diana Insanally and Navindra A. Singh, Puisne Judges

Ms. Judy Stuart-Adonis for the Appellant

Mr. Stephen Fraser S.C. for the Respondent

Delivered July 7th 2020

DECISION

BACKGROUND

The Respondent is a company duly incorporated under the **Companies Act; CAP 89:01** of the laws of Guyana which carries on the businesses of money transfer and bill payment services in Guyana.

The Respondent company, from 1994 up until May 2018, was assessed for corporation tax at a non-commercial rate having been classified as a non-commercial company.

By letter dated May 17th 2018, the Appellant, the entity tasked with enforcing compliance with Guyana's tax, customs and related laws, informed the Respondent

that it had been reclassified as a commercial company and therefore additional assessments were raised by the Appellant for the years of assessment 2011 - 2017 with respect to the Respondent's liability for corporation tax.

This resulted in the Respondent having a tax liability for those said years in the sum of three hundred and seventy seven million one hundred and thirty five thousand one hundred and eighty four dollars (\$377,135,184.00).

The letter informed the Respondent that it is a "commercial company" as defined in **section 2(1) of the Corporation Tax Act; CAP 81:03** of the laws of Guyana and therefore it was hitherto previously incorrectly classified as a non-commercial company.

Having been reclassified as a commercial company, additional assessments were raised under **section 72 of the Income Tax Act; CAP 81:01** of the laws of Guyana resulting in the afore-stated corporation tax liability.

By letters dated May 30th 2018 The Respondent raised objections to the reclassification and the additional assessments and by letters dated September 26th 2018 the Appellant informed the Respondent company that it was maintaining its position on the reclassification and the additional corporation tax assessments.

The Respondent appealed this decision of the Appellant to a Judge in Chambers of the High Court pursuant to **section 86 of the Income Tax Act** by Fixed Date Application [2018-HC-DEM-FDA-2000] filed October 26th 2018.

Having heard the Appellant and the Respondent, the Honourable Justice N. Haranan ruled on July 5th 2019 that the Respondent was not a commission agency

and therefore not a “commercial company” as defined in **section 2(1) of the Corporation Tax Act**.

It is this ruling that the Appellant appeals while the Respondent cross appeals the Judge’s finding that a commercial company as defined in **section 2(1) of the Corporation Tax Act** includes all commission agencies and not only those that trade in goods.

ISSUE I

Does a commercial company as defined in **section 2(1) of the Corporation Tax Act** include all commission agencies.

LAW

Section 2(1) of the Corporation Tax Act, which provides;

“commercial company” means a company at least seventy-five per cent of the gross income of which is derived from trading in goods not manufactured by it and includes any commission agency, any telecommunication company, anybody corporate licensed or otherwise authorised by law to carry on banking business in Guyana, and any company carrying on in Guyana, insurance business, other than long-term insurance business, as defined in section 2 of the Insurance Act.

ANALYSIS

The Respondent submits that the use of the word “includes” is only an extension of the category of companies where at least seventy-five per cent of their gross income is derived from trading in goods not manufactured by it.

In legislative drafting “**includes**” is a term of enlargement and not of limitation or exclusive enumeration, therefore use of this term does not create a presumption that components not expressed are not included.

When the word “include” is used in legislative drafting, the intention is to create a list that is merely exemplary and not exhaustive and therefore in so doing there is no presumption that all or even most of the components are mentioned.

Further, the section [**section 2(1)**] must be read as a whole for the true meaning and intention of the drafters to be determined as Kennedy J. stated in **KMart Corp. v Cartier Inc.** [1988] 486 U.S. 281;

“In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole.”

In this regard, if the Respondent’s contention is accepted, then only telecommunication companies and banking businesses **which derive at least seventy-five per cent of their gross income from trading in goods not manufactured by them** would be included in the definition and would therefore be classifiable as “commercial companies”, which simply leads to an absurdity.

It is patently obvious that the various components named, to wit, entities trading in goods not manufactured by it, commission agencies, telecommunication companies, etc., form a non-exhaustive list of examples of “commercial companies”.

The words “*and includes*” as used in **section 2(1) of the Corporation Tax Act** are indisputably referable to the phrase “commercial companies” and not specifically to companies which derive at least seventy-five per cent of their gross income from trading in goods not manufactured by them.

I find that the case **Elliott v HM Advocate** [1995] SCCR 280, referred to by the Respondent, is inapplicable to any discussion regarding the interpretation of **section 2(1) of the Corporation Tax Act**.

CONCLUSION

All types of commission agencies are “commercial companies” as defined in **section 2(1) of the Corporation Tax Act**, as found by the trial Judge.

Therefore the cross appeal by the Respondent is dismissed.

ISSUE II

Is the Respondent company a commission agency.

LAW

Blacks’s Law Dictionary, Ninth Edition defines “**commission**” as “*a fee paid to an agent or employee for a particular transaction, usually as a percentage of the money received from the transaction.*”

Blacks’s Law Dictionary, Ninth Edition defines “**agency**” as “*a fiduciary relationship created by express or implied contract or by law, in which one party*

(the agent) may act on behalf of another party (the Principal) and bind that other party by words or actions.”

The Law of Agency and Partnership, Reuschlein & Gregory (2d ed.) explains “*The basic theory of the agency device is to enable a person, through the services of another, to broaden the scope of his activities and receive the product of another’s efforts, paying such other for what he does but retaining for himself any net benefit resulting from the work performed.*”

Blacks’s Law Dictionary, Ninth Edition defines “**agency in fact**” as “*An agency created voluntarily, as by a contract.*”

FACTS

Upon a proper reading and analysis of paragraphs 14 and 15 of the “Affidavit in Defence” sworn to by Lancelot Wills on December 21st 2018 in conjunction with paragraphs 5 and 13 of the “Affidavit in Reply” sworn to by Harryram Parmesar on January 4th 2019 it has been established that the Respondent’s principal activity is the collection, remittance and disbursements of monies as an agent of Western Union Money Transfer International and as an agent for various other companies facilitating the payments of bills due to those companies.

The Respondent earns a commission from each transaction it processes.

The trial Judge found that the Respondent is an agent but not a commission agent.

ANALYSIS

The trial Judge appears to have accepted the following as the definition of a commission agent;

“a commission agent as being unique in that it deals in its own name with the third party ... This description of a commission agent appears to have been accepted in a number of authorities in various common law jurisdictions.”

The trial Judge further went on to state *“In the circumstances, the Respondent has not defended its description of the Applicant company as a commission agent against the definitions submitted and assertions made by the Applicant. ... there is sufficient evidence that the Respondent appears to have applied a definition of that term different from that **which has been established at common law.**”*

Unfortunately the common law authorities referred to by the trial Judge were not listed, nevertheless, I find that that *“commission agency”* is not, by any stretch of the imagination, a complex term of art.

It cannot be disputed that the Respondent conducts its business with third parties as agent of Western Union in its own right.

The Respondent is a registered company in Guyana and not a registered subsidiary of Western Union.

The Respondent is subject to taxation in Guyana in its own name and not as a subsidiary of Western Union.

The Respondent can bring and defend suits in a Court of law in its own name, as it is presently doing.

Certainly if the Respondent is not paid commission that it has earned it can in fact file suit against Western Union.

When the definitions for “agency” as stated above in **Blacks’s Law Dictionary** and **The Law of Agency and Partnership** are applied I find that the Respondent is an *agency in fact* of Western Union and since it earns by payment of commission then it logically follows that it is a commission agency.

In fact, even on the definition settled on by the trial Judge, it appears that an application of the foregoing facts leads to the conclusion that the Respondent is a commission agency.

CONCLUSION

The Respondent is a commission agency.

ISSUE III

Does the Respondent derive seventy-five per cent or more of its income through being a commission agency.

FACTS

Upon a proper reading and analysis of paragraphs 17 and 18 of the “Affidavit in Defence” sworn to by Lancelot Wills on December 21st 2018 in conjunction with paragraphs 14 and 15 of the “Affidavit in Reply” sworn to by Harryram Parmesar on January 4th 2019, it is clear that the Respondent has not denied that it does earn seventy-five per cent or more of its income through the business that it does.

In the said paragraphs the Respondent simply sought to maintain its contention that it should not be classified as an entity within the definition of **section 2(1) of the Corporation Tax Act.**

CONCLUSION

The evidence is unchallenged that the Respondent derives seventy-five per cent or more of its income through being a commission agency.

ISSUE IV

Is the Appellant estopped from reclassifying the Respondent as a “commercial company”.

FACTS

The Respondent was on a previous occasion, in the year 2003, similarly re-assessed after being re-classified as a “commercial company” by the Appellant.

The Appellant subsequently reconsidered the re-classification and discharged the additional assessments.

The Respondent contends that since those additional assessments were discharged the Appellant is estopped from raising the assessments it has raised in 2017.

ANALYSIS

This issue really does not require any lengthy disposition on the law since this really is a matter of common sense and logic.

The reason/s for the discharge of the additional assessments in 2003 is not known and really is irrelevant since the finding of an officer of the Appellant in 2003 cannot bind the Appellant in the execution of its mandate in accordance with law.

The Appellant is the entity tasked with enforcing compliance with Guyana’s tax, customs and related laws.

Whenever and however the Appellant became aware of the fact that the Respondent was improperly classified in accordance with the law and as a result was being improperly taxed, the Appellant has a lawful duty to correct such error.

Similarly, if the Respondent was being over taxed and the Appellant discovered such an error, even without an objection being raised by the Respondent, the Appellant would have been under a lawful duty to correct such an error.

CONCLUSION

The Appellant is not estopped from re-classifying the Respondent as a commercial company since the reclassification was done in accordance with the law.

ISSUE V

Does the Respondent have a legitimate expectation of always being classified as a non-commercial company.

CONCLUSION

The Respondent has not stated any facts or advance any argument in support of this contention and I find that the principle is inapplicable in this case.

In these circumstances I would reverse and set aside the ruling of Justice Harnanan dated July 5th 2019 in its entirety and further dismiss High Court Action No. 2018-HC-DEM-CIV-FDA-2000 on its merits.

The Court awards costs to the Appellant against the Respondent in the sum of \$500,000.00.

Justice N. A. Singh

