IN THE COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

APPELLATE JURISDICTION

CIVIL APPPEAL No. 24 OF 2011

BETWEEN:

In the matter of an application by **GRAND COASTAL INN INC**, for Writs of Certiorari and Prohibition.

GUYANA REVENUE AUTHORITY, a body corporate established under S. 9 of the Revenue Authority Act No. 13 of 1996.

Appellant/Respondent

-and-

GRAND COASTAL INN INC.

Respondent/Applicant

Coram:

Mm'e Justice Dawn Gregory – Justice of Appeal
Mr. Justice Rishi Persaud – Justice of Appeal
Mr. Justice Rafiq T. Khan – Justice of Appeal

Appearances:
Ms. Joy Persaud, Ms. Hessaun Yassin Nandalall and Ms. M. Halley for the Appellant.
Mr. Robin Hunte for the Respondent.

Dates:
26th February; 12th March, 2018

Decision of the Court delivered by Khan JA (ag)

Proceedings in the High Court.

The Respondent's Claim.

[1] By a Notice of Motion dated 15th November, 2010, the Respondents commenced proceedings in the High Court seeking:

(a) An or Rule Nisi of Certiorari directed to the Commissioner General of the Guyana Revenue Authority (The GRA) to show to the Court cause why

his decision made on or about the 11th June, 2010 and the 2nd and 3rd November, 2010 that the applicant is liable to payment of additional Value Added Tax (VAT) for each of the Tax Periods January 2007 to December 2008, should not be quashed on the grounds that the said decisions were made in excess of the powers conferred on the Commissioner General under the Value Added Tax Act. No. 10 of 2005 as unreasonable and without or in excess of jurisdiction and in breach of the rules of natural justice;

(b) An Order of Rule Nisi of Prohibition directed to the Commissioner General of the GRA, his servants and or agents prohibiting him or any of them from demanding or imposing additional Value Added Tax for each of the tax periods January 2007 - December 2998 unless cause is shown;

(c) A Writ of Certiorari quashing the decisions made by the Commissioner on or about 11th June 2010 and 2nd and 3rd November, 2010 on the grounds that the said decisions were made in excess of powers conferred on him under the Value Added Tax Act. No. 10 of 2005 and are unreasonable and without or in excess of jurisdiction and in breach of the rules of natural justice;

(d) A Writ of Prohibition directed to the Commissioner General of the GRA prohibiting him and any of his servants or agents from demanding or imposing additional Value Added Tax for each of the Tax Periods January 2007 - December 2008.

[2] It appears, that for the period January 2007 - December 2008, the Respondent had, as required by the Valued Added Tax Act, submitted to the GRA self-assessed returns for Value Added Tax with which GRA did not agree. There is no evidence as to what was the total amount of value added tax for the period January 2007 to December 2008 for which the Respondent had assessed itself.

[3] It would appear that the GRA did not agree with the figures which the Respondent had declared. Consequently, an audit of the Respondent's VAT affairs was launched by the GRA pursuant to the provisions of the VAT Act to determine what was in the opinion of the GRA the true value added tax liability of the Respondent for the period January 2007 - December 2008.

[4] In conducting this audit, the GRA made a number of written requests of the Respondent for information. In addition, officers of the GRA made a number of visits to the business premises of the Respondent for the purpose of conducting the audit investigations and had discussions with representatives of the Respondent.

[5] The Respondent claims in an Affidavit in Support of the motion, that it supplied all information that it was in a position to provide. GRA on the other hand claims that the supply of information was sporadic and incomplete.

[6] By a letter dated 11/6/10 to the Respondent, signed by a Ms. Tracey Fredericks for the Commissioner General of the GRA and bearing an official stamp of the Guyana Revenue Authority, Audit and Verification Division, the Respondent was informed that its adjusted estimated VAT liability to the GRA amounted to $31,990,375. The letter informed the Respondent that the GRA had granted it an extension of time to Monday 14th June, 2010 at 10:00 am to meet with officers of the GRA to have discussions relevant to any concerns/disagreements it may have relating to the findings of the audit. It also stated that a failure by the Respondent to visit the GRA office on the stipulated time for discussion relating to the findings of the audit "will result in the audit being finalized based on the adjusted findings". Attached to that letter were detailed calculations of the GRA's additional estimated Vat liability of the Respondents for the period under review.

[7] A further letter dated 3/11/10, was sent to the Respondent stating that having considered additional invoices submitted by the Respondent on the 1/7/10, the GRA had reduced the additional VAT liability of the Respondent for the period to $31,290,473. Again this letter was signed by Tracey Fredericks for the Commissioner General and bore the stamp Guyana Revenue Authority, Audit and Verification Division. Attached to that letter was a statement showing the computation of the Respondent's estimated VAT liability for the period January 2007 – December 2008 amounting to $31,290,473.00.

[8] On the said day also, a further letter was sent by the GRA attaching notices of assessment for the Respondent's value added tax liability "resulting from the audit findings as outlined in the letter dated November 3, 2010". There were attached 22 notices of assessment of value added tax each bearing the signature of the Commissioner General for the period 12/2007 - 1/2008.

[9] The Respondent thereafter, in April 2011 commenced these proceedings against the Appellant seeking the prerogative writs.

[10] In its written submissions the Respondent contended before the High Court that "the said assessments were unlawful in that they were done by the auditors and subsequently approved by the Commissioner General". In that regard the Respondent contended that:

(a) The letters from the GRA dated 11/6/10 and 3/11/10 showed that the assessment was raised by the auditors and therefore they were unlawful and ***ultra vires***the Value Added Tax Act 2005.
Reliance was placed on the High Court decision in **Che Ping v. Commissioner General of the GRA** No. 180 of 2008 (unreported) in which Chang CJ (ag) stated that it was not the function of the auditors to raise or make an assessment of VAT liability. These functions fell exclusively within the powers of the Commissioner General and the Commissioner General could not treat such reports and findings of the auditors as assessment and that if the Commissioner did so, "**he would be abdicating his statutory duty in favor of his auditors**" (emphasis mine).

(b) the Commissioner General confirmed in his affidavit in answer that he delegated his duties to his auditors and then proceeded to issue notices of assessment based on the audit findings.

(c) the assessment was a condition precedent to the payment of Tax and assessment was solely the province of the Commissioner General and constitutes his own opinion of the amount of tax is chargeable to a taxpayer.

(d) even if the Commissioner had wide general powers to delegate his duties, powers they did not extend to the assessment of taxes payable by a taxpayer and that such powers of delegation "of any function to the auditors

would limit them to investigate and report to the Commissioner General and not to determining the liability of taxpayers by using assessment". Reliance was placed on the decision of De La Bastide CJ, as he then was in the unreported decision of the Court of Appeal of Trinidad and Tobago in the case of ***Wishma Maraj and Shanti Maraj v. The Board of Inland Revenue***No. 4 of 1987 which distinguished the functions of an investigator from those of an adjudicator holding that function of the investigator was to pass on to the results of the investigation for the purpose of determining the liability of the person investigated.

(e) as such it was the contention of the Respondent that the Commissioner General by abdicating his duties of assessment, acted ultra vires, the assessment provisions of the Value Added Tax Act 2005, and the Respondent was not bound to avail itself of the statutory recourse provided for in the Act, but was at liberty to seek prerogative relief before the courts to have the assessment quashed.

The Appellant's Response

[11] In an affidavit by the Commissioner General filed in answer to the Respondent's allegations, the Commissioner General swore that:

(a) the tax officers i.e. the auditors did not raise any assessment, but had conducted an examination of the Respondent's records as were made available by it;

(b) such information as was supplied by the Respondent failed to dislodge the computations made by the tax officers and based on the information made available to him, he made an estimate of the taxes payable by the Respondent;

(c) pursuant to Section 33 (1) of the VAT Act 2005, he is authorized to make assessments for additional taxes and in so doing, he may consider and utilize the information available to him consequent upon the examination of the records of a taxpayer.

(d) he did the additional assessment based on the information made available to him and he did not act ***ultra vires*** the powers granted to him under the Act.

(e) the Value Added Tax Act provided a remedy to taxpayers aggrieved by an assessment of taxes which involved first an appeal to him and thereafter to the VAT board and finally to the Court and that is the

proper procedure for the Respondent to have invoked rather seeking prerogative remedies in the first place.

[12] The written submissions to the High Court on behalf of the Appellant expanded on the Commissioner General's affidavit, contending that:

(a) Section 33 (5) of the Vat Act. No. 10 of 2005 statutorily authorized the Commissioner General to make assessment and in so doing, he is permitted to consider and utilize information made available consequent upon an examination of the available functional records and information of the taxpayer.

(b) The numerous correspondence from the GRA to the Respondent and the not so numerous meetings with representatives of the Respondent demonstrated that the Respondent was afforded an opportunity to be heard and make submissions on its own behalf in relation to the investigation.

(c) The actions of the GRA during the investigation were reasonable.

(d) In any event, section 22 (6) of the Guyana Revenue Authority Act allowed the Commissioner to delegate such of his powers as he deemed fit.

(e) More specifically Section 7 (2) of the VAT Act 2005 clearly provided that the powers conferred and duties imposed upon the Commissioner General under that Act could be performed by him personally or

> **"By a taxation officer engaged in carrying out the said provisions under the control, directions or supervision of the Commissioner".**

(f) The Commissioner General had not abdicated his duties but had carefully delegated such duties as he thought fit to his audit staff and he utilized the information garnered from such audit as an important source of information to enable him to make the assessment. Reliance was placed on the dicta of Chang CJ (ag) in **Che Ping v. Commissioner General of the Guyana Revenue Authority** (supra).

(g) The notice of assessment under the hand of the Commissioner General himself demonstrated that the final decision had been made by him and that he was at all

times involved in and supervised the decision making process.

(h) The VAT Act provided a statutory procedure for taxpayers to follow if they were aggrieved by any assessment by the Commissioner General and that that procedure was the appropriate procedure for the Respondent to have followed and not simply to have approached the Court as a matter of first resort seeking prerogative remedies.

[13] **The High Court's Decision**

(a) Chang CJ (ag) declared the Notices of Assessment dated 3/11/10 were null and void and of no legal effect on the ground that they were made without legal authority i.e out with the provisions of the VAT Act 2005 as they were not assessments made by Commissioner General or by an officer engaged in making an assessment under his direction, control or supervision. Accordingly, he made the Rules Nisi of Certiorari and Prohibition made by him on the 16/11/2010 absolute. He did not consider the alternative remedy submissions and made no findings thereon.

(b) Relying on the dicta of De La Bastide CJ in ***Wishma Maraj and Shanti Maraj v. The Board of Inland Revenue*** (supra) and on his interpretation of the letters dated 11/6/10 and 3/11/10 (referred to above) the learned acting Chief Justice found that those letters:

> **"emanated from the Audit and Verification section of the GRA [and] spoke to an audit investigation which must be distinguished from an assessment"**

(c) On this basis, the learned Chief Justice found that the said letters:

> **"conduced to the finding that the commissioner had effectively abdicated his statutory responsibilities for making assessment in favor of the auditors.**

(d) Accordingly he held that the notices of assessments dated 3/11/10 were "not assessments made by the Commissioner..."

Further the Honourable Acting Chief Justice was of the view that:

> **"where the Commissioner General makes an assessment (consequent on the rejection of a self-assessment made by the taxpayer) the common law would imply a right to be heard before the Commissioner General concludes his assessment.**

(e) The learned acting Chief Justice found it:

"inexplicable why it was the auditors (tax officers) and not the Commissioner General who had purported to afford the Applicant company any opportunity of being heard before the additional assessment were raised".

(f) The learned acting Chief Justice sought to bolster his conclusion by invoking article 142 (2) (a) (i) of the Constitution, holding that taxation laws cannot be held to be inconsistent with Article 142 (1) – even though the effect of such taxation laws may entail the compulsory acquisition of property. This was another reason why taxation laws must not only be strictly construed but strictly complied with. According to his reasoning;

"assessment of tax liability must therefore be made in strict compliance with the relevant taxation legislation to avoid a violation of Article 142 (i) ... if taxation liability is assessed and imposed by the tax authorities the relevant provisions of the taxation legislation it would constitute a violation of Article 142 (i) ... by those whose responsibility lie in administering and enforcing such laws".

The Appeal to the Court of Appeal

[14] On the 6/4/11, the Commissioner General filed an appeal against the order and decision of the acting Chief Justice, as he then was, seeking inter alia its revision and to have it set aside. Commissioner General contends that the learned Chief Justice (ag)

(a) Failed to properly assess the evidence before the Court and thereby drew inferences that were both erroneous and bad in law;

(b) Failed to apply the relevant law to the evidence as found by him;

(c) Erred in law in granting the Orders and Rules Nisi of Certiorari and Prohibition insofar as the conditions for the grant of same were not satisfied;

(d) in making the said Orders and Rules Nisi of Certiorari and Prohibition absolute, misdirected himself in that he:

(i) misapplied the law relating to delegation of the powers of the Commissioner General pursuant to the Value Added Tax Act No. 10 of

2005 and the Revenue Authority Act No. 13 of 1996.

(ii) Erred in law in ruling that the Respondent/Applicant was entitled to be heard by the Commissioner General himself, prior to him concluding the process of determining its chargeable income and assessing VAT liability;

(iii) Failed to appreciate and apply the provisions of the Value Added Tax Act. No. 10 of 2005

(iv) Failed to address the question of alternative remedies i.e. that the Respondent/Applicant ought to have utilized the specified statutory remedy outlined in the Value Added Tax Act No. 10 of 2005 prior to involving the prerogative jurisdiction of the High Court.

Submissions on behalf of the Commissioner General

[15] In the written submissions on behalf of the Commissioner General to the Court it was submitted that:

(a) While Section 33 of the Value Added Tax provides for the Commissioner General to make assessments thereunder, the combined effect of the express statutory provisions of the proviso to Section 8 of the Revenue Authority Act. Chapter 79:04 and Section 7 (2) of the Value Added Tax Act Cap 81:05 specifically authorized the Commissioner General to delegate any of his duties to a taxing officer.

(b) A public functionary can delegate the powers to perform to perform work preparatory to decision making though the final decision must be made by the functionary charged with the power;

(c) The evidence in this case indicates that the auditors of the Guyana Revenue Authority investigated and interviewed the Respondent's representatives and made calculations of additional VAT payable by the Respondent. Further the evidence shows that the findings of the investigation by the Guyana Revenue

Authority includes an assessment/final determination of VAT payable by the Respondent was made by the Commissioner General himself as is borne by the notices of assessment signed by the Commissioner General himself.

(d) No evidence was adduced by the Respondent to establish that the auditors who conducted the investigations were not under the control, direction or supervision of the Commissioner General who had stated that in his affidavit that they were in fact at all material times under the control/direction and supervision.

(e) He had lawfully exercised his power to delegate pursuant to section 7 (2) of the VAT Act and the assessments were lawfully made by the Commissioner General himself in accordance with the provisions of the VAT Act.

(f) The Respondent was afforded an opportunity to be heard and was heard, but that hearing did not have to be conducted before the Commissioner General himself as there is no provision in the VAT Act which mandates the Commissioner General to personally hear the taxpayer prior to making an assessment pursuant to the VAT Act.

(g) It would be impractical for the Commissioner General to personally hear each and every taxpayer prior to making an assessment.

(h) The evidence demonstrates that the Respondent was given an opportunity to be heard and was heard prior to the assessments.

(i) The Respondent being dissatisfied with the Commissioner General's decision was obliged to avail itself an appellate procedure provided for by Section 39 of the VAT Act to appeal to the Vat Board of Review and if dissatisfied with the decision of the Board of Review to appeal the Board's decision to a Judge in Chambers pursuant to Section 41 of the VAT Act.

The Respondent's Submissions

[16] Before this Court the Respondent maintained its submissions that:

(a) The Commissioner General had acted illegally, in excess of jurisdiction and denied the Respondent

its natural justice expectations and the Respondent adopted the correct procedure in seeking prerogative writ remedies.

(b) There was no rule of law requiring the exhaustion of administrative remedies before seeking prerogative writ remedies.

(c) The letter dated 3/11/10 setting out the additional liability of the Respondent based on the audit findings amounted to an unlawful assessment of the Respondent's Vat liability.

(d) The delegation of the Commissioners General's duties under section 7 (2) of the VAT Act was a delegation to officers concerned to audit the Value Added Tax affairs of the Respondent and it was the auditing function which was delegated to the auditors who were, so the Respondent contends, not taxing officers within the meaning of the VAT Act.

(e) The Court should construe the delegation of power under section 7 (2) of the Vat Act restrictively.

(f) The auditors could not have validly given the Respondent a fair hearing because their duties were limited to investigating and reporting to the Commissioner General.

(g) When the additional assessment was sought to be made, the Respondent should have been given a hearing personally by the Commissioner General;

(h) This case was solely concerned with the unlawfulness of the additional assessment by the auditors, hence the action for prerogative writ remedies and as such the Respondent was not obliged to avail itself of the statutory appeal procedure under the VAT Act.

The issues for the Court of Appeal

[17] The issues which this Court has to determine are as follows, whether:

(a) It was necessary that the assessments for additional VAT for the period January, 2007 to December, 2008 made by the Commissioner General personally having regard to the provisions of the VAT Act.

(b) it has been demonstrated on the evidence adduced before the High Court that the auditors of the GRA were not acting under the control, direction or supervision of the Commissioner General when they were conducting the investigation of the VAT affairs of the Respondent.

(c) within the applicable and relevant statutory scheme the powers and duties assigned to the Commissioner General needed to be delegated by him to subordinate officers of the GRA.

(d) a taxpayer has a right prior to assessment being made on it or him, to be heard by the Commissioner General personally or whether he can be heard by officers of the GRA assigned with that task by the commissioner General and as a corollary to that finding, whether the Respondent in this case, was granted a hearing.

(e) the Respondent was obliged to first invoke the prescribed statutory appellate proceedings before taking direct proceedings to the Court for prerogative writ remedies.

(f) there is any rule of statutory interpretation which mandates that taxing statutes be restrictively interpreted.

The Statutory provisions

[18] In order to determine the issues presented by this case, it is necessary to consider them in the light of the relevant statutory provisions.

The Revenue Authority Act

[19] The Revenue Authority was established as a body corporate by section 9 of the Revenue Authority Act. Chapter 79:04. Its functions as specified by section 10 (1) of the Revenue Authority Act are inter alia:

(a) to assess, charge, levy and collect all revenue due to government under such laws as the Minister may by order specify.

(b) to promote compliance with the written laws relating to revenue and create in the society full

awareness of the obligations and rights of revenue payers.

[20] The Revenue Authority is controlled by a governing board established under section 11 of the Act which performs the functions given to it by section 12 of the Act, which include the making of policy, monitoring of the performance of the authority and discipline of staff.

[21] The Commissioner General of the Authority is appointed by the governing Board under section 21 (1) of the Revenue Authority Act and performs the functions as the Chief Executive Officer of the Revenue Authority (section 21 (2)). He can, with the approval of the board, appoint staff of the authority, section 22 (3).

[22] Section 22 (6) of the Revenue Authority Act provides:

> **"Members of staff appointed under subsection (3) shall exercise such functions and perform such duties as are conferred upon them by the laws specified by the Minister under section 10 or as are delegated or assigned to them by the Commissioner General. (Emphasis mine)**

The Value Added Tax Act Chapter 81:05 (VAT Act)

[23] Section 7 (1) of the VAT Act, vests in the Commissioner the responsibility of carrying out the provisions of the Act.

[24] Section 7 (2) states:

> **"The powers conferred and the duties imposed upon the Commissioner by or under the provisions of this Act may be exercised or performed by the Commissioner personally or by a taxation officer engaged in carrying out the said provisions under the control, direction or supervision of the Commissioner". (Emphasis mine)**

[25] Section 2 of the VAT Act, defines a "taxation officer" as meaning the Commissioner or any other person in the service of the Board of the Guyana Revenue Authority". In the submissions advanced on behalf of the Respondent much ado was made of the role of the auditors and the supposed responsibility of various departments of the GRA. Section 21 (2) of the Revenue Authority Act Cap 79:04 gives the Commissioner wide

powers in the administration of the Revenue Authority and as such this Court is not concerned with the administrative, managerial and departmental techniques which are employed by the Commissioner in the management, organization and administration of the Authority. This Court is satisfied that the employees of those departments including auditors are taxation officers within the meaning of the Act and nothing has been shown by the Respondent to be otherwise.

[26] Section 7 (3) of the VAT Act states that a decision made and a notice or communication issued or signed by a taxation officer referred to in subsection (2) can be withdrawn or amended by the Commissioner or by the Taxation officer concerned and "until it has been withdrawn" is deemed to have been made, issued or signed by the Commissioner" provided that a decision made by a taxation officer other than the Commissioner in the exercise of a discretionary power under the Act, shall not be withdrawn or amended after a year has expired from the date of notification of such decision or of the notice of assessment giving effect thereto" Section 7 (4). (emphasis mine).

[27] Section 33 (1) (b) of the VAT Act states inter alia, that where the Commissioner is not satisfied with the returns furnished by a person, he may make an assessment of the amount of the tax payable by the person.

[28] In this regard under section 33 (5) of the VAT Act the Commissioner may estimate the tax payable by a person for the purpose of making such assessment based on information available.

[29] Where such an assessment has been made the Commissioner is required by section 33 (9) of the VAT Act to serve a notice of assessment upon the person assessed.

[30] Section 34 (1) of the VAT Act states that the original or a certified copy of a notice of assessment is receivable in any proceedings as conclusive evidence that the assessment has been duly made and save as in the statutory appeal proceedings under part X of the Act, that the amount and all particulars of the assessment are correct". (Emphasis mine)

[31] Part X of the VAT Act sets out the statutory appellate procedure, which is first of all by formal objection to the Commissioner and upon his disallowance thereof, to the VAT Board of Review established under section 39 A of the VAT Act.

[32] A party who is dissatisfied with a decision of the Vat Board of Review has 20 days from the date of the decision to appeal to a judge in chambers on a question of law or one of mixed law and fact (see section 41 (4) of the Vat Act).

[33] Where an appeal is made to a judge in chambers from a decision of the VAT Board of Review, the taxpayer is required under section 41 (3) of the VAT Act to pay the full amount of the tax which is in dispute to the Commissioner as a condition precedent to filing such appeal.

Discussion

Burden of Proof

[34] In the scheme of the prerogative remedy procedure which prevailed in Guyana when these proceedings were filed, orders nisi of certiorari, prohibition and mandamus are generally sought on an ex parte application and if granted by the Court, they call upon the administrative or public body to show cause why those orders nisi should not be made absolute.

[35] In the general scheme of things, the burden of proof naturally lies in the first instance with the applicant. If the act complained of is the absence of statutory power or other wrongful injury, the Plaintiff only has to prove the facts which would constitute the wrong. The burden of proof then passes to the public authority which has to show just cause. [See **Wade and Forsyth on Administrative Law** 10th Edition p. 246]

[36] Thus the initial onus of proof is upon the party alleging the invalidity. As Lord Greene MR. pointed out in ***Minister of National Revenue v. Wright's Canadian Ropes Ltd.***[1947] AC 109 at p. 122:

> **"It is for the taxpayer to show that there is ground for interference and if he fails to do so the decision must stand".**

[37] In **Administrative Law by Wade and Forsyth** 10th edition, the authors at p. 247 state that there "is a presumption that the decision or order is properly and validly made, a presumption sometimes expressed in the maxim ***omnia praesumuntur rite esse acta***"

[38] In **R v. Inland Revenue Commissioners Exparte Rossminister Ltd** [1980] AC 952 at 1015 Lord Diplock counselled:

> **"Where Parliament has designated a public officer as a decision maker for a particular class of decisions the High Court, acting as a reviewing Court... is not a Court of Appeal. It must proceed on the presumption *omnia praesumuntur rite esse acta* until that presumption can be displaced by the Applicant for review upon whom the onus lies of so doing".**

[39] In the present case, the Respondent contends that the additional assessments were made by the auditors and not by the Commissioner and that was a clear usurpation by the auditors of the Commissioner's duties.

[40] The Respondent relied on the letters dated 11/6/2010 and 3/11/2010 sent to it by the audit committee informing it of its additional VAT liability based on investigations by the audit department. These, argued the Respondent, amounted to the actual assessment which was in fact done by the auditors and which was the exclusive domain of the Commissioner.

[41] The Respondent further contended that the notices of assessment under the hand of the Commissioner dated 3/11/2010 were in fact the work of the auditors and not the Commissioner.

[42] On the other hand the Commissioner in his Affidavit in Answer denied that assessments were done by the auditors and subsequently approved by him. He contended that he estimated the additional tax due by the Respondent which said estimate he stated was "based on my judgment" and further that he made the assessments himself.

[43] The Commissioner was not cross examined on his affidavit or at all. So what was before the Court was an allegation made by the Respondent arising out of its interpretation of the two letters dated 11/6/2010 and 3/11/10 and the Commissioner's unchallenged assertion that the

assessments were made by him. The notices of assessment which are indisputably under the Commissioner's hand were also in evidence before the Court having been exhibited by the Respondent.

[44] Section 34 (1) of the VAT Act deems the original or a certified a copy of the notice of assessment in proceedings before this Court or the High Court to be "conclusive evidence that the assessment has been duly made and that the amount and particulars of the assessment are correct". In this case while the copies of the notices of assessment exhibited by the Respondent were not certified none of the parties disputed that they were true copies of the originals, and they were accepted as such.

[45] Additionally section 7 (3) of the VAT Act deems any communication issued and signed by a taxation officer to have been made and signed by the Commissioner.

[46] This would mean that the letters dated 11/6/2010 and 3/11/2010 are statutorily deemed to have been signed by the Commissioner and his signature appearing on the notices of assessment dated 3/11/10 are conclusive evidence in proceedings such as these, that the assessments had been duly made. Therefore the Respondent's submission that those letters were made by the taxation officers apart from the Commissioner is based on a false assumption. It may be based on ignorance of the statutory provisions examined above by virtue of which, such letters signed by taxation officers are deemed to have been signed by the Commissioner himself.

[47] It is the view of this Court that the Respondent's assertions in relation to how the assessments were made amount to nothing more than pure speculation and have no evidential foundation. They do not suffice to displace the presumption both at common law and under the statute that the assessments were properly and validly made. For those reasons this Court is of the view that the Respondent had not discharged the burden of proof placed upon it to prove that the assessments were in any way unlawful.

Delegation

[48] The words of section 7 (2) of the VAT Act and section 22 (6) of the Revenue Authority Act are clear and unambiguous. Section 22 (6) of the Revenue Authority Act allows the Commissioner to delegate functions and duties to members of staff of the Revenue Authority.

[49] Section 7 (2) of the VAT Act which is of primary relevance to this case, expressly permits that the duties and powers conferred upon the Commissioner under the provisions of the Act can also be performed by a taxation officer carrying out the said duties and powers under the control, direction or supervision of the Commissioner.

[50] In the submissions on behalf of the Appellant both in the Court below and before this Court, section 7 (2) of the VAT Act was advanced as conferring a power of delegation of the duties and powers of the Commissioner.

[51] In our view, on a true reading of section 7 (2) of the VAT Act, it confers no powers of delegation. What section 7 (2) of the VAT Act does is to vest directly a concurrent ability to exercise the powers and duties conferred upon the Commissioner by the provisions of the Act, in a taxing officer acting pursuant to those provisions while under the control, direction and supervision of the Commissioner.

[52] What the Respondent claimed in its affidavit in support of its motion in the High Court was that the additional assessments by the Commissioner were made by the auditors and amounted to an unlawful delegation and abdication of his duties under the VAT Act. Further, that the alleged delegation and subsequent approval were null and void. But having regard to the true meaning of section 7 (2) of the VAT Act as explained above, this submission by the Respondent is misconceived. The taxing officers were exercising powers and duties vested in them by the section.

[53] There was no allegation whatsoever, or for that matter, any proof in the Respondent's affidavit, that the auditors were not acting under the supervision or control of the Commissioner.

[54] How the learned acting Chief Justice was able, in those circumstances, to find that:

> **"In the instant case, it does not appear that any taxation officer was engaged in the function of making an assessment under the control/direction or supervision of the Commissioner General"**

is inexplicable, since it was never so alleged much less proved by the Applicant on whom lay the initial burden of so proving.

[55] Even if the taxing officers were indeed engaged in the process of making additional assessments of Value Added Tax, they were, in so doing, exercising powers and performing duties of the Commissioner specifically given to them by section 7 (2) of the Act. Therefore the onus was on the aggrieved Respondent to rebut the presumption that they were so performing such powers and duties under the supervision, control or direction of the Commissioner. This the Respondent failed to do and the learned Chief Justice for the reasons mentioned earlier, erred in having concluded otherwise.

[56] Reliance was placed by the learned acting Chief Justice on the dicta of the Hon De La Bastide CJ in the unreported decision of the Court of Appeal of Trinidad and Tobago in the case of ***Wishma Maraj and Shanti Maraj v. the Board of Inland Revenue*** Civil Appeal No. 4 of 1989. The facts and circumstances of that case are however fundamentally different from the present case.

[57] In Maraj, two commercial banks under their reporting obligations to the Revenue, forwarded information of interest earned by the Appellants on two bank accounts, which the Appellants had failed to declare to the Revenue. An assessment of the Appellants was launched by the Inland Revenue. An officer of the Inland Revenue initially involved in the investigation was personally involved in litigation with the Appellants. Upon discovery of this, that officer was removed by the Deputy Commissioner and the investigation proceeded and an assessment was made. The Appellants claimed inter alia writs of certiorari to quash the assessment on the basis of bias due to the initial involvement of that officer

involved in litigation against them. Their appeal was dismissed on the ground that any alleged bias ceased to exist when the officer with whom they had litigation had been removed prior to the assessment which was made by the Deputy Commissioner.

[58] The comments made by De La Bastide CJ upon which Chang CJ (ag) placed undue reliance, were made in the context of an explanation of the role played by the officer against whom bias had been alleged in the process concluding with the assessment of the taxpayers by the Deputy Commissioner.

[59] The case certainly was not concerned with the delegation of powers and duties and even more so, had nothing to do with the interpretation of the vesting of powers and duties as enabled by any similar provision in Trinidad to section 7 (2) of the VAT Act Guyana.

[60] Nonetheless, it does appear that the learned acting Chief Justice recognized that, quite apart from the Commissioner, a taxing officer could make assessments. In the words of the acting Chief Justice:

> **"Thus if a taxation officer is engaged in making assessments he must do so only under the control, direction or supervision of the Commissioner General".**

[61] When so engaged in any assessment function, the learned Chief Justice, was however of the opinion that, the taxation officer.

> **"is not himself assessing but is merely assisting the Commissioner General in the discharge of his statutory duty and responsibility of making the assessments. Section 7 (2) serves to emphasize that that function of raising assessments must essentially be performed by the Commissioner General"**

[62] We do not agree that this is an accurate interpretation of section 7 (2) of the VAT Act. We find and so hold that the words of section 7 (2) of the VAT Act are sufficiently ambulatory to encompass a qualified vesting of the Commissioner's powers and duties under the Act including his power to make assessments under sections 33 (1) (b) and 33 (5) of the Act to a

taxation officer with the caveat that where the taxing officer so exercises these powers and duties under any section of the Act, he is to do so under the control, direction and supervision of the Commissioner.

The Fair Hearing Issue

[63] The Respondent claims that prior to assessment for additional VAT for the period January 2007 – December 2008, it had a right to be heard by the Commissioner himself and not by any other taxing officers of the Revenue Authority.

[64] It is quite clear that there was a number of correspondence between the taxation officers and the Respondent along with meetings and discussions among taxation officers and representatives of the Respondent prior to the notices of assessment dated the 3/11/10.

[65] These discussions and communications resulted in a reduction of total assessed VAT liability for the said period from $31,990,375 to $31,290,437.

[66] Nonetheless the Respondent contends that it had a right to be heard personally by the Commissioner before the assessments were made.

[67] It is accepted that a taxpayer has no statutory right under the VAT Act to a hearing by the Commissioner before an assessment and that if any such right exists, it does so at common law.

[68] It is undoubted that the Respondent was allowed an opportunity to make representations and present evidence to the Commissioner prior to the assessment. In fact the Respondent did do so and as a consequence its additional VAT liability was reduced.

[69] But the Respondent argues that its interactions both written and in person, through its representatives, was with the audit officers and not with the Commissioner himself and that it has a right to be heard by the Commissioner himself.

[70] A right to a fair hearing as explained by Fiadjoe in his **Commonwealth Caribbean Public Law** 2nd edition page 230.

"means an opportunity to put one's side of a case before a decision is reached"

[71] The legal requirement as Fiadjoe puts it (supra) is:

"nothing more than a basic duty of fairness"

[72] In this regard Lord Diplock in **R v. Commission for Racial Equity** ex p. **Hillingdon LBC** (1987) AC. 779 explained:

"Where an Act of Parliament confers upon an administrative body functions which involve its making decisions which affect to their detriment the rights of other persons or curtail their liberty to do as they please, there is a presumption that Parliament intended the administrative body should act fairly towards those persons who will be affected by their decision"

[73] This court has already expressed its views that the scheme of the VAT Act permits taxing officers to perform the functions and duties of the Commissioner General albeit under his direction, control or supervision and that communications signed by them are deemed to have been signed by the Commissioner.

[74] We are satisfied on the evidence presented by the Respondent itself, that:

(a) it was afforded an opportunity to make representations to taxing officers of the Revenue Authority before it was assessed for additional Value Added Taxes;

(b) It in fact did make such representations to taxing officers of the Revenue Authority prior to the assessments being made which indeed resulted in a reduction in total value added tax liability for the period in question;

(c) There is no legal requirement that the Respondent be heard by the Commissioner himself as it would be too onerous a task to impose upon the Commissioner a duty to himself hear each and every taxpayer prior to an assessment of such taxpayer. It would defeat the intention of Parliament which saw it fit in easing the burdens on the Commissioner in the exercise of his powers and duties under the Act to expressly vest the powers and duties granted to the Commissioner in taxing officers acting under his direction, control or supervision.

(d) In all events the process leading up to the assessments was fair.

Alternative Remedies

[75] Section 33 (1) (b) of the VAT Act enables the Commissioner, if he is dissatisfied with a return to make an assessment of the amount of tax payable by the person. This is what the Commissioner did in this case.

[76] That estimate of tax payable by the taxpayer for the purpose of making an assessment may be based upon information available to the Commissioner, section 33 (5).

[77] Where a taxpayer is dissatisfied with the assessment, his first recourse is to lodge an objection to the decision within 20 days of the service of notice of assessment. Section 38 (8).

[78] The Commissioner may allow the objection in whole or in part or may disallow it (section 38 (5)).

[79] If the taxpayer disagrees with the disallowance of his objection he can appeal to the VAT Board of Review as provided for by Section 39 (2) of the Act.

[80] If the taxpayer disagrees with a decision of the VAT Board of Review he may appeal to a judge of the High Court in Chambers under section 41 (1) of the Act. In such a case section 41 (3) of the Act states that no such appeal lies unless the full amount of tax which is in dispute is paid to the Commissioner.

[81] The Appellant has argued in the proceedings before the High Court and this Court, that the Respondent's complaint is really against the assessments and that being the case, the proper procedure for the Respondent to have adopted was to have availed itself to the statutory appellate procedure summarized above.

[82] The learned acting Chief Justice in the light of his eventual decision did not deal with this issue in his judgment.

[83] We have carefully considered the various correspondences exhibited by the Respondent in the proceedings before the High Court and the affidavits filed on behalf of both parties. We agree with the submission on behalf of the Appellant, that the case, stripped of its prerogative remedies costume, in reality is concerned with a disagreement with the additional value added tax assessed by the Commissioner. As such we are of the view and so hold that the appropriate procedure for the resolution of these issues was the appellate procedure provided for in Part X of the VAT Act and that the VAT Board of Review was the appropriate and better equipped tribunal for the determination of these issues.

[84] Quite recently the Caribbean Court of Justice had reason to pronounce on this very issue in **Guyana Stores Ltd v. Attorney General of Guyana et al** [2018] CCJ 2 AJ. In that case a challenge was made to the constitutionality of a 2% minimum corporation tax created by the Fiscal Enactments (Amendment) Acts. The Court rejected the Appellant's arguments that the 2% tax was unconstitutional and held that while the Appellant was entitled to pursue a claim for constitutional relief, that:

> "Entitlement did not alter the fact that at root, the **underlying and primary issue the company had, was with the liability to pay the demanded taxes. This was precisely suited for resolution by the specialized processes and tribunal established by the Income Tax Act for producing such resolution**" (emphasis mine).

[85] After examining the correspondence from the Revenue Authority which included a letter which stated:

> **"The total tax due and enclosed a table showing the tax assessed for each year going back to 1986 and ending in 2010";**

the Caribbean Court of Justice concluded that there was "no sudden and unheralded imposition of and demand for taxes from the Revenue Authority and, it appears, it was no arbitrary assessment".

[86] In the present case, the evidence in the Respondent's affidavit and the correspondence exhibited to that affidavit show that the additional VAT was assessed after an investigation which included meetings with and

representations on behalf of the Respondent from June 2010 to November 2010 culminating in the letter dated 3/11/2010 and the notices of assessment dated 3/11/2010.

[87] Indeed there was in this case "no sudden and unheralded imposition of or demand for taxes from the Revenue Authority" or arbitrary assessments. There was nothing to prevent the Respondent from lodging an objection and invoking the jurisdiction of the VAT Board of Review if the objection was rejected. Indeed no exceptional circumstances or for that matter no circumstances were shown that would justify prerogative remedy proceedings in the light of the more appropriate and specialized appellate procedure established under the VAT Act.

[88] What this present action, misconceived as it was, has succeeded in doing, is to falsely secure for the Respondent temporary financial respite at the expense of the nation while this case wound its way through the court processes for over seven years. But such strategy, if one may call it that, in no way helps the Respondent who will still remain liable for the taxes assessed along with the consequential interest imposed by the Act.

[89] It therefore behooves the Courts before whom applications such as this are initially heard to exercise great care in making the orders prayed for lest they become unwitting participants in a charade. Undoubtedly there will be genuine cases for prerogative remedies but these should be exceptional. As Lord Scarman stated in **R v. Inland Revenue Commissioners Exp. Preston** [1985] AC 835 at 852; it was

> **"A proposition of great importance [that] a remedy by way of judicial review is not to be made available where an alternative remedy exists[and that] it will only be very rarely that the Courts will allow the collateral process of judicial review to be used to attack an appealable decision."**

Similarly Donaldson MR in **R v. Epping and Harlow General Commissioners Exp. Goldstreme** [1983] 3 All ER 257 at 262 stated:

> **"it is a cardinal principle that, save in the most exceptional circumstances [the judicial review] jurisdiction will not be exercised where other remedies were available and have not been used"**

Recently the Caribbean Court of Justice in the **Medical Council of Guyana v. Jose Ocampo Trueba** [2018] CCJ 8 at paragraph 25, stated that while:

> **"the mere existence of a right of appeal does not preclude judicial review" [an] "applicant may be permitted to proceed with judicial review if he shows there are exceptional circumstances which justify so proceeding rather than appealing"**

The Court therefore must not shirk its responsibility to quickly identify the wolf in sheep's clothing and dispatch it with all due haste. In this case the Respondent has failed to establish any exceptional circumstances which would justify the preference of the prerogative writ procedure to the statutory appellate procedure.

The Constitution requires that the Taxing Acts be restrictively construed

[90] Prior to concluding his decision, the learned Acting Chief Justice attempted to justify his view that taxation legislation ought:

> **"Not only to be strictly construed but also strictly complied with"**

on the basis that Article 142 (2) (a) (i) of the Constitution provided that taxation laws could not be held inconsistent with Article 142 (1) as they did not entail compulsory acquisition of property.

[91] With the greatest respect to the Honourable Acting Chief Justice, we do not see how the provisions of article 142 (2) (a) (i) of the Constitution imply a requirement for strict interpretation of and compliance with the provisions of taxing laws.

[92] This Court endorses the views expressed by Lord Killowen CJ in **AG v. Carlton Bank** [1899] 2 QB 158 at 164 where he said:

> **"I see no reason why special cannons of construction should be applied to any Act of Parliament and I know of no authority for saying that a taxing Act is to be differently construed from any other Act. The duty of the Court is in my opinion, in all cases the same, whether the Act to be construed relates to taxation or**

any other subject, viz to give effect to the intention of the legislature..."

[93] Similarly the High Court of Australia in **Alcan (NT) Aluminum Pty Ltd. v. Commissioner of Territory Revenue (2009) 239 CLR 27 at [57]** stated:

"Tax statutes do not form a class of their own to which different rules of construction apply"

[94] Whilst a taxpayer is to be taxed only on clear words, the Court's approach to the construction of a taxing Act is to pay due regard to:

"The context and scheme of the relevant Act as a whole and its purpose should be regarded"

[Per Lord Wilberforce in **WT Ramsay Ltd. v. IRC** [1982] AC 30 at 323]

[95] We are of the view therefore and so hold that Parliament intends that its taxing statutes are to be interpreted in a meaningful and purposeful way, giving effect to the objectives of the legislation. To this end, they should be unshackled by any unnecessary constraints upon their construction and application.

Disposal

[96] For all the reasons given above this Court holds that:

(a) The appeal be allowed;
(b) The Orders nisi and absolute of certiorari and prohibition of the Honorable Mr. Ian Chang S.C Chief Justice (ag) granted in action No. 192 – M of 2010 Demerara be and are hereby discharged;
(c) The Respondent do pay the Appellant costs in the sum of $250,000.00.

Dated this 21st day of May 2018

COURT OF APPEAL OF THE SUPREME COURT OF JUDICATURE

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Mr. Justice Rafiq T. Khan
Justice of Appeal (ag)