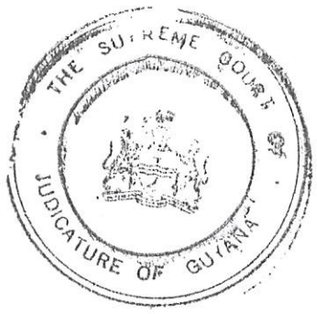
2008 No. 221 – M DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION



In the matter of articles 40, 142, 144 and 153 of the Constitution of the Co-operative Republic of Guyana.

-and-

In the matter of an application by Mings Products and Services Limited for Writs of Certiorari and Prohibition.

BETWEEN:

MINGS PRODUCTS AND SERVICES LIMITED, a company duly incorporated in Guyana under the Companies Acts having its registered officers at Lot 16 Urquhart Street, Georgetown, Demerara, Guyana.

(Plaintiff)

-and-

1. **THE ATTORNEY-GENERAL**
2. **THE GUYANA REVENUE AUTHORITY.**
3. **THE COMMISSIONER--INLAND REVENUE** of the Guyana Revenue Authority, Mr. Khurshid Sattaur.

(Defendants, jointly and severally).

BEFORE:

HON. MR. JUSTICE IAN CHANG, C.C.H, S.C – CHIEF JUSTICE (ag.)

Mr. Stephen Fraser with Mr. Marcel Bobb for the Plaintiff.

Miss Sam for the 1st named Respondent.

Mr. S. Scarce for the 2nd and 3rd named Respondents.

DECISION

This application is for reliefs under Article 153 of the Constitution for likely breach of the applicant's right not to be deprived of his property under Article 142 of the Constitution for reason of alleged incorrect assessments of corporation tax made by the Commissioner-General under the Corporation Tax Act. The question which arises in this application is whether such incorrect assessments can as a matter of law give rise to a claim for a threatened violation of the tax payer's right under Article 142. Since assessment by the Commissioner-General of the Revenue Authority is premised on taxation, the preliminary question can arise as to whether what purports to be a tax under the taxation statute is definitionally a tax in pith and substance. In the instant case, the preliminary question arises whether the imposition of a 2% tax on sales returns on commercial companies under the relevant provisions of

the Corporation Tax Act is legally a tax or some other form of levy.

Article 142 of the Constitution provides:

> ***"(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired except by or under the authority of written law and where provision applying to that taking of possession or acquisition is made by a written law requiring the prompt payment of adequate compensation."***
>
> ***(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of the preceding paragraph –***
>
> ***(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property -***
>
> ***(i) in satisfaction of any tax, duty, rate, cess or other impost."***

It is clear that Article 142 (1) has no application to the provisions of a taxing statute or anything done thereunder to the extent that the statute provides for the possession or acquisition of any property in satisfaction of any tax. Article 142 (2) clearly mandates the court not to hold that the contents of any taxing statute or anything done thereunder to be inconsistent with Article 142 (1).

In **Bata Shoe Company Ltd and Others V. Commissioner of Inland Revenue** (1976) 24 W.I.R 172, it was submitted that the Government was precluded from imposing new taxes without providing for the payment of compensation, it was held by the Court of Appeal that compensation following taxation was not contemplated under Article 8 (1) (the equivalent of Article 142 (1) of the 1980 Constitution) and that the power given in Article 72 (the equivalent of Article 65 (1) of the 1980 (Constitution) to make laws for the peace, order and good government of Guyana was in the nature of an enabling power and conferred a jurisdiction in Parliament to do all such acts or employ such means as were essentially necessary to their execution, including a power to levy new taxes. In that case, Crane J.A. stated at 188:

> ***"I am clearly of opinion that art. 8 (1) is applicable only to situations where the individual can fittingly claim compensation.***

In my view, it is totally related to any question of taxation for taxation and payment of compensation are irreconcilable. It seems to me a power to tax must necessarily exclude the obligation to compensate for the latter is necessarily incompatible with the former. But even if it were possible to go so far as to say that a monetary tax on property can be compulsorily taken possession of, I think it would make nonsense of the article under consideration to suggest that prompt and adequate compensation must become payable to the individual for so doing. The truth would seem to be that taxation is absolutely unrelated to, and irreconcilably opposed to art. 8 (1)."

It is clear to the court that the dicta of Crane J.A. underlie the purpose and intent of Article 142 (2). However, the court is of the view that, as far as taxation statutes are concerned, the first part of Article 142 (1) ("No property of any description shall be compulsorily taken possession of and no right in or interest over property to any description shall be compulsorily acquired, except by or under the authority of a written law") does have application to taxation to the extent that it prescribes that there can be

no taxation without legislation. It is the second part of Article 142 (1) which has no application to taxation.

It is instructive to note the further dicta of Crane J.A. in the **Bata Shoe Company** case when he stated at 189:

> ***"I therefore reject the submission that it is incompetent and unconstitutional for Parliament to levy new taxation by legislation unless there is payment of compensation. It seems to me puerile to suggest that an amendment of the Constitution is necessary before there can exist the right to impose new taxation without compensation. When the framers of the Constitution gave Parliament the power to make laws for the peace, order and good government of Guyana, that grant was clearly in the nature of an enabling power, and the maxim of the implied power immediately came into operation because of the rule of construction that whenever an Act confers a jurisdiction, it impliedly also grants the power of doing all such acts or empowering such means as are essentially necessary to its execution. The maxim is: Cui jurisdictio data est, eo quoque concessa***

esse videntior, since quibus jurisdictio explicari not potuit." It is inconceivable to think that any Government could have to survive for long, unless it is given the power to impose new taxes or that Parliament did ever intend such a state of affairs should exist as payment of compensation following taxation. Payment of compensation which must be "prompt" would neutralize taxation, which is clearly unnecessary because, as was said by Wood C.J. in Canada in the Hudson Bay Co. V. A.G of Mamtoba (1878) Temp. Wood 209,

> ***"The imposition of tax is one of the highest act of sovereignty. Taxes are burdens or charges imposed by the legislature's power to raise money for public purposes. The power to tax rests on necessity and is inherent in every sovereignty."***

The court therefore holds that, in so far as the Corporation Tax Act is a taxation statute, it cannot be held to be unconstitutional and in violation of the applicant's right not to be deprived of property under Article 142 (1) having regard to the **Bata Shoe Company** case (supra) and, more

particularly, Article 142 (2) of the Constitution which is the successor to Article 8 (2) (a) (1) of the 1966 Constitution.

In the **Bata Shoe Company** case (supra) Luckhoo J.A, in drawing the distinction between the power of eminent domain and the power of taxation, stated at 207:

> ***"Reference was made to the distinction between the power of eminent domain and the power of taxation, the former being the power of the State to take the property of the subject against his will by authority of law for a public purpose on payment of compensation. Eminent domain is a concept peculiarly American and is akin to our art 8 (1) (now Article 142 (1)). But there are essential differences between the two powers which can best be discerned in an extract from the judgment of Mukherjea J. in The Commissioner Hindu Religious Endowments, Madras Vs Sri. Lakshmendra Thirtha Suramair of Sir Shirur Mutt (1956) S.C.R at p. 1040):***
>
> ***"A neat distinction of what "tax" means has been given by Latham C.J of the High Court of Australia in Matthews V. Chickery Marketing Board (60 CLR 263 at 276):***

"A tax", according to the learned Chief Justice "is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered." This definition brings out, in our opinion, the essential characteristics of a tax as distinguished for other forms of imposition which, in a general sense, are included within it. It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power with the taxpayer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without any reference to any special benefit to be conferred on the payer of the tax. This is expressed by saying that the levy of tax is for the purpose of general revenue which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of quid pro quo between the taxpayer and the public authority."

Thus, the definition of "tax" in **Matthews V Chickery Marketing Board** (60 CLR 263 at 276) was endorsed by Mukherjea J. in **The Commissioner Hindu Religious Endorsements, Madras V Sri Latshmindra Thirtha Swamiar Sri Shirur Mutt (supra)** and further endorsed by Luckhoo J.A in the **Bata Shoe Company** case. According to that definition, which this court also endorses, the minimum 2% corporation tax on sales imposed on commercial companies by the Corporation Tax Act is a tax and Article 142 (2) (1) applies to prevent it from being subject to the application of Article 142 (1).

It should be noted that, in **Inland Revenue Commissioners and Attorney-General V Lilleyman** (1964) 7 W.I.R 496, the British Caribbean Court of Appeal held, *inter alia*, that the three elements of a tax are that it must be imposed by the State or other public authority, must be compelled and the imposition must be for public purposes. It was further held that the power to legislate for the peace, order and good government of the country does not authorise the enactment of a law which contravenes the provisions of the Constitution which confer such power even though such a law has been duly passed by the legislature. The court held that the levy of the National Development Levy Ordinance 1962 was in the nature of a forced loan and was neither a tax nor a due. The court

held that the substance of the Ordinance revealed that the transaction had all the elements of commercial borrowing and the position of the Government to the citizen was one of borrower and lender. In the instant case, all the essential elements of a tax are present and there is absolutely nothing in the substance of the Corporation Tax Act to indicate that the imposition of the minimum 2% corporation tax on the sales returns of commercial companies is anything other than a tax though it was imposed on gross sales returns and not on profits.

Since the court has found that the provisions of the Corporation Tax Act speaks, in pith and substance, to a tax, the primary question can now be answered as to whether an incorrect assessment (which is higher than what ought to be by the Commissioner-General) attracts an application for constitutional relief for a threatened breach of the tax payer's right not to be deprived of his property under Article 142. The power of the Commissioner-General to make assessments include the power to make assessments, which may be right or wrong **as a question of fact**. In **Law of Writs** by V.G Ramachandran (Revised Edition), the learned author under the caption of **"Taxation Laws"** observed:

> ***"After the coming into force of the Constitution, there is no difficulty. The***

aggrieved party can now resort to Article 226 if he wants to attack the very law authorizing taxation or the basic principles of assessment. No suit is necessary. <u>But if he wants to question the manner of assessment or a detail of accounting or a question of fact, the remedy can only be an appeal or a revision.</u>"

At page 527, the learned author further stated:

Questions of the <u>correctness of the assessment</u> apart from its constitutionality, are for the decision of the authorities ....."

It does appear to the court that neither the constitutional jurisdiction of the High Court nor the prerogative writ jurisdiction can be invoked to correct assessment of tax made by the Commissioner-General provided he has not acted ultra vires the taxation Act. The remedy lies in the **<u>appeal</u>** procedure provided by the relevant taxation Act and not in public law or constitutional proceedings to the **<u>original</u>** jurisdiction of the High Court. A court of original jurisdiction cannot exercise appellate jurisdiction unless such appellate jurisdiction is conferred by written law.

It should be noted that the application by way of Motion was for constitutional reliefs and not for prerogative writ reliefs. As such, the applicant had to allege and prove

not merely a breach of a provision of the Constitution but rather a violation of a right under Articles 138 – 151 of the Constitution. The following dicta from decisions of the Indian courts are pertinent and instructive.

In **Ujjam Bai V. State of Uttar Pradesh** (1963) SCR 778, S.K. Das J. stated:

> ***"An order of assessment made by an authority under a taxing statue which is ultra vires and in the undoubted exercise of its jurisdiction cannot be challenged on the sole ground that it is passed under a misconstruction of a provision of the Act or of a notification made thereunder. Article 32 guaranties the right to a constitutional remedy and relates only to the enforcement of the rights conferred by Part 111 of the Constitution. Unless a question of the enforcement of fundamental right arises, Art. 32 does not apply. There can be no question of the enforcement of a fundamental right if the order challenged is a valid and legal order, in spite of the allegation that is erroneous."***

In **Gulabdas V. Assistant Collector of Customs A.I.R** 1957 733, certain orders passed under the Indian Tariff Act

1934 were challenged as erroneous on merits by filing a petition under Article 32 of the Constitution. Dismissing the petition, the Court stated:

> ***"If the provisions of law under which the impugned orders have been passed are good provisions and the orders passed are within their jurisdiction, whether they are right or wrong on the facts, there is really no question of the infraction of a fundamental right. If a particular decision is erroneous on facts or merits, the proper remedy is by way of appeal."***

In **State of Rajasthen V Unionof India** A.I.R 1977 1361, Bhagwati J. rightly observed:

> ***"It is only where there is a direct invasion of a fundamental right or imminent danger of such invasion that a petitioner can seek relief under Article 32. The impact on the fundamental right must be direct and immediate and not indirect or remote. Merely because by the dissolution of the Legislative Assembly, the petitioners would cease to be members and that would incidentally result in their losing their***

salary, it cannot be said that the dissolution would infringe their right to property."

In **Hitrakshak Samiti V. Union of Indian** A.I.R 1990 S.C 851, it was stated:

"It is well settled that the jurisdiction conferred on the Supreme Court under Article 32 is an important and integral part of the Indian Constitution but violation of a fundamental right is the sine qua non for enforcement of those rights by the Supreme Court. In order to establish the violation of a fundamental right, the Court has to consider the direct and inevitable consequences of the action which is sought to be remedied or the guarantee of which is sought to be forced ..."

Having regard to what have been stated above, the court must dismiss this Motion for constitutional redress under Article 153 as misconceived. No order as to costs.

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Ian N. Chang, C.C.H, S.C

Chief Justice (ag.)

Dated this 26th day of July, 2013