



**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2013 HCV 02609**

BETWEEN BARRINGTON CIGARS (JAMAICA) LIMITED APPLICANT

AND THE MINISTER OF FINANCE AND PLANNING 1ST RESPONDENT

AND THE COMMISSIONER OF CUSTOMS 2ND RESPONDENT

Application for permission to apply for Judicial Review – Provisional Tax Order by Minister – Retrospective legislation by Parliament – Whether Certiorari will go to quash Provisional Tax Order

Georgia Gibson Henlin and Taneisha Rowe instructed by Henlin Gibson Henlin for the Claimant

Ms. Carlene Larmond instructed by the Director of State Proceedings for the Defendant

HEARD: 11th October 2013 & 21st February 2014

CORAM: THE HON. MR. JUSTICE DAVID BATTS

1. The delay in delivery of this Judgement is entirely due to administrative challenges. I am grateful for the assistance provided recently by a volunteer judicial clerk from the Norman Manley Law School who assisted with the typing of this and other judgements.
2. By a Third Further Amended Notice of Application for Leave to Apply for Judicial Review, the Applicant seeks permission of this Court to apply for the following relief:

- i. A declaration that the Act to validate and confirm the imposition, variation, variation and renewal of tax under the General Consumption Tax Act – Act 14 of 2013 is unlawful.
 - ii. A declaration that the Provisional Collection of Tax (General Consumption Tax) (No. 2) Order, 2012 purportedly published in the Gazette on the 15th day of June 2012 has ceased to have effect and no tax imposed by it is recoverable.
 - iii. A declaration that the Provisional Collection of Tax (General Consumption Tax) (No. 3) Order, 2012 purportedly published in the Gazette on the 13th day of December 2012 has ceased to have effect and no tax imposed by it is recoverable.
 - iv. Certiorari to quash the Provisional Collection of Tax (General Consumption Tax) (No. 2) Order, made by the Minister of Finance and Planning on the 15th day of June 2012.
 - v. Certiorari to quash the Provisional Collection of Tax (General Consumption Tax) (No. 3) Order, made by the Minister of Finance and Planning on the 13th day of December 2012.
3. The Applicant relies on the Affidavits of Taneisha Rowe dated 1st July 2013, 13th June 2013, and the Affidavit of Barrington Adams dated 29th April 2013. The Crown relies on the two Affidavits of Basil Williams dated 10th October 2013.
4. The facts are not in dispute. The Minister of Finance by Provisional Tax Orders purportedly made under power contained in the General Consumption Tax Act and/ or the Provisional Collection of Tax Act increased several items of tax. This was done over a period of time. The Minister however failed to obtain the approval of Parliament as he is obliged to do within the stipulated period (see section 3(4) of the latter Act). By Act No. 14 of 2013 which received the Governor General's assent on the 12th day of June 2013, Parliament passed an Act to validate and confirm the imposition, variation and renewal of tax under the General Consumption Tax Act by several provisional orders pursuant to section 3 of the Provisional Collection of Tax Act. The collection of such tax was stated in the said Act of 2013 to be in good faith even if inadvertent invalid, improper or unlawful, during the period commencing on the 1st day of April 2003 and ending

on the day of coming into operation of the Act. The purpose of Act 14 of 2013 was to declare the aforesaid collection valid and to free acquit discharge and indemnify the government and all persons acting on behalf of the Government from liability in relation thereto.

5. The Applicant has brought separate Constitutional proceedings challenging the law which purports to retroactively endorse and make valid the provisional taxing orders. The issue of validity of that Act of Parliament is not therefore before me.
6. The Applicant nevertheless asks for permission to challenge the Provisional Tax Orders made by the Minister on 2 grounds. I hope I do no violence to her submissions by summarising them thus:
 - a. The Provisional assessment is so high and works such injustice on the Applicant that it cannot be called a tax.
 - b. The Provisional Order was spent by the time the legislation was passed, and therefore cannot be saved by the legislation even if the legislation is valid.
7. In support of the first ground, the Applicant states that it is the only person adversely affected by the tax being challenged. The Claimant is 100% owned by Jamaican nationals. It purchases 90% of its tobacco from local farmers and blends that tobacco with very small amounts from the United States and the Dominican Republic. The imported cigar wrapper stock (made from unfinished cigar tobacco) is not however produced or grown in Jamaica. The Minister by the Provisional Order imposed a Special Consumption duty on “unmanufactured tobacco or refuse” of “\$10.50 per 0.7 grams/ 1 stick.” The Applicant states:

“Thus the importer of cigarettes and manufactured tobacco, and the importer of unmanufactured cigar tobacco leaves, pay the same amount of special consumption tax. This tax not only serves as a disincentive to the manufacture of tobacco in Jamaica, but

effectively makes the Applicant's business entirely and immediately unprofitable."

The Applicant goes on to assert that the special consumption tax on the unmanufactured tobacco used to create one cigar now far exceeds the retail costs of that cigar and that this additional cost cannot be passed on to the consumer. The Applicant asserts that the tax will ruin his business

8. Counsel relied on several authorities and filed written legal submissions which were admirable for their clarity and thoroughness. I do not find it necessary to reference those nor do I need to refer to the speaking notes helpfully prepared by the Crown.
9. It is to my mind manifest that this Application must fail. Permission ought only to be granted if the Applicant demonstrates a real likelihood of success in the substantive application or as it is sometimes said, that there is an arguable ground with a real prospect of success in the substantive matter.
10. The Constitution protects the individual from being deprived of his or her property without compensation. One exception to this right is the power of the state to impose taxes. The Parliament of Jamaica by the Provisional Collection of Tax Act has delegated to the Minister, the power to impose taxes subject only to Parliament's subsequent ratification. The Applicant contends that the tax is arbitrary unreasonable and or oppressive and will permanently harm the Applicant and /or it is so high that it cannot properly be called a tax. However the imposition is generally applicable and therefore anyone who imports or purchases the items in question must pay the impost. It is therefore not directed at the Applicant personally or peculiarly. The Minister's action has received the endorsement of Parliament which clearly labelled the imposition a tax, albeit retrospectively. A court of judicial review cannot in these circumstances, overturn an Act of Parliament.

11. Judicial Review is concerned with administrative acts, the review of inferior legislation, and/or the review of acts or omissions by inferior tribunals or other agents of the state including Ministers of government. The question when an application for Judicial Review is made is usually whether the state's agent has acted within the statutory power given to him or her. In this case there can be no suggestion that the Minister has done other than that which Parliament wished him to do because, Parliament has ratified, sanctioned and endorsed retroactively the Provisional Orders made by the Minister. In that regard, and with reference to the second ground of the Applicant's submission, I hold that it matters not that the Order being ratified was spent at the time the retroactive approval was granted by Parliament.
12. This is because a court of Judicial Review, operating pursuant to Section 56 of the Civil Procedure Rules, is concerned to see whether the questioned conduct is within jurisdiction. Submissions based on the hardship to the individual or as to the wisdom of the policy or the impact on the industry are properly to be advanced before the policy makers or, in our democratic society, to members of Parliament who can then seek to articulate them in the appropriate fora. It is clear that Parliament intended to retroactively approve the Orders imposing a tax whether they had been spent or not. This application for Judicial review therefore has no real prospect of success, indeed the Claimant's contention is not arguable.
13. In this regard since the coming into force of our Independence Constitution 1962 we have maintained (some say unwisely so), a distinction between Constitutional Review and Judicial Review. It may be the time has come to review that separation. However for the time being Constitutional Relief or challenges are made before the Full Court and do not require an Order 56 application for permission.

14. The Applicant recognised this and has applied in separate proceedings to challenge the validity of the retroactive legislation approving the Minister's Provisional Orders. All challenges to the constitutionality of the impost (to use a neutral term) can and should therefore be considered in that forum. Let me hasten to add that the convenient practice of applying for both Constitutional and Judicial Review in the same claim has much to recommend it and my remarks are not intended to cast doubt on the validity of the practice.

15. In the result therefore, the application for permission to apply for Judicial Review is refused. I will hear submissions on Costs.

David Batts
Puisne Judge
21st February 2014.