



[2025] JMRC 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

REVENUE COURT

APPEAL NO. 2023 RV 00006

BETWEEN	GREGORY CHUNG	APPLICANT
AND	THE COMMISSIONER GENERAL (TAX ADMINISTRATION JAMAICA)	RESPONDENT

(No. 2)

IN CHAMBERS

Karen O. Russell, Attorney-at-Law for Gregory Chung.

Maxine Johnson, Monique Russell and Racquel Kerr, Attorneys-at-law for the Commissioner General, Tax Administration Jamaica.

Heard: 8th and 20th January 2025

Civil Procedure - Application for extension of time to apply to appeal decision and for leave to appeal decision of the Revenue Court.

C. BARNABY, J

[1] On 8th January 2024 the following applications came on for hearing before me: (a) Notice of Application for Court Orders filed 10th July 2024 together with the Affidavit of Karen O. Russell in Support of Notice of Application for Court Orders sworn and filed 8th and 10th July 2024 respectively; and

(b) Notice of Application for Court Orders and Respondent's Opposition to the Appellant's Request that Time be Extended to file Notice of Appeal

filed 9th August 2024 together with the Affidavit of Maxine Johnson in Opposition of the Request that Time be Extended to File an application for leave to appeal and the Request for Court Orders sworn and filed 9th August 2024.

- [2] Mr. Gregory Chung is the applicant in the first application which I will refer to as “the Chung Application” and the Commissioner General of Tax Administration Jamaica who I will call “the Commissioner” is the applicant in the second application to be called the “Revenue’s Application”.
- [3] Mr. Chung is seeking an extension of time to apply for leave to appeal my decision delivered on 28th May 2024 and comprised in **Gregory Chung v the Commissioner General (Tax Administration Jamaica)** [2024] JMRC 1 which I will call “the Judgment” hereafter; leave to appeal the judgment; and a stay of the judgment pending the determination of the proposed appeal.
- [4] By the Judgment Mr. Chung’s application to extend the time for leave to appeal the decision of the Commissioner made on 12th June 2017 was refused, and in consequence thereof, his Notice of Appeal in respect of that decision filed in the Revenue Court on 21st August 2023 was dismissed.
- [5] The Commissioner opposes the application, and by the Revenue’s Application asks that the application for extension of time to apply for leave to appeal the Judgment be dismissed; that the appeal for leave to appeal the Judgment be refused; that no restriction be placed on his ability to collect the outstanding assessed taxes; and costs.
- [6] Ms. Johnson, Counsel for Commissioner conceded that the orders sought on the Revenue’s Application would flow if the substantive relief sought on the Chung Application were refused by the court. Considering this concession, the orders sought there are not specifically addressed.
- [7] The grounds on which Mr. Chung relies in pursuit of each of the orders on the Chung Application appear on its face and will not be reproduced in these brief reasons for my decision to refuse the application.

[8] Mr. Chung concedes that he has failed to file his application for leave to appeal the Judgment in the stipulated time. No authorities were cited in submissions but a plethora of them exist which speak to the considerations for the court confronted with such an application including the decision in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, Supreme Court Civil Appeal, Motion No. 12/99, (6 December 1999) which is referenced at paragraph 32 of the Judgment. To grant the relief, the court is required to be satisfied of the following:

- (a) that the length of the delay is not inordinate;*
- (b) there are good reasons for the delay;*
- (c) there is an arguable case for an appeal; and*
- (d) if the application is allowed, the degree of prejudice to the other parties is not oppressive.*

Length of and Reason for Delay

[9] It was submitted by Ms. K. Russell, Counsel for Mr. Chung, that he had fourteen (14) days within which to make his application for leave to appeal the Judgment on account that it was not a final judgment. The Judgment having been delivered on the 28th May 2024, she reckoned that the Notice of Application for Court Orders filed on 10th July 2024 was filed about thirty (30) days out of time. It is contended that the delay is not lengthy and was unintentional.

[10] It is not contended on behalf of the Commissioner that the delay of a month in filing the Chung Application was inordinate, but it is argued that that no good or acceptable reason for the delay has been provided by the applicant.

[11] It is Ms. K. Russell's evidence that the applicant needed time to properly consider the pros and cons of an appeal and that he had had some difficulty in reconciling some of the factual circumstances with the decision of the court and had met with her to dissect the contents of the Judgment. It is also her evidence that she was thrown off by aspects of the facts and law appearing in the Judgment and had

spent time perusing documents in her possession and researching to advise the applicant. She further avers that at the time of filing of the application, she had only recently been instructed by the applicant to pursue an appeal on his behalf.

- [12] I have no reason to doubt Ms. Russell's averments and will accept the reason offered for the delay. In any event, the authorities have established that while some reason for delay should be supplied if the court is to exercise the discretion reserved to it to extend time, the fact that that which is supplied is not considered good reason does not bar the exercise of the court's discretion to extend time.

Prejudice

- [13] Ms. K. Russell submits that Mr. Chung would be highly prejudiced if the Judgment was left to stand without further recourse. She says the Commissioner collects even after an appeal is decided and even on the death of Mr. Chung. She contends that there is no real risk of the Commissioner being deprived of any monies and that interest is being added. On the other hand, Mr. Chung would be shut out of having his proper day in court.
- [14] Counsel acknowledged that the court is being asked to exercise its discretion but submits that this is a matter for interference by the Court of Appeal as the issues in the judgment were a little different from what was put before the court and the taxpayer should be given all the opportunity to be heard on the substantive issue.
- [15] Ms. Johnson submits that while interest is being calculated, the taxes have been owed for a long time, and it is important that they be collected. She goes further to say that there is demand on the Government to provide social services and when taxes are not collected, the Government's ability to deliver is impacted. She concludes by saying that if the matter is permitted to proceed to appeal it will waste the resources of the court, the Commissioner's and Mr. Chung's resources because as far as the Commissioner is able to see, there is no real prospect of success on appeal.

- [16] As stated in the Judgment, the fact that a taxpayer will have to honour a significant financial obligation to the revenue is insufficient without more to compel a court to extend the time to appeal. Similarly, the court cannot ignore prejudice to the Commissioner and proper revenue administration generally, where appeals against assessments are not pursued in a timely manner.
- [17] Having found that the delay in making the application for leave to appeal the Judgment was not inordinate and that I would accept the reason proffered for the delay, I would not regard the prejudice to the Commissioner as being undue if I considered that the proposed appeal would have a real chance of success. However, for the reasons which appear in the Judgment and the brief reasons set out below in respect of the submissions made relative to the Chung Application, it is my view that the complaints on the application, which are repeated in Ms. K. Russell's affidavit filed in support of it are unmeritorious and do not disclose any arguable grounds with any real chance of success on appeal.

Arguability of the Appeal

- [18] Ten (10) grounds are listed in the Chung Application. Grounds (i) and (ii) respectively, are that the application is being made pursuant to rule 1.8 of the Court of Appeal Rules 2002 and that the applicant has a real chance of succeeding in the appeal. While the other grounds will not be reproduced here, I will address them by numerical reference and several convenient, albeit broad headings.

Grounds (iii) and (v)

Management of the case

- [19] Further to the expressed grounds relating to the management of the case, Ms. K. Russell submits that she believes that areas of her submissions were not considered by the court in delivering the Judgment. She went further to say that had the applicant had enough time, they would have been more comfortable with

the decision. In my assessment the complaints do not disclose any arguable grounds with any real chance of success.

- [20] Reference is made to paragraphs 1 to 9 of the Judgment which set out a chronology of the proceedings and discloses the orders made by the court in managing the applications which are the subject of the Judgment, including for the filing and service of affidavit evidence, and the written submissions and authorities on which the parties intended to rely in the applications which are the subject of the Judgment.
- [21] While the parties were specifically asked to “*include*” an address on the scope of the obligation on an objector to “produce” within the meaning of section 40(2)(a) of the **General Consumption Tax Act** (the GCT Act), the orders for the filing and service of written submissions imposed no page, word or subject limits. The parties were accordingly free to prepare and file full written submissions and any authorities they believed to be relevant. The hearing of oral submissions was accordingly scheduled for one (1) to which the court abided.
- [22] Regrettably, the court does not have unlimited resources and is required to manage such limited resources it has effectively and efficiently. The court sought to optimize the use of its resources, as it routinely does, by requiring the parties to file and serve written submissions and authorities ahead of the hearing and limiting oral submissions in the way that it did. A reasonable opportunity was accordingly given to each party to present evidence on which they intended to rely and make any arguments they wished to make to the court.
- [23] Although not stated in the Judgment nor referenced by Ms. K. Russell, the leave of the court was sought by Ms. Johnson at the hearing on 3rd April 2024 to file affidavit evidence in support of written submissions by the Commissioner on the court’s indication that she was limited to referring to only such facts as were in evidence before the court. Ms. K. Russell at the hearing also sought the court’s permission to file further submissions, she having elected to only file “Preliminary Submissions” on behalf of Mr. Chung, which were themselves late.
- [24] Both requests were refused having regard to:

- (i) the concern of the applications (the timing of the proposed challenge to the Commissioner's decision);
- (ii) the existence of proceedings in a court below for recovery of the sums the subject of the said decision;
- (iii) the fact that orders for the management of the applications were made on the 29th February 2024 based on evidentiary material which the parties saw fit to place before the court, without any request to file and rely on anything further in pursuit of or in opposition to the applications;
- (iv) the fact that orders were made for the filing and service of written submissions and authorities well ahead of the date of the hearing to reduce the time which would reasonably be required for oral arguments; and
- (v) the court's view that the accommodations being sought would have further delayed the determination of the applications which concern revenue assessments of the Commissioner some eight (8) years prior.

[25] In all these circumstances the court declined to facilitate the filing of further written submissions by Ms. Russell who had elected to only file "Preliminary Submissions" a day before the hearing, some twelve (12) days after they were due; part hear the application for another date; or dislocate other fixtures which followed the hearing to afford Ms. K. Russell additional time to make oral arguments. In any event, there was no application or evidence presented to the court to explain partial compliance with the order of 29th February 2025 to file and serve written submissions and authorities in support of or opposition to the applications as appropriate, or the delay in filing of the partial submissions.

[26] In respect of the complaint relative to consideration of the facts, there was due consideration of all the evidence presented. The inclusion in the Judgment of facts which the court regarded as material in explaining its reasons for decision and the failure to make reference to every averment in the affidavits does not mean that those averments were not duly considered.

[27] In respect of the Affidavit of Ms. K. Russell which was filed on 22nd February 2024 which I regraded as non-compliant with rule 30.4(1)(d) of the CPR and therefore inadmissible, if another view should have been taken of it, I nevertheless expressly went on to consider its contents in the Judgment, quoted from it and concluded for example, that it did not offer any good reason for the inordinate delay in filing the Notice of Appeal against the decision of the Commissioner. In this regard reference is made to paragraphs 36 to 38 of the Judgment.

Grounds (iv) and (vi)

Allegations of Errors of Fact, Bias, Partiality, and Failure to Conscientiously consider facts presented

- [28] The preceding statements in respect of complaints about my consideration of the facts repeated and I go further to say that the broad allegations of bias, partiality and failure to conscientiously consider the facts and all the allegations made in grounds (iv) and (vi) are unsupported by any evidence.
- [29] Further, there is no particularisation of evidence which I am alleged to have introduced to favour the Commissioner, or which demonstrates that I took on his role in the proceedings.
- [30] The facts to which I refer in the Judgment and upon which relevant conclusions are premised on the evidence presented in the proceedings and having regard to the applicable law.
- [31] In respect of arguments presented in writing or orally, it is evident on a reading of the Judgment that I accepted or rejected arguments of both parties and indicated the reasons therefor. The fact that I disagreed with some of the positions taken on behalf of Mr. Chung or that the applications were ultimately determined in the Commissioner's favour is insufficient to ground the complaints now being addressed. The complaints do not, in my view, satisfy the threshold of arguability with a real chance of success.

Grounds (vii), (viii), (ix)

Alleged errors in law

[32] In respect of any complaint relative to my interpretation or application of the law, for the reasons set out in the Judgment, I do not consider the grounds relied upon in these regards will have a real chance of success on appeal.

[33] Ms. K. Russell contended that the case for Mr. Chung was that the triggering of section 40 (2) (a) was necessary for the Commissioner to give a section 40 (3) decision. After reading paragraph 58 of the Judgment, she said she could not understand some of what was written there. The paragraph, which I believe speaks for itself says this:

Also in evidence is a letter to the Commissioner under the hand of Ms. Russell dated 22nd May 2017 titled “Notice to produce records/documents for Income Tax, GCT and Education Tax Objection for Gregory Chung - TRN ... Year of assessment 2011” which is exhibited to Mr. Chung’s affidavit. Ms. Russell refers to correspondence from the Commissioner dated 12th April 2017, and among other things which are not immediately relevant, speaks to having received a “Notice to Produce” and references preparation for a proposed meeting.

[34] Counsel further submitted that she was asking this court to appreciate that there are primarily two ways that the Commissioner can deal with a decision which has been objected to: (a) a full-fledged hearing and (b) a section 40(3) determination if a notice to produce records is issued and the records are not produced. That the Commissioner may dispose of an objection in one of these two ways was never lost on the court. In that regard, reference may be had to paragraphs 46 and 47 of the Judgment where it is clearly indicated that the decision of the Commissioner which was sought to be challenged was made pursuant to section 40(3) and was not the result of an enquiry into the merits of Mr. Chung’s notice of objection.

[35] Ms. K. Russel went on to submit that there was no evidence that a notice to produce was issued for GCT. While a copy of the notice to produce documents was not in evidence, as stated in paragraph 58 of the Judgment, correspondence from Ms. Russell dated 22nd May 2017 which has as its subject “**Notice to produce**

records/documents for Income Tax, GCT and Education Tax Objection for Gregory Chung - TRN ... Year of assessment 2011" was in evidence [**Emphasis added**]. The letter is an exhibit to an affidavit sworn by Mr. Chung. In it, Ms. Russell refers to correspondence from the Commissioner dated 12th April 2017 and speaks specifically to the receipt of a "*Notice to Produce*". This is the applicant's own evidence and was unchallenged. It is therefore surprising that Ms. Russell now submits that no notice to produce was issued in respect of GCT.

[36] Ms. Russell also submits that the court having accepted/acknowledged that Mr. Chung's notice of objection was served by facsimile and registered post, I would have "introduced somehow" - based on her understanding of the judgment - that even though Mr. Chung did that, the service was negated because she had indicated in the objection sent on his behalf that the assessment had not been personally served on him. She therefore contended that I introduced something which was not introduced by the parties to conclude that the operative notice of assessment was that which was personally served on Mr. Chung on 19th January 2017.

[37] Counsel also submitted that sections 40(2)(a) and 40(3) work together and went on to pose this question: Was the Commissioner correct in issuing a section 40(3) notice? She thereafter contended that section 40(2)(a) was not engaged to trigger a section 40(3) notice. These very submissions and Ms. K. Russell's question belies her argument that the court had introduced something which was not introduced by the parties to conclude that the operative notice of assessment was that which was served personally on Mr. Chung in January 2017.

[38] The evidence which the court accepted, as expressly stated at paragraph 50 of the Judgment, is that the applicant's "*notice of objection dated 3rd November 2016*" was "*sent*" to the Commissioner through the Montego Bay office via facsimile and registered post on 4th November 2016. Having formed the view that "*service*" of a notice of assessment was a precursor to a notice of objection pursuant to section 40(1) of the GCT Act, I determined that the notice of objection sent on 4th November 2016 was "*premature*".

[39] The conclusion of prematurity was arrived at having regard to the very notice of objection which was under the hand of Ms. K. Russell. She states that the “*Notices of Assessment were not personally served*” on Mr. Chung but “*came to his attention on the 6th day of October, 2016*”, and that he “*objects to the Assessment out of an abundance of caution...and reserves the right to argue this as his first point of objection.*” If Mr. Chung had in fact been served with the notices of assessment, I cannot think of any good or legitimate reason for Ms. Russel to have raised these issues in the notice of objection. While Ms. Johnson in an affidavit sworn by her was of the view that Mr. Chung admitted in the 3rd November 2016 missive that he had received the notice of assessment to GCT, which led her to say that he was “re-served” in January 2017, no such admission was seen on the document. There was no evidence of service of the notices of assessment except that Mr. Chung was personally served on 19th January 2017. This evidence was unchallenged and accepted.

[40] In assessing whether the applicant had an arguable appeal with a realistic prospect of success against the decision of the Commissioner made pursuant to section 40(3) of the GCT Act it was necessary, as a matter of law, for the court to consider issues with respect to the date of “service” of the notice of assessment. It is this service which triggers the obligation to file a notice of objection if it is desired to dispute the assessment, as provided in section 40(1) of the Act. On “*receipt*” of “*a notice of objection under [section 40(1)]*” the Commissioner is then empowered to require the objector to, among other things, produce books or documents relating to the taxable supply pursuant to section 40(2). The decision of the Commissioner which Mr. Chung sought to challenge by appeal to this court was made under section 40(3) of the Act which provides that a notice of objection ceases to have effect, and the assessment made is final and conclusive where a person fails to comply with any requirement of the Commissioner pursuant to section 4(2).

[41] Further still, the issue in respect of service arose on the Commissioner’s Notice of Application for Court Orders filed 20th September 2023 which was one of the applications before the court, wherein the court was asked to dismiss the

taxpayer's application to appeal on account that it is grossly out of time, and for an order that the net adjustment raised for the period January to December 2011 for GCT is final and conclusive. Among the grounds are:

(a) That the notice of assessment is dated September 29, 2016 and the Appellant admits to having received this notice on October 6, 2016. This Appeal was filed on August 21, 2023. Seven (7) years after the decision that forms the basis of this appeal was made. (sic)

(b) That further, the Appellant was again served notice of decision relating to the additional assessment of General Consumption Tax on 19th January 2017, by personal hand delivery.

[42] As earlier stated, and as appears in the Judgment at paragraph 55, there was no evidence before the court of any admission by Mr. Chung that he “received” the notice of assessment on 6th October 2016. The only evidence of service of a notice of assessment for GCT for 2011 which was before the court is of personal service effected on 19th January 2017.

[43] Further and in any event, outside of refusing the application for leave to appeal to the Revenue Court on the basis that the applicant did not have an arguable appeal with a real prospect of success, it was also my judgment that the application should be refused on account that the delay in making it was inordinate and fatal to the application to pursue the appeal. Even if there was no statutory prescription as to the time within which an appeal against the decision of the Commissioner was to be made, the delay of some six (6) years in pursuing the appeal must be regarded as inordinate and constitutive of an abuse of the process of the court in the absence of very cogent and compelling explanation for the delay. No explanation of that character was before the court.

[44] It is in all the foregoing premises and for the reasons set out in the Judgment, that I consider that the appeal will not have a real chance of success and accordingly refuse the orders sought on the Chung Application.

ORDER:

1. The orders sought on the Notice of Application for Court Orders filed on 10th July 2024 are refused.
2. Costs of the application to the Commissioner General of Tax Administration of Jamaica, which are to be taxed if not sooner agreed.
3. The Attorney-at-law for the applicant on the Notice of Application for Court Orders filed on 10th July 2024 is to prepare, file and serve this order.

Carole S. Barnaby

Puisne Judge and Judge of the Revenue Court