[2020] JMRC 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

REVENUE COURT

REVENUE COURT APPEAL 2019 RV 00005

BETWEEN	**DIGITAL AUTO IMPORTS LIMITED**	**APPELLANT**
AND	**THE COMMISSIONER GENERAL OF TAX ADMINISTRATION JAMAICA**	**RESPONDENT**

Ms. Zara Lewis instructed by Zara Lewis & Co., Attorneys-at-Law for the Appellant.
Ms. Gabrielle Warren and Mrs. Cecilia Chapman-Daley, Attorneys-at-Law, Tax Administration Jamaica.

13th and 31st July 2020

Appeal from the Revenue Appeals Division - General Consumption Tax Act - Income Tax Act - assessment raised by Commissioner General after tax payer filed returns - burden of proof.

Direct verification of Income and Output Tax - duty of taxpayer to keep and produce complete and accurate records - unreliability of sales invoices as the direct verification method of the taxpayer's Income and Output Tax - unreliability of bank deposits alone as a method of verification of taxpayer's Income and Output Tax.

Indirect verification of Income and Output Tax - registered liens - bank deposits - mark-up - whether the Commissioner General exercised his best judgment in arriving at the additional assessments.

C. BARNABY, J (AG)

INTRODUCTION

[1] The Appellant, who now challenges additional assessments to GCT and Income Tax which were raised by the Respondent for the year 2016, is a limited liability company

duly incorporated under the laws of Jamaica. Among its principal activities is the importation and sale of used or preowned motor vehicles from Japanese suppliers.

[2] In 2017, the Respondent advised the Appellant of its intention to attend at its offices to conduct an audit of its General Consumption Tax (hereinafter called "GCT") and Income Tax returns for the period January 2016 to December 2016 (hereinafter called "the relevant period"). The Appellant was also advised that it should make available all documents and records used to prepare its returns, and which would enable it to substantiate its income for the relevant period. A number of documents were requested, among them were invoices, bank statements and import entries for the Appellant's business.

[3] On conclusion of that audit, verified Output Tax and total sales in excess of that reported by the Appellant were ascertained. This resulted in additional assessments of both GCT and Income Tax for the relevant period. Both assessments were objected to by the Appellant and at the close of that process, the GCT and Income Tax assessments raised on the audit were confirmed and the Appellant notified of the decision.

[4] The Appellant, being a person aggrieved, appealed to the Revenue Appeals Division (hereinafter called the "RAD") in respect of both assessments. The appeal was heard on 27th February 2019. By Notices of Decision dated 18th October 2019, the RAD confirmed the method of verification used by the Respondent to ascertain the Appellant's Income and Output Tax for the relevant period; and varied the sums arrived at by the Respondent, making provision for two expenses related to Input Tax Credits for GCT. While these expenses had been noted during the objection process, they were not granted and no explanation was provided by the Respondent for their exclusion. For ease of reference, the liability of the Appellant at the objection and RAD stages are set out in the table which follows.

TAX TYPE	LIABILITY ON OBJECTION	LIABILITY ON APPEAL	VARIANCE
GCT	$3,729,286.00	**$2,806,448.67**	$922,837.33
INCOME TAX	$5,818,044.00	**$4,351,186.15**	$1,466,857.85

[5] By Notice of Appeal filed on the 25th November 2019, the Appellant challenges the decisions of the RAD relative to its GCT and Income Tax Liability. The appeal, which is by way of rehearing, was heard on the 13th July 2020, and a decision thereon was reserved to today's date.

THE GROUNDS OF APPEAL AND RELIEF SOUGHT

[6] The decisions of the RAD are challenged on a number of grounds, which are summarised below for convenience and with the expectation that the substance of the Appellant's pleadings are not in any way diminished. It is the Appellant's case that the RAD Commissioner erred in fact and law in,

(i) agreeing with the Respondent that the Appellant's sales invoices were unreliable as the primary method of verifying its income and taxes payable for the relevant period;

(ii) concluding that the Appellant's bank records were incomplete;

(iii) placing too much weight on the lien amounts that were listed on the Respondent's motor vehicle database, in circumstances

where motor vehicles were purchased from the Appellant prior to liens being obtained on them; and

(iv) treating lien amounts as final sales prices; and applying a mark-up percentage of 46.59% in calculating final sales prices for vehicles which had no lien amounts, and bank deposits treated as final sales prices.

[7] In consequence, the Appellant prays that the decisions of the RAD as to its Income Tax and GCT liability for the relevant period be set aside; that its sales invoices be used for calculating the income earned and the taxes payable for the relevant period; costs against the Respondent on this appeal and below; and such further relief as the Court deems fit.

THE RESPONDENT'S ANSWER AND RELIEF SOUGHT

[8] In its Statement of Case filed on the 24th December 2019, the Respondent refutes the allegations of the Appellant.

[9] The Respondent contends that there were several discrepancies on the invoices presented to him, which made them unreliable as the primary method for verifying the Appellant's Income and Output Tax. This was on the basis that:

(i) Most of the invoices did not contain the customer's name;

(ii) There were invoice numbers which were duplicated, however the substantive information on duplicate invoices did not match;

(iii) The price/subtotal on the sale invoices did not include the GCT paid at Customs and Stamp Duty, however it did include the service charge of $15,000.00 - $35,000.00.

(iv) The invoices did not reflect the market value of the motor vehicles;

(v) There were significant discrepancies between the sums invoiced and the corresponding motor vehicle lien in that the lien sum was greater than the invoiced amount in all instances.

(Sic)

[10] In response to the Appellant's position that deposits in its bank account should have been used to ascertain its income, the Respondent states that this method was also unreliable, as twenty to thirty percent (20% - 30%) of the deposits made were not reflected in the bank account initially submitted by the Appellant.

[11] The Respondent goes further to say that while the Appellant's Income and Output Tax were verified using three methods, invoice, bank deposits and mark-up, the latter was deemed by the Respondent as being the most reliable. The verification exercise was approached in two ways by the Respondent's auditors. In the first instance,

(i) The purchase prices were ascertained using the information which was present on the Jamaica Customs system, and C87 custom import forms submitted by the Appellant.

(ii) Sales prices (less GCT) were determined by:

i. Lien amounts registered on the Automated Motor Vehicle System (AMVS);

and/or

ii. Deposits recorded on bank statements supplied by the Appellant.

(iii) The mark-up percentages from (i) and (ii) above were then averaged to arrive at the 46.59% mark-up applied by the Respondent.

[12] In the second instance, where there was no lien or no identifiable deposit record on bank statements supplied by the Appellant for relevant motor vehicles, the percentage mark-up of 46.59% was applied to those vehicles. During the objection process, that mark-up was adjusted by eliminating the high and low mark-ups which resulted in a reduced average of 42%.

[13] The Respondent therefore asks that the appeal be dismissed; that the decisions of the Commissioner of the RAD be confirmed; that he be awarded the costs of and incidental to this appeal; and such further and other relief as the Court deems fit.

ISSUES

[14] Having considered the parties' positions on their Appeal and Statement of Case, it is my view that the following three (3) issues, which will be addressed sequentially, now arise for determination on this appeal. They are:

(i) Whether the sales invoices upon which the Appellant seeks to rely are reliable and therefore capable of being used as the primary method for verifying its sales income for the relevant period.

(ii) Whether the Appellant's bank records were complete and could be relied upon to verify the Appellant's sales income.

(iii) Whether the Appellant's additional assessments for GCT and Income Tax were made in exercise of the Respondent's best judgement.

BURDEN OF PROOF

[15] On the instant appeal, the parties are enjoined as to the quantum of GCT and Income Tax payable by the Appellant for the relevant period.

[16] Pursuant to **section 41 (4)** of the **GCTA** and **section 76 (2)** of the **ITA**, on an appeal to the Revenue Court, *"[t]he onus of proving that the assessment complained of is erroneous shall be on the objector"*, which proof *"… must be based upon the nature and quality of the evidence which the taxpayer is able to provide."* [1]

[17] It was concluded by Morrison JA (as he then was), in **D.R. Holdings Ltd. v the Commissioner of Taxpayer Appeals**[2] that the word *"erroneous"* was *"wide enough to embrace both a complaint that the assessment is wrong in principle and that it is excessive in amount."* Morrison JA then proceeded to quote with approval an extract appearing at page 172 of Dr. Claude Denbow's work, *Income Tax Law in the Commonwealth Caribbean,* which, though written in the context of income tax law, is equally applicable to an appeal against the Revenue's assessment of GCT. It is this,

> *"The taxing statutes in the Commonwealth Caribbean invariably provide that, in a tax appeal the burden of proof rests on the taxpayer to show that the assessment in dispute is wrong or unfounded. This means that the taxpayer bears the legal burden on the whole of the case to show that the income being imputed to him by virtue of the Revenue's assessment is not taxable and the reasons why this is so. However, this does not mean that the Revenue is entitled to raise an assessment on a taxpayer and then leave it to him to show that he is not taxable on the income imputed to him. While the onus of the whole case rests on the taxpayer and he is obliged to begin, his mere denial of any imputed income throws upon the Revenue the evidential burden to adduce testimony in order to support its assessment…The matter has perhaps been best expressed by the Court of*

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[1] Per Anderson J in **Llandovery Investments Ltd. v The Commissioner of Taxpayer Appeals (Income Tax)** (JM Revenue Court Appeal, 10 February 2010, 36)
[2] (JMCA, 31 October 2008 [25])

Appeal in Trinidad and Tobago in the case of ***Inland Revenue Board v Boland Maraj*** *by Kelsick CJ when he said:*

> *'On the Revenue rests only the evidential onus that it rightly 'appears' to the Revenue to act, which it discharges by adducing evidence of the information or material which caused it to appear to the Revenue that the taxpayer was under-assessed. On the other hand, the statutory burden of the whole case is on the taxpayer'."*[3]

[18] The obligation upon the Appellant does not end there however. As observed by Warner JA in **Bi-Flex Ltd v Inland Revenue**,[4] who cited with approval the following excerpt from **N. Ltd. v Taxes Commissioner** (1962) 24 SATC 655, 658 Nyasaland,

> *The onus is upon the appellant, by satisfactory evidence, to show that the assessment ought to be reduced or set aside, that is, the appellant has to attain the standard of proof in a civil suit to prove his case… **The taxpayer must as a general rule, show not only negatively that the assessment is wrong, but also positively what correction should be made to make it right or more nearly right.***
>
> **[Emphasis added]**

[19] I now turn to the assessment and determination of the issues previously identified.

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[3] Ibid. [28]
[4] (1986) 38 WIR 344, 361 [c] - [g]

APPLICABLE LAW AND ANALYSIS

Whether the sales invoices upon which the Appellant seeks to rely are reliable and therefore capable of being used as the primary method for verifying its sales income for the relevant period.

[20] It is contended on behalf of the Appellant that it relied on invoices and bank deposits to determine its sales income; and that the Respondent and the RAD erred in rejecting those as unreliable and incapable of being used as the primary method for verifying its sales income and taxes payable for the relevant period.

[21] The additional assessments which are the subject of a challenge are Income Tax and GCT. So far as is relevant to the instant appeal, Income Tax is chargeable on all the income, profits or gains which accrue to the Appellant from any trade or business, whether carried on in the Island or elsewhere, for each year of assessment. This is pursuant to **section 5 (1) (a) (ii)** of the **ITA.** At **section 2** chargeable income is defined, and refers to a taxpayer's income from all sources, less allowable deductions and exemptions. Where a business is a registered taxpayer, liable to pay GCT, the obligation would impact the entity's chargeable income. Accordingly, it is convenient to approach assessment of the issue under consideration from the perspective of the Appellant's obligations under the **GCTA.**

[22] GCT applies to both goods and services. It is a value added tax in that it is paid at successive stages in the supply process and recovered by the intermediate taxpayer, with the cumulative tax being borne by the final customer. Like most other countries with value added tax, Jamaica employs the credit-invoice method. It operates on the basis that as goods or services pass from one manufacturer or vendor to another, the price increases as value is added at each stage. The registered supplier of the goods or services are taxed on their sales but obtains credits for taxes paid on inputs.

[23] **Section 3 (1)** of the **GCTA** states,

> *3 (1) Subject to the provisions of this Act, there shall be imposed, from and after the 22nd day of October, 1991, a tax to be known as general consumption tax -*
>
> *(a) on the supply in Jamaica of goods and services by a registered taxpayer in the course or furtherance of a taxable activity carried on by that taxpayer;*
>
> *(b) on the importation into Jamaica of goods and services,*
>
> ***by reference to the value of those goods and services**.*
>
> *(1A) …*
>
> *(1B) …*
>
> *(2) General consumption tax is paid by –*
>
> *(a) **a registered taxpayer**;*
>
> *(b) any other person, who imports into Jamaica any goods and services.*
>
> **[Emphasis added]**

[24] A *"registered taxpayer"* is defined at **section 2** of the **GCTA** to mean *"a person who is registered pursuant to section 27 and is liable to pay tax under this Act."* A person in this position is liable to account for GCT on taxable supplies of goods and services during a taxable period. The sum payable is the difference between the Input and Output Tax.

[25] GCT is due and payable in respect of taxable supplies and is applied in two broad circumstances as provided for at **section 5** of the **GCTA:**

> (a) *at the time when goods are entered for home consumption under the Customs Act; and*
>
> (b) *in any other case, at the time of supply.*

[26] Generally, a taxable supply takes place when an invoice for supply is issued by a supplier; payment is made for the supply; or the goods are made available or services are rendered, to the recipient as appropriate: **section 6(1)** of the **GCTA.**

[27] On the evidence presented, while there appears to have been a dispute at the audit and objection stages as well as at the RAD, as to the nature of the taxable supplies in the Appellant's business, that is not an issue which has been raised on the appeal before this court. Additionally, there is no dispute that the Appellant is a registered taxpayer liable to pay both GCT and Income Tax. The parties to the appeal are enjoined as to quantum and how that is to be assessed.

[28] The Appellant challenges several findings of fact made by the RAD in confirming the approach taken by the Respondent in verifying its Income and Output Tax. The findings concern discoveries by the Respondent that:

(a) of the invoices presented in sequential order, some were unaccounted for;

(b) some of the invoices presented did not detail the particulars of the customers, including their names;

(c) there was duplication of some of the numbers on the invoices and when compared, the information on them was different;

(d) the total sales verified by means of invoices presented was less than the sales reported on the Appellant's Income Tax Return;

(e) the total Output Tax verified from the invoices presented by the Appellant was less than the amount reported on the Appellant's GCT Returns; and

(f) that no explanation was given by the Appellant's representative during the objections process for the variance at (d) and (e) above.

[29] For its part **section 89 (1)** of the **ITA** mandates that

> *Every person engaged in any trade, profession or business shall keep in the English language proper books of account sufficient to record all transactions necessary in order to ascertain the gains and profits made or the loss incurred in each such trade, profession or business, and any such person who fails to comply with this provision shall be guilty of an offence against this Act, and in addition to any penalty incurred he shall be liable to pay any tax to which he may be assessed by the Commissioner according to the best of his judgment.*

[30] The obligation to keep records also arises under the **GCTA. Section 36** states,

> *Every registered taxpayer shall –*
>
> (a) *keep such accounts, books and records as may be prescribed;*
>
> (b) *if required by an authorized person, produce at such time and place as the authorized person may specify, any accounts, books, records or other documents relating to the taxable activity;*
>
> (c) *produce at such times as an authorized person may specify, such other information as the authorized person may require as may be prescribed.*

[31] The **GCTA** makes further provision for the records which a registered taxpayer must make in the course of making taxable supplies. In particular, the **General Consumption Tax Regulations, 1991** (hereinafter called "the **Regulations**") set out the procedures which are applicable on the supply by a registered taxpayer to another registered taxpayer on one hand; and the supply by a registered taxpayer to a person other than a registered taxpayer on the other. As between registered taxpayers, so far as is relevant to this appeal, **regulation 8** prescribes that an invoice for a taxable supply should have the words *"Tax Invoice"* at the top thereof; the name, address and registration number of the registered taxpayer issuing the tax invoice; the serialized number of the invoice; the date the taxable supply was made; the name of the registered

taxpayer to whom the supply was made; the total amount of the consideration for the taxable supply; and the rate of tax and amount of tax payable thereon. It goes on to mandate that only one *"Tax Invoice"* is to be issued in respect of each taxable supply and that a copy of each invoice must be retained by the registered taxpayer. I have observed that notwithstanding that some of the customers whose names appear on the Appellant's sales invoices are legal persons, there was no evidence before the court that any of the customers to whom taxable supplies were made were registered taxpayers. **Regulation 9** therefore becomes relevant.

[32] **Regulation 9** prescribes the recording procedure on the making of a taxable supply to a non-registered taxpayer by a registered taxpayer. It states, in relevant part, that

> *9 (1) Subject to paragraphs (2) and (3), where a registered taxpayer makes a taxable supply to a person who is not a registered taxpayer, the registered taxpayer shall indicate the consideration for the taxable supply separately from the amount of tax charged by any of the following methods –*
>
> *(a) issuing a receipt showing the consideration and the tax payable thereon; or*
>
> *(b) affixing to the taxable supply the consideration therefor and the tax payable thereon…*

[33] For accounting and taxation purposes, sales invoices are source documents and are a direct, primary and preferred method of verifying sales income, and in calculating taxes which are payable. To be so used however, invoices must accurately reflect the transactions to which they relate.

[34] The importance of accuracy in recording customer identity information on an invoice or other receipt relating to a taxable supply cannot be overstated. It is that information which indicates the customers' status and demonstrates the appropriateness of the form of the transaction record for tax purposes. Where the customer is a registered taxpayer it must be an invoice designated *"Tax Invoice"* in accordance with **regulation 8**. Where the customer is not a registered taxpayer, the record of the transaction must conform with the requirements of **regulation 9**. Adherence to the cited **regulations** is

essential in arriving at the correct Input and Output Tax amounts; in enabling the registered taxpayer to make faithful and accurate returns in respect of any relevant period; and in calculating any credit to which the registered taxpayer may be entitled.

[35] It is the unchallenged evidence of the Respondent's tax auditors, Korea Cooper and Runnet Mills, that during the course of the Appellant's audit they compiled detailed records of documents presented by the Appellant, including its invoices. Both compiled invoice tables which are exhibited to their respective affidavits. It is further averred that it is the practice of the Respondent to return in full documents given to it by a taxpayer in the course of an audit and copies made of select documents, as are necessary.

[36] Both Ms. Cooper's and Ms. Mills' tables reflect receipt of invoices numbering up to 77, with the following invoice number duplications noted in both:

> **Invoice # 12**: One named and one unnamed customer; different motor vehicles; different prices; and issued on April 28, 2016.
>
> **Invoice # 20**: Two unnamed customers; different motor vehicles; different prices; and issued on May 28, 2016.
>
> **Invoice # 24**: One named and one unnamed customer; different motor vehicles; different prices; and issued on May 31, 2016.
>
> **Invoice # 25**: Different named customers; different motor vehicles; different prices; and issued on May 31 and June 20, 2016.
>
> **Invoice # 30**: One named and one unnamed customer; different motor vehicles; same prices; and issued on June 24, 2016.

[37] In Ms. Cooper's table, there were no invoices numbered 1, 3, 31, 62 and 71. In Ms. Mills' table, which was generated in the Respondent's Objection Unit, the invoices numbered 1 and 3 appear to have been then supplied. In respect of customer identification details, they were said to be missing from 57 of the invoices received by Ms. Cooper. At the objection stage, the number was reduced to 38 as seen in Ms. Mills' table.

[38] The Appellant admits that although it submitted documents to the Respondent for the purposes of the audit on or about October 17, 2017, it failed to submit the complete set as requested. The evidence of one of the Appellant's principals, Mr. Sean Green, is that the company supplied what it had having regard to the nature of its business, which he states at paragraph 5 of his affidavit, sworn and filed 17th June 2020, is operated in the following manner.

i. *The customer of the business prior to engaging the Appellant Company's services choose a motor vehicle form the overseas supplier's website;*

ii. *the customers of the Appellant Company then deposit the purchase price for the motor vehicle in the Company's account;*

iii. *the chosen motor vehicle is then ordered and paid for using the deposited sums which are then wired to a supplier who is usually from Japan;*

iv. *the Customer also deposits in the Appellant Company's account, the General Consumption Tax and wharf charges in full;*

v. *the Appellant Company then in turn adds a mark-up on the purchase price of the vehicle. The mark-up usually added by the Appellant Company is approximately Thirty Thousand Dollars ($30,000.00) or Forty Thousand Dollars ($40,000.00) per vehicle depending on the amount of work involved, the type of motor vehicle chosen and the quantity of motor vehicles ordered. This mark-up is not a percentage but rather a fixed amount.*

vi. *In addition to the mark-up on the vehicle the Appellant Company also uses Tax Refunds to operate its business activities. This refund comes from the difference that the business claims for the General Consumption Tax (GCT) after filing their monthly returns. This*

amounts to approximately Three Million Dollars ($3,000,000.00) per annum.

(sic)

[39] Having regard to the record keeping and production obligations of a registered taxpayer under the **GCTA** and a taxpayer under the **ITA**; the Appellant's explanation of the nature of its business; and the discrepancies which were observed on invoices presented during the audit process, I cannot say that the Respondent was wrong in viewing with suspicion the invoices submitted by the Appellant. I am also unable to find that they erred in concluding that the invoices were an unreliable method of verifying the Appellant's Income and Output Tax for the relevant period.

[40] Additionally, it is also the unchallenged evidence of Miss Cooper and Miss Mills that several of the invoices now produced by the Appellant through the Affidavit of Brian Bailey filed on the 17th June 2020, have been modified to address some of the deficiencies identified by the Respondent during the course of its audit. There were modifications as to invoice dates, subtotals, GCT charged, invoice totals and customer information. It was further averred that some of the invoices were never submitted by the Appellant in the proceedings below. The number of the modified invoices highlighted by the Respondent total twenty-one (21). The audit having been raised after the filing of the Appellant's tax returns and thus, after taxable supplies were made, it is beyond curious that the information on some of them have now changed.

[41] Mr. Bailey at paragraph 11 of his affidavit states that he produces true and faithful copies of "paid tax invoices" which were given to the Appellant's customers during the relevant period, which are marked "BB2" and exhibited. A total of eighty-six (88) invoices were exhibited, two of which bore dates outside of the relevant period, being invoices numbered 68 and 16, dated 10th February and 2nd March 2017 respectively. The observations which follow are in respect of the remaining eighty-six (86) invoices which bore dates within the relevant period.

[42] The invoices were not sequentially ordered and they ranged in number from seven (7) to one hundred and eighty-six (186). With the exception of six (6) invoices, the fields for customer identification have been populated. At least six invoice numbers, 12, 20, 30, 13, 48 and 61 have been duplicated. None of the invoices were labelled "Tax Invoice" as required by **regulation 8** where the taxable supply is made to another registered tax payer.

[43] At the time of making a taxable supply to a non-registered taxpayer, the Appellant was required by **regulation 9** to include in the sales invoice the consideration for the said taxable supply and the tax which was payable thereon. *"Consideration"* is defined at **section 2** of the **GCTA** thus:

> *in relation to the supply of goods and services to any person,* ***includes any payment made*** *or any act or forbearance in respect of, in response to, or for the inducement of, the supply of any goods or services, whether by that person or by any other person;*
>
> [**Emphasis Added**]

[44] The Appellant, during the course of oral submissions was permitted to isolate an invoice of its choosing to demonstrate the accuracy of the record. The invoice numbered 7 and dated 11th February 2016 in exhibit BB2 was selected for that purpose. It shows that a 2011 Toyota Belta was purchased by a named customer in the amount of **$1,089,474.40** and sales tax of **$179,763.28,** which is 16.5% of the stated purchase amount. There is no indication on the invoice that any credit was given by the Appellant to the customer. The corresponding C87e importation form from the Jamaica Customs Agency was also exhibited by the Appellant. It shows a tax base of **$1,069,274.40** which attracted a GCT rate of 21.5% which amounts to **$229,894.00**. Total taxes, including GCT amounted to **$535,565.08,** and a further fee of **$200.00** was applied. The total declaration on the imported motor vehicle amounted to **$535,765.08.**

[45] Output Tax is calculated by reference to the consideration for the taxable supply inclusive of tax in accordance with **regulation 11**. Pursuant to **regulation 14**, the registered taxpayer is entitled to *"claim as credit any input tax payable by him under section 3(1) of the Act."* **Regulation 14 (2) (b)** goes further to prescribe that credit can be claimed on the sum of *"any input tax paid by that registered taxpayer on the importation of taxable supplies into Jamaica"*. The percentage credit to which the registered taxpayer is entitled is calculated in reference to the various formulae which appear at **regulation 5**, having regard to the nature of the taxable supply.

[46] It is the Appellant's evidence that after selecting a motor vehicle, the customer deposits the purchase price in its account which is wired to the supplier, usually in Japan. The customer also deposits into the Appellant's account the GCT and wharf charges in full. The invoice numbered 7 shows consideration of **$1,089,474.40**. It was confirmed during submissions that this figure was arrived at using the tax base of **$1,069,274.40** on the C87e form and the Appellant's mark-up of **$20,200.00**. The Input Tax on importation was not included in the sales invoice. Most of the copy invoices produced in evidence by the Appellant suggest the use of this formula. The Appellant consistently, and in contravention of the **regulations** asserts that the Input Tax paid on importation at the Customs Agency belongs to it and in consequence, has failed to account for it on its sales invoices.

[47] Another formula was also seen on sales invoices produced by the Appellant in these proceedings. On the invoice numbered 9 for example, dated 4th March 2016, a 2006 Volvo Tractor Head is purchased in the amount of **$1,699,659.62**. The field for "Payment/Credit Applied", like the invoice numbered 7 is empty. The tax base on the corresponding C87e form on which GCT on importation was charged is **$2,086,532.11.** However, unlike the invoice numbered 7, there is no mark-up of any kind, the unit price on the invoice is just **$386,872.49** less than the Jamaica Customs Agency's tax base for GCT.

[48] In both invoices sampled, the GCT charges which the customer is said to pay in full by deposit to the Appellant's bank account has not been included in the consideration

for the taxable supply as required by the **Regulations**. In consequence, the GCT on the invoices do not accurately reflect the GCT which is payable by the customer for the taxable supply and for which the Appellant, as the registered taxpayer, is required to account to the Revenue. This results in a distortion of the total consideration and Output Tax for each taxable supply, and by extension the Input Tax Credit to which the Appellant was entitled.

[49] It is also Ms. Cooper's evidence that during the course of the Appellant's audit, she engaged in research, which included online searches. Between the 16th October and 16th November 2017, she discovered multiple digital advertisements for motor vehicles advertised for sale by the Appellant. Within these advertisements, each motor vehicle was generally described and its make, model, transmission, CC rating, mileage and purchase price stated. Motor vehicles of the same model, make and years as those which were the subject of the Appellant's invoices were being offered for sale at significantly higher prices than appear on the Appellant's invoices. This is not denied by the Appellant.

[50] It is Mr. Green's evidence in his Affidavit in Response, sworn and filed on the 25th June 2020, that when he advertises on behalf of the Appellant he does so at a higher price than that for which the motor vehicle is finally sold. He avers that only a mark-up of $15,000.00 to $20,000.00 was earned by the Appellant in respect of vehicles sold during the relevant period. As stated previously, the invoices produced in the appeal do not reflect that credit was applied to the benefit of the customers in the recorded sales.

[51] The court is being urged by the Appellant to accept its invoices to verify its Income and Output Tax, they are therefore material evidence on the appeal. Having regard to the significance of these items of evidence in resolving the dispute and the deficiencies in them which have been identified in these proceedings, I too find them unreliable as a direct method of verification of the Appellant's sales Income and Output Tax for the relevant period. I therefore confirm the decision of the RAD in this respect.

Whether the Appellant's bank records were complete and could be relied upon to verify its sales income.

[52] Among the documents requested of the Appellant at the audit stage were bank statements. It is the Appellant's contention that the Respondent erred in finding that the bank statements submitted were incomplete, in circumstances where the Respondent was presented with full bank records, including the records for its United States Dollar Scotia Bank Account.

[53] The Respondent's position, as articulated in his Statement of Case is that this method of verification was also unreliable, as twenty to thirty percent (20% - 30%) of the deposits made were not reflected in the bank account which the Appellant initially submitted to it.

[54] Ms. Cooper states that under cover of letter dated 17th October 2017, a copy of which is exhibited, the Appellant submitted some of the documents requested by the Respondent for audit purposes. Among the list of documents referred to in the Appellant's letter is "Bank A/C Totals". On 16th November 2017 an additional bank statement was requested from the Appellant. Copies of the bank statements submitted to the Respondent were exhibited to Ms. Cooper's affidavit sworn and filed on the 12th and 15th June 2020 respectively. The statements were in respect of one of the two accounts the Appellant says were held by it, being the account numbered ****64.

[55] It is also Ms. Cooper's evidence that the bank deposits were regarded as unreliable for verifying the Appellant's Income and Output Tax on account that there were discrepancies between invoiced amounts and lien amounts. The Respondent, through its AMVS, where registered liens are recorded, located liens which were of significantly higher values than the amounts stated on corresponding invoices submitted by the Appellant.

[56] In one example cited by the Respondent in these proceedings, which is admitted by the Appellant, the motor vehicle had a sale price of **$625,843.24**. This is seen on the

sales invoice numbered 5 and dated 29th January 2016. On the Respondent's AMVS however, a lien in the amount of **$1,300,000.00** was registered in favour of a financial institution in respect of the said motor vehicle. A corresponding amount was deposited by the said institution into the Appellant's bank account. It is averred on behalf of the Appellant that this sum was remitted to the customer who had already paid the purchase price of the motor vehicle in full, less a valuation fee of **$3,000.00**.

[57] It was also noted by Ms. Cooper that not all of the registered lien amounts was reflected on the Appellant's bank statements. In the Further Affidavit in Response of Sean Green sworn and filed on 25th June 2020, the Appellant replies,

> *17. Paragraph 16 of the Affidavit of Korea Cooper is denied ad I say in answer to that the discrepancies were explained to the auditors. I told the auditors that at the time when the motor vehicles were purchase from the Appellant Company, the majority of the customers paid in full. I further explained during audit meetings that this was because financial institutions require that imported used cars to clear customs before they can be used as security for any loans whatsoever. So the customers of the Appellant fully pay the purchase price to the Appellant Company. (sic)*
>
> *18. I also explained o the Respondent's Auditors that on some occasions the customer informs me that they want to use the vehicle as security for the loan. In those circumstances, the customer has the vehicle valued and the bank uses the assessed value of the vehicle to issue the loan. Some financial institutions require that the Appellant Company issues no interest letter since the Appellant Company is the registered importer of the vehicle. While other financial institutions disburse the loan amount to the Appellant Company directly as it is the registered importer of the vehicle. (sic)*
>
> *19. When the latter occurs, the Appellant Company disburses the sums back to its customer. We provided proof in terms of a spreadsheet I prepared using invoices and bank statements…*

[58] Mr. Green goes on to list the headings in the spreadsheet and proceeds to attach a copy of it as an exhibit and then says,

> *Accordingly, when the lien is registered on the AMVS motor vehicle system this does not reflect the amount that was paid to the Appellant Company for the vehicle. The document accurately reflecting the amount paid was the amount invoiced. These invoices were presented to the Respondent's auditors.*

[59] I have made a number of observations on Mr. Green's response. First, a majority of the Appellant's customers pay the Appellant in full, which appears consistent with what he says is the nature of the business. Second, some of the Appellant's customers, desirous of obtaining loans from financial institutions, propose to use the motor vehicle supplied by the Appellant as security for those loans. Three, those customers cause the motor vehicle to be valued, and the assessed value is used by the financial institution to issue the loan. Four, the financial institution disburses the loan amount to the customer directly or to the Appellant as importer. Fifth, the customer having already paid the Appellant for the motor vehicle, the Appellant pays out the sums it receives from the bank to the customer.

[60] I find it difficult to accept Mr. Green's account as a credible explanation for the significant disparity observed by the Respondent between registered lien amounts and the amounts stated by the Appellant on the corresponding invoices; or the absence of some registered lien amounts in the banks statements submitted by the Appellant. This difficulty is made even more grave in light of Mr. Green's admission that the Appellant destroyed the very evidence which was capable of substantiating the arrangement it says it had with these customers.

[61] It is Ms. Mills' evidence, which is admitted by Mr. Green, that after explaining that lien amounts received by the company were transferred to customers who had previously paid the purchase price for their motor vehicles, the Appellant's representative had also explained that these customers were usually given receipts for any partial or interim

payments made. When these records were requested, Ms. Mills was advised that no copies of the receipts were kept and that the receipt books had been disposed of. This was at a meeting with the Appellant on the 17th August 2018 for presentation of the findings of the objections and an attempt to resolve discrepancies between lien and sales invoice amounts.

[62] As previously stated, a request for the Appellant's bank statements was made by the Respondent by letter dated 26th September 2017. By this correspondence the Appellant was also advised of its audit appointment. The Appellant first submitted some documents to the Respondent under cover of letter dated 17th October 2017. In Ms. Mills' affidavit, sworn and filed on the 12th and 15th July 2020 respectively, a prepared account statement for the account numbered ****91, which covers the relevant period has also been exhibited. The statement is dated 22nd August 2018, almost a year after the Respondent's request for documents and during the objection process. I have observed that while the statement indicates withdrawal and deposit amounts, there is no clear indication of the source of those deposits. I am unable to ascertain whether or not the deposits were made by the Respondent's customers.

[63] Having regard to the stage in the process when this additional bank statement was produced, it can rightly be said that the Appellant's bank statements were incomplete at the audit stage and that the deposits reflected therein could not be used to verify its total sales income or Output Tax for the relevant period.

[64] Mr. Brian Bailey in his affidavit states that he attended up the Appellant's banker when he commenced preparation of its tax returns for the relevant period and was handed bank account statements for accounts numbered ****91 and ****64. He goes further to state that he attaches true and faithful copies of those statements, marked "BB2" for identification. When the contents of "BB2" are examined however, they are not what they have been represented to be. Instead of the Appellant's accounts, the statements are in respect of an account numbered ****77 in the name of one of the Appellant's principals, Mr. Sean Green.

[65] In all the foregoing premises, I cannot fault the Respondent's conclusion, which was confirmed by the RAD, that the bank deposit method of verifying the Appellant's sales could not be *"fully"* relied upon to verify the Appellant's income and Output Tax for the relevant period. This finding of the RAD is accordingly confirmed.

Whether the Appellant's additional assessments for GCT and Income Tax were made in exercise of the Respondent's best judgement.

Self-Assessment

[66] It is the Appellant's submission, which is beyond contradiction, that the Jamaican tax system is premised upon self-assessment. What is incongruous is its further contention that *"… the method of self-assessment utilized by each tax payer should be assessed on a case by case basis and not on a set of rigid standard (sic), especially in circumstances where the taxpayer or the tax-payer's agent preparing the statements and books is not a trained or Chartered Accountant."*

[67] The Appellant relies on the judgment of Rattray J in **National Commercial Bank Jamaica Limited et al v The Commissioner General Tax Administration of Jamaica** [2015] JMRC 1, extracts from which demonstrate the unsustainability of the Appellant's argument. After remarking that information on the business side of a taxpayer's operation would be solely within its knowledge, Justice Rattray went on to say this of self-assessment,

> *[17] … I accept, as submitted by Counsel for the Respondent, that taxing statutes in Jamaica, including the GCT Act, are predicated on a system of self assessment, with the taxpayer being obliged to file the requisite returns and to pay over the tax due, within the time specified. I also accept, as this has not been challenged, that initially under the 1991 GCT Act, while*

taxpayers would pay amounts purporting to represent GCT due and owing, they failed however to file the necessary returns to indicate how the sums paid were arrived at for the particular period. This led to the 1995 amendment to the GCT Act, which, inter alia, imposed separate penalties for failure to file returns and for failure to pay the tax due within the time prescribed by the statute.

[18] I am satisfied then that apart from the usual purpose of taxation statutes, which is to collect revenue, ***the rationale behind the GCT Act, as amended in 1995, is to ensure that the registered taxpayers fulfil their obligations, not only to self-assess, but also to file accurate and complete GCT returns and to remit the amount of taxes so assessed to the relevant authorities****,* ***within the period prescribed by section 33 of the Act.***

[**Emphasis Added**]

[68] Under the **ITA**, the obligation on the taxpayer who has self assessed is to *"… deliver or cause to be delivered by his agent… a true and correct return of the whole of his income from every source whatsoever for [the] year of assessment."*

[69] In respect of the current appeal, I believe the matter was well put by Ms. Warren, Counsel for the Respondent, when she said, *"the law [does] not dictate what methods or expertise must be utilized or acquired by the taxpayer in order to ensure that the return was true and correct and certainly it does not waiver or stutter in establishing the acceptable standard to which the return must adhere."*

[70] At the core of any efficient tax system are its laws, which must be clear as to the imposition of liability and the machinery for assessment and collection. A taxpayer does not then get to cherry pick what is included in its returns for a relevant period. His obligation is no less and no more than to file accurate and complete returns and to satisfy in full, its liability to the Revenue.

[71] I do not find that there is any merit in the Appellant's submission that the Respondent should have deviated from the standard method of assessment in respect of it so as to make allowance for the lack of accounting training on the part of the taxpayer or the agent selected to prepare its statements and books for self-assessment purposes.

Respondent's power to raise an assessment

[72] The Respondent is empowered by **section 38** of the **GCTA** to make an assessment of tax payable by a registered taxpayer where that tax payer either fails to furnish a return as required by the legislation, or furnishes a return which appears to him to be incomplete or incorrect. Further, where the Respondent is not satisfied with the calculations on the furnished return or the basis upon which the return has been prepared, he

> *38 (2)* …
>
> (a) *may make an assessment of the amount that he thinks the registered taxpayer ought to have stated on the return; and*
>
> (b) *shall, in any such assessment, state the general basis on which the assessment is made.*

In making the assessment above, the Respondent

> *38 (4)* *… may, **to the best of his judgment**, make an assessment of the tax chargeable on any goods which no longer form part of the taxable supply of a registered tax payer and for which no satisfactory account can be given by the tax payer.*
>
> [**Emphasis added]**

[73] Similarly, where a person has delivered a return under the **ITA**, the Respondent may,

72 (2) (b) *refuse the return and, **to the best of his judgment**, make an assessment upon that person of the amount at which he ought to be charged.*

[**Emphasis added**]

[74] Having determined that neither the sales invoices nor the bank deposits alone could be reliably used to determine the Appellant's total Income or Output Tax for the relevant period, it now falls to be considered whether the indirect methods used by the Respondent for verification purposes enabled him to arrive at assessments to the best of his judgment.

[75] Neither the **GCTA** nor the **ITA** define what is meant by the term *"to the best of his judgment"*, but there are ample judicial pronouncements which put its meaning beyond doubt. While a number of such authorities were helpfully referred to by the Respondent in submissions, I need only make reference to some of them in resolving the issue.

[76] In **Von Boeckel v Customs and Excise Commissioners[5],** following a visit to the taxpayer's licensed public house and an inspection of relevant documents, it appeared to officers of the commissioners that the VAT returns over a three-year period were incorrect. They failed to declare and accurately account for tax on the full value of supplies made by the taxpayer. When enquiries were made of the taxpayer. He blamed pilferage for the deficiency. The public house was run by the taxpayer's manager and the commissioners made no enquiries of him or carried out further investigations. The commissioners noted the income of the establishment over a period of five weeks to assess the amount of tax due by the taxpayer.

[77] The taxpayer appealed and the tribunal determined that the commissioner's assessment had been made to the best of his judgment. The amount was nevertheless

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[5] [1981] STC 290, 292-293 [f-a]

reduced to account for pilferage. The taxpayer further appealed the decision of the tribunal on the basis that the commissioner had failed to act to the best of his judgment within the meaning of section 31(1) of the *Finance Act 1972*; and that the tribunal having determined that the commissioner should have taken pilferage into account, the assessment by the commissioner was invalid and should be set aside. The taxpayer's appeal was dismissed. As to the obligation imposed on commissioners to make an assessment to the best of their judgment, Woolf J stated the matter thus,

> *As to this, the very use of the word 'judgment' makes it clear that the commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide. It would be a misuse of that power if the commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment.*
>
> *Secondly, clearly there must be some material before the commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.*
>
> *Thirdly, it should be recognised, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the commissioners of carrying out exhaustive investigations. What the words*

> *'best of their judgment' envisage, in my view, is that the commissioners will fairly consider all material placed before them and, on that material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act then they are not required to carry out investigations which may or may not result in further material being placed before them.*

[78] Lord Dyson in **McNicholas Construction Co. Ltd. v HM Commissioners of Customs & Excise**[6] put it this way,

> *… the words 'to the best of their judgment' permit the commissioners a margin of discretion in making an assessment; a taxpayer may only challenge the assessment if he can show that the commissioners acted outside the margin of their discretion, by acting in a way that no reasonable body of commissioners could do. In order to succeed, the taxpayer must show that the assessment was wrong in a material respect, and that if so, the mistake is such that the only fair inference is that the commissioners did not apply best judgment, as explained by Woolf J in Van Boeckel v Customs and Excise Comrs [1981] STC 290.* ***The primary focus of the attention of the tribunal, therefore, should be on the objective evidence adduced by the taxpayer in seeking to discharge the burden of showing that the amount of VAT assessed was not due from him.*** *This is because it would be absurd for the tribunal to conclude that the assessment was correct, but that the commissioners had made a dishonest or capricious assessment. Parliament cannot have intended that a tribunal should be required to set*

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[6] [2000] STC 553 [76]

aside assessments which are shown to be correct, or which the taxpayer does not show are incorrect.

[**Emphasis added**]

[79] The taxpayer in that case carried on business as a civil and public works contractor. Following investigations into the taxpayer by the commissioners, during which there were raids on its premises and certain documents seized, assessments were raised including to recover input tax deducted in respect of VAT invoices issued in the names of 12 of its sub-contractors. The commissioners contended that the VAT-only invoices were issued in the course of frauds with the object of evading income tax and VAT, and were not genuine invoices for supplies made to the taxpayer. The commissioners were able to substantiate this for most but not all of the taxpayer's subcontractors. On appeal, it was held that the exclusion of pieces of evidence from subcontractors against whom the allegations were not substantiated was insufficient to show that the commissioners did not exercise their best judgment in relation to the assessments as a whole.

[80] In **Schlumberger Inland Services Inc v Customs and Excise Commissioners,**[7] the taxpayer provided training services to other companies within its group without any intention to make a profit. For tax purposes the taxpayer was advised to state its charge plus a 10% 'uplift'. The taxpayer's tax point was in April. The taxpayer failed to make VAT returns believing that the services it provided were exempt. The commissioner was of the view that the taxpayer's activities were chargeable to VAT at a standard rate.

[81] After a delay of two years from the inception of the commissioners' investigations, the agreement pursuant to which the taxpayer offered the service and a schedule of charges was supplied to the commissioner. The schedules had been made out for each calendar year. An estimate of the VAT payable by the taxpayer was therefore made

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[7] [1978] STC 228

using only those documents. The taxpayer declined to accept the estimated amount and a formal assessment was made.

[82] The taxpayer appealed against the decision arising on the formal assessment on two bases. First, that the supply of services was exempt and second, that the assessment was not made in accordance with the requirements of the *Value Added Tax Act 1983, Sch 7, para 4*. The appellate tribunal found that the services attracted VAT and that the commissioner had used actual figures provided by the taxpayer's accountants in raising the assessment. While the commissioner had fallen into error in wrongly assuming that the tax point was December 31 in each year as opposed to April, it had not acted dishonestly, vindictively or capriciously; and it could not be said that the assessment was not made to the best of his judgment at the time. The taxpayer's appeal against the decision of the appellate tribunal was accordingly dismissed.

[83] In rejecting the complaint of counsel for the taxpayer that a proper judgment had not been arrived at based on the material before the commissioner, and that he had copied mechanically the calendar figures from the taxpayer's accountant, Taylor J stated,

> *… the assessor is not required to possess and deploy the deductive powers of Sherlock Holmes and the clairvoyance of Madame Arcarti. What he did was to use actual figures and relate them as closely as he could to accounting periods..."*[8]

[84] Justice Taylor went further to say,

> *In so far as his assessment was guesswork or was to some extent arbitrary, the tribunal was entitled to conclude that it was so only within the meaning of those words intended by Lord Russell. It ill lies in the mouth of the taxpayer company to criticise the judgment of an officer whom it has persistently*

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[8] Ibid, 234

denied the details it should have given him. To suggest that, by piecing together what snippets of information the taxpayer company vouchsafed, he could have gone through motions which may have brought him nearer to the tax points, although not accurately to them, is to my mind a barren argument.

[85] The foregoing authorities demonstrate, as submitted by the Respondent, that an assessment to the best of his judgment is to some extent arbitrary and involves some amount of guesswork, but that it must be honestly undertaken using such information as is available to it.

[86] The Appellant does not deny that the motor vehicles on which the Respondent made its assessment were sold by it. The dispute is as to the prices for the transactions.

[87] In the first instance, the Respondent used the information which was present on the Jamaica Customs system, and C87 custom import forms submitted by the Appellant to ascertain purchases prices. The value of the Appellant's taxable supplies which is contained in these forms provide the tax base on importation upon which GCT and other taxes are chargeable by the Jamaica Customs Agency and in respect of which the Appellant is permitted to claim credit for Input Tax for GCT purposes. In light of the information contained in those forms and the use to be made of them in calculating the taxpayer's liability, they were appropriately relied on by the Respondent.

[88] The Respondent determined sales prices, less GCT in two (2) ways:

i. Lien amounts registered on the Automated Motor Vehicle System (hereinafter called "AMVS");

and/or

ii. Deposits recorded on bank statements supplied by the Appellant.

[89] The Respondent used lien amounts which were registered on those taxable supplies which appeared on its AMVS to arrive at the sales price for those vehicles. A lien is a thing of value to the financial institution which is its holder. It encumbers the

property which the borrower has pledged as security for the debt up to the amount of the debt; and guarantee's the lender's right to recover through legal means. In my mind, a lien should therefore be a good indicator of the value of the related property and was therefore appropriately used by the Respondent to determine the sale prices of those taxable supplies to which they attach.

[90] For those taxable supplies for which there were no liens, the Respondent used the bank deposits to determine the final sale prices for those vehicles to which the deposits relate. Those deposits having been made by the Appellant's customers to its bank account, I see no reason for concluding that they are not reflective of the prices paid for their acquisition. The Respondent was permitted to use those prices, to the extent they could be ascertained, in aid of verifying the Appellant's total sales income for the relevant period.

[91] For motor vehicles without liens or an identifiable deposit record on bank statements supplied by the Appellant, a mark-up of 42% was applied by the Respondent to ascertain their sale prices. It represents an average of the mark-up percentages observed for lien and bank deposit transactions which totalled 46.59%, which was reduced to 42% at objection when high and low mark-ups were then eliminated.

[92] It appears to me that in making his assessment and in using the mark-up method, the Respondent relied on the objective evidence which was available to him in determining the Appellant's GCT and Income Tax liability for the relevant period. While it undoubtedly involved some amount of guess work, which was made necessary by the Appellant's failure to keep and produce accurate records when requested, there is no evidence that the exercise was not approached honestly by the Respondent, or that he acted without *bona fides* in assessing the amount of tax payable by the Appellant. I therefore find that the assessments made by the Respondent were to the best of his judgment having regard to the information available to him. Accordingly, the finding of the RAD in this regard is confirmed.

DISPOSITION

[93] In all the foregoing premises, it is ordered that:

1. The appeal against the assessments to GCT and Income Tax is dismissed.

2. The decisions of the Commissioner of the RAD as to the Appellant's GCT and Income Tax liability for the year 2016 are confirmed.

3. Costs of and incidental to the appeal are awarded to the Respondent.