



[2020] JMRC. 4

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE REVENUE COURT

REVENUE COURT APPEAL 2019 RV 00002

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| BETWEEN | K. CHANDIRAM LIMITED | APPELLANT |
| AND | THE COMMISSIONER GENERAL OF TAX ADMINISTRATION JAMAICA | RESPONDENT |

Paul Beswick, Terri-Ann Guyah and Ayesha Thomas instructed by Ballantyne, Beswick & Company, Attorneys-at-Law for the Appellant.

Khian Lamey and Noel Gayle-Miller, Attorneys at Law for the Respondent.

Heard: 5th, 6th October and 20th November 2020.

Revenue Law - Duty Free Shopping System Act (DFSSA) - whether goods sold at a licensed duty free shop to persons who are not passengers or diplomats were sold under the duty free shopping system and therefore exempt from GCT.

General Consumption Tax Act (GCTA) - whether the Respondent had jurisdiction to raise an assessment for GCT where goods sold at a licensed duty free shop to persons other than passengers or diplomats but exported through Customs - if the Respondent had jurisdiction to raise assessment to GCT - whether the exported goods are to be taxed at a rate of zero percent or at the standard rate.

Remedies - liability for alleged consequential loss or injury pending determination of appeal against assessment for GCT.

C. BARNABY, J (AG)

INTRODUCTION

[1] The Appellant, a duly registered limited liability company is a licensed duty free operator, with shops at and outside ports of entry on the island. It is also a

licensed exporter and registered taxpayer for General Consumption Tax (GCT) purposes.

- [2] Following a joint investigation between the Respondent and the Jamaica Customs Agency, the former raised an assessment against the Appellant for GCT for the period January 2014 to September 2015 (the review period). This assessment followed an examination of the Appellant's books and records and a conclusion by the Respondent that certain sales by the Appellant were not authorised under the duty free shopping system, not having satisfied the conditions for sale at section 18(1) of the **Duty Free Shopping System Act (DFSSA)**¹; that the sales were taxable supplies and therefore subject to GCT pursuant to the **General Consumption Tax Act (GCTA)**; and that the Appellant failed to collect the tax at the time of supply of the goods to each purchaser. In consequence, the Respondent determined that the Appellant filed erroneous returns for the review period, and failed to remit GCT to the Respondent for those supplies.
- [3] Adjustments were made to the Respondent's initial assessment following an audit of GCT returns for the review period, which resulted in a reduction but not an extinction of the Appellant's liability. The Appellant objected and a verification exercise was undertaken by the Respondent.
- [4] In arriving at this reduced assessment, the Respondent regarded ten (10) sales as having been improperly treated by the Appellant during the period under review. These transactions were in respect of sales made to four (4) and six (6) registered and non-registered taxpayers respectively.

¹ Following the passage of the **Tourist (Duty-Free) Shopping System (Change of Name and Amendment) Act, 2010**, the **Tourist (Duty-Free) Shopping System Act** was renamed the **Duty Free Shopping System Act**.

- [5] There is now no dispute that all the goods which were purchased from the Appellant were in fact exported. The Respondent regarded the supplies to the registered taxpayers as being entitled to tax at a zero rate pursuant to section 24 of the **GCTA** and treated them accordingly. In respect of the remaining six (6) non-registered taxpayers, their purchases were treated by the Respondent as being liable to GCT at the standard rate. In consequence of the latter treatment, the Respondent found that those supplies were not reported by the Appellant which resulted in an understatement in the Appellant's returns for the relevant period. It is on that alleged understatement that the net tax liability of **Sixty-Three Million, Nine Hundred and Thirty-Two Thousand, Six Hundred and Thirty-Eight Dollars (\$63,932,638.00)** was determined by the Respondent on objection. The Appellant was advised of the reduced assessment by way of Notice of Decision dated 20th June 2017.
- [6] On appeal to the Revenue Appeals Division (RAD), the decision of the Respondent was confirmed. The Appellant was advised by Notice of Decision dated 21st February 2019. It is from that decision that the Appellant appeals to this court by way of Notice of Appeal filed on the 22nd March 2019 after initially filing a Fixed Date Claim Form.
- [7] The Appellant claims a total of fifteen (15) reliefs which include declaratory reliefs; orders quashing the decision of the Respondent and the Commissioner of the Revenue Appeals Division; orders directing the Respondent to process refunds and request for the release of aged customs bonds, and to remove any hold on its accounts with the Revenue; damages for loss of use of monies being held by the Respondent in respect of the challenged liability; damages for unlawful interference with commercial business operations and loss of means profits; general damages; commercial interest on damages; interest pursuant to the Law Reform Miscellaneous Provisions Act; costs and Attorney-at-Law costs; and such further or other relief the court deems just.

- [8] The Respondent, in its Statement of Case filed on the 24th April 2019, prays that the appeal be dismissed; that the decision of the Commissioner of the RAD be confirmed; that the Appellant pays its costs of and incidental to the appeal; and such further or other relief as the court deems fit.
- [9] While the Appellant identified and argued several grounds of appeal to which the Respondent made submissions before me, having duly considered them and having regard to the applicable law and evidence, I find the following four (4) issues to be determinative of the Appeal.
- (i) Whether the transactions satisfied the conditions for purchases under the **DFSSA**.
 - (ii) Whether the goods supplied by the Appellant were supplied outside the customs area thereby giving the Respondent the jurisdiction to raise an assessment for GCT.
 - (iii) Whether the goods would be liable to tax at the standard or zero rate if they were supplied outside of the customs area.
 - (iv) Whether the Respondent is answerable or accountable for consequential loss, deterioration or injury allegedly suffered by the Appellant because it halted the processing of its application for refunds while the decision as to liability is on appeal.
- [10] The appeal proceeded by way of rehearing on the 5th and 6th October 2020 and judgment was reserved to today's date.
- [11] I find that the Appellant, who has the onus of proving that the assessment complained of is erroneous, has discharged the burden placed upon it. Accordingly, I will allow the appeal against the decision of the RAD confirming the GCT assessment of **Sixty-Three Million, Nine Hundred and Thirty-Two Thousand, Six Hundred and Thirty-Eight Dollars (\$63,932,638.00)**.

[12] While the goods were sold to persons who were not permitted shoppers under the **DFSSA** and therefore lost the duty free-status under that Act, they were sold at the private bonded warehouses operated by the Appellant, entered for export and were in fact exported with the oversight and approval of Customs. In consequence, the Respondent who has responsibility for taxes other than those relating to customs, did not have the jurisdiction to raise an assessment on the basis that taxable supplies were made “in Jamaica”. In any event, if the supplies were made locally, thereby giving the Respondent the jurisdiction to raise an assessment, the sales attracted GCT at the rate of zero percent pursuant to **section 24** of the **GCTA** and not at the standard rate as assessed by the Respondent on the ground that the goods were exported from Jamaica in prescribed circumstances.

[13] I also find that the aged customs bonds are being held by Jamaica Customs and that the relevant Commissioner is not a party to these proceedings. Without making any determination as to the legitimacy of the custody of the aged bonds, I refuse the order being sought by the Appellant for their return by the Respondent.

[14] Further, there being an appeal against the Respondent’s assessment as to liability for GCT, the Respondent is neither answerable nor accountable to the Appellant for any alleged consequential loss, deterioration or injury for its refusal to process the Appellant’s request for GCT refunds pending a determination of the said appeal. The various claims for damages and other related consequential relief therefore fails.

THE GROUNDS OF APPEAL

[15] The issues which were previously identified and which are discussed subsequently, arose on the Appellant’s stated grounds of appeal which are now reproduced.

- a. *The Commissioner of the Revenue Appeals Division fell into error when she determined that the Duty-Free Shopping System Act was not the applicable legislation and further misguided herself when she interpreted at Paragraph 80 of her reasons that the spirit of the GCT Act required that export transactions would be afforded the zero rated status, such transactions like the ones which were done by the Appellant herein. The Commissioner cannot on the one hand determine that exports would be exempted from taxes but then conclude that despite the evidence which was shown by the Appellant of the export transactions by way of bills of lading, airway bills and certified customs export entries that this “intent to export or actual export” was not what the legislators intended;*

- b. *The goods which are the subject of this appeal and audit by the 1st Respondent, having been removed from the Appellant’s warehouse in accordance with Sections 115, 116 and 117 of the Customs Act and the relevant approval received from the Commissioner of Customs, who is the relevant Revenue Commissioner for the purposes of the Appellant’s operations under the Duty-Free Shopping System Act, the Revenue cannot now retroactively impose duties and taxes on these goods when they approved the handling and exportation of the said goods;*

- c. *The Commissioner of Customs having approved the goods for export in accordance with Section 14(2) of the Duty Free Shopping System Act, by authorizing the Transfer and Disposal of Goods under the Tourist (Duty Free) Shopping Act (Form C33A) and the Customs Export Entries did permit the removal of the said consumables from the private warehouse (being the duty free shop) and did approve the exportation of the said goods. Accordingly, the customs duty, excise duty, general consumption tax and the special consumption*

tax should be duly waived in accordance with Section 17 of the Duty Free Shopping System Act;

- d. General Consumption Tax is collected by companies from consumers upon purchasing goods and then paid over to the Revenue, on goods and services which are **locally consumed**. These goods were never deemed applicable for GCT by the Appellant, and no GCT was collected upon their sales from the purchasers, as the goods were exported and not deemed liable to GCT or any other duties or taxes, accordingly the assessment herein is unconscionable, unreasonable and extremely prejudicial especially in circumstances where the exportation of the goods from the Appellant's warehouse was done with the authorization and approval of the Revenue and there was no revenue leakage as the goods never entered the domestic supply and the imposition of these taxes are contrary to the intention of parliament and would amount to unjust enrichment of the Revenue as there was no consumption of the said goods which would necessitate the payment of GCT. The finding that the GCT Act would not have provided that goods sold to persons who were not registered taxpayers for the purpose of export to be exempted from GCT is ultra vires Section 45 of the said act and the Revenue fell into error when they failed to apply the provisions of the said section;*
- e. Even if the goods were not handled in accordance with the Duty Free Shopping System Act, then the goods would still be deemed exempt from taxes under the provisions of Sections 128 and 158 of the Customs Act and the Customs Act generally given that it is undisputed that the goods have been duly exported;*
- f. The finding of fact that the Appellant did engage in sales to other customers whose purchases are subjected to tax at the standard rate*

is incorrect as the Appellant's business does not facilitate nor do they conduct these sales and such a finding is erroneous, further the finding of law that the goods do not fall within the exempt category under the GCT Act is incorrect;

- g. The failure by the Revenue to honour the General Consumption Tax refunds and the request for release of the aged Customs Bonds has severely hampered the business operations of the Appellant and has had an adverse effect to the commercial trade operations of the Appellant and has stymied its ability to effectively manage its inventory, and the Appellant has suffered damages from this arbitrary and unlawful actions of the Revenue in changing their business model and operations resulting in loss of business sales and profits.*

ANALYSIS

Whether the transactions satisfied the conditions for purchases under the DFSSA.

[16] It is contended on behalf of the Appellant that the ten (10) transactions to which the Respondent's assessment relate were duty free and therefore exempt from duties, including GCT, pursuant to the **DFSSA**. I do not find favour with that submission.

[17] The Appellant referred to a number of authorities from the United States and India in seeking to persuade the court of its position but I did not find them helpful in determining the appeal. It is sufficient to say that the authorities were factually dissimilar and concerned constitutional and statutory provisions which are unlike those which arise for consideration on this appeal.

[18] Section 17 of the **DFSSA** states,

Subject to the provisions of this Act and of any regulations made thereunder, any approved goods or consumables warehoused in a licensed duty-free shop may be sold free of any customs duty, excise duty, general consumption tax or special consumption tax to which such

goods would, but for the provisions of this Act, be liable. [Emphasis added]

[19] The exemption from GCT and all other duties referred to in the foregoing provision is expressly made subject to the provisions of the **DFSSA** and its regulations. As a result, any sale of approved goods and consumables which are warehoused in a licensed duty free shop must comply with the Act and its regulations.

[20] Section 18 of the **DFSSA** prescribes that:

18 (1) *Approved goods or consumables may be purchased from a licensed duty-free shop by any person –*

(a) who is arriving in Jamaica in or on any aircraft or ship at the port of entry, and before clearing Customs;

(b) who is departing from Jamaica and who can supply proof that he is, at or about the time of the purchase, departing from Jamaica; or

(c) who is a diplomat.

(2) Any approved goods or consumables purchased by a diplomat or other person under subsection (1) shall be subject to any prescribed requirements in respect of packaging or otherwise.

[21] The provisions at section 18 of the **DFSSA** are the result of repeal and replacement of the provisions which previously existed under the **Tourist (Duty-Free) Shopping System Act** (the **Principal Act**), following the enactment of the **Tourist (Duty-Free) Shopping System (Change of Name and Amendment) Act, 2010**. As contended by the Appellant, the amendments were aimed at enlarging the country's ability to benefit from the very lucrative global duty free shopping system.

[22] Under section 18 of the **Principal Act**, approved goods or consumables which were warehoused in a tourist duty-free shop could only be sold for export. The

amendments do not bring about any change in substance in regard to sale for export.

- [23] In respect of approved goods, they could only be sold to visitors and diplomats under the **Principal Act**. Where approved goods were purchased by visitors, those goods could only be delivered to them at the time of purchase, subject to prescribed requirements for packaging and otherwise, being met. In respect of consumables, those purchasers could not be delivered to the purchaser save upon furnishing the vendor with satisfactory proof that the purchaser is departing from Jamaica, at or about the time of delivery of the consumables. Both diplomats and visitors were defined in the legislation. While three classes of visitors were identified, it is presently sufficient to say that they are all natural persons who arrived and remained in the island temporarily and who in ordinary Jamaican parlance are referred to as “tourists”. The word “diplomats” is defined to mean “*persons entitled to immunities or privileges under section 10 of the Diplomatic Immunities and Privileges Act*”.
- [24] With the amendments to the legislation in 2010, the class of persons who are now permitted to purchase goods and consumables under the duty-free shopping system have been expanded. In addition to diplomats, any person arriving or departing Jamaica who satisfies the conditions at section 18 (1) (a) and (b) the **DFSSA** are approved purchasers under the duty free shopping system.
- [25] There is no dispute that items which are the subject of the Respondent’s assessment were approved goods and consumables or that they were purchased at the Appellant’s licensed duty-free shops. The issue for this court is whether the purchasers were persons designated by section 18 (1) (a) or (b) to make duty free purchases under the duty free shopping system.
- [26] There is no suggestion that the purchasers to whom the Appellant made the disputed sales are diplomats within the retained meaning of the word under the

DFSSA. With the exception of two (2) natural persons, all the purchasers are limited liability companies vested with legal personhood.

[27] Pursuant to section 18 “a person” may purchase approved goods or consumables from a licensed duty-free shop.

[28] Section 3 of the **Interpretation Act**, provides that where the word “person” appears in an enactment, it *“includes any corporation, either aggregate or sole, and any club, society, association or other body, of one or more persons”*, unless there is something in the subject or context of the enactment which is inconsistent with that construction. While the Appellant favours the construction of the word “person” that has been supplied in the **Interpretation Act**, I conclude otherwise.

[29] It is the undisputed evidence that the Appellant’s shops are licenced duty free shops and that the purchases were conducted through the facility of those shops. Duty-free shop licences are issued under the provisions of section 5 of the **DFSSA** and authorises the use of premises or parts thereof for the sale of approved goods and consumables *“under the duty-free shopping system”*, which system is helpfully defined at section 2 to mean,

*... the system permitted by [the DFSSA] for the sale of approved goods and consumables to arriving **passengers**, departing **passengers**, diplomats, free of customs duty, excise duty, general consumption tax and special consumption tax;*

...

[Emphasis added]

[30] A “passenger” in its ordinary signification is no more than a traveller on a mode of transportation who does not have responsibility for its conduct. That definition has been expanded by the legislature however as it is provided in section 2 of the **DFSSA** that “passenger” includes a crew member.’ I find it inconceivable that a non-natural person could qualify as a passenger capable of arriving in or departing from the island on a conveyance.

- [31] In the context of the **DFSSA** and the duty-free shopping system which it regulates, to interpret the word “person”, which appears at section 18 of the Act to include non-natural persons such as limited liability companies, would, in my view, be inconsistent with the Act. I therefore conclude that an authorised purchaser under the duty-free shopping system does not include a non-natural person.
- [32] It is trite, and I readily accept that the will of a limited liability company is exercised through natural persons. Where a natural person, whether on his own behalf or in an expression of a limited liability companies will, purchases approved goods and consumables from a licenced duty-free shop, save where that person is a diplomat, he must satisfy one or either of the conditions of section 18 (1) (a) or (b). The purchaser must either be arriving in Jamaica in or on an aircraft or ship at a port of entry, and in those instances, the purchase is made before clearing Customs; or he must be departing from the island and can supply proof that he is, at or about the time of the purchase, departing from Jamaica. In the latter instance, the purchaser must supply proof, not of the departure of the approved goods and consumables he has purchased, but of his departure from Jamaica at or about the time of the purchase. As a first step, one of the conditions at section 18(1) must be satisfied to enable the purchase to qualify as one which has been made under the duty-free shopping system.
- [33] A purchaser having satisfied those requirements, a second condition is imposed by section 18(2) of the **DFSSA**. The approved goods or consumables which have been purchased are subject to prescribed requirements for packaging or otherwise. In respect of packaging, regulation 18 of the **Duty Free Shopping System Regulations (DFSSR)** provides that packaging be done in accordance with the directions of the Commissioner of Customs who is the relevant Commissioner under the **DFSSA** and be sealed with seals approved by him. Additionally, there must be printed or affixed to each package “*in bold letters and a conspicuous colour*” the notice:

FOR EXPORT ONLY
DISPOSAL OR TRANSFER OF THE CONTENTS OF THIS PACKAGE
IN JAMAICA IS PROHIBITED BY LAW.

TSOL No.:

TSL No.:

- [34] The two conditions in section 18 do not operate in isolation, they must both be satisfied. This ensures that only the statutorily designated purchasers of the duty-free shopping system are allowed to purchase approved goods or consumables from a licenced duty-free shop; and that the purchases are in fact exported and not disposed of or consumed locally.
- [35] While there is now no dispute that the purchases were in fact exported, the Appellant has not brought any evidence which proves that the purchases of the approved goods and consumables from its duty-free shops were done by statutorily designated purchasers under the duty-free shopping system. There is no evidence of any purchaser arriving in Jamaica in or on an aircraft or ship at a port of entry and making purchases before clearing Customs; or departing from the island and having supplied proof to the Appellant that at or about the time of the purchase, the purchaser was departing the island. In the absence of compliance with this requirement of the legislation, I find that the Respondent was permitted to conclude that the purchases were not made in accordance with the **DFSSA** and could not be accorded GCT exempt status on that basis.
- [36] While a "C33A" form was issued and approval given by the Commissioner of Customs for the movement of the goods out of the Appellant's private warehouses, that approval was premised on the Appellant's representation that the purchases were made under the duty-free shopping system. The purchases were not so made. While the shops did not lose their status as private warehouses, when the Appellant permitted the purchase of approved goods and consumables by persons who were not authorised to shop under the duty-free shopping system, the purchases lost the insulation from tax under that system.

[37] In the foregoing premises, the contention of the Appellant that the RAD erred in confirming the Respondent's decision that the impugned sales fell outside of the **DFSSA** is without merit.

Whether the goods supplied by the Appellant were supplied outside the customs area thereby giving the Respondent the jurisdiction to raise an assessment for GCT.

[38] The Appellant challenges the jurisdiction of the Respondent to raise an assessment for GCT on two bases.

[39] I understand the first prong of the jurisdictional challenge to be that the relevant Commissioner in respect of the impugned transactions is the Commissioner of Customs who is given exclusive remit for the administration and regulation of the duty-free shopping system under the **DFSSA**. This proposition is generally unassailable. In the context of this appeal however, where I have determined that the sales did not comply with the conditions prescribed under that Act and are therefore incapable of being treated as GCT exempt thereunder, without more, I do not find that there is merit to this particular aspect of the jurisdictional challenge.

[40] The second basis upon which the Respondent's jurisdiction is challenged is that the goods were entered in the Appellant's duty free shops *qua* private warehouses on bond, and were removed for export and were exported pursuant to the **Customs Act**. It is the Appellant's contention that the goods were not consumed locally to enable the Respondent to raise an assessment in respect of their sale. There is merit in this aspect of the Appellant's challenge.

Administration of tax within and outside the customs area

[41] Pursuant to the **Revenue Administration Act**, the Respondent is entrusted with the responsibility of administering all tax laws, with the exception of those relating to customs, which is the remit of the Commissioner of Customs. It should therefore come as no surprise that responsibility for the assessment and collection of GCT within the customs area on the importation of goods into the

island has been reserved to the Commissioner of Customs as reflected in sections 17A and 17B of the **GCTA**; and that the assessment and collection of GCT on the supply of goods and services domestically is the sole remit of the Respondent.

Imposition of GCT

[42] Pursuant to **section 3** of the **GCTA**, GCT is imposed in two circumstances: (i) on the supply of goods and services in Jamaica by a registered taxpayer in the course of furtherance of a “taxable activity” carried on by him; and (ii) on the importation of goods and services into the island. In each instance the tax is calculated by reference to the value of the goods and services. It is paid by a registered taxpayer and the importer of goods and services into Jamaica. It is due and payable at the time goods are entered for home consumption under the **Customs Act** and at the time of supply in any other case.

[43] The impugned goods were entered into bonded warehouses which are deemed private warehouses for the purpose of several pieces of legislation, including the **GCTA**. There is no evidence of imposition of GCT on importation and if there was, it would be more than a little curious, as approved goods and consumables under the duty-free shopping system are not entered for home consumption. Of necessity, the enquiry must therefore turn to whether or not the goods were supplied “*in Jamaica*” by the Appellant in the course or furtherance a taxable activity carried on by it.

Supply in Jamaica

[44] While “taxable supply” is defined at section 2 of the **GCTA** to mean “*any supply of goods and services on which tax is imposed under section 3*”, the word “supply” has not been defined. I believe that it is beyond dispute that the ordinary meaning of the verb “supply” is to make something which is needed available to someone. There is no doubt that the Appellant supplied the impugned goods to the purchasers at its duty free shops.

[45] Section 14(1) of the **DFSSA** prescribes as follows,

Every licensed duty-free shop shall be deemed to be a private warehouse or a private excise warehouse, as the case may be, for the purposes of the Customs Act, the Excise Duty Act and the General Consumption Tax Act.

[46] Although not cited by either party, I take the liberty of repeating what is the uncontroversial effect of deeming provisions as appears in the judgment of Morrison, JA (as he then was), in **Digicel Jamaica Ltd v The Commissioner of Taxpayer Appeals** [2014] JMCA Civ 36. It is this,

[83] In R v Verrette [1978] 2 SCR 838, 845, a decision of the Supreme Court of Canada, Beetz J defined a deeming provision in this way: "A deeming provision is a statutory fiction; as a rule, it implicitly admits that a thing is not what it is deemed to be but decrees that for some particular purpose it shall be taken as if it were that thing although it is not or there is doubt as to whether it is. A deeming provision artificially imports into a word or an expression an additional meaning which they would not otherwise convey beside the normal meaning which they retain where they are used; it plays a function of enlargement analogous to the word 'includes' in certain definitions."

[84] A deeming provision therefore explicitly creates for the purposes stated in the statute a situation which does not in fact (and would not otherwise) exist...

[47] Section 16 of the **DFSSA** takes the statutory fiction further by stating that the provisions as to the warehousing of goods in Part IV of the **Customs Act** are to apply *mutatis mutandis*. The warehousing provisions are therefore applicable in consideration of the respective differences in the legislation.

[48] Among other things, the warehousing provisions under Part IV of the **Customs Act** permit the relevant Minister, by notice in the *Gazette*, to declare the kinds of goods which can be warehoused on first importation into the island without the payment of any duties; sets out the procedure for removing goods from one warehouse to another, including to a port or place of destination; and provides insulation from duties payable on importation on goods which have been entered on bond for due exportation, subject to compliance by the exporter with all customs laws and conditions of any bond.

[49] The approved goods and consumables which may be sold in licenced duty-free shop *qua* private warehouse are declared in the Schedule of the **DFSSA**. The movement of those goods and their insulation from GCT is provided for in the Act itself and is different in material respects from the relevant warehousing provisions under the **Customs Act**, which differences make alterations necessary. Section 14 (2) of the **DFSSA** is relevant in that regard. It states,

14 (2) The Commissioner may permit any approved goods or any consumables which, but for the provisions of this Act, would be liable to customs duty, excise duty, general consumption tax or special consumption tax to be removed from any warehouse, or customs area, or private excise warehouse or factory licensed under the Excise Duty Act, without payment of such duty or tax and deposited in a licensed duty-free shop, subject to the prescribed conditions, for purposes of import or export under the duty-free shopping system.

[Emphasis added]

[50] It is the evidence that the goods were moved from the Appellant's duty free shops with the authorisation of the Commissioner of Customs by way of "C33A" certificates which are generally issued for the transfer and disposal of goods under the **DFSSA**. The insulation from GCT under the **DFSSA** only arises "*subject to the prescribed conditions, for the purposes of import or export **under the duty-free shopping system.***"

[Emphasis added]

[51] The goods which were sold by the Appellant were not permitted to be sold to the purchasers under the duty-free shopping system. The sales therefore fell outside of the act and the duty-free status it offers. The issue of a "C33A" form which was approved by the Commissioner of Customs on the representation of the Appellant that the purchases were made under the system and in accordance with its duty-free licence, is in my mind, incapable of ascribing to the sales a status which they were not intended to enjoy, duty exempt. While it is tempting to form the view that in these circumstances the supplies by the Appellant were made in Jamaica, I believe the temptation must be resisted.

[52] In cross-border trade, goods which are entered into a bonded warehouse within an importing jurisdiction are not regarded as having been imported until they are removed from the bonded warehouse for domestic consumption. This is the cumulative effect of the warehousing provisions under Part IV of the **Customs Act**.

[53] There is no evidence of the Appellant's shops having lost their status as licenced duty-free shops. In consequence, for the purposes of the **GCTA**, the shops are to be treated as private warehouses.

[54] The evidence is that all the impugned goods sold by the Appellant were exported. The sale and export process is traversed in Mr. Anup Chandiram's evidence. It is this,

- a. *When the exporters attend upon the shop to purchase goods and consumables, they supply information concerning the order and the intended port, carrier and warehouse agent. The exporter then signs a declaration that the Goods Purchased will be exported;*
- b. *The order is then packaged for export and kept at the duty free shop until the day of export when the customs-bonded warehouse agent at the port of exit can accept the shipment;*
- c. *The exporter then makes arrangements for transportation and attend upon the Applicant's bonded warehouse being the duty free shop and supply a copy of the Customs Export entry. A Delivery slip is then prepared and Form C33A – Transfer and Disposal of Goods under the Tourist (Duty Free) Shopping Act is completed and taken to Customs for approval;*
- d. *Upon the Transfer and Disposal of Goods by Customs, then the shipment is then [sic] loaded and escorted to the warehouse at the Port of Exit in accordance with Sections 115 and 116 of the Customs Act;*
- e. *Upon arrival at the port of exit, the goods as purchased by the exporter are produced to Customs at the Customs Bonded Warehouse. The Warehouse keeper then endorses Form C33A and endorses the Delivery Slip;*
- f. *Customs then reviews the export entry, and tally the goods against the Invoice;*

- g. The Airline/Ship agent will then generate an Airwaybill or Bill of Lading and after Customs approval, accept the shipment for export in accordance with Sections 117 and 118 of the Customs Act;*
- h. A copy of the export entry, C33A, delivery slip and Airwaybill/Bill of Lading is then placed in the warehouse ledger to account for the goods which were sold and duly exported.*

[55] The Respondent does not challenge that this is the Appellant's process but contends that it is a matter for the Appellant and Jamaica Customs. While the C33A form does not enable the sales to be regarded as duty-free as concluded earlier, the movement of the goods between the Appellant's private warehouses; entry into customs for export; and subsequent export, all with the authorisation of Customs, demonstrate that the goods were never imported into Jamaica for domestic consumption or removed from the Appellant's private bonded warehouses for that purpose. It cannot be said that the goods left the customs area to enable them to be regarded as having been supplied in Jamaica. Accordingly, I find that the Respondent did not have jurisdiction over the goods to enable it to raise an assessment on the basis that the Appellant made taxable supplies in Jamaica in the course or furtherance of taxable activities carried on by it.

Whether the goods would be liable to tax at the standard or zero rate if they were found to have been supplied outside of the customs area.

[56] While the resolution of the jurisdictional challenge by the Appellant is ground enough to allow the Appellant's appeal against the decision of the RAD as to liability for GCT, there were substantial arguments on both sides as to the rate of tax to which the goods would be liable if it was determined that the Respondent had the jurisdiction to raise an assessment in respect of the sales. In the event a view opposite to the one I have reached in respect of the absence of jurisdiction in the Respondent to raise the assessment for GCT against the Appellant, I will address issue.

- [57] Where goods or services are supplied in Jamaica by a registered taxpayer in the course of furtherance of a “taxable activity” carried on by him, the supply is subject to GCT. A “taxable activity” is defined at section 2 of the **GCTA** to include any activity carried on in the form of a business or trade whether or not for a pecuniary profit and which involves the supply of goods and services to any other person for a consideration.
- [58] The Appellant is a registered taxpayer, operator of licenced duty-free shops and exporter. There is no dispute that the Appellant sold the impugned goods at its shops, received payments and issued invoices. Had I determined that the goods were supplied in Jamaica, the inescapable conclusion would have been that the Appellant did so in the course or furtherance of taxable activities carried on by it.
- [59] In those circumstances, the Respondent, who is responsible for administering domestic taxes, would be empowered by **section 38** of the **GCTA** to make an assessment of the tax payable by the Appellant for those supplies. The power given to the Respondent is exercisable where a registered taxpayer either fails to furnish a return as required by the legislation, or furnishes a return which appears to the Respondent to be incomplete or incorrect. Further, where the Respondent is not satisfied with the calculations on furnished returns or the basis upon which the returns have been prepared, he may, according to the best of his judgment, make an assessment of the amount that he thinks the registered taxpayer ought to have stated on the return.
- [60] In treating with the ten (10) taxable supplies, the Respondent regarded them as having been made to two classes of purchasers, registered and non-registered tax payers. Four (4) purchasers fell into the former category and the remaining six (6) in the latter. The Appellant has not supplied any evidence which puts this court in a position to say that the Respondent was incorrect in classifying the purchasers as it did and accordingly, that distinction remains undisturbed.

- [61] There is no evidence of the Appellant having collected any GCT on the ten (10) sales; and there is no dispute that all the goods which were purchased, including those purchased by non-registered taxpayers, were in fact exported through Jamaica Customs. In reducing the assessment raised against the Appellant for GCT, the Respondent determined that the goods purchased by registered taxpayers and exported were to be taxed at a rate of zero per cent while the exported purchases by non-registered taxpayers were to be taxed at the standard rate.
- [62] It is the treatment of the purchases by the non-registered taxpayers which led the Respondent to a reduced assessment **Sixty-Three Million, Nine Hundred and Thirty-Two Thousand, Six Hundred and Thirty-Eight Dollars (\$63,932,638.00)** on objection, which was confirmed by the RAD.
- [63] It was submitted by the Appellant that even if the sales by it to non-registered taxpayers were not handled pursuant to the **DFSSA**, and the Respondent was the relevant Commissioner, the sales are subject to a GCT rate of zero per cent and not the standard rate as contended by the Respondent. I am persuaded to accept the submission of the Appellant.

Treatment of Exports under the GCTA

- [64] When the **GCTA** is examined, it is clear that the jurisdiction to tax cross-border transactions is premised on the principle of destination and not origin. The destination principle which underlies so many other value added tax regimes globally, gives jurisdiction to tax to the country where the full value of the goods and services are consumed.
- [65] Section 24 of the **GCTA** provides that

Tax in respect of the supply in Jamaica or the importation into Jamaica of any taxable goods or services specified in Part II of the First Schedule shall be at a rate of zero per cent.

Categories of exports, which I will address more fully later, are specified in Part II of the First Schedule to the **GCTA**.

[66] The supplier of zero rated goods does not generally record a tax on the invoice issued by it in respect of the supply. He is nevertheless able to claim input credit for the tax allocable to his acquisition of that which has been supplied. The effect of this process is that the sale, while not exempt from GCT, is for all intents and purposes made free of the tax. With the exception of goods entered for local consumption under the **Customs Act**, GCT is due and payable at the time the taxable supply is made. Generally, the making of a sale subject to GCT at a zero rate therefore presents little difficulty when the time of a taxable supply fits neatly into any of the circumstances listed at section 6 of the **GCTA**, including when an invoice for the supply is issued by the registered taxpayer. However, the **GCTA** makes express prescriptions for the treatment of goods or taxable supplies which are exported.

Export of Taxable Supplies by Registered Tax Payers

[67] Pursuant to paragraph 6 of Group 5 of Part II of the First Schedule, a zero rate of tax would apply to

6. *Any taxable item which is manufactured or supplied in Jamaica and*

a. *exported by a **registered taxpayer**; or*

b. *shipped by a **registered taxpayer** –*

i. *for use as stores on an aircraft or vessel;*

ii. *as merchandise for sale to persons on board an aircraft or vessel,*

the final destination of which is outside of Jamaica.

[68] The RAD interpreted this provision to mean that export transactions would be afforded the zero rated status and not the local supply of goods. The RAD considered that a contrary interpretation “[80] ... *counteracts the intent and spirit of the **GCT Act**, as except for a mere proposition there is no certainty at the time*

*of the local transaction that the taxable items would in fact be exported; and furthermore, it is the “**export**” to which the legislators intended for zero-rating to apply for the purposes of **Group 5 and not a mere local supply with an intent to export or that was actually exported.**”* The effect of such an interpretation is that any taxable item which is supplied in Jamaica would be subject to GCT at a rate above zero percent and could never be sold by a registered tax payer subject to a rate of zero per cent.

- [69] While I agree with the RAD that the zero rating provided for items in Group 5 is inapplicable on a mere intention to export a taxable item which was locally supplied, I cannot agree with the restrictive interpretation placed on the provision by the RAD as it relates to taxable items so supplied and which are actually exported by a registered taxpayer.
- [70] Where a registered taxpayer exports a taxable item which was supplied locally, the supply is subject to GCT at the rate of zero percent pursuant to paragraph 6 of Group 5 of Part II of the First Schedule. Where there is no collection of GCT at the time of supply, say at the time an invoice for the supply is issued, because it is a registered tax payer who has exported the taxable item, an adjustment may be made as reflected in the proposed treatment by the Respondent of the exported taxable items which were supplied to the four (4) registered tax payers.
- [71] As a result, while the RAD did not disturb the Respondent’s treatment of the purported supplies to registered tax payers on principles of fairness and the provisions of the tribunal’s enabling statute, I am of the view that the Respondent’s approach to supplies by registered taxpayers is in fact authorised by paragraph 6 of Group 5 of Part II of the First Schedule to the **GCTA**, once a determination has been made that the taxable items were exported by those tax payers.

Goods Entered for Export by Supplier and Exported

[72] Paragraph 1, Group 5 of Part II of the First Schedule, specifies that GCT at a rate of zero per cent is to be accorded to “[g]oods, other than used goods, exported from Jamaica in prescribed circumstances.” It is noteworthy, that unlike paragraph 6, Group 5 of Part II of the First Schedule and section 45 of the **GCTA**, which I will address subsequently, this provision is not limited to export of “taxable supplies” but applies to goods other than used goods where there is what I would refer to as “supplier regulated export”.

[73] Regulation 18 of the **GCTA Regulations** prescribes that,

The provisions of paragraphs 1 and 4 of Group 5 of Part II of the First Schedule to the Act shall apply to the following goods and services –

a) **goods** –

- i. *which have been **entered by the supplier** for export pursuant to the Customs Act and which have been exported; and*
- ii. *in respect of which a customs certificate of exportation has been issued;*

b) ...

[Emphasis added]

[74] The words “entered” and “exporter” are defined at section 2 of the **Customs Act** thus,

"entered" in relation to goods imported, warehoused, put on board an aircraft or ship as stores or exported means the acceptance and signature by the proper officer of an entry, specification, or shipping bill, and declaration signed by the importer or exporter on the prescribed form in the prescribed manner, together with the payment to the proper officer by the importer or exporter of all rents and charges due to the government in respect of the goods, and, in the case of dutiable goods (except on the entry for warehousing of imported goods), the payment by the importer or exporter to the proper officer of the full duties due thereon, or else, where permitted, the deposit of a sum of money or giving of security for the duties, as provided by law, or, in the case of goods for which security by bond is required on the exportation, putting on board an aircraft or ship as stores or removal of such goods, the giving of such security;

"exporter" includes any person by whom any goods (including goods transferred from an importing aircraft or ship) are exported from the Island or supplied for use as aircraft's or ships' stores in accordance with section 157, and also the owner, or any person acting on his behalf, and any person who for customs purposes signs any document relating to goods exported or intended for exportation or supplied or intended for supply as aircraft's or ships' stores as aforesaid;

- [75] There is no reference to these provision in the Notice of Decision of the RAD and accordingly no findings on them. They were the subject of argument before me however, and the appeal to this court being by way of rehearing, I was permitted to entertain them.
- [76] In a "supplier regulated export", goods can be sold subject to a rate of zero percent on account that the registered taxpayer and supplier knows that they are being supplied for export, takes appropriate steps in that regard to ensure due exportation and the goods are in fact exported. Where the export of a supply is approached in this way, the registered taxpayer, cognizant of his obligations to collect GCT, is permitted to apply the zero rating at the time of supply of the goods.
- [77] Again, there is no dispute that the goods which were supplied by the Appellant were entered for export pursuant to the Customs Act; were in fact exported and that customs certificates of exportation have been issued in respect of them. That notwithstanding, it was submitted by Counsel for the Respondent that the provisions did not avail the Appellant. It was argued that it is the supplier of the goods who must have "entered them for export" and that Appellant was not designated "exporter" in the export entry forms which were put into evidence by the Appellant. I am unable to accept Counsel's limited construction of the word "exporter" when the **Customs Act** expressly provides that it includes any person who signs any document relating to the export or intended exportation of goods; and where the requirement is that the supplier "enters for export" as distinct from "exported", goods as appears elsewhere in the **GCTA** and its **Regulations**.

[78] In the process adopted by the Appellant, the purchaser is required to sign a declaration that the goods will be exported. A declaration appears on the "Duty Free Shop" sales invoices put into evidence by the Appellant. The Appellant's sales clerks are also signatories to those declarations, which demonstrates the Appellant's own intention to see to the exportation of the goods. The goods are packaged by the Appellant for export and kept at its duty free shops until the day of export when a customs-bonded warehouse agent at the port of exit can accept the goods. The purchaser makes arrangements for the transportation of the goods to the port of exit and attends the duty free shop with a copy of the customs export entry. The delivery slip is prepared by the Appellant who also completes the C33A form in its capacity as owner of the goods. The form is submitted to Customs for approval. Upon Customs' approval of the transfer and disposal of the Appellant's goods, the goods are loaded and escorted and produced to Customs at the Customs Bonded Warehouse at the port of exit who endorses the C33A form and delivery slip. The export entry is reviewed and the goods are tallied against the invoice issued by the Appellant. The Airline or Ship's agent generates an Airway Bill or Bill of Lading as appropriate; and when that has been approved by Customs, the goods are then accepted for export. The Appellant retains a copy of the export entry, C33A form, delivery slip and Airway Bill or Bill of Lading which is placed in the warehouse ledger to account for goods sold by it and exported.

[79] It is with the Appellant's assent and Customs' approval that the goods were allowed to leave the Appellant's private warehouses, proceed through Customs and admitted for export out of the island. When the Appellant's involvement in the export process it has adopted is examined, it appears to me that factually, it entered the goods for export within the meaning of the **Customs Act**. The Appellant was therefore permitted to make all ten (10) sales subject to GCT at a rate of zero per cent and not at the standard rate as contended by the Respondent. This is the result whether or not the persons to whom the supplies were made were registered or non-registered taxpayers. In these circumstances,

I find that there is merit in the Appellant's submission that if the Respondent was permitted to raise an assessment, it nevertheless erred in assessing the supplies to GCT at the standard rate and not at the rate of zero per cent; and that the RAD would have erred in confirming the assessment of **Sixty-Three Million, Nine Hundred and Thirty-Two Thousand, Six Hundred and Thirty-Eight Dollars (\$63,932,638.00)**.

Export of Taxable Supplies by Non-Registered Tax Payers

[80] In light of the difference in the treatment afforded to registered and non-registered taxpayers in respect of supplies and exports conducted in the same manner, the Appellant contends that the RAD erred in finding that the **GCTA** does not exempt from GCT goods sold to persons who are not registered taxpayers for the purpose of export; and that such a finding by the RAD is ultra vires Section 45 of the **GCTA**. I disagree with the Appellant in both respects.

[81] GCT does not attach to exempt supplies and where the **GCTA** intends to exempt goods and services from the tax, it does so pursuant to section 25 of the Act. It provides that “[t]he goods and services specified in the Third Schedule shall be exempt from the payment of tax under this Act.” The goods do not appear in the Third Schedule and are not GCT exempt pursuant to the **GCTA**.

[82] Section 45 of the **GCTA** provides that

Where a person who is not a registered taxpayer purchases a taxable supply from a registered taxpayer for the purpose of exporting such supply or shipping the supply as stores that person may, on the exportation or shipment thereof, make application in the prescribed form to the Commissioner General for a refund of the tax paid on that supply and the Commissioner may, on being satisfied that the supply was so purchased and exported or shipped as stores, as the case may be, refund the tax.

[83] The foregoing section neither exempts taxable supplies which have been exported by a non-registered taxpayer from GCT nor does it accord a zero rating

to those taxable supplies. The supplies to non-registered taxpayers would therefore be liable to tax at the standard rate, and would have been due and payable at the time of the making of the taxable supply to the non-registered taxpayer. There is no question of an adjustment being made as is the case where a registered taxpayer exports a taxable supply to which a zero rating attaches pursuant to paragraph 6 of Group 5 of Part II of the First Schedule to the **GCTA**. That notwithstanding, parity in tax outcome for the non-registered taxpayer is achieved by way of a tax refund for which he may make an application to the Respondent.

[84] Consequently, unless supplies to non-registered taxpayers are capable of being made subject to GCT at a rate of zero percent at the time of supply, a registered taxpayer would have had an obligation to collect GCT at the standard rate, report and remit the same to the Respondent. The non-registered tax-payer and not the registered taxpayer who made the taxable supply would then be entitled to apply to the Respondent for a refund. Prudence would therefore dictate that when a registered taxpayer is making a taxable supply, he ascertains the status of the purchaser who intends to export the supply, collects, records, and remits GCT at the appropriate rate so that he is not left to shoulder a tax burden he does not wish to assume because any shortfall in the revenue will have to be accounted for. It is the responsibility of the registered taxpayer to collect and remit GCT to the Respondent for taxable supplies made by it and it is he who will be called upon account for the tax.

[85] In the foregoing premises, the RAD was correct in finding that the **GCTA** does not exempt from GCT goods which were sold to the non-registered taxpayers for the purpose of export and which were in fact exported. Such a finding is not *ultra vires* section 45 of the **GCTA** which is concerned with achieving parity in tax outcomes between a registered and non-registered taxpayer who exports taxable supplies by allowing the latter to apply for and receive refunds of taxes paid for the supply.

Whether the Respondent is answerable or accountable for consequential loss, deterioration or injury allegedly suffered by the Appellant because it halted the processing of its application for refunds while the decision as to liability for GCT is on appeal.

[86] Among the reliefs sought by the Appellant are orders directing the Respondent to process refunds for which it has applied; release aged customs bonds; and remove any hold on its accounts with the Revenue. The Appellant also claims damages for loss of use of monies being held by the Respondent in respect of the challenged liability; damages for unlawful interference with commercial business operations and loss of means profits; general damages; and commercial interest on damages.

Claim for return of aged customs bonds

[87] The Respondent's evidence, which I accept, is that the aged customs bonds are in the possession of the Customs Department whose tax administration responsibilities differ from that of the Respondent. The Commissioner of Customs was not a party to the proceedings below and is not a party to this appeal. I accordingly decline to make any order for the release of aged customs bonds as prayed by the Appellant, without making any determination as to the correctness or otherwise of their custody.

Legality of refusal to process refund request

[88] It is Appellant's further submission that the Respondent, who has failed to process its request for refunds has acted unlawfully and in consequence thereof, has caused it to suffer loss and damage. There was no proof of the loss and damage alleged to have been suffered. In any event, I do not believe the claim is a competent claim or that the Respondent is answerable or accountable to the Appellant for any such alleged loss and damage.

[89] The provisions of the **Tax Collection Act** which concern the payment, collection, recovery and enforcement of payment applies to GCT as provided at section 48 **GCTA**. Pursuant to section 30 of the **Tax Collection Act**, a distress or levy for

tax may be made on any money bonds, bills, notes, or other securities for money which belong to the person against whom a levy is made. In that regard, in accordance with section 33 of the said Act,

“No action shall be brought, nor shall any Collector of Taxes, or other officer as aforesaid, be answerable or accountable for any loss, deterioration, or injury to any goods or chattels, or other property levied or distrained upon, except for wilful negligence, ill-usage, or injury.”

[90] Under the **GCTA**, while a registered taxpayer is entitled to a refund of any amount paid in excess during a taxable period, the Respondent is also permitted to set off against any unpaid GCT any amount refundable to the registered taxpayer. This is in accordance with section 46(2) of the Act.

[91] Additionally, section 41(7) of the **GCTA** provides that:

Tax shall be payable or refundable, as the case may be, in accordance with a determination of the Revenue Court unless, in the event of an appeal being made to the Court of Appeal, the Court of Appeal otherwise orders.

[92] The Respondent has the statutory responsibility for the administration of domestic tax laws. Having raised an assessment for GCT against the Appellant, and with a view to ensuring that any sums due to the Revenue can be collected, the Respondent is permitted to set off unpaid taxes against sums, which may be refundable to the registered taxpayer.

[93] Further, it is the evidence of the Respondent that as a matter of policy, where there is an appeal against liability for tax, GCT refunds are not made until a determination of the appeal in accordance with section 41(7) of the **GCTA**. It is the evidence of Mr Paul Kerr, who swears several affidavits on behalf of the Respondent, that this policy is in place to avoid the risk of sums being incorrectly paid out from the revenue. With a view to mitigating the risk to taxpayers, interest of 1.5% per month is applied to refunds held by Tax Administration Jamaica.

[94] The policy approach of the Respondent does not appear to be inconsistent with the legislative provisions concerning the collection of outstanding GCT and the

use of refunds in that regard. I therefore find that the concerns relating to due revenue administration and the approach taken by the Respondent to address those concerns are legitimate and lawful. Additionally, there cannot be said to be any wilful negligence, ill-usage, or injury to make the Respondent answerable or accountable to the Appellant for any alleged loss, deterioration, or injury to goods, chattel, or other property. The Appellant's claims for damages, general damages, commercial interest on damages, interest pursuant to the Law Reform (Miscellaneous Provisions) Act are not competent and must therefore fail.

ORDERS

1. The appeal against the decision of the RAD to confirm the Respondent's assessment against the Appellant for GCT which was reduced on objection to **Sixty-Three Million, Nine Hundred and Thirty-Two Thousand, Six Hundred and Thirty-Eight Dollars (\$63,932,638.00)** is allowed.
2. The claims for damages, general damages, commercial interest on damages, interest pursuant to the Law Reform (Miscellaneous Provisions) Act are refused.
3. An order directing the Respondent to release aged customs bonds is refused.
4. Costs of the Appeal to the Appellant to be taxed if not sooner agreed.