



[2015] JMCC COMM 19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2014CD00136

BETWEEN NIKA MANAGEMENT COMPANY LIMITED CLAIMANT
AND GLOBAL ACCOUNTANCY COLLEGE LIMITED DEFENDANT

IN CHAMBERS

Nigel Jones and Kashina Moore instructed by Nigel Jones and Company for the claimant

Althea McBean for the defendant

July 17 and October 1, 2015

GENERAL CONSUMPTION TAX – WHETHER UNREGISTERED PERSON CAN COLLECT GENERAL CONSUMPTION TAX

SYKES J

- [1]** Nika Management Company Ltd ('Nika') owns property that it leased to Global Accountancy College Ltd ('Gobal'). The term began on August 7, 2012. Rent was payable monthly on the first day of each month. Between August 2012 and October 2014, Global paid its monthly rental which included an amount for a general consumption tax know as GCT. This tax is based on the value of the rent.
- [2]** It has now turned out that Nika was not registered under the General Consumption Tax Act ('GCTA'). Upon being armed with this information, Global decided it would not pay any more rent and demanded a refund of all the sums it had paid over as taxes. Global went further to say the amount collected as GCT should be applied to rent and therefore, Global need not pay over any more actual cash until it had occupied the property for an period of time equivalent to amount collected as GCT.
- [3]** Nika responded by giving notice to Global and filed a fixed date claim form in which it sought (a) an order for recovery of possession; (b) outstanding rent of US\$16,070.01; (c) a declaration that Global is not entitled to set off rental payments against the GCT payments payable; (d) mesne profits at US\$5,356.67 per month and (e) interest on the amount owed at a commercial lending rate.
- [4]** At the time of the hearing, Global had already vacated the property so the first order sought is no longer before the court. There is no doubt that Global refused to pay the rent and to that extent the amount claimed is actually owed. There is no doubt that Global occupied the property after it received notice to quit and therefore mesne profit is due and payable to Nika in the amount claimed. It is also the case that since Global declined to pay the rent that what it did was force Nika to become an involuntary lender and so the rent owed attracts interest at a commercial rate. Nika submitted evidence of the interest during the relevant period and interest is therefore awarded on the outstanding rent at the rate claimed. This applies to the rent and the mesne profit.
- [5]** The court has decided that Global is entitled to set off rental payments against the GCT payments collected by Nika. This amounts collected by Nika attracts

interest but at the rate under the Law Reform (Miscellaneous Provisions) Act because interest at the commercial rate was not claimed by Global. The has decided that Nika was not entitled to collect GCT from Global because it was an unregistered taxpayer and on that basis the amount of money collected is refundable.

The submissions

[6] Nika contends that even though it was not registered it was liable to pay GCT from the time it started leasing the premises to Global because the relevant statute imposes the tax regardless of whether one is registered or not and the liability to pay arises not upon registration but on offering any goods or services that are taxable. The court has to decide who is correct.

[7] Global's response is a one liner: 'You are not registered under the GCTA and therefore you have no lawful authority to be collecting GCT.' The court agrees with Miss McBean, counsel for Global. These are the reasons.

GCT

[8] In 1991 the GCTA became law in Jamaica. GCT is imposed on the supply in Jamaica of goods and services by a registered taxpayer once that taxpayer is carrying on a taxable activity (section 3 (1)). The amount of the tax is based on the value of the goods and services. The tax is a percentage of the total value of the transaction. From time to time the percentage of the transaction that comprises the tax is varied. By taxable activity it is meant that the activity is being carried on in the form of a business, trade, profession, vocation, association or club and the activity is carried on habitually or continually (section 2 (1)). This definition was amended in 2014 but nothing turns on the amendment.

[9] In simple terms the tax worked like this: the supplier charges the purchaser the stated percentage of the value of the transaction. When that percentage is collected it is paid over to the government. In some circumstances, the consumer of the goods or services could claim a refund. In effect, the supplier is the tax collector for the government which explains why he needs to be registered.

The Statute

[10] The court will examine the statute in order to determine what was its object. The court bears in mind that a statute may have many purposes. In deciding what the objective of the statute is the starting point must be the actual words used by the legislature and not some extrinsic material such as Ministry papers, Ministerial statements and the like. The reason is that the legislative process does not necessarily go as smoothly as even the minister would like. It has been said that what emerges from Parliament is the state the statute should have been in when it went in and what goes in is the state in which it should have come out.

[11] The court is aware of Lord Nicholls' enthusiastic endorsement of the use of extrinsic material in **Regina v. Secretary of State for the Environment, Transport and the Regions, ex parte. Spath Holme Ltd** in [2001] 2 AC 349. This court's caution about the too ready use of these materials is that must not be forgotten that it is the legislature that makes laws and not the executive. The executive proposes law. The executive has the support the draftsman who crafts the laws to meet the policy enunciated by the executive and at that time the statute may well be a coherent whole with all pieces fitting together. It is well known that the Bill may be subject to special committees who hear submissions from interest groups and the committee may make recommendations for the Bill to be amended. If the Bill comes out of the committee, when it goes before the whole legislature it may be subject to even further changes and so what was a coherent document now becomes a document resembling a patchwork.

[12] If this patchwork is passed, that is what the law is and not what the executive had introduced. It is this court's view that this way of examining the matter is more democratic than giving effect to extrinsic material which may be helpful but are not the actual words used in the statute. It was Lord Reid who said **Black-Clawson International Ltd v Papierwerke Waldhor-Aschaffenburg AG** [1975] AC 591, 613:

We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used.

[13] This statement was endorsed by Lord Nicholls in **Spath Holme** (see page 398). Despite this court's reservations about Lord Nicholls' statement regarding extrinsic materials the court agrees with his Lordship when he said at page 397:

Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House. These individuals will often have widely varying intentions. Their understanding of the legislation and the words used may be impressively complete or woefully inadequate. Thus, when courts say that such-and-such a meaning "cannot be what Parliament intended", they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.

[14] It does not matter what subject matter the statute deals with the starting point is the words of the statute. A classic demonstration of this is found in the Privy

Council's decision in **Eaton Baker v R** [1975] AC 774 on appeal from Jamaica which was reaffirmed by the Board in **Jamaican Redevelopment Foundation Inc v The Real Estate Board** (2014) 85 WIR 429. In **Baker** Lord Diplock was seeking to determine the meaning of the relevant statutory provision. His Lordship began with the ordinary grammatical meaning of the words under consideration. Next his Lordship referred to other provisions in the statute. At the end of his review of the statute, his Lordship stated this general principle at page 782:

Where the meaning of the actual words used in a provision of a Jamaican statute is clear and free from ambiguity, the case for reading into it words which are not there and which, if there, would alter the effect of the words actually used can only be based on some assumption as to the policy of the Jamaican legislature to which the statute was intended to give effect. If without the added words, the provision would be clearly inconsistent with other provisions of the statute it falls within the ordinary function of a court of construction to resolve the inconsistency and, if this be necessary, to construe the provision as including by implication the added words. But in the absence of such inconsistency it is a strong thing for a court to hold that the legislature cannot have really intended what it clearly said but must have intended something different. In doing this a court is passing out of the strict field of construction altogether and giving effect to concepts of what is right and what is wrong which it believes to be so generally accepted that the legislature too may be presumed not to have intended to act contrary to them. That is what this Board has been invited to do by counsel for the appellants.

[15] This court will now embark on an examination of the statute to see whether unregistered taxpayers are permitted to collect GCT as contended by Miss Kashina Moore on behalf of Nika.

The provisions

[16] The court should indicate that there were amendments in 2014 to the GCTA but having examined them those amendments do not affect the conclusion of the court.

[17] From reading the entire statute the main objective was to impose a tax on the supply in Jamaica of goods and services. It sought to do this by employing various concepts such as taxable activity, recipient of goods and services, goods, services, input tax and the like. Central to all this is the concept of a registered taxpayer which is defined as 'a person who is registered pursuant to section 27 and is liable to pay tax under this Act' (section 2 (1)).

[18] Section 20 (1) states that every registered taxpayer shall calculate the amount of tax payable by him and pay over the amount due. Section 22 requires the registered taxpayer who supplies goods to another registered taxpayer to give the taxpayer supplied a tax invoice containing prescribed particulars.

[19] Under section 26 (1) every person who carries on a taxable activity after the statute came into force is liable to pay GCT must apply to be registered under the GCTA. Section 26 (3) states that an application for registration should be made within 30 days of the statute coming into force and within 21 days of the commencement of a taxable activity. The Commissioner of Tax Administration Services ('the Commissioner') has the discretion to extend time for compliance with section 26 (3).

[20] Section 27 states that Commissioner shall register the applicant once the statutory conditions are met.

[21] Before the 2014 amendment, by virtue of section 28 (1) if the Commissioner has reason to believe that someone ought to be registered and is not, the Commissioner shall inform that person that registration is required. If the person fails to register voluntarily then the Commissioner 'shall register the person'

(section 28 (2)). Under the amendment, the Commissioner is authorised to register the person without any prior notification. Once he is registered he receives a GCT certificate. There is explicit provision for challenging the decision to register him.

[22] Before the 2014 amendment, it was the case that where the Commissioner registers a person then the date of that person's registration is the date on which the taxable activity began or the date on which the gross value of the supplies made by that person reaches the values stated. Under the 2014 amendment the change effected is that the only relevant date now is the date on which the gross values of the supplies reach the new amounts specified and not when the taxable activity began.

[23] Section 33 specifies that the registered taxpayer whether or not he makes a taxable supply shall make returns to the Commissioner in the prescribed form.

[24] The purpose of the statute as gleaned from the provisions cited as well as others is that all persons eligible to pay GCT should do so and registration is a crucial element of the statute.

[25] When one looks at the entire statute there is nothing there that authorises an unregistered taxpayer to collect GCT. Indeed, not even the Commissioner has any jurisdiction over an unregistered taxpayer save to register him and then administer the statute to him after he is registered.

Application to case

[26] It is common ground that Nika would have met the registration requirements before 2014 amendments. Equally, no issue has been raised on whether Nika met the requirements for registration under the 2014 amendment.

[27] Mr Jones has advanced the submission that despite Nika being unregistered it was within its rights to collect GCT from Global on the ground that it would be liable to pay over the GCT once it became registered. In other words, since the purpose of the statute was to impose GCT on specified activities then the unregistered taxpayer can collect the tax and pay over at anytime registration takes effect.

[28] The difficulty with this submission is that the statute does not say any of this and neither is it necessary to read the statute in the way proposed in order to give effect to the words used.

[29] Regrettably for Nika, the statute does not allow an unregistered taxpayer to charge and collect GCT. Miss McBean's single sentence response has prevailed. The GCT collected by Nika was unlawful.

[30] In light of this conclusion it follows that Global is entitled to a refund of all sums collected purportedly as GCT and Global can indeed apply those funds to any sums owed to Nika. 80% of costs of hearing to Nika to be agreed or taxed. Counsel are to agree an order giving effect to these reasons.