

Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE FULL COURT
SUIT NO. 84/87

REGINA vs. COMMISSIONER OF INCOME TAX
EX PARTE DONALD PANTON
APPLICATION FOR ORDERS OF CERTIORARI
AND MANDAMUS.

Angela Hudson-Phillips instructed by Clough, Long and Company for the Applicant.

Ranse Langrin, Q.C., Senior Assistant Attorney General instructed by the Director of State Proceedings for the Respondent.

Heard: January 18 and 19, ¹⁹and November 1988

CORAM: Zacca C.J., Bingham and Ellis J.J.

JUDGMENT

BINGHAM J.

On 18th and 19th January, 1988, we heard arguments by Learned Counsel for the Applicant and the respondent in this matter and at the conclusion of that hearing we came to the unanimous decision that the Orders of Certiorari and Mandamus ought to be granted in respect of the reliefs sought in the application. We promised then to put our reasons into writing at a later date. The fact these reasons are now just forthcoming has been due in the main to a very heavy workload on my part coupled with certain recent events which has for the present shortened considerably the time available for preparing judgments.

These, however, are the reasons for our decision.

The facts and the arguments will be set out in some detail although the issues upon which the matter turned fell within a very narrow compass.

The main question to be examined is to what extent, if any, are the powers of the Commissioner of Income Tax under Section 75 of the said Act subject to review in determining whether there exists a basis for her exercise of those powers

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under Section 75 (5) (c) of the Act?

The facts as outlined in the Affidavits of the Applicant and the respondents are not in dispute.

The Applicant is a businessman and the Managing Director of several companies. On 2nd June, 1987, he was served with six notices of assessment in respect of income for the Years of Assessment 1981 - 1986. The notices which were all dated 18th May, 1987 were in respect of chargeable incomes and penalties for the respective years and were computed as follows:-

1. 1981 - \$ 650,000
2. 1982 - \$ 800,000
3. 1983 - \$1,000,000
4. 1984 - \$1,200,000
5. 1985 - \$1,500,000
6. 1986 - \$2,400,000

These sums when quantified amounted to a total income tax liability of \$5,616,000.

The notices of assessment purported to have been sent to Applicant by the Commissioner of Income Tax acting pursuant to her powers under Section 72 (4) of the Income Tax Act when read together with Section 75 of the said Act.

The proviso to Section 75 (3) of the Act states:-

"provided that in case of assessment the notice thereof shall be duly served on the person intended to be charged and such notice shall contain in substance and effect the particulars upon which the assessment is made."

(Emphasis is mine).

It is of interest to note that although the requirement for the particulars to be supplied by the Commissioner is mandatory and the very basis for a valid assessment, it is common ground that none was supplied to the Applicant.

Despite this, the Applicant was nevertheless served with a notice restricting him from leaving the island conditional on

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on his making satisfactory arrangements for the payment of the said tax liability.

The next stage was the filing by the Applicant of a Notice of Objection to all the assessments.

Following this, there was a request made to the Applicant by the Commissioner on 1st July, 1987 for the following documents to be furnished within certain stated periods. These were:-

- "1. Returns of Income within thirty (30) days.
- 2a. Capital Statements showing all assets owned or controlled by the Applicant whether or not through his wife or children local or foreign.
- b. Capital Statements should show all relevant liabilities in connection with 2(a).
- c. The pertinent capital rests for each year should also be clearly shown per the capital statement.
3. All records, in connection with these assets and liabilities including but not limited to the following:-
 - (a) Copies of all bank statements and bank passbooks, local or foreign.
 - (b) Copies of all pertinent contracts and Loan Agreements.
 - (c) Copies of all lodgement books and lodgement slips.
4. A full and complete Disclosure Document duly executed."

The ~~statutory~~ period for submitting all these documents except the Returns of Income was sixty days from the date of the letter of request.

A successful request was made by the Attorneys-At-Law acting on behalf of the Applicant for an extension of fourteen days within which to furnish the Returns of Income. These were supplied on 24th August and included a Capital Statement.

These documents were prepared by the Applicant's Accountant. This was followed by a memorandum from the Commissioner

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dated 27th August, 1987 which stated inter alia that the Capital Statements were unacceptable. There was a further request made for proper and complete Capital Statements.

By letter dated 28th August, the Applicant's Attorneys-At-Law sought to enquire from the Commissioner:-

1. The basis for the statement that the Capital Statements furnished were not complete.
2. The statutory authority for requesting a sworn disclosure statement.

Thereafter, followed a series of correspondence between the Commissioner and the Attorneys-At-Law on behalf of the Applicant in which it appears that all the documents which were requested and were in the Applicant's possession or under his control were supplied.

No sworn disclosure statement was, however, furnished and the Commissioner has not up to date stated what authority, if any, she had for making such a request.

On 14th October, 1987, the Commissioner apparently not being satisfied with the attempts made by the Applicant at complying with the requests of 1st July, 1987 invoked her powers under Section 75 (5) (c) of the Income Tax Act treating the assessments made on the Applicant as final and conclusive and therefore due and payable as a tax debt.

Although in the interim, the Applicant had by furnishing a guarantee from a financial institution in excess of the alleged tax liability and which guarantee still remained in force into 1988, the permission given to the Applicant to travel abroad on business in the interim was cancelled and the restriction on travel was imposed until the tax liability was fully satisfied.

The Arguments:

Learned Counsel for the Applicant submitted that:-

1. The letter of 1st July, 1987 requesting certain

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particulars to be supplied by him was a standard form letter sent to the Applicant whether it applied to him or not.

2. If the Applicant did not possess the information requested, or supplied what was in his possession or under his control then the respondent could not without more resort to invoking Section 75 (5) (c) on the basis that the taxpayer has not complied with the Law.
3. Whereas under the Law the onus of proof is always on the taxpayer to prove that the assessment is excessive, where the taxpayer has set up a prima facie case the burden shifts to the tax gatherer (respondent) to disprove that case.
4. It is not sufficient for the Commissioner merely to say as she has in paragraph 11 of the Affidavit of Woodrow Moore that the requirements requested have not been met and to invoke Section 75 (5) (c). Before so acting, what the Commissioner must state is that, the information supplied is deficient and, if so, in what manner it is.
5. Section 75 was never designed for the purpose for which the Commissioner has now sought to have resort to it, especially when as in this particular case the figures forming the basis of the assessments have been in the absence of any evidence to the contrary the result of guess work.*
6. Given the facts in this case, the Commissioner has not disproven the particulars supplied by the Applicant and accordingly the Court ought to find that there has been compliance on his part.
7. Section 75 (3) in-so-far as the proviso is concerned

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when examined is in terms mandatory. No particulars were supplied to the taxpayer. Moreover, in-so-far as Section 75 (3) which deals with Return of Income, the Commissioner must relate to the income of the person being assessed. There is also a further requirement that the returns are limited to income of the taxpayer and to such matters that are in his custody or under his control and must relate to the years in respect of which the taxpayer has been assessed.

8. The request for the taxpayer to swear to a declaration of full disclosure was ultra vires the Commissioner's powers under Section 75(5) (a) (iii) of the Act.
9. In-so-far as the Commissioner has sought to reject the Returns of Income and other information by the taxpayer for the years of assessment 1981 - 1986 in its entirety and to invoke Section 75 (5) (c), her powers were not at large. The words "any income" could only relate to the particular year of assessment in respect of which the matter is in dispute. The word "any" in the Section does not have a particular meaning. It can mean one or all.
10. Section 75 when examined as to its legislative intent shows that it was designed to deal with taxpayers who have either failed to provide a return or have supplied very little documentary proof of or very little information as to their actual income.
Substantial compliance is not intended to come within the section.

This must be the case even moreso where the contents of the letter from the taxpayer (respondents) is a standard form letter which may or may not apply to the taxpayer.

Learned Counsel relied upon Argosy Limited in Voluntary Liquidation (1970) 15 WIR 502 in support of her submissions.

In that case where the Commissioner of Income Tax in Guyana had assessed a company then in voluntary liquidation in respect of the year of assessment prior to its ceasing to operate, it was held by the Privy Council (per Lord Donovan), that "even though the onus was on the company to show that the assessment was excessive, the Commissioner must show the grounds on which he formed the opinion that the Company was liable to pay tax before he could make an assessment based upon the best of his judgment, and as there had been no evidence before him on which he could have formed such an opinion and as he had formed an opinion on liability which no reasonable person could hold the assessment as bad."

On the basis of the above, it was contended by Learned Counsel for the Applicant that he had complied with the requirements of the Act and that the Commissioner had not shown the grounds upon which she had invoked Section 75 (5) (c), as what was being asked for by her under the subsection was oppressive and unjust.

Learned Counsel for the respondent submitted that:-

1. The discretionary power entrusted to the Commissioner under Section 75(5) (a) (ii) is to enable her to make the assessment that was made.
2. Parliament intended by use of the words "such particulars as the Commissioner may deem necessary" that the person who is to exercise those powers is to be the judge of the kind of particulars to be requested.
3. The Court should be careful not to encroach upon the Commissioner's task unless the exercise of the power is so unreasonable that no reasonable authority could have come to make such a request.
4. The fact that the Court may have different views as to how the powers is to be exercised is irrelevant

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to the consideration as to whether the power is exercised reasonably.

5. The Court should also bear in mind that the act of requesting particulars is an executive act and Parliament has entrusted the Commissioner with such a decision on a matter which the knowledge and experience of the Commissioner can best be entrusted to deal with it.
6. The facts before the Court indicated clearly that the taxpayer had refused to supply some of the particulars requested by the Commissioner in that the disclosure document was not supplied. The request for such a document to be furnished by the Applicant was a lawful one.

In the light of the above arguments it was submitted that by a refusal to comply with the Commissioner's request in respect of all the particulars sought by her, the taxpayer acted in contravention of the right of the Commissioner to make such a request for particulars.

Learned Counsel for the respondent cited no authorities in support of his submissions.

It may be convenient to dispose of this last contention before proceeding to deal with the substantive issues raised in this matter. For the taxpayer to be in contravention of a request by the Commissioner for particulars it follows as a precondition that such a request be a lawful one and which she could properly make.

While one appreciates and is fully aware of the legislative intent to be gathered from a careful examination of the Act under review and the fact that it clearly entrusts to the Commissioner as the executive authority and the tax gatherer under the Act and has clothed this authority with wide inquisitorial powers in order for ferreting out and making the defaulters liable to the payment

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of taxes, there, is nevertheless the equal necessity for the Courts to ensure that these powers are not exercised in such a manner as to encroach on the rights of the subject. The Courts need to keep a conscious watch on the actions of statutory bodies including the Commissioner to ensure that these powers entrusted to them are exercised in a manner which are kept within the limits that Parliament intended. Where those powers are exercised unreasonably or there is a failure to comply with the procedural requirements of the Act then such actions are open to review and the appropriate relief by way of prerogative orders is then brought into operation to keep such actions within the proper bounds.

It is against that background that the decision of the Commissioner in invoking Section 75 (5) (c) has to be examined in order to determine whether the Commissioner acted fairly.

It is common ground that in making the assessments for the years 1981 - 1986 the Commissioner failed to furnish the Applicant with the particulars upon which these assessments were based.

Section 75 (5) states:-

- "(a) On the receipt of the notice of objection referred to in subsection (4), the Commissioner may require the person giving the notice of objection -
- (i) to deliver (if he has not already done so) within thirty days or such longer period as the Commissioner may permit, a return of income for the years of assessment which in the opinion of the Commissioner are affected by the notice of objection;
 - (ii) to furnish within such period as the Commissioner may specify, such particulars as the Commissioner may deem necessary with respect to the income of the person assessed and to produce all books and other documents in his custody or under his control relating to such income.
- and may by notice summon any person who he thinks is able to give evidence respecting the assessment to attend before him and may examine such person on oath or otherwise.
- (b) Any person who without lawful excuse refuses or neglects to attend or to give evidence in pursuance of a notice served on him under paragraph (a), or to produce any books or document which he is

required to produce under the said paragraph, or who refused to answer any lawful question touching the matters under consideration, or who knowingly or wilfully gives any false evidence before the Commissioner, shall be guilty of an offence against this Act.

(44) Where the person giving the notice of objection refuses or neglects to deliver any return or furnish any particulars or to produce any books or documents, as the case may be, required by the Commissioner under paragraph (a), within the period prescribed by or pursuant to that paragraph, the notice of objection served by such a person shall cease to have effect and the assessment as made shall, subject to Section 81, be final and conclusive for all purposes of this Act as regards such person."

When the facts relating to the exercise by the Commissioner of her powers under Section 75 (5) (c) are examined it appears that the Commissioner fell into error in that:-

The Assessments

Section 75 (3) when read makes it abundantly clear that a precondition for a valid assessment is that the notice shall contain in substance and effect the particulars upon which the assessment is based.

As it is not being disputed that the six notices of assessment contain "in substance and effect" no particulars this in effect rendered the assessments bad as this being a tax provision it called for a strict construction and the Commissioner was therefore obliged to act within the four corners of the Act.

It also follows from this, therefore, that any subsequent act of the Commissioner, which in this case would have included the subsequent letter written by Woodrow Moore requesting the Applicant to furnish certain documents and the notice by the same writer invoking Section 75 (5) (c), would equally ineffective as the basis for these acts would have been the original notices of assessment which were in my opinion invalid for the reasons previously stated.

Support for this view can be gained not merely from applying the cardinal principle of construction which applies to construing tax measures which are in pari materia with the

with the general principles applied to penal clauses in statutes and here it is common ground that the facts fall squarely within this area.

In Collector of Taxes and Winston Lincoln R.M. Miscellaneous Appeal 2/86 delivered on 5th February, 1986 where it was held by the Court of Appeal (Honourable President, Wright and Downer J.J.A.) citing with approval Ola vs. Federal Board of Inland Revenue (1976) 1 A.C.R. Comm. 85 (Nigeria) and Mandivia vs. Commissioner of Income Tax (1958) East African Reports 696. It was held that the proviso to Section 75 (3) of the Act requiring the Commissioner of Income Tax to furnish the taxpayer in substance and effect in the notice of assessment with the particulars upon which the assessment is based is a mandatory provision and a failure to provide such particulars renders the assessment null and void.

Even if I am wrong in relation to the conclusion reached as how the proviso ought to be construed, there now remains the question, given the facts of this case, whether the Commissioner acted reasonably in invoking Section 75 (5) (c).

On the facts of this case it can be seen that the Commissioner sought to invoke the particular provision of the Act because:-

1. The Applicant refused to submit a sworn disclosure statement, or
2. Failed to furnish all the proper documents which he was requested to submit to the Commissioner within a specified time.

In this regard, as the Commissioner in the notice invoking Section 75 (5) (c) has not clearly stated the grounds upon which this decision was based this Court is entitled to examine the question as to whether there existed any reasonable basis for this course of action.

Moreover, as the entire procedural basis for this action has to be examined as a whole it follows that if there was no

valid basis for any of the particulars requested from the Applicant by the Commissioner this would render the entire exercise as invalid and in my opinion the Applicant was not obliged to furnish any of the documents requested.

In this regard the views as canvassed by the Court of Appeal in the case of Collector of Taxes, (Montego Bay) vs. Winston Lincoln (supra) apply with equal force to this contention.

Again, however, if I am wrong in so contending, in seeking to discover whether the actions of the Commissioner in requesting a sworn disclosure statement from the Applicant was lawful or not, an examination of the Act and in particular Section 75 discloses that the Commissioner although clothed with certain inquisitorial powers had no such authority. Section 75 (5) merely empowers the Commissioner in her sole discretion to summon any person (which may include the Applicant) and to examine him on oath in respect to any assessment. This power does not extend to the request made of the Applicant in this case.

It suffices to state that in this regard the Commissioner sought to arrogate unto herself powers which the Legislature had not given to her. In-so-far as her actions sought to make such a request of the Applicant, it was ultra vires and void he was quite within his rights in refusing to comply with this request.

There now remains the question of how Section 75 (5) (c) ought to be construed.

In short, what do the words, "refused or neglects to deliver any return or furnish any particulars or to produce any books or documents." Are these words when read together as a whole taken to mean that a taxpayer who has sought to furnish all that is requested of him, but that such an attempt is not done to the satisfaction of the Commissioner that the provisions of this Section maybe invoked in order to deprive the taxpayer of a right of appeal to the Revenue Court?

On a common-sense view it would seem ludicrous that the section could be construed in such a manner.

It is a cardinal rule of construction that penal provisions ought not to be construed in such a manner as to deprive the subject of rights which would ordinarily be opened to him under the general law. A right of Appeal would fall into such a category. It is of some importance, in this regard, that where the Commissioner acts under Section 75 (6) of the Act to review an assessment the decision arrived at does not deprive the subject of redress by way of Appeal under the provisions of Section 76. An aggrieved taxpayer may appeal from such a decision within thirty (30) days to the Revenue Court.

On the facts in this case based upon the submissions there is no dispute that apart from the Applicant's refusal to furnish the sworn disclosure statement there has been a substantial compliance by him in furnishing the documents requested by the Commissioner, albeit that this has not been done to the satisfaction of the Commissioner.

Moreover, an examination of the correspondence passing between the Commissioner and the Applicant disclose an almost total lack of an attempt at a full and frank disclosure on the Commissioner's part to certain enquiries made by the Applicant's Attorneys which would possibly have gone a far way towards indicating to the Applicant in what areas he was lacking in meeting the Commissioner's requirements.

As Learned Counsel for the Applicant so aptly put it, the Commissioner for reasons best known to herself, sought to engage in a game of "hide and seek".

In my opinion Section 75 (5) (c) was not intended to be invoked in a situation based on these facts, where there has been substantial compliance. It seems to me that such a course as that resorted to by the Commissioner is properly exercised where a person who has been validly assessed files a notice of objection in order to stay the Commissioner's hand in seeking immediate

recovery of the sum(s) assessed but to borrow the words of Section 75 (5) (c), "refuses or neglects to do any act in order to place the Commissioner in a position to review the assessment and to arrive at a decision as to what is the proper sum due and payable for the year(s) under review."

In the light of the above reasons it would also follow indubitably that the reimposition by the Commissioner of Income Tax of the restriction order which followed as a consequence of the assessment being determined by that authority to be final and conclusive would equally be unjustifiable and unlawful as:-

1. This act was based upon an invalid assessment.
2. Even if the action of the Commissioner in invoking Section 75 (5) (c) was lawful, as the Applicant had before the Commissioner's act already satisfied the Commissioner by providing a guarantee from a reputable financial institution, the life of which still remained in force well beyond the date of the Commissioner's Act reimposing the restriction order, this conduct on her part was unjustifiable and one which no reasonable authority clothed with such statutory powers properly applying its mind to the matter would have come to such a decision.

When one examines the manner in which the Commissioner acted in this case, therefore, it is difficult to determine whether by her course of conduct she was rejecting all the particulars and the documents furnished by the Applicant in respect of the entire period 1981 - 1986 as the notice invoking Section 75 (5) (c) was devoid of any particulars in this area. In the absence of any such particulars this leads me to conclude that the manner in which the Commissioner sought to invoke Section 75 (5) (c) was prompted by the Applicant's refusal to furnish the sworn disclosure statement, and in this regard her conduct amounted to an unreasonable exercise

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of her powers under the Act.

In my opinion the Section clearly was not intended to cover cases in which there was a serious attempt for certain particulars.

In conclusion, I would therefore, hold that for the reasons which I have stated that the reliefs sought by the Applicant ought to be granted with such order for costs as previously made by the Honourable Chief Justice.

ZACCA C.J.:

I agree.

ELLIS J.:

I agree.