[2022] JMRC 02

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

REVENUE COURT

APPEAL NO. 2021 RV 0005

BETWEEN	**SATURN SALES LIMITED**	**APPELLANT**
AND	**COMMISSIONER GENERAL TAX ADMINISTRATION JAMAICA**	**RESPONDENT**

Tana'ania Small Davis and Kerri-Ann Allen Morgan instructed by Livingston Alexander and Levy for the Appellant

Cecilia Chapman-Daley and Noelle Gaye Miller, Attorneys-at-law for the Respondent

Heard: July 18, 19 and October 13, 2022

General Consumption Tax - Section 38 General Consumption Tax Act - Section 17(l) Revenue Administration Act - Whether there was a basis for an audit of taxpayer's returns and in raising GCT assessment - Whether assessment to additional GCT was a best judgment assessment - Whether assessment was wholly unreasonable and should be set aside.

IN OPEN COURT

C. BARNABY J

BACKGROUND

[1] The Appellant, Saturn Sales Limited is a registered taxpayer under the **General Consumption Tax Act** and was engaged in the domestic purchase and resale of telephone cards. On conclusion of an audit process by the Respondent of the Income Tax, GCT (General Consumption Tax) and P.A.Y.E returns made by the self-assessed Appellant for the period January 2011 to December 2013 (the relevant period), the

Respondent assessed the Appellant to GCT in the amount of **Five Hundred and Sixty-Eight Million One Hundred and Thirty-One Thousand Eight Hundred and Ninety-Seven Dollars** ($568,131,897.00) which was increased on objection to **Five Hundred and Sixty-Eight Million Two Hundred and Twenty-Two Thousand Eight Hundred and Ninety-Seven Dollars** ($568,222,897.00). The Respondent Commissioner is responsible for the administration of GCT under the **GCT Act.**

[2] On appeal to the Revenue Appeals Division (RAD) on the grounds of *"[f]lawed assumptions on the part of TAJ; [l]ack of knowledge or ignorance of the sector laws; [and] [n]on-correlation with the Company (sic) financial records"*, the assessment was reduced to **Ten Million Five Hundred and Ninety-Four Thousand Two Hundred and Ninety-Three Dollars and Ninety-Three Cents** ($10,594,293.93).

[3] The results of that hearing were communicated by decision of the RAD dated 31st March 2021 from which Appellant now appeals to this court. The appeal was heard on the 18th and 19th July 2022 and judgment reserved to 13th October 2022. The decision of the court and reasons therefore are set out below.

ISSUES AND SUMMARY CONCLUSIONS

[4] Having regard to the parties' cases, which are set out later, I regard the following three issues as dispositive of the appeal.

(i) Did the Respondent have a basis for making an assessment against the Appellant in respect of returns furnished for the years 2011, 2012 and 2013?

(ii) Was the assessment raised against the Appellant by the Respondent a best judgment assessment?

(iii) Was the assessment by the Respondent wholly unreasonable and to be set aside?

[5] I find that the Respondent did have a basis for making an assessment against the Appellant for the relevant period but that the assessment raised was not a best judgment

assessment, was wholly unreasonable in the Wednesbury sense in failing to give effect to a relevant revenue measure contained in Ministry Paper for the Fiscal Year 2013/2014 which addressed accounting for GCT on phone cards with effect from March 2013, and in incorrectly using GCT inclusive figures produced by the Appellant's suppliers instead of net GCT figures which were also available in estimating the Appellant's purchases for the accounting periods in each relevant year, upon which the additional assessments were premised. The assessments being wholly unreasonable, it is unfair that the Appellant should be made to answer a case in respect of them. Accordingly, the appeal is allowed and the assessments set aside.

THE APPELLANT'S CASE

[6] The Appellant asks that its appeal be allowed; the decision of the RAD be set aside; and that the assessments to additional GCT made against it for the period 2011 to 2013 be discharged. It also seeks costs in the appeal and such further or other relief as the court deems just. These reliefs are sought on the

> *(a)… grounds of Appeal stated in the Notice of Appeal to the Revenue Appeals Division dated 21 November 2016 … namely [that]:*
>
> *(i) Assumptions made by Tax Administration of Jamaica are flawed;*
>
> *(ii) The decision reveals a lack of knowledge or ignorance of the sector laws; and*
>
> *(iii) The decision displays a non-correlation with the Company's financial records…*
>
> *(b) The Respondent's assessment of additional tax was disallowed to the extent of 98.15% from $568,222,897 down to $10,594,293.93 for the three years. This fact is sufficient to demonstrate the gross, careless and inexcusable errors that were made in the initial assessment. In their decision, the Revenue Appeals Division described the Respondent's work as "fraught with errors" many of which were evidenced a fundamental misunderstanding of principles. The revision by which the initial*

assessment has been significantly reduced on appeal took a period of five years. It is therefore unconscionable and an abuse of process to subject the Appellant taxpayer to further review process.

(c) *The magnitude of the downward adjustment reflects the degree to which the initial assessment was seriously flawed and therefore calls into question the reliability of the revised assessment which was conducted by the same personnel. It is therefore in and of itself a sufficient basis for rejection of the estimations adopted by the Respondent.*

(d) *The assessment is entirely based on estimation. By definition any estimation technique is imprecise. The adjustment assessment arrived at by the Respondent represents less than 1% of the total sales. Given the statistical margin of error of 1-2% the additional assessment is wholly inappropriate, inequitable and unreasonable in the circumstances.*

(e) *In accepting the Respondent's estimation, where the records are voluminous, the Revenue Appeals Division ought to have given greater weight to its finding that the variance in reported mark-up and margins 'are very minuscule". The Revenue Appeals Division erred and misdirected herself in fact and in law by:*

i. *failing to properly compute and apply the weighted average mark-up percentages and this led to the erroneous and unfounded finding that the veracity of the information stated in the Appellant's financial statements was called into question.*

ii. *Finding that the Respondent's mark-up of 0.0163044348 for Lime purchases are upheld without any proper basis and not having proper regard to the information from the records presented by the Appellant which finding was against the weight of the evidence presented to the Respondent.*

(f) *Further and in the alternative, the assessment of additional tax is excessive.*

(sic)

THE RESPONDENT'S CASE

[7] The Respondent prays for the dismissal of the appeal; confirmation of the decision of the RAD; costs of and incidental to the appeal; and such further or other relief as

deemed just. In the Statement of Case filed in response to the appeal, the Respondent denies the allegations contained in the pleaded grounds of appeal and contends that the decision of the RAD was validly made on the bases:

> *(a) [of] the Commissioner's power to make an assessment [under] s. 38 of the GCT Act…;*
>
> *(b) The mark-ups determined and used by TAJ in the assessment were not overstated.*
>
> *(c) The RAD correctly applied the First Schedule of the GCT Act, Part IV Items 2 and 3 in determining whether the additional sum of $96,450,249.05 was correctly assessed.*
>
> *(d) TAJ correctly treated the amounts which were stated to be the total local purchases and expenses in Saturn Sales Limited's returns as being purchases.*
>
> *(e) TAJ was correct in its computation of net stock adjustment - by verifying opening and closing stock from the taxpayer's books and records, making adjustments to value the verified amounts at cost based on the discount rates that were stated by the taxpayer as being "within a range of 0.3% to 1%".*
>
> *(f) Based on the records supplied by the Appellant, the RAD acted correctly in adjusting the assessment made by the Respondent on objection for the period January 2011 - December 2013.*
>
> *(sic)*

BURDEN AND STANDARD OF PROOF

[8] As observed in **Llandovery Investments Ltd v The Commissioner of Taxpayer Appeals (Income Tax)** [2012] JMCA Civ 19 at paragraph 15, *"...proceeding[s] before the Revenue Court, although stated to be an appeal, is in the nature of…fresh proceeding[s], the parameters of which are set by the by the information contained in the documents which have been filed in that court."*

[9] In these proceedings the burden of proof lies on the Appellant who must satisfy the court, pursuant to section 41(4) of the **GCT Act**, that the assessment by the

Respondent is *"erroneous"* which Morrison JA (as he then was) stated was *"… wide enough to embrace both a complaint that the assessment is wrong in principle and that it is excessive in amount."*[1]

[10] On my assessment of the grounds of appeal, the Appellant challenges the assessment on the basis that it is wrong in principle in that it was not made to the best of the Respondent's judgment and that it is excessive in amount. In both instances the Appellant bears the legal burden of showing that the assessment is erroneous.

[11] As stated by Dr. Claude Denbow at page 172 of *Income Tax Law in the Commonwealth Caribbean* which was quoted with approval by Morrison JA (as he then was) in **D.R. Holdings Ltd.** and which I concluded is applicable to an appeal against the Revenue's assessment of GCT notwithstanding that the learned author was referencing income tax,[2]

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

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[1] **D.R. Holdings Ltd. v the Commissioner of Taxpayer Appeals** (JMCA, 31 October 2008), [25]
[2] **Digital Auto Imports Ltd. v the Commissioner General of Tax Administration** [2020] JMRC 1, [17]

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

[12] In contrasting the burden imposed on the taxpayer with that on the Revenue, Morrison JA (as he then was)[3] referred to the dictum of Carey JA in **Karl Evans Brown v Commissioner of Income Tax** (1987) 24 JLR 227, 281 who put it this way.

> *"In my judgment the matter stands thus: there are two distinct burdens of proof in an appeal to the Revenue Court. There is first, the burden on the appellant to show that the assessment is excessive. This onus is a heavy one because of his duty to make a full disclosure of all his income from whatever source. The burden on the Commissioner is the lighter one because in the vast majority of cases, the objector is not claiming that he is not liable to tax; he is challenging quantum: the burden on the Commissioner is evidential. It only arises or shifts to him when the taxpayer on whom the initial burden rests leads evidence that he is not liable for any tax whatever."*

[13] Where an appellant alleges that the assessment is excessive, as expressed in the quotation from *N Ltd v Taxes Commissioner* (1962) 24 SATC 655, 658 which was cited by Warner J[4] of the Trinidadian Court of Appeal,

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

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[3] Supra n 1, [29]
[4] **Bi-Flex (Caribbean) Ltd v Inland Revenue Board** (1986) 38 WIR 344, 361 [c] - [g]

DISCUSSION

[14] Ahead of discussing the issues, it is convenient to reproduce provisions at section 38 of the **GCT Act** from which the Respondent derives the power to make an assessment. So far as is relevant to the instant appeal, it provides thus.

> *38 (1) The Commissioner General **shall make an assessment in writing** of the tax payable by a registered taxpayer where the registered taxpayer –*
>
> *(a) fails to furnish a return as required by this Act; or*
>
> ***(b) furnishes a return which appears to the Commissioner General to be incomplete or incorrect.***
>
> *(2) **Where the Commissioner General is not satisfied with the calculations on any return furnished by a registered taxpayer or the basis on which the return is prepared, the Commissioner General –***
>
> ***(a) may make an assessment of the amount that he thinks the registered taxpayer ought to have stated on the return; and***
>
> ***(b) shall in any assessment, state the general basis on which the assessment is made.***
>
> *…*
>
> *(4) **The Commissioner General may, to the best of his judgment, make an assessment of the tax chargeable on any goods which no longer form part of the taxable supply of a registered taxpayer and for which no satisfactory account can be given by that taxpayer.***
>
> *…*
>
> *(5) **Where an amount which is payable by a registered taxpayer has been assessed and notified to that taxpayer, the amount shall, subject to section 40, be deemed to be the amount of tax due from that taxpayer and may be recovered accordingly unless the assessment has been withdrawn or reduced.***
>
> *(6) It shall not be lawful for the Commissioner General after the expiration of six years from the end of any taxable period, to make an assessment or alter an assessment so as to increase the amount payable thereunder.*
>
> *(7) Notwithstanding subsection (6), where a registered taxpayer with intent to defraud fails to make full disclosure of all the material facts*

necessary to determine the amount of tax payable for any taxable period it shall be lawful for the Commissioner General at any time to make or alter an assessment.

(8) Notice of any assessment made or altered pursuant to this section shall be served on the taxpayer concerned.

(9) ***An assessment shall, subject to any amendment on objection or any determination on appeal, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any a proceeding under this Part in relation thereto****.*

[Emphasis added]

[15] Section 40 empowers a taxpayer to dispute an assessment or decision of the Commissioner General by making a written application to him by way of written notice of objection, setting out precisely the grounds of his objection.

(i)

Did the Respondent have a basis for making an assessment against the Appellant in respect of returns furnished for the years 2011, 2012 and 2013?

[16] There is no dispute that the Appellant filed GCT returns for the relevant period so that the raising of an assessment would only have been authorised pursuant to section 38(1)(b) of the GCT Act, where the furnished returns appeared to the Respondent to be incomplete or incorrect. For the overarching submission that there could be no basis for such a conclusion, with which I am unable to agree, the Appellant contends that:

(1) the Respondent has not stated the basis on which it embarked upon:

(a) an audit of its GCT liability; and

(b) an assessment of the said liability; and

(2) that its records were properly kept and available.

[17] The second limb of the complaint appears to be more appropriately directed at the method adopted by the Respondent in raising the assessment against the Appellant and will be addressed separately.

[18] In addressing the first limb of the complaint however, I find assistance from **Indian Ocean Restaurant v Commissioner of Customs and Excise** [1977] Lexis Citation 1006 upon which the Appellant relies. It suffices to say here that the case concerned assessments raised pursuant to section 73 (1) of the *UK Value Added Tax Act* 1994 which provided as follows.

> *Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him…*

[19] The Tribunal said this of section 73 (1).

> *14. This provision implies a two stage process: it must first be apparent to the Commissioners that the returns are incomplete or incorrect and only if that test is satisfied may they proceed to assess the amount of tax. In practice, the two stages may well be intermingled, for example where an officer checks a trader's calculations by preparing a calculation of his own, he may simultaneously make the calculation which forms the basis of a subsequent assessment, and form the view that the trader's returns, because they reach a different answer from his own conclusion, mis-state the amount of tax due. Nevertheless, the wording of the section does underline the generally accepted view that the Commissioners must have good reason to suspect that a trader's returns are inaccurate or incomplete before proceeding to assess, and that they may not assess capriciously…*

[20] Although differently worded, I find that the approach is capable of being applied to section 38(1) of the **GCT Act** so that where returns have been filed, it must first be

apparent to the Commissioner that the assessment is incomplete or incorrect in order to ground an assessment under section 38(1)(b).

[21] The assessment by the Respondent follows an audit of the Appellant who contends that the Respondent has not stated the basis upon which it embarked on the said audit of the Appellant's GCT liability. That contention is inconsistent with the evidence.

[22] By letter dated 15th June 2015 the Appellant was advised of the Respondent's intention to visit its offices on the 22nd June 2015 for the purpose of conducting an audit of its Income Tax, GCT and P.A.Y.E returns for the relevant period. The Appellant was advised to make financial documents available for inspection including financial statements, sales invoices, worksheets for the relevant years and all other records used to prepare its returns for the period, pursuant to section 17(l) of the **Revenue Administration Act (RAA).** The purpose of the audit was expressly stated in the letter thus.

> *In keeping with the system of self-assessment the Tax Administration Jamaica has instituted a programme to verify returns filed for all tax purposes.*

[23] The stated purpose is consistent with the exercise of the statutory powers reserved to the Respondent for domestic tax administration. Under the **GCT Act** the registered taxpayer is required to self-assess GCT payable, make returns in that regard and remit the tax collected to the Revenue. I believe it to be beyond doubt that where revenue liability is self-assessed there is potential for, among other things, underreporting and overstating with, or without an intention to defraud the Revenue. In consequence, there must be a corresponding mechanism which facilitates audits and investigations to verify self-assessed returns to ensure that there is faithful discharge of statutory obligations by the taxpayer.

[24] In that regard, Tax Administration Jamaica has general responsibility under the **RAA** for administering the laws relating to the audit, assessment, administration and collection of domestic tax revenue; for collecting all such revenue; and directing,

organising and controlling all domestic tax revenue collection activities. The Respondent Commissioner is responsible for the due administration of the entity, and for the purpose of discharging his functions under the **RAA** is authorised to carry out audits, assessments and collection operations. Section 17(I) in particular, empowers the Commissioner or other authorized person to enter the business premises of a taxpayer during office hours to conduct inspection, audits and examinations for the *"purposes of exercising any power under a relevant law"*.

[25] It was after the conclusion of the audit that the challenged assessment was raised against the Appellant, who contends that the basis for assessment of its GCT liability was not stated by the Respondent. This is not supported by the evidence.

[26] In the Notice of Assessment under the hand of the Commissioner, the Appellant was notified that the assessment was raised under sections 38 and 54 (which deals with interest) of the **GCT Act**, advised of the net tax adjustment, penalty and interest, and of its liability for the relevant accounting periods as contained in the table in the said notice. It was also expressly stated that:

> *[t]his adjustment is based on the results of an audit of your* General Consumption Tax *returns for the* Period *January 31, 2011 to December 31, 2013, the details of which are attached.*
> *Please note that these amounts are as a result of the audit only and reflect the charges as at the date of the notice…*

[27] The findings of the audit were previously revealed in the *Closing Conference Memorandum* and were the subject of the discussions between the representatives for the Respondent and the Appellant at the related conference on 16th March 2016.

[28] Section 38(2) of the **GCT Act** which has been earlier reproduced requires the Commissioner to state the *"general basis"* for his assessment of the amount he thinks ought to have been stated in the return prepared by the taxpayer. It is my view that the *Notice of Assessment* dated 27th April 2016 and served on the Appellant on 17th May 2016 satisfies the requirement of the section in indicating that it was based on the results of the audit of the Appellant's GCT returns for the period 1st January 2011 to 31st

December 2013, and by going further to attach the details of the assessment for the discrete accounting periods during the three years which were the subject of the audit.

[29] The conclusion of the audit - greater detail of which will be set out later - was that there was additional income upon which tax was to be recovered. Further, during the Closing Conference where the findings of the audit were discussed the Appellant's representative Mr. Foo is said to have "… *admitted that his department made an error when filing the company's Income Tax returns*."

[30] In the circumstances I find that the Commissioner stated the basis for both the audit and assessment of the Appellant's GCT liability, and could properly have come to the view that he was not satisfied with the calculations of the returns furnished by the registered taxpayer or of the basis upon which they were prepared to then make an assessment of the amount he thought ought to have been stated on the returns which the Appellant furnished. Accordingly, I conclude that there was a basis for raising the audit and raising an assessment against the Appellant. Whether the assessment was a best judgment assessment by the Respondent is an altogether different matter, which takes me to the second issue on this appeal.

(ii)

Was the assessment raised against the Appellant by the Respondent a best judgment assessment?

[31] The Appellant further submits that the assessment made against it by the Respondent was not a best judgment assessment. The substantial premise for the submission is that gross, careless and inexcusable errors were made in the assessment, namely that:

(a) it displayed a non-correlation with the Appellant's records;
(b) it revealed a lack of knowledge and ignorance of sector laws;
(c) serious errors and mistakes were made; and
(d) assumptions made by the Respondent were flawed.

[32] In **Indian Ocean Restaurant,** the appellant which operated as a partnership was assessed to VAT following a control visit to its premises, and consequent on further request for information from the assessing officer. The assessing officer supplied several detailed pages of calculation based on a sample period, which the dominant partner was advised would form the basis of an assessment in the absence of a response to the request for further information. There was no response to the request and the appellant was accordingly assessed on the basis of the calculations. The appellant appealed the assessment on the ground that it was not made to the best of the commissioner's judgment as the sample period was not representative, stock had not been taken into account, that allowance made for staff and free meals as well as the wastage allowance used were unrealistic, and that the mark-ups estimated to have been achieved were rarely achieved in fact. Following the lodging of the notice of appeal, there was exchange of correspondence and discussions between the commissioners and the VAT consultant engaged by the appellant which resulted in a reduction in the assessment. The appellant's appeal against the assessment was allowed on the basis that it was not a best judgment assessment as required by section 73 of the *Value Added Tax Act 1994* which provided that "*where it appears to the Commissioners that [a trader's] returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."*

[33] I have already expressed that although section 73 of the VAT Act is differently worded from section 38(1) of the **GCT Act** the approach to the enquiry - whether there was a best judgment assessment - which appears in **Indian Ocean Restaurant** can be applied. In addition to requiring commissioners to make assessments which are not capricious, the tribunal also stated thus.

> *16. It is also clear from the wording of section 73 that* ***the amount of tax due must be assessed with a reasonable degree of accuracy.*** *Complete accuracy is unlikely to be achievable, certainly so if full and reliable records are not available to the assessing officer…*
>
> ***[Emphasis added]***

[34] The Tribunal found that there was a substantial amount of errors in the calculations by the assessing officer, including mistake in the analysis of meal bills, transcription and

arithmetic errors. The assessing officer's analysis of the meal bills for the opening month of the business was used to extrapolate calculations to cover a significantly longer period in consequence of which the errors were magnified, and the tax assessed significantly more than the amount which would have been assessed if the analysis and arithmetic had been accurately undertaken. It was admitted by the assessing officer that he had not taken stock movement into account in the original assessment in circumstances where the Tribunal found that stock allowance ought to have been given by the assessing officer. Another matter of concern to the Tribunal was that the entirety of the assessment was based upon meal bills for a one-month period. Although the period was found to be reasonable, the Tribunal considered that it would have been safer if a month within the period of assessment was used - assuming that records were available - there being no suggestion that records were unavailable.

[35] In the result, the Tribunal found that the commissioners through the assessing officer were justified in considering that the appellant's returns were incomplete or incorrect as it was apparent from the dominant partner's answers to the assessing officer during the course of their interview and of the said partner's evidence that tax had been under-declared. It also arrived at what it termed the *"inescapable conclusion"* that the assessment was not raised to the best of the commissioners' judgment. This was on account that there were numerous significant errors made in calculations by the assessing officer, failure of the said officer to take stock movement into account at all, and in using records only from the sample period without any cross-check to earlier months to ascertain whether they were typical of the business which had been established for almost two years.

Non-correlation with the Appellant's records

[36] Much of this appeal and the proceedings below turn on the Appellant's records. The gravamen of the Appellant's submission in this regard is that its source documents were available and ought to have been used to verify its purchases and sales. As a result, it is contended that the Respondent, in using the indirect verification method had acted unreasonably. I am unable to agree with the Appellant.

[37] The Appellant accepts, as stated in **Digital Auto Imports Limited v the Commissioner General of Tax Administration Jamaica** [2020] JMRC 1, [33] that *"[f]or accounting and taxation purposes, sales invoices are source documents and are a direct, primary and preferred method of verifying sales income, and in calculating taxes which are payable. To be so used however, invoices must accurately reflect the transactions to which they relate".* That conclusion followed a recitation of the obligations of a registered taxpayer under the **GCT Act** in respect of which the following was stated.

> *[30] Section 36 [of the Act] states,*
>
> > *Every registered taxpayer shall –*
> > *(a) keep such accounts, books and records as may be prescribed;*
> > *(b) if required by an authorized person, produce at such time and place as the authorized person may specify, any accounts, books, records or other documents relating to the taxable activity;*
> > *(c) produce at such times as an authorized person may specify, such other information as the authorized person may require as may be prescribed.*
>
> *[31] The [Act] makes further provision for the records which a registered taxpayer must make in the course of making taxable supplies. In particular, the General Consumption Tax Regulations, 1991 (hereinafter called "the Regulations") set out the procedures which are applicable on the supply by a registered taxpayer to another registered taxpayer on one hand; and the supply by a registered taxpayer to a person other than a registered taxpayer on the other. As between registered taxpayers … regulation 8 prescribes that an invoice for a taxable supply should have the words "Tax Invoice" at the top thereof; the name, address and registration number of the registered taxpayer issuing the tax invoice; the serialized number of the invoice; the date the taxable supply was made; the name of the registered taxpayer to whom the supply was made; the total amount of the consideration for the taxable supply; and the rate of tax and amount of tax payable thereon. It goes on to mandate that only one "Tax Invoice" is to be issued in respect of each taxable supply and that a copy of each invoice must be retained by the registered taxpayer…*

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

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

[38] It is not disputed that the Appellant made records available to the Respondent. What is in dispute is the state of the records. It is the evidence of Mr. Foo on behalf of the Appellant that the records, though voluminous were furnished to the Respondent and that those records were well kept, save and except for some invoices which had started to fade in consequence of the passage of time. In his opinion, they could be used by the Respondent to verify the Appellant's purchases, sales and its input and output tax for the relevant period and that what was required was "more zest" and "zeal" on the part of the Respondent in reviewing the records.

[39] The evidence of the Respondent's officer who conducted the audit of the Appellant's returns is that a box of documents was submitted but the documents were not organized and the invoices were not supported by the requisite schedules. By way of example he stated that

> *… sales records were dispersed without any classification or collation - they were not organized in any order nor supported by schedules. There were sales books, invoices scattered in the box. Some of the invoices were illegible due to fading. As such Saturn Sales Limited… failed to keep proper books or accounts as are necessary to exhibit or to explain its transactions and financial position in its business or trade.*

[40] It is further averred that attempts were made to organize the records but that he arrived at the conclusion that it was an exercise in futility after two weeks because of the volume of documents. He averred that

> *…it is outside of [his] scope of duty or TAJ's statutory mandate to organize the documents of a taxpayer in order to conduct an audit. In fact it is the duty of the taxpayer to organized (sic) the required documents and present them to the tax authority when required to do so.*

[41] Mr. Foo responds on behalf of the Appellant and stated as follows:

> *…The review of any appeal in a timely manner benefits from more accurate recollections of pertinent matters and a reduced likelihood of records being lost or misplaced. Further, given the timespan between the submission of the taxpayer's file and the delivery of the RAD's decision, it is possible that had the taxpayer file been provided soon after the request for the same, the RAD's review and determination of the matter would have occurred prior to the Appellant ceasing operations in 2019.*

[42] The observation of Mr. Foo on the timely disposition of an appeal is indeed poignant and I would go on to say that it applies to every aspect of the process engaged in determining a taxpayer's liability including the audit, objection and appellate processes at the RAD and the court. So far as is relevant to the instant appeal, if the record keeping processes in the **GCT Act** are adhered to, it appears to me that verification of GCT liability by the Respondent can in fact be concluded in a timely manner on supply of the records required to be kept under the Act after a request for them have been made.

[43] The likelihood of records being lost or misplaced and imprecise recollections is undoubtedly a valid concern but every person in lawful possession of books, records or other document relevant to tax liability are required by section 17LA (1) of the **RAA** to keep those items for a period of not less than seven (7) years. Further, outside of the obligation to keep proper books and records for tax accounting purposes, a person who serves notice of objection to an assessment pursuant to section 40 of the **GCT Act** or lodges an appeal pursuant to section 41, is obligated to keep all records relating to the

objection or appeal until they are determined, pursuant to regulation 21(6) of the **GCT Regulations.** The Appellant's notice of objection to the assessment raised by the Respondent was made by letter dated 18th May 2016 which long preceded the ceasing of operations by the Appellant in 2019. The Appellant therefore had a responsibility to keep the records relating to its objection and appeal. Where those records have in fact been kept and are available, they may be used to pursue an objection and such appeals as are made in respect of the assessment.

[44] Mr. Foo expressed surprise that it would be claimed on behalf of the Respondent that the documents supplied to it by the Appellant were not organised, and goes on to aver that in assisting the Respondent with the audit, he had sent an email to its representative dated 4th October 2016,

> *… providing soft copies of the Appellant's Sales Data for 2011 to 2013, which were the documents used to compile its financials. [He] noted in that email that the individual sales invoices would be made available at the Appellant's office and that they were plentiful. [He] also stated that the purchases information would be emailed subsequently and [he] indicated his willingness to address any queries…"*

[45] In addition to *"all other documents used to prepare [the Appellant's] returns"*, *"Sales Invoices for 2011-2013"* and *"Records and Documents to substantiate cost of Sale and other expenses for 2011-2013"* were expressly included in the list of documents and records requested by the Respondent in its letter dated 15th June 2015, whereby the Appellant was advised of the intention to conduct an audit.

[46] I observe that neither sales invoices or source documents which would record or document the Appellant's taxable sales or expenses for the relevant period, whether in the form of a representative sample (since they are said to be voluminous) or otherwise, have been produced on appeal to this court where the Appellant has the whole legal burden of proof. I am therefore unable to make any assessment as to whether source documents were at minimum "kept" as required by the **GCT Act**.

[47] The absence of source documents for inspection is not always fatal however. Among the authorities cited by the Appellant in aid of its appeal is the decision of the London VAT Tribunal in **C Read and another v the Commissioners** [1982] VATTR 12, where the appeal of the taxpayers who were partners in a firm engaged in the distribution, repair and servicing of motor vehicles was allowed. It was found that the commissioners had acted unreasonably in disallowing a claim for input tax on the ground that the related invoices were no longer available for inspection and there was no other supporting evidence.

[48] The determination of that appeal turned on the nature of the evidence before that tribunal. Evidence was accepted from one of the partners that he forwarded his books to his accountant immediately after the end of each quarter and that the accountant filled in his VAT return which was signed by the partner, who also obtained his books back within two or three days. Also accepted was the evidence of the accountant that he personally checked each entry in the VAT book - which was admitted into evidence as an exhibit- in particular each purchase entry against each of the invoices or receipts and personally marked each entry with a "v" sign after he had done so. He also checked VAT calculations for correctness and on occasions when they were incorrect, he made alterations to the VAT book. Where VAT was not entered by the partner in relation to purchases at auctions, he added those amounts in the VAT book in his own handwriting. Accordingly, the Tribunal found that the accountant had meticulously checked the invoices against entries in the VAT book in evidence before it. It had no doubt that the receipts existed and truly recorded actual purchases made by the appellants and that the VAT thereon had been correctly recorded. It was also accepted that the relevant receipts and invoices were lost or mislaid when a partner moved house.

[49] At the audit interview Mr. Chin, one of the Appellant's directors indicated that he had prepared the GCT returns. On a review of the GCT Returns for the relevant period which were exhibited by the Appellant, the "Declaration" as to the truth and correctness of the return is made by the Managing Director, Andrea Chin. The signatory to the declaration, whose name has not been printed on the returns, signs *"… for A. Chin"*. With the exception of a document titled *"Customer Quick Report"* dated 26th July 2011 for the

period 2nd to 31st May 2011 upon which the writing, "*Actual Sales for May 2011. Information generated from invoice seen"* appears, there is no indication of either the process used to prepare the reports and summaries exhibited or of the person who prepared them. The note is in any event undated and unsigned. Unlike the taxpayer in **C Read**, the Appellant has not supplied any evidence to this court of a process for verifying its transactions and in preparing its GCT returns which could cause me to be satisfied that these summaries and reports should be relied upon to determine its GCT liability for the relevant periods. That these were the summaries and reports used to prepare the GCT Returns furnished is insufficient basis for concluding that they accurately and fully reflect the transactions by the Appellant.

[50] In all the foregoing premises the Appellant has not discharged the burden upon it of proving that its source documents were kept and available or that the Respondent acted unreasonably in using the indirect method to verify its purchases and sales for the relevant period.

Knowledge and Ignorance of Sector Laws

[51] It is the Appellant's submission that the Respondent's assessment demonstrated an ignorance of revenue measures set out in Ministry Paper for the Fiscal Year 2013/2014 which addressed accounting for GCT on phone cards effective March 2013, the consequence of which was that there would be no difference in input tax paid to the Appellant's suppliers for phone cards purchased since that effective date and output tax collected by the Appellant on the sale of those cards. The Respondent admits that the Appellant was assessed liable to GCT for March to December 2013 contrary to the revenue measure in the Ministry Paper.

Errors/mistakes in assessment raised

[52] The Appellant also contends that there were grave errors by the Respondent in estimating the Appellant's purchases in using figures which were inclusive of GCT rather than the figures net of GCT. The Respondent admits the error.

Flawed assumptions by the Respondent

[53] The Appellant also complains about the mark-up percentages used by the Respondent in raising the assessment. It is the Respondent's evidence that the mark-up percentages used by it in the assessment were calculated on the basis of the discount rates which had been supplied to it by Mr. Chin, a Director of the Appellant. By email dated 26th October 2015 Mr. Chin advised the Respondent of discount rates in respect of phone cards from its two suppliers as follows.

Digicel

Facey Commodity Co. Ltd sells to Saturn Sales Limited at 4.33% off face value of card e.g. $100 card sold to Saturn at $95.67

Saturn Sales sells to wholesalers at 3.6% off face value e.g. $100 card sold for $96.40

Lime (now Flow)

Lime sells to Saturn Sales at 8% off the face value e.g. $100 card sold to Saturn at $92.00

Saturn Sales sells to wholesalers at 6.50% off face value e.g. $100 card sold for $93.50

[54] To the extent that the Respondent believed the information supplied in the email could be relied upon, I am unable to find that the Respondent was wrong in using the information which was supplied by the Appellant's director in calculating mark-up percentages.

[55] In the foregoing premises, while I cannot find that the Respondent erred in using the indirect verification method in raising the additional GCT assessment against the Appellant, on the Respondent's own admission errors were made in making the assessment. The assessment in respect of the period March 2013 to December 2013 did not give effect to the revenue measure in the Ministry Paper and had, for the relevant period, incorrectly used GCT inclusive figures produced by the Appellant's suppliers instead of net GCT figures which were also supplied, in estimating the Appellant's purchases. Both errors relate to information which was available to the Respondent's officer at the time the assessment was raised and if given careful thought would have

obviated the errors which resulted in the Appellant being assessed to very significant additional GCT. Although I do not regard the assessment to have been made capriciously, in the circumstances of these errors I find that it was not done with the reasonable degree of accuracy required of a best judgment assessment by the Respondent.

(iii)

Was the assessment by the Respondent wholly unreasonable and to be set aside?

[56] It is the Appellant's submission that the Respondent's assessment of it to additional GCT is not a best judgment assessment, is a nullity and should accordingly be disregarded in its entirety. It is my judgment that the assessment by the Respondent was wholly unreasonable and that it is unfair that the Appellant should be required to answer an assessment of this character and should therefore be set aside.

[57] In **TY McGurk Sports Limited** [2002] Lexis Citation 609 which is relied upon by the Appellant, section 73 (1) of the VAT Act 1994 required commissioners to make best judgment assessments. The following was stated.

> *26. The classic analysis of the requirements imposed upon the Commissioners by s.73(1) is in the judgment of Woolf J, as he then was, in* Van Boeckel v Customs and Excise Commissioners [1981] STC 290 *at p 292:*
>
> > *"It would be a misuse of [their power to assess] if the Commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could be possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment. Secondly, clearly there must be some material before the Commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due … **What the words 'best of their judgment' envisage, in my view, is that the Commissioners will fairly consider all material placed before them, and, on that***

material, come to a decision which is one which is reasonable and not arbitrary as to the amount of tax which is due*."*

27. Those principles were recently re-stated by Carnwath J, as he then was, in Rahman (t/a Khayam Restaurant) v Customs and Excise Commissioners [1998] STC 826*. At p 835 he said, after examining the judgment in* Van Boeckel *and other cases:*

"… ***the tribunal should not treat an assessment as invalid merely because it disagrees as to how the judgment should have been exercised. A much stronger finding is required; for example, that the assessment had been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment are missing'; or is 'wholly unreasonable'.***

and at p 836:

*"****In principle there is nothing wrong in the tribunal considering the validity of the assessment as a separate and preliminary issue, when that is raised expressly or implicitly by the appeal, and, as part of that exercise, applying the*** Van Boeckel v Customs & Excise Commissioners ***test. There is a risk, however, that the emphasis of the debate before the tribunal will be distorted. If I am right in my interpretation of*** **Van Boeckel** ***it is only in a very exceptional case that an assessment will be upset because of a failure by the Commissioners to exercise best judgment."***

[Emphasis added]

[58] Ahead of so stating, Carnwath J at page 836 of **Rahman** hints at the rationale for setting aside of an assessment which is not made to the best of a commissioner's judgment - *"… it would not be fair for the taxable person to be required to answer a case which had been formulated in that way."*

[59] As earlier indicated, I would not characterise the Respondent's assessment as capricious, I also would not describe it as having been reached dishonestly or vindictively, as a spurious estimate or guess from which all elements of judgment are missing. Those

are not the only grounds upon which an assessment may be found to be invalid and appropriately set aside however. That outcome is also possible where the assessment is wholly unreasonable. Of these tests Carnwath J at page 835 of **Rahman** stated that *"…[i]n substance [they] are indistinguishable from the familiar Wednesbury principles… Short of such a finding, there is no justification for setting aside the assessment."*

[60] The Wednesbury principles appear in the following dictum of Lord Greene M.R. **Associated Provincial Picture Houses Ltd v Wednesbury Corp** [1948] 1 KB 223, 229.

> *… Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion* ***must, so to speak, direct himself properly in law****. He* ***must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably."*** *Similarly,* ***there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority.*** *Warrington L.J. in* Short v. Poole Corporation *(1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.*

[61] Among the authorities cited in the appeal is **Vadamalay v Revenue and Customs Commissioners** [2019] UKFTT 241 (TC) on which the Respondent relies. There the tribunal refused to set aside an assessment which was not made to the best of the commissioners' judgment.

[62] The appellant in that case was the operator of a property business who appealed against discovery assessments and closure notices made under the Taxes Management Act in respect of income tax and undeclared rental income. He had not been cooperative

with HMRC and had had many opportunities to provide evidence of the correct amount of his rent, expenses and tax due including at the hearing of the appeal but had not done so. While it was observed that he appeared to expect HMRC to do research to determine rent, expenses and mortgage interest which was not the responsibility of the respondent in the case, the Tribunal held that HMRC was not absolved of the obligation *"to make a fair assessment to the best of their judgment."* It was not clear how HMRC arrived at the current market rent for the properties subject of the assessment; they had assumed rents had increased at a certain percentage annually; did not allow deduction for mortgage interest although they were aware that certain properties were mortgaged; and had not reduced the assumed rent to allow for expenses.

[63] The extracts from both **Van Boeckel** and **Rahman** which were cited in **TY McGurk Sports Limited** and reproduced earlier were cited with approval. The assessments were found to have been raised by

> *52… spurious estimate or guess in which all elements of judgment are missing; or wholly unreasonable"* as *"no business has no expenses and to make an assessment on the basis that there are no expenses [did not] satisfy the test in* Van Boeckel *that the officer must exercise judgment in the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, though there must necessarily be guesswork in the matter, it must be honest guess-work.*

[64] Notwithstanding that the assessments were not best judgment assessments, the tribunal declined to set aside the assessments as it was not in the interest of justice to do. Vadamalay had failed to notify HMRC of his liability to tax, complete tax returns when required to do so and to declare the income of his property business, the sale of one of the properties, and had also failed to co-operate with HMRC when they found out about it. In these circumstances the tribunal was of the view that he clearly owed tax which he should pay. The tribunal required further assistance to determine a fair figure for the tax to be paid however and issued directions accordingly. HMRC adhered and revised the quantum of closure notices and discovery assessments which the tribunal was satisfied represented a proper, albeit imperfect exercise of the commissioners' judgment.

[65] Having regard to the rationale for setting aside assessments which are not made to the best of a commissioner's judgment - that it would be unfair for the taxpayer to be required to answer a case which was formulated in that way - it is my view that **Vadamalay** was properly decided. The result of that appeal turned on its peculiar facts however and is distinguishable from the instant case.

[66] It is my judgment that the Respondent's assessment was not a best judgment assessment on account that the Appellant was assessed to GCT for the period March 1, 2013 to December 31, 2013 in contravention of the revenue measures which were set out in the Ministry Paper for the Fiscal Year 2013/2014 which addressed accounting for GCT on phone cards effective March 2013; and its phone card purchases determined using GCT inclusive figures instead of net GCT figures. While the first of the two errors affected only a few months, the second affected each accounting period for the years 2011, 2012 and 2013 and resulted in the substantial additional assessment of **Five Hundred and Sixty-Eight Million One Hundred and Thirty-One Thousand Eight Hundred and Ninety-Seven Dollars** ($568,131,897.00) which was increased on objection to **Five Hundred and Sixty-Eight Million Two Hundred and Twenty-Two Thousand Eight Hundred and Ninety-Seven Dollars** ($568,222,897.00).

[67] The Respondent's response to the errors made in the initial assessments is that they were cured on appeal to the RAD. I am unable to agree.

[68] On a review of the decision of the RAD, whether or not the assessments for the relevant period were to the best of the Respondent's judgment and whether they ought to be set aside do not appear to have been considered, notwithstanding that the Appellant had there complained in its letter indicating that the assessments would be appealed that *"… [in the absence of … written reasons for the additional assessment, [it was] unable to identify the discrepancy, if any [with its internal records and supplier statement reconciliations [which did not support what the Appellant termed as the Respondent's 'conjecture and speculation']."*

[69] In the assessment of the RAD, the main issue before it was *"… whether the assessments on objection were excessive".* An affirmative conclusion on that issue is inescapable, the RAD having determined that the additional assessments made on objection were to be reduced on the appeal to it from **Five Hundred and Sixty-Eight Million Two Hundred and Twenty-Two Thousand Eight Hundred and Ninety-Seven Dollars** ($568,222,897.00) to **Ten Million Five Hundred and Ninety-Four Thousand Two Hundred and Ninety-Three Dollars and Ninety-Three Cents** ($10,594,293.93). The Appellant in its returns for the relevant period had reported GCT liability in the amount of **Seven Million Three Hundred and Forty-One Thousand Four Hundred and Sixty-Two Dollars and Fifty Cents** ($7,341,462.50). Many of the findings of the RAD and the decision returned on that appeal rather than being curative of the Respondent's errors further demonstrates the unreasonableness of the additional GCT assessment raised.

[70] While there is a risk that a discrete best judgment challenge might distort the emphasis of the debate on a tax appeal as stated in **Rahman**, I believe that the instant case is to be regarded as falling within the category of very exceptional cases in which an assessment should be set aside because a commissioner has failed to exercise his best judgment.

[71] Unlike Vadamalay, the Appellant here filed GCT returns for the relevant period and can be regarded as disclosing his liability to pay the tax; and had cooperated in some way with the Respondent's during its audit and assessment processes. I observe that the assessment by the RAD which the Respondent says cured the errors in the initial assessment saw the assessment reduced by approximately 98.15%, using information which was available to the Respondent at the time the assessments were raised against the Appellant for the relevant period. It is the evidence of the Appellant that there is a 1% to 2% margin of error in the additional assessments raised by the Respondent. The Respondent does not challenge that evidence. On the evidence before me I am unable to find that the Appellant clearly owes GCT for the relevant period, which would then permit me to refuse to set aside the assessment raised on the basis that it would not be in the interest of justice to do so.

[72] It is in all the foregoing premises that I am constrained to find - notwithstanding that the Appellant has not demonstrated that its books and records were properly kept - that the Respondent in raising the assessment against the Appellant did not direct himself properly in law or call to attention matters which he was bound to consider, and considered figures which were irrelevant and inappropriate for estimating the Appellant's purchases for each relevant accounting period, which resulted in a significant inflation of the figures used in coming to the conclusion that the Appellant had under reported his GCT liability by a significant amount. The assessments raised by the Respondent against the Appellant for the relevant period were therefore wholly unreasonable and it is unfair in the circumstances of this case that the Appellant should be required to answer assessments of this character. In the result the Respondent's assessment for the years 2011, 2012 and 2013 should be set aside.

ORDERS

[73] In all the above circumstances, the following orders are made.

i. The appeal is allowed.

ii. The additional assessments to General Consumption Tax raised by the Respondent against the Appellant for the years 2011, 2012 and 2013 which were the subject of the taxpayer's appeal to the Revenue Appeals Division are set aside.

iii. The decision of the Revenue Appeals Division dated 31st March 2021 is set aside.

iv. Costs of the appeal to this court to the Appellant to be taxed if not sooner agreed.

Carole S. Barnaby
Puisne Judge