IN THE SUPREME COURT OF SEYCHELLES

In Re:

Central Stores Development Ltd

Of Victoria, Mahé **Appellant**

vs

The Commissioner of Taxes of

Liberty House, Victoria, Mahé **Respondent**

Civil Appeal No: 11 of 2006

Mr. P. Boullé for the appellant
Ms. F. Laporte for the respondent

D. Karunakaran. J.

JUDGMENT

This is an appeal preferred under Section 106 of the Business Tax Act - hereinafter referred to as the "Act" - against the decision of the Commissioner of Taxes - hereinafter referred to as the "respondent" - on the amended assessment of business tax payable by the appellant, namely, "Central Stores Development Ltd" for the tax years 2000, 2001 and 2002, hereinafter collectively referred to as the "relevant years".

The Appellant, Central Stores Development Ltd - hereinafter referred to as the "CSD" - is a company that was incorporated in Seychelles in 1972. During the years 1972-76 the company acquired a plot of land Parcel V815 in the heart of town Victoria and constructed a multi-storey building

thereon consisting of several office and shop units, known as “Victoria House”. In fact, the land on which the “Victoria House” now stands, was previously owned by one *“Messrs Jivan Jetha and Company”* On 26 December 1972, the CSD purchased this land from the previous owners for one hundred and fifty thousand sterling pounds and then it constructed the building thereon. Although the original objective of the company - CSD - is unknown, since its incorporation it has been engaged only in the business activity of generating rental income by leasing/renting out various units in the building to different tenants and incidentally maintaining the building and providing lease-related services to its tenants. Undisputedly, this has been the main activity of CSD for more than a quarter of a century, up to 1998. The ownership and control of the “CSD” was until 1998, in the hands of non-resident shareholders. Indeed, in 1976 one *Fidelity Holdings SA* (Société Anonyme) owned 714 shares in CSD out of its 1000 shares on issue, which represented 71.4% of the shares in CSD. Out of the said 1000 shares on issue, 101 shares were held by another company by name, *“Hyson Limited”,* whereas 184 shares in it were held by yet another company namely, *“Frank et Compagnie”.*

Be that as it may, at all material times one *“Remali Investments (Pty) Ltd”* hereinafter referred to as “Remali Investments” was and is a company registered in Seychelles. This company’s main business activity has been property development in Seychelles, including construction and selling of condominiums and generating income therefrom. One Mr. Remutulah Merali was the major shareholder and director of the “Remali Investments” and his wife Mrs. Merali was also a director and shareholder. In fact, in 1997 Mr. Merali owned 99% of the shares in Remali Investments, which in the course of its normal trading had undertaken a number of property developments and construction of condominiums in Mahé. It had undertaken one at Roche Caiman and another development in town called “City Centre Building”. Indeed, the City Centre building

project was carried out through another corporate entity called "City Centre Development Ltd", in which again, the Miralies were the major shareholders and directors. Obviously, the Miralies were the promoters and natural persons behind the corporate entities - "Remali Investments" and "City Centre Development Ltd" and undisputedly, had been engaged in the business of construction and selling of condominiums and generating income therefrom.

With this background, I will now turn to the material facts that gave rise to the business tax assessments and subsequent amendments made thereto by the Commissioner of Taxes in respect of the income, which the Central Stores Development Ltd (CSD) derived from selling different units of Victoria House, during the tax years 2000 to 2003.

It is not in dispute that in 1998, the majority shareholder of CSD namely, *Fidelity Holdings SA,* which owned 714 shares in CSD, went into liquidation. Consequently, on the 27th May 1998 *Fidelity Holdings* sold all its 71.4% interest therein to "Remali Investments" for US$ 1.3 million. Following the acquisition of the said 714 shares, "Remali Investments" controlled major interest - a 71.4% holding - in CSD. In addition thereto, on 31st December 1998, "Remali Investments" again acquired 101 shares and 184 shares in CSD from the remaining shareholders *"Hyson Limited"* and *"Frank et Compagnie"* respectively. Thus, by the end of 1998, "Remali Investments" owned a total of 999 shares in CSD out of the 1000 shares on issue taking its holding to 99.9% in CSD. Incidentally, it is also not in dispute that the 1997 annual return lodged by "Remali Investments" showed that 99% of the shares in "Remali Investments" were owned by Mr. Remutulah Merali.

In August 1998, the CSD - whose majority shareholder was then "Remali Investments" - carried out a major renovation work to the building 'Victoria House" incurring a cost of Rl, 379,518 and also in 1999 it again carried out a similar work at a cost of R62, 720. On the 24th March 1999,

CSD appointed a land surveyor to survey and prepare plans to transform the building "Victoria House" into condominiums. Thereafter, CSD embarked on a process of subdivision and registration of the units. In fact, four floors of the Victoria House were subdivided into 33 units. In August 1999 the CSD registered those units with the Land Registry under the Condominium Property Act. Having thus converted the building into condominiums, CSD gradually started selling the individual units to third parties. The activity of its sale of the units started in 2000 and continued up to 2003. In fact, the CSD, on 31 July 2000 sold the first unit in the building to a third party as per Document No.14 in file. In the following months and throughout 2001, 2002 and 2003, it sold all remaining units in the building to different parties. Indeed, all the units in the building were thus sold out during the period between 2000 and 2003. The CSD recorded substantial profits in its accounts on the sale of those units in each of the years 2000 to 2003. The profits, which the CSD earned from those sales, were declared as non-taxable in its tax returns lodged for the relevant tax years. The Commissioner of Taxes originally assessed the tax returns as lodged by the CSD for the tax years 2000, 2001 and 2002, with minor adjustments, which were not related to the issues involved in the instant appeal.

However, the Commissioner subsequently - in 2003 - reopened the previous assessments for the relevant years. He conducted an investigation through his officer one Mr. R Herbert to ascertain the business activities, which CSD had been carrying out during the previous years namely, 2000, 2001 and 2002. In fact, the officer Mr. Herbert, on 26th June 2003, interviewed the representatives of the CSD Mr. R Merali in the presence of his wife Mrs. Merali and one Mr. Bhadresh Mehta, presumably another representative of CSD. Following that interview - vide document No: 12 in file - and the information allegedly revealed therefrom, the Commissioner amended the previous assessments. In fact, by issuing the notice of Amended Assessments dated 26th April, 2004 the Commissioner amended the previous assessments in respect of tax-returns for the years 2000, 2001 and 2002 and included profit on the sale of the units hereinbefore mentioned as assessable income, as well as made depreciation related adjustment therein. Undisputedly, the CSD had, in lodging its returns from 2000 to 2002, excluded the profits on

disposal of condominiums. The tax-returns were indeed, assessed without the inclusion of any profit on disposal of condominiums. Thus, the assessments of the relevant years were subsequently - in 2004 - amended by the Commissioner after investigation and disclosure of certain information allegedly made by Mr. Merali in the said interview.

Being dissatisfied with the said amended assessment issued by the Commissioner, for the tax years 2000, 2001, and 2002 the CSD exercised its right under section 104 of the Business Tax Act and served on the Commissioner, its objections in writing to those amended assessments - vide letters dated 15th June 2004. However, the Commissioner in his considered decision - in terms of Section 105 of the Act - disallowed those objections. The CSD therefore, in terms of Section 106 of the Act, requested the Commissioner to treat those objections as an appeal against his decision and refer the matter to the Supreme Court for determination. The Commissioner accordingly, referred the matter to the Supreme Court with the relevant records in terms of Section 106 (1) of the Act and hence is the instant appeal before this Court.

Pursuant to Section 108 (1) of the Act, the Commissioner filed his submission in relation to the appeal, setting out his reasons both on facts and on law in support of his decision made under Section 105 of the Act. The Commissioner's bones of contention are in essence, as follows:

1. He had the power to amend the 2000 year tax return, because section 97(3) did not apply. A full and true disclosure was not made to the Commissioner prior to the original assessment or the first amendment;
2. The profit on sale of the units is assessable under section 21 of the Business Tax Act;
3. Alternatively, if not assessed by section 21, the profit is assessable under section 22(l)(g); and
4. If the profit is assessed under section 22(1)(g) the Commissioner is not prevented from making an assessment under section 48(2).

On the other side, the appellant through its counsel Mr. Boullé filed a

written defence of objection dated 20th June 2005 under Section 108 (2) of the Act, in response to the submission filed by the Commissioner. This defence of objection inter alia reads thus:

1. Defence to Respondent's 1st contention namely that *"He had the power to amend the 2000 year tax return because section 97 (3) did not apply as a full and true disclosure was not made to the commissioner prior to the original assessment in the first amendment".*

In his reasons for the above contention the Commissioner rests his case on a single fact stated in paragraph 17 of his reasons namely that: "However, the purpose of Remali Investment in acquiring the shares in Central Stores was eventually disclosed to the Commissioner on the 26th June 2003 vide Document 12 in file and it is that information which set in train the process towards amending the 2000 year tax return a second time".

According to the appellant, the above reason is flawed on 2 grounds founded in law and on facts.

On the point of law, the appellant contends that Documents 12, the record of interview is an inadmissible document to prove any of the facts stated therein for the reason that it was prepared by an employee of the respondent and is therefore

1) Hearsay as an employee related the facts to the Commissioner

Hearsay upon hearsay due to the fact that the interviewer got the answers of Mr. Merali from his wife as admitted by Mr. Herbert when he states in his record of the interview that "his wife was able to pass on questions and answers to me"
self serving
Not signed by any of the parties present, except the interviewer; and

2) It was abuse of power and unethical for Mr. Herbert to interview someone who was under, as he put it, "a disability, perhaps Parkinson's disease or similar" and to assume that

> "he understood our discussion", in the light of which it is inadmissible as evidence until proof is placed before the Court that the state of mind of Mr. Merali was such that he was capable of responding to an interview.

Furthermore, it is the contention of the appellant that the Commissioner in exercising his power to review the assessment did not bother to find out the nature or extent of the illness of Mr. Merali which was a most crucial factor in determining the true nature of the intention of Mr. Merali, which it was his duty to search for.

On facts, the appellant contends as follows:

(A) REGARDING THE ALLEGED DISCLOSURE IN THE INTERVIEW

1. The record of the interview relating to the intention of Remali Investment in acquiring the building, where it is stated that "They said yes" renders the Commissioners statement at paragraph 17 of his reasons that "the purpose of Remali Investments in acquiring the shares in Central Stores was eventually disclosed to the Commissioner on 26th June 2003", totally incorrect as the interviewer had not attributed the answer to Mr. Merali or any representative of Remali Investment, such that the reliance of the Commissioner on that report is completely unreasonable and irrational.

2. Faced with the report of the interviewer - Document 12, who interviewed a sick disabled man, which contained statements such as "they answered yes" on the one hand and a letter from Mr. Remutulah Merali dated 2nd July 2003 rectifying the records of the interview agreed to by the Commissioner in manuscript on the said letter and by a subsequent letter dated 9th July 2003, it is irrational to argue in terms of paragraph 17 that "the purpose of Remali Investment in acquiring the shares in Central Stores was eventually disclosed to the, Commissioner on 26th June 2003.

3. The credibility of the entire report is also put in serious doubt when it

stated that “I asked if Victoria House was the only assets of Central Store? They said yes”, in the light of the fact that at the date of the interview Central Stores Development owned another property in Victoria registered a Parcel No V 5409 acquired in August 2002 which it is leasing to tenants, which leads to either one or more of the following conclusions:

(a) the interviewer’s report is not correct or credible

(b) Mr. Merali was not capable of dealing with an interview due to his illness
(c) The interviewer could not properly understand the answers given by Mr. Merali.

4. The company’s records show original shareholders of the Central Stores Development and the date the shares were transferred to Remali’s Investment as follows:

Fidelity Holdings - Luxemburg - 714 shares – 27th May 1998

Frank et Comp - Switzerland - 184 shares – 31st December 1998
Hyson Ltd - Jersey - 102 shares – 31st December 1998

Under the provisions under (sections 122) of the Companies Act if a company intends to dispose of a major part of its fixed assets, a resolution of shareholders is required. It is therefore impossible to conceive that a person would invest US$ 1.3 M in the Seychelles for selling condominiums at a future date with the uncertainties of:

(i) Getting the other shareholders to agree to the proposal to sell Victoria House without infringing minority rights.
(ii) Being successful in buying out minorities to proceed with the scheme and
(ii) That there would be enough Seychellois buyers for the condominium as non-Seychellois buyers would be subject to the Immovable Property (Transfer Restriction) Act.

The evident truth of the matter according to the appellant, is that after acquisition of the shares, Mr. Merali’s health was deteriorating and along with the fact that his other projects such as Capital City required additional finance led him to believe that the time had come for him to rearrange his financial affaires, which he proceeded to do by realizing all his investment in the following manner:

(1) sell Victoria House to finance the completion of another building in

Victoria, namely Capital City, and it was envisaged that the most expeditious way to do so was to divide Victoria House into condominium units to be sold individually, which proved to be a viable commercial strategy.
(iii) sell Capital City which he had to do even before its completion due to further deterioration of his health, which like Victoria House he had never intended to sell but did so due to changed circumstances.
(iv) place all his other assets on the market, some of which has been sold, while others including a third building in Victoria are still up for sale.

(B) REGARDING FULL AND TRUE DISCLOSURE OF ALL MATERIAL FACTS NECESSARY FOR ASSESMEN'T UNDER SECTION 97(3) OF THE BUSINESS TAX ACT

The commissioner has based his right to re-open previously assessed taxation on the grounds that:

(Para 3)- The tax return and attached documents did not disclose sufficient information to allow a determination by the commissioner whether the disposals were done to make a profit or were the mere realization of some assets.
(Para 5)- The determining factor on full and true disclosure as per *Austin Distributors Pty Ltd V FC of T) 1964 13ATD 429 runs thus:*

"If advise had been sought by the tax payer whether or not the sum in question was ...taxable . . . would the person from whom advise was 'sought require more information than this return disclosed to the commissioner?"

According to the appellant the year 2000 assessment has to be looked at in the context of events which took place during the following time frame:
28 September 2000: Date return lodged
05 December 2001: Date 1st Assessment, disallowing bad debts
14 December 2001: Objection to Assessment, for bad debts disallowed
13 March 2002: Request, for variation of 2002 taxation, mentioning disposal of condominiums
14 March 2002: Agreement to variation
14 March 2002: Letter from commissioner having reviewed CSD file

15 March 2002: Agreement to CSD's objection
27 May 2002: Amended Assessment
06 August 2002: Review-seeking income and details of depreciation on disposal of fixed assets, confirming that the commissioner had agreed to disposal of condominiums as disposal of depreciated assets.
26 April 2004: Amended assessment on ground that full and true disclosure was not made.

With the first return, which was in full compliance with section 88 of the Business Tax Act and the Fourth Schedules to the said Act, the various documents submitted included the following:-

A) Schedule L4 enclosed showing subdivision of Victoria House in 33 condominiums of which 22 were sold at a profit of R.l4, 525,202. It should be noted that the 22 condominiums were purchased by only two entities. At no time did the company advertise to the public to sell individual condominiums, contrary to the commissioner's allegation that the conversion of Victoria House to condominium amounts to converting its asset to a corresponding trading stock.

B) The sales of condominiums disclosed in the statutory accounts are highlighted as follows:

(i) Director Report Activities

During the year the company subdivided the "Victoria House" and sold 48.9% of the floor area as condominiums.

Results

Profit on disposal of condominiums has resulted in a profit of P14, 525,202 net of tax.

(ii) Profit & Loss account
As exceptional items "profit on disposal of
Condominiums net of taxation"- R 14,525,202.
(iii) Note 3 of the accounts

"Exceptional item arises from disposal of 48.9% of "Victoria House" as condominiums as computed as follows".

C) Taxation schedule ZF2 showed profit on sale of 22 condominiums of R 14,525,202 as exempt income out of a total profit for the year of

Hence, it is the contention of the appellant that full and true disclosure was made on the nature of disposal of condominiums, which the tax payer believed to be exempt income by virtue of the fact that there is no capital gains tax in Seychelles.

Based on information provided to the Commissioner of Taxes, by making the assessments of 5 December 2001 and 27 May 2002 according to the appellant, the Commissioner was satisfied that he did not require additional information over and above that which had been submitted to him. Partial disposal of a building as condominiums is not a routine event in the Seychelles, and hence, the Commissioner, when raising the assessments of 5 December 2002 and 27 May 2003, obviously concurred with the view that such sales should be treated as disposal of depreciated property.

The appellant further submitted that the above view is confirmed by the letter of the Commissioner of 6 August 2002. Under the heading "Depreciation-Balancing charges", the letter confirms that "we have observed depreciation has been claimed in full on all assets despite the sale of certain condominiums".

In all his submissions, according to the appellant, the Commissioner has not shown any credible information of significance has come to his attention since 5th December 2001 which would justify his claim that a full and true disclosure was not made by the tax payer when submitting the return on 28 September 2001. The appellant thus contents that the evidence provided to the court herewith proves the opposite, i.e., that the taxpayer went out of his way to disclose the sale of condominiums as an exceptional event.

As regards the Respondent 2nd contention (supra) that "The profit on sale of the units is assessable under section 21 of the Business Tax Act" the appellant submitted in defence thus:

The Commissioner states at paragraph 17 page 11 that "It is acknowledged that after the significance of his intention was explained to Mr. Merali, he sought to withdraw that statement by letter dated 2 July 2003. However, the Court will observe that the actions of Central Stores from 1998 through to 2003 are consistent with the Commissioner's understanding of his (Mr. Merali's) (mine) intentions in l998.That is, to subdivide and sell the property".

According to the appellant, once again the Commissioner relies on the intentions of the Tax payer in order to fit the profits on sale within the definition of income under section 21 (1) of the Business Tax Act. The Appellant repeats and relies on its arguments set out in its defence to the respondent's first contention (supra) to meet the Commissioner's 2nd contention.

The appellant argues that it is most significant to note that the Commissioner is in this instance inviting the Court to "observe that the actions of Central Stores from 1998 through 2003 are consistent with the Commissioner's understanding of his (Mr. Merali's) (mine) intentions in 1998", which actions were all disclosed to the Commissioner in the accounts and Tax Returns. Therefore, appellant contents that the Commissioner is admitting in no uncertain terms that there was true and full disclosure of all the material facts necessary for his assessment under section 97 (3) of the Business Tax Act.

As regards the respondent's 3rd contention that *"Alternatively, if not assessed by section 21, the profit is assessable under section 21(1) (g)"* the appellant submitted that the Commissioner's argument ignores the crucial and irresistible conclusion which can be drawn from all the surrounding facts, namely that Central Stores very simply found a clever way to dispose of its assets. In the event that Central Stores had only sold the land and building without dividing it into condominium it would evidently likewise have made a profit and probably a larger one, in the light of which the argument that the subdivision into condominiums was a profit making scheme as opposed to a mere disposal of assets rests on an unrealistic proposition.

Furthermore the appellant argues that the Commissioner impliedly reveals in his arguments that there was true and full disclosure of all the material facts for his assessment when he argues at paragraph 16 and 17 at pages 13 and 14 of his submissions as follows:

"16. If there was not plan in May 1998 when Remali Investments acquired the interest in Central Stores, it is apparent that it had become the plan for a course of action by March 1999 when a land surveyor was engaged. The time of formulation of the scheme is not crucial, it is only necessary for there to be a scheme".

" 17. *Irrespective of the time that the plan or scheme was formulated, it is clear from the actions of central Store that a profit making scheme was carried out. The company:*

- *Sought the services of a surveyor in March 1999 (vide Document 13)*

Registered the subdivided units in August 1999
Commenced selling those units in Ju1y 2000 (vide Document 14)".

In view of all the above, the appellant urged the Court to allow this appeal upholding its objections to the respondent's amended assessments for the tax years 2000, 2001 and 2003.

I meticulously perused the appellant's objections to the assessments in dispute, as well as the submission of the respondent setting out his reasons for those assessments. I also perused the written defence of the appellant filed in the appeal proper. I gave diligent thought to the arguments advanced by both counsel on points of law as well as on the facts in issue.

Before I proceed to examine the main issues of substantive law and of facts, it is important to determine the issue, which the appellant has raised on a **point of procedural law** relating to the admissibility of documentary evidence. It is not in dispute that the Commissioner has used a piece of information contained in document 12 namely, the interview report dated 26th June 2003, which set in train the process towards amending the tax return a second time to make amended assessments for the relevant years. In this respect, Mr. Boullé, learned counsel for the appellant submitted that the interview-report, which the respondent has accepted, relied and acted upon for his assessment, is inadmissible in law (as evidence) since

i) This document is hearsay

it was prepared by an employee of the respondent
self serving
not signed by any of the parties present, except the interviewer
it is an abuse of power and unethical for Mr. Herbert to interview Mr. Merali, who was suffering from "Parkinson's disease or similar"

In substance, the appellant contends herein that the respondent has admitted this report, in breach of the rules of evidence relating to admissibility of documents, as well as in abuse of his powers under the Act. Moreover, according to counsel, it is unethical for the respondent's officer to interview Mr. Merali, who was then suffering from "Parkinson's disease or similar" at the material time.

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I deeply analyzed the contention of the appellant on this point. It seems to me that learned counsel for the appellant is overstretching the judicial meaning of the term "evidence" used in this respect, to include "information", which the respondent had obtained from investigation for making his tax assessments. With due respect to the views of Mr. Boullé, it seems to me that there is a world of difference between the concept of "judicial evidence" that is accepted and acted upon by a Court of law in the legal proceedings and the "information" that is received and acted upon by any investigative agency in furtherance of their statutory duties. Obviously, "judicial evidence" is a *species*, whereas "information" is the *genus.* Although all "judicial evidence" emanates from "information", the converse is not true as all "information" may not pass the test of admissibility rules and qualify to become "judicial evidence". Indeed, Courts of law usually have to find that certain facts are proved to exist, before pronouncing on the rights, duties and liabilities of the parties and the information, which Courts receive/admit in furtherance of this task, is called "judicial evidence". This may consist of testimony, hearsay, documents, things and facts. The Courts will accept/admit them as evidence, if and only if, that information passes the test of admissibility rules. However, on the other hand, statutory authorities such as

Commissioner of Taxes, Immigration Officers, Police Officers and the like usually when carry out investigation they also accept or receive "information" from different sources as they are acting under a duty to do so. They compile documents or records containing that information. It could be a simple statement of a person, hearsay, documents, things, interview reports signed or unsigned by the parties etc. Whatever the source or nature of such information, whatever the manner or the means in which it was obtained the fact remains that they all simply constitute "Information", not "judicial evidence" by any stretch of interpretation. If such information is otherwise relevant and admissible in accordance with the rules of evidence, it will be admitted as judicial evidence regardless of the manner it was obtained ***vide Kuruma, Son of kaniu vs R [1955] AC 197, 203 per Lord Goddard CJ; R Vs Sang [1980] AC 402***. This however, in criminal cases, does not affect the Judges rules that a confession made by a defendant, must have been obtained in the absence of oppression and of circumstances likely to render it unreliable, since the issue involved therein, is one of admissibility of confession, not of the means by which the confession was obtained as such. Be that as it may.

Obviously, in order to make tax assessments, the Commissioner of taxes in this matter, has accepted, relied and acted upon a piece of "information" contained in the document - interview report - compiled by his officer Mr. Herbert, who had interviewed the taxpayer, exercising the powers of the Commissioner in terms of Section 7(1) of the Act. It is evident, the Commissioner is authorized by Section 93(1) of the Act to use such information, which he may have in his possession or obtain from other sources for the purpose of assessment. He is not bound to admit or accept or look for any "judicial evidence", nor ought to adhere to any rules as to admissibility of documentary evidence such as "hearsay rule" etc. while making his tax assessment. What he needs for his assessment is simply "information", which should however, be relevant, accurate and reliable. I find therefore, the "Rules of evidence" regarding admissibility of documents, and their applicability to "judicial evidence" have nothing to do with "information", which the Commissioner may have in his possession or obtain or accept from other sources for the purpose of

making tax assessments against any taxpayer. This is evident from Section 93(1) of the Act, which runs thus:

" 93. (1) From the returns, and from any other ***information*** *in his possession, or from any one or more of those sources, the Commissioner shall make an assessment of the amount of the taxable income of any business, and of the tax payable thereon by the owner of the business"*

As regards the issue of the alleged abuse of power by the Commissioner, I do not find any scintilla of evidence on record to substantiate this allegation. In fact, Section 9 of the Act describes a number of circumstances from which one may infer abuse of power by an officer or any other person employed in carrying out the provisions of the Act as well as it creates statutory offences therefor. Obviously, the evidence on record does not disclose any of those circumstances. Hence, I find that the respondent did not abuse any of his statutory powers conferred on him by the Act, in conducting the interview with the taxpayer through his officer. As regards the allegation of unethical conduct, I do not find anything unethical conduct on the part of the investigator Mr. Herbert in interviewing Mrs. and Mr. Merali in exercise of powers conferred on him by the Act for the management and collection of the tax. Had Mr. Merali been suffering from such sickness - why did he at first place, agree to meet the officer for an interview, having fixed the venue, date and time by himself? His wife Mrs. Merali, who had known the physical and mental condition of her husband better than anyone else that time, never objected to the interview. She had not only been present but also has been actively participating in the interview along with another gentleman, Mr. Bhadresh Mehta. Having regard to all these circumstances surrounding the interview, I find nothing unethical on the part of the officer, who conducted the interview. Therefore, the appellant's argument on the alleged admissibility of documentary evidence in this respect, does not appeal to me in the least.

Having said that, I also find on a point of law that this particular ground of objection as to admissibility of documentary evidence is not maintainable in law for the following reason:-

This particular issue has been raised by the appellant first time only in the instant appeal before this Court under Section 106 of the Act. Obviously, this ground has not been stated by the appellant in its written objections served -at first instance - on the Commissioner under Section 104 of the Act vide documents Nos. 4, 5 & 6.

In fact, the Act prevents the appellant from raising new grounds in the appeal, which were not raised in the first instance before the Commissioner. Section 110 of the Act reads thus:

"On any appeal to the Supreme Court under section 106 -

(a) the owner of a business shall be limited to the grounds stated in his objection served under section 104, and

(b) the burden of proving that the assessment is excessive shall lie upon the owner of a business"

In the circumstance, I hold that the objection relating to admissibility of the interview report, raised by the appellant in the instant appeal, is not maintainable in law and liable to be dismissed in limine.

I will now turn to the main issues raised by the parties on points of substantive law and on the facts. First of all, I note that the objections of the appellant do not refer to the Commissioner's method of calculating the profits or depreciation adjustments or the amounts. The calculations and numbers used are not the subject of dispute. The following are indeed, the fundamental questions that require determination in this matter: -

1. *In relation to the 2000 year amended assessment, does section 97(3) prevent the Commissioner from amending the original assessment?*

Is the profit on sale of the units assessable under section 21 of the Business Tax Act?
(Alternatively)

2. *Is the profit assessable under section 22(1) (g)? and*

3. *Does assessment of the profit under section 22(1) (g) preclude the Commissioner from also making an assessment under section 48(2) for the same transaction?*

As regards question no. 1, it is important, first, to peruse Section 97 of the Act in its entirety so that one can understand the myriad of factual circumstances in which the Commissioner may make amendments to previous tax assessments. Please, forgive me; I have no other choice but to reproduce the entire Section of law, which reads thus:

97. (1) Subject to this section, the Commissioner may at any time amend an assessment by making such alterations therein or additions thereto as he thinks necessary, notwithstanding that tax may have been paid in respect of the assessment.

(2) Where a business has not made to the Commissioner a full and true disclosure of all material facts necessary for his assessment, and there had been an avoidance of tax, the Commissioner may -

(a) where he is of the opinion that the avoidance of tax is due to fraud or evasion, at any time; or

(b) in any other case, within six years from the date when the notice of assessment is issued in accordance with section 101.

amend the assessment by making such alterations therein or additions thereto as he thinks necessary to correct an error in calculation or a mistake of fact or to prevent avoidance of tax, as the case may be.

(3) Where a business has made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the owner of the business in any particular shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the end of the tax year in which the assessment was made.

(4) No amendment effecting a reduction in the liability of the owner of a business under an assessment shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be made after the expiration of three years from the end of the tax year in which the assessment was made.

(5) Where an assessment has, under this section, been amended in any particular, the Commissioner may, within three years from the end of the tax year in which the amended assessment was made, make in or in respect of that particular, such further amendment in the assessment as,

in his opinion, is necessary to effect such reduction in the liability of the owner of a business under the assessment as is just.

(6) Where an application for an amendment in his assessment is made by the owner of a business within three years from the end of the tax year in which the assessment was made, and the owner of the business has supplied to the Commissioner within that period all information needed by the Commissioner for the purpose of deciding the application, the Commissioner may amend the assessment when he decides that application notwithstanding that that period has elapsed.

(7) Nothing contained in this section shall prevent the amendment of any assessment in order to give effect to the decision upon any appeal, or its amendment by way of reduction in any particular in pursuance of an objection made by the owner of a business or pending any appeal.

(8) Where -

(a) any provision of this Act is expressly made to depend in any particular upon a determination, opinion or judgments of the Commissioner; and

(b) any assessment is affected in any particular by that determination, opinion or judgment,

then if, after the making of the assessment it appears to the Commissioner that the determination, opinion or judgment was erroneous, he may correct it and amend the assessment accordingly in the same circumstances as he could under this section amend any assessment by reason of a mistake of fact.

(9) Notwithstanding anything contained in this section, when the assessment of the taxable income of any year includes an estimated amount of income derived by a business in that year from an operation or series of operations the profit or loss on which was not ascertainable at the end of that year owing to the fact that the operation or series of operations extended over more than one or parts of more than one year, the Commissioner may at any time within three years after ascertaining the total profit or loss actually derived or arising from the operation or series of operations, amend the assessment so as to ensure its completeness and accuracy on the basis of the profit or loss so ascertained.

(10) Nothing in this section prevents the amendment, at any time, of an assessment for the purpose of giving effect to the provisions of section 39(3) or section 48(5).

(11) Nothing in this section prevents the amendment of an assessment for the purpose of giving effect to section 2 (6) if the amendment is made within three years after the end of the tax year in which the assessment was made.

(12) Notwithstanding anything in this Act, the Commissioner may amend an assessment for the purpose of giving effect to section 66 if the amendment is made within six years after the end of the tax year in which the assessment was made.

(13) Except as otherwise provided, every amended assessment shall be an assessment for the purpose of this Act.

From a plain reading of Section 97(1) (2) (a) and (b) supra, it is evident that in cases where the Commissioner is of the opinion that a taxpayer **had not made** a full and true disclosure of all material facts for the assessment in respect of any assessment year and had thus avoided payment of tax **fraudulently or evasively**, the Commissioner has the power to amend that particular assessment subsequently **at any time**. In other words, there is no time limit in those cases preventing the Commissioner from reopening and making such amendments to the previous assessments. However, in other cases where such **non-disclosure** was presumably, **not due to fraud or evasion** by the taxpayer, the Commissioner has the power to amend that assessment only **within six years** from the date when the notice of the original assessment was issued. In other words, there is a statutory **limitation of six years** in such cases preventing the Commissioner from reopening and making such amendments beyond that limitation period. On the other hand, Section 97(3) stipulates that in cases where if a taxpayer **had made** a full and true disclosure to the Commissioner of all material facts necessary for the assessment, and if an assessment had already been made after that disclosure, then no amendment of the assessment increasing the liability of the taxpayer shall be made except to correct an error in calculation or a mistake of fact, and no such amendment shall be

made after the expiration of **three years from the end of the tax year** in which the assessment was made.

Now, coming back to the case on hand, in relation to the 2000 year amended assessment, the Commissioner claims that he was of the opinion that the appellant **had not made** a full and true disclosure of all material facts necessary for that assessment and had thus avoided tax payment; he has therefore, reopened and amended that assessment. A case of such **non-disclosure** obviously, falls under Section 97 (1) (2) (b) supra. Hence, the Commissioner in such cases, has the power to reopen and amend that assessment **within six years** from the date when the notice of the original assessment was issued. On the other hand, Section 97 (3) supra obviously refers to cases of **disclosure,** where the taxpayer **had made** a full and true disclosure to the Commissioner of all material facts necessary for the assessment. In such cases, the Commissioner has no power in law to reopen and amend that assessment after the expiration **three years** subject to the exceptions stated supra. Hence, it follows that if and only if the appellant had failed to make a full and true disclosure, the Commissioner is entitled to amend the 2000 year tax assessment on the 26 April 2004, since that date falls well within the said six-year limitation period.

Hence, the crucial question now arises as to whether the appellant **had made** a full and true disclosure to the Commissioner as required under Section 97 (3) above, in order to prevent the Commissioner from making amendment after the expiration **three years**. According to the Commissioner, the tax return and attached documents did not disclose sufficient information to allow a determination by him of whether the disposals of the individual units in the said Condominium were done to make a profit, or were the mere realization of some assets.

It is correct as submitted by the respondent that Section 97(3) of the Act is identical to a corresponding former provision in the Australian Income Tax Assessment Act (1936), which has been considered by Australian Courts on many occasions. While not binding our Courts in Seychelles, such cases however, provide significant guidance in interpreting our tax laws.

In the case of ***Austin Distributors Pty Ltd v FC of T (1964) 13 ATD 429*** the Australian Court has in fact, propounded a test for full and true disclosure in cases of this nature. This runs thus:

"If advice were to have been sought by the taxpayer whether or not the sum in question was.., taxable..., would the person from whom advice was sought have required more information than this return disclosed to the Commissioner?"

In other words, if advice was to be sought from a tax agent, a lawyer, the Commissioner or indeed the Court - was there some information not disclosed which would be important in framing that advice? The Commissioner argues that there was important information not disclosed to him. The critical information, which was not provided to the Commissioner, *was the purpose of the taxpayer's actions leading up to the disposals and the purpose of those disposals.* Indeed, to allow a proper decision on the assessability of the profits on disposal of property, as rightly argued by the Commissioner, it is necessary to know *the purposes of the taxpayer* in carrying out their actions.

In my considered view, *the intentions and purposes of the taxpayer* in carrying out their actions or transactions that affect or likely to affect their tax liability, may be revealed directly and openly by the taxpayer to the Commissioner by making a full and true disclosure of all material facts expressing those intentions and purposes explicitly in clear terms. This, I would call a **"voluntary disclosure"** if I may say so**.** On the contrary, when there is no such **"voluntary disclosure"** by the taxpayer, the said

intentions and purposes, may, of course be inferred from the circumstantial facts and information, which the Commissioner may possess or obtain through investigation carried out under the provisions of the Act. This, I would call a **"constructive disclosure"** if I may say so**.**

Now let me recount the *taxpayer's actions leading up to the disposals of the condominium units in the present case and the "constructive disclosure" of the purpose of those disposals.*

Obviously, in 1998 Remali Investment suddenly acquired a total of 999 shares in CSD out of the 1000 shares on issue and took over its control gaining its holding to 99.9% in CSD. Since then, the nature of its business objective and activity has drastically changed. Before the major acquisition, CSD was simply carrying on the business of leasing out the building to different tenants and lease related services. However, soon after the said acquisition, it started to convert the building into condominium, registered the units with the Land Registry under the provisions of the Condominium Property Act and started selling the units to others for a profit. In fact, in August 1998, the CSD - whose majority shareholder was then "Remali Investments" - carried out a major renovation work to the building 'Victoria House" incurring a cost of R l, 379,518 and also in 1999 it carried out a similar work at a cost of R62, 720. On the 24th March 1999, CSD appointed a land surveyor to survey and prepare plans to transform the building "Victoria House" into condominiums. Thereafter, CSD embarked on a process of subdivision and registration of the units. In fact, four floors of the Victoria House were subdivided into 33 units. In August 1999 the CSD registered those units with the Land Registry under the Condominium Property Act. Having thus converted the building into condominiums, CSD gradually started selling the individual units to third parties. The activity of its sale of the units

started in 2000 and continued up to 2003. In fact, the CSD, on 31 July 2000 sold the first unit in the building to a third party as per Document No.14 in file. In the following months and throughout 2001, 2002 and 2003, it sold all remaining units in the building to different parties. Indeed, all the units in the building were thus sold out during the period between 2000 and 2003. The CSD thus recorded substantial profits in its accounts on the sale of those units in each of the years 2000 to 2003.

From the sequence of all these actions, which CSD carried out over the relevant years, the only logical inference any reasonable tribunal can draw is the fact that the ***intentions and purposes*** of CSD behind all those actions ought to have been to make profit or derive income from disposing of the units. However, the CSD, whose control had then been taken over by "Remali Investments", as I see it, never made any **"voluntary disclosure"** (vide supra) of all material facts constituting those intentions and purposes in any of its tax returns submitted for the relevant years.

As invited by the appellant I looked at the disputed assessments in the context of events, which took place during the relevant years and the documents submitted by the appellant to the Commissioner while lodging the tax returns for those years. However, I find that none of those events or documents or any content thereof reveals the intention or purpose for which CSD in 1998 changed its line of business activity of generating income from leasing out the units to the one of selling them out for a profit.

It is also relevant to note that in ***AL. Hamblin Equipment Pty Ltd vs. FC of Taxes- 74 ATC 4001*** it was held that for there to be a full and true disclosure of all material facts for the purposes of assessable income, the taxpayer must disclose the purpose of its actions. Stephen J. stated therein:

"The purpose of the taxpayer at the time of acquisition is a fact and a highly material one and

it is apparent from the taxpayer's returns that this fact was not disclosed. That is, in my view, fatal to the taxpayer's contention that disclosure was full and true. It is well established that the disclosure required is of the relevant facts and not of the tax consequences which they may produce and it may seem to be demanding an excessive disclosure to require a taxpayer to volunteer the nature of the purpose actuating him in acquiring assets which he subsequently sells. However where the taxation legislation fixes upon a taxpayer's purpose as decisive of liability to tax, as does section 26(a), it appears to me to be inescapable that full disclosure calls for disclosure of the relevant purpose"

Although the results of transactions involving disposal of units were disclosed in the 2000 tax return and the profits were declared, those profits were evidently, characterized by the appellant as capital and not assessable income. These profits were therefore, excluded from the net income declared by the appellant. In effect, the sales were characterized as mere disposals of some of the assets of the company. The appellant did not address or reveal the underlying intentions, purposes and motivations of the company in its dealings with Victoria House from 1998 to 2000. In ***Austin Distributors Pty Ltd v FC of T (1964)13 ATD 429*** it was held that any disclosure which leaves the Commissioner to speculate as to some of the material facts, is not at all sufficient in order to constitute full and true disclosure. As rightly submitted by the Commissioner the intentions and purposes of a company are the intentions and purposes of those who control the company. To know the company's intentions and purposes, it is necessary to know the intentions and purposes of its management and controllers.

Obviously, the purpose of Remali Investments in taking over CSD in 1998 was not disclosed in the 2000 tax return or prior returns, nor was it disclosed in any other correspondence leading up to the original or first amendment of the 2000-year tax assessment. However, the purpose of Remali Investments in acquiring the shares in CSD was eventually disclosed to the Commissioner on 26 June 2003 (Document 12) – a voluntary disclosure - and it is that information which set in train the

process towards amending the 2000 year tax return a second time and so I find.

In the circumstances, I conclude that in relation to the 2000 year amended assessment, the CSD did not make a full and true disclosure of all the material facts to the Commissioner as contemplated under the Act. Hence, I find that Section 97(3) (supra) does not prevent the Commissioner from amending the original assessment despite the expiration of three years from the end of the tax year in which the original assessment was made. This finding of the Court answers the question no. 1 above.

Coming back the question no. 2 above, it is important to note that Section 21(1) of the Act reads thus:

"Subject to this Act the assessable income of a business includes the gross income derived, or deemed to be derived, from a source in Seychelles by the business, whether directly or indirectly, which is not exempt income"

It is the contention of the Commissioner that the profits on sale of the units received by the appellant during the relevant years were assessable income under section 21 of the Business Tax Act. In order to attract Section 21(1) the CSD transactions in question in my view, should satisfy three conditions namely, (1) the profits must be "income" (2) must have been derived from a source in Seychelles and (3) by the business activity it carried out directly or indirectly.

Obviously, the term "Assessable Income" is not defined in the Act. The Section obviously, does not restrict the scope of this term by defining what it means; rather it broadens the scope by using the word "include" in order to enlarge the meaning of the term. In short, it is an inclusive definition, which may cover all profits or income or gains except those specifically exempted by the statute.

Indeed, in **Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 429-30 (1955)** - referring to the statute's words "income derived from any source whatever", the US Supreme Court stated, "this language is used by the legislature to exert in this field 'the full measure of its taxing power.' . . . And the Court has given a liberal construction to this broad phraseology in recognition of the intention of the legislature to tax all gains except

those specifically exempted.

However, where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit... assessable to income Tax. But it is equally well established that enhanced values obtained from realization or conversion of securities may be so assessable, where what is done is not merely a realization or change of investment, but an act done in what is truly the - carrying on, or carrying out, of a business vide ***California Copper Syndicate (Limited and Reduced) v Harris (1904)5 TC 159.***

Therefore, in determining the application of section 21(1) the following question must be answered - Was the disposal of the units by CSD merely the realization of an asset, or was it an act of carrying on or carrying out a business?

Undisputedly, CSD acquired the land and built the building during the 1970's. It held the property for many years, several decades, all along obtaining only rental income. Although, as rightly submitted by the respondent that the company's original intentions are unknown, but it is reasonable to infer that it did not originally construct the property for resale at a profit by developing condominiums. In any event, there were not even the necessary legislations in place those days - in Seychelles - to create and regulate Condominium Properties. Hence, to my mind, no real estate developers of those days would have even thought about such business scenario. Evidently, the property was not originally acquired for profit-making by sale of condominiums, but which has been subsequently put to that use after the major takeover by "Remali Investments" and so I find.

It is also pertinent to note here that in the case of ***FC of Taxes vs. McClelland 69 ATC 4001 Barwick C.J.*** while considering the taxable nature of income derived from the property acquired as an inheritance, which was clearly not originally acquired for a profit-making purpose, the Court held thus:

"The realization of an inheritance even though carried out systematically and in a

businesslike way to obtain the greatest sum of money it will produce, this does not make the proceeds either profit or income for the purposes of the Act. But, if the inheritor adventures the inheritance as the capital of a business, for example, of land jobbing or developing, the income of that business will be taxable...according to ordinary concepts of income."

From the above, it is clear that although CSD did not originally acquire the property or construct the Victoria House for profit making by sale of its units, since 1998 it has however, changed its direction towards the business of developing condominium and selling its units for profit. This, undoubtedly, constitute an assessable income for the purposes of the Act.

The case in point is this respect is the famous "Whitfords Beach Case" - **Federal Commissioner of Taxes v Whitfords Beach Pty Ltd (1982) 56 ALJR 240-** the facts of which are pretty similar to that of the present case.

Whitfords Beach Pty Ltd was a company which held, for passive purposes, certain property for many years. Eventually the original shareholders sold their shares to new shareholders, who came with different intentions for the property. Their intentions were to subdivide and sell off the property for profit, which were carried out over successive years. In determining the assessability of the income, which the company derived from those sales, **Justice Gibbs C.J**. had to say this:

" In the present case I gravely doubt whether the profits arising from the development, subdivision and sale of the land would have been taxable if it had not been for the events that occurred on 20" December 1967 (sale of all shares in the company to new shareholders). Had that not occurred, the situation would have been analogous to that of the company in ***Scottish Australian Mining Co. Ltd v Federal Commissioner of Taxes***. *However, on 20" December 1967, the taxpayer was transformed from a company which held land... to a company whose purpose was to engage in a commercial venture with a view to profit. Counsel for the taxpayer submitted that it was not permissible to blur the distinction*

between the company and its shareholders. That of course is true, but in deciding whether what was done was an operation of business, it is relevant to consider the purpose with which the taxpayer acted, and, since the taxpayer is a company, the purposes of those who control it are its purposes."

In short, the takeover of Whitfords Beach by new shareholders who had the intention and ultimately carried out that intention of subdivision and sale of units was crucial in determining that there was a business of trading in property. Besides, Justice Gibbs C.J. made it clear when he stated thus:

"The purpose of those controlling the taxpayer was to engage in a business venture with a view to profit. Moreover, although the taxpayer was not formed for the purpose of selling land, after December 1967 it became a company which existed solely for the purpose of carrying out the business operation on which the new shareholders had decided to embark when they acquired their shares"

In the case of CSD, I find that the purpose of Remali Investments in acquiring all - save one - of the shares in the company was to subdivide and sell units in the building. This is also corroborated by the information revealed in an interview between a representative of the Commissioner and the substantial shareholder of Remali Investments Mr. Merali on 26 June 2003. From the time CSD was under new control, its business metamorphosed dramatically. It was transformed from a passive property owner into a company that acted with a scheme, planned to subdivide and sell the property for profit. It is evident that after the significance of his intention was explained to Mr. Merali, he sought to withdraw that statement by a letter dated 2 July 2003 to the respondent.

Moreover, I note that the actions of CSD from 1998 to 2003 are consistent with the Commissioner's understanding of its intentions in 1998. That is, to subdivide and sell the property. From the time Remali Investments gained control, CSD was in the business of selling units for a profit, it had

no other apparent business though it did continue to collect its routine rental income during the relevant years.

In the final analysis and for the reasons hereinbefore stated, I conclude that the profit, which the appellant derived during the relevant years from sale of the units in Victoria House is assessable income under section 21 of the Business Tax Act as it satisfies all three conditions stated supra namely, (1) the profits must be "income" (2) must have been derived from a source in Seychelles and (3) by the business activity it carried on indirectly for the purpose of making profit.

Having said that, I hold that the disposal of the units by CSD was not merely the realization of an asset; it was undoubtedly, an act of carrying on or carrying out a business. Remali Investments acquired control of CSD from the outset for the purpose of resale of the Victoria House with a scheme of developing it into condominiums and this action forms part of the normal trading activities of the business, in which "Remali Investment" had been and has been habitually engaged. Therefore, in my judgment, it is assessable income under Section 21(1) of the Act as any profit on disposal of the units will be ordinary income derived from the business.

Hence, I find answer to question no. 2 in the affirmative thus; "yes, the *profit on sale of the units is assessable under section 21 of the Business Tax Act"*

Obviously, the answers thus far found for the first two questions have substantially and effectively, disposed of this appeal. In the circumstances, I believe it is not necessary for the Court to determine the 3rd and the 4th questions, as they stand formulated in the alternative to questions 1 and 2.

In view of all the above, and taking all the circumstances of the case into consideration, I find no ground for disturbing the decision of the Commissioner of Taxes in this matter. His conclusion to disallow the appellant's objections to the 2000, 2001 and 2002 assessments or amended assessments cannot be faulted on any of the ground founded in law or on the facts, and am in agreement with that conclusion. The appeal is therefore, dismissed and I make no orders as to costs.

IN THE SUPREME COURT OF SEYCHELLES

.....

D. Karunakaran

Judge

Dated this 27th day of June 2008