

**Seychelles Development Corporation Ltd v
Commissioner of Taxes**

(2009) SLR 116

Davino SABINO for the appellant
Ronny GOVINDEN for the respondent

Judgment delivered on 5 October 2009 by:

KARUNAKARAN J: 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 levied against the appellant, namely, Seychelles Development Corporation Ltd for the tax years 1999, 2000 and 2001, hereinafter collectively referred to as the "relevant years".

The appellant is a company incorporated in Seychelles, whose principal activity - since its incorporation - had been the development of properties for profit. During the years particularly, in the 1960s, the appellant had acquired a large extent of land with a view to developing tourism facilities such as marina, golf, resort etc. According to the appellant, no planning permission for such projects was granted and a large portion of the company's land was compulsorily acquired by government in 1989. No compensation was paid and no land was ever returned by government. No tax loss was either claimed or given by the respondent. Since, the appellant was not able to use the land for its original purpose, it treated the land as part of the company's assets and started to sell the land piecemeal during the relevant years in order to realize its investment on assets. The sales of land during the relevant years were therefore, considered by the appellant as a sale of the company's assets and the income thereof as realization of its assets. Hence, the appellant, in its tax returns for the relevant years namely, 1999, 2000 and 2001 disclosed the profit on the sale of that property (the land) as income and claimed that those incomes were not assessable income for business-tax purposes under the Act. The respondent originally allowed the profit on sale of land as not assessable income and had accordingly, issued notice of (original) assessments for the relevant years impliedly ascertaining the non-taxable nature of such income for each tax year. However, the respondent subsequently, in May 2004 reopened those previous assessments of the relevant years, reassessed for each year and issued fresh Notice of Amended Assessments, taking into account the said profit on sale of land as assessable income in respect of the relevant years and increased inter alia, the assessment adding a fresh tax liability and penalties burdening the taxpayer. In essence, following are the details of the said Notice of Amended Assessments reissued by the respondent for each of the relevant years in dispute in this matter -

1. Against the original assessment for tax year 1999, the respondent reassessed and issued the Notice of Amended Assessment dated 11

May 2004 having levied inter alia, a business tax on the profit on sale of land, which income the appellant received during the tax year 1999.

2. Likewise, against the original assessment for tax year 2000, the respondent reassessed and issued the Notice of Amended Assessment dated 11 May 2004 having levied inter alia, a business tax on the profit on sale of land, which income the appellant received during the tax year 2000.
3. Likewise, against the original assessment for tax year 2001, the respondent reassessed and issued the Notice of Amended Assessment dated 11 May 2004 having levied inter alia, a business tax on the profit on sale of land, which income the appellant received during the tax year 2001.

Being dissatisfied with the said Notice of Amended Assessments issued by the Commissioner, for the tax years 1999, 2000 and 2001 the appellant exercised its right under section 104 of the Act and served on the Commissioner, its objections in writing to those amended assessments - vide letters dated 9 July 2004. However, the Commissioner - pursuant to section 105 of the Act - in his considered decision disallowed the objections. The appellant therefore, in terms of section 106 of the Act, requested the Commissioner to treat its 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 the 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. On the other side, the appellant through its counsel Mr Pardiwalla also filed a written defence of objection dated 4 August 2006 under section 108(2) of the Act, in response to the submission filed by the Commissioner.

With these background facts, 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. Although the parties have joined a number of ancillary issues on points of law and facts, as rightly conceded by Mr Sabino, counsel for the appellant, there are only two fundamental questions before the Court for determination that would effectively and substantially dispose of this matter. They are:

1. Has the Commissioner correctly interpreted and applied section 104 in rejecting the objection against the 1999 amended assessment to the extent it relates to the assessment of profits on the sale of land? And
2. Are the profits on the sale of land the company received in the tax years

1999, 2000 and 2001 are assessable income?

As regards the first question, in relation to the assessment of income in the tax-year 1999, the respondent has rejected the objection of the appellant on the ground of statutory time-limit stating that the Appellant has failed to file the objections within the statutory time-limits of 60 days from the date of service of the notice of assessment, as required under section 104 of the Act. On the other side, the appellant contends that the objections were filed within the time-limit of 60 days from the date of service of the notice of amended assessment. Hence, according to the appellant, its objections were not time-barred.

Indeed, section 104 of the Act reads thus:

- (1) Subject to subsection (2), the owner of a business *dissatisfied with an assessment under this Act* may, within sixty days *after service of the notice of assessment*, serve on the Commissioner a notice in writing against the assessment stating fully and in detail the ground for his objection.
- (2) A separate objection shall be served in respect of each assessment objected against.
- (3) Where the Commissioner has amended an assessment under this Act, the owner of a business shall have no further right of than he would have had if the amendment had not been made, except to the extent to which by reason of the amendment a fresh liability in respect of any particular is imposed on him or an existing liability in respect of any particular is increased.

On a plain reading of the above section it is evident that the meaning of the words used in subsection (1) namely, “dissatisfied with an assessment under this Act” and the notice of assessment, appear to be ambiguous in the sense, that if one gives those words their natural and ordinary meaning, it is not clear whether the term “an assessment” and its cognate “assessment” used therein (i) means only the original assessment or (ii) it means and includes all subsequent amended assessments as well. Thus, there are two possible constructions that can be given to the term “an assessment” and its cognate used by the legislature in this context. On the one hand, the first construction or approach is obviously, a restrictive one, if I may say so, since it purports to mean that a taxpayer shall have right to file objection within 60 days, only to the original assessment and shall have no right at all to file objections to any subsequent amended assessment after the expiry of 60 days following the original assessment. The second construction or approach is undoubtedly a liberal one since it purports to mean that a taxpayer shall have right to file objection not only to the original assessment but also to any subsequent amended assessment as well within 60 days after service of notice in respect of each and every such amended assessment, if any, which amends the previous one.

Having said that, I would simply ask: Which construction or approach is to be preferred “restrictive or liberal”, when there is an ambiguity especially, in the taxing statute?

It is truism that the legislature makes the laws and the judiciary interprets them. In the process of such interpretation, the role of the judiciary is to ascertain the meaning of the words used in the statute, by giving those words their natural and ordinary meaning and give effect to it. This is the golden rule. However, when there is an ambiguity in the use of words or where alternative constructions are equally open in a statute - like the one we come across in the present case - in my considered view, it is the duty of the Court to choose the meaning that would accord with reasoning and justice and prefer that alternative which will be consistent with the smooth working of the system, which the statute purports to be regulating. Undoubtedly, in the case on hand the liberal one is to be preferred among the two possible constructions. For, liberal construction or approach not only accords with reasoning and justice but also it is in line with the established rules of statutory interpretation as it stipulates that when there is an ambiguity in the provisions of any taxing statute, it should be construed in favour of the tax payer. As Lord Simonds rightly put it in the decision of the House of Lords - vide *Russell v Scott (Inspector of Taxes)* [1948] 2 All ER 1 - that 'the subject is not to be taxed unless the words of the taxing statute unambiguously impose the tax upon him'. It is also pertinent to note that ambiguity in interpretation has to be resolved in favour of the taxpayer vide *CIT v Kulu Valley Transport Co Pvt Ltd* [1970] 77 ITR 518 Supreme Court of India. Besides, the view that the benefit of doubt as to interpretation of law should also go to the taxpayer is now well established in many common law jurisdictions, as was held in the case of *CIT v Madhav Prasad Jatia* [1976] 105 ITR 179 (SCI) & *CIT v Vegetable Products Ltd* [1973] 88 ITR 192 (SCI).

Now, coming back to the case on hand, it is clear on the record that the Commissioner issued the Notice of Amended Assessment for the tax year 1999, on 11 May 2004, whereas the appellant filed its objection in response to that assessment on 9 July 2004. Applying the liberal construction to the term “an assessment” used by the legislature in section 104(1) of the Act, the intervening period obviously, falls well within sixty days after service of the amended assessment. Hence, I find that the Commissioner has misconstrued section 104 on the issue of time-limit and erred in rejecting the objection of the appellant against the 1999 amended assessment to the extent it relates to the assessment of profits on the sale of land. This answers the first question.

I will now turn to the second question: Are the profits on the sale of land the company received in the tax years 1999, 2000 and 2001 are assessable income?

As I see it, an effective answer to this question is found in the recent judgment of the apex Court - the Seychelles Court of Appeal - in *Central Stores Development Limited v Commissioner of Taxes* SCA No: 14 of 2008 delivered on 14 August 2009. The relevant facts and the issues that arose in the said case, which are quite similar to that of the present case, are in essence, as follows:

The Central Stores Limited, a company engaged in the business of property development, received income from profits on a piecemeal sale of its property (land and building registered under the Condominium Property Act) over a couple of years. The company treated those sales as a sale of the company's assets and the income received therefrom as realization of its assets. Hence, the company, in its tax returns for the relevant years disclosed the income from the sale of property (the land and building) as income but claimed that those incomes were not assessable income for business tax purposes under the Act. The Commissioner, in his original assessments accordingly, allowed such income as not assessable; but, subsequently - after a couple of years - reopened those assessments, reassessed and issued the Notice of Amended Assessments treating those incomes as assessable and increased the tax liability. The Central Stores objected to those amended assessments but the Commissioner rejected their objection. The matter was referred to this Court on appeal preferred by the Company. This Court after hearing the appeal on the merits upheld the decision of the Commissioner. This Court found in its judgment dated 27 June 2008 that the profits on the sale of property the company had received in the relevant tax years were assessable income under the Seychelles Business Tax Act. Although there is no specific and unambiguous provision governing such assessment, this Court found so, by placing reliance on the Australian case law - vide *FCT v Whitfords Beach Pty Ltd* 82 ATC 4031, as well as by drawing an analogy from the Australian Income Tax Act to iron out the creases found in the Seychelles Business Tax Act. However, the Court of Appeal disapproved of this approach and reversed that finding in its judgment cited supra and held that such profits were not assessable income under the Seychelles Business Tax Act, which in the words of their Lordships, "lacks clarity and precision" on taxability of such income .

Obviously, the core issue in the present case is identical to the one determined by this Court in the *Central Stores* cited supra, which determination was subsequently, reversed by the Court of Appeal. The crux of the issue is whether the profit on sale of a company's assets is assessable income for business tax purposes, and whether the Commissioner of Taxes is right in reopening and levying business tax on those incomes, in the absence of a clear and unambiguous provision in the Act, and in the absence of any taxing statute to govern the capital gains tax in Seychelles.

To resolve the issue, I believe, it is important to restate what the Court of Appeal has stated in *Central Stores* supra. Please, forgive me for quoting *in extenso* the relevant excerpts from the judgment, which reads thus:

The Law: The law governing matters in issue in this appeal is embodied in the Business Tax Act, 1987. It is a piece of legislation which sometimes poses problems of comprehension even to legal practitioners. Whereas we are of the view that the Act does not suit the present needs of our business community, this appeal must be adjudicated upon in accordance with the law as it stands.

Section 97 of the Act is most pertinent to this appeal and we quote the first five of thirteen sub-paragraphs thereof:

- (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 issue 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 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.

Registration: The Appellant had a condominium project for the property known as Victoria House. It is common ground (see page 5) that in March 1999, the Appellant obtained the services of a surveyor to subdivide the property into 33 (thirty-three) condominium units. In August 1999 it registered these units in the Land Registry, under the Condominium Property Act (page 5) and sale of the units commenced in July 2000. It is trite law that registration gives notice to the whole world. Hence, registration gave notice to the Commissioner, of the project and its state of advancement as at the date of registration.

Full and true disclosure: The Appellant is required under the Act, to make a “full and true” disclosure of all facts material to and necessary for tax assessment by the Commissioner. These facts include profits made during the year of assessment. In our understanding, “full” disclosure means disclosure of matters within the knowledge of the tax payer and which are necessary for assessment by the Commissioner.

Fraud: It is pertinent to note that, in the present case, the Commissioner has not made any allegation of fraud or malpractice on the part of the Appellant. In our jurisdiction, fraud must be pleaded and proved; citizens benefit from a rebuttable presumption of honesty. Section 97.(2) (a) gives to the Commissioner power to amend an assessment and make such alterations as he thinks fit and necessary “where he is of the opinion that the avoidance of tax is due to fraud or evasion, at any time”; this not being the case, the sub-section has no application.

The Appellant contends that because it had made “full and true” disclosure in its returns and attached documents, the Commissioner had no power to reassess as taxable, profits he had initially assessed as non-taxable...

As we have stated earlier in this judgment (page 8, para. [7.1), I am of the opinion that our Business Tax Act 1987 does not suit the requirements of the business environment in this country. According to both the Commissioner and the learned Judge, our Act is modeled on the Australian Income Tax Assessment Act, 1936. Indeed, the learned Judge commented as follows: “... it is correct as submitted by the Respondent, that Section 97(3) of our Act is identical to the corresponding former provision in the Australian Income Assessment Act (1936)” (Page 36, record). Be that as it may, as was stated by Raulatt J in *Cape Brandy Syndicate v. IRC* (12 TC 358) “A subject is only to be taxed upon clear words, not upon intendments or upon equity” of an Act. Any taxing Act of the Legislature is to be construed in accordance with this principle ... in a taxing Act one has to look mainly at what is clearly said.

Even procedure must be reformed. Following the Australian model, a unique double-appeal system - to the Supreme Court and to this Court -, hitherto unknown in our jurisdiction, has been introduced.

We are informed that the Australian legislation of 1936 has been updated, whereas we are still laboring under provisions of a law which above all lacks clarity and precision.

What is required is legislation which is clear, easily understood and business friendly. The ultimate objective is to facilitate the collection of revenue, in a spirit of mutual understanding, devoid of unnecessary confrontation. Perhaps, a more user-friendly conciliatory system should be considered as a more effective process for resolving differences.

The Minister for Finance has recently announced that the fiscal policy and tax collection procedures are being reconsidered. Hence, the timing is most opportune to consider the above suggestions. We are of the view that cases like the present one, which are costly and time consuming, should in future be resolved with greater fluidity.

For the reasons stated above and based on the same ratio decidendi given by the apex Court in its judgment in *Central Stores* (supra), I find that the profits on the sale of land the appellant received in the tax years 1999, 2000 and 2001 are not assessable income. I am loath to accept the contention of the Commissioner of Taxes to the contrary, in this respect. Therefore, I uphold the objection of the appellant, the Seychelles Development Corporation Limited contained in its letter dated 9 July 2004 against the Business Tax Amended Assessment issued by the Commissioner of Taxes dated 11 May 2004 in respect of income/profits on the sale of land the appellant received in the tax years 1999, 2000 and 2001. Consequently, the reassessment for the relevant years and the decision of the Commissioner dated 13 February 2006, disallowing the objection of the appellant is hereby set aside.

Accordingly, I allow the appeal and make no order as to costs.

Record: Court of Appeal (Civil No 6 of 2006)