IN THE SUPREME COURT OF SEYCHELLES

MOORINGS (SEY) LTD **APPELLANT**

VS

THE COMMISSIONER OF TAXES **RESPONDENT**

Civil Appeal Side No: 14 (A) of 2008

Mr. K. Shah for the Appellant
Ms. A. Madeleine for the Respondent

JUDGMENT

Burhan J,

This is a referral to the Supreme Court by the Commissioner of Taxes in terms of section 108 of the Business Tax Act Cap 20 (hereinafter referred to as the said Act).

In terms of section 104 of the said Act, the owner of a business if dissatisfied with an assessment under the said Act may within 60 days of the notice of assessment, serve on the Commissioner an objection in writing against the assessment, stating fully and in detail the grounds of his objection.

The Commissioner shall thereafter under section 105 of the said Act consider the objection and may either disallow it or allow it either wholly or in part and shall serve the owner of the business with written notice of his decision.

The owner of the business if dissatisfied with the decision of the of the Commissioner made under section 105, may within 60 days, in terms of section 106 of the said Act, request the Commissioner to treat his objection made in terms of section 104 of the said Act as an appeal and forward it to the Supreme Court.

The Commissioner within 60 days after receiving the request from the owner under section 106 as set out above subject to section 109 (not applicable to this instant case) shall refer the objection made in terms of section 104 as an appeal to the Supreme Court.

Having set out the law under which this case was referred to the Supreme Court by the Commissioner of Taxes, the facts of this case as admitted by the appellant and the respondent are that the appellant in this case Moorings (Seychelles) Ltd is a company that was incorporated in the Seychelles and it is further admitted by parties that the appellant had a contract with Moorings Ltd (a company registered in the British Virgin Islands and located in the United States hereinafter referred to as the parent company) for the management of yacht charter services in the Seychelles.

The Respondent the Commissioner of Taxes submits that the appellant had lodged the tax returns for the year 2003, 2004 and 2005 and an audit revealed that the appellant was declaring as income for business tax purposes 0-30% of the amount that the client using the yacht had paid to the parent company. Thereafter the returns of the appellant were amended by the respondent Commissioner from 0-30% to 100% of the amount paid by the client to the parent company.

It is the contention of the appellant that according to its contract with the parent company it is not the appellant that contracts directly with the clients but that it is the parent company that contracts directly with them. The arrangement between the parent company and the appellant is that a fee calculated at 30% of the fee paid by the client to the parent company is paid to the appellant by the parent company as its fees for management and logistic support of the yacht chartering service. It is the appellant's contention that the yachts are only managed by the appellant to provide the charter for the parent company. Further it is the appellant's position that it is the parent company that makes available to the appellant a fleet of sailing boats for chartering purposes and also purchases and ships to the appellant spare parts for the operation of the said fleet of sailing boats. In fact Articles 1 and 2 of the said Yacht Charter Agreement contract between the appellant and The Moorings Ltd (parent company) filed in the record, sets out in detail the obligations of the appellant and the parent company while Article 4 of the contract sets out the financial arrangements between the two parties. It is to be noted that the Articles of the contract corroborate the position taken up by the appellant.

It is the contention of the respondent that the aforementioned contract between the appellant and the parent company is void in terms of section 179 of the Business Tax Act as it is a contract designed to defeat taxation.

Section 179 of the said Act reads as follows;

"Every contract, agreement or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly-

(a) *altering the incidence of any business tax;*

(b) *relieving any person from liability to pay any business tax or make any return;*

(c) *defeating any duty or liability imposed on any person by this Act; or*

(d) *preventing the operation of this Act in any respect,*

be void as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose."

It is submitted by the appellant that 100% of the payment made by the client is not received by him. Quiet understandably the client pays not only charges for the yacht chartering services but also for other services including airline passage, hotel accommodation, tour operators and travel agents services as required by him. All these payments have been made in this instant case to the parent company and an amount apportioned for the services provided by the appellant. It would therefore be unfair to tax the appellant for anything other than the payment received by him for the services provided by him. The Commissioner has not taken into consideration that the contract on its face value is based on normal business practice of tour operators and charterers. On perusal of the said contract there is nothing to establish that the contract has the purpose or effect set out in section179 of the said Act.

Further it is apparent that that the Commissioner of Taxes has based his assessment of the assessable income as set out in section 21 of the said Act which reads as follows;

"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 to be noted that "subject to this Act" refers to the "special cases" set out in section 67 onwards. Section 69 refers to the taxable income of a ship owner or charterer and reads as follows;

(1)Where a vessel belonging to or chartered by a person whose principal place of business is out of Seychelles carries passengers, livestock, mails or goods loaded in Seychelles, five percentum of the amount paid or payable to him in respect of such carriage, whether that amount is payable in or out of Seychelles, shall be deemed to be the taxable income derived by him in the Seychelles."

(2)The master of a ship or the agent or other representative in Seychelles of the owner or charterer of a vessel, shall when called upon by the Commissioner by notice served by him or by any other notice to him, make a return of the amounts so paid or payable.

For all purposes it appears that the appellant falls into the category set out in section 69(2) and has complied with the requirement contained therein by making a return of up to 30% of the income received by the parent company from the client and therefore the facts contained in the ***Nathan v Federal Commissioner of Taxation [1918] HCA; and Thorpe Nominees Pty Limited v The Commissioner of Taxation of the Commonwealth of Australia [1988] FCA 378*** are not applicable as according to the said Act in the Seychelles a "special case" scenario exists in respect of ship owners and charterers and thus it would be unfair to

calculate the assessable income in this instant case in terms of section 21 of the said Act.

Therefore this court holds that in this instant case as the facts set out a " special case" the assessment should be based on section 69 which overrides the provisions contained in section 21 of the said Act.

M. BURHAN

JUDGE

Dated this 29th day of July 2011