MILL HILL v REVENUE COMMISSIONER

(2013) SLR 403

Alton for the appellant
D Esparon for the respondent

3 October 2013 CA 1/2009

KARUNAKARAN J

[1] This is an appeal preferred under s 106 of the Business Tax Act - hereinafter referred to as the "Act" - against the decision of the Revenue Commissioner - hereinafter referred to as the "respondent" - on the amended assessment of business tax payable by the appellant, namely, Mill Hill Pty Ltd for the tax years 2000, 2001, 2002, 2003, 2004, 2005 and 2006 hereinafter collectively referred to as the "relevant years".

[2] The appellant, Mill Hill Pty Ltd - hereinafter referred to as the "MHPL" - is a company. This was incorporated in Seychelles on 26 July 1998. According to its Memorandum of Association, it was established to acquire immovable property by way of purchase or lease, acquiring shares in other companies that deal in immovable property, carrying out the business of leasing immovable property and carrying out the business of property development and management. On 28 July 1998 the company acquired a plot of land parcel V5242 (hereinafter called the "property") from La Moutia (Pty) Ltd for the sum of R 1,193,031.91, situated at La Louise, Mahé. The property included land and a building, which comprised a restaurant, kitchens, storage area, an office and living quarters. In fact, the property previously was owned by one "Vera Doreen Georges". On 9 April 1993, the La Moutia (Pty) Ltd represented by its directors Mr Melton Pierre Ernesta and Mrs Georgette Suzanne Ernesta purchased the property from the previous owners for R 500,000.

[3] Subsequent to the sale of the property, Mrs and Mr Ernesta leased out the property to the appellant. This was done initially through the entity "La Moutia (Pty) Ltd" and later by Mrs Ernesta in her own right registered with tax office as a sole trader restaurateur.

[4] 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 Revenue Commissioner in respect of the annual returns lodged by the appellant for the relevant years.

[5] On 16 October 2001 the appellant registered with Tax Office and declared on its application that it commenced business on 27 July 1998 with its main activity being real estate. Subsequently, the appellant lodged its annual returns pursuant to s 88 of the Act. Within these returns it valued the property at R 2,300,000 (land R 680,000 and building R 1,700,000) and claimed depreciation on the building on a cost basis as follows:

Year	Depreciation Claimed	Resulting Tax Shortfall
2001	340,000	100,844.00
2002	170,000	90,839.20
2003	170,000	69,999.40
2004	170,000	64,698.00
2005	170,000	17,770.20
2006	170,000	2,167,75

[6] Based on the information provided in the annual returns and other information at his disposal, the Commissioner assessed the returns pursuant to s 93 of the Act and informed the appellant of the assessments. In fact, after presumably securitizing and having accepted the annual returns furnished by the appellant for the relevant years, the Commissioner issued a Notice of Nil Tax Liability assessment to the appellant pursuant to s 93 of the Act, which reads 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.
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> (2) Where the Commissioner has made any adjustment to the return submitted by a business, he shall notify the business of any adjustments made.

[7] On 1 April 2007, the Commissioner initiated an audit (case number l392) investigating the taxable income of Mill Hill over the relevant years. During the audit, facts surrounding the depreciation treatment of the property were discovered and subsequently the Commissioner proceeded to amend the assessments of Mill Hill for all the relevant years by (among other things) increased tax liability by disallowing the depreciation of the property pursuant to s 50(1) of the Act.

[8] On 19 August 2008, the appellant lodged objections to the 2001 to 2006 amended assessments pursuant to s 104 of the Act. However, the Commissioner in his considered decision - in terms of s 105 of the Act - disallowed those objections. The appellant therefore, in terms of s 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 s 106(1) of the Act and hence is the instant appeal before this Court. The grounds of objections and the

contention of the respondent in reply thereto were in essence, fall under three grounds as follows.

First ground of objection

[9] The first ground of objection of the appellant was based on the application of s 97(3) of the Act (which is about the "Amendment of assessments"). This section reads thus:

> 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.

[10] According to the appellant, it made a full and true disclosure in all its annual returns to the respondent, of all the material facts necessary for its assessments with respect to relevant years. The respondent also made his assessments after those disclosures and accordingly issued the Notice of Nil Tax Liability Assessment to the appellant. By virtue of s 97(3) of the Act, no subsequent amendment of the assessment increasing the liability shall be made after the expiration of three years from the end of the tax year in which the assessment was made. Therefore, the appellant contends that in the instant case the amendment of assessment made after three years, that was in 2008 by the respondent, for the tax years 2001, 2002, 2003, 2004 and 2005 is time-barred and hence not tenable in law.

[11] However, the respondent contends that the appellant did not make full and true disclosure in their annual returns of the material facts pertaining to depreciation on property. Hence the amendments made were not subject to the statutory period of three year limitation. The respondent accordingly amended the assessment disallowing the depreciation claimed by the appellant and imposed an Additional Tax or Omitted Income Penalty pursuant to s 143(2) of the Act for the relevant years; the details of which are as follows:

Annual Return Year	Omitted Income Penalty
2000	97,750.00
2001	88,052.00
2002	56,460.00
2003	52,183.00
2004	11,918.00
2005	1,182.00
2006	4,011.00

Total 311,556.00

Second ground of objection

[12] The second ground of objection was based on the application of s 50(1) of the Act (which is about the "Acquisition of depreciated property"), which section reads thus:

> Where either before or after the commencement of this Act a business has acquired any property in respect of which depreciation has been allowed or is allowable under this Act or the previous Act, the business shall not be entitled to any greater deduction for depreciation than that which would have been allowed to the person from whom the property was acquired if that person had retained it;
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> Provided that, where under section 48 an amount is included in the assessable income of the business selling the property, the business acquiring the property shall be allowed depreciation calculated on the sum of that amount and the depreciated value of the property under this Act immediately prior to the time of the sale.

[13] According to the appellant, it correctly claimed depreciation at the rate specified under paragraph 9 of the Third Schedule, which permits such deduction.

[14] Hence, the appellant contends that the property on which depreciation was claimed falls within the ambit of law and correctly constitutes an allowable deduction.

[15] However, the respondent contends that s 50 should be interpreted using a purposive approach to accord with the "Fiscal Policy" of the Government; that is to encourage the investment in new assets within Seychelles such as construction of hotels or commercial premises. Hence, generous capital allowances such as depreciation on capital assets were given on such investments. The appellant did not construct the building in question. Hence, he cannot be given the benefit of allowable deduction based depreciation on capital assets. Besides, it is the contention of respondent that the actual wording of s 50(1) to wit: "property in respect of which depreciation has been allowed or allowable" implies that since deduction of the depreciation was allowable under the Act, the appellant is not entitled to any greater deduction for depreciation than which would have been allowed to the previous owner La Moutia (Pty) Ltd had it retained the property. Therefore, the respondent contends that appellant's claims for depreciation were not allowed.

Third ground of objection

[16] The third ground of objection relates to the payment of tax for late lodgments and penalties. In a letter dated 20 October 2008, the Commissioner allowed the objection in part pursuant to s 105 of the Act. The objection to the calculation error was allowed whereas all other objections were disallowed. The appellant does not dispute that the respondent's power and rights to impose penalties under the Act for late lodgments or other lawful reasons. However, the appellant objects to a taxpayer being penalized after being misled by actions of the Commissioner.

[17] On the other side, the respondent contends that the Late Lodgment Penalties

(LLP) totaling R 15,285.00 were imposed on the appellant as it lodged the annual returns late for the tax-year 2002 and 2003, which were in fact, lodged after a delay of 295 days and 112 days from their respective due dates. Therefore, the respondent applied both ss 143(1) and 143(2) of the Act to late lodgments of annual returns and imposed the LLP accordingly.

[18] 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 relevant tax years.

[19] I meticulously perused the appellant's grounds of 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 submission 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.

[20] First of all, I wish to observe that 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.

[21] I will now proceed to examine the fundamental issues raised by the parties on points of substantive law and on the facts restricting only to the grounds stated in the appellant's objection served under s 104 of the Act.

[22] On ground no 1, it is important to peruse s 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. This section 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.
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> 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
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> (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 theamendment 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.

[23] From a plain reading of ss 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.

[24] On the other hand, s 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.

[25] Now, coming back to the case on hand, in relation to the amended assessments for the relevant years, 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 nondisclosure obviously, falls under s 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.

[26] On the other hand, s 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 previous tax assessment on 24 July 2008, since that date falls well within the said six-year limitation period.

[27] Now, the crucial question arises as to whether the appellant had made a full and true disclosure to the Commissioner as required under s 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 on the issue of allowable deduction based on depreciation.

[28] It is pertinent to note that s 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.

[29] In the case of Austin Distributors 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?

[30] In my considered view, any material fact or information that affects or likely to affect the tax liability, may be revealed directly and openly by the taxpayer to the Commissioner by making a full and true disclosure of them explicitly - in unambiguous terms - in his annual returns. This, I would call a “voluntary disclosure”. On the contrary, when there is no such “voluntary disclosure” made, either through inadvertence or unintentional omission on the part of the taxpayer or an ambiguity or lack of information exists in the annual returns, then the Commissioner is under an obligation first to request the taxpayer to furnish those facts and information, which

he deems necessary for the purpose of making his assessments or adjustments. If the taxpayer is not cooperative, he may obtain them through investigation carried out under the provisions of the Act. This, I would call a "constructive disclosure".

[31] Obviously, in the instant case, after receiving the annual returns from the appellant, the Commissioner did not require more information than the appellant's return disclosed to him. Presumably, he was satisfied and accepted the information sufficient as disclosed in the returns. Therefore, he proceeded to issue the Notice of Nil Tax Liability Assessment to the appellant. Even if one assumes for a moment that if advice had been sought by the taxpayer from the Commissioner himself, whether or not the depreciation he claimed in the annual return constitutes an allowable deductions, most probably he would not have sought and in fact, he did not seek more information from the appellant than the appellant's return disclosed to him. In the circumstances, I find that the appellant had made a full and true disclosure to the Commissioner as required under s 97(3) above. This certainly, prevents the Commissioner from making amended assessments after the expiration three years from the end of the relevant tax years namely, 2000, 2001, 2002, 2003, 2004 and 2005. Accordingly, I allow the appellant's objections in this respect based on ground no 1 above and uphold the contention of the appellant that in the instant case the amendment of assessment made after three years, that was in 2008 by the respondent, for the tax years 2001, 2002, 2003, 2004 and 2005 are time-barred and hence not tenable in law save 2006. Besides, I hold that issuing of a Nil Tax Liability Assessment constitutes an assessment pursuant to s 93 of the Act for the simple reason that in law, "assessment" means "the ascertainment of the amount of taxable income if any, and of tax payable thereon" vide s 2 of the Act. In a particular case, if the amount of taxable income is ascertained to be nil or zero and consequently, the tax payable thereon would also be nil or zero. This does not mean there was no assessment. What constitutes "assessment" for all legal intents and purposes is the act or process of ascertainment, not the quantum of the amount ascertained, which could range from zero to any other positive integer that is being ascertained. With due respect, I beg to differ with the respondent's interpretation in this respect.

[32] Now, I will move on to ground no 2 pertaining to the application of s 50(1) of the Act (which is about the "Acquisition of depreciated property"). It is evident from s 40 of the Act, that in calculating the taxable income of a business, the total assessable income derived by the business during the tax year shall be taken as a base, and from it there shall be deducted all allowable deductions of the business and such other sums as may be prescribed.

[33] In passing, I should mention that in interpreting the provision of law under s 50, both parties bring in the "marginal note" (Acquisition of depreciated property) as an aid to interpret it. As a word of caution it is not permitted and does not accord with the principles of statutory interpretation. In fact, the marginal notes often found printed at the side of sections in an Act, which purport to summarize the effect of the sections, have sometimes been used as an aid. However, the weight of the authorities show that they are not part of the statute and so should not be considered for they are not inserted by the legislators nor under the authority of Legislature but by irresponsible persons vide In re Woking Urban District Council (Basingstoke Canal) Act 1911 [1914] 1 Ch 300 per Phillimore LJ at p 322.

[34] In fact, s 50(1) states that if the taxpayer has acquired any property in respect of

which depreciation had already been allowed or is allowable under this Act or the previous Act, he shall not be entitled to any "greater deduction for depreciation than that which would have been allowed to the person from whom the property was acquired if that person had retained it".

[35] Obviously, this section does not deny the taxpayer his depreciation claims altogether on the depreciated properties he acquired from anyone, but it only restricts the quantum of deduction so that such deduction does not exceed what had been allowed before to the previous owner or would have been allowable to the person from whom the property was acquired.

[36] In the instant case, in the absence of any evidence before the Commissioner - especially when he was in doubt as to whether the previous owner had claimed depreciation on the property or not, and more so without ascertaining whether depreciation was in fact, allowed before or allowable for the benefit of the previous owner - in my considered view, it is not lawful for the Commissioner to deny the appellant's claim for depreciation under s 50(1) of the Act based on guesswork or speculation.

[37] The appellant has claimed depreciation on his property at the rate specified under paragraph 9 of the Third Schedule, which reads thus:

> In relation to all building, plant, and articles owned by a business, other than a hotel or building referred to in paragraph 5 and 6, acquired or installed ready for use or the construction of which commenced on or after January 1, 1995 the following rates of depreciation shall apply.

[38] Obviously, it is evident from the above paragraph 9 of the Third Schedule depreciation at rates specified thereunder, shall apply to any building that had been acquired by the taxpayer after 1 January 1995. It is interesting to note that no distinction is made herein between the properties which were previously subjected to depreciation deductions by the previous owners and the ones which were not. Hence, in my considered view, it is lawful for the appellant or any other taxpayer for that matter, to claim depreciation, if he had acquired that immovable property after 1 January 1995 as part of his initial investment cost on capital assets. Therefore, I hold that the appellant is entitled to claim depreciation on the building on a cost basis as he did in his annual returns for the relevant years.

[39] I will now move on to ground no 3, which relates to the payment of tax for late lodgments and penalties. The appellant does not dispute that the respondent's power and rights to impose penalties under the Act for late lodgments or other lawful reasons. However, the appellant objects to a taxpayer being penalized after being misled by actions of the Commissioner.

[40] On a careful examination of the records, it is evident that the appellant has lodged the annual returns late for the tax years 2002 and 2003, which were in fact, lodged after a delay of 295 days and 112 days from their respective due dates. Therefore, the respondent applied both ss 143(1) and 143(2) of the Act to late lodgments of annual returns and imposed the LLP accordingly. Hence, the decision of the Commissioner cannot be faulted for imposing the Late Lodgment Penalties

(LLP) totaling R 15,285.000 on the appellant. Therefore, I see no merit in the appellant's objection on ground 3 above, which objection is liable to be dismissed.

[41] Obviously, the determination on all three grounds have substantially and effectively, disposed of this appeal. In summing up, for the reasons given hereinbefore, I make the following declarations and orders:

> 1) the amendments of assessment made after three years, that was in 2008 by the Commissioner, for the tax years 2001, 2002, 2003, 2004 and 2005 are time-barred. They are not tenable in law. Accordingly, all those amendments of assessment are hereby set aside. For the avoidance of doubt, I hold that the Nil Tax Liability Assessment notices issued by the Commissioner for the said tax years constitute valid assessments, which are final and still binding the parties;
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> 2) the deduction claims made by the appellant in its annual returns for the tax years 2000 to 2006 for depreciation on the building are allowable deductions. The Commissioner's orders to the contrary disallowing those claims are hereby set aside; and
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> 3) the Late Lodgment Penalties (LLP) imposed by the Commissioner on the appellant, in the total sum of R 15,285.000 for the tax years 2002 and 2003 are valid in law. The appellant is liable to pay the said sum to the respondent.

[42] In view of all the above, the appeal is therefore partly allowed and I make no orders as to costs.