

SUPREME COURT OF SEYCHELLES

Reportable/Not Reportable/Redact

[2021] SCSC ...*453*

MA 25/2021

(Arising in CS07/2019)

In the matter between:

**THE ATTORNEY GENERAL
FOR THE COMMISSIONER GENERAL OF THE
SEYCHELLES REVENUE COMMISSION**
(rep. by Mr. Hemanth Kumar)

Applicant

and

ISLAND CONSTRUCTION COMPANY LIMITED **Respondent**
(rep. by Joel Camille)

Neutral Citation: *Commissioner General v Island Construction Company Limited*
(MA25/2021) [2021] SCSC ...*453*... (23 July 2021).

Before: E. Carolus J

Summary: Application to charge property as lien for unpaid revenue - section 27(2) of the Revenue Administration Act.

Heard: 1st April 2021

Delivered: 23 July 2021

ORDER

The application to charge Title Numbers B1404, B1940 and S2773 belonging to Mr. Franky Petrouse in his capacity as Public Officer and Director of the company Island Construction Company Limited, as lien for unpaid revenue owed to the Seychelles Revenue Commission by the company is dismissed.

RULING

CAROLUS J

Background

- [1] This Order arises out of an application made under section 27(2) of the Revenue Administration Act ("RAA") for an order directing the Registrar General / Land Registrar to register a charge in favour of the Seychelles Revenue Commission ("the SRC") on

certain immovable properties belonging to Mr. Franky Petrousse namely land parcels B1404, B1940 and S2773.

- [2] The application arises out of CS No.07/ 2019 (the “head suit”) in which the Commissioner General of the SRC (plaintiff) seeks to recover unpaid revenue (taxes) in the sum of SCR 24,355,141.79 from Island Construction Company Limited (defendant) represented by its Public Officer and Director Mr. Frankie Petrousse. The applicant and respondent in the present application are plaintiff and defendant respectively in the head suit.
- [3] The application is made by way of Notice of Motion supported by an affidavit sworn by Ms. Thirah Ah-Kong (“the affidavit”), an employee of the SRC who avers that she is duly authorised by the Commissioner General by Special Power of Attorney (duly exhibited) to represent the SRC in the head suit out of which the present application arises. Supporting documents are also attached to the Notice of Motion.
- [4] Counsel for the respondent has raised two pleas in *limine litis* on the basis of which he moves for dismissal of the application with costs, reserving his objections on the merits.
- [5] The Court heard oral submissions from counsels for both parties which will be referred to in detail below.

Pleas in Limine Litis

- [6] I will first deal with the second plea in limine litis which is that “*Land Title B1404 is not registered in the name of Mr. Franky Petrousse and hence cannot be made subject of an order as prayed for by the applicant*”. During the course of the proceedings counsel for the applicant stated that he would not be pursuing the application insofar as it concerns parcel B1404 as it no longer belongs to Mr. Petrousse. It is not disputed that the two remaining land parcels B1940 and S2773 are registered in the name of Mr. Petrousse.
- [7] In terms of the first plea in limine litis, the defendant claims that section 27(2) of the RAA does not empower the SRC to charge the property of Mr. Petrousse, given that the proceedings in the principal suit are brought against the defendant Island Construction Company Limited who is the taxpayer, and not against Mr. Petrousse personally. It reads as follows:

(1) Defendant submits that the application is incompetent ... in that section 27(2) of the Revenue Administration Act does not authorize the Seychelles Revenue Commission to obtain any order of the Court to register a Charge against property belonging to a third party other than the taxpayer itself. In the present case, the taxpayer remains the Defendant and not Franky Petrousse. On the premise that there is no proof that the Defendant has property in Seychelles, the application must fail.

[8] In order to deal with this point, the status of Mr. Petrousse in the principal suit must first be clarified. In the caption of the plaint the defendant Island Construction Company Limited is stated to be “Represented by its Public Officer and Director Mr. Frankie Petrousse Bois De Rose, Mahe”. In paragraph 2 of her affidavit Mrs. Thirah Ah-Kong avers that the defendant company is represented in the principal suit by Mr. Frankie Petrousse as its Public Officer, Chairman /Managing Director and Director.

[9] The issue regarding Mr. Petrousse’s status and whether the plaint in the principal suit was wrongly suited was settled by a ruling of this Court in *Attorney General of Seychelles for the Commissioner General of Seychelles Revenue Commission v Island Construction Company Limited represented by Mr Frankie Petrousse* (CS 07/2019) [2019] SCSC 1062 (29 November 2019). That ruling arose from a plea in limine litis filed in the principal suit by the defendant to the effect that the plaint was wrongly suited firstly because Mr. Petrousse was no longer the Public Officer of the defendant company because he had delegated all his powers as a public officer to one Mr. Pierre Quatre by a power of attorney, and secondly because he no longer resides in Seychelles. The Court found that Mr. Quatre was not appointed as Public Officer of the company for the reason among others, that the provisions of the RAA relating to the re-appointment of a Public Officer had not been complied with and stated:

Having found thus, I cannot find otherwise than that Mr. Petrousse must be taken to be the public officer of the defendant company until another person is appointed to that position in accordance with section 39(3) of the Revenue Administration Act.

[10] As for the defendant’s argument that Mr. Petrousse could not be a Public Officer of the defendant company because he no longer resided in Seychelles, the Court found that there

was insufficient evidence to show that Mr. Petrousse was not a “resident person” as defined by the relevant legal provisions of the RAA and the Business Tax Act.

- [11] The Court further found that Mr. Petrousse was properly cited as representing the company as a director thereof. In addition I wish to make the following observations in regards to the directorship of Mr. Petrousse who appears to be the last known director of the company. The latest correspondence between the SRC and Mr Petrousse exhibited to the supporting affidavit is dated 27th March 2014 in which he signed as Chairman & Managing Director of the company. The particulars of Directors and Secretaries of the defendant company as at 28th November 2012 and registered by the Registrar General in 2013, lists 3 appointed directors namely Mr Frankie Petrousse, Mr Olsen Vidot and Mr Charles Bastienne. Mr Vidot and Mr Bastienne resigned on 25th April 2013 and 25th October 2013 respectively but there is no evidence that Mr Petrousse resigned as director and/or as a Public Officer. However, the particulars of Directors and Secretaries as at 28th May 2014 and registered by the Registrar General on 4th September 2014 do not provide any details of the directors, either current or resigned. It is unclear why the aforementioned particulars of Directors and Secretaries is blank insofar as it concerns the directors. I note that section 162(1) of the Companies Act provides that a company shall have at least two directors and if Mr Petrousse had resigned as a director, of which there is no evidence, two directors should still have been appointed. There is no evidence that this has been done. In the absence of any evidence to show that Mr. Petrousse is no longer a director of the company, the ruling of this Court that he was correctly cited as representing the company in his capacity as a director holds.

- [12] Having said that, I move on to section 27 of the RAA under which the present application is made. It provides:

Unpaid revenue a charge over property.

27.(1) Revenue imposed under a revenue law that has not been paid by the due date is a lien and charge upon the property, real or personal, of the taxpayer.

(2) The Supreme Court may, on an application made by the Revenue Commissioner, order that a charge on real property under subsection (1) be registered by the Registrar General without fee against the title of the property

charged if the Revenue Commissioner has filed with the Registrar a memorandum describing the property so charged and the amount of revenue due.

(3) *A registered charge under subsection (2) shall not be removed from the register until the Revenue Commissioner advises the Registrar General that the revenue to which the charge relates has been paid.*

(4) *If any unpaid revenue is, by virtue of subsection (1), a charge upon the property of the taxpayer, the Revenue Commissioner may apply by petition to the Supreme Court for the enforcement of the charge and the Court may order—*

(a) the sale of the property or any part of the property; or

(b) the appointment of a receiver of the rents, profits, or income from the property,

and, subject to subsection (5), that the proceeds of sale or the rents, profits, or income, shall be used to pay the revenue due and any costs of the Revenue Commissioner in enforcing the charge.

(5) A charge over property created by this section is subject to any mortgage, charge, or encumbrance over the property existing at the time of creation of the charge."

Emphasis added.

- [13] It is not disputed that section 27(2) has been complied with. The Court now has to determine who the "taxpayer" under section 27(1) is in the present case which will in turn determine whether or not Mr. Petrousse's property can be charged under that section. Section 2 of the RAA defines "taxpayer" as follows:

"Taxpayer" means—

(a) a person liable for revenue under a revenue law; or

(b) a person liable to deduct withholding tax from a payment made by the person;

- [14] Under the same provision, "person" is defined as "*an individual, entity, partnership, trust, estate, government, political subdivision of a government, or public international organisation*".

- [15] In the present case the principal suit has been brought against the defendant company for recovery of its tax debt. It is the company which is liable for the debt, and in line with the

definition of “taxpayer” under section 2 of the RAA (which defines a taxpayer as a person liable for revenue under a revenue law) it is the company which is the taxpayer. Consequently, under section 27(1) of the RAA, it is the company’s property that can be charged under that provision.

[16] Applicant’s counsel submits that Mr. Petrouse as the Public Officer of the company can be held personally liable for the unpaid revenue due by the company to the SRC under section 38(5) of the RAA and that consequently his personal property can be charged pursuant to section 27(1) of the RAA.

[17] The definition of “taxpayer” under section 2 of the RAA (i.e. “a person liable for revenue under a revenue law”) suggests that where a director is found personally liable for unpaid revenue of a company under section 38 of the RAA that director may be considered as a “taxpayer” and therefore his personal property may be charged pursuant to section 27. However such director must first be held personally liable for such revenue.

[18] Section 38 provides that:

Liabilities and obligations of representatives.

38. (1) In this section, “representative” means—

[...]

(b) in the case of a company, the public officer of the company;

[...]

(j) in the case of any person (including a person referred to in paragraphs (a)-(i)), an agent or representative of the person as provided for under a revenue law or specified by the Revenue Commissioner, by notice in writing, to the person.

(2) Every representative of a taxpayer is responsible for performing any duties or obligations imposed by a revenue law on that taxpayer, including the payment of revenue.

(3) A representative making a payment of revenue on behalf of taxpayer is treated as acting under the authority of the taxpayer and is hereby indemnified in respect of the payment.

(4) Subject to subsection (5), any revenue that, by virtue of subsection (2), is payable by a representative of a taxpayer is recoverable from the representative only to the extent of any assets of the taxpayer that are in the possession or under the control of the representative.

(5) Subject to subsections (6) and (7), every representative is personally liable for the payment of any revenue due by the representative in that capacity if, while the amount remains unpaid, the representative -

(a) alienates, charges, or disposes of any moneys received or accrued in respect of which the revenue is payable; or

(b) disposes of or parts with any moneys or funds belonging to the taxpayer that are in the possession of the representative or which come to the representative after the revenue is payable, if such revenue could legally have been paid from or out of such moneys or funds.

(6) Subsection (5) does not apply to a representative in relation to liability for revenue if the representative did not know and could not reasonably be expected to know of the liability.

(7) Nothing in subsection (5) prevents a representative paying an amount on behalf of a taxpayer that has priority over the revenue payable by the taxpayer.

(8) If there are two or more representatives of a taxpayer, the duties or obligations referred to in this section apply jointly and severally to the representatives but may be discharged by any of them.

(9) Nothing in this section relieves a taxpayer from performing any duties or obligations imposed on the taxpayer under a revenue law that the representative of the taxpayer has failed to perform.

(10) The amount that a representative is personally liable for under subsection (5) is treated as "revenue" for the purposes of Part V.

Emphasis added.

[19] In respect of the applicant's contention that Mr. Petrouse is personally liable for the debts of the company, it is averred in the affidavit that:

3. ... when Mr. Frankie Petrouse acted as Public Officer Chairman/Managing Director and Director of Island Construction Company Limited, he gave the assurance to Seychelles Revenue Commission to clear all the tax dues of the Company by his letter

dated 26th February 2014 (exhibited) and 27th March 2014 (exhibited). Thereafter he did not fulfill his obligations as guaranteed by him with SRC and there were no efforts taken by him to clear the said tax dues of the company till date and stopped all communications with SRC ...

- 4. ... as per ... enquiries made by SRC on ... Island Construction Company Limited's business activities in Seychelles, it has come to our attention that the company stopped all its business activities on or after the year 2014 and its Corporate Office at Bois de Rose Avenue, Mahe was also closed several years before. Instead of paying the tax liabilities of the Company to SRC as assured by Mr. Frankie Petrousse being the Public Officer Chairman/Managing Director and Director of Island Construction Company Limited, he stopped all the business activities of the Company in Seychelles and evaded the tax dues to be payable with the Seychelles Revenue Commission.*
- 5. ... all the efforts taken by the SRC have been (sic) failed to reach Mr. Frankie Petrousse directly in Seychelles to recover the tax dues for several years after 2014. ... [I]n the beginning of the year 2019, the SRC was looking for legal avenues to file a suit in court to claim the tax dues from Island Construction Company Limited ... Wherein it has come to the attention of SRC that the only existing Director cum Chairman/Managing Director/Public Officer of Island Construction Company Limited, Mr. Frankie Petrousse, who is a Seychellois citizen, left Seychelles and settle (sic) down in Kenya and carrying out (sic) his business activities in Kenya, and not turned up (sic) to Seychelles thereafter. ... [T]he Commissioner of SRC requested the Kenya Revenue to provide the information of Mr. Frankie Petrousse's whereabouts, passport details and the type of business activities engaged by him in Kenya. ... [T]he Kenya Revenue Authority provided the details confirming that Mr. Frankie Petrousse is running a business along with a Kenyan business man in Kenya in the name of the company namely "SATHI INVESTMENTS LIMITED" incorporated in Kenya in the year September 2009. Further they provided the travel history of him confirming that he did several international journeys using his Seychelles passport from Kenya, after he settle down there ...*
- 6. ... the above said information obtained from the Kenya Revenue Authority confirmed that the revenue generated by Mr. Frankie Petrousse in Seychelles in the name of Island Construction Company Limited for several years up to the year 2014 would have been used by him to start a company in Kenya and to settle down his business and family in Kenya, and to go for several international trips from Kenya, instead of clearing the tax dues of Island Construction Company Limited with SRC. It confirms that the revenue of Island Construction Company Limited generated in Seychelles disposed by him for his other business purposes and personal commitments he has in Kenya as stated in*

section 38(5) of the Revenue Administration Act, instead of paying the tax dues of the company with SRC under 20 of the Revenue Administration Act.

7. *I state that it further proves that the fact that Mr. Frankie Petrousse being the Public Officer, Chairman/Managing Director and Director of Island Construction Company Limited, has not exercised the degree of care, diligence and skill necessary to prevent the failure to remit the taxes to be payable to SRC, that would be exercised by a reasonably prudent person in comparable circumstances, which made him personally liable to pay the said tax dues to SRC on behalf of his company under section 38(5) of the Revenue Administration Act.*

Emphasis added.

- [20] It is evident that under section 38(2) Mr. Petrousse as the Public Officer of the defendant company was responsible for payment of revenue by the defendant company to the SRC. However this does not automatically make him personally liable for unpaid revenue due to the SRC by the company. Under 38(4) such revenue is recoverable from him as a Public Officer “*only to the extent of any assets of the taxpayer [i.e. Island Construction Company Limited] that are in [his] possession or under [his] control*”. However section 38(4) is subject to section 38(5) which provides for circumstances in which his personal liability may be engaged: firstly if he “*alienates, charges, or disposes of any moneys received or accrued in respect of which the revenue is payable*”; secondly if he “*disposes of or parts with any moneys or funds belonging to the taxpayer that are in [his] possession or which come to [him] after the revenue is payable*”.
- [21] Paragraph 5 of the affidavit in support of the application (reproduced above) states that Mr. Petrousse moved and settled in Kenya with his family and started and is running a business there. It is further averred that he travels internationally from Kenya frequently. Evidence of the same obtained from the Kenya Revenue Authority has been produced to this Court. At paragraph 6 of the affidavit it is averred that the information obtained from the Kenya Revenue Authority confirms that Mr. Petrousse used money generated by him in the name of the respondent company in Seychelles before he left the jurisdiction, to start and operate his company in Kenya, to settle down with his family there and to fund his numerous trips from Kenya instead of paying the tax dues of the respondent company to the SRC. With

respect, this Court can find no evidence to show the money used by Mr. Petrousse to open and operate his business in Kenya, to move and settle with his family there and to travel from Kenya, was money that was generated by or belonged to or was linked in any way to the respondent company. In the absence of such evidence the Court cannot make a finding in terms of section 38(5) that Mr. Petrousse is personally liable for the payment of any revenue due by him in his capacity as representative of the company. Consequently, even if the personal property of Mr. Petrousse could be charged pursuant to section 27(1) of the RAA if he was found to be personally liable for the unpaid revenue of the company, this Court is unable to make an order to that effect.

- [22] Counsel for the applicant has cited two cases in support of his submissions that Mr. Petrousse may be held personally liable for the unpaid revenue due by the company and his personal property charged. The first is the Indian case of *S Basant Singh (Decd.) And Ors. ...vs Tax Recovery Officer And Ors* in which judgment was delivered on 29 July 1997 by the Punjab-Haryana High Court. In that case, the directors of a company were held liable to discharge the liability of the company for payment of arrears of income tax under section 179 of the Indian Income Tax Act 1961. Subsection (1) of that section provides as follows:

179. (1) Notwithstanding anything contained in the Companies Act, 1956 (1 of 1956), where any tax due from a private company in respect of any income of any previous year or from any other company in respect of any income of any previous year during which such other company was a private company, cannot be recovered, then, every person who was a director of the private company at any time during the relevant previous year shall be jointly and severally liable for the payment of such tax.

- [23] It is to be noted that the above provision differs substantially from our section 38 of the RAA. Whereas under section 38 of the RAA the onus is on the plaintiff to prove the matters under section 38(5)(a) and (b) to engage the personal liability of the Public Officer, under section 179 of the Indian Income Tax Act, the tax authorities only have to prove that the tax is due and cannot be recovered for the directors of the company for the relevant year to be liable. The Indian provision is much wider in that sense. The judgment does not disclose whether there is any defence open to the directors. A reading of the judgment also reveals that court proceedings were initiated against the directors of the company as opposed to against the company itself, after undergoing a procedure pursuant to section 179 namely:

(1) by the Income-Tax Officer issuing notice under section 179 holding the directors liable to discharge the liability of the company for arrears of income tax; (2) Reply to the notice by the directors; (3) Order of the Income-Tax Officer; (4) Filing of revision of Order of Income-Tax Officer to Commissioner of Income-Tax; (5) Decision of Commissioner of Income-Tax. No similar procedure is prescribed under our law. For a Public Officer to discharge himself of personal liability, he has to show that he did not know or could not reasonably be expected to know of the liability under section 38(6) of the RAA. It is also noteworthy that section 179 of the Indian Income Tax Act provides for liability of the directors of a private company in liquidation. The defendant company in the present case is not one in liquidation.

[24] In view of the differences between section 38(6) of the RAA and section 179 of the Indian Income Tax Act 1961, which was not addressed by applicant's counsel to the satisfaction of this Court, and the different circumstances arising in the two cases, it would be unsafe for this Court to rely on that case to make a finding that Mr. Petrousse is personally liable under section 38 of the RAA.

[25] In any event that case did not turn on the point of whether the directors were personally liable for the company's tax debt per se but rather whether they could be deemed defaulting assesseees (and therefore be personally liable for payment of the arrears of income tax outstanding against the company) in terms of section 220(4) of the Act, in the absence of service on them as opposed to service on the company, of a notice of demand under section 156. Under section 220(4) they would be deemed assesseees in default if they failed to pay the sum payable as notified to them in a notice of demand under section 156. In that respect the appellate Court made reference to the lower Court's finding at paragraph 17 of its judgment that:

"... So far as the second underlying necessity of issuance of the notice under Section 156 is concerned, it may be observed that the position of a person on whom liability is fastened under section 179 is equated to that of the defaulting assessee. Under section 179, the liability is fastened on a director of the company only if the company has become a defaulter, and the money cannot be recovered from it and the directors are held liable for the default. Hence for the purpose of the provisions of Section 220(4) of the Act, the person held liable under section 179 to pay the tax

liability of the company would be deemed to be a defaulting assessee in terms of Section 220(4) of the Act”.

- [26] The appellate court went on to conclude at paragraph 18 of its judgment that:

We, therefore, find no merit in the arguments of learned counsel for the appellants that before the directors of the company can be held to be assesseees in default, the income-tax authorities were bound to serve a notice of demand under section 156 of the Act.

- [27] I further observe from the judgment that once a director is deemed an assessee in default his or her personal property can be attached and sold to satisfy the tax dues of the company. However applicant’s counsel did not provide the court with relevant legal provisions in that respect and made no submissions thereon. This Court is therefore not in a position to assess the similarities and/or differences between the Indian legislation and ours on that issue. Counsels need to be reminded that it is up to them to prove their case on behalf of their clients and to bring before the court sufficient material for the Court to make an informed decision on the matter before it. It is not up to the Court to do counsels’ work for them.

- [28] The second judgment relied upon by applicant’s counsel is one of the Canadian Federal Court of Appeal delivered on March 25 2020 in the case of *Alaowddin Ahmar and Her Majesty the Queen* in an appeal against a decision of the Tax Court. In that case the Tax Court found Mr Ahmar who was the sole shareholder, director, officer and operator of a company called Strong Forming personally liable for the tax debt of the company for having failed to exercise the degree of care, diligence and skill required to prevent the failure to remit that would be exercised by a reasonably prudent person in the circumstances.

- [29] In regards to the applicable law the appellate Court stated at paragraph 15 that:

In accordance with subsection 323(1) of the Excise Tax Act, corporate directors are jointly and severally liable with the company for any net taxes, penalties or interest that the company fails to remit ... A director will be able to avoid personal liability if the individual can establish that he or she exercised the degree of care, diligence and

skill to prevent the failure to remit that would be exercised by a reasonably prudent person in the circumstances: see subsection 323(3) of the Excise Tax Act

- [30] In dismissing the appeal the Court found that the Tax Court did not err in concluding that Mr Ahmar had not demonstrated that he had exercised the degree of care, diligence and skill necessary to prevent the failure to remit that would be exercised by a reasonably prudent person in comparable circumstances. In that respect it made reference to the reasons given by the Tax Court for its decision which in relevant part reads as follows:

[21] ...the Tax Court ... also observed that the company had received \$1,660,478.00 from Rossclair out of the total contract price of \$1,705,775.00, at least some of which could have been applied to reduce or discharge the company's tax debt. Strong Forming also received a payment of \$250,000 from another customer, which related to an earlier construction project with respect to the Toronto subway extension. In addition there was evidence before the Tax Court that Mr. Ahmar had periodically injected funds into the company in an attempt to keep things going ...

[22] Moreover ... it is unclear from the evidence that was before the Tax Court how much of the monies taken in by Strong Forming were actually paid to the company's employees, and how much were used to pay suppliers and other company expenses. What is clear is that none of these funds were applied towards Strong Forming's HST debt.

[23] The Tax Court further found that Mr. Ahmar was clearly aware of Strong Forming's tax obligations, its financial difficulties and his potential personal liability for the company's tax debts. Instead of using some of the company's revenues to satisfy the company's obligations, however, the Court found that Mr. Ahmar made the conscious decision to have Strong Forming defer payment of its HST debt, and to use these revenues to satisfy other obligations in the hopes of turning the company's financial position around ...

[...]

[27] ... Court evaluated Mr. Ahmar's explanation for the company's failure to pay its taxes in light of governing jurisprudence, finding that he had been focused on curing the failure to remit, rather than on preventing the failure in the first place ...

- [31] In the present case, it is averred at paragraph 7 of the affidavit in support of the application (reproduced above) that Mr. Petrousse "*being the Public Officer, Chairman/Managing Director and Director of Island Construction Company Limited, has not exercised the*

degree of care, diligence and skill necessary to prevent the failure to remit the taxes to be payable to SRC, that would be exercised by a reasonably prudent person in comparable circumstances, which made him personally liable to pay the said tax dues to SRC on behalf of his company under section 38(5) of the Revenue Administration Act". It is my view however that, unlike in the Alaowddin Ahmar case (supra) where there was sufficient evidence to show that Mr. Ahmar had not "exercised the degree of care, diligence and skill necessary to prevent the failure to remit that would be exercised by a reasonably prudent person in comparable circumstances", this averment has not been sufficiently supported by evidence in the case of Mr. Petrousse.

- [32] Furthermore it appears that liability of directors of a company under Canadian Tax laws including the Excise Tax Act is not automatic. This is explained in a short article by Ryan Morris and Les Chaïet entitled "On the Hook: Directors Liability for Corporate Tax Transgressions" as follows:

"Before the CRA can assess directors for the tax liabilities of the corporation, the CRA must demonstrate its inability to recover the amounts directly from the corporation. To demonstrate its inability to recover the amounts directly from the corporation, the CRA must generally show that its execution against the corporation was returned unsatisfied, prove a claim against the corporation in dissolution or liquidation proceedings, or prove a claim against the corporation in bankruptcy proceedings"

- [33] None of this has been shown in the present case. It has only been averred in the affidavit in support of the present application that pursuant to enquiries made by SRC it came to their attention that the company had stopped all its business activities on or after the year 2014; that its Corporate Office at Bois de Rose Avenue, Mahe was also closed several years before; that all efforts to reach Mr. Petrousse to recover the tax dues were in vain; and that they only discovered that he had left Seychelles in 2019. The Court further notes the differences between section 38 of the RAA and the provisions of the Canadian Excise Act relating to the personal liability for tax debts of company directors as a result of which care must be taken in relying on such cases in deciding cases in our jurisdiction.
- [34] I note that the same terminology as is used in the Canadian tax legislation is used in section 53(2) of the RAA in terms of which, where a company commits an offence, the offence is treated as having been committed by director and/or public officer unless it was committed

without their knowledge and the director and/or public officer has exercised reasonable diligence to prevent the commission of the offence. That provision provides as follows:

Offences by companies.

53. (1) *If an offence under a revenue law is committed by a company, the offence is treated as having been committed by every person who, at the time the offence was committed, was—*

- (a) the public officer, director, general manager, company, secretary, or other similar officer of the company; or*
- (b) acting or purporting to act in that capacity.*

(2) Subsection (1) does not apply to a person if—

- (a) the offence was committed without the person's consent or knowledge; and*
- (b) the person, having regard to the nature of the person's functions and all the circumstances, has exercised reasonable diligence to prevent the commission of the offence.*

[35] For that provision to operate and for the director or Public Officer become personally liable, several elements need to be satisfied: (1) the actual commission of an offence by the company; (2) the person whose personal liability is engaged must be a director/ Public Officer or similar officer; and (3) knowledge or consent of the director/ Public Officer regarding commission of the offence and failure of the director/ Public Officer to exercise reasonable diligence to prevent the commission of the offence.

[36] I note that offences under the RAA fall under Division III of Part IX of the RAA. These offences (section 46 -54) do not relate to recovery of tax revenue which is covered in Part V of the RAA which is entitled "Collection and Recovery of Revenue". In fact there is no specific offence of failure to pay revenue due to the SRC. Under part V, (section 20(1)) "*[r]evenue, when it becomes payable, is a debt due to the Government, and shall be paid to the Revenue Commissioner ...*". It is further provided that "[a]ny unpaid revenue may be sued for and recovered in any court of competent jurisdiction by the Revenue Commissioner or by the Attorney-General suing on behalf of the Government (section 21(1)). Recovery of unpaid revenue is therefore not a matter which falls under Division III of Part IX of the RAA which deals with offences. Section 53 would therefore not apply in the present case.

[37] In conclusion, I find that an application under section 27 of the RAA may be made for a charge to be registered against a company's property where the company is a taxpayer. However although it appears that the personal property of a Public Officer of that company who has been held personally liable for the tax debts of the company may be subject to a charge under that section, the applicant has failed to bring evidence to show that the Public Officer in the present case Mr. Petrousse is liable for such debts in terms of section 38 of the RAA.

Decision

[38] For the reasons stated above, the application is dismissed

Signed, dated and delivered at Ile du Port on 23 July 2021

A handwritten signature in cursive script, appearing to read "Carolus", is written above a horizontal line.

E. Carolus J