[2012] JMCA Civ 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 35/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE MCINTOSH JA

BETWEEN	**LLANDOVERY INVESTMENTS LTD**	**APPELLANT**
AND	**THE COMMISSIONER OF TAXPAYER APPEALS (INCOME TAX)**	**RESPONDENT**

Herbert Hamilton instructed by Lightbourne and Hamilton for the appellant

Mrs Cecelia Chapman Daley and Miss Sophia Preston for the respondent

29, 30, November; 1, 2 December 2010 and 30 March 2012

HARRIS JA

[1] On 11 April 2007, assessments were raised by the commissioner of the Taxpayer Audit and Assessment Department (TAAD) for the payment of income tax by the appellant for the period 1996 to 1998. The appellant unsuccessfully appealed to the respondent against that decision. Before this court is an appeal against the decision of Anderson J in which he dismissed an appeal brought by the appellant against the respondent in the Revenue Court. Anderson J ordered that the assessments made by

the commissioner on the appellant for the years of assessment 1996 to 1998 be confirmed and that the amounts payable are as follows:

"Years of Assessment	Tax
1996	450,332.00
1997	1,553,317.33
1998	4,411,470.00"

[2] The appellant is a limited liability company incorporated in Jamaica and is involved in the business of dairy farming. Prior to 1996 the appellant was accorded exemption from income tax, it having been granted an approved farmer status. In 2000 the appellant made an application for an exemption but was requested by the TAAD to file returns for the years 1996 to 1998. In June 2000 it filed income tax returns and audited statements. The returns did not reveal a net income. However, the financial statements accompanying the returns reflected a net income. Following this, on 22 April 2002, the TAAD, in pursuance of section 72 of the Income Tax Act, raised additional assessments for the relevant period and served the requisite notices of the assessments on the appellant.

[3] By letter of 8 May 2002, the appellant, through Ms Karen Russell of K.O. Russell and Associates (KORA), a firm of accountants, acting on its behalf, objected to the "additional assessment for the years 1996-1998" on the bases that the explanation given for each year was an "insufficient-one line" and that "the adjustments are erroneous and excessive and do not in any way reflect the activities of the company".

On 10 June 2002, the TAAD, through, Mr Hopeton Pottinger, an officer employed to the TAAD, responded, indicating that the approved farmer status for which the appellant had applied had not yet been granted as the appellant had failed to comply with all its statutory requirements such as the filing of its National Housing Trust and education tax returns. Mr Pottinger also informed the appellant that it, having not qualified as an approved farmer, had not obtained that status and as a result the approval could not be granted retrospectively. Therefore, the income earned for the years 1996-1998 was subject to income tax.

[4] Upon receipt of this letter, Ms Russell, by letter of 31 July 2002, further objected by stating, among other things, that her detailed review of the accounts revealed that the accounts as presented were erroneous and that this required that the accounts and the tax computations for the periods 1996 to 1998 be reconstructed. It is necessary to state that Ms Russell had not been the accountant who had constructed the returns and financial statements filed in 2000. By letter of 19 February 2003 the respondent accorded the appellant an extension of time to 28 March 2003 to file the amended financial statements. The TAAD also indicated that the "timely settlement of the objection for Y/A [year of assessment] 1997 and 1998 is dependent on the provision of these records on the date specified".

[5] The amended financial statements and returns for the years 1996 to 1998 were submitted in March 2003. By letter of 7 January 2004 the TAAD informed the appellant that it should submit, by 19 January 2004, certain specified documents to complete the objection process in order to substantiate the figures in its amended

financial statements. Failure to do so would cause the notice of objection to cease and the assessment made would be final. A letter dated 26 February 2004 was sent to the appellant granting it a further extension of time to 4 March 2004 to submit the requisite documents. On 1 March 2004 the appellant furnished some of the documents requested and gave an explanation for the absence of the others.

[6] On 18 May 2005 the TAAD wrote to the appellant's managing director, Mr Everald Nam, informing him that meetings had been held between the department and the appellant's accountant on 17 January 2005 and 11 May 2005. This letter further stated:

> "At this meeting [of 11 May 2005], you were informed that the information provided to date did not substantiate your claim that the financial statements filed with returns on June 2, 2000 were erroneous.
>
> Therefore, based on the information gained and documentation made available, it is the decision of the department that no change would be made to the amounts previously assessed as there is not sufficient evidence to disregard or discount the information contained in the returns filed on June 2, 2000.
>
> ...
>
> The enclosed AU10 and AU3 will provide details of the revised assessment.
>
> ..."

[7] Included in the AU3 form was a statement that the documents presented by the appellant's accountant during the objection process were related to the year 1998. There was also an explanation pertaining to why the documents submitted were not

regarded as substantiating the sum given as income (which had been significantly reduced in the amended returns) and other sums given for various items of expenditure in the amended financial statements. On 9 June 2005, KORA wrote to Errol Hudson, who was the Commissioner of the Taxpayer Appeals Department at the time, indicating that it was objecting to the decision received from the Objection and Quality Review Unit on two grounds of appeal and "addressing some of the matters identified by the Revenue's representative in his decision letter". The hearings in relation to the appeal took place on 5 September 2005 and 7 October 2005. Present at the hearings were, Mr Nam, Ms Russell, representatives from the TAAD, Ms Yasmine Jackson and Mr Raule Plummer, as well as Ms Georgia Silvera Finnikin representing the Taxpayer Appeals Department.

[8] Subsequent to the hearing of the appeal, by letter dated 3 November 2005, the appellant was requested to produce certain documents within 14 days of the receipt of the letter, and by letter dated 25 November 2005 the appellant was invited to a hearing scheduled for 12 December 2005. The appellant was informed that at this meeting the documents previously requested would be examined. The appellant was also advised that during the hearing, it would be given the opportunity to "address [the Commissioner], give evidence, call witness[es] and put questions to any witness called to give evidence". These letters also indicated that these activities were being done pursuant to regulation 8 of the Revenue Administration Act. It appears that this meeting did not materialize and on 8 March 2007 Mr Plummer of the TAAD wrote to the Taxpayer Appeals Department indicating that he saw no basis for recommending any

changes to the assessment raised on the appellant. There was no further communication between the parties until 11 April 2007, at which time Mr Hudson wrote to Ms Russell informing her of his decision to confirm the assessments.

[9] The appellant being dissatisfied with the Commissioner of Taxpayer Appeals' decision filed a notice of appeal in the Revenue Court. Following the filing of the appeal, a statement of case was filed by the respondent which was subsequently amended. A reply to the statement of case and an amended reply were filed by the appellant. Seven grounds of appeal were filed by the appellant in support of its challenge to Anderson J's order.

Ground one

> "The Learned Judge erred in holding that it is permissible for the Respondent to file an affidavit containing material adverse to the Appellant and to supplement/support his decision when an Appeal is filed against that decision in the Revenue Court."

[10] In his oral and written submissions, Mr Hamilton submitted that the procedure for conducting appeals is set out in the Revenue Administration (Appeals and Disputes Settlement) Regulations, 2002 (the Revenue Administration regulations). Pursuant to these regulations, the respondent in hearing these appeals may require parties or any other persons to give evidence on oath. The respondent, he argued, is also entitled to carry out his own investigation of the decision being appealed and may summon persons to give evidence in relation to the decision. He argued that these powers made it clear that in hearing the appeal from the decision of the TAAD, the respondent was

exercising a quasi-judicial function in that he was required to adjudicate upon the conflicting contentions between the relevant commissioner and the taxpayer. The general principle, he submitted, is that a decision-maker who performs a quasi-judicial function is functus officio after he hands down the decision. Therefore, he contended, the respondent, having been *functus officio*, after delivering his decision, was not competent to file the affidavit. In support of these submissions, he relied on ***Slaney v Kean*** [1970] 1 All ER 434 and ***Re VGM Holdings Ltd*** [1941] 3 All ER 417.

[11] Counsel further argued that the reliance on the affidavit was contrary to rule 13 of the Revenue Court Rules of 1972, which provide that reliance ought not to be placed upon any facts not set out in the notice of appeal, statement of case or reply. He relied on ***Edward Shoucair v The Commissioner of Income Tax*** **SCCA** No 58/1979, delivered 31 March 1982 to support this latter argument. He also submitted that by admitting the affidavit on an ex parte basis, the learned judge had acted in breach of the rules of natural justice.

[12] In written submissions, it was submitted on behalf of the respondent that the issue raised by this ground was whether the hearing at the Revenue Court was in the nature of a trial de novo for the determination of the correctness of the assessment. Mrs Chapman Daley submitted before this court that the hearing in the Revenue Court is in the nature of an appeal by way of rehearing. The Revenue Court, it was submitted, was exercising original jurisdiction and the proceedings were to be regarded as a trial de novo. She relied on ***Goldman v Minister of National Revenue*** [1951] CTC 241 (a case from the Canadian jurisdiction) and ***Shoucair v The Commissioner of***

Income Tax. She referred to the Judicature (Revenue Court) Act and the Revenue Court Rules and submitted that there was nothing to indicate that the information before the tax authorities had to be produced before the Revenue Court. Rule 24 allows for the filing of affidavits and does not specify which party is entitled to do so, she argued. Further, there was no evidence to suggest that the affidavit filed on behalf of the respondent contained anything that was adverse to the appellant nor did it contain anything new that was not in the statement of case.

[13] Affidavit evidence was adduced on behalf of both parties. An affidavit of Ms Russell was filed on behalf of the appellant and affidavits of Messers Hudson, Pottinger and Plummer were filed in respect of the respondent's case. The affidavits and the exhibits thereto were taken into consideration by the learned judge. In order to determine the nature of the evidence which was considered at the hearing before the learned judge, it is necessary to examine the statutory provisions which govern these proceedings and not, contrary to Mr Hamilton's submission, the provisions relative to the proceedings before the respondent. ***Slaney v Kean*** is of no relevance. In that case, the issue as to the nature of the proceedings in the appeal before the High Court did not arise. The central issue was whether an appeal from the decision of tax commissioners should be allowed by consent. The High Court, in the course of the judgment, considered the nature of the duty carried out by the commissioners, which it said was quasi-judicial. The relevant provisions governing the hearing before the Revenue Court are to be found in the Income Tax Act, the Judicature (Revenue Court) Act and the Revenue Court Rules. Section 76 of the Income Tax Act provides that a

taxpayer who has disputed his assessment by notice of objection may appeal to the Revenue Court and the appeal shall be limited to the grounds stated in the notice of objection, but the Revenue Court has the discretion to permit the amendment of the grounds. However, section 7(6) of the Judicature (Revenue Court) Act, which specifically relates to the proceedings of the court, provides that the practice and procedure of the court shall be regulated by rules of court.

[14] It is therefore to the Revenue Court Rules that I must now direct my attention. Rules 5 and 6 provide that an appeal shall be instituted by the filing of a notice of appeal which shall consist of "grounds of appeal concisely stating the allegations of fact and the points of law or other reasons which the appellant intends to submit in support of the appeal". Rule 9 mandates the respondent to file two certified copies of the documents giving rise to the appeal. By rule 10(1), the respondent is required to file a statement of case "setting out the allegations of fact and points of law or other reasons upon which the Respondent intends to rely". Under rule 11 the appellant may file a reply "admitting any of the allegations of fact set out in the statement of case and/or setting forth such other facts as he may allege". Rule 13 provides that neither the respondent nor the appellant is entitled to rely upon any facts not set out in the "Notice of Appeal, Statement of Case or Reply as the case may be" (unless it was amended according to the provisions of rule 12). At the hearing of the appeal, both parties are entitled to tender evidence orally and by affidavit (rule 24).

[15] It seems to me that it is clear from these rules that the parties are not circumscribed by the evidence that was presented before the respondent. Both parties

are allowed to include in their documents "other reasons" upon which they intend to rely, which clearly indicates that the respondent may give reasons other than those which he had delivered at the time of his decision. Therefore, it could be said that the proceeding before the Revenue Court, although stated to be an appeal, is in the nature of a fresh proceeding, the parameters of which are set by the information contained in the documents which have been filed in that court. This was the view of this court in ***Shoucair v The Commissioner of Income Tax***, where the issue to be considered was whether a taxpayer was allowed to raise before the Revenue Court issues that were not raised before the Commissioner of Taxpayer Appeals. Kerr JA expressed the view that "the trial judge [in the Revenue Court] was not limited to a consideration of matters raised before the Commissioner provided there was compliance with Rule 13". At page 22, Carey JA said this:

> "... the Judge of the Revenue Court exercises an original jurisdiction at these hearings called 'appeals'. He is entitled to make findings of fact which are not impeachable in this court. While the proceedings before him are wholly judicial, those before the Commissioner are largely administrative, albeit quasi-judicial, as well. I would point out that the proceedings before the Judge of the Revenue Court are circumscribed by the issues raised in the pleadings filed."

[16] While in that case the question before that court concerned the nature of the evidence to be adduced by the taxpayer, I think the conclusion must be equally applicable to a respondent as there is nothing in the Revenue Court Rules to suggest that the respondent's entitlement to adduce evidence is more limited than that of the taxpayer. Further, there is no restriction in relation to the entitlement to file affidavits.

Mr Hamilton did not point to any specific section of Mr Hudson's affidavit as being objectionable but objected only to the fact of it being filed. A perusal of the affidavit demonstrates that it merely chronicled the events leading up to his, Mr Hudson's, decision. It further disclosed what transpired during the hearing. He exhibited the verbatim notes and showed how he arrived at his decision. The contents of the affidavit did not include considerations that were not contained in his letter to Ms Russell. It cannot be said that the affidavit contained prejudicial or objectionable material. There being no objection that can properly be mounted in respect of the affidavit having been filed, or of its contents, this ground must fail.

Ground two

> "Persons dissatisfied with a decision of the Commissioner [sic] has a right of appeal to the Respondent. The Respondent did not hear the appeal and in contravention of the statutory requirements, delegated this function to some other Officer: inexplicably also, the Respondent prepared and issued a Decision in the matter, as well as the aforementioned Affidavit in which he asserted personal knowledge, although he was absent from the hearing."

[17] Mr Hamilton submitted that a review of the relevant provisions of the Income Tax Act, the Revenue Administration Act and the Revenue Administration Regulations establish unambiguously that the duty to hear appeals against decisions of the revenue commissioners rests solely upon the respondent. He argued that section 34 of the Interpretation Act stipulates that where an Act imposes a duty upon a public officer, it must be exercised by the holder for the time being of that office. He contended that there is nothing in the Revenue Administration Act which permits delegation of the duty

to hear an appeal. Relying on dictum in ***Allingham and Another v Minister of Agriculture and Fisheries*** [1948] 1 All ER 780, he submitted that the regulations had to be construed strictly. He further submitted that having regard to the statutory provisions, Miss Finnikin, who represented the respondent at the hearing, was not entitled to hear the appeal. The hearing, he argued, was therefore a nullity. In the absence of a valid hearing, he contended, the respondent was not entitled to make the requisite decision upon issues which were canvassed in his absence, and to the extent that he purported to do so, his decision was ultra vires.

[18] It was submitted on behalf of the respondent that, as was pointed out by Panton JA (as he then was) in ***Nyoka Segree v Police Service Commission*** SCCA No 142/2001, delivered 11 March 2005, a hearing is not limited to an oral one. Mrs Chapman Daley accepted that the relevant statutes, which confer the power on the respondent to hear the appeal, do not specifically indicate that he may delegate his function. She conceded that the power conferred on a public official must be exercised by him personally. However, she submitted, in a practical world, for the purpose of efficacy and to give effect to the intention of Parliament, some duties of the commissioner will of necessity be performed by subordinate officials. Section 11B of the Revenue Administration Act provides specifically for sufficient staffing for the efficient administration of the Taxpayer Appeals Department, she argued. Although the Revenue Administration Act specifically made provision for deputy and assistant commissioners, in practice, all the members of staff are given descriptions as appeals officers. These appeals officers may sit in the hearing of the appeal before the respondent. The

Revenue Administration Act requires that the respondent make the decision but does not require him to do everything at every step of the process. It would be hamstrung, it was argued, to be of the view that the Taxpayer Appeals Department should only operate in the presence of the respondent.

[19] Relying on ***Jeffs v New Zealand Dairy Production and Marketing Board*** [1967] 1 AC 551, she further submitted that a functionary can delegate the power to undertake work preparatory to decision-making, but the final decision must be taken by the functionary charged with the power. Even though the respondent had not presided over the oral hearing, she argued, the appellant had not been prejudiced as the respondent, in arriving at his decision, had the benefit of verbatim notes of the hearing which included submissions by both parties and the discussion on the evidence presented. In addition, he would have been presented with the files used at the hearing, any new information or evidence adduced by the taxpayer at that time and a report from the officer who presided. Further, she argued, the Revenue Administration Regulations recognize that even after the oral hearing, there may be situations where further evidence and documents may be taken. The appeals officer can sit in the hearings but the ultimate decision is that of the respondent based on the documents submitted and the notes from the oral hearing. Finally, on this point, Mrs Chapman Daley submitted that since the proceeding before the Revenue Court is a fresh proceeding any defects in the procedure before the respondent ought not to be raised in that court, or at this juncture.

[20] It is a well-known principle that ordinarily a public functionary on whom a duty is conferred by statute may not delegate this duty to anyone unless authorized by statute or otherwise - see ***R v Minister of Agriculture and Fisheries ex parte Graham,*** [1955] 2 WLR 872. This principle is expressed in the maxim "*delegatus non potest delegare*". So too, a person to whom power has been delegated may not further delegate that power. In ***Allingham v Minister of Agriculture and Fisheries*** the Minister of Agriculture was given power "to give such directions with respect to the cultivation, management or use of land for agricultural purposes". The direction was to be given by notice served on the person who was required to comply with the direction. The Minister delegated this duty (as he was entitled to do) to the war agricultural executive committee. The committee came to the conclusion that certain produce should be grown for the 1947 season but left the decision as to the land on which the cultivation should take place to their executive officer. It was held that on the principle of *delegatus non potest delegare*, the committee could not delegate the power to determine the land to be cultivated to its officer and therefore the notice in relation thereto was ineffective.

[21] It is perfectly permissible for a public functionary to delegate certain preparatory acts necessary for the execution of the functionary's duty as argued by the respondent. In ***Jeffs***, the New Zealand Dairy Production and Marketing Board was given the power to define areas from which particular factories could get cream and milk. The board was empowered to regulate its own procedure. A committee set up by the board to investigate questions of supply, and consisting of three of its members, held a public

enquiry at which farmers in the district gave evidence. The committee made a written report to the board, recommending certain zoning. The board accepted the committee's recommendations without alteration and made the orders. The board did not see the written statements produced by the witnesses at the hearing. Its members who were not members of the committee were not informed of the evidence given. The report outlined the submissions made at the hearing but did not state what evidence was given. It did not contain a summary of the evidence nor did the board see the written submissions. The farmers in that case, by way of judicial review, sought to quash the board's decision for a zoning order, by way of an order of certiorari, and also an injunction to restrain the board from assessing compensation, by contending that, by permitting the committee to hear the evidence and submissions, the board had improperly delegated its judicial task. It was held, among other things, that the board, although entitled to proceed as they deemed fit, failed to act judicially as it arrived at a decision without considering the evidence and had failed to hear the interested parties. At page 568, Viscount Dilhorne said:

> "On the facts of this case it does not appear that the board asked the committee to hold the public hearing or delegated to the committee any part of its duties. Subject to the provisions of the Act and of any regulations thereunder, the board can regulate its procedure in such manner as it thinks fit (1961 Act, s12(10)). Whether the board heard the interested parties orally or by receiving written statements from them is...a matter of procedure. Equally it would have been a matter of procedure if the board had appointed a person or persons to hear and receive evidence and submissions from interested parties for the purpose of informing the board of the evidence and submissions (see ***Osgood v Nelson*** and ***Rex v Local Government Board, Ex parte Arlidge***)....if it had been followed in this case and

> as a result the board, before it reached a decision, was fully informed of the evidence given and the submissions made and had considered them, then it could not have been said that the board had not heard the interested parties."

Although it was apparent that the board had not authorized the committee to hold a public hearing nor had it been delegated to carry out any of the board's functions, it is clear that since the board was able to regulate its procedure, the act of the committee was regarded a matter of procedure. If the board had the evidence and submissions before it made its ruling, it could have properly arrived at a decision. From this, it could be said that assigning a person to carry out the work preparatory to the making of a decision is not a delegation of a power, in the true sense of the word.

[22] There can be little doubt that the maxim of *delegatus non potest delegares* is well accepted, but of course, it has been recognized that it is not an absolute principle. The authorities show that a public body has an implied power to entrust its own members with the authority to investigate, to hear evidence and submissions and to make recommendations in a report. In ***Osgood v Nelson*** (1872) LR 5 HL 636, it was decided that the appointment of a committee to take evidence and report was not in itself a delegation of authority. A public body retains the power of the making of the decision in its own hands provided that it receives a report full enough to enable it to comply with its duty to "hear" the relevant parties before making its decision – see ***R v Commission for Racial Equality*** [1980] 3 All ER 2765.

[23] In ***R v Dr A Binger et al ex parte Chris Bobo Squire*** (1984) 21 JLR 118, the Court of Appeal had to consider whether the principle of *delegatus non potest delegares* applied in circumstances where the appellant was employed to the Scientific Research Council but was dismissed by fellow employees who were senior members of staff but were not appointed to the council. White JA referred, with approval, to the view of S.A. de Smith, as expressed in the 4th edition of the text "Judicial Control of Administrative Discretion", thus:

> "The maxim delegatus non potest delegare does not enunciate a rule that knows no exception; it is a rule of construction to the effect that a discretion conferred by statute is prima facie intended to be exercised by the authority on which the statute had conferred it and by no other authority, but this intention may be negatived by any contrary intention found in the language, scope or object of the statute. But the courts have sometimes assumed that the maxim does lay down a rule of rigid application, so that devolution of power cannot in the absence of express statutory authority be held to be valid unless it is held to fall short of delegation. In this way, an unreasonably restricted meaning has often been given to the concept of delegation."

[24] He also reviewed the decisions of the English Court of Appeal in ***Barnard v National Dock Labour Board*** [1953] 1 All ER 1113 and also that of the House of Lords in ***Vine v National Dock Labour Board*** [1956] 3 All ER 939 and concluded that the "nature or classification of the power was important [it] being considered that neither legislative nor judicial power can be delegated, whereas administrative power is delegable". In ***Barnard v National Dock Labour Board***, Lord Denning expressed the view that an administrative function can often be delegated although a judicial

function rarely can be. In ***Vine,*** Lord Somervell observed that, in deciding whether a person has power to delegate, one has to consider the nature of the duty and the character of the person. He too was of the opinion that judicial authority cannot be delegated but that some administrative functions could be. In that case, it was considered that the duty in question was too important to delegate.

[25] In ***R v Race Relations Board ex parte Selvarajan*** [1975] 1 WLR 1686, Lord Denning in dealing with the question of the applicability of the maxim said at page 1695:

> "The maxim delegatus non potest delegare applies strictly to judicial functions. But it is different with a body which is exercising administrative functions or which is making an investigation or conducting preliminary inquiries, especially when it is a numerous body."

It is clear from the preceding authorities that a duty given by statute may be delegated, where the duty is an administrative one.

[26] The pertinent section relative to a taxpayer's right to appeal the decision of a commissioner of the TAAD is section 75(6A) and 75(6B) of the Income Tax Act, as rightly submitted by Mr Hamilton. The section reads:

> "(6A) A person who is dissatisfied with a decision of the Commissioner under subsection (6) may appeal against that decision to the Commissioner of Taxpayer Appeals within thirty days of the receipt of the decision.
>
> Provided that the Commissioner upon being satisfied that owing to absence from the Island, sickness or other reasonable cause, the person disputing the assessment was prevented from making the application

within such period, shall extend the period as may be reasonable in the circumstances.

(6B) On an appeal under subsection (6A) the Commissioner may confirm, reduce the amount under or vacate the decision concerned."

By virtue of these provisions, the jurisdiction or the duty to determine the appeal resides solely within the power of the respondent. Upon consideration of the appeal, the respondent has the power to confirm, reduce the amount or vacate the previous decision of the relevant commissioner.

[27] Section 11A (1) of the Revenue Administration Act establishes the Taxpayer Appeals Department. Section 11A (2) sets out the duties of the department. It states:

"It shall be the duty of the Taxpayer Appeals Department to-

(a) provide for-

(i) the hearing of appeals by taxpayers against decisions of Revenue Commissioners in relation to assessments made under the relevant laws relating to revenue; and

(ii) the settlement of disputes arising between a taxpayer and a revenue department in relation to the taxpayer's liability under such relevant law;

(b) establish procedures in relation to [these] matters."

Section 11B provides for the appointment of a Commissioner of Taxpayer Appeals, Deputy Commissioners of Taxpayer Appeals, Assistant Commissioners of Taxpayer

Appeals and "such and so many officers as may be necessary for the efficient operation of the Taxpayer Appeals Department".

[28] In addition, regulation 8 of the Revenue Administration Regulations gives certain powers to the respondent in relation to the hearing of the appeals. Regulation 8 provides:

> "8(1) The Commissioner –
>
> (a) shall fix a date, time and place for the hearing and shall give to the appellant or disputant, or relevant Revenue Commissioner, as the case may be, not less than fourteen days notice thereof;
>
> (b) may hear on oath or otherwise the appellant or disputant, the relevant Revenue Commissioner or any other person;
>
> (c) shall give to the appellant or disputant and the relevant Revenue Commissioner an opportunity to address him, give evidence, to call witnesses and to put questions to any witness called to give evidence."

[29] From these provisions, it may therefore be said that while the respondent has been fixed with the duty of determining the appeals, the Taxpayer Appeals Department has the power to determine the procedure governing the appeals process and this process would, as a matter of course, include the participation of those officers appointed in the department.

[30] There is no dispute that an officer of the Taxpayer Appeals Department, other than the respondent, presided over the hearing of the appeal. The issue which therefore arises is whether this action was permissible. It is not a sufficient answer to say that it is impracticable or impossible for the respondent to carry out his duties personally. In determining whether this was permissible, it is necessary to consider the nature of the duty in question as well as the object and scheme of the Income Tax Act, the Revenue Administration Act and the regulations. As earlier stated, and as shown by judicial authority, the principle of delegatus non potest delegare is not inflexible. Although the language of section 75 (6 B) of the Income Tax Act is clear as to the role of the respondent, the court, in its interpretation of the section, must seek to achieve a result which does not operate manifestly unjustly. The duties outlined in the Revenue Administration Regulations are clearly investigative. The objective of section 11A of the Revenue Administration Act is for the carrying out of some administrative action, that is, determining whether the assessment imposed by the relevant commissioner should be confirmed or reduced or set aside. It is of significance that regulation 8(2) allows for the respondent to obtain further evidence "for the investigation of the decision appealed" after appropriate notice specifying "what evidence or further evidence is required". This was in fact done in this case.

[31] In light of the nature of the powers in question conferred under the Revenue Administration Act, the fact that it envisages that other officers will be appointed for the efficient functioning of the department and the fact that the respondent is allowed to requisition further evidence, it is my view that, in construing the relevant provisions

of the Act and the regulations thereunder, it would have been the legislative intent to allow for the appeal hearing to be conducted by an officer of the Taxpayer Appeals Department who is not the respondent. Further, having obtained the notes from the hearing, the respondent was perfectly entitled to consider those notes in making his decision. Indeed, if he had not done so, Mr Hamilton would no doubt have taken issue with that. It may therefore be said that the appellant was afforded a hearing by the respondent who gave his decision in the matter by way of his letter of 11 April 2007. In these circumstances, it may be said that appointing an officer of the Taxpayer Appeals Department to hear the evidence and submissions of the parties can be regarded as being part of the procedure and that the respondent, having had all the requisite information before him, in making his decision, had retained the power to determine the appeal.

This ground is unsustainable.

Ground three

> " The Respondent has mandatory statutory access to all the files of the Commissioner relating to the decision prior to the hearing, whether they contain material prejudicial to the Appellant or not, by virtue of Paragraph 7(a) of the Revenue Administration (Appeals and Disputes Settlement) Regs (2002) (The Regs). The Appellant was not, in the circumstances, afforded 'a fair hearing before an independent and impartial authority' as required by the Constitution of Jamaica."

[32] In his written submissions, Mr Hamilton argued that by virtue of section 91 of the Income Tax Act and the Revenue Administration Act, the respondent is vested with

considerable powers to investigate and obtain, inter alia, material about taxpayers which might be prejudicial or incriminating. He submitted that paragraph 7(a) of the Revenue Administration Regulations makes it mandatory for the relevant commissioner to surrender all the files relating to her decision to the respondent prior to the respondent's consideration of the matter. The Revenue Administration Regulations, he argued, also require that a written statement of the reasons for that decision be submitted to the respondent. He further argued that there is no requirement for the information so obtained to be disclosed to the appellant taxpayer, which is a contravention of the appellant's constitutional right to a fair hearing before an independent and impartial authority. He also submitted that not only did the relevant commissioner disclose the material relating to the decision prior to the hearing, she had also gratuitously supplemented the decision by sending a letter offering her version of the facts to the respondent before the respondent offered his decision. The respondent, he contended, issued his decision approximately one month after the receipt of this letter, and it was therefore not an unreasonable inference that he was influenced by it since the decision until then had been pending for over 18 months. These ex parte communications between the respondent as adjudicator and the relevant commissioner, both before and after the hearing, were in breach of the appellant's right to a fair hearing by an independent and impartial authority as well as the common law principles of fairness and the rules of natural justice, he argued. Further, he submitted, where as in this case, the respondent exercises a quasi-judicial function, he should not receive nor act on such ex parte information. He went on to refer to the oft-cited words of

Lord Hewart CJ in ***R v Sussex Justices, ex parte McCarthy*** (1923) All ER 233 that justice should not only be done but should manifestly be seen to be done".

[33] Relying on ***Mootoo v Attorney General*** (1978) 30 WIR 411, Mrs Chapman Daley submitted, in response, that there is a presumption that statutes passed by Parliament are constitutional. She further submitted that the intention of the statute is to ensure that taxpayers are properly assessed and to allow the respondent to be sufficiently seised of all the information relevant to the assessment in order to determine the accuracy of that assessment. She argued that the relevant commissioner is required to submit only material that is relevant to the assessment. The decision could not be impugned on the basis only that the material might be prejudicial since if the material is relevant, it has to be submitted. It could therefore not be argued that the mandatory statutory access to all files relating to the decision inherently affects the appellant's opportunity or right to a fair hearing before an independent and impartial authority. She argued also that the appellant had been afforded a hearing before a judicial body and could not now complain of a breach of natural justice. She relied on ***Century National Merchant Bank and Others v Davies and Others*** [1998] AC 628 to support this latter proposition, in particular the view of their Lordships' Board that the statutory right of appeal to the Court of Appeal exercising wide original jurisdiction should be sufficient to achieve justice to the appellant. She also submitted that the Revenue Administration Act taken as a whole is sufficient to achieve fairness.

[34] A taxpayer who disagrees with the decision of the relevant commissioner, who, in this case, is the commissioner of the TAAD, is afforded a statutory right to file a notice

of objection. Section 75 (4A) of the Income Tax Act gives him such a right. Section 75(6) of that Act provides the procedure to be followed at the end of the objection process. It provides:

> "75. (6)In the event of any person assessed, who has objected to an assessment made upon him, agreeing with the Commissioner as to the amount at which he is liable to be assessment, the assessment shall be amended accordingly. In any other event, the Commissioner shall give notice in writing to the person of his decision in respect of the objection."

Pursuant to section 75(6A) of the Income Tax Act, an appeal, by the taxpayer, from the decision of the relevant commissioner, lies to the respondent. The procedure to be adopted at that stage is outlined by the Revenue Administration Regulations. Rule 3 provides that an appeal to the respondent shall be brought by a notice of appeal in writing within 30 days of receipt of the decision. The other relevant provisions state:

> "5. A Notice of Appeal or Grounds of Dispute shall be in writing and shall include –
>
> (a) ...
>
> (b) the grounds of appeal or grounds of dispute (as applicable);
>
> (c) copies of the documents on which the appellant or disputant relies in support of his appeal or dispute; and
>
> (d) a copy of the notification of the relevant decision
>
> 6. The Commissioner shall cause a copy of the Notice of Appeal...to be served on the relevant Revenue Commissioner.

7. The relevant Revenue Commissioner shall within twenty-one days of being served with a copy of the relevant Notice of Appeal or Grounds furnish to the Commissioner of Taxpayer Appeals –

(a) all files relating to the relevant decision

(b) a written statement of the reasons for the relevant decision."

[35] In considering the proceedings, the respondent is a decision-maker fixed with the task of considering the taxpayer's appeal. As with all appeals, in dealing with this appeal, the respondent is required to review the material that was before the relevant commissioner in order to decide whether to 'confirm', 'reduce the amount' or 'vacate the decision'. As Mrs Chapman Daley has correctly submitted, the intention of the rules, in requiring that all files relating to the decision be submitted to the respondent, is to ensure that the respondent is fully seized of all the relevant information, whether or not it is prejudicial. In the interest of good administration and in keeping with the prescription of section 7 (a) of the Revenue Administration Regulations all information which was before the relevant commissioner, must be placed before the respondent. Logic dictates that the respondent would have been unable to carry out a valid assessment of the relevant commissioner's decision if such information was not before him. In light of the nature of the respondent's role, it is my view that it cannot be seriously argued that the receipt of the reasons and the relevant files prior to the hearing renders the respondent biased. An allegation of bias can only be substantiated where there is proof that a fair-minded observer being cognizant of all the relevant circumstances would be of the view that there was a real possibility of bias - see

Porter v Magill [2000] 2 AC 357. In all the circumstances, I cannot say that there would have been any danger that having had the material before him prior to the hearing, this would have influenced the respondent's judgment and had undermined his impartiality.

[36] There is also Mr Hamilton's challenge with reference to the submission of the written reasons by the relevant commissioner. This challenge was on the basis that there is no corresponding obligation for it to be served on the appellant. The Revenue Administration Regulations make provision for written statements of reasons to be submitted to the respondent. The regulations make it clear that written reasons for the decision are supplied only at the appellate stage, that is, after the appellant taxpayer has submitted all the documents he deems pertinent to his appeal, but before the appeal is heard. It may well be said that although there is no provision for the amendment of an appellant's grounds of appeal, having the benefit of the reasons could very well influence the way it proceeded with its appeal before the respondent. The Income Tax Act does not specify what form a notification of the relevant commissioner's decision should take, but there is nothing to indicate that it should not include the reasons for the decision. In fact, the letter of 18 May 2005 informing the appellant of the decision, made reference to the AU3 form which accompanied it. The AU3 form clearly outlines the reasons for the decision by setting out under each item of expenditure a short statement as to the reason for not accepting the figure in the amended return. In these circumstances, the appellant would have been fully aware of the nature of the case and in my view, would not have been prejudiced by not being

provided with a copy of the written statement of the reasons sent to the respondent, as he would already have knowledge of the reasons.

[37] There is no doubt that a representative from the TAAD, Mr Raule Plummer, wrote to the respondent after the hearing. In his letter, Mr Plummer indicated that "no information had been presented to show how the information captured in the Financial Statements accompanying the Returns filed on June 2, 2000, were derived or what were the errors and the cause of the errors in these audited financial statements which resulted in the accounts having to be reconstructed". He further concluded that there was no basis for "recommending any changes to the assessment raised on the company". As Mr Hamilton submitted, the respondent gave his decision one month later.

[38] In his letter, the respondent stated:

> "The TAAD noted that the schedules submitted by the appellant outlined the information captured from these source documents and indicated how the selected income and expenses were derived on the amended return filed on March 21, 2003. However, no information was presented to show how the information captured in the Financial Statements accompanying the Returns filed on June 2, 2000 were [sic] derived or what were the errors and the cause of the errors in these audited financial statements which resulted in the accounts having to be reconstructed. As a result the TAAD has indicated that there is no basis for recommending any changes to the assessment raised on the company.
>
> Coupled with the above, the schedules presented were supported in all cases by estimates, derived amounts, photocopied third party verification, and unsupported claims of inter-company set offs in the case of insurance.

> The documents presented were insufficient to verify the income reported and expenses claimed on the amended returns. Sufficient proof has not been provided that the initial returns were erroneous neither was there the requisite source documents and verification in support of the amended returns.
>
> ..."

[39] From the above communication, it is clear that in giving his reasons, the respondent adopted some of the words used by Mr Plummer. This suggests that the TAAD's reasons were brought to bear on the respondent's decision (even though the letter had been written subsequent to the hearing). This notwithstanding, I am of the view that no prejudice was occasioned by this, for the reason that, apart from the letter of 18 May 2005, there appears to be no correspondence from the TAAD regarding the reasons for the decision suggesting that Mr Plummer's letter was the written statement of the reasons which should have been submitted prior to the hearing. In any event, although the respondent took into account what was said by Mr Plummer, it is clear that the respondent did address his mind to the issues and arrived at his own conclusions for confirming the assessment. There is therefore no merit in this ground.

[40] As grounds four and five are closely connected, it will be convenient to deal with them simultaneously.

Ground four

> "The Learned Judge erred in holding that it was correct for the Commissioner on delivery of the Appellant's Amended Returns dated March 31, 2003 **to ignore the statutory procedure which obliged her to accept or refuse them**

> **and make new assessment(s) (Section 72(2)):** and to regard them as linked to the Appellant's objection dated May 8, 2002 made to the initial assessments dated April 22, 2002 and, proceed thereafter, to make a decision dated May 18, 2005 (Section 75(6) confirming the initial assessments."

Ground five

> "The statutory provisions for making assessments on delivery of the Amended Returns, (s72(2), as well as the Appellants [sic] right to object to those assessments (s75(4), are conditions precedent to the proper exercise of the Respondent's jurisdiction under Section 75(6b). The aforementioned decision made in contravention of those provisions was, in consequence, ultra vires."

[41] It was Mr Hamilton's submission, with respect to ground four, that the Income Tax Act makes provision for the delivery of returns of income in two factual circumstances: (i) where the taxpayer voluntarily complies with his duty to deliver a true and correct return of his income (ii) where the taxpayer refuses or neglects to deliver a return and complies only after he has been assessed, has objected to the assessment and is then served a notice requiring him to deliver a return. Where, as in this case, a taxpayer who falls within the first category discovers that the return delivered is erroneous, he must, in obedience to his statutory duty ensure that the return is true and correct, make the requisite amendments to the return and deliver it to the commissioner. Mr Hamilton argued that there is no legal impediment, save for time stipulations, to the taxpayer's delivery of a corrected version to replace the one originally delivered.

[42] Counsel further submitted that the provisions of the Income Tax Act establish a clear demarcation of the duties of the taxpayer and the commissioner. The taxpayer who discovers that the return is incorrect must amend and deliver the corrected version to the commissioner because he is permitted to deliver a return, not two or more, as implied by the respondent. When this is done, he argued, the process begins 'de novo' and the commissioner's duty is then to examine the amended return, make a determination to accept or refuse it and then raise the requisite assessment. He contended that the respondent had arrogated to himself the role of selecting a return when his proper role was to review the evidence to ensure that the relevant commissioner had acted in accordance with the law. He further argued that the commissioner, in making the assessment on the amended return, can take into account all the material available to him/her, including the original return but he/she could not regard the original return, which has been replaced, as being still extant and in effect disregard the amended return.

[43] In response, Mrs Chapman Daley submitted that the learned judge had accurately captured the scheme of the Act. Referring to the various pieces of correspondence which passed between the parties, she submitted that the amended returns were filed contingent on the objection process, to settle this process that was already in train. She argued that contrary to Mr Hamilton's argument, the appellant's accountant indicated that she understood that this was the basis on which the amended returns were being submitted. Since the amended returns were in relation to the objection process, there was no reason for the commissioner to raise new assessments

on the amended returns, she arrgued. She pointed out also that the first returns were supported by audited financial statements, but Ms Russell who reconstructed the accounts for the amended return did not state on what basis she treated the first accounts as being superseded nor was she in possession of all the documents necessary to reconstruct the accounts. The auditor who approved the first financial statements would have had the benefit of the appellant's records, whereas Ms Russell only had the benefit of third party information, she argued and the first accountant would therefore have been in a better position to present correct returns. The commissioner, she argued, would have been more compelled to accept the first return. She also referred to the case of ***Bi Flex Ltd v Inland Revenue Board*** (1986) 38 WIR 344 and submitted that an assessment remains right until the taxpayer shows that it is wrong.

[44] In relation to ground five, Mr Hamilton submitted that the conditions precedent to the making of the respondent's decision were that the taxpayer must be assessed and he/she must have objected to that amount. He argued that the respondent and the commissioner at the TAAD fell into error by failing to recognize that the appellant's objections to the assessment based on the initial returns were no longer relevant to the process because, the initial returns, having been replaced by the amended returns, the process began de novo. The facts, he argued, showed that there was no assessment or objection to the amended returns and specifically no objection to the commissioner's revised assessments. There was, it was submitted, in consequence no decision in respect of an objection which could properly give rise to invoking the appeal provisions

under section 75(6A). The respondent therefore acted without legal authority in purporting to decide the matter pursuant to section 75(6B) and the decision was therefore null and void, he argued.

[45] Mrs Chapman Daley, in response, submitted that no assessment needed to be raised as the amended return was filed as a supporting documentation to be used in the settlement of the objection. At all times the appellant had the benefit of the statutory provisions with respect to objections and appeal and in all the circumstances it did make use of all such provisions and was at no point ever prejudiced or prevented in its endeavours in accordance with the Income Tax Act. Therefore, it was submitted, the learned judge was correct when he found that the conditions prescribed for the exercise of the respondent's jurisdiction were in fact met.

[46] The starting point of the taxpayer's liability to pay income tax is section 67(1) which insofar as relevant:

> "every person liable to pay income tax in respect of any year of assessment shall deliver ... to the Commissioner of Inland Revenue or to the Collector or Assistant Collector of Taxes... a true and correct return of the whole of his income from every source whatsoever for that year of assessment .."

As prescribed, every person who is liable for the payment of income tax has a duty to deliver a true and correct return of his income. Section 72(1) entitles the commissioner to "proceed to assess every person liable to the payment of tax" as soon as the period has expired for the submission of the return. Section 72(2) provides that "the Commissioner may accept the return and make an assessment... or refuse to accept the

return and, to the best of his judgment, make an assessment ... of the amount at which he ought to be charged". It is my view that this provision makes it clear that the ultimate determination of whether the return is "true and correct" rests with the commissioner. Implicit in the power to reject the return is the recognition that the return may not be true and correct. If it were otherwise, the system of assessment would be open to much abuse or undesirable practices, as it would be possible for the taxpayer to manipulate the returns so as to minimize the amount he would be assessed at or be required to pay in taxes.

[47] I am also of the view that once the taxpayer has submitted a return and the commissioner has raised an assessment, the Income Tax Act does not contemplate the submission of a fresh return to replace it. This was not the intent of Parliament. If that were the case, I think the drafters of the Act would have so expressly stated. Further support for this conclusion is found in the fact that the commissioner, upon rejecting the returns is empowered to make a best judgment assessment. I am therefore in agreement with the learned judge that "the taxpayer's decision to submit subsequent returns cannot compel the Commissioner of TAAD to accept them on the presumed basis that they are now 'true and correct'". Any harsh results that are occasioned by this (as is the case alleged here, that is, that there is a subsequent discovery that the returns are incorrect) are mitigated by the provisions of section 75(4) which allows the taxpayer to formally object.

[48] It follows that any documents submitted after the assessment must be viewed as being a part of the objection process. The commissioner did not ignore the statutory

procedure which required that he "accept or refuse the return", but rather, he accepted the returns filed in June 2000, rejected the assessment which flowed therefrom and proceeded to assess the appellant's liability to taxation. Thereafter, the appellant having objected, the documents which were submitted subsequently, regardless of their nature, had to be viewed as part and parcel of its attempt to show that the assessment was erroneous. There was no obligation on the commissioner to deal with the amended returns as being the correct ones. They were part of the objection process and had to be dealt with accordingly. The assessment and the objection process having been completed, the conditions precedent to the proper exercise of the respondent's jurisdiction were met. These grounds also fail.

Ground six

> "The Learned Judge erred in holding that the Appellant had an obligation to explain/justify the differences between the initial and Amended Returns."

[49] Mr Hamilton argued that the appellant did not merely assert that the original returns were incorrect, but, as was its duty to do, it delivered amended returns to replace them. Thereafter, the onus that rested on the appellant was to object to any assessment made in the event that the relevant commissioner refused to accept the amended returns. He further submitted that the TAAD's letter of 8 March 2009 confirmed that the amended returns were properly supported by the relevant documentation, stating that there was no obligation on the appellant to reconcile the figures, it having taken steps to replace the original returns.

[50] In relation to the alleged insufficiency of documentary evidence to support the amended returns, he relied on dictum in ***D.R. Holdings Ltd v Commissioner of Taxpayer Appeals*** SCCA No 71/2007, delivered 31 October 2008, that the lack of documentary evidence should not invariably be a reason for rejecting explanations given by the taxpayer. He also argued that there is no authority for the proposition that when a taxpayer replaces a return, he has a duty to reconcile and/or explain any differences between the original returns and the amended or later returns, and his failure to do this is to be regarded as a failure to discharge the onus of proving that the assessment raised on the basis of the original return is erroneous. He further argued that it is not the law, as implied in the respondent's decision, that the appellant was vicariously liable for the acts of its accountant.

[51] It was submitted on behalf of the respondent that by virtue of sections 75(4A) and 76(2) the onus of proving that an assessment is erroneous rests on the appellant. It was argued that the facts as found by the learned judge were that the original returns were supported by audited financial statements which were the basis for the assessments. The evidence of Ms Russell revealed that the amended returns were premised on speculations and subjective interpretations without the benefit of source documents. Therefore, it was argued, there was no basis for disturbing the learned judge's findings on this issue.

[52] In dealing with this aspect, the learned judge made reference to ***Bi-Flex Ltd*** and adopted the dictum of the judge in that case, viz, that in proving that the assessment was erroneous, the appellant had to show not only that the assessment

was incorrect, but also what was required to make the assessment correct. The learned judge stated that:

> "The Appellant acknowledged ... that it had difficulty with securing all the necessary documents which it would have required to re-construct the accounts and the returns. The Commissioner TAAD also acknowledged that some additional information had been provided by the accountant. The clear evidence is that the Appellant's accountant was unable to provide the information which would have discharged the onus to prove 'the assessment erroneous'."

Further, in addressing the appellant's submissions that certain statements contained in the decision of the respondent suggested the "availability/adequacy of the Appellant's records", he highlighted the following:

> " ... the schedules submitted by the appellant outlined the information captured from these source documents and indicated how the selected income and expenses were derived on the amended return filed on March 21, 2003."
>
> "... the schedules prescribed were supported in all cases by estimates, derived amounts, photocopied third party verification, and unsupported claims of inter-company set off in the case of insurance."

He then stated that "[n]othing could be further from the truth" and that "the supporting documentation was inadequate to support any positive finding in favour of the Appellant's objection". Then, at page 29 of the judgment, he said:

> " It was submitted, and in my view correctly, that the Commissioner did not err in confirming the additional assessments as he had not been provided with the evidence to allow him to draw the conclusion that the initial returns and accounts were wrong. He could only have concluded

> that the second submitted returns were correct if he had been provided with evidence that the initially submitted returns and accounts were wrong. This, the Appellant failed to supply."

[53] In my view, although ***Bi-Flex Ltd*** concerned the making of a best judgment assessment, the approach espoused in that case, which was adopted by the learned judge, is a reasonable one. As the learned judge noted and as is evident from the provisions of the statute, the focus is on proving the assessment wrong. Indeed, this being the process subsequent to the delivery of the amended returns, which I have attempted to show would be the objection process, the onus is on the taxpayer to prove that the assessment is erroneous as provided for in section 75(4A) of the Income Tax Act. It will be recalled that one of the grounds of objection advanced on behalf of the appellant was that the audited financial statements which formed the basis for the return submitted in June 2000 were wrong. In his affidavit Mr Pottinger indicated that the assessment was based on those financial statements. It would seem to me to follow that the appellant in seeking to show that the assessment was erroneous would have had to show why the initial return and the accompanying financial statements containing the appellant's accounts were wrong and as a corollary to that, why the subsequent return was correct. The error had not been shown. There is therefore no merit in this ground.

Ground seven

> "The Learned Judge erred in holding that if the Appellant were provided with the quantum of tax and the relevant year of assessment, this was sufficient compliance with the

> mandatory requirement that the Notice of Assessment state the basis on which it is made."

[54] Mr Hamilton submitted that section 75(3) of the Income Tax Act outlines the circumstances in which an assessment "shall not be impeached or affected" but with the proviso that the notice of assessment served on the person intended to be charged shall state the basis on which the assessment is made. The effect of the substitution of the words "state the basis" for the words "contain in substance and effect the particulars" was that the relevant commissioner could explain in less detail the reasons for the assessment, he argued. However, it did not alter the purpose of the proviso, which is essential to enable the assessed to know the sources taxed and the reasons for doing so in order that he can formulate a sensible response if he wishes to file an objection. Mr Hamilton made reference to the view of Rowe P in ***Collector of Taxes v Winston Lincoln*** (1988) 25 JLR 44 that the commissioner is obliged to state, at minimum, the sources of income and submitted that this opinion should be preferred to the view of Dukharan JA in ***Dennis Murray v The Commissioner of Taxpayer Appeals*** SCCA No 70/2007, delivered 2 October 2009. He further submitted that the view taken by Rowe P was consistent with the relevant statutory provisions given the importance of the source concept in Revenue Law. Income tax, he argued, was imposed on income derived from the sources delineated in section 5 of the Income Tax Act. Accordingly, he submitted, the combined effect of the relevant sections was to require that the notice of assessment state: the source of income chargeable; the amount of tax assessed; the amount of tax payable; and the year of assessment

brought into charge. He stated that since there was no assessment made on receipt of the amended returns, there was consequently no basis stated and to the extent that it was asserted that there was, it was not sufficient.

[55] Counsel further submitted that if the court accepts that the purpose of the notice is to put the taxpayer in a position to formulate a sensible response by way of objection, the basis had to be included. He submitted that it was clearly not in compliance with the proviso, for the basis to be provided in an affidavit or correspondence long after the notice of assessment had been served. He further argued that a perusal of the notice indicated that no basis was disclosed in the forms and that the "adjustment of return of income form" for 1998 and 1997 indicated that no basis had been stated. The Act, he argued, requires that each year of assessment be dealt with separately. Accordingly, even if the basis for 1998 had been stated, as a matter of principle and law this would not be compliance for 1996 and 1997, he argued.

[56] He submitted also that the appellant was designated an approved farmer for income tax purposes pursuant to section 36D of the Income Tax Act and was entitled to an exemption from tax liability for 20 years. This designation he argued could only be revoked by the gazetted order of the Minister of Finance. The appellant was incorporated and commenced operations in August 1988 and would be entitled to the exemption until 2008, and the commissioner, he contended, in raising assessments on the company in 2002 had, in effect, revoked the exemption. Given the statutory provisions, there was a duty to provide proof of the revocation by way of the gazetted order of the revocation and, if the revocation was based on alleged breaches by the

appellant, the respondent was required to provide proof of compliance with the natural justice requirements of section 36D (3) of the Income Act to establish the validity of the revocation. It was also argued that any exemption which had accrued during the years of assessment of 1996 to 1998 could not be denied retroactively.

[57] Mrs Chapman Daley referred to the case of ***Dennis Murray*** submitted that the respondent had complied with the mandatory statutory requirement to state the basis of an assessment. This, it was submitted, was evident from the affidavit of Mr Pottinger. She further submitted that the appellant had assessed itself but had failed to make an ascertainment as to the correct quantum. Operating under an error that it was exempt, the appellant had assessed itself at a taxing rate of nil when it ought to have been at the rate of 33 1/3% and therefore a claim by the taxpayer of not being aware of the basis of the assessment was fallacious and untenable, she argued. The assessment indicated that it was income that was assessed based on their returns. In written submissions, it was argued that consistent with section 36D(13) of the Act, an approved farmer is not exempted from filing returns to the commissioner or from complying with the provisions of the Income Tax Act in any other respect as this is necessary to establish the liability, if any, of the approved farmer to income tax.

[58] Anderson J had relied on ***Dennis Murray*** in rejecting Mr Hamilton's submission that the basis for the assessment as required by section 75(3) of the Income Act had not been stated. In ***Dennis Murray***, Dukharan JA stated that:

> " ... in circumstances where the Commissioner stated the particular years of assessment, the quantum of the

> Commissioner's assessment of the taxpayer's income and the source of such income (even if the source of the income is not precisely defined) is a sufficient basis of assessment to necessarily put the taxpayer on notice of the tax levied against him."

[59] Mr Hamilton has invited this court to decline to follow ***Dennis Murray*** and to revert to the former position as stated by Rowe P in ***Winston Lincoln*** that "the Commissioner is obliged ...to state at the minimum, [the] sources of income". As Dukharan JA pointed out in ***Dennis Murray***, the provision under consideration in ***Winston Lincoln*** was amended subsequently. The position prior to the amendment was that the "notice [should] contain, in substance and effect, the particulars on which the assessment is made". Rowe P relied on ***Federal Board of Inland Revenue*** (1976) 1 ACR Comm 85 where the judge, in commenting on a taxing provision in the Nigerian statute which was similar to the Jamaican provision as it was then, stated that the "particulars are essential to enable an assessee to know the sources and or basis for the assessment of his chargeable income". Rowe P observed that the prescribed income tax forms used at the time, made provisions for particulars of assessment with a "sub-head for sources of income". It was in that context that Rowe P opined that under the sub-head "Sources of Income", the commissioner should state at minimum the sources of income. It seems to me that was a different framework from that which presently exists in the amended provision. There is therefore no sound basis for preferring the approach in ***Winston Lincoln*** which interpreted a different provision. That approach required more specific information as the word "particulars" suggests. This is not a necessity in the amended provision.

[60] It is significant to note that in the prescribed income tax form intituled "Adjustment of Return of Income", there is no provision for particulars. It, however, requires that the "item of income" be stated "by reference to the relevant Section and line on return". In the Adjustment of Return of Income form sent to the appellant in this case, these items were delineated as "Trade or Business", "Investment Income", "Balancing Charge", "Capital Allowance/Loss", and "Franked Income" which, it appears, were taken from the return. Attached to the form was the explanation that the figure represented "income earned ... that was not assessed". This was done in respect of each year. From this form, the appellant's managing director would have been aware of the sources from which the appellant's income was derived and to which the income tax rate of 33 1/3% was applied. In his affidavit, Mr Pottinger stated that although the financial statements showed a net income, the returns reflected a net income of nil. It was on that basis that the returns were sent for assessment. This would have resulted, as Mrs Chapman Daley has submitted, in the commissioner merely applying the 33 1/3% to the income. It could not reasonably be said that the appellant taxpayer through its managing director was not made aware of the basis of the assessment.

[61] Before this court, it was argued by Mr Hamilton that the appellant was entitled to the benefit of the approved farmer status. This issue was never raised in the court below. It cannot be entertained at this stage. As Mrs Chapman Daley rightly argued, this court should disregard the arguments in relation to whether the appellant had been exempt, as not only was there no evidence of any exemption granted to the appellant

but the matter of an exemption was not canvassed before the court below. Consequently, this ground too fails.

[62] I would dismiss the appeal and order that the decision of the learned judge in the Revenue Court be affirmed and that the assessments should stand. I would award costs to the respondent to be agreed or taxed.

DUKHARAN JA

[63] I have read in draft the judgment of my sister Harris JA. I agree with her reasoning and conclusion and have nothing to add.

MCINTOSH JA

[64] I too have read the draft judgment of Harris JA and agree with her reasoning and conclusion.

HARRIS JA

ORDER

The appeal is dismissed. The decision of the learned judge of the Revenue Court is affirmed. The assessments of the amounts payable by the appellant shall stand.