JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 70 OF 2007

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE DUKHARAN, J.A. (Ag.)

BETWEEN DENNIS MURRAY APPELLANT

AND THE COMMISSIONER OF TAXPAYER APPEALS RESPONDENT
(Income Tax)

Herbert Hamilton for the Appellant.

Miss Kathy-Ann Pyke, Mrs. Suesette Rogers and Miss Karen Gayle for the Respondent.

February 25, 26, 27, 2008 and October 2, 2009

PANTON, P.

1. In this appeal, the appellant challenges the order of Anderson, J. made on May 25, 2007, wherein he upheld the decision of the Commissioner of Taxpayer Appeals confirming assessments made against the appellant.

2. The grounds of appeal and submissions that were before Anderson, J. are substantially the same that were filed and argued before us. Having considered the evidence, the submissions and the relevant law, I have concluded that there is no good

reason to differ from the conclusion arrived at by Anderson, J. His judgment was carefully reasoned, and I find no fault with it.

3. I agree with the views expressed by my learned brother, Dukharan, J.A., who has set out the relevant details that have been the subject of consideration by Anderson, J. and us.

A taxpayer who fails to make a return, or who fails to make a full and true return as to his income will find that the Income Tax Act gives wide powers to the Commissioner of Inland Revenue to deal with the delinquency of the taxpayer. There has been no abuse of those powers in this case. The appeal ought to be dismissed.

HARRISON, J.A.

4. I have read the draft judgment of my brother Dukharan, J.A. and I agree with his reasoning and conclusion.

DUKHARAN, J.A.

5. This is an appeal from the judgment of Anderson, J. presiding in the Revenue Court on the 25th May, 2007 where he confirmed the decision of the Commissioner of Taxpayer Appeals ("the Respondent") in the following sums against Dennis Murray ("the Appellant"):

Years of Assessment	Tax
1997	$ 625,000.00
1998	$ 750,000.00

1999	$ 953,274.13
2000	$1,649,826.00
2001	$2,017,338.00

Background

6. The facts disclose that the Appellant is the Managing Director of Murray's Wrecking Service and Auto Parts Limited. He is also the operator of Mandeville Cesspool Service as a sole trader and receives rental income.

7. The matter commenced when the Appellant filed income tax returns for the period 1996 to 1999. The Commissioner of the Taxpayer Audit and Assessment Department (hereinafter referred to as "TAAD") raised additional assessments on the Appellant for years of assessment 1996 to 1999 which contained adjustments increasing the Appellant's chargeable income in the following amounts:

Years	Tax
1996	$3,731,045.62
1997	$ 937,500.00
1998	$1,125,000.00
1999	$2,017,338.00

8. These adjustments to chargeable income resulted from the Commissioner of TAAD treating the consideration of $10,000,000 used by the Appellant to purchase real

estate located at Brumalia in the parish of Manchester as being income obtained from an unreported source.

9. A 'Form 13' dated the 8th October, 2000 was served on the Appellant requiring him to make and deliver returns of his income to the Commissioner of TAAD for the years of assessment 2000 and 2001.

10. The Appellant failed to file returns for the years of assessment 2000 and 2001. Subsequently, the Commissioner of TAAD pursuant to Section 72 of the Income Tax Act (hereinafter referred to as the Act) made estimated assessments for those years totalling $3,667,164 inclusive of penalty.

11. The Appellant, by letter dated the 10th January, 2003 objected to the Notice of Assessment for the years 2000 and 2001 and the Notice of Additional Assessment for the period 1996 to 1999. The basis for his objection were as follows:

(1) That the estimated assessment under section 72 of the Act was excessive and did not agree with his accounting records or income tax returns already submitted.

(2) That the assessments provided no details as to the additional income.

12. The Appellant denied the existence of any such additional income and requested information from the TAAD so that he could state his grounds of objection more extensively.

13. The representatives of the TAAD met with the Appellant's accountant on the 28th January, 2003 with a view to settling the objection. It was agreed that a Capital Statement would be submitted to the TAAD within a reasonable time. The Appellant made several requests for an extension to file the Capital Statement. On the 9th September, 2003 he requested a further extension until 24th September, 2003. The Appellant failed to submit the Capital Statement within the time specified and again sought a further extension until the 10th October, 2003. However, by letter dated the 30th September, 2003 the Commissioner of TAAD confirmed the assessments and informed the Appellant that she was unable to grant any further extension of time as sufficient time had been given since the objection.

14. The Appellant by letter dated 31st October, 2003 appealed to the Respondent the decision of the Commissioner of TAAD and enclosed the Capital Statement.

15. A hearing was held on the 16th March, 2004 at the Taxpayer Appeals Department where additional information was requested from the Appellant to support some balances in the Capital Statement to be presented on or before the 17th May, 2004. A meeting was held with the Appellant's representative on the 22nd April 2005 where certain errors contained in the Capital Statement were pointed out by the Respondent's representative. The Appellant by letter dated the same day responded to the issues raised at the meeting and provided a revised Capital Statement to the Respondent. However this contained arithmetic and constructional errors and when corrected

showed the Appellant owing more taxes than that for which he was assessed by the Commissioner of TAAD.

16. On the 27th April, 2005 the Respondent issued his Notice of Decision, vacating the additional assessment for 1996, while confirming the additional assessment for the years 1997 to 1999 and the estimated assessments for 2000 and 2001. The penalties for 1997 to 1999 were however removed.

17. It was the finding of Anderson, J. that the self assessment scheme of the Income Tax Act is premised upon the taxpayer making full disclosure of his income from all sources. It was also the finding of the learned judge that income "from sources not stated elsewhere" is not to define it as being income outside of the heads of income in section 5 of the Act, but rather to define it as being income not included among the heads of income included in the taxpayer's return which the Commissioner had a right to reject. The amendment of the Act in 1991 substituted the word <u>basis</u> for "particulars" and did not require the Commissioner to provide as fulsome an explanation as to the <u>source</u> of the income as formerly. It was also the finding of Anderson, J. that all that is necessary is a reasonable or rational basis for believing that the taxpayer has a tax liability. The learned Judge also found that returns filed by the Appellant for the period 1997 - 1999 showing a tax liability means that the Commissioner's burden is already met and that the taxpayer has admitted that there is a liability. It was also the finding of the learned judge that there was no obligation to grant any hearing when the appellant neglected or refused to deliver a return for the years 2000 and 2001.

18. It is against this background that the Appellant filed the following Grounds of Appeal:

"(A) The learned trial judge erred in law in confirming assessments which in breach of the mandatory statutory requirements failed to:

(1) identify the source from which the income assessed for Years of assessment (Y/A) 1997, 1998 and 1999 - allegedly arose;

(2) disclose the basis on which the assessments for Y/A 1997, 1998, 1999, 2000 and 2001 were made;

(3) furnish the Appellant with the prescribed documents necessary for it to comply with the notice issued under section 70 (1);

The aforesaid assessments were, in consequence, nullities and have no legal effect.

(B) Where, as in this case, the Appellant's objection to the assessment(s) raises the issue of liability as distinct from quantum the onus rests on the Commissioner to prove that the Appellant falls within the charge to tax in respect of the particular assessment(s) raised.

(C) The learned judge erred in law in holding that the Commissioner can impose a surcharge under section 72 (6) (b) without giving the Appellant an opportunity to be heard."

19. In ground (A) (1), Mr. Hamilton for the appellants challenged the findings of the learned judge on the basis that the onus rests on the Commissioner to show that the sums assessed derive from sources delineated in section 5 of the Act. He submitted that the assessments for the years 1997, 1998 and 1999 are ex facie flawed. He said this was so because the sums assessed are stated to have been derived from sources

"not stated elsewhere" and such a characterisation cannot be brought within the ambit of section 5 of the Act. It was further submitted by Counsel that the self-assessment scheme applies only to persons who are liable to tax and the requirement for disclosure arises only after liability is established. The Commissioner is obliged to show the grounds on which she formed her opinion that the appellant is liable to pay tax, before she can make an assessment to the best of her judgment. Counsel further submitted that the evidence presented, provided no information as to the grounds on which the Commissioner formed the view that the appellant was liable to pay additional tax for the years 1997-2001. Consequently the assessments are void.

20. Counsel referred to the cases of **Commissioners of Inland Revenue v Reinhold** (1953) 34 TC 389, **Karl Evans Brown v Commissioner of Income Tax** (1987) 24 JLR 277, **Collector of Taxes v Winston Lincoln** (1988) 25 JLR 44 and **Argosy Co. Ltd. (in voluntary liquidation) v Commissioner of Inland Revenue** (1971) 15 WLR 502.

21. In response, Miss Pyke for the respondent submitted that the phrase "sources not stated elsewhere" is a 'catch all' phrase used to denote other sources which is income that is not chargeable to tax under any other head stated on the Notice of Assessment, but which is not to be excluded from total income under the Act. She further submitted that it is the taxpayer who has the obligation to definitively identify his source of income and prove that the assessment is erroneous. The Commissioner in not identifying the precise source of the taxpayer's income does not absolve the

taxpayer from his exigibility to tax. It was further submitted that at the Notice of Assessment stage, the Commissioner has no obligation to show any grounds to the taxpayer. The Commissioner has no duty to disclose any details or particulars obtained during the investigation into the taxpayer's taxable capacity. Counsel further submitted that even if this court found that the Commissioner has an obligation to identify the source of the taxpayer's undeclared income, and such duty was not satisfied, that is an error that is not material and can be cured by the provisions of section 75 (3) of the Act.

22. In this ground the appellant's contention is that the onus rests on the Commissioner to show that the sums assessed derive from sources delineated in section 5 of the Act and does not accord with the meaning and intendment of the Act. Section 67 (1) of the Act provides;

> "Subject to the provisions of Part 1 of the Second Schedule, every person liable to pay income tax in respect of any year of assessment shall deliver, or cause to be delivered by his agent, to the Commissioner of Inland Revenue ... a true and correct return of the whole of his income from every source whatsoever for that year of assessment ..."

23. It is quite clear that it is incumbent on every taxpayer to deliver a true and correct return of the whole of his income from every source. Where the taxpayer disputes an assessment the legal burden rests solely on him to prove that the assessment is excessive or erroneous. Section 76 (2) of the Act provides;

> "The onus of proving that the assessment complained of is erroneous shall be on the objector".

The Act does not impose an obligation on the Commissioner to prove that the assessment is valid. The Commissioner bears only an evidential burden. In **Karl Evans Brown v Commissioner of Income Tax** (supra), Downer J.A. said at p. 289;

> "The cardinal features of the Income Tax Act are the obligation on the tax-payer to furnish particulars of his income to the tax gatherer and the inquisitorial power of the tax gatherer to require such particulars. There is no room for reversal of roles."

24. The evidence of Michael Williams of the Tax Fraud Investigation Division at the TAAD in his affidavit at para 7, states that for the years 1996 an adjustment was made to the chargeable income of the appellant. This is where $10,000,000.00 was used to purchase real estate located at Brumalia in the parish of Manchester. The consideration was treated as being income from an unreported source. This in my view is sufficient evidence to ground the Commissioner's reasonable opinion that liability exists. As Carey, J.A. said in **Karl Evans Brown v Commissioner of Income Tax** (supra) at page 281;

> "...in *Argosy v Commissioner of Inland Revenue*, the objector's acquisition of property which he has not returned ... can constitute the material on which the Commissioner could rely, to show the tax-payer's prima facie liability to tax. Indeed, it appears to me that the Commissioner could have acquired this information from any source whatever. That material may be cogent or hearsay or evidence inadmissible in a Court of Law."

25. It is to be noted that the evidence of Austin Edman (An Assistant Commissioner at the TAAD), in his affidavit indicates that when the appellant's corrected capital

statement was completed, he had grossly understated his returns and also owed more taxes than what he was assessed for by the Commissioner.

26. In my view the learned judge was correct when he held that the characterization "sources not stated elsewhere" was sufficient and that even if it was not, this defect was not material to invalidate the assessment. This ground therefore fails.

Ground (A) (2)

27. It was submitted by Mr. Hamilton that if a person is to be brought within the charge to tax it is mandatory for the Commissioner to identify the source (s) under section 5 of the Act from which he allegedly derived the income. The proviso to section 75 (3) of the Act mandates the Commissioner once he is satisfied that the taxpayer is liable to tax, to serve upon him a Notice of Assessment, and such notice shall state the basis on which the assessment is made. Counsel was critical of the judge's finding that there was no recognition of the fact that identifying the 'source' has to do with establishing the liability to tax while stating the basis may relate to its computation or other circumstances. He further submitted that there was no compliance, fulsome or otherwise with the mandatory provision of section 75 (3) of the Act, resulting in the assessments being nullities. The law requires that the Notice shall state the basis on which the assessment is made, so that the taxpayer can respond to the assessment. He further added that the onus of complying with the mandatory statutory provisions, that is, to identify the source of income, and to state the basis on which the assessments are made rests squarely on the Commissioner.

28. In response Miss Pyke submitted that the Commissioner's failure to specifically pin-point a specific source in the Notice of Assessment does not invalidate the assessment as it is in conformity with the statute. She further submitted that the requirement to give "Particulars" of an assessment was the position prior to the 1991 amendment of the Act. That amendment has led to a less stringent requirement to state the basis of an assessment.

29. The proviso to section 75 (3) of the Act states;

> "Provided that in cases of assessment the notice thereof shall be duly served on the person intended to be charged and such notice shall state the basis on which the assessment is made."

As was pointed out in **Federal Commission of Taxation v Prestige Motors** (1994) 123 ALR 311 at p 312.

> "The principal purpose of this notice of assessment is to bring to the attention of the person on whom it is served that such person is liable to pay on the due date the amount of tax assessed in the notice on the income stated in the notice".

The purpose of an assessment was discussed in **Dezura v Minister of National Revenue** [1948] 1 DLR 465 at p.469 when Thorson, P. said;

> "The object of an assessment is the ascertainment of the amount of the taxpayer's taxable income and the fixation of his liability in accordance with the provisions of the Act. If the taxpayer makes no return or gives incorrect information either in his return or otherwise he can have no just cause for complaint on the ground that the Minister has determined the amount of tax he ought to pay provided he has a right of appeal therefrom and is given an opportunity of showing that the amount determined by the Minister is incorrect in fact. Nor need the taxpayer who has made a

> true return have any fear of the Minister's power if he has a right of appeal. The interests of the revenue are thus protected with the rights of the taxpayers being fully maintained. Ordinarily, the taxpayer knows better than any one else the amount of his taxable income and should be able to prove it to the satisfaction of the Court. If he does so and it is less than the amount determined by the Minister, then such amount must be reduced in accordance with the finding of the Court. If, on the other hand, he fails to show that the amount determined by the Minister is erroneous, he cannot justly complain if the amount stands. If his failure to satisfy the Court is due to his own fault or neglect such as his failure to keep proper accounts or records with which to support his own statements, he has no one to blame but himself."

It seems clear in my view, that once the assessment is served on the taxpayer, if he objects, the burden is on him to prove that the assessment is invalid. This is so because he has superior knowledge of his income which the Commissioner might not be in a position to know. I agree with the view of Anderson, J. that the term "basis" does not require a "special technical meaning" as "basis" must be interpreted in the context of Revenue law and the particular statutory provision.

30. I agree with Counsel for the respondent that in circumstances where the Commissioner states 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. In the affidavit of Michael Williams at para. 6, the basis of assessment for 1997 was the actual return made by the appellant plus additional income from "sources not stated elsewhere".

31. The requirement to give "particulars" of an assessment was the position prior to 1991. The decision in **Collector of Taxes v Winston Lincoln** (1988) 25 JLR 44 resulted in an amendment to the Act, which provided a less stringent requirement to state the basis of an assessment.

32. In my view Anderson, J. was correct when he found that the Commissioner fully complied with section 75 (3) of the Act and that there is no requirement for the Commissioner to precisely identify the source of the appellant's unreported income in the Notice of Assessment.

Ground A (3)

33. It was submitted by Mr. Hamilton that when the Commissioner issued a notice under section 70 (1) of the Act requiring the appellant to make a return for the Y/A 2000-2001, it was incumbent on the Commissioner to provide the appellant with the prescribed documents (forms) as per section 67 (5) and 67 (6) of the Act so that he was able to comply with the notice. Counsel cited **Collector of Taxes v Winston Lincoln** (supra) at p 49 as support for this requirement, where Rowe, P. said;

> "Section 67 (6) provides that "every return shall be in the prescribed form" and by virtue of section 2 (1) of the Act "prescribed" means "prescribed by the Commissioner". It is prima facie reasonable to infer that a taxpayer could not comply with Sections 67 (1) and (2) to provide returns until there was presented to him personally or by post, a form prescribed by the Commissioner on which to make a return".

34. Counsel further submitted that Anderson, J. had misinterpreted the effect of section 70 (6) as the amendment to that section had not repealed section 70 (1) of the Act. He said that the effect of section 70 (6) was to give the Commissioner an additional assessment power. It was only on the expiration of the time given that this power arises.

35. Counsel for the respondent submitted in response that there was no requirement by law for the Commissioner to furnish every taxpayer personally or by post the prescribed forms on which to file a tax return. Counsel further submitted that since the judgment in the **Winston Lincoln** case (supra) the amendment to the Act was to clarify the construction of section 70 and gave a discretion to the Commissioner to issue a notice to ensure compliance by delinquent taxpayers.

36. Section 70 (1) of the Act states;

> "Every person, whether he is or is not liable to pay income tax, upon whom the Commissioner of Inland Revenue may cause a notice to be served requiring him to make and deliver a return of his income or the income of any person, shall, within fifteen days after the date of the service of such notice, make and deliver to the Commissioner of Inland Revenue a return as aforesaid."

Section 70 (6) states;

> "Nothing in this section shall be construed as requiring the Commissioner of Inland Revenue to cause a notice to be served upon any person before an assessment is made upon that person".

37. The submission by Counsel for the appellant that once the Commissioner has issued a notice pursuant to section 70 (1), it is mandatory that the Commissioner send the prescribed forms on which to file the returns is not in my view correct. My reading of the section is that the Notice under section 70 (1) is a mere reminder for taxpayers who have failed to make their returns.

38. In my view Anderson, J. was correct in his interpretation of section 70 (6) that there is no requirement to issue prescribed forms to the appellant even if a notice had been sent to him.

Ground B

39. Counsel for the appellant submitted that when the Commissioner raised additional assessments for Y/A 1997-1999 allegedly derived from "sources not stated elsewhere" there is no such source under section 5 of the Act. As a consequence the appellant was not brought within the charge of tax and is not liable to pay income tax. He said that was sufficient to end the matter. He further submitted that liability is established by showing that the taxpayer earned income from sources stated under section 5 of the Act. He said that where the Commissioner raises an additional or estimated assessment in respect of a new source the taxpayer is entitled as the appellant did in this case to object to the assessment on the grounds of liability. Where the Commissioner's additional or estimated assessment relates to an existing source, the taxpayer's objection would be to quantum and the onus would rest on him.

40. It was Anderson, J's finding that returns were submitted for 1997-1999 showing a tax liability means that the Commissioner's burden is already met and the appellant has admitted that there is a liability. Likewise with respect to the estimated assessments for 2000 and 2001 the appellant has not raised any claims that he is not liable to tax.

41. It seems to me that whether the appellant disputes his assessment raising liability as distinct from quantum the burden of proving that the assessment is erroneous lies on the appellant and this burden never shifts. The burden on the Commissioner is an evidentiary one.

42. In my view, Anderson, J. was correct when he found that since the appellant had filed returns for the period 1997-1999, the burden of proving liability had already been met and that the appellant would have admitted there was a liability. I also agree with the learned judge that the Commissioner would be well within her right to draw an inference that there was a substantial tax liability arising from income from different sources for the period 1997-1999 and as such there would also be liability for the years 2000-2001.

Ground C

43. The complaint in this ground is that the Commissioner before exercising her discretion to impose a penalty under section 72 (6) (a) of the Act must in obedience to the statutory provision and the principles of natural justice, give the taxpayer an opportunity to be heard. In this case the Commissioner did not comply with this

statutory requirement and as a consequence, removed the surcharges imposed for Y/A 1997 to 1999 but not for 2000 and 2001. Counsel for the appellant submitted that the non-submission of a return can arise, inter alia from neglect. In such a situation a taxpayer should be given an opportunity to be heard before a penalty is imposed. Counsel further added that an explanation might not only mitigate the penalty to be imposed but satisfy the principle of procedural fairness and of natural justice.

44. In looking at section 72 (6) (a), this envisages a situation where a taxpayer files returns representing his tax obligation. If the Commissioner in assessing finds additional income it would be mandatory that the Commissioner gives the taxpayer a hearing. However in section 72 (6) (b) if no returns are filed and the Commissioner makes a best judgment assessment the taxpayer would not be entitled to a hearing. Section 72 (6) (b) unlike subsection (a) has no mandatory request for the Commissioner to give the taxpayer a hearing. In this case the appellant filed no returns for 2000 to 2001.

45. I agree with Anderson, J's finding that there is no obligation to grant any hearing for the appellant when he neglected or refused to deliver a return for the period 2000 and 2001. I also agree with the learned Judge that the surcharges which were upheld by the respondent in relation to the Commissioner's decision for the years 2000 and 2001 were properly imposed.

46. Accordingly, I would dismiss the appeal and affirm the decisions of the Commissioner of Taxpayer Appeals and the learned Judge of the Revenue Court. Costs to the respondent to be taxed if not agreed.

PANTON, P.

ORDER:

47. Appeal dismissed. Decisions of the Commissioner of Taxpayer Appeals and Anderson, J. affirmed. Costs to the respondent to be taxed if not agreed.