JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 94/2005

BEFORE: THE HON. MR. JUSTICE PANTON, J.A
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN:	**STEWART'S HARDWARE LIMITED**	**APPELLANT**
AND:	**THE COMMISSIONER OF GENERAL CONSUMPTION TAX**	**RESPONDENT**
BETWEEN:	**DOMINION HOUSE LIMITED**	**APPELLANT**
AND:	**THE COMMISSIONER OF GENERAL CONSUMPTION TAX**	**RESPONDENT**

Herbert Hamilton, instructed by Dan Kelly and Associates for the Appellants.

Patrick Foster and Miss Thalia Francis, instructed by Director of State Proceedings for the Respondent.

October 9, 10, 11, 12, 2006 and December 20, 2007

PANTON, P.

I have read in draft the reasons for judgment written by my learned brother, Cooke, J.A. I am of the view that he has dealt with the important issues in these appeals, and have nothing to add.

I agree that the appeals are to be dismissed with costs to the respondent to be agreed or taxed.

COOKE, J.A.

1. Although these are consolidated appeals, all the energy of counsel for the appellants was devoted to the cause of Stewart's Hardware Limited, both as to written submissions and to oral presentation. I should add that the grounds of appeal in respect of each appellant were identical. I will therefore address my attention to the challenge of Stewart's Hardware Limited which for ease of convenience I will refer to as "the appellant". The out come of both appeals will be the same.

2. The appellant's main place of business, as hardware merchants, was in May Pen in the parish of Clarendon. There were other locations in Lionel Town and Mocho also in that parish. By a Notice of Assessment dated March 4, 1999, the appellant was informed as follows:

> "RE: AUDIT REPORT
>
> Take notice that the Commissioner of General Consumption Tax has assessed you under Section 38 of the General Consumption Tax Act for an additional amount of tax amounting to $12,440,248.02 for the period September 1994 to December 1997.
>
> This assessment is based on an audit, the findings of which are either attached to this notice or have earlier been provided to you by the Commissioner of General Consumption Tax.

PENALTY, SURCHARGE AND INTEREST

Penalty, Surcharge and Interest will be charged on all unpaid balance and late returns in accordance with Section 54 of the General Consumption Tax Act. (See overleaf for details.)"

3. The appellant forthwith objected to this assessment and by letter of March 5, 1999, stated:

"Re: Stewart's Hardware Limited
TRN: 000 053 457
GCT Notice of Assessment for
September 1994 to December 1997

On behalf of our above-mentioned client we hereby object to the assessment raised in respect of the period September 1994 to December 1997 on the grounds that is [sic] excessive and not in keeping with the Returns submitted.

It appears that all the input tax in respect of the three largest suppliers to this company has not been included in the GCT Returns and time is needed to do further investigations in this regard. This matter has been discussed with the Audit Supervisor, Mr. Andrew Edwards."

4. The Notice of Decision in respect of the objection dated September 3, 1999 was delivered by hand to the appellant on September 6, 1999. This was in these terms:

"Re: Notice of Decision

Please note that the final decision under Section 40(4)(b) of the GCT Act, on your objection to the assessment raised on the company in relation to the period September 1994 to December 1997, is that

> the assessment will be reduced to $11,915,869.00 **subject to interest and penalty**.
>
> Under section 41 (1) of the Act should you be dissatisfied with this decision you may appeal to the Revenue Court within thirty days of this decision."

5. This decision was challenged in the Revenue Court and it was confirmed on the 30th June, 2005 by Anderson, J. who further ordered that the penalty and interest on the tax due "shall not apply beyond May 2001". It is in respect of this confirmation that the appellant has filed and argued 7 grounds of appeal which are listed below:

> "(a) Commissioner's decision is out of time
>
> (b) Commissioner has no power to amend an assessment to which an objection has been filed.
>
> (c) Commissioner obliged to elect the sub-section of Section 38 under which assessments made.
>
> (d) Commissioner has no statutory power to raise a "Global" Assessment under Section 38 instead of for <u>each</u> taxable period.
>
> (e) the Commissioner's use of "Industry Standard Ratios" to make <u>new</u> assessment not a valid exercise of her power to make assessment (s).
>
> (f) Commissioner obliged to compute penalties, surcharge and interest payable where taxpayer notified that they are to be added to the tax due as permitted by Section 55.
>
> (g) Assessment excessive ex facie: Commissioner failed to take into account the sum of One Million One Hundred Thousand Dollars

> ($1,100,000.00) paid to the Respondent by the Appellant on August 4, 1999: that is prior to decision dated September 3, 1999.

6. Before dealing directly with each ground of appeal, I wish to make two preliminary observations. Firstly, I note that none of the grounds of appeal speak to ground of objection that the assessment was "excessive" (See para. 3 supra). Ground 7 (g) which is that "the Assessment excessive" pertains to the submission that the assessment did not take into account the fact that the appellant had paid $1,100,000.00. The grounds of appeal pertain to the same issue raised in the Revenue Court. In the Explanation of Notice of Decision (which will be set out fully subsequently) it was said that there was "fraudulent manipulation" of the appellant's records. Neither in the Revenue Court nor before us was this grave charge disputed. The appellant has chosen (as is its right) to complain that the assessment ran foul of the statutory regime which governs that exercise. Secondly, in accordance with Rule 1.16 (i) of the Court of Appeal Rules 2002, this appeal is by way of re-hearing.

7. **Ground (a): The Commissioner's decision is out of time.**

The relevant statutory provision in Section 40(4) of the General Consumption Tax Act (the Act) states:

> "Where a person has objected to an assessment made upon him —
>
> (a) in the event of his agreeing with the Commissioner of Taxpayer Audit and

> Assessment as to the amount at which he is liable to be assessed, the assessment shall be confirmed or amended accordingly; or
>
> (b) in any other event that Commissioner shall give notice in writing to that person of his decision in respect of the objection, so, however, that where that Commissioner fails to hand down his decisions within six months of the receipt by him of the objection and the delay is not attributable to the person's omission or default, the assessment shall be null and void."

In dealing with Section 40 (4) (a), Anderson, J. after reviewing the evidence before him said:

> "... I hold that the decision of the Commissioner was not issued outside of the time allowed by the statute. In the words of the statute, I would consider that the delay was attributable to the Appellant's "delay or omission" in sending the alleged evidence, some four (4) months after its objection and its promise to provide the schedules."

The appellant relies on a letter dated 26th April, 1999 from Andrew Edwards, a director in the Internal Investigations Unit of the Revenue Protection Department to contend that the Commissioner was not obedient to Section 40 (2) (a) of the Act. I now reproduce this letter written to Deloitte and Touche a firm of accountants acting on behalf of the appellant.

> "I write to confirm certain agreements reached in our telephone conversations (Edward/McCarthy) on Thursday April 15, 1999 regarding your client Stewarts Hardware Limited.
>
> We had discussed:

> 1. The fact that the Taxpayer's Notice of Objection, dated March 5, 1999 was erroneously addressed to the "Commissioner of Income Tax", and
>
> 2. your concern that the Taxpayer would need more time to analyze the audit findings.
>
> It was agreed that the Taxpayer would be allowed until Friday May 14, 1999 to submit records supporting grounds of the objection. Please acknowledge your confirmation of the above by signing and returning the attached copy of this letter."

The section of the Act on which the appellant relies is 40 (2) (a) which reads:

> "The Commissioner of Taxpayer Audit and Assessment may, on receipt of a notice of objection under subsection (1), require the person giving such notice —
>
> (a) within such period (not being less than thirty days) as that Commissioner may specify, to make any return or furnish such particulars or produce such books of account or documents relating to the taxable supply as, in the opinion of that Commissioner, are affected by the notice of objection; and
>
> (b) ..."

It was submitted that the appellant was not given at least thirty days to furnish "such particulars etc." as is required by the section of the Act. This submission fails. On a proper construction of the letter, as was found by Anderson, J. it was not indicative of a request by the Commissioner under this section but rather giving the appellant yet more time to substantiate its stance that the original assessment was excessive. This letter may properly be categorized as indicating

forbearance, mindful of the heavy onus on the appellant to demonstrate that the assessment was excessive **Karl Evans Brown v. Commissioner of Income Tax** [1987] 24 J.L.R. 277 at p. 281 D. This letter must be seen in the context of the correspondence between the parties which shows that the appellant did "not have its house in order". In the letter of objection it was stated that "time is needed to do further investigations". By letter dated August 4, 1999 to the Commissioner of General Consumption from Mr. B. O. Stewart, the principal of the appellant wrote:

> "As indicated to you, we have now engaged the services of an Accountant who has been sorting out our records and who has been calculating the current Returns correctly to the best of our knowledge."

I am of the view that Anderson, J. cannot be faulted for his conclusion on this aspect of the matter.

8. In this court, with permission, the respondent submitted that by virtue of the Interpretation Act the decision was handed down within the stipulated six months. The objection lodged pursuant to section 40 (1) of the Act was received by personal delivery on the 5th March, 1999 and the decision was handed down on 6th September, 1999. The relevant part of the Interpretation Act is section 8 (1) (a) and (b) which are in these terms.

> "8 (1) In computing time for the purpose of any Act, unless the contrary intention appears—

> (a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or the act or thing is done;
>
> (b) if the last day of the period is Sunday or a public holiday (which days are in this section referred to as excluded days) the period shall include the next following day, not being an excluded day;"

The respondent argued that the Act did not indicate that there was any contrary intention as to the computation of time so as to exclude the operation of the Interpretation Act. Therefore time began to run as of the 6th March, 1999, and as such time would have stopped on the 5th September, 1999. However, that was on a Sunday so the decision which was handed down on the following day would have been in time. I find that there is merit in this submission.

9. I think I should comment on the evidence that the appellant was sent a copy of the Notice of Decision by facsimile on 3rd September, 1999. As to this the appellant's stance was:

> "**SERVICE BY FACSIMILE**
>
> Put briefly, the law had not yet caught up with technology (fax) in 1999, and so service of documents on Companies was governed by Section 370 of the Companies Act and/or Section 52(1)(c) of the Interpretation Act (the Act) – this provided that in circumstances where, as in Section 40(4)(b), the manner of service was not specified, service should be effected "in the case of a corporate body or any

> association of persons (whether incorporated or not) by delivering it to the Secretary or Clerk of the body or association at the registered or principal office or the body or association, or serving it by post on such Secretary or Clerk at such office."

The learned trial judge contented himself by saying that in view of the fact of his finding that the decision was in time:

> "I do not need to examine the issue of whether fax service on September 5, 1999 was good service under the previous Judicature (Civil Procedure Code) Law."

Now Section 40 (4) (b) does not require that the decision of the Commissioner should be "served" on the appellant. It said that the Commissioner should "hand down" his decision within six months of the receipt of the objection. In the concise Oxford Dictionary, 8th Edition to "hand down" is "to transmit (a decision) from a higher court etc." In **Swainston v. Hetton Victory Club Ltd.** [1983] 1 All E.R. 1179 the headnote which accurately reflects the substance of the English Court of Appeal judgment states:

> "Since presentation of a complaint to an industrial tribunal for the purposes of s 67(2) of the 1978 Act did not require any action on the part of the tribunal a complaint could be 'presented' within s 67(2) if it was communicated to the tribunal through a channel of communication held out by the tribunal as being an acceptable means of communication and receipt of a complaint. Accordingly, a complaint could be 'presented' to the tribunal if it was posted through a letter box in the door of the tribunal's office, and since the complainant could have presented his complaint to the tribunal in that manner on Sunday, 6 December 1981 he was out of time when he presented it on the following Monday. The appeal would therefore be dismissed (see p 1184 c to g, post)."

In the instant case a reading of the record showed that the use of facsimile was employed as a means of communication between the parties. Thus this is to be regarded as "an acceptable means of communication". There is no challenge as to the accuracy of the appellant's facsimile number (the telephone record was exhibited). In my view the transmission by facsimile to the appellant satisfied the obligation of the Commissioner to "hand down his decisions". It is quite unnecessary for handing down to be encumbered with any formalities as to service. Ground (a) fails.

9. **Ground (b): Commissioner has no power to amend an assessment to which an objection has been filed.**

I have previously set out Section 40 4(a) and (b) (para. 7 supra). The appellant submitted that where:

> "... the taxpayer objects to an assessment the Commissioner can only amend the assessment if there is an agreement with the taxpayer as to the amount at which he is liable to be assessed. S40 (4)(a).
> The taxpayer may agree that the amount assessed is correct in which case the assessment must be confirmed: If the agreement is that the assessment should be increased, reduced or withdrawn then the assessment must be amended.
> Where there is no agreement the Commissioner must advise the taxpayer that her assessment as made stands, and the taxpayer then has the option of having the matter determined by the Court."

This ground of appeal is misconceived. There are no statutory constraints in section 40 (4) (b) to which the Commissioner is subject when arriving at his decisions subsequent on an objection by a taxpayer who disputes the assessment. Section 40 (1) under which the appellant lodged his objection requires the Commissioner "to review the assessment or other decision" once such objection is conveyed in writing. The objecting taxpayer is obliged to "state precisely the ground of his objection". It is expected that in the review exercise the Commissioner will act fairly in arriving at a decision. The Commissioner would no doubt use as a starting point the grounds of objection and consider all the relevant material pertinent to the precise grounds that are statutorily mandated. In this case it is doubted that the grounds of objection have been precisely stated. It is patently illogical that in reviewing the assessment under section 40 (4) (b) the Commissioner is only allowed to make the decision that the original assessment "stands". This would mean that a taxpayer who had genuine grounds for a reduction as to the original assessment would be denied relief even if the Commissioner was so persuaded on the review. Such an unfortunate taxpayer would be, in the appellant's view, forced at his expense (time and money) to seek the aid of the court. I find it not without a touch of irony that a taxpayer is complaining that the tax due has been wrongly reduced. This ground of appeal fails.

10. **Ground (c): Commissioner obliged to elect the subsection of Section 38 under which assessments made.**

Section 38 of the Act governs the power of the Commissioner to make assessments. Section 38 (1) and (2) are now set out below:

> "(1) Where a registered taxpayer —
>
> (a) fails to furnish a return as required by this Act;
>
> (b) furnishes a return which appears to the Commissioner of Inland Revenue to be incomplete or incorrect,
>
> that Commissioner shall refer the matter to the Commissioner of Taxpayer Audit and Assessment who shall make an assessment in writing of the tax payable by that registered taxpayer.
>
> (2) Where the Commissioner of Inland Revenue is not satisfied with the calculations on any return furnished by a registered taxpayer or the basis on which the return is prepared, the Commissioner of Inland Revenue shall refer the matter to the Commissioner of Taxpayer Audit and Assessment who —
>
> (a) may make an assessment of the amount that he thinks the registered taxpayer ought to have stated on the return; and
>
> (b) shall in any such assessment, state the general basis on which it is made."

Then there is Section 38 (4) which is not relevant but is set out for completeness. It states:

> "The Commissioner of Taxpayer Audit and Assessment may, to the best of his judgment, make assessment of the tax chargeable on any goods which no longer form part of the taxable supply of a

> registered taxpayer and for which no satisfactory account can be given by that taxpayer."

The thrust of the appellant's submission is that it was incumbent on the Commissioner to elect which subsection of Section 38 reliance was being placed in the assessment made. It was argued that:

> "The Respondent having failed to comply with the procedural and mandatory requirements of the Section the assessment is null and void"

Certainly the Act does not set out the appellant's contention that there is "a procedural and mandatory requirement" as espoused by the appellant. Therefore this submission advances the appellant's view as to how sections 38 (1) and (2) ought to be construed as to their effect. The original assessment was made under Section 38 without any reference to any specific subsection (see para. 3 supra). The respondent submitted that the Act does not require the Commissioner to elect a specific subsection under which an assessment is made. The scheme of the Act was contrasted with that of the Income Tax Act "which has specific provisions dealing with the contents of an Income Tax Notice of Assessment". Further it was submitted that:

> "... the Commissioner's powers of assessment contained in the provisions of section 38(1), 38(2) and 38(4) of the GCT Act are not mutually exclusive. It is submitted that where the circumstances permit, the Commissioner may rely on more than one subsection of section 38 in making an assessment."

Here is how the learned trial judge below dealt with this issue.

> "Counsel for the Appellant apparently takes the view that the provisions of section 38 (1) (b) and 38 (2)

> are mutually exclusive. But is this necessarily so? It seems to me that a return could be both "incorrect and incomplete", at the same time being one in respect of which the Commissioner of Inland Revenue is not "satisfied with the calculations". Counsel also submitted that the Commissioner had erroneously produced a global assessment, that is, one not related to specific taxable periods as required by the statute, and it is because of this global assessment that she was unable to determine under which provision the assessment was raised.
>
> I am of the view that the section does not necessarily mandate the Commissioner to elect between raising the assessment under subsection (1) or (2). It simply outlines instances in which the Commissioner of Inland Revenue shall refer matters to the Commissioner of Taxpayer Audit and Assessment. Under section 38 (1) (b), if the Commissioner of Inland Revenue determines that the taxpayer's returns are either incomplete or incorrect, she must refer the matter to the Commissioner Taxpayer Audit and Assessment who must then make an assessment. Under section 38 (2), if the Commissioner of Inland Revenue is either not satisfied with a) the taxpayer's calculations of his returns, or b) the basis upon which his returns were prepared, then the matter must be referred to the Commissioner, (TAAD). In the second case however, the Commissioner (TAAD) may make an assessment but, having done so, must state the general basis on which the assessment was made."

I would not fault the approach of Anderson, J. From the original assessment the appellant was aware of the areas of dissatisfaction of the Commissioner. These were conveyed in the details appended to the Notice of Assessment of March 4, 1995. Those details demonstrated that the dissatisfaction was both as to "incomplete or inaccurate returns" [38 (1) (b)] as well as to "calculations" [38 (2)]. The appellant sought to rely on three authorities: **Collector of Taxes v.**

Winston Lincoln [1988] 25 J.L.R. 44; **R. v. Commissioner of Income Tax, Ex Parte Donald Panton** [1988] 25 J.L.R. 448 and **Danmark and Forestwood v. F.C. of T.** [1944] 7 ATD 333. The reliance is misplaced. In **Lincoln** this court held that:

> "The power of the Commissioner of Income Tax to make an assessment under s. 67 (1) of the Income Tax Act is subject to conditions precedent. Where the assessment is carried out without the conditions precedent having been fulfilled, the purported assessment amounts to a nullity, and on process for execution of the amount of the assessment, the court can declare the purported assessment a nullity."

This is inapplicable to this case. In **Panton**, the Full Court held that:

> "... since the Commissioner has failed to supply the applicant with the particulars upon which the assessments were made in accordance with the mandatory requirements of the proviso to section 75 (3) of the Income Tax Act, she had fallen into error and the subsequent requests and assessments made by the Commissioner were invalid."

This case is not relevant. In **Forestwood** it was held that an assessment made under a particular provision cannot be sustained under some other provision. In this case the assessment was made under two provisions. As to 38 (2) the general basis was provided in the details supplied to the appellant attached to the Notice of Assessment of March 4, 1995. It is not necessary for the Commissioner to state the basis of assessment for each of the forfeiting monthly periods. This ground of appeal fails.

11. **Ground (d): Commissioner has no statutory power to raise a "Global" Assessment under Section 38, instead of for <u>each</u> taxable period.**

Essentially, the appellant contends that since according to Section 20 (1) of the Act and 6 (1) of the Regulations, the taxable period is one month, it is imperative that the assessment specifies the tax due in respect of each such period. If the appellant is correct what would be the position of pursuant to 38 (1) (a) of the Act where a registered taxpayer:

> "... fails to furnish a return as required by this Act..."

It would then mean that since the Commissioner would be unable to attribute the specific tax due to each taxable period, there could be no assessment. It is to be noted that Regulation 17 inter alia prescribes that:

> "A demand notice issued under section 37 of the Act shall state—
>
> (a) the period for which the tax has not been paid;
>
> (b) the amount of tax payable..."

There is no requirement that there should be a demand based on a monthly period. The learned trial judge expressed himself thus:

> "In my view, although the Jamaican legislation does speak to the payment of tax by reference to specific taxable periods, there is nothing in it which precludes the Commissioner raising a so-called global assessment if the taxpayer is adequately advised of the liability with which he is being charged in respect of each taxable period within the so-called global assessment. There is nothing in the Act which requires a court to hold invalid, an assessment which gives the taxpayer the information that is necessary

> for him to understand the assessment and its relation to specific periods."

While I agree that there is nothing in the Act which precludes the Commissioner raising a global assessment, I would take issue with the comments thereafter. If the Commissioner had information in relation to each statutory period and the assessment was raised in accordance with that information then the assessment would not then be global. The preferable view is that as regards global assessments the taxpayer should be informed of the rationale underpinning such assessments. In my view the rationale is provided by Explanation of Notice of Decision and the appended schedules as well as the details that accompanied the Notice of Assessment. It would appear that the Commissioner has a wide discretion (provided there is a rational basis) to raise a global assessment. In **House (trading as P & J Autos) v. Customs and Excise Commissioners** [1996] STC 154 paragraph 1 of the headnote which accurately summarizes the judgment the English Court of Appeal held:

> "The power of the commissioners to make a global assessment was not confined to those cases where it was impossible or impracticable to identify the specific accounting period or periods for which the tax claimed was due."

This ground of appeal fails.

12. **Ground (e): The Commissioner's use of "Industry Standard Ratios" to make <u>new</u> assessment not a valid exercise of her power to make assessment (s).**

(a) Three questions immediately arise:

> The first is what is the Industry Standard Ratios (ISR)?
>
> The second is how was this utilized by the Commissioner?
>
> The third is this utilization unlawful bearing in mind the task of the Commissioner to review the original assessment?

(b) The affidavit of Norris Miller on paragraphs 3 – 6 describes the ISR;

> "1. ...
>
> 2. ...
>
> 3. That when a taxpayer applies for registration under the General Consumption Tax Act and for a Taxpayer Registration Number he is required to state the nature of the business he is involved in and is then assigned a business nature code. Based on this information, the Department is able to identify the industry to which each taxpayer belongs.
>
> 4. The industry standards/ratio is a comparative analysis of tax returns made by companies and individuals engaged in similar types of business activity. The industry standard/ratio is determined over a period of time from actual auditing and/or examination of the records of business in an industry. This forms part of the Department's records.
>
> 5. Among other things, in carrying out the analysis, an examination is done of the total sales; the relationship between the actual cost of purchases and the actual cost of goods sold; the mark up on goods; and the relationship between the net tax payable and taxable supply (which attracts a positive rate of tax) in each establishment.

6. The industry standard/ratio is generally used to identify taxpayers who appear to be filing incorrect returns, and to guide the assessment when a taxpayer does not have adequate or reliable records."

(c) This same affidavit demonstrates how the ISR was utilized in paragraphs 7 – 12:

"7. The Appellant objected to an assessment raised by the Respondent and Mr. Denzil Haase, the officer handling the objection, requested my assistance in the review of the Appellant's assessment, with a view to determining whether, and to what extent, a reduction of the assessment could be made.

8. On my examination of the records of the Appellant it was disclosed that their several inaccuracies rendered them unreliable.

9. In the circumstances I analyzed the GCT returns submitted by the Appellant against the returns submitted by other companies in the industry with sales exceeding $1 billion, and made a determination that the Appellant was recording the lowest net tax payable and had the lowest ratio of net tax payable to standard-rated sales. This is more fully indicated in the following table:

TAXPAYERS	TOTAL SALES	TAXABLE SALES (which attract a positive rate)	NET TAX PAYABLE (NTP)	NTP/STDS
A	4,041,111,108	3,800,234,388	95,445,903	2.51%
B	3,129,618,426	2,858,292,392	76,716,598	2.68%
C	2,174,581,354	2,124,979,080	45,797,372	2.16%
D	2,023,294,888	2,006,954,009	41,711,368	2.08%
E	1,500,293,587	1,427,547,632	5,358,143	0.38%
Stewart's Hardware	1,360,511,212	1,174,051,457	772,067	0.07%
G	1,356,221,472	1,291,683,484	26,002,123	2.01%
H	1,248,741,389	1,192,459,746	27,776,229	2.33%
I	1,085,197,577	523,142,250	8,673,910	1.66%
J	1,080,656,655	987,941,328	10,620,790	1.08%
K	1,076,050,160	1,000,249,251	16,822,228	1.68%

10. The first column refers to the companies under review. As an officer of the Department I have an obligation to secrecy. I am therefore prohibited from disclosing information on these taxpayers with any greater particularity, as all the information set out in the table was provided to the Revenue by the listed taxpayers themselves (which are companies in operation in the hardware sector in Jamaica) by way of their GCT returns. The second column indicates the taxpayers' total sales. The third column indicates the sum total of goods sold which attract a positive rate of GCT. The fourth column indicates the [sic] each taxpayer's assessment of his own liability to GCT. The last column indicates each taxpayer's assessment of how many cents in each dollar of the taxable sales is payable.

11. An analysis of the Appellant's returns and records indicated several irregularities, and when compared with other taxpayers in the same industry, several deviations from the industry norm were discovered.

12. The reduced assessment figure of $11,915,869.00 was arrived at by applying the

> industry standards/ratio to the input tax figures for each year, obtained from the Appellant's records. This is indicated in the schedule exhibited hereto as "**NM1**"."

However, it was not only the ISR which was the sole criterion in the review exercise. I now reproduce in full the Commissioners "Explanation of Notice of Decision".

> "The assessment on Stewart's Hardware Ltd. was arrived at by three means:
>
> i) analyzing and testing their return data.
>
> ii) analyzing and testing their financial statements in collaboration with the Industry Standards.
>
> iii) Physical examination of input tax returned.
>
> **Analyzing and Testing Return Data**
>
> Tests done on output tax returned suggest that the input tax was overstated by $12,567,305.00, see appendix 1.
>
> **Analyzing and Testing Financial Statements in Collaboration with the Industry Standards**
>
> These tests revealed that the company was returning far less tax than similar size or even smaller volume firms in the sector, re computation of the next tax payable using the industry ratios resulted in a tax liability of $11,915,869.00, see appendix 2.
>
> **Physical Examination of Input Tax Returned**
>
> Examination of the records revealed what is being investigated as fraudulent manipulation of the records and these among other thing (sic) suggest an adjustment to the tax returned of $12,440,248.02, appendix 3.

> **Findings**
>
> These analyses and tests all brought about adjustments in the range of $12,567,305.00; the highest to $11,915,869.00, the lowest. The initial assessment was done at [sic] of $12,440,248.02; the mid figure. This was thought to be a fair and reasonable assessment, as it is well below what is being returned by much smaller businesses in the industry.
>
> ...
>
> **Conclusion**
>
> After much consideration the decision was taken to re examine the initial assessment and it was determine (sic) that the that (sic) that could be taken to assist the taxpayer was to reduce the assessment to the lower end of the band of assessments identified by the tests performed. (i.e. $12,567,305.00 - $11,915,869.00). Therefore the decision was taken to reduce the assessment to $11,915,869.00."

(d) It is therefore incorrect to argue, as the appellant did:

> "... that the Industry Standard Ratios was (sic) used to determine the quantum of the assessment under appeal..." [Emphasis supplied]

The ISR was historical statistical data pertaining to like activity as that in which the appellant was engaged. In the circumstances of this case especially as to the "fraudulent manipulation of the records", I hold that the employment of the ISR was fair and lawful. This was not a new assessment as set out in the ground of appeal. It was the decision subsequent to the appeal on the appellant's objection in the Revenue Court. **Jeudwine v. Customs and Excise Comrs.** (1977) V.A.T.T.R. 115. in support of this ground. It must be immediately

recognised that **Jeudwine** was decided with specific reference to section 31 of the English Finance Act. The short report in DE VOIL is now reproduced.

> "Customs and Excise, not being satisfied that certain pictures had been exported by a picture dealer, issued an assessment for £187. Sub-sequently they decided that the proof they had been given that certain other pictures had been exported was inadequate and issued a further assessment, giving credit for the amount previously assessed. Only the second assessment was appealed against. The Tribunal held that section 81 permits only one assessment for any period and are bound by that assessment unless and until further evidence comes to their knowledge. In this case no further evidence had come to light; Customs and Excise merely took a different view of the existing evidence. The assessment was therefore bad."

This case is not helpful. Clearly it is not relevant to the exercise of the Commissioner's discretion in arriving at a decision under 40 (4) (b) of the Act. This ground of appeal fails.

13. **Ground (f): Commissioner obliged to compute penalties, surcharge and interest payable where taxpayer notified that there are to be added to tax due as permitted by section 55.**

The appellant submitted that:

> "The Commissioner's decision is invalid as the Commissioner failed to discharge her obligation to compute penalties, surcharge, and interest that were notified (sic) to the Appellant as being payable."

I do not find it necessary to advert to the sections of the Act pertinent to penalties etc. I agree with the submission of the respondent that:

> "The decision under appeal was made pursuant to section 40(4)(b) of the GCT Act. Subsection 40(4)(b) of the GCT Act requires the notice of decision to be in writing, and does not specify any other requirements with which the notice of decision must comply. There is no requirement that the decision include a computation of the penalties, surcharge and interest that may be payable. A computation of these sums would be done when the liability is finally determined. In the interim, the taxpayer is notified of the fact that the sum assessed will be subject to penalty, surcharge and interest." [Emphasis supplied]

This ground fails.

14. **Ground (g): The assessment is ex facie excessive as the Commissioner failed to take into account the sum of $1,100,000.00 paid by the Appellant on August 4, 1999.**

This ground has no merit. What the Commissioner did was to determine the total amount due from the appellant for the relevant period. The fact that $1,100.000.00 had been paid is relevant to the final sum which the appellant will have to pay. This in my view is a matter of simple arithmetic. This ground fails.

15. I would dismiss the appeal of Stewart's Hardware Limited. There should be costs to the respondent. I would also dismiss the appeal of Dominion House Limited and order that the respondent should have its costs.

HARRIS, J.A.

I agree.

PANTON, P.

ORDER

The appeals are dismissed. Costs to the respondent, to be agreed or taxed.