ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.20 OF 2002

BETWEEN:

BRITISH AMERICAN INSURANCE COMPANY LIMITED

Appellant

and

THE ATTORNEY-GENERAL OF ANTIGUA AND BARBUDA

Respondent

Before:

His Lordship, The Hon. Sir Dennis Byron	Chief Justice
His Lordship, The Hon. Mr. Ephraim Georges	Justice of Appeal [Ag.]
His Lordship, The Hon. Mr. Brian Alleyne, SC	Justice of Appeal [Ag.]

Appearances:

Mr. Justin Simon for the Appellant
Mr. Anthony Astaphan, SC; Mr. John Fuller with him for the respondent

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2003: February 6; 18;
June 18.

JUDGMENT

[1] BYRON, C.J.: This case was commenced to contest the assessment by the Commissioner of Inland Revenue that British American was liable to pay $1,067,166.00 as withholding tax for the period 1995 to 2001 pursuant to section 39(1) of the Income Tax Act Cap 212. Two actions were commenced and consolidated.

[2] In one, the decision was challenged as being in breach of the proper interpretation of section 39. The section provides for the withholding tax to be paid where any person pays to another person not resident in Antigua and Barbuda mortgage or debenture, interest or rent, annuity or other annual payment which the payor is

entitled to deduct under section 10 of the Act in arriving at its chargeable income. The learned trial Judge concluded on the facts that, since British American was incorporated in the Bahamas and registered in Antigua as a foreign company doing business, the Bahamian company and the Antiguan branch were one and the same person. Thus the amounts paid from Antigua to Bahamas on which the assessment was based were not paid to "another person" as the payee was the same person as the payor. He accordingly concluded that the assessment was erroneous and made appropriate orders quashing liability to pay the assessment. The State did not appeal against the decision.

[3] In the other case declarations were sought to establish that amendments enacted in 2000 to section 62 of the Income Tax Act Cap 212contravened the Constitution by depriving the citizen of the right to protection of property and to protection of the law as guaranteed under and by sections 3, 9 and 15 of the Constitution. The provisions which were challenged sought to compel the payment of the assessment before any objection could be determined. The learned trial Judge concluded that the section was constitutionally unchallengeable and dismissed the application. This decision has been appealed against. Both counsel submitted that the matter should not be treated as hypothetical as the matter was being treated as a test case as there were many other applications seeking similar relief.

The Appellant's Complaint

[4] The legislative scheme for disputing assessments under the Income Tax Act Cap 212, before the amendment, was set out in provisions of sections 56 to 62. These provided that a taxpayer who was dissatisfied with any assessment could apply to the Commissioner to review the assessment. If the review did not satisfy the taxpayer he could appeal from the commissioner to the Appeal Board, and then to a Judge of the High Court whose decision would be final with power for the Judge to state a case to the Court of Appeal and provided for the Chief Justice to prescribe Rules of procedure governing such appeals. Section 62(2) had originally

provided that the collection of tax shall remain in abeyance until the objection or appeal is determined, provided that the Commissioner may enforce payment of any portion of the tax that is not in dispute. Subsection (3) provided that payment must be made within 30 days of the final determination of the appeal.

[5] In 2000 the Income Tax (Amendment) (No.2) Act, 2000 was enacted. By section 11 it repealed section 62(2) and (3) and replaced it with new provisions. The amendment to the section reads as follows and I think it is important to quote it:

[1] Not applicable

[2] The collection and payment of tax shall, notwithstanding any notice of objection or appeal, be enforced in full;

[3] No right of an objection or appeal shall be exercised under this Act, unless the taxpayer has paid to the Commissioner the amount of tax assessed and stated in the notice;

[4] Notwithstanding subsections (2) and (3) the Commissioner may if satisfied that the taxpayer has no means of paying the assessed tax prior to the objection to the Board, he may require the Board to hear and decide on the objection if the Board considers that there is merit in the objection;

[5] All objections notified to the Board shall be heard and decided within sixty days;

[6] If the Board decides that the appellant is over charged, the Commissioner shall refund the excess plus interest at the rate of five per centum to the appellant within fourteen days of the making of the decision.

[7] Not applicable.

[6] The appellant appealed on the basis that the learned trial Judge applied a wrong principle when he concluded that a provision to “pay now and argue later” does not deny a person a right of access to the Court or oust the jurisdiction of the Court. He contends that the correct formulation of the statute was “pay before you object” and that was an unjustifiable fetter on the right of access to the court.

[7] There were several grounds of appeal and both sides submitted learned full and thorough skeleton arguments and books of authorities. The argument commenced in the Antigua Sitting of the Court and continued in the St. Lucia sitting some weeks later. This had become desirable because during the argument the issues had become narrowed as consistent premises of law emerged from the argument of both counsel. The nature of the dispute did not allow for a consensual conclusion. I do not think it necessary to recite all the arguments presented as by the end of the case the only issue in dispute was the interpretation of section 62 of the Income Tax Act as amended.

[8] The competence of parliament to make laws in the field of taxation ceased to pose any controversy during argument. Taxes are the lifeblood of any democratic society. They enable Government to meet its legal, social and economic obligations to all persons and citizens in the State, to honour its financial obligations to State employees and creditors, to discharge its liabilities to regional and international institutions, and to embark on social and development programs for the benefit of all. It is, therefore, not surprising that Section 9(4) of the Constitution specifically prescribes that nothing contained in or done under the authority of any law shall be held to be unconstitutional to the extent that the law in question makes provision for the taking of any property in satisfaction of any tax except so far as it is shown not to be reasonably justifiable in a democratic society. In reliance on the decisions which have legitimated the consideration of evidence to construe legislation or constitutions[1], the context in which the amendments were introduced was proven by evidence that the 2000 budget gave notice of Government's policy to strengthen its tax collection capacity and one of the strategies involved combating making frivolous appeals which resulted in significant amounts of assessed taxes remaining unpaid. It was uncontested that

[1] **Attorney General v Antigua Times Limited** (1976) A.C. 16; **Mootoo v Attorney General of Trinidad and Tobago** (1979) 1 WLR 1334; **Cable and Wireless** (Dominica) **Limited v Marpin Broadcasting and Telecommunications Limited** PCA 15 of 2000.

the challenged legislation imposed taxes on income. It could not be shown that the section was not reasonably justifiable in a democratic society[2].

[9] The taxpayer's right to the protection of law as prescribed by section 3 of the Constitution also ceased to be controversial during argument. The fundamental right of access to the Court which section 3 guarantees has its genesis in Article 6 of the European Convention of Human Rights and has been judicially explained.[3] Although Parliament may in the public interest limit, qualify, or restrict access to a Court or other legal authority without violating the right to the protection of law, the rights guaranteed by the Constitution do require that disputes be resolved by "due process of law" which includes the undisputed right to have civil rights determined by an independent and impartial body established by law within a reasonable time[4].

[10] Reliance was placed on Janosevic v Sweden[5]. In this case after a major investigation, the tax authorities increased the applicant's tax assessment and ordered him to pay tax surcharges because of incorrect information supplied in his tax returns. The appellant requested reconsideration of the decisions and requested a stay of execution pending the determination. The tax authority demanded security and on the applicant's failure to produce it refused the stay of execution. The tax authorities enforced collection and the applicant was declared bankrupt. He was subsequently prosecuted and convicted for tax fraud. The claim against the assessment had not been heard over a period of six years but domestic appeals on the process had all been lost. The European Court examined the application of Article 6 to this case.

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[2] **Nyambirai v National Social Security Authority and Another** (1996) 1 LRC 64
[3] **Browne v Scott** (2001) 2 WLR 817;
[4] **Ranaweera v Wickramasinghe** (P.C.) 1970 A.C. 951**; Lasalle v A.G.** (1971) 18 WLR 379 per Phillips JA at 395; Re Consitution of Vanuatu (1993) 1LRC 141; **State v Boyce** (2002) 3 LRC 774 at 790.
[5] Application No. 34619/97

[11] They confirmed that in general tax disputes fall outside the scope of "civil rights and obligations" as per the consistent decisions of the court as set out in Ferrazzinni v Italy[6]. However, that court defined "criminal charges" to include the imposition of the tax surcharge and ruled that Art.6 did apply to it. It reaffirmed that the right of access is not absolute but may be subject to limitations permitted by implication. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired. Furthermore, they will not be compatible with Art.6 if there is not a reasonable relationship or proportionality between the means employed and the aim sought to be achieved. The Court considered that the tax authorities could be empowered to impose the tax surcharge so long as the person affected can bring such decision affecting him before a judicial body that has full jurisdiction to quash in all respects the challenged decision. On the particular facts of the case, the Court considered that there was undue delay in determining the issues concerning the liability to the additional taxes and surcharges which amounted to denial of effective access to the Courts.

[12] There were other issues in this case but I think it is interesting to note that under Swedish Law a request for reconsideration or an appeal against a decision concerning taxes and tax surcharges has no suspensive effect on the taxpayer's obligation to pay the amounts in question. However the tax authority may grant a stay of execution if it may be assumed that the assessments will be reduced or remitted, if the outcome of the appeal is uncertain, or if the payment of the amount in question could result in considerable damage for the taxpayer or would otherwise appear to be unjust.

[13] The issue as to whether the taxpayer could be required to pay before the determination of his appeal ceased to be controversial during argument. In refuting the contention that it is unconstitutional to require payment before the determination of the appeal the easy analogy is the Court process itself. The rule

[6] Application No.44759/98

is clear that the lodging of an appeal does not act as a stay of execution. However, the Court has a power to order a stay of execution in certain circumstances. In this case the amendment intended that when the appeal was lodged against the assessment it should not operate as an automatic stay of execution. Provision was made for the Commissioner to order a stay.

[14] The dispute became narrowed to the provisions relating to the grant of the stay of collection pending the determination of objections and appeals. The appellant contended that provision for the stay to be granted on appeal to the Board was meaningless because the legislative scheme required that before the taxpayer could appeal to the Board he had first to object to the Commissioner, and in order to do so he had to pay the assessed tax.

[15] There was also the complaint that the only ground for granting the stay was inability to pay and it was considered that this rule was not proportional to the permissible aims and objectives.

[16] In addition there were submissions that the Commissioner was not the proper authority to determine whether a stay should be granted as his office made it impossible for him to be objective. It was my understanding however, that this last objection was withdrawn during argument as it was conceded that this was part of the administrative process of assessment. General principles of administrative law protect against unreasonable decision making which would be subject to control by the Court.

[17] There are many circumstances which demonstrate the desirability of such a rule. The existence of the discretion to order a stay protects the deserving appellant. I am persuaded that if the Commissioner does not exercise his discretion reasonably then his decision may be subject to control by the Court. In addition the Act creates a statutory duty for repayment with interest and within a specified time. In my view the provision does not infringe the protection of law.

[18] The issue as to whether payment could be a condition precedent to appealing also ceased to be controversial. There were a number of decided cases which indicated that the procedural rules relating to appeals could include provisions requiring payment if these provisions were part of a scheme which did not result in the impairment of the right of appeal. The interpretation of section 62 of the Income Tax Act Cap 212 as amended by section 11 of the Act of 2000 became the main issue for our determination.

[19] The appellant contends that the import of subsections (2) and (3) is to compel the payment of taxes as a condition precedent to the exercise by the taxpayer of his right of objection or appeal to an assessment as the taxation procedures require that the first appeal should go to the Commissioner and only thereafter to the Board.

[20] The respondent contends (after argument had caused some adjustment to his original position) that the section was inelegantly drafted and that the words "notwithstanding subsections (2) and (3)" at the commencement to subsection (4) indicate that it was not the intention of Parliament that subsection (4) should apply only on appeal to the Board but also to an appeal to the Commissioner. He assured the court that the Government intended to institute a scheme which made the assessed taxes payable while the objection and appeal process was in progress. However the Government intended to permit that in cases where hardship would otherwise result that the Commissioner could grant a stay of collection until the determination of the objections and appeals. He submitted that the apparent "default of the drafting" could be corrected by judicial interpretation to bring the statute into conformity with the Constitution. It seems reasonable to accept the statement of policy given by cousel for the Attorney-General. The Legislation did contain specific provision for the exercise of a discretion to permit the objection process to proceed without the advance payment of the assessed tax. It is true that the law as drafted does not say this properly,

because I agree with the appellant that the meaning that it has is that the payment must be made prior to review by the Commissioner of Inland Revenue which under the scheme was itself a condition precedent to review by the Board.

[21] If it were not remedied this would be disproportional to the legitimate aim of making the assessed tax payable pending the determination of objections and appeals except in those cases where it would be unjust to require the payment at that stage. Determining the circumstances under which it would be unjust, in the absence of other guidelines, would require reasonableness and would also require that reasons for decision be given. I would think that ultimately Parliament should determine the circumstances or criteria which would make it unjust. There are policy issues involved which makes Parliament the appropriate authority. I am of the view however, that, in the absence of any such guidelines, the court could supervise the exercise of a discretion that is based on justice.

[22] The Act specifically provided a remedy for unlawful or erroneous assessment by mandating that moneys collected be repaid with interest within 60 days of the determination of the error. These provisions clearly support the contention of Counsel that Parliament intended to impose a regime which was similar to that utilized in the process of judgment enforcement in the Court.

[23] Schedule 2 of the Antigua and Barbuda Constitution Order 1981 section 2(1) states that the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order. This specifically empowers the exercise of that power in relation to laws in existence in 1981. The offending provision was enacted in 2000 and is not governed by the transitional provisions. I would think that the power to refrain from striking down a law altogether by exercising the power of modification to bring it into conformity with the constitution is implied in the well accepted presumption of constitutionality. This was expressed by Sir Vincent Floissac CJ [and approved by the Privy

Council] when he concluded that in certain cases statutes should be interpreted by making such reasonable additions and modifications to the words used therein as will ensure conformity of the statute with the Constitution.[7]

[24] When the Privy Council was considering what would be an appropriate order when a 15 year old was sentenced to be detained until the pleasure of the Governor General be known in accordance with the Offences against the Person Act (1873), after concluding that the provisions contravened section 3(1) of the Constitution of St.Kitts-Nevis because sentencing formed an integral part of judicial function and should not have been committed to the hands of the Governor General, Lord Hobhouse opined that the court could decide what modifications were required to the offending provision and to give effect to its modified form, in order not to have to strike down the provision altogether. The court identified the element of unconstitutionality in the relevant provision and determined what change was necessary to give effect to the requirements of the constitution and the appellant's constitutional rights[8].

[25] I think that it is therefore open to the Court to modify the offending provision.

[26] It is desirable that Parliament takes necessary steps as soon as possible. However in my view it would be unreasonable to make a declaration of unconstitutionality that would make the Act unusable in the meantime. We have decided that in the circumstances I should declare that section 62 be modified to read as follows:

> "sub-section 3: that making an objection or appeal under this act shall not act as a stay of the collection and payment of the assessed tax; provided that the commissioner may order the stay of the collection and payment of the whole or part of the assessed tax until the determination is completed if it would be unjust not to do so.

[7] **Permanent Secretary v de Freitas** (1995)49 WIR 70 at 78e and (1998) 53 WIR 140d to h [Privy Council]
[8] **Browne v The Queen** (St.Christopher and Nevis) (1999) UKPC 21 (Privy Council Appeal No. 3 of 1998).

And the deletion of subsection 4.

[27] In the circumstances of this appeal, being in the public interest, I would order that the state pay the costs of the appellant.

Sir Dennis Byron
Chief Justice

I concur.

Brian Alleyne, SC
Justice of Appeal [Ag.]

[28] GEORGES J.A., [AG.]: I have had the privilege of reading the judgment of the learned Chief Justice in draft and desire only to say that I am in complete agreement with his opinions, reasons and conclusion in what I consider to be an interesting and important case which was very ably argued by learned Counsel.

Ephraim Georges
Justice of Appeal [Ag.]