ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO ANUHCV 2002/0574

BETWEEN:

LE BISTRO LTD

Claimant

And

COMMISSIONER OF INLAND REVENUE
ATTORNEY GENERAL

Defendants

Appearances:

Hugh Marshall and Cherissa Roberts-Thomas
of Marshall & Co. for the Claimant
John Fuller for the Defendants

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2004: June 30 th, July 1st
August 27th
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JUDGMENT

[1] Joseph- Olivetti J: Le Bistro Ltd. ("the Company") is the owner of Le Bistro, a restaurant reputed to be among Antigua's finest. Mr. Raphaele Esposito is the majority shareholder of the Company. In March, 2002, the Commissioner of Inland Revenue ("the Commissioner") through his agents seized the financial records of the Company and subsequently imposed on it two assessments, one for $88,719.69 under the Restaurants and Catering Services Tax Act 1994 ("he R.C.S.T. Act") and the other for $496,624.12 under the Income Tax Act ("the I.T .Act") on the basis that the Company had not declared its full income. The Company sought and obtained leave to issue a writ of certiorari challenging these assessments.

[2] The main issues arising can be summed up as follows:

(1) Does the Commissioner have the power under the R.C.S.T Act to seize and detain records?

(2) Is the assessment under the R.C.S.T Act valid?

(3) Is the assessment under the I.T Act valid?

[3] In support of its case the Company relied on the affidavits of Mr. Esposito filed 28th November 2002 and that of Mr. Patrick Gaudecheau filed 14th May 2004. The Defendants relied on the affidavits of Douglas James McLaren filed 10th March 2004, Ian Mellows and Clarence Pilgrim both filed 6th May 2004. All the deponents were cross- examined at trial.

[4] I shall now consider issue 1. The Commissioner through its servant or agent Mr. McLaren went to the premises of Le Bistro on March 26th 2002 and demanded and took away all the business records. Mr. Gaudecheau, the manager of Le Bistro, and as it appeared at trial, the intended purchaser of all Mr. Esposito's shares in Le Bistro, was present at the time and gave evidence which tallies with that of Mr. McLaren as to what took place. I accept their evidence as Mr. Esposito was not present and anything he had to say about what happened then could only have been hearsay and thus not admissible. I am satisfied that Mr. McLaren went to premises used as the offices of Le Bistro and not to the dwelling of Mr. Esposito as that goodly gentleman testified and demanded the records and that Mr. Gaudecheau cooperated and showed him where they were kept and he took them away. No unlawful force was used. These records were subsequently returned, after demand was made, to Mr. Esposito's lawyer on condition that they be would be given back to the Commissioner should proceedings be considered.

[5] I note that in paragraph 6 of his affidavit Mr. McLaren claimed that he removed the records for the purposes of ascertaining whether the Company was declaring all of its income in its annual tax return and his returns under the R.C.S.T Act. However, in a letter dated 18th April 2002 the Commissioner stated that he was acting under the R.C.S.T Act Section 5(2). See paragraph 7 of Mr. Esposito's affidavit and the

letter exhibited as part of Ex. RE4. It is noticeable that the letter made no mention of the I.T Act although it was a direct response to a query from Mr. Esposito's lawyer as to the authority under which the Commissioner acted when he entered the premises and seized the documents. See the lawyer's letter dated 4th April 2004 which also forms part of Exhibit RE4. I therefore find that the Commissioner was acting under section 5(2) of the R.C.S.T Act when he took away the records.

[6] Not surprisingly the condition on which the records were returned to Mr. Esposito's lawyer was never met as the Company termed the Commissioner's action unlawful and an invasion of its rights. Its counsel submitted that the Commissioner having regard to the R.C.S.T Act and to section 5(2) in particular had no power to seize and remove records from the premises and to hold them.

[7] The R.C.S.T Act is proclaimed by its long title, as "An Act to impose a tax on the sale of food and beverages in restaurants and in catering establishments and to make provision for other matters incidental thereto". By section 5(1) it is the duty of every proprietor of a restaurant or catering establishment to maintain a record of all food and beverages and of sales of such food and beverages in such form and containing such information as will enable the tax payable under the Act to be determined.

[8] Section 5(2) provides as follows;

" The Commissioner or any person authorised by him in writing has power at all reasonable hours to enter any restaurant or catering establishment and to require the production to him by the proprietor or his agent or servant of such documents or records as he may reasonably require in order to ascertain the amount of tax due."

[9] Section 5(3) makes it an offence punishable on conviction to a fine of $10,000.00 or to imprisonment for five years for any person to refuse to produce any

documents or records required by the Commissioner. It is therefore clear that the requirement to produce records when required is not to be taken lightly by the taxpayer.

[10] The ordinary meaning of the word, " to produce" according to the Concise Oxford Dictionary of Current English 9th edn. is "to bring forward for consideration, inspection or use". True, Section 5(2) does not speak directly to the Commissioner being able to take away records when they are produced to him. However, the reason for requiring the production of records is clearly stated as, " to ascertain the amount of tax due." To my mind it would defeat the purpose for which the power is given if that power is not interpreted as encompassing the implied power to take away the items produced for the use envisaged. Surely, it would be more injurious to the taxpayer if instead of being allowed to take the records away the Commissioner were constrained to remain on the premises to carry out his investigations into them on the spot. Imagine the confusion and inconvenience to the taxpayer and its customers which would result if the records were numerous and agents were forced to examine them there and then at the business place of the taxpayer. I am therefore of the view that a power to carry away the records and to keep them for a reasonable time to ascertain the tax payable must be implied in the power to require production given by section 5 (2). I am further supported in this conclusion by section 16(3) of the Interpretation Act Cap. 224 which is to the effect that when legislation authorises any person to do an act or thing that all such powers which are reasonably necessary or incidental to enable that person to do that act or thing shall be deemed to be included in that power. Accordingly, I am of the opinion that the Commissioner has the power to take away the records produced and to hold them for a reasonable time to enable him to ascertain their accuracy. However, once he has done that he is not entitled to keep them as he sought to do in this case .He could have made copies of questionable documents for any further proceedings if he thought that was necessary. Mr. Esposito's lawyer therefore had no obligation to comply with the conditions set by the Commissioner for the return of the

documents as it would appear that the Commissioner had carried out his examination of them.

[11] Now to issue two. Counsel for the Company contended that there is no power to make an assessment if the Commissioner is of the opinion that the proper tax was not paid under the R.C.S.T Act. Counsel argued that the Commissioner is authorized to impose a penalty and interest when the tax is not paid in addition to recovering the tax – see section 6 and to levy a fine where proper records are not kept – see section 5 (3) In addition, I remark that section 10 makes it an offence to knowingly furnish a false return which is punishable on summary conviction with a fine of $5,000.00 and imprisonment for two years.

[12] I note that the Defendants have not identified any specific provision of the R.C.S.T Act which empowers the Commissioner to make an assessment but instead argued by analogy to the Commissioner's specific powers under the I. T. Act. Suffice it to say that to my mind that approach cannot be countenanced where one does not have similar provisions to compare and interpret.

[13] The R.C.S. T Act contains no specific or implied authority for the Commissioner to make an assessment of tax payable under it. The ordinary and natural meaning of the sections dealing with failure to pay the tax cannot by any twist of the language be interpreted to give such a power to the Commissioner. Accordingly, the Company's submission must prevail. The Commissioner acted ultra vires the R.C.S.T Act in making the assessment and it cannot stand. The relief prayed for in respect of this assessment is therefore granted.

[14]. I shall now consider issue three. Section 57 of the I.T. Act Cap 212 as amended provides as follows;

" Where it appears to the Commissioner that any person liable to tax has not been assessed, or has been assessed at a less amount than that which ought to have been charged, the Commissioner may within the year of

assessment or within six years after the expiration thereof assess such person at such amount or additional amount as according to his judgment ought to have been charged and the provisions of this Act as to notice of assessment, appeal, and other proceedings under this Act shall apply to such assessment or additional assessment and to the tax charged thereunder. "

[15] Despite this clear wording which gives the Commissioner the power to make an assessment where one is assessed at a lesser amount than ought to have been charged, counsel for the Company submitted that there is no statutory authority to impose a second assessment where one has already been being imposed. This seems to fly in the face of the very clear words of this section. It speaks to being able to make an assessment where one was made which was not accurate and this must mean that one can make another assessment. To my mind whether one terms this further assessment, a re- assessment as designated by counsel for the Company, or a new assessment it seems to me that it would be covered by the section; to hold otherwise would be to do violence to the ordinary and natural meaning of the words used. I therefore find no merit in this submission.

[16] The only other issue to be considered under issue three is whether the Commissioner exercised his powers under that section properly. Essentially, Counsel for the Company contends that he did not and that the assessment must be quashed. Counsel challenged the sufficiency of the evidence on which the Commissioner based his conclusion that the Company had systematically under-reported its sales and falsified its daily log of sales. Counsel asserts that there is no factual basis for the alleged suppression of income of 22 per cent for five years on which the assessment is premised as the sample was too small in that it was based only on two nights observations. And that in any event the Commissioner had to act in good faith and therefore not seek to re-assess without a reasonable basis which he had not established and further that the acts of his servants or

agents were oppressive. Therefore, he did not act reasonably and as a result his assessment was ultra vires the I.T Act.

[17] On the other hand, counsel for the Defendants urged that the Commissioner acted properly and that the assessment ought to be upheld. Counsel submitted that the issue here is whether the assessment constituted an honest and genuine attempt by the Commissioner to make a reasoned assessment. See- Mrs. Hasina Hossain T/A Balti House Tandoori v. The Commissioners of Customs and Excise, Manchester VAT & Duties Tribunal Decision . Counsel argued that the sample of under reporting was small but urged that taken with all the other circumstances there was sufficient evidence for the Commissioner to exercise his powers properly under section 57. Counsel relied on the case of Yat Tai Cheung T/A Wandering Dragon, Manchester VAT & Duties Tribunal Decision, 20th January, 2004, Tynewydd Labour Working Men's Club And Institute Ltd. v. Customs and Excise Commissioners [1979] STC 570 at 580 and the other cases referred to in his written submissions.

[18] In considering this matter I am mindful that my role is one of review and that I ought not to substitute my opinion for that of the Commissioner's unless his exercise of his power was plainly wrong. In the Wandering Dragon Case the Tribunal followed Woolf J.'s interpretation in Van Boeckel v. Customs and Excise Commissioners [1981] STC 290 at page 292 of a similar power granted to the Commissioner to make assessments by section 73(1) of the Value Added Tax Act 1994 He said-"... the very use of the word "judgment" makes it clear that the commissioners are required to exercise their powers in such a way that they must perform that function honestly and bona fide. ....Secondly, clearly there must be some material before the commissioners on which they can base their judgment....Thirdly, it should be recognized, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the commissioners should not be

required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment is due."

[19] I am guided by this dicta as our section 57 is similar to that provision and the same principles would apply. The circumstances before the Commissioner must be looked at. The evidence established that he carried out an undercover operation at Le Bistro for two nights and that sales to all the diners seen by the investigators were not accounted for in the returns made by the Company. Having heard Mr. Mellows and Mr. Pilgrim I have no hesitation in accepting their testimony as to what they observed when they dined at Le Bistro and I find that all sales were not accounted for. I also accept the evidence of Mr. Mclaren as to the calculations made on the basis of the observations and the returns. When questioned about the ostensibly missing sales Mr. Gaudecheu said without more that perhaps some of the meals were complimentary. The sample was small but it appears that an average cover was approximately U.S. $ 75.00. and like it or not this country has very limited resources and surely cannot reasonably be expected to send out under cover agents to dine at fine establishments on numerous occasions. Furthermore, the Commissioner is entitled to consider the fact that the Company was given an opportunity to cooperate in the investigations and that it failed to provide any information or assistance which was in its power to do. Clearly, Mr. Esposito took the view that he had no obligation to assist in any way. For example, they made a bare allegation without more that the missing meals were complimentary and expected the Commissioner to act on that when they were in possession of all documents and information which could easily have established whether this were so or not. I also note that Mr. Gaudecheau"s evidence was scanty as to how complimentary meals were provided and recorded. It is telling that Mr. Gaudecheu admitted in cross-examination that the production of their bank deposit records would have cleared up any disputes about the daily takings and that cash sales was not the major part of their takings but that no attempt was made to produce bank records to the Commissioner. In fact the Company did not even produce its records of the nights in question save for the

receipts referred to by Mr. Gaudecheau but relied on its annual returns and stated that it had paid the proper taxes under both Acts. This approach by the Company in not giving information in its possession to the Commissioner was clearly misguided as can be seen from the case of the Wandering Dragon.

[20] Another matter which is pertinent is whether the Company ran a boat charter business as alleged by the Commissioner or not. I note Mr. Gaudecheau's evidence in paragraph 13 of his affidavit that the restaurant provided meals to Mr. Esposito for the boat trips without charge. I reject Mr. Esposito's explanation as to the true ownership of the boats and that he only took out friends on the boat and did not use it for charter.. And, having heard the evidence and in particular that of Mr. Mc Laren who gave evidence in cross examination that he saw advertisements at Jolly Harbour for the charter of the yacht Le Bistro and that of Mr. Gaudecheau who said in cross-examination that whenever telephone calls were made to the restaurant enquiring about boat charters that he passed the calls on to Mr. Esposito who dealt with them personally and not that he simply told them that they were not in the boat charter business, I find that there was evidence that Mr. Esposito conducted through his Company a boat charter business and that he failed to disclose the income from that business and that the Commissioner was entitled to consider this in making his assessment.

[21] In all circumstances I am of the view that the Company has failed to prove on a balance of probabilities that the Commissioner did not act in his best judgment or that he acted dishonestly or mala fides. There was sufficient evidence before the Commissioner to enable him to make the assessment and it is valid.

[22] Defence counsel in his submissions argued as a footnote that the Company was not entitled to come to this court at this stage until it had exhausted the appellate remedies under the I.T Act and relied on British American Insurance Company limited v. The Attorney General of Antigua and Barbuda Civil Appeal No. 20 of 2002. This is undoubtedly so and the court has a discretion to insist that the

specific statutory regime provided for be followed before an aggrieved person can come to the court. However, this is a point as to procedure which ought properly to have been made at the first opportunity and not at the end of the trial. In any event the R.C.S.T Act makes no provision for the Commissioner to make an assessment and provides no appellate remedies and thus this argument cannot apply. The I.T. Act on the other hand does. However, because of the late stage at which this was raised and the manner in which it was done it is clear that the Defendants have waived their right to object to the procedure.

[23] The effect of this judgment is that the assessment under the I.T. Act stands and the Company must comply with it unless it asks the Commissioner to review his assessment. However it is out of time for so doing but the Commissioner has through its counsel at the trial indicated that if the assessment is upheld he would not object to the Company seeking a review outside the time limited by the I.T Act for so doing.

[24]. To sum up the assessment under the R.C.S.T Act must be quashed as the Commissioner had no authority to make it. The assessment under the I. T. Act is valid. On the question of costs the Company has succeeded on one of the two major challenges it mounted against the assessments. To my mind it is therefore entitled to some costs although it cannot recover all its costs of bringing this action. Under Part 65.5 CPR 2000 the court has discretion to award costs. In the circumstances I will award the Company half its prescribed costs based on the value of a claim for $30,000.00. in accordance with Part 65.5 (2) (b) (iii).

Rita Joseph-Olivetti
High Court Judge