GRENADA

IN THE HIGH COURT OF JUSTICE

GDAHCV 2010/0108

BETWEEN:

CROMWELL SCOTT & CO. LTD.

Appellant

and

THE APPEAL COMMISSIONERS

Respondents

Before:

The Hon. Mr. Hugh A. Rawlins — Chief Justice

Appearances:

Mr. James Bristol, with him Ms. Ria Marshall, for the Appellant
Ms. Karen Samuel, Senior Crown Counsel, for the Respondents

2011: March 29;
August 24.

Income Tax Appeal – Assessment of taxable profit – Whether the Comptroller of Inland Revenue erred in assessment of taxable profit "to the best of his judgment" – Sections 11, 65(1) and 78(3)(b) of the Income Tax Act

The Comptroller of Inland Revenue ("the Comptroller") determined that the appellant, Cromwell Scott & Co. Ltd. ("the company"), was liable to tax for the year 1994 on a profit of $127,943.23. The company appealed to the Appeal Commissioners complaining that the Comptroller assessed their taxable profits for that year incorrectly. The company contended, in particular, that in assessing its taxable profits "to the best of his judgment" under section 78(3)(b) of the Income Tax Act, the Comptroller did not take into account the trading results of the company. The company contended, further, that the Comptroller's calculation of the profit did not take into consideration all factors precedent for that determination. The company also complained that the assessment was not in keeping with its composite audited financial statements, which the company submitted for the years 1994, 1995 and 1996. Additionally, the company insisted that the assessment did not take into consideration the accounting adjustments for inventory, receivables or payables, considerations, which the company insisted, are fundamental in determining its trading results. The Appeal Commissioners dismissed the appeal on the grounds that the Comptroller correctly formed the opinion to carry out the assessment "to the best of his judgment" and the company did

not show what corrections were necessary to make the assessment right or more nearly right. The company appealed to the court and was permitted to adduce evidence in these proceedings to show what corrections were necessary to make the assessment right or more nearly right.

Held: dismissing the appeal and affirming the decision of the Appeal Commissioners, with no order as to costs:

1. The company furnished composite audited statements of account for the years 1994, 1995 and 1996, instead of an individual statement for each year. It thereby did not comply with sections 11(1), 11(3) and 65(1) of the Income Tax Act. Additionally, the company was unhelpful in assisting the Comptroller to assess its liability to tax for the 3 years by not furnishing the statements for the individual years at the requests of the Comptroller. Accordingly, the Tax Appeal Commissioners rightly held that the Comptroller's decision to carry out the assessment for 1994 "to the best of his judgment" under section 78(3)(b) of the Income Tax Act was correct.

2. An assessment "to the best of his judgment" cannot be carried out in an arbitrary and capricious manner even where a company is unhelpful. The Comptroller's assessment must be rationally and reasonably formed in accordance with principles and best practices.

   Dictum by Lord Donavan in Argosy Co. Ltd. v Inland Revenue Commissioner (1971) 15 WIR 502 (P.C.), applied.

3. A large element of guesswork may be involved in the Comptroller's assessment "to the best of his judgment", particularly where the material which the Comptroller has for the assessment is sparse. Where, however, on a proper basis, the Comptroller embarks upon an assessment "to the best of his judgment", that assessment remains prima facie right until the tax payer shows positively what corrections should be made in order to make the assessment right or more nearly right. The Appeal Commissioners correctly decided that there was no proper basis on which to impugn the Comptroller's assessment because the company did not show what corrections were necessary to make the assessment right or more nearly right. The burden was on the company.

   Dicta by Lord Lowry in Bi-Flex (Caribbean) Ltd. v Inland Revenue Board (1990) 38 WIR 344 (P.C.) and by Kelsick CJ in Inland Revenue Board v Boland Maraj Trinidad and Tobago Civil Appeal No. 43 of 1981, applied.

   The further evidence, which the company was permitted to adduce, did not discharge the burden upon the company to show that the Comptroller did not reasonably estimate the quantum of the liability on the reliable information that was available to him. The company could have used the information which it had to prepare an audited statement for the year 1994 alone. It would thereby have assisted the Comptroller to see its true financial position for that year, rather than to insist that the Comptroller should make reference to the composite statements, which the Comptroller thought were unreliable.

   Argosy Co. Ltd. v Inland Revenue Commissioner (1971) 15 WIR 502 (P.C.), distinguished.

JUDGMENT

[1] RAWLINS, C.J.: The central question in this appeal is whether the Tax Appeal Commissioners erred when they found that the Comptroller of Inland Revenue ("the Comptroller") properly exercised his "best of judgment assessment" under section 78(3)(b) of the Income Tax Act of Grenada[1] when he determined that the appellant, Cromwell Scott & Co. Ltd. ("the company"), was liable to tax on a profit of $127,943.23 for the year 1994.

[2] Section 78(3)(b) of the Income Tax Act confers a discretion on the Comptroller to assess taxable income using his or her best judgment, where the Comptroller is not satisfied that a person has furnished a correct return.

[3] The Comptroller carried out "the best of his judgment assessment" in assessing the company's liability to tax for the years 1994, 1995 and 1996. He found that the company had a loss for the years 1995 and 1996, while he found that it had a taxable profit of $27,943.23 for 1994. The company challenged the assessment for 1994.

[4] In a decision which they gave on 11th February 2010, the Appeal Commissioners dismissed the appeal and confirmed the Comptroller's assessment. The company appealed to this court, pursuant to section 91(1) of the Income Tax Act, on the following grounds, which closely mirror their appeal to the Appeal Commission:

1. The respondent (the Commission) failed to consider properly or at all the following grounds of objection:
    (a) That the assessed profit was incorrect as it was not based on the trading results.
    (b) That the assessed profit did not take into consideration all factors precedent in determining the operating results for the period ended 30th April 1994.

[1] No.36 of 1994, as amended.

(c) That the assessed profit was not reflected in the audited financial statements.

(d) That the assessed profit did not take into consideration the accounting adjustments for inventory, receivables or payables, these adjustments being fundamental in determining the trading results.

[5] In essence, these grounds are bases on which the company objects to the manner in which the Comptroller carried out the "best of his judgment assessment". They support the company's assertion that the assessment did not comport with the correct principles and practices.

[6] It bears noting, at the outset, that Mr. Bristol, learned counsel for the company, conceded that the Comptroller correctly invoked his discretion to make the assessment under section 78(3)(b) of the Income Tax Act. Counsel also conceded that the Appeal Commissioners applied the correct legal principles in arriving at their decision. I paused to consider whether the institution of the appeal was properly brought under section 91(1) of the Income Tax Act, but decided that it involves a question of mixed fact and law inasmuch as the company asserted that the Comptroller carried out the assessment exercise wrongly.

[7] A brief statement of the background will provide a fitting precursor to the decision in this appeal.

Background

[8] The company furnished what they referred to as a "combined financial statement" to the Comptroller for the years 1994, 1995 and 1996. The company did this notwithstanding that a taxpayer is under a duty to furnish a return of income for any year of assessment to assist the Comptroller in the assessment of his or her tax liability. Thus, section 65(1) of the Income Tax Act provides as follows:

> "Subject to section 77, every person liable to furnish a return of income in respect of any year of assessment either personally or in a representative capacity, shall furnish a return in such form as may be approved by the Comptroller on or before the 31st March in the year following that year of assessment ..."

Section 11(1) of the Income Tax Act provides that the basis period for a year of assessment shall be the whole of the income ascertained in accordance with Part V of the Act, which accrued to the person during the twelve months ending on 31st December in that year. In the Act, this is referred to as "the basis period for a year of assessment." If the taxpayer wishes to vary the basis period, section 11(3) of the Act provides that he or she may do so with the Comptroller's approval in writing.

[9] In furnishing the "combined financial statement" for 1994, 1995, 1996, the company informed the Comptroller that it was experiencing serious financial difficulties for the period 1994 to 30th April 1996. The company's audited financial statements and accounts for that 3 year period showed a loss of $493,842.00 with an average loss for each year.

[10] By letter dated 20th April 2001, the Comptroller informed the company that the Revenue Department had determined that the income and expenditure account for the 1994 financial year revealed a profit of $127,943.23. Adjustments to the profit yielded a net taxable profit of $130,000.00 with a resulting assessment of $43,250.00 income tax for the year. The company appealed to the Appeal Commissioners.

The Commissioners decision and reasoning

[11] In dismissing the appeal, the Appeal Commissioners noted that the company furnished a "combined financial statement" for the years 1994, 1995 and 1996. The Commissioners further noted that the company's audited financial statements of accounts for the 3 year period showed a loss of $493,842.00. They also noted that the statements showed an estimated average loss for each of the 3 years of some $164,614.00 and no income subject to tax for any of the 3 years. The Appeal Commissioners noted that in response to the Comptroller's repeated requests that the company should furnish individual returns for each year, as the law requires, the company failed to provide these but eventually provided some management accounts. These included the General Ledger Income Statements for the period ending 30th April, 1994. The Appeal Commissioners noted that by Notice of Assessment under the cover of a letter dated 20th April 2001, the Comptroller

informed the company that for the year 1994, the company's income and expenditure accounts revealed a profit of $127,943.23, which sum, with adjustments, yielded an assessed net profit of about $130,000.00. The assessment resulted in the assessed tax of $43,250.00 payable for the 1994 tax period.

[12] On his analysis, the Comptroller considered 1995 and 1996 to be no profit/no loss financial year, for which no taxes were payable by the company.

[13] In their decision, the Appeal Commissioners referred to the requirements of sections 11(1), 11(3) and 65(1) of the Income Tax Act,[2] and stated as follows:

> "It is therefore indisputable that the basis period for a year of assessment of chargeable income is a period of twelve months. This period can only be varied with the approval of the Comptroller in writing. Further, the Act imposes a duty on the tax payer to submit annual returns of income on or before the 31st day of March, in the year following that year.
>
> "The Commission notes that the tax payer in spite of any adverse trading conditions experienced in its operations cannot legally vary the basis period for the assessment of chargeable income without the written approval of the Comptroller.
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> "This Commission therefore finds that the Appellant was acting in contravention of the Income Tax Act when it submitted a 'combined financial statement" for the years 1994, 1995 and 1996 without the written approval of the Comptroller."

[14] It is my view that these statements by the Appeal Commissioners are correct. The company did not comply with sections 11(1), 11(3) and 65(1) of the Income Tax Act. Additionally, the company was unhelpful in assisting the Comptroller to assess the company's liability to tax for the 3 years that were under review. However, it was this non-compliance that occasioned the Comptroller to carry out the assessment "to the best of his judgment" under section 78(3)(b) of the Income Tax Act. It is trite principle that this assessment cannot be carried out in an arbitrary and capricious manner notwithstanding that the company was unhelpful. The Comptroller was duty bound to carry out the assessment in accordance with principles and best practices. Having found that the company was unhelpful, the Appeal Commissioners then had to determine whether the

[2] Set out in paragraph 7 of this judgment.

Comptroller made the assessment reasonably in accordance with principles and best practices.

Principles and practice

[15] The Appeal Commissioners noted that the assessment "to the best of his judgment" has been the subject of judicial pronouncements by the courts in the Commonwealth Caribbean on similar provisions, where either the tax payer made no annual return or where a return was not accepted by the Comptroller. Accordingly, the Appeal Commissioners set out the principles which Dr. Claude H. Denbow extracted from the cases concerning a "best of judgment assessment". The Appeal Commissioners reproduced the principles, which Mr. Bristol accepts, and with which I agree, as follows:

> "a. Where an officer of the Inland Revenue is making as assessment to the best of his judgment because the taxpayer is in default of supplying the relevant information, then such officer must not act capriciously but exercise his judgment in the matter. He must make the assessment based on what he honestly believes to be a fair estimate of the proper figure to be attributable to the income of the tax payer and in so doing he is entitled to take into consideration knowledge of previous returns and assessments of the tax payer as well as all other matters which he thinks will assist him in arriving at a fair and proper estimate. There must necessarily be some element of guesswork in the exercise but it must be honest guesswork.
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> "b. The element of guesswork involved in a "best of judgment assessment" must be founded on a rational opinion based on information available to the Inland Revenue Officer. The best of judgment assessment is likely to be sustained by the Court so long as the estimate or guess involved is honestly made on such materials as are available to the officer. It must not be some spurious estimate or guess in which all elements of judgment are lacking or else it is likely to be regarded as null and void and unsustainable.
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> "c. A best of judgment assessment which is shown to be an honest estimate or guess based on information available to the Inland Revenue is treated by the Court as being prima facie right until the taxpayer shows that it is wrong. In such a situation, the taxpayer as a general rule has an obligation not only to show that the assessment is wrong but also positively to show what correction should be made in order to make it right or more nearly right."

[16] The Appeal Commissioners further noted that the Judicial Committee of the Privy Council utilized these principles to find, in the Guyana case Argosy Co. Ltd. v Inland Revenue

Commissioner,[3] that the best of judgment assessment was not based on a rational opinion. They further noted that their Lordships found that that assessment was not sustainable since the Comptroller could not have formed a reasonable opinion that the company was liable to income tax for the year of assessment 1996 owing to the large carry forward of losses which would have to be set against its chargeable income.

[17] The Appeal Commissioners distinguished Argosy Co. Ltd. from a later decision of the Privy Council in the Trinidad case Bi-Flex (Caribbean) Ltd. v Inland Revenue Board.[4] In so doing, they noted that in Bi-Flex (Caribbean) Ltd. the company's tax returns for the years 1971-1974 could not be traced by the Inland Revenue Department. The company was unable to provide duplicate copies of its records but provided copies of its returns. No other material was available. The figures showed a trading loss for each of the three years 1971-1974. The Inland Revenue Department prepared an analysis of information relating to other garment manufacturing companies in Trinidad. On the basis of their percentage gross profit, the Department concluded that the company's returns were understated and that its gross profits for the years 1971-1974 should be increased. Notwithstanding that the company objected to the conclusion of the Inland Revenue Department, the Court held that the best of judgment assessments made by the Inland Revenue Department were sustainable. The Privy Council held that in the absence of any records from the company, the Inland Revenue used an acceptable accounting method to make the best assessment it could on the sparse material available. The Appeal Commissioners also noted that the Privy Council further found that the large element of guesswork involved in the assessment was immaterial, considering the fact that the Inland Revenue Department used a rational basis by making reference to the average gross profit of other garment manufacturers operating in the country for the particular period. The Appeal Commissioners noted, in particular, that Lord Lowry, who delivered the opinion of the Privy Council in Bi-Flex (Caribbean) Ltd. stated that the element of guesswork and the almost unavoidable inaccuracy in a "best of judgment assessment", are prima facie right and remain right until

[3] (1971) 15 WIR 502 (P.C.).
[4] (1990) 38 WIR 344 (P.C.).

the tax payer shows positively what corrections should be made in order to make the assessment right or more nearly right.

[18] The Appeal Commissioners reiterated and reinforced the importance of the burden which a taxpayer bears, as against that of the Comptroller, in cases concerning the "best of judgment assessment" by referring to the following statement by Kelsick CJ of Trinidad and Tobago in Inland Revenue Board v Boland Maraj:[5]

> "On the Revenue rests only the evidential onus that it rightly appears to the Revenue to act; which it discharges by adducing evidence of the information or material which caused it to act. On the other hand, the statutory burden of the whole case is on the tax payer."

The burden on the company is therefore a heavy one.

[19] The Appeal Commission concluded their decision as follows:[6]

> "The Respondent [the Comptroller] submitted to this Commission that the management accounts of the Appellant [the company] were considered, to wit, the General Ledger Income Statement for the period ending 4/30/94. This Commission finds that there was some rational basis on which the Respondent based his assessment of the chargeable income of the Appellant for 1994. The Appellant on the other hand has merely contended that the assessment for the year ending the 30th day of April, 1994 was not based on facts and information and should not be allowed to stand, but has failed to show what correction should be made to the Respondent's findings in order to make the assessment right or more nearly right.
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> "In the aforesaid circumstances the Commission therefore dismisses the appeal and finds that the Respondent's assessment of the Appellant for income tax for the period 1994 must be based on the profit of $127,943.23."

The Appeal Commissioners were correct

[20] The Appeal Commissioners were quite correct because the company submitted nothing to them to discharge its burden to show the right or more right assessment of its taxable profits for 1994.

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[5] Civil Appeal No. 43 of 1981. See: pages 9-10 of the written decision of the Appeal Commission.
[6] At page 10 of their written decision.

[21] The company sought, on a notice of intention to tender evidence, filed on 12th November 2010, to bring in evidence in the attempt to discharge its burden and possibly impugn the Comptroller's assessment. On this notice, I gave directions on 25th November 2010 to permit the company to file evidence. This was filed by way of an affidavit deposed by Henry Joseph, a Chartered Accountant, and Senior Partner of the firm of Chartered Accountants, Pannell Kerr Forster, the company's auditors.

[22] Mr. Joseph deposed that his firm audited the company's accounts for over forty years, and, during that period, the Comptroller never questioned the accuracy and credibility of the audited financial statements prepared by the firm. He stated that for the period of 1994 to 1996, the company experienced financial difficulties and was unable to prepare annual financial statements, and, by extension failed to furnish to the Comptroller separate returns of income for each of the years 1994, 1995 and 1996. This, of course, is by way of seeking to provide an excuse for the company's non-compliance with section 77 of the Income Tax Act. I do not think that this is acceptable. In my view, the Comptroller quite correctly treated the composite audited financial statements for the period of 1994 to 1996 as such. In the circumstances it is difficult to accept the argument on behalf of the company that the Comptroller should have found from those statements that the company's trading position in 1994 showed a total loss of $133,616.00 for the period. In my view, the Comptroller's dissatisfaction with the composite audited financial statements was on good legal ground. By extension, he had good reason for giving little or no weight to them. Accordingly, it is my view that even the fact that Mr. Joseph vouched for their accuracy and authenticity would not impeach the Comptroller's decision.

[23] I have noted Mr. Joseph's assertions that the general ledger income statements, which the Comptroller sought from the company and used as the main bases for his assessment, may have had programme generating issues. I also note his further assertion that the general ledger income statements showed no adjustment to reflect the inventory, receivables and payables position at a particular date, and further, that those statements may not have accurately shown balances as they did not take into account unpaid bills for goods purchased.

[24] Mr. Bristol urged me to find that certain passages in the judgment of the Privy Council in Argosy Co. Ltd. assisted him in the present case. He relied, for example, on the statement by Lord Donovan to the effect that before the Comptroller could make an assessment "to the best of his judgment" he must first form an opinion that the person is liable to pay tax. Lord Donovan referred to it as a rational opinion and not one that flies in the face of the facts or which no reasonable person could form. In my view, the Comptroller reasonably formed the opinion that the company was liable to pay tax. This is reflected in his letters to the manager of the company, dated 12th February 1996, 2nd April 1997, and, in particular, those dated 20th April 2001, 18th May 2001 and 19th June 2001. On Lord Donovan's guidance, it is my view that the Comptroller reasonably estimated the quantum of the liability on the reliable information that was available to him, once he had formed that reasonable opinion.

[25] The company (Cromwell Scott) could have used the information which it had to prepare an audited statement for the year 1994 alone. It could have thereby assisted the Comptroller to see its true financial position for that year, rather than to insist that the Comptroller should use the composite audited statements, which the Comptroller thought were unreliable. The company in Argosy Co. Ltd. was very differently circumstanced. The liquidator could not have furnished a return for the relevant year (1962) because the books of the company had been destroyed by a fire.

[26] In the premises, and with great respect, I do not agree with Mr. Bristol's contention that great weight should be given to the composite audited financial statements and the suggestion that the Comptroller should have found therefrom a gross profit ratio of 21.6% for the tax period from 1994-1996, rather than 45% which he found.

[27] It is from the foregoing perspective that I find the submissions which were preferred by learned counsel for the Tax Appeal Commissioners attractive. I accept them. Counsel submitted that while the Comptroller may look to an overall trading period of years to find a general trading position of a company that approach cannot provide a conclusive position

when there is specific material upon which the Comptroller may rely for any given year. The income statement shows that the company made a profit in excess of $127, 000.00 for 1994. Counsel indicated that the suggestion by counsel for the company that the Comptroller stated that those accounts were "fraught with errors" was not accurate. Counsel asked the Court to refer for accuracy to the actual statement by the Comptroller that:[7]

> "Your Accountant's letter stated that the accounts submitted to us were fraught with errors and I accept that they were not accurate. However, I believe that your Accountant could have been used them to prepare annual financial statements."

[28] Counsel for the Appeal Commissioners submitted, further, that the Comptroller is not bound by the composite audited financial statements which appeared to have been unsubstantiated and there was material which showed a contrary financial position. Learned Counsel asked me to note that the Comptroller did not accept the composite statements and tried, without success, to have the company submit annual statements.

[29] Counsel for the Appeal Commissioners also disagreed with the contention by Mr. Bristol that the Comptroller should have brought forward the accumulated losses up to 1993, as documented in the composite audited financial statements, in calculating the taxable profits for 1994. Section 39(3) of the Income Tax Act provides for the bringing forward of such losses. However, this Act came into force on 1st January 1994. Counsel for the Appeal Commissioners therefore argued that section 39(3) of the Income Tax Act was not applicable for the purpose of bringing forward accumulated losses for 1993 and prior years to 1994. In the second place, counsel submitted, there was no apparent method by which to verify those losses or of quantifying them to individual years prior to 1994.

[30] Learned counsel for the Appeal Commissioners pointed out that prior to 1994, taxation on companies was governed by the Business Levy Act 1987.[8] According to counsel, that Act contained two schemes by which companies were taxed. Section 4 of the Business Levy Act, as amended, imposed a levy either as a percentage of the gross trading

[7] Letter dated 18th May 2001 from the Comptroller to Cromwell Scott & Co. Ltd.
[8] No. 5 of 1987 of the Laws of Grenada.

receipts of the company, or on 33% of the profits of the company, whichever is greater. A company that earned below a certain threshold was exempted from the levy where the company had no profits. The Business Levy Act ceased to have effect from 1st January 1995. While section 130 of the Income Tax Act expressly preserves liabilities and obligations which arose under the Business Levy Act, there was no provision for bringing forward losses incurred during the period when the Business Levy Act was in force. For the foregoing reasons, counsel submitted that the Comptroller had no basis on which to bring forward the accumulated losses incurred prior and to consider them in his 1994 assessment. I agree.

[31] In the foregoing premises, I do not accept the submissions and the calculations on which Mr. Bristol urged me to find that for 1994, the Comptroller should have arrived at a reduced gross profit of $315,714.74, which, when subtracted from total expenditure of $529,796.81 would yield, in effect, a net loss of $214,082.07. For the same reason, I do not agree, that alternatively, at best, not allowing for adjustments for inventory, receivables and payables, there would only be a net taxable profit of $65,000.00. I would therefore dismiss the appeal.

[32] I recall that during the course of the hearing, learned counsel for the parties agreed that there should be no order as to costs, whichever party prevailed in this appeal.

Order

[33] In conclusion, my order is that the appeal against the decision, which the Appeal Commissioners gave in this matter on 11th February 2011 is dismissed, and, accordingly, I hereby declare that the appellant, Cromwell Scott & Co. Ltd., is liable to pay $43,250.00 income tax as assessed by the Comptroller of Inland Revenue for the year 1994. There is no order as to costs.

Hugh A. Rawlins
Chief Justice