

Judgment Book

IN THE REVENUE COURT

APPEAL NO. 1 OF 1998

BETWEEN J. WRAY & NEPHEW LTD. APPELLANT
AND THE COMMISSIONER OF GENERAL CONSUMPTION TAX RESPONDENT

Mrs. Angella Hudson Phillips and Dawn McNeil instructed by McNeil and McFarlane for the appellant

Mrs. Barbara Lee and Frank Williams for the respondent

Heard on the 26th and 27th day of November, 1998 and the 17th day of December, 1999

COURTENAY ORR J.

The Background

The appellant carries on its sole business as blenders bottlers and distributors of fine rums and spirits and wines.

As a part of the contract of service specified employees are required to wear uniforms provided by the Appellant as a condition of employment.

The Appellant is not in the business of providing uniforms or promoting functions for the benefit of third parties whether for consideration or not.

The Appellant is a registered tax payer under the General Consumption Tax Act, (hereinafter referred to as "the Act").

The Appellant is required to file returns and pay tax each calendar month in accordance with Section 33 of the Act and Regulation 6 of The General Consumption Tax Regulations, 1991 (hereinafter referred to as "the Regulations"). The Appellant filed returns for the taxable periods between July 1, 1993 and September 30, 1996, inclusive; and upon examining the said returns, the Respondent through his authorized officers, conducted an audit of the Appellant's business for the period July 1, 1993 to September 30, 1996.

Arising out of the said Audit, the Respondent determined, inter alia, that:-

(i) The Appellant had claimed full input tax credit in respect of amounts expended on:-

- * uniforms which it provided for members of its staff
- * Staff entertainment and lunches

(ii). the Appellant had, in certain instances, failed to make claims for input tax credits, to which it was entitled. As a consequence, the Respondent, acting under Section 38 of the Act, raised an assessment in the sum of \$9,224,894.00.

The Respondent arrived at the said sum by:-

- (i) crediting the Appellant's account with the sum of \$4,269,153.68 as input tax credit which it had failed to claim, as set out above.
- (ii) applying Regulation 14 (5)(a)(ii) to amounts claimed for third party entertainment.
- (iii) wholly disallowing the amounts claimed in respect of uniforms and staff entertainment and lunches.

Included in the sum assessed is \$745,484.16, which is the actual amount of the input tax credit claimed by the Appellant in respect of uniforms, staff entertainment and lunches. The Appellant's objection, however, referred to an amount of \$744,602.34 and this latter amount comprises the subject matter of this appeal.

The Appellant was notified of the Assessment by Notice of Assessment dated May 14, 1997, the said Notice incorporating an Audit Report and a summary of adjustments. The Notice duly advised the Appellant that, inter alia, "penalty, surcharge and interest will be charged on all unpaid balances... in accordance with Section 54 of the Act".

By letter dated June 25, 1997 the Appellant objected to the Assessment, contending that it "has not made supplies to employees in terms of the General Consumption Tax Act... definition of 'supply'.

The Respondent's Decision not to allow the aforesaid \$744,602.34 claimed as input tax credit was issued on December 1, 1997 and served on the Appellant.

The appellant now brings this appeal against the respondents decision:

"whereby it was **Decided** that the Appellant is not entitled to claim as a tax credit any input tax which it is charged in respect of any materials or and any goods which it supplies to any employee by way of the provision of uniforms for employees and staff functions free of charge, pursuant of Regulation 14 (7) (b) of the General Consumption Tax Regulations 1991.

And whereby it was **determined**:

that the assessment in the sum of \$744,602.34 allegedly due for the period October 1, 1993 to September 30, 1996 in respect of input tax claimed by

the Appellant be confirmed.”

The Relevant Statutory Provisions

Input tax” is defined in section 2 of the GCT Act in relation to a registered taxpayer, to mean, inter alia;

- (a). tax charged under section 3 (1) on the supply of goods and services made to that taxpayer or on the importation into Jamaica of goods and services by that taxpayer being goods and services required wholly or mainly for the purpose of making taxable supplies.
- (b).

Section 3 of the GCT Act provides for the imposition, subject to the provisions of the Act, of GCT, on inter alia,

- (a). The supply in Jamaica of goods and services by a registered taxpayer in the course or furtherance of a taxable activity carried on by that taxpayer.
- (b).

by reference to the value of those goods and services.

“Taxable activity” is defined to mean- (so far as is relevant to this case).

“any activity being an activity carried on in the form of a business, trade, profession, vocation, association or club which is carried on continuously or regularly by any person whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services (including services imported into Jamaica) to any other person for a consideration; but does

not include -

- (a).....
- (b).....
- (c).....”

“Taxable supply” means - (section 2)

“ any supply of goods and services on which tax is imposed pursuant to this act.”

Except as otherwise provided, a taxable supply takes place, inter alia, when:

- (a) an invoice for the supply is issued by the supplier; or
- (b) payment is made for the supply; or
- (c) the goods are made available or the services are rendered, as the case may be, to the recipient whichever first occurs.”

9. Section 63 (1) (k) of the GCT Act empowers the Minister of Finance to make regulations prescribing the circumstances in which a registered taxpayer may be given credit against output tax paid by him. The Minister has, by regulation 14 of the GCT Regulations, 1991, prescribed the circumstances for the grant and the quantum of such credit. Regulation 14 provides, inter alia, that:

“(1) Subject to paragraphs (2), (3), (4), (5), (6) and (6A), a registered taxpayer shall, in respect of a taxable period, be entitled to claim as a credit any **input tax** payable by him during the period and any other amounts specified in this regulation.

(2) For the purposes of paragraph (1), the input tax in relation to which a credit may be claimed shall be the sum of:

- (a) any amount stated as tax on a tax invoice issued to the registered taxpayer in respect of taxable supplies

made to him during a taxable period and

(b) any input tax paid by that registered taxpayer on the importation of taxable supplies into Jamaica, being supplies used by the registered taxpayer in carrying out his taxable activity.

The Decision, Grounds of Appeal and Subsequent Pleadings

In his letter of decision addressed to KPMG Peat Marwick, the respondent gave the following reason for his decision:

“We have reviewed your case, However, the previous position of the department has not changed, and rules that Regulation 14 (7) (b) applies in the circumstances covered by the assessment.”

The letter continued:

“We therefore will not discharge the amount of \$744,602.34 of the assessment which relates to the provision of uniforms for employees and staff functions.”

The appellant filed a notice and grounds of appeal. The grounds of appeal read as follows:

“(3).

(i) That Pursuant to the provisions of Regulation 14 (1) and 14 (2) (a) and (b) the Appellant is entitled to claim as a credit input tax paid by it in respect of taxable supplies made to it during a taxable period, being supplies used by it

in carrying out its taxable activity.

(ii). That the provisions of Regulation 14 (7) (b) are not applicable because the provision of uniforms to employees is not a supply within the meaning of section 18 of the General Consumption Tax Act.”

(iii). That the provisions of Regulation 14 (7) (b) are not applicable to the Staff functions arranged for employees of the Appellant as such functions do not constitute supply within the meaning of Section 18 of the General Consumption Tax Act.”

The respondent thereupon filed a statement of case, and later on an amended statement of case, in which he prayed that the decision should be confirmed for the following reasons:

“4.....

(i) The tax charged to the Appellant in respect of the provision of uniforms and lunches for its employees cannot be interpreted to be input tax as defined in section 2 of the Act, not being tax on goods and services required wholly, or mainly for the purpose of making taxable supplies.

(ii) The Appellant is not entitled to claim the said amounts as tax credits since they are not amounts specified in Regulation 14.

(iii) The Appellant is not entitled to claim

the said amounts under regulation 14 (2), said amounts being neither input tax nor amounts paid by the Appellant in respect of "supplies used in carrying out [its] taxable activity.

(iv) The Respondent agrees with paragraph 3 (ii) and (iii) of the Notice of Appeal; (supra), and contends similarly that Regulation 14 (7) (b) is not applicable to the provision of lunches."

By leave of the court, the appellant filed an amended reply to the respondent's amended statement of case. In the amended reply the appellant challenged some of the averments of the respondent and in particular stated at paragraph 1 (e) as follows:

"Furtherthe Appellant says:

"That such uniforms and lunches as it provides for its employees are provided pursuant to its agreement with the National Workers Union and the University and Allied Workers Union in respect of its unionised staff and pursuant to their contract of employment in respect of its non-unionised staff."

There were other averments which spoke to the issue of lunches and staff functions, but it is not necessary to outline these as by the time the hearing began, the respondent had made concessions which resulted in the question of the provision of uniforms being the only remaining substantive issue.

In paragraphs 2 and 3 of his amended reply the Appellant advanced new grounds of appeal as set out hereunder:

- (i) The Appellant contends that the Respondent is not entitled to raise at the hearing of this Appeal REASONS (i) (ii) (iii) of paragraph 4 of his Amended Statement of Case which did not form part of his Decision and in respect of which the Appellant is bound by its Grounds of Objection
- (ii) The Appellant joins issue with the Respondent as to his said REASONS set out in Paragraph 4 (i) (ii) (iii) of his Amended Statement of Case and contends as follows:-
 - (a) The uniforms and lunches provided by the Appellant to its employees are, the Appellant contends, provided pursuant to the latter's contracts of employment. They were required by the Appellant wholly for the purpose of making its own taxable supplies, within the meaning of paragraph (a) of the definition of "input tax" in section 2 of the General Consumption Tax Act. The Appellant is therefore, entitled to apply such input tax as a credit against the output tax charged by it on its own supplies for the relevant period.
 - (b) The input tax referred to at sub-paragraphs (g) to (k) inclusive of paragraph 1 hereof, was paid by the Appellant in respect of goods required by it wholly or mainly for the purpose of making its own taxable supplies and is therefore properly creditable against its output tax as aforesaid.
 - (c) It is not a precondition for the successful claim for an input tax credit pursuant to regulation 14

of the General Consumption Tax Regulation, that the sum paid should be both an "input tax" as defined and an "amount" specified in the said regulation. The Appellant contends that it is sufficient for the purpose of such claim if the sum paid falls within either category. The said sums claimed herein being "input tax" within the meaning of the aforementioned definition, are therefore capable of being offset against the Appellant's output tax for the reasons set out in (A) and (B) hereof.

- (d) The Appellant cannot, in the light of the matters set out in paragraph 1 (e) and (f) hereof, carry on its business activity and make its own taxable supplies without the supply of it of the uniforms and lunches and the payment of the input tax thereon, the subject of this appeal. The Appellant therefore contends that the said input tax was not only tax on goods required by the Appellant wholly or mainly for the purpose of making taxable supplies within the meaning of the aforementioned definition, but also amounts stated on a tax invoice to the Appellant in respect of taxable supplies used by the Appellant in carrying out its taxable activity, within the meaning of regulation 14 (2) of the General Consumption Tax Regulations.
- (iii) The Appellant contends that the Respondent is not entitled to the Relief Sought and in particular to the relief set out at item (c) of Paragraph 5 of his Amended Statement of Case in view of the admission made at paragraph 4 (iv) of his said Reasons.

The Appellant filed an affidavit sworn to by Rakesh Goswami, General Manager Finance and Administration of the Appellant company. In paragraphs 6,7,8,9 and 12 he

makes the following averments:

- (6) That the Appellant carries on as its only business, the blending, bottling and distribution of fine rums, spirits and wines. In the course of and for the purposes of carrying on this business, the Appellant employs approximately 450 persons, approximately 350 of whom are represented by the National Workers Union (NWU) and the University and Allied Workers Union (UAWU) hereinafter referred to as the "unionised staff".**
- (7) That pursuant to the Heads of Agreement made in 1994 between the Appellant on the one hand and the NWU and UAWU on behalf of their members, on the other hand, the Appellant undertook to provide uniforms and lunches for the unionised staff. A copy of the said Heads of Agreement marked "RG1" for identity, is exhibited hereto. This 1994 document represents an update of the earlier agreements between the Appellant and the unions. The provision of uniforms and lunches has been a feature of these agreements for a number of years.**
- (8) The Appellant's non-unionised staff are also required by their contracts of employment to wear uniforms and are entitled to the provision of such uniforms and lunches.**
- (9) That the Appellant does not itself carry on the business of providing uniforms or lunches. The uniforms are supplied to the Appellant by suppliers of uniforms and lunches are supplied by caterers. The Appellant provides canteen**

space for the use of its employees.

- (12) That the Appellant has always prided itself on being a good corporate citizen and feels that it is its duty not only to meet the expectations of its stakeholders but also to ensure that in its business operations it keeps their best interests in focus. The Appellant includes in the term "stakeholders", its shareholders, its employees, its suppliers, its customers and community in which it operates.

At this point it is useful to say something about the nature of General Consumption Tax, so as to place the issues that separate the parties in their proper perspective.

The Nature of General Consumption Tax (G.C.T.)

General Consumption Tax is a value added tax. A similar tax, value added tax, (V.A.T.) was introduced in Great Britain by the Finance Act 1973, which was part of the preparation for that country to enter the Common Market. In 1985, New Zealand enacted The Goods and Services Tax Act 1985. The tax thus imposed is commonly called G.S.T. The wording of much of the British Act is different from our G.C.T. Act, hence British cases must be referred to with great caution.

On the other hand our Act owes something to the New Zealand legislation particularly in the concept of any definition of "taxable activity" in contrast to the English "business".

General Consumption Tax is a broadly based consumption tax imposed under the Act, on the supply of goods and services in Jamaica, and on goods imported on or after 22nd October, 1991. Generally the tax is levied at the standard rate 15% (increased from the initial figure 10%) but some supplies are taxed at a nil rate (zero rated - Section 24

