IN THE REVENUE COURT

REVENUE COURT APPEAL NO. 6 OF 2007

IN RE THE INCOME TAX ACT

BETWEEN	LLANDOVERY INVESTMENTS LIMITED	APPELLANT
A N D	THE COMMISSIONER OF TAXPAYER APPEALS	RESPONDENT

Mr. Herbert Hamilton for the Appellant; Ms. Cecelia Chapman and Ms. Sophia Preston for the Respondent, Commissioner of Taxpayer Appeals; Ms. Keita Marie Chamberlain (legal advisor of Respondent, watching proceedings)..

Heard: July 14, and 15, 2009; and February 10, 2010

REVENUE LAW: Taxpayer submitting returns and audited accounts and tax computation showing tax due, but not paying tax in mistaken belief that it was an "Approved agricultural enterprise". Revenue raises assessment based upon accounts submitted; taxpayer purports to submit new un-audited accounts and returns; rejected by Commissioner; previous assessment subject of decision by Commissioner Taxpayer Audit and Assessment; confirmed on appeal to Commissioner Taxpayer Appeals; whether Commissioner wrong in law, whether assessment valid; whether assessment and decision in breach of Assessment provisions of the Income Tax Act as amended.

CORAM: ANDERSON J.

This is an appeal by Llandovery Investments Limited, ("The Appellant"), against the decision of the Commissioner of Taxpayer Appeals ("The Respondent") whereby it was ordered that the assessments made on the Appellant by the Commissioner, Taxpayer Audit and Assessment (Income Tax) (the Commissioner) in the amount of additional tax for Years of Assessment 1996 to 1998 be confirmed. The sums confirmed by the Respondent's decision are the following:

Years of Assessment	Tax
1996	450,332.00
1997	1,553,317.33
1998	4,411,470.33

The reliefs sought by the Appellant are set out below.

(a) The Appeal be allowed.

(b) That the aforementioned decision of the Respondent be set aside.

(c) The Assessments of the Commissioner be discharged.

(d) That the Respondent do pay to the Appellant, the costs of and incident to the hearing of this Appeal.

(e) Such further or other relief as this Honourable Court may deem just.

The grounds relied upon by the Appellant are as follows:-

That the Respondent erred and/or misdirected himself in fact and law -

(a) by confirming assessments which were ex facie in breach of the mandatory statutory requirement that the "notice(s) shall state the basis on which the assessment(s) is made."

(b) by confirming assessments made on the basis of returns which on the evidence or lack thereof, the Respondent knew were not true and correct.

(c) by agreeing with the Commissioner that the Appellant was bound by the financial statements/accounts submitted with its original returns and, in consequence, ought to be used as the basis for making the assessments instead of the amended returns filed by the Appellant.

(d) by rejecting the Appellant's amended returns which were, as the Respondent admitted, supported by information derived from source documents, on the basis that they "did not substantiate the claim that the income and expenditure shown in the financial statements filed with the original returns were incorrect".

(e) by alleging that the appellant did not keep proper records – no particulars were provided – and justifying the Commissioner's acceptance of the

original returns as a basis for making the assessments, by reference to Section 89 of the Income Tax Act.

(f) by failing to conduct a careful enquiry to determine which of the returns – original or amended – more accurately reflected the out-turn of the Appellant's business operations and unreservedly accepting the Commissioner's rejection of the Appellant's amended returns.

The Appellant also sought leave to file and argue Supplemental grounds of appeal. These were that the Respondent had erred in law and in fact:

(a) by adjudicating upon the matter without ensuring that the conditions precedent necessary - that is an objection by the Appellant to the assessments made on May 18, 2005 and a decision thereon – to the exercise of his jurisdiction had been met.

(b) by not recognizing that the Commissioner's failure to follow the correct statutory procedure denied the Appellant its fundamental right to object to the assessments made on May 18, 2005.

THE FACTUAL BACKGROUND

The taxpayer is a body corporate involved in dairy farming in the Parish of St. Ann. It first submitted returns for the years of assessment under review showing that there would have been tax due on the basis of the audited returns and tax computation but claiming, erroneously as it turned out, to be exempt from tax on the basis that it was an "approved agricultural enterprise". The taxpayer was advised that at the relevant time it was not an *approved agricultural enterprise* and therefore the tax liability was payable. It seems to be accepted as common ground that the status could not have been conferred retrospectively, and so a liability arose upon the returns initially submitted.

Based on this determination, the documents were sent to the Assessment unit for an assessment to be raised. Pursuant to section 72 of the Income Tax Act, the Commissioner of Taxpayer Audit and Assessment Department (TAAD) by letter dated April 22, 2002, raised additional assessments for the years 1996 to 1998 and the Notices of Assessment were served on the Appellant. The Appellant objected by letter dated May 8, 2002 on the basis that the explanation given for each was insufficient and vague and that the adjustments were erroneous and excessive. The TAAD responded to the Appellant by letter dated June 10, 2002 and gave a further explanation as to the basis of the adjustments. It indicated that the Appellant was not an *approved farmer* for the relevant years 1996-1998 and that the income reported in the financial statements was therefore assessable to income tax.

By letter dated July 31, 2002, the Appellant acknowledged the letter from TAAD dated June 10, 2002, reinforcing its objection and stating that the financial statements for the years ended July 31 1997 and 1998 were erroneous. It was indicated that the taxpayer would be filing amended returns which required reconstruction of accounts as well as the tax computation. It was also further argued that the year of assessment 1996 was partly statute barred, but the Appellant wished to convene a meeting for the reconstructed tax computation to be presented.

Several extensions of time were granted to the Appellant to present the amended financial statements before the Appellant filed amended returns for the relevant

years (1996 – 1998) on March 21, 2003. Un-audited statements were attached to the amended returns filed. In pursuance of a settlement of the objection, TAAD requested the Appellant to present bank statements, lodgement books and other source documents to substantiate turnover. Subsequent to that, numerous reminders were sent to the Appellant to produce the documents and again meet with the TAAD.

It is the contention of the TAAD that while the Appellant did submit some of the documents, these were not sufficient to justify rejecting the initial returns filed and overturning the original assessments made. Consequently, TAAD confirmed the assessments.

Pursuing its right given under the Revenue Administration (Appeals and Dispute Settlements) Regulations 2002, the Appellant appealed to the Respondent, Taxpayer Appeals Department (TAD) on May 24, 2006. A hearing was conducted over two (2) days and the Appellant was required to produce the requisite source documents and verification in support of the amended returns. The TAD, having heard the appeal, determined that the Appellant had failed to produce all the documents required. Consequently, after a comprehensive review of the facts the Respondent issued his Notice of Decision, whereby the decision of the Commissioner of TAAD was confirmed.

The Appellant now appeals to this Honourable Court from the decision of the Commissioner TAD as stated in the said Notice of Decision.

THE PROCEEDINGS BEFORE ME

When the hearing commenced on July 14, 2009, the Appellant raised two (2) preliminary points in objection to the matter being heard at all by this court:

The Appellant's Preliminary Objections

Firstly, it was argued for the Appellant that there was no jurisdiction on the part of the Commissioner TAD to hear the appeal from the Commissioner TAAD. The Appellant submitted that the Respondent purported to exercise his jurisdiction to hear the Appellant's appeal pursuant to Section 75(6B) without ensuring that the requisite conditions precedent were met.

In this regard the Appellant cited section 75 (6A) and (6B) of the Income Tax Act. Sub-sections (6), (6A) and (6B) are in the following terms:

> (6) In the event of any person assessed, who has objected to an assessment made upon him, agreeing with the Commissioner as to the amount at which he is liable to be assessed, the assessment shall be amended accordingly. In any other event the Commissioner shall give notice in writing to the person of his decision in respect of the objection.
>
> (6A) A person who is dissatisfied with a decision of the Commissioner under subsection (6) may appeal against that decision to the Commissioner of Taxpayer Appeals, within thirty days of the receipt of the decision:
>
> Provided that the Commissioner upon being satisfied that owing to absence from the Island, sickness or other reasonable cause, the person disputing the assessment was prevented from making the application within such

period, shall extend the period as may be reasonable in the circumstances.

(6B) On an appeal under subsection (6A) the Commissioner may confirm, reduce the amount under or vacate the decision concerned.

In response to this, Ms. Chapman for the Respondent submitted that the court should reject this ground of the Appellant's submissions as the conditions prescribed within statute were in fact met. As such, the Appellant could not complain on this account. It was her contention that the decision of the TAAD given May 18, 2005 was the culmination of a process which began with the assessment raised on the Appellant in its assessment of April 22, 2002 to which objection was made by the Appellant in June 2002. Everything which occurred in between the date of the original assessment and the date of the decision was intended to assist in ascertaining whether the initial assessment was correct. There was accordingly no basis for the Appellant to have formed a view that the second set of returns and accounts had ever been accepted in substitution for and derogation from the initial returns and accounts.

In fact, Ms. Chapman points to paragraph 24 of the affidavit of the Appellant's accountant, Karen Russell (the "Russell Affidavit") filed on behalf of the Appellant. There, Ms. Russell states:

> .....since *the focus and purpose was primarily to satisfy the process of a tax objection review* the absence of a balance sheet would not in any way prejudice or otherwise affect the computation of the Appellant's statutory income for each year. Amended income and expenditure accounts (hereinafter the re-filed returns") for each of the years ended 31 July 1996, 1997 and 1998 and are attached hereto and marked **"KORA015", KORA016"** and **KORA017"** respectively was prepared and

> did form part of the revised return that was presented for each year of assessment. *The manner in which these were presented ensured that the objection process was not further delayed and importantly accuracy was not sacrificed. Additionally, there is no requirement by law that a taxpayer returns must be supported by audited financial statements and further no request was made by TAAD for any audited or unaudited financial statements. It is not unprecedented nor is it unconventional that the TAAD accepts as a proper return from taxpayers, income statements and/or profit and loss account.* (Emphasis mine)

Counsel therefore argued that there had been no ambivalence about what were the returns that were the subject of the assessment and later decision. There had been no expressed or implied indicator in the letter of February 19, 2003 that could lead the Appellant rationally to conclude that the Returns filed in 2000 would be discarded by the Revenue and the returns submitted latterly accepted.

In additional submissions, counsel for the Appellant suggested that the duty of the Appellant was to submit a true and fair return and once it had established that the initial returns did not comply with those terms, it could not be estopped from submitting "correct returns". It was further submitted on behalf of the Appellant that all that the Commissioner's letter of February 19, 2003 could do would be to extend the time for complying with that duty:

> "The Commissioner has no legal authority to circumscribe the performance of the Appellant's duty or more importantly to determine which return it would accept. It was the Appellant's determination both as a matter of fact and law to rely upon its Amended Returns/Accounts and the Commissioner's obligation was to either accept or reject them".

The Appellant also made another submission to the effect that if the Respondent was correct in stating that the Commissioner's letter dated May 18, 2005 was a decision made properly under Section 75(6), it would mean that no assessments

had been raised in respect of the amended Returns/Accounts delivered on March 21, 2003 and so the Appellant would have had no obligation to prove them erroneous. But this is based upon the erroneous premise that the second returns were ever accepted by the Commissioner TAAD. That is specifically denied by the Revenue.

For the avoidance of doubt, I find as a matter of fact, that at no time did the TAAD in its decision, or the Respondent in confirming that decision, accept that the second submitted returns were "the returns of the Appellant" for the purposes of the assessment process as set out in sections 72 et seq, of the Act.

I should also observe that it seems to me that there is an internal contradiction in the Appellant's propositions as stated above. In any event, it is clear that the taxpayer's decision to submit subsequent returns cannot compel the Commissioner TAAD to accept them on the presumed basis that they are now "true and correct". It is undoubtedly the statutory right, and indeed duty, of the Commissioner to determine which return, or indeed whether any of them, is a "true and correct" return and to raise an assessment accordingly. For reasons which are set out later in this judgment I find that the conditions prescribed for the exercise of the jurisdiction of the TAD was in fact met and as such the Appellant's objection cannot succeed.

Secondly, the Appellant objected on the basis of presumed and actual bias on the part of the Respondent. The first is premised upon the fact that the Respondent herein, the Commissioner TAD, (a party to the proceedings) is also an affiant. Justice, it was submitted, must not only be done, but must manifestly be seen to be done. In that regard, the Appellant points to 2 exhibits attached to the affidavit of the Commissioner TAD. These were the notes of hearing and a report of TAAD. The report from the TAAD indicated that no explanations were provided (by the Appellant) to show how the new figures in the subsequent returns and accounts had been derived or what were the specific errors which would have invalidated the earlier accounts and returns. It was also suggested that the TAAD's insistence upon the use of the first returns without hearing from the accountants who had provided the revised figures, was itself evidence of bias.

On the other hand, it was submitted for the Revenue that the Commissioner TAD is in fact the proper Affiant for the Respondent as it is from his decision that the Appellant now appeals. The affidavit of the Respondent raises no new information from that in the Notice of Decision and it was the Respondent's submission that the use of notes of evidence from the hearing was proper. It must also be remembered that the onus of proving that the assessment is excessive or erroneous remains with the Appellant.

I found that the Appellant's allegation of bias was unsustainable and as such I had no hesitation in holding that the second preliminary objection should also not succeed.

THE SUBSTANTIVE APPEAL

I come now turn to the substantive appeal. The Appellant's grounds of appeal as stated in the Notice of Appeal and Supplementary Grounds of Appeal are set out above. I will first deal with the supplementary grounds:

> That the Respondent erred and/or misdirected himself in fact and law –
>
> (a) by adjudicating upon the matter without ensuring that the conditions precedent necessary - that is an objection by the Appellant to the assessments made on May 18, 2005 and a decision thereon – to the exercise of his jurisdiction had been met.
>
> (b) by not recognizing that the Commissioner's failure to follow the correct statutory procedure, it denied the Appellant its fundamental right to object to the assessments made on May 18, 2005.

Counsel for the Revenue asserted that there had been no procedural breaches in the terms of either (a) or (b) above, regarding the Appellant's ability to have his objection properly heard. As pointed out by Counsel, once an 'additional assessment' has been raised by the Commissioner a Notice of Assessment is sent to the Taxpayer advising of the assessment and the right to raise an objection within a stipulated time. It is trite that where an objection is raised, the Commissioner may confirm the assessment or make adjustments thereto.

According to the evidence of Hopeton Pottinger, upon receipt of the 'additional assessment' the Appellant's accountant K.O. Russell and Associates, by letter

dated May 8, 2002, objected to the 'additional assessments' claiming that the explanations given in the notice of assessment were "...insufficient one-line which by its vagueness indicates that the assessment had very little basis and validity". The Appellant further objected stating that the "adjustments are erroneous and excessive and do not in any way reflect the activities of the company" and requesting that the adjustments be withdrawn.

In response to the Appellant's objections, the Commissioner offered further explanations in a letter dated June 10, 2002 concerning the basis of the adjustments and indicating that they failed to qualify for *Approved Farm Status* for the years in question as it was not given retroactively and as such the income which they reported in their returns for 1996-1998 was assessable to income tax.

The Appellant again exercised its right to object and wrote a further letter in which it "reinforced their objection" and raised additional grounds for the objection, including as they claimed, that the assessment for 1996 was not properly assessed as it was statute-barred.

In respect of the year 1996, the Commissioner advised the Appellant in letter of February 19, 2003 that the year of assessment 1996 was properly assessed based on Section 72(4) and was not statute-barred. In light of that the Commissioner confirmed the assessment for 1996.

Further, in an attempt to settle the objection, several meetings were held with the appellant and numerous requests for source documents made of the Appellant. At the end of that process, a Notice of Decision dated May 18, 2005 was issued not an assessment (as the Appellant claimed). The Notice of Decision served to inform the Appellant that the "additional assessment" raised by the Commissioner for the years 1996-1998 were confirmed on the basis that the evidence presented during the objection process was not sufficient to require the Commissioner to change the assessments.

It was submitted that all the statutory conditions precedent to the appeal to the Respondents had been complied with and there was no misdirection or error in law or in fact on the part of the Respondent.

In so far as the supplementary grounds are concerned, I hold that these can easily be disposed of. The fundamental premise of these grounds is that there was an assessment handed down by the Commissioner TAAD in May 2005. I find as a matter of fact and law that that is not correct. The assessment had been made in 2002 and the taxpayer had "objected" as was its right as demonstrated. The second supplemental ground has not been made out. There was no non-recognition by the Respondent of any failure by the Commissioner TAAD, since in my holding, there was no such failure. Having disposed of the supplemental grounds, I will now consider the other grounds raised by the Appellant.

The Appellant raises a number of issues which it claims provide the basis for reversing the Respondent's decision. These were outlined earlier in the judgment. I propose to deal with grounds (c) and (d) together.

It was submitted that the assessment raised by the Commissioner failed to provide the basis of the assessment as required by section 75(3) of the Income Tax Act. That sub-section and the proviso thereto are in the following terms:

> An assessment or the duty charged thereon shall not be impeached or affected-
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> (a) by reason of a mistake therein as to -
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> (i) the name or surname of a person liable; or
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> (ii) the description of any income; or
>
> (iii) the amount of the tax charged; or
>
> (b) by reason of any variance between the notice and the assessment:
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> Provided that in cases of assessment the notice thereof shall be duly served on the person intended to be charged and such notice shall state the basis on which the assessment is made.

In this regard, Counsel for the Appellant cites the well-known case of ***Collector of Taxes v Winston Lincoln*** [1988] 25 JLR 44 per Downer J.A. It was again submitted by counsel Mr. Hamilton, as he has done in other cases involving the making of an assessment by the Commissioner, that the assessment does not "state the basis" upon which it is made. It is to be recalled that this provision represents an amendment to the previous provision which required the Commissioner to give "particulars". Dukharan J.A. in ***Dennis Murray v Commissioner of Taxpayer Appeals (Income Tax)*** SCCA # 70 0f 2007,

agreed with counsel for the Revenue in that case, that the requirement to "state the basis" was less stringent than the previous requirement for "particulars".

Mr. Hamilton submitted that the "revised assessments" issued in 2005 only stated the basis for the year of assessment 1998 and that, accordingly, the assessments for 1996 and 1997 were void. This, by reason of the foregoing, with respect, is incorrect.

It was also submitted for the Appellant that the demand for supporting documentation and information by the Commissioner TAAD was ill-conceived. On his submission this was so because, once the amended returns and accounts were submitted, the previously submitted returns and accounts were "no longer extant". He also suggests that between March 22, 2003 and May 17, 2005 there was no assessment in place and therefore no power in the Commissioner to order the production of documents. Therefore, it was argued that there was no objection and thus no existing basis upon which the taxpayer could be required to prove that the assessment is excessive. With the greatest respect, this is a misconception.

Counsel for the Revenue denies that the Commissioner had failed to state a basis. It was submitted that once the taxpayer's accounts and returns had showed that tax would be payable and it was established that the basis of the claim for tax exempt status was illusory, then pursuant to section 72(4) the Commissioner was entitled to raise the assessment. In any event, the Notice of

Assessment includes two forms, the AU3 and the AU10 which gives a full explanation of the reasons and therein provides the basis upon which the assessment has been made. This evidence is found in the affidavit of Hopeton Pottinger. In particular, exhibit HP1 is a letter dated April 22, 2002, including the computations with explanations which set out the basis of the assessment and HP 2, a further letter dated June 10, 2002 responding to the objection of the Appellant with further explanations of the basis.

In addition, as counsel for the Respondent points out in her submissions, "the Appellant had conducted its own self assessment and filed returns indicating a net income, but had not included computation for tax liability for any of the years for which they filed on the presumption that they were in receipt of the Approved Farmer Status as they had been for previous years". It is common ground that what the Commissioner did was to apply the appropriate tax rate to the income declared by the Appellant, but which the Appellant had treated as not taxable on the basis that it was exempt income. That erroneous view having now been corrected, it can scarcely be said that the taxpayer did not know the basis upon which it was being taxed.

This question of whether a proper basis for tax assessed has been stated has been the subject of a recent decision in the Jamaican Court of Appeal in ***Dennis Murray*** cited above. There, his lordship, Dukharan J.A., after setting out the proviso to section 75(3) referred to above, stated:

As was pointed out in ***Federal Commissioner of Taxation v Prestige Motors*** (1994) 123 ALR 311 at page 312:

> The principal purpose of this notice of assessment is to bring to the attention of the person on whom it is served, that such person is liable to pay on the due date the amount of tax assessed in the notice on the income stated in the notice.

The purpose of an assessment was discussed in ***Dezura v Minister of National Revenue*** [1948] 1 DLR 465 at p. 469 when Thorson, P. said:

> "The object of an assessment is the ascertainment of the amount of the taxpayer's taxable income and the fixation of his liability in accordance with the provisions of the Act. If the taxpayer makes no return or gives incorrect information either in his return or otherwise he can have no just cause for complaint on the ground that the Minister has determined the amount of tax he ought to pay provided he has a right of appeal therefrom and is given an opportunity of showing that the amount determined by the Minister is incorrect in fact. Nor need the taxpayer who has made a true return have any fear of the Minister's power if he has a right of appeal. The interests of the revenue are thus protected with the rights of the taxpayers being fully maintained. Ordinarily, the taxpayer knows better than any one else the amount of his taxable income and should be able to prove it to the satisfaction of the Court. If he does so and it is less than the amount determined by the Minister, then such amount must be reduced in accordance with the finding of the Court. If, on the other hand, he fails to show that the amount determined by the Minister is erroneous, he cannot justly complain if the amount stands. If his failure to satisfy the Court is due to his own fault or neglect such as his failure to keep proper accounts or records with which to support his own statements, he has no one to blame but himself."

It seems clear to me, that once the assessment is served on the taxpayer, if he objects, the burden is on him to prove that the assessment is invalid. This is so because he has superior knowledge of his income which the Commissioner might not be in a position to know. I agree with the view of Anderson, J. that the term "basis" does not require a "special technical meaning" as "basis" must be interpreted in the context of Revenue law and the particular statutory provision.

I agree with Counsel for the Respondent that in circumstances where the Commissioner states the particular years of assessment, the quantum of the Commissioner's assessment of the taxpayer's income and the source of such income (even if the source of the income is not

precisely defined) is a sufficient basis of assessment to necessarily put the taxpayer on notice of the tax levied against him. *In the affidavit of Michael Williams at paragraph 6, the basis of assessment for 1997 was the actual return made by the appellant plus additional income from "sources not stated elsewhere"*. (My emphasis)

The requirement to give "particulars" of an assessment was the position prior to 1991. The decision in ***Collector of Taxes v Winston Lincoln*** (1988) 25 JLR 44 resulted in an amendment to the Act, which provided a less stringent requirement to state the basis of an assessment.

In my view Anderson, J. was correct when he found that the Commissioner fully complied with section 75 (3) of the Act and that *there is no requirement for the Commissioner to precisely identify the source of the appellant's unreported income in the Notice of Assessment*. (My emphasis)

It seems clear from the foregoing that this ground appeal must accordingly fail."

In his closing submissions for the Appellant, counsel argued that a further ground of appeal was that the Respondent fell into error in seeking to assert the validity of the originally-filed returns as a basis for rejecting the second-submitted amended returns and putting the onus on the Appellant to prove the original erroneous. This seems to be a re-statement of this ground of appeal that the Respondent erred when he confirmed the additional assessments made on the basis of returns which, on the evidence or lack thereof, the Respondent knew were incorrect and untrue.

According to the evidence of the Appellant as gleaned from the affidavit of Karen Russell, after the Appellant had made its objection and had received the further explanation from the Respondent, its new accountants Karen O. Russell and Associates (KORA), advised the Commissioner TAAD that upon checking the

accounts (and returns) previously submitted, it had found them to be "erroneous" and would submit new ones. Given until March 28, 2003, the new accountants submitted the replacement accounts and returns on March 21, 2003.

Ms. Russell's evidence is that her firm which had now taken on the responsibilities for the Appellant's accounts, held discussions with the auditors who had been previously engaged, J. Jolly and Company and, having reviewed what had been submitted formed the view that there were "some blatant, anomalies and inconsistencies". It was her further evidence that while she sought the assistance of the previous accountants with respect to the schedules and other information which he had used to prepare the accounts and returns for the years under review, she did not receive their full co-operation in this process. Ms. Russell points out that even before her extensive review of the documentation, she had written to the TAAD for permission to file revised accounts and returns by her letter dated on or around July 31, 2002. She says she got a response from TAAD in a letter dated February 19, 2003.

The following quote from Ms. Russell's affidavit is instructive: "I understood this letter to be (a) permission to prepare and submit revised/amended financial statements and returns for the relevant years and (b) that the revised submission would supersede those which were previously filed and as such it was the revised returns that would be subjected to the scrutiny of the TAAD during the objection process". There does not appear to be given anywhere a basis for her

to have arrived at that conclusion and certainly the position of the TAAD was that no such assurance was ever given or any such concession made. In any event, she said that she eventually submitted the amended returns and accounts. However, Ms. Russell acknowledged that in preparing the amended returns for filing, "I used and or relied on the documents and or information available at the time and these included the items as outlined in paragraph 12 herein (cash book, cheque vouchers, receipt books journal, payroll register and other miscellaneous documents) in addition to third party confirmations and verification". She also stated that "to adequately and fairly reconstruct the clients' returns, monthly bank reconciliations were done; also the disbursement journals and supporting schedules were prepared for completeness. There were some constraints in having a balance sheet expeditiously prepared especially due to the unavailability of an opening trial balance and other opening entry verifications as I was still not getting the assistance or co-operation of Mr. Jolly".

I also found it instructive that in the course of the affidavit, Ms. Russell says, in reference to the second-submitted returns and accounts: "*The manner in which these were presented ensured that the objection process was not further delayed* and importantly accuracy was not sacrificed". (Emphasis mine) It would seem from this that the accountant herself considered that the new submissions were "part of the objection process" which it could only be if there had been, as the Respondent maintains, a previous assessment and an objection. Thus, the TAAD, having reviewed the information provided by the new accountants, KORA,

determined that there was nothing to convince the Commissioner to change his original assessment and accordingly, a decision was issued in May, 2005. This decision was upheld by the Commissioner TAD in the following terms:

> "The Taxpayer Audit and Assessment Department (TAAD) noted that schedules submitted by the Appellant outlined the information captured from these source documents and indicated how the selected income and expenses were derived and the amended return filed on March 21, 2003. However, no information was presented to show how the information captured in the financial statements accompanying the Returns filed on June 2000 were derived or what were the errors and the cause of the errors in these audited financial statements which resulted in the accounts having to be reconstructed. As a result TAAD has indicated that there is no basis for recommending any changes to the assessment raised on the company"

It was submitted by counsel for the Appellant that the decision is "untenable" as "a raft of cases confirm that neither the Commissioner nor the Appellant can be estopped in the factual circumstances of this case from performing their statutory duty to obey the law; and the Appellant is required by law to deliver a true and correct return for the whole of its income from any source whatever – Section 67(1)".

In that regard, the Appellant's counsel cites ***IRC v Brooks*** [1914] AC 478 at pages 491-492 and ***Maritime Electric Company Limited v. General Dairies Limited*** [1937] AC 610 at pages 620-621. In the ***Brooks*** case, the taxpayer had been assessed to income tax by the General Commissioners. His liability there-under had been determined by the General Commissioners applying the statutory provision to find the average of gains and profits over a specified three year period. Once that figure had been determined on an appeal then, by virtue

of section 57(10) of the Finance Act of 1880, it was final. That had been determined at Six Thousand Three Hundred and Thirty One Pounds. (£6,331)

He also became assessable to super tax which was declared to be a duty of income tax, and which was brought into existence by the Finance Act 1909-1910. The assessment to super tax was to be done by the Special Commissioners and they were required to estimate the total income of the taxpayer in the same way as in the case of exemptions from income tax. In order to determine liability to super tax the Special Commissioners also went through the three year averaging exercise.

However, the taxpayer, having been dissatisfied with the determination of the General Commissioners, claimed he was not bound by the determination of the General Commissioners with respect to income tax, for the purposes of super tax, and required that the Special Commissioners investigate it over again and come to their own conclusion. The Crown claimed that he was bound by the figures previously determined by the General Commissioners, essentially claiming that he was estopped from asserting that the figures previously arrived at after appeal from the General Commissioners was not final for all purposes. The House of Lords held that he was not so estopped.

I do not find any assistance from that case as there the issue was two different taxes determinable by two different bodies, each of whom had a statutory responsibility to come to a determination. As Lord Loreburn said, this was simply

a matter of construction of the relevant statutory provisions. Section 57 (10) was in the following terms:

> Appeals once determined by the General Commissioners, or by the major part of them present on the day appointed for hearing of appeals, shall be final; and neither the determination of the Commissioners nor the assessment then and there made thereupon shall be altered at any subsequent meeting, or any other time or place except by order of the High Court when a case has been required as provided by this Act.

His lordship then said:

> It does not say that the determination is to be final for all purposes. When, therefore, another tax is imposed by another statute, whether it be a duty of income tax or not, and a different tribunal is directed to estimate the same figure as part of a greater whole, I do not read the section as imposing upon the new tribunal a duty to accept the determination of the old.

It is clear that the situation there deals with two different statutes and two different taxes and can have no application to the instant case. Nor do I find any further help in the dictum of Lord Parker of Waddington at pages 491-492 of the judgment, cited by counsel, where he said that estoppel, being a rule of evidence could not prevent the performance of a statutory obligation. In fact, if anything, it assists the Respondent because it is the duty of the Commissioner TAAD to make the assessment in the circumstances set out in the Act while it is the obligation of the Appellant to prove the assessment erroneous.

I also do not gain any assistance from the ***Maritime Electric Company Limited*** case. There the appellant was a private electrical power supply company. It was under a statutory duty "to furnish reasonably adequate service and facilities and was strictly limited in accordance with filed schedules open to public inspection as to the rates, tolls and charges which they could make and exact." It supplied power to the respondent, but by virtue of a mistake in the calculation of the amounts due based on the respondent's meter readings, the respondent was only billed for one-tenth of the amount for which it was liable over a twenty-eight month period. The appellant claimed to recover the nine-tenths outstanding and the respondent resisted on the basis that the appellant was estopped.

The House of Lords held, reversing the judgment of the Supreme Court of Canada, that the appellant was not estopped from recovering the outstanding sums. The duty imposed by the relevant legislation (the Public Utilities Act) on the appellant to charge and the respondent to pay at scheduled rates, could not be avoided or defeated by a mere mistake in the computation of accounts. "The relevant sections of the Act were enacted for the benefit of a section of the public, and in such a case where the statute imposed a duty of a positive kind it was not open to the respondents to set up an estoppel to prevent it".

It appears to me that the submission about estoppel is misconceived. It seems to be premised upon the proposition that because the taxpayer says that the subsequent accounts and returns are correct, the TAAD is obliged to accept it as such as being in fulfillment of the obligation to submit a "true and correct return". The Appellant is not relying upon any principle of estoppel. Clearly that would make nonsense of the rights given by the Act to accept or reject the submissions of the taxpayer and raise an additional assessment accordingly.

The Appellant's counsel also submits that it is not the law that the taxpayer is bound by its books of accounts or is vicariously liable for the acts of its accountant. For these propositions, the Appellant cites two cases; namely, **Nicol, Nicol and Bliss v. Commissioner of Inland Revenue (N.Z.)** [1955] Vol. XL Austrailian Tax Decisions at pages 16-17 and ***Commissioner of Taxes v Melbourne Trust Limited*** [1914] 18 CLR 413. There is no necessary assertion in the decision of the Respondent, that the taxpayer is vicariously liable for acts of its accountants.

In the ***Nicol*** case, the taxpayers were convicted by a magistrate of willfully making false returns in respect of returns prepared by their accountant. On

appeal, one of the issues raised was whether the taxpayer was vicariously liable for acts or defaults of their accountant. While it was held that the relevant taxing statutes in Australia had not been construed to fix a principal with liability for the criminal act of his agent, the convictions were upheld. This case does not provide me with any assistance. Similarly, I find too that the case of ***Commissioner of Taxes (Victoria) v Melbourne Trust Ltd.*** does not offer me any help.

This ground of appeal is again premised upon a misconception of the duties imposed upon the taxpayer and the two Commissioners, TAAD and TAD, by the Act. As pointed out by the counsel for the Respondent, it is the duty of the taxpayer under section 67(1) to deliver a true and correct return of his income. It is equally clear that to the extent that returns are accompanied by duly audited financial statements with the appropriate certificate by an accountant, the Commissioner TAAD will likely rely upon those audited accounts as being true and correct. Nevertheless, it must be implicit from the terms of the Act that the Commissioner is not obliged to accept the returns as true and correct. It is clear from section 72(2) that the Commissioner TAAD has the options set out in that subsection as follows:

> (2) Where a person has delivered a return the Commissioner may –
>
> (a) accept the return and make an assessment accordingly; or
>
> (b) refuse to accept the return and, to the best of his judgment, make an assessment upon that person of he amount at which he ought to be charged.

There is no reference to the nature of the accompanying financial statements. However, it would be passing strange if audited financial statements were not given considerable weight.

In addition, section 72 (4) provides:

> (4) Where it appears to the Commissioner that any person liable to tax in respect of any year of assessment has not been assessed or has been assessed to 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 or surcharge, as according to his judgment ought to have been charged.

It is my view that the phrase "a person who has been assessed to a less amount than that which ought to have been charged" would include those the subject of deemed assessments under subsection (5) of section 67 and so would clearly include the taxpayer in the instant case, based upon the situation at the time of submitting the initial returns. It is equally clear that it is for the person who disputes the assessment to show that it is excessive or otherwise wrong. What the Commissioner was in effect doing by allowing the taxpayer to produce evidence of the errors which it alleged had informed the initial returns, was giving the Appellant an opportunity to show that the "assessment was excessive". It is not the function of the Commissioner to determine whether the returns are statutorily correct. It is his duty to make the assessment, where necessary on his best judgment. Once he has done that, he has discharged his statutory duty. The burden is thereafter on the taxpayer who challenges that assessment to establish that it is wrong.

It must follow from this that the role of the Respondent upon an appeal to him is primarily to review the evidence available and presented and to determine whether the statutory procedure has been faithfully followed. He could only reverse the findings of the Commissioner TAAD if he came to the view that the procedure was not followed or that the taxpayer had demonstrated to his satisfaction that the assessment was excessive or otherwise erroneous. It is clear that the Respondent was not provided with such evidence during the two (2) day hearing before him. In that regard, it is instructive to note the Respondent's evidence in affidavit of Errol Hudson. There it is averred that on

the second day of the hearing the Appellant brought in some documentary proof in support of its claim that the initial filing was incorrect, but indicated that it did not have all the records. It was stated that the documents were unavailable and that while it could substantiate the amended returns, it could not show why the initial return was erroneous.

The Respondent's counsel's submission in this regard is, in my view, un-impeachable:

> Based on the tenor of the ITA it is not for the Commissioner to determine which is correct or which is incorrect, the burden is on the taxpayer to show the *correctness of the assessment or its incorrectness.* (My emphasis) This burden will be discharged only where the taxpayer has provided evidence by way of records and books with sufficient information to move the Commissioner to adjust the assessment. In this case, the Commissioner accepted the returns and raised an assessment, not on the basis that it was incorrect but on the basis that it was undercharged. It was the Appellant who raised the issue of incorrectness of their own returns on objection. The Commissioner otherwise had no reason to believe that the returns were incorrect.

It is quite clear that the burden for proving the assessments were wrong is squarely upon the person who is objecting. Thus, Section 75(4A) provides as follows:

> "The onus of proving that the assessment complained of is erroneous shall be on the person making the objection".

In terms of what followed after the making of the objection, I would characterize it as the Commissioner exercising his statutory powers under subsection (5) (a) (ii) as provided in the following:

> (5)(a) On the receipt of the notice of objection referred to in subsection (4), the Commissioner may require the person giving the notice of objection-
>
> (i)
>
> (ii) to furnish within such period as the Commissioner may specify such particulars as the Commissioner may deem necessary with respect to the income of the person assessed and to produce all books and other documents in

> his custody or under his control relating to such income and may by notice summon any person who he thinks is able to give evidence respecting the assessment to attend before him and may examine such person on oath or otherwise.

The Appellant acknowledged (See the affidavit of Karen Russell) that it had difficulty with securing all the necessary documents which it would have required to re-construct the accounts and the returns. The Commissioner TAAD also acknowledged that some additional information had been provided by the accountant. The clear evidence is that the Appellant's accountant was unable to provide the information which would have discharged the onus to prove "the assessment erroneous". In that regard, it must be borne in mind that what is at issue in the process is the assessment; it is not the return or the accounts per se. In other words, what the Commissioner TAAD is saying is: "I have made an assessment which is based upon the figures which had been contained in your original returns and audited financial statements. If that is erroneous, please let me have the information to demonstrate that fact so that I can come to the view that my assessment was erroneous". The taxpayer failed to discharge the burden of proof.

The Respondent's counsel in opposition to this ground of the appeal also cited the decision of Warner J.A. in ***Bi-Flex Ltd v Inland Revenue Board*** (1986) 38 WIR 344 at page 361. There the learned judge opined that the burden on the Appellant was two fold and extended beyond merely showing that an assessment is incorrect, but that the Appellant must go further to show, what was required to make the assessment correct. Thus, he stated:

> "To discharge [the] burden it must show not only negatively that the assessment was wrong, but also positively, what correction should

be made to make it right or more nearly right."

It follows therefore that even though the Appellant may have provided some evidence in support of the amended returns, that it was not enough to satisfy the burden of proof. In all cases where an appeal is made in response to a confirmation of an assessment after the making of an objection, it is the duty of the Respondent to ensure that all the parties are heard. There can, however, be no doubt that the burden of proof remains on the Appellant to provide sufficient information and evidence to satisfy the Respondent that the "additional assessment" as confirmed should be overturned.

Given the evidence which was produced by the new accountants, replacing the former accountants who had acted for the Appellant for years before this issue arose, the Commissioner TAAD clearly came to the view that he had no basis for concluding that the original returns, *and therefore his assessments based thereon*, were incorrect. He was, accordingly, entitled to confirm the additional assessment. It was submitted, and in my view correctly, that the Commissioner did not err in confirming the additional assessments as he had not been provided with the evidence to allow him to draw the conclusion that the initial returns and accounts were wrong. He could only have concluded that the second submitted returns were correct if he had been provided with evidence that the initially submitted returns and accounts were wrong. This, the Appellant failed to supply. I would only add that the Respondent's submission that it is not sufficient for the Appellant to assert that it is not aware of how the figures were arrived at for the first return and for them to disclaim the accounts when it no longer suited their purpose must be correct when viewed within the context of the scheme of the Income Tax Act.

Another ground for the appeal was stated to be that the Respondent had misdirected himself in law and fact by "rejecting the Appellant's amended returns which were, as the Respondent admitted, supported by information derived from

source documents, on the basis that they 'did not substantiate the claim that the income and expenditure shown in the financial statements filed with the original returns were incorrect'".

It was submitted that given certain statements in the decision of the Respondent, it was not proper to come to a conclusion, (characterized as a "*non sequitur*" by the Appellant), that the "documents provided were insufficient to verify the income reported and expenses claimed on the amended returns". The statements referred to are the following:

> "During the appeal process, documents were submitted by the Appellant and accepted for examination. The documents consisted of schedules relating to salaries and wages, chemical expense, medical expense, repair and maintenance, cleaning and sanitation, bank interest, other income and various source documents".
>
> "The Taxpayer Audit and Assessment Department noted that *the schedules submitted by the Appellant outlined the information captured from these source documents and indicated how the selected income and expenses were derived on the amended return filed on March 21, 2003"*.
>
> "Coupled with the above, *the schedules prescribed were supported in all cases by estimates, derived amounts, photocopied third party verification, and unsupported claims of inter-company set off in the case of insurance*. (All emphases mine)

Based upon these statements, counsel for the Appellant suggests that the foregoing confirms "the availability/adequacy of the Appellant's records". Nothing could be further from the truth. Given the areas which I have emphasized in the quotes set out above, I have to conclude that the submission, carefully framed to characterize the records as "available/adequate", has been made with tongue firmly in cheek. Even a cursory reading of the selected quotation indicates that the supporting documentation was inadequate to support any positive finding in favour of the Appellants objection. There is nothing in the quoted sections which suggests that the information was adequate. This is a submission without merit.

This submission again also seems to be quite misconceived. The role of the Respondent is not to select a return which is the one more suitable to the Appellant. It is abundantly clear that the burden of showing that *the assessment* is erroneous is, and always remains with the taxpayer. It is equally clear that the Respondent came to the view that the Appellant had, on the information which was made available to him, not discharged the onus of proof.

The Appellant's counsel in his closing submissions refers to the observation in the Respondent's decision, on the duty of the taxpayer to keep proper accounts and records. The issue raised there by the Appellant, finds its expression in what is set out as ground (e) of the Notice and Grounds of Appeal. In that ground counsel stated as a further basis for reversing the decision of the Respondent that the Respondent erred by misdirecting himself in fact and law "by alleging that the appellant did not keep proper records – no particulars were provided – and justifying the Commissioner's acceptance of the original returns as a basis for making the assessments by reference to section 89 of the Income Tax Act". Part of the argument set out in the closing submissions is that there were "adequate and available" records to vindicate the validity of the second-submitted returns.

The short answer to this submission, and I so find as a matter of fact, is that there is no evidence that the Respondent *used the absence of proper record keeping by the Appellant, required by section 89 of the Act, "to justify the Commissioner TAAD's decision on the objection*". (My emphasis) However, since section 89 has been raised, I will make a few observations.

It is, of course, undoubtedly the obligation of the taxpayer pursuant to section 89 of the Act, to keep proper records and accounts. The failure to keep such proper records and accounts does not, per se, necessarily form the basis of an assessment unless the conditions of section 72 are fulfilled. The relevance of

proper record keeping in this context must be that unless the taxpayer has kept proper records, he will be unable to demonstrate to the standard required by the Act, that an assessment is "erroneous" and so resist the assessment. The Respondent is not "*relying upon section 89*" to support the Commissioner's decision. He is making an observation as to the nature and quality of the evidence presented before the Commissioner and before him. He concludes that the inadequacy of the records upon which reliance is sought to be placed, by definition, prevent the Appellant from being able to meet the onus of proving that the assessment is "erroneous".

In this regard, I advert to the submissions of the Respondent on this issue. The Respondent again cited the judgment of Warner J.A. in the case of ***Bi-flex Ltd v Inland Revenue Board*** [1986] 38 WIR 344 at page 361. The learned judge in considering the importance of keeping proper records stated:

> "Obviously the facts in relation to his income are facts peculiarly within the knowledge of the taxpayer or, in a company, its agents. In the absence of some record in the mind or in the books of the taxpayer, it would more often than not be quite impossible to make a correct assessment. "

I also agree with the Respondent's further submission that:

> "In the instant case, it was the Appellant that asserted that the original returns were incorrect and that assertion was not ignored by the Commissioner, nor was the Appellant denied the ability to prove their claim. The ability to prove the truth of their assertion rests solely in the knowledge of the Appellant and not the Commissioner, and must therefore be proved by them".

This proposition is clearly consistent with the tenor of the Act which places the onus for proving that the assessment was erroneous, on the taxpayer.

Another ground put forward by the Appellant as a ground for overturning the decision of the Respondent is that the Respondent erred and misdirected himself in fact and law "by failing to conduct a careful enquiry to determine which of the returns, original or amended more accurately reflected the out-turn of the Appellant's business operations and unreservedly accepting the Commissioner's

rejection of the Appellant's amended returns". The non-feasibility of this proposition is immediately apparent on at least two counts.

The role of the Respondent is not that of auditor of the Appellant's accounts. Suppose the taxpayer were to submit successive returns with different accounts for the same period on the basis that the previous one was incorrect, is it being argued that the Commissioner TAAD and/or the Commissioner TAD should do a detailed audit on each set of accounts and returns so as to determine "which return is correct?" Surely, that is not contemplated by the Act and why section 72(4) is framed in the terms it is. And secondly, where the accounting records are a) not complete and b) not the subject of an extant auditor's certificate, how is the Commissioner to determine which return "more accurately reflects the out-turn of the Appellant's business operations?" It must be apparent that it is in those circumstances that the Commissioner has a duty to make a best estimate assessment. If he has a set of returns which provide some help, then so be it. But if he does not, then he must do the best he can and the taxpayer must rebut his assessment with evidence.

The Respondent's submission with respect to this ground is apposite.

> To aver that the Respondent failed to conduct a careful enquiry to determine which of the returns- original or amended– more accurately reflected the out-turn of the Appellant's business operations is not only inaccurate, but also, it is an attempt to shift the burden of proof from the Appellant and place it on the Respondent.

In addition to the question whether as a matter of law the Commissioner of Taxpayer has any obligation to carry out the exercise that is suggested by the Appellant in this ground, there is the factual question as to whether any such evidence has been adduced by the Appellant. The only witness for the Appellant is the accountant, Karen O. Russell. It should be borne in mind that where a witness provides affidavit evidence, pursuant to the Civil Procedure Rules 2002, he is to state that he has personal knowledge of that of which he swears or that it is true to the best of his information and belief and the source of the information.

It will be readily recognized that considerable areas of the evidence in Ms. Russell's affidavit speaks to issues of which she did not and could not have had personal knowledge. Some of the evidence purportedly given goes to the root of whether evidence was provided to the Commissioner TAAD, on the basis of which he could have changed his assessment. It might be instructive to consider some of the averments contained in the affidavit of the main affiant for the Appellant, Karen Russell.

In paragraph 60 she states:

> There was no effort on my part to substantiate the original accounts as no request was ever made of me and *in my view these were no longer relevant*. It is therefore clear that the amount of Four Hundred and Sixty Seven Thousand Three Hundred and Fifteen Dollars ($467,315) included in the re-filed returns as Chemical expenses was in fact supported but the Appellant is being 'penalized' for returns that it was allowed to withdraw.

The affiant here states her view that the original accounts were no longer relevant and so no part of her effort was directed to substantiating the prior accounts. She provides no reason for having concluded as she did, that the previous accounts were no longer relevant.

In paragraph 65, she also purports to give evidence though there is no indication as to source of her information or belief. She states:

> 65. that additionally the Medical expenses were disallowed based on my reading of the last paragraph of Page 73 of the Respondent's Statement of Case because most of these cheque payments were made payable to "O.K. Dixon". It was explained to Mr. Plummer that these payments were to pay Veterinarians for injections and other medication for the cattle. I further explained to him that these cheques were usually encashed by the payee who was at all material times the Farm Manager and the cash used for the mentioned medical care. The Appellant arranged its affairs in this manner as the veterinarians for the most part insisted on cash. In any event any part of this expense that Mr. Plummer found to be unsupported or not acceptable could have been disallowed rather than discarding the entire re-filed return.

Again in this paragraph of her affidavit, the affiant clearly provides evidence which is at best hearsay and perhaps hearsay upon hearsay. What is more, there is no indication of the basis for any information and belief. It is not even suggested that the previous accounts would have provided information about veterinarians insisting upon being paid in cash. In addition, the suggestion that to the extent that Mr. Plummer found specific items to be "unsupported or not acceptable" he could have disallowed the specific item rather than discarding the entire return. It is not even clear on what basis Ms. Russell makes this suggestion.

But, in terms of the submission made on behalf of the Appellant that evidence had been provided which was "adequate", it is instructive that the affiant says in paragraph 93 of her affidavit that:

> I hasten to point out that the Appellant was unable to obtain full co-operation of all the lending institutions partially because of the age of the information sought and as such *I was forced to use ratios/estimates to determine how much of the total payment to these institutions was to be apportioned to interest versus principal.* (My emphasis) (Payments were not in issue and these could be traced to the bank statements).

The importance of this admission is that it explains what the affiant meant when she referred to information being "derived".

Paragraph 98 of the affidavit is another instance of egregious hearsay on the part of the evidence without any indication of the source of information and belief in the truth of the averment. There the affiant states:

98. that the Appellant insurance was paid by a related company, Island Dairies Limited, this has been so for many years and continues to be so. The companies share related transactions and often cross pay bills for each other. This is so for reasons of convenience, availability of funds and practicality.

It should be noted that, unlike the evidence given by the accountant for the Appellant, with respect to the evidence given on behalf of the Respondent, that evidence was mostly about what the affiant had done in relation to this Appellant. This observation about the evidence is of importance because, as in an appeal before the Commissioner TAD, so under section 76 (2), on an appeal to the Revenue Court, "the onus of proving that the assessment complained of is erroneous shall be on the objector". That proof must be based upon the nature and quality of the evidence which the taxpayer is able to provide.

Having considered the several Grounds of Appeal, the submissions of the Appellant and the Respondent and the legal principles applicable thereto, I find that the Appellant has failed to discharge the onus placed on it by the Income Tax Act, to show by evidence before this Court, that the assessment was erroneous or that the Respondent's decision is in any way to be faulted. The appeal is therefore dismissed and I award costs to the Respondent, to be taxed if not agreed.

ROY K. ANDERSON
JUDGE OF THE REVENUE COURT
FEBRUARY 10, 2010