



[2015] JMRC 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE REVENUE COURT

REVENUE COURT APPEAL NO. 4 OF 2012

BETWEEN	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	1ST APPELLANT
AND	NCB INSURANCE COMPANY LTD	2ND APPELLANT
AND	DATA-CAP PROCESSING LTD	3RD APPELLANT
AND	THE COMMISSIONER GENERAL TAX ADMINISTRATION OF JAMAICA	RESPONDENT

Gavin Goffe & Shani Nembhard instructed by Myers Fletcher & Gordon for Appellants

Cecelia Chapman Daley & Sophia Preston for Respondent

Janelle Mushette Leibare representative of the Appellants present

Suzette Harriot Rogers representative for the Respondent present

General Consumption Tax – GCT paid within prescribed time – Returns filed a day late – Penalty imposed – Whether liability appropriate – Meaning of ‘Due and Payable’ – Appropriate procedure when returns filed late – sections 33, 54(2) General Consumption Tax Act

Heard: 17th and 18th April, 2013 and 23rd March, 2015

Cor: Rattray, J.

[1] The Appellants, National Commercial Bank Jamaica Limited (‘NCB’), NCB Insurance Company Limited (‘NCB Insurance’) and Data-Cap Processing Limited (‘Data-Cap’) are companies incorporated under the Companies Act of Jamaica, sharing registered offices at the Atrium, 32 Trafalgar Road, Kingston 5. They appeal against the

decision of the Commissioner General, Tax Administration of Jamaica, which sought to impose penalties and interest for the late filing of General Consumption Tax ('GCT') returns. The penalties, inclusive of interest, applied to each of the Appellants were:-

NCB - \$14,530,101.50

NCB Insurance - \$ 1,191,837.71

Data-Cap - \$99,515.00

These sums represent fifteen percent (15%) of the taxes which the Respondent alleges was 'due and payable' for the taxable period December 1, 2011 to December 31, 2011.

[2] On January 31, 2012, the last day of the prescribed period set out by the General Consumption Tax Act ('the GCT Act') for the payment of such taxes, the Appellants remitted their GCT for the said taxable period. They however neglected to furnish the requisite GCT returns, which returns were submitted the following day, February 1, 2012, one day outside the prescribed period.

[3] By letter dated February 20, 2012 addressed to the 1st Appellant NCB captioned "Payment Reminder", the Debt Management Officer from Tax Administration Jamaica pointed out that the company had failed to make payment on account of its GCT liability and also quantified the sums to be paid as penalty and interest. Two similar letters of the same date were also sent to the other two Appellants, NCB Insurance and Data-Cap, but their correspondence did not bear the aforementioned caption. Those letters reminded the Appellants that interest also accrued at the rate of 2.5%. It is accepted by both sides that these letters inaccurately alleged that the Appellants had failed to make payments of GCT for the period ending December, 2011.

[4] By letters dated February 29, 2012, the Appellants objected to the demands made in the payment reminders. The Respondent in turn in their letters dated April 23, 2012, advised the Appellants of their obligation under Section 33(1) of the GCT Act to furnish a return and to pay to the Commissioner, within the prescribed period, the amount of GCT, if any, for the taxable period to which the return relates. That section states:-

“S. 33(1) A registered taxpayer shall, within such period as may be prescribed, whether or not he makes a taxable supply during any taxable period-

- (a) furnish to the Commissioner a return in a form prescribed or approved by the Commissioner containing such particulars as may be prescribed; **and**
- (b) pay to the Commissioner the amount of tax, if any, payable by that registered taxpayer in respect of the taxable period to which the return relates.”

The letters also stated that the penalty was imposed by virtue of Section 54(2)(b) of the GCT Act, which reads:-

“S.54 (2) Every person who fails to make a return under section 33 shall be liable –

- (a) in the case of –
 - (i) an individual, to a penalty of one thousand dollars, or
 - (ii) a body corporate, to a penalty of two thousand dollars, or
- (b) to a penalty of an amount equal to fifteen per cent of the tax which was due and payable in respect of the taxable period to which the return relates,
whichever is the greater.”

[5] The Appellants were advised to appeal to the Commissioner Taxpayer Appeals, which they did by letters dated April 27, 2012. After careful consideration however, the Acting Commissioner, under cover of letter dated June 26, 2012, declined to hear the appeals as the matters in dispute were outside its jurisdiction, which is limited to disputes as to assessment of taxes only and not disputes regarding the imposition of penalties. In their response, the Appellants by letter dated July 24, 2012 requested that they be provided with either a notice of assessment to facilitate the appeal or notice of decision to facilitate the filing of an appeal with the Revenue Court. By letter dated July 26, 2012, the Commissioner General Taxpayer Appeals reiterated its advice that any appeal would have to be made to the Revenue Court.

[6] The Appellants appeal to this Court on the grounds that:-

- i. The Appellants are not liable for penalties or interest under section 54(2) of the General Consumption Tax Act as the Respondent has not made an assessment in writing of the tax payable by the Appellants as required by section 38 of the Act.
- ii. There is no statutory basis for the Respondent to issue a Payment Reminder and consequently such Payment Reminders are null and void.
- iii. The Appellants did not fail to make a return under section 33 of the General Consumption Tax, but instead were one day late in the filing of their returns for which there is no prescribed penalty under the Act.
- iv. If the Appellants are liable under section 54(2) of the Act for failing to make a return, the maximum penalty payable is \$2,000.00.

Ground 1

The Respondent has not made an assessment in accordance with section 38 of the Act

[7] Under the first ground of appeal, the Appellants contend that they are not liable for penalties or interest under section 54(2) of the GCT Act, as the Respondent has not made an assessment in writing of the tax payable by the Appellants as required by section 38 of the said Act. That section states:-

“S. 38(1) Where a registered taxpayer-

- (a) fails to furnish a return as required by this Act;
- (b) furnishes a return which appears to the Commissioner of Inland Revenue to be incomplete or incorrect, that Commissioner shall refer the matter to the Commissioner of Taxpayer Audit and Assessment who shall make an assessment in writing of the tax payable by that registered taxpayer.”

[8] Counsel for the Appellants, Mr. Goffe argued that the GCT Act provides its own mechanism, which must be followed where a return is not filed and that procedure is that the Commissioner “shall refer the matter to the Commissioner of Taxpayer Audit and Assessment who shall make an assessment in writing of the tax payable by that registered taxpayer.” Mr. Goffe submitted that the language of the said Act is mandatory and that the Respondent is obliged to raise an assessment before legal liability for the tax can arise. He relied on the case of **Berry v Farrow & Another** [1914] KB 632 in support of that submission. In that case, the Court held that under the Income Tax Act, 1842 and the Taxes Management Act, 1880, Notice of Additional Assessment and a demand for payment must be given to the person sought to be charged.

[9] He further submitted that the raising of an assessment is not only a prerequisite for the legal liability to pay the tax, but also for any interest and penalties that may be imposed by the Act. In that regard, Counsel relied on section 55 of the GCT Act, which provides that “Any penalty... payable under this Act may be added to any tax due and payable and may be recovered as if it were tax.” He also relied on section 48 of the Act, the effect of which is to apply the provisions of the Tax Collections Act with respect to payment, collection and recovery of tax and the enforcement of such payment, to General Consumption Tax. Section 23 of the Tax Collection Act states:-

“S.23 When no return, in respect of the duties or taxes, or any of them, imposed by any enactment of this Island, as shall be by such enactment required, shall be made to the Collector of Taxes, or other officer as aforesaid, such officer shall assess the person neglecting to make such return to the best of his judgment, and according to such information as he may be able to obtain, and shall add to such duties or taxes the penalty specified in that enactment.”

In his submissions, Counsel for the Appellants strenuously urged the Court to find that the above cited section puts it beyond doubt that the imposition of any penalty for the failure to file a return must be made by way of an assessment and not by letter or by a payment reminder.

[10] The essence of the Appellants' complaint under Ground 1 of Appeal is that they ought not to be found liable for any penalty under the GCT Act as the Commissioner has not raised any assessment as required by section 38. Without such an assessment in the circumstances of this case, no penalty can arise. The Appellants contend that there are four(4) relevant provisions of the said Act to be considered :-

- (a) under section 33, the two fold obligations that the taxpayer has to satisfy, that is, to furnish a return, and to pay the tax, within the prescribed period;
- (b) under section 38, the procedure that the Commissioner of Inland Revenue is to utilise in the event that the taxpayer fails to adhere to the provisions of that section, which is to refer the matter to the Commissioner of Taxpayer Audit and Assessment for an assessment to be raised of the tax payable by the taxpayer;
- (c) when the Commissioner raises an assessment, reference is to be made to section 54(2) of the GCT Act to determine the prescribed penalty;
- (d) under section 55, the Commissioner is to add any penalty imposed to any tax found payable and to include both sums in the assessment.

Counsel for the Appellants reiterated that the tax authorities not having complied with the requirements of section 38 of the said Act, liability for the penalties imposed cannot attach to his clients.

[11] Counsel for the Respondent, Mrs. Chapman Daley in her response addressed firstly, the historical background to the Act, which was introduced in 1991. Under section 54 of the 1991 Act, there was a single provision dealing with the failure to make a return **and** pay the tax, the penalty being thirty percent (30%) of the tax which should have been paid. There was however, severe non compliance with respect to taxpayers filing returns within the prescribed time, although those same taxpayers were compliant with respect to payments due under the Act. As a consequence, the tax authorities had challenges in their ability to determine whether the amounts paid accurately reflected the sums which ought properly to have been paid. It is in an attempt to address and

resolve this deficiency, that the legislators in 1995 amended the GCT Act to include a provision dealing with the penalty for failure to file returns within the prescribed time and a separate provision for late payment. The present Act addresses both those scenarios under sections 54(2) and 54(2A) respectively. That latter mentioned section states:-

“S.54(2A) Every person who fails to pay the full amount of tax due and payable under section 33 in respect of a taxable period shall be liable to a penalty of fifteen per cent of the amount unpaid.”

As a consequence of these amendments, Counsel indicated that the revenue authorities are now able to ascertain the correct sums which ought to be paid.

[12] As regards the 1st Ground of Appeal, Counsel for the Respondent submitted that the scheme of the GCT Act, as is the case with other taxing statutes in Jamaica, is predicated on a self-assessment system. As such, all taxpayers are required to first of all raise a true and accurate assessment of the amount of taxes for which they are liable. This requirement ought not to pose a challenge, as the information is peculiarly within the knowledge of the taxpayer. Counsel further submitted that section 33 of the GCT Act obliges the registered taxpayer not only to self-assess, but also to file evidence of such assessment in the prescribed manner and within the prescribed period as set out in the GCT Act. She pointed out that in the case of all taxing legislations, and indeed all regulatory legislations, where an obligation is imposed upon an individual, in this case a taxpayer, there is usually a corresponding provision applicable in the event that the taxpayer fails to comply with the said obligation. Counsel maintained that in the GCT Act, the penalty for failing to file a return pursuant to section 33 is set out in section 54.

[13] Mrs. ChapmanDaley argued that in addition to mandating the taxpayer to self-assess, the GCT Act went on to provide the Commissioner with the power to raise an assessment, in circumstances where a taxpayer has not filed a return or has filed a return which appears incomplete or incorrect. She further argued that the imposition of the penalty for failing to file in accordance with section 33 is independent of the power of the Commissioner to raise an assessment as provided by section 38 of the GCT Act. She contended that it was the failure of the Appellants to file returns within the

prescribed period, which triggered the applicable penalty under section 54 and not the 'payment reminder' as suggested by the Appellants.

[14] Counsel for the Respondent strenuously denied the Appellants' submission that on the failure of the taxpayer to file a return as required by section 33, the Commissioner ought to have raised an assessment pursuant to section 38, in the absence of which there can be no application of a penalty under section 54 of the GCT Act. She stated in her written submissions that a failure to file returns within the prescribed period did not prevent the taxpayer from filing at a later date, as in the present case. She stated further that having received the late return, the Commissioner did not find it necessary to raise an assessment on the taxpayer. The decision of the Commissioner to accept the late returns of the Appellants and not raise an assessment, she argued, was not in contravention of the legislation, but rather was giving a practical effect to the operation of the GCT Act. She also argued that nothing in the GCT Act prevented the Commissioner from accepting a late return from a taxpayer.

[15] The case of **Barclays Mercantile Business Finance Ltd. v Mawson (Inspector of Taxes)** [2005] 1 All ER 97 was relied on by Counsel to illustrate the modern approach to interpreting statutes. In that case, the Appellate Committee of the House of Lords at paragraph 32 of its Judgment stated;-

"The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered to the statutory description. Of course this does not mean that the courts have to put their reasoning into the straitjacket of first construing the statute in the abstract and then looking at the facts. It might be more convenient to analyse the facts and then ask whether they satisfy the requirements of the statute. But however one approaches the matter, the question is always whether the relevant provision of statute upon its true construction, applies to the facts as found."

Counsel asserted that the intention of the legislature was to give the Commissioner the power to assess where a taxpayer failed to assess himself. This is to ensure that at all times, there is an assessment in the system for every liable taxpayer, whether by initiated by the taxpayer or by the Commissioner. She therefore maintained that where

the Commissioner received a late return from a taxpayer, he would not be obliged to raise a separate assessment, unless he was of the view that it was incomplete or incorrect. By accepting a late return and not raising an assessment, she argued did not negative the fact that the return was indeed filed late, as a consequence of which it attracted the relevant penalty.

[16] This 1st Ground of Appeal raises the issue whether the Appellants are liable to the penalties imposed for failure to file returns where no prior assessments have been raised by the Commissioner of Taxpayer Audit and Assessment. In order to properly consider this issue however, the provisions of the statute in question have to be examined to ascertain their intention and applicability to the facts at hand. In the case of **MacNiven (Inspector of Taxes) v Westmoreland Investments Limited** [2001] UKHL 6 at [8], Lord Nicholls of Birkenhead stated;-

“The paramount question always is one of interpretation of the particular statutory provision and its application to the facts of the case.”

Additionally, in the case of **Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)** cited earlier, the Appellate Committee of the House of Lords explained the modern approach to interpreting statutes, which was to give the statute a purposive construction.

[17] The question then is, what is the purpose of the GCT Act and what is it intended to achieve? This piece of legislation was introduced to the Jamaican statutory landscape in 1991, as a tax on the supply in Jamaica of goods and services by a registered taxpayer in the course of a taxable activity and on the importation into Jamaica of goods and services, by reference to the value of those goods and services. (Sections 3(1)(a) and (b) GCT Act). Any such information concerning the business side of the taxpayer's operation is solely within the knowledge of that taxpayer. In that regard, I accept, as submitted by Counsel for the Respondent, that taxing statutes in Jamaica, including the GCT Act, are predicated on a system of self assessment, with the taxpayer being obliged to file the requisite returns and to pay over the tax due, within the time specified. I also accept, as this has not been challenged, that initially under the 1991 GCT Act, while taxpayers would pay amounts purporting to represent

GCT due and owing, they failed however to file the necessary returns to indicate how the sums paid were arrived at for the particular period. This led to the 1995 amendment to the GCT Act, which, inter alia, imposed separate penalties for failure to file returns and for failure to pay the tax due within the time prescribed by the statute.

[18] I am satisfied then that apart from the usual purpose of taxation statutes, which is to collect revenue, the rationale behind the GCT Act, as amended in 1995, is to ensure that the registered taxpayers fulfill their obligations, not only to self-assess, but also to file accurate and complete GCT returns and to remit the amount of taxes so assessed to the relevant authorities, within the period prescribed by section 33 of the Act.

[19] Part VIII of the GCT Act is headed "Offences and Penalties". The failure to comply with an obligation **to furnish returns** leaves the offending taxpayer liable to the penalty specified under section 54(2), of one thousand dollars (\$1,000.00) in the case of an individual, or two thousand dollars (\$2,000.00) if a body corporate, or a penalty of an amount equal to fifteen per cent (15%) of the tax which was due and payable over the requisite period, whichever is greater. The failure **topay** to the Commissioner the tax due in respect of the taxable period for which the return relates, within the time prescribed, exposes the taxpayer to the penalty specified in section 54(2A) of the GCT Act of fifteen per cent (15%) of the amount unpaid.

[20] The Appellants argue that there has been a breach in procedure whereby the Respondent has not made an assessment in writing in accordance with section 38 of the Act. That section specifies that where a registered taxpayer fails to furnish a return as required by the GCT Act or furnishes a return which appears to the Commissioner of Inland Revenue to be incomplete or incorrect, that Commissioner shall refer the matter to the Commissioner of Taxpayer Audit and Assessment who shall make an assessment in writing of the tax payable by that registered taxpayer. Further, they argue that this provision is mandatory and that in those circumstances, the Respondent is obliged to raise an assessment before legal liability for the tax may arise. They also seek to find support for this argument by relying on Section 23 of the Tax Collection Act which empowers the Collector of Taxes to assess a taxpayer who fails to make a return.

[21] The effect of this contention by the Appellants is that the Commissioner of Audit and Assessment has no authority to accept or to examine a late return. Once such a return is late, that Commissioner must raise an assessment. I find myself unable to agree with this contention. If such a prohibition were to have been intended, the legislation would have contained such a restriction. There is no such provision in the GCT Act.

[22] I am of the view that section 38(1) of the GCT Act addresses the situation where the taxpayer;-

- (a) fails to furnish a return at all;
- (b) fails to furnish a return within the time prescribed;
- (c) furnishes a return which in the opinion of the Commissioner of Inland Revenue appears incomplete;
- (d) furnishes a return which in the opinion of the said Commissioner appears incorrect.

Where no return is furnished at all, the taxpayer is in breach of section 38(1)(a) and of the requirement to self-assess. The breach of that section triggers the penalty imposed by section 54(2) of the Act. An assessment is therefore required to ascertain the extent of that taxpayers' liability, to which amount the penalty would be added. Where a return is furnished by the taxpayer, but outside the time prescribed by the statute, the taxpayer is again in breach and liable to the penalty prescribed pursuant to the legislation. In such an instance however, a return has in fact been furnished, which, although late, contains the self-assessment carried out by the taxpayer. The issue is whether, on the referral of the matter by the Commissioner of Inland Revenue to the Commissioner of Taxpayer Audit and Assessment, that taxing officer, who would or ought to have been put in possession of the late return, is obliged to raise an assessment.

[23] The use of the word "shall" in section 38 of the GCT Act appears to be the foundation from which the Appellants launched their contention that the obligation of the Commissioner to raise an assessment is mandatory, where no return as required by the

Act is filed. Black's Law Dictionary, Revised Fourth Edition at page 1541 contains the following definition of "shall" –

“As used in statutes, contracts or the like, this word is generally imperative or mandatory....

But it may be construed as merely permissive or directory, (as equivalent to 'may') to carry out the legislative intention...”

It is also interesting to observe that the marginal note to section 38 reads, “Commissioner **may** make assessment”. The commissioner to which this reference is made can only be, on a reading of the section, the Commissioner of Taxpayer Audit and Assessment. I am of the view and I find that the use of the word “shall” is, in the context of section 38 and in relation to the mischief being addressed, permissive and not mandatory.

[24] I am satisfied, as contended by the Respondent, that one of the purposes of the statute was to give the Commissioner the power to assess, where the taxpayer fails to self-assess and file the requisite return. This enables the tax authorities to ensure that at all times, there is in the system an assessment for every registered taxpayer, whether prepared by the taxpayer or raised by the Commissioner. Implicit in this power is the discretion of the Commissioner of Taxpayer Audit and Assessment, on a referral from the Commissioner of Inland Revenue, to examine and to accept a late return from a taxpayer, once satisfied as to the information contained in the return. In the event of not being so satisfied, the Commissioner would be at liberty to proceed with raising an assessment. The penalty for filing the said returns late would still be applicable however, in accordance with section 54(2) of the GCT Act.

[25] I do not find the case of **Berry v Farrow** cited by Counsel, MrGoffe helpful, as the focus there was on the giving of notice of assessment to the person being charged. In this matter, one of the issues is whether or not an assessment is necessary. In the present case, no assessment was raised by the Commissioner of Taxpayer Audit and Assessment. The penalty was imposed pursuant to the statute. It would therefore appear that the returns filed late were in fact accepted by the Commissioner, as I find

that that officer is entitled to do. The purposive intent of the statute to ensure that there is an assessment on record for every taxpayer through self-assessment is achieved by the acceptance by the Commissioner of the returns filed by the Appellants. To impose an obligation on the taxing authorities to make an assessment in the circumstances of this case is to raise an unnecessary bureaucratic hurdle, eventually cleared if the results of the assessments fall in line with the Appellants' returns. The sums complained of are only in respect of the penalties imposed for failure to file the returns in the time statutorily prescribed. I agree with the submission of Counsel for the Respondent, that the imposition of the penalty for not filing returns in the time prescribed is separate from and independent of the power of the Commissioner to raise an assessment, as provided for by section 38 of the GCT Act.

[26] I find that reference to Section 23 of the Tax Collection Act operates only for collection purposes and not for the purpose of assessment. I find further that the GCT Act sets up its own assessment mechanism as contained in Section 38 of the Act. I accept Mrs. Chapman Daley submission that there is no need to refer to the Tax Collection Act for the implementation of their assessment procedure. I also find that the wording of section 38, being permissive in intent, allows the Commissioner of Taxpayer Audit and Assessment the discretion to accept returns filed late, once that officer is satisfied with the information provided. This ground of appeal therefore fails.

Ground 2

The Respondent has no authority to impose a penalty on a taxpayer by way of issuing Payment Reminders

[27] The three (3) documents dated February 20, 2011, one of which was addressed to the 1st Appellant with the caption "Payment Reminder", each erroneously referred to amounts purportedly due by the Appellants to the tax authorities for failure to pay general consumption tax. It is the Appellants contention that the issue the Court has to consider is which document imposed the respective penalties. Their position is that the penalties were imposed by the payment reminders.

[28] Counsel for the Appellants in his written submissions referred to section 37 of the GCT Act, which states;-

“S.37 Where a registered taxpayer fails to make payment on account of tax, the Commissioner shall issue a notice (hereinafter referred to as a “demand notice) to the registered taxpayer for payment of such tax.”

He submitted that his clients did not and still had not received a demand notice. He then went on to assert that they were not entitled to such a notice, as they did **not** fail to make payment on account of tax. Counsel further submitted that sections 37(1) and 38(1) govern the course of action to be taken by the Respondent upon the failure of a taxpayer to file a return or to pay the tax. He asserted that the use of payment reminders was not permitted by statute and therefore they were not valid.

[29] It is abundantly clear that section 37 is not applicable to the case where a taxpayer has failed to file a return, but instead applies to the issuance of a demand notice by the Commissioner, where the taxpayer fails to make payment on account of tax. That is not the situation here, as Counsel Mr. Goffe readily admitted. He however contended that in correspondence from Tax Administration Jamaica dated April 23, 2012 addressed to his clients, the tax authorities indicated that a penalty had been imposed. He further contended that the penalty was imposed by the payment reminders, the use of which was not authorised by any taxing legislation.

[30] I accept that there is no statutory basis for the issuance of payment reminders in respect of penalties. I am satisfied that although no statutory requirement for a payment reminder exists, the Appellants have in no way been prejudiced by the correspondence, which in effect amounted to a notification of penalties. I do not accept however, that those penalties were imposed by way of payment reminders as urged by the Appellants.

[31] A perusal of sections 33 and 54(2) of the GCT Act provides the answer to the query raised by Mr. Goffe, when he asked the Court to consider which document imposed the penalty. Under section 33(1)(a), a taxpayer is required to furnish a return to

the Commissioner within the prescribed period, that is, within one month after the end of the taxpayer's taxable period. A failure to act in accordance with that section activates the penalty specified in Section 54(2) of the GCT Act. I find therefore that it is the failure of the taxpayer to comply with the provisions of section 33, which led to the imposition of the penalty and not the payment reminders. This ground of appeal also fails.

Ground 3

The Appellants did not fail to make returns under section 33 of the Act, but rather made their returns one day late

[32] An examination of the wording of this ground of appeal reveals the initial challenge faced by the Appellants. On a literal interpretation, they seek to contend that they did not fail to furnish returns, which would have rendered them in breach of section 33 of the GCT Act, but rather they filed their returns one day late. The language of that section is clear and unambiguous. A registered taxpayer is obligated, **within such period as may be prescribed** (my emphasis), to furnish the Commissioner with their returns relating to general consumption tax. The returns are either furnished in time or not. The Appellants admit that their returns were filed one day outside of the prescribed period. No other conclusion can then be drawn, save that they failed to furnish their returns in accordance with the provisions of section 33 of the Act. A breach of section 33 is occasioned not only in the failure to file the return, but also in the failure to file the return in the prescribed time. Once such a breach has occurred, the offending taxpayer is liable to the penalty pursuant to section 54(2) of the GCT Act.

[33] The Appellants maintain, in the written submissions filed on their behalf, that the effect of section 54(2) of the Act is to prescribe the penalty for which an offender may be assessed and therefore held liable, but it does not automatically impose any penalty. They submit that it is for the Commissioner General to raise the assessment in accordance with the strict provisions of the Act. They further submit that an assessment cannot lawfully be raised under section 38 of the GCT Act after a complete and correct return has been filed by the taxpayer. The Appellants contend that the Commissioner

General can only raise an assessment where the taxpayer has failed to furnish a return or where the return appears to the Commissioner General to be incomplete or incorrect.

[34] An examination of section 38 reveals that any assessment to be raised in respect of a taxpayer who is in breach of the provisions of that section is to be carried out by the Commissioner of Taxpayer Audit and Assessment. Where no return is filed or where a return is furnished outside the prescribed period, it is the Commissioner of Inland Revenue who refers the matter to the Commissioner of Taxpayer Audit and Assessment for an assessment in writing to be made. Similarly, where the Commissioner of Inland Revenue is of the view that a return appears incomplete or incorrect, that matter is also to be referred to the Commissioner of Taxpayer Audit and Assessment for an assessment in writing to be made of the tax to be paid by the taxpayer.

[35] I have already decided on the evidence in this matter, that the Commissioner of Taxpayer Audit and Assessment has a discretion to accept the self-assessment of a taxpayer contained in a return filed late, if on an examination, that Commissioner is satisfied with the contents of the return, although filed out of time. I am of the view that in this matter, the Commissioner exercised that discretion and accepted the self-assessments carried out by the Appellants as contained in their late filed returns. As a consequence, the penalties for late filing were applied, based on the Appellants' own returns. I am also of the view, as asserted by the Respondent, that the imposition of the penalty for failing to file returns in accordance with section 33 is independent of the power of the Commissioner to raise an assessment as provided by section 38 of the Act.

[36] As regards this ground of appeal, I find that by filing their returns one day late, the Appellants were in breach of section 33 of the GCT Act, which mandated taxpayers to furnish the Commissioner, "within such period as may be prescribed" with the requisite returns. I further find that there is in the GCT Act a prescribed penalty for such a breach, to be found in section 54(2) of the GCT Act. This ground of appeal also fails.

Ground 4

If the Appellants are liable under section 54(2) of the Act for failing to make a return, the maximum penalty payable is \$2,000.00

[37] The issue under this ground of appeal is how the penalty, which arises once a taxpayer fails to make a return in accordance with section 33 of the GCT Act is to be calculated. The applicable penalty provision to be examined in this matter is section 54(2) which reads;-

“S.54(2) Every person who fails to make a return under section 33 shall be liable-

(a) in the case of-

(i) an individual, to a penalty of one thousand dollars; or

(ii) a body corporate, to a penalty of two thousand dollars; or

(b) to a penalty of an amount equal to fifteen per cent of the tax which was due and payable in respect of the taxable period to which the return relates,

whichever is greater.”

[38] Counsel for the Appellants, Mr. Goffe in his written submissions contended that the term “payable” in section 54 was of critical importance. He argued, relying on a passage from “Words And Phrases Legally Defined”, that the word “payable” in the phrase “due and payable” meant “required to be immediately or presently paid”. He further argued that the amount of the penalty is not ascertained based on the return filed by the taxpayer, but on the assessment of the tax which was due and payable in respect of the taxable period.

[39] Counsel then went on to suggest that the use of the term “payable” in section 54(2) of the GCT Act ties back to its use in section 38(1), which empowers the

Commissioner to “make an assessment in writing of the tax payable”, as well as in section 38(5), which provides;-

“S.38(5) Where an amount which is payable by a registered taxpayer has been assessed and notified to that taxpayer, the amount shall...be deemed to be the amount of tax due from that taxpayer and may be recovered accordingly...”

Mr. Goffe argued that the use of the word “payable” in these various provisions remains the same. He further argued that the Commissioner General cannot raise an assessment in respect of the tax or the penalty under section 54(2) of the Act, unless there is an amount that is payable when that assessment is sought to be raised. Counsel asserted that in the present case, the Appellants had extinguished their liability to pay general consumption tax before any assessment was raised. He further asserted that if the Commissioner had a basis to raise an assessment after payment had been made, which they dispute, that assessment could only have reflected that the amount “payable”, that is, the amount **required to be immediately or presently paid**, in respect of the taxable period was nil. The Respondent therefore would have been obliged to assess the Appellants with a penalty equal to the greater of 15% of nil on the one hand and \$2,000.00 on the other.

[40] An apparent flaw in Counsel’s interpretation is that he has sought to isolate and interpret the meaning of the word “payable” by itself and not in the context used in the legislation, in the form of the phrase “due and payable in respect of the taxable period to which the return relates”. It is a general principle of statutory interpretation that in attempting to ascertain the meaning of a word or phrase, the context in which it is used ought to be considered.

[41] In addressing what perhaps would be a worst case scenario, Mr. Goffe submitted that it would be unreasonable to interpret the statute to require the Respondent to subject a taxpayer to a penalty in excess of \$14,000,000.00, when that taxpayer has paid over the full amount of the tax by the due date and filed its return on the following

day. He relied on a passage from Maxwell on Interpretation of Statutes, 11th edition at page 183, which states;-

“In determining either the general object of the legislature, or the meaning of its language in any particular passage, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles, should, in all cases of doubtful significance, be presumed to be the true one.”

Even on this submission however, there is a clear admission that the returns of the Appellants were filed late, that is, one day outside the prescribed time.

[42] I have no difficulty in accepting this general principle of interpretation. However, blinkered attention ought not to be focused, as in this case, only on the amount of any penalty that may be imposed, to determine the reasonableness of a statutory provision. It is the mischief which the Act seeks to address and the legislative intent which the particular provisions seek to achieve that should be the focus. The provisions of this Act address not only the obligation of the registered taxpayer to remit general consumption tax, but also the concomitant obligation to file complete and correct returns within the time prescribed, from which the tax authorities can be satisfied as to the accuracy of the amount of taxes paid.

[43] On an examination of sections 54(2) and (2A) of the GCT Act, I am of the view that that section provides the formula for the calculation of the penalty to be imposed, once the taxpayer is in breach of the obligation to furnish returns and/or pay the taxes due, as required by section 33 of the Act. It is worth repeating the specific wording of that penalty provision, where a body corporate fails to comply with that section. In such an instance, that entity is liable under section 54(2)(a)(ii)...

“...to a penalty of two thousand dollars; or
(b) to a penalty of an amount equal to fifteen per cent of the tax which was due and payable in respect of the taxable period to which the return relates,

whichever is greater.”

[44] To the question then of how the penalty is to be calculated, the answer is found in the following words “an amount equal to fifteen per cent of the tax **which was due and payable in respect of the taxable period to which the return relates**” (my emphasis). It is to be noted that reference is not made to the amount “which is due”, but to the amount “which was due and payable in respect of the taxable period”. Once that sum is ascertained from the returns, either upon self assessment by the taxpayer or on an assessment by the Commissioner, the percentage prescribed by statute is applied to determine the amount of the penalty. I agree with the submission of Counsel for the Respondent that it matters not whether in fact the tax had been paid. This provision is dealing with the penalty imposed for failure to file GCT returns within the time prescribed. If the legislature had intended to apply, as a penalty for failure to file returns, a percentage of the unpaid tax due for the period, the statute would have been so worded. An example is seen in section 54(2A) of the GCT Act, dealing with the taxpayer who failed to pay the full amount of the tax due under section 33, which provides; -

“S.54(2A) – Every person who fails to pay the full amount of tax due and payable under section 33 in respect of a taxable period shall be liable to a penalty of fifteen per cent of the amount unpaid.”

This was not the situation in the present case.

[45] I find that there is no merit in this ground of appeal. In light of my findings in this matter, the Appeal herein is dismissed. Costs to the Respondent to be taxed if not agreed.

