**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**REVENUE COURT APPEAL NO. 1 OF 2004**

**BETWEEN PAUL DESNOES APPELLANT**

**AND THE COMMISSIONER OF TAXPAYER APPEALS DEPARTMENT RESPONDENT**

Mr. Raymond Clough Instructed by Clough Long & Company for the Appellant.

Mrs. Yolande Lloyd-Small and Miss Janice Beaumont instructed by Tax Administration Services Department, for the Respondent.

Heard March 7, and March 10, 2005

**ANDERSON, J.**

The Appellant in these proceedings urges the Revenue Court to overturn "the whole or part of a decision of the Commissioner of Taxpayer Appeals (Department) and set out in a Notice of Decision letter to the Appellant dated August 24, 2004...which decision ordered that the Appellant Paul Desnoes pay the sum of $870,545.00 representing confirmed Estimated Assessment of Income Tax for the years 1994 – 1998."

The Taxpayer submitted computations of the taxes purportedly due for the years of Assessment in question, and both sides agreed that these computations could be admitted into evidence as Exhibit I, as the base figures were agreed to be the same. The difference between the parties, was their view of the appropriate accounting treatment to be accorded to their figures. The Appellant sets out a number of grounds of appeal including:

(1) The sums assessed were estimates and exorbitant

(2) The assessment failed to take into account the fact that Coopers and Lybrand wrote off over $20,000,000.00 in Bad Debts and Work in Progress.

**NOTE** Income Tax is Annual Tax. The assessments are for three (3) years of Assessment. The loss would have to be related to particular years of Assessment.

(3) The assessment failed to take into account the fact that Coopers & Lybrand recorded a loss for the years 1996 1997.

(4) The assessment for 1998 agrees with the Return filed and Subsequently paid by the Appellant.

The Revenue says that:

(1) There is a self-assessment system which requires the non-PAYE taxpayer to assess himself and make his return based on his statutory income.

(2) Burden of proving that the Assessment is bad or excessive is on the Appellant (See Sec. 75. of Income Tax Act).

The Assessment confirmed by the Commissioner of TAAD and confirmed by the decision of the Commissioner or Taxpayer Appeals, under the Income Tax Act S.75 were:

| Year | Total | Tax | Penalty |
|---|---|---|---|
| - 1995 | 565,916.41 | = (377,277.61 | + 188,638.00) |
| - 1997 | 221,071.62 | = (147,381.08 | + 73,690.54) |
| - 1998 | 83,557.00 | = ( 5,704.00 | + 27,852.00) |

Those are the three separate assessments that must be appealed against.

The Revenue accepted the Taxpayer's position for 1994, 1996. Taxpayer must show that either the taxable amount is not income or the amount is exempt. This has NOT been shown to the Court.

The Taxpayer says that there is evidence that there was a custom at the partnership of which he was a member to deduct (salary) amount from Service Company from the partner's share of profits.

I regret that there is no independent evidence of this.

How do Service Companies attached to partnerships practice work?

A "Service" Company is typically a cost center, and not a profit center. It pays expenses including salaries. It is then "reimbursed" from the partnership account as a fee (usually a management fee) for the service of paying the salaries. This reimbursement is an expense from the partnership and is computed in the partnership's Profit and Loss Account to give rise to a net profit or loss which is then divided according to the partnership agreement so that the sum to which the partner is entitled, is that sum less his drawings in his drawings account.

Drawings are not salaries and therefore not per se taxable. However, the fact that the Appellant admitted in his return that there are PAYE

Deductions, makes it obvious that there were "salary" payments, apart from drawings.

On the Taxpayer's own case there are salary payments and share of profits.

The fact that the Taxpayer was the company's managing partner makes it difficult to understand why he could not get the relevant accounts to support his claim.

It is possible that he would have been able to succeed if he could show that it was not the Service Company, SENTINEL, that paid salaries, which were reimbursed in partnership accounts, as is usually the case in such arrangements.

The loss of Twenty Million Dollars referred to in the Partnership (1) has not been proven and (2) does not refer to any specific year of assessment. What is the evidence that it was incurred, or that the sums were not recovered in subsequent periods? I find that there is no such evidence.

The onus is on the Appellant and has not been discharged. The Appellant said that the Revenue had promised to share certain information. However, whatever the Revenue may have promised, can't assist the Appellant or otherwise a taxpayer would always be able to shift the burden of proving his case on to the Revenue.

The Appellant also wants this court to declare the penalty excessive. But it is trite law that where statute vests discretion in a creature of that statute, the Court will not impose its own discretion merely because it disagrees with the way in which it was exercised, unless it was exercised unlawfully, e.g. in breach of rules of natural justice, or bias or some other error in law.

Both sides in this appeal cited the case, Collector of Taxes v Winston Lincoln, (1998) 25 J.L.R. 44, a decision of the Jamaican Court of Appeal. In that case the taxpayer challenged the right of the Commissioner of Income Tax to raise assessments. It was held that:

1. The power of the Commissioner of Income Tax to make Assessment under 67 (1) of the Income Tax Act is subject to conditions precedent. Where the assessment is carried out without those conditions having been fulfilled, the purported assessment is a nullity, and on process for

execution of the amount of the assessment, the court can declare the purported assessment a nullity.

2. The condition precedent to a valid assessment of tax is (sic) that there must be a request made upon the taxpayer to render a return, and the Commissioner or other assessing officer must wait for the time allowed in the request to pass. In the instant case the conditions precedent were not fulfilled before the Commissioner proceeded to make the original assessment on the defendant/respondent.

3. A Notice of Assessment is defective it is does not contain, in substance and effect, the particulars on which the assessment is made. In the instant case the failure of the Commissioner to include particulars in the Notice of Assessment rendered the assessment void.

In the instant case, the Revenue has adduced evidence that there were indeed requests for returns made to the taxpayer and the taxpayer failed to respond within the time given for the submission of the returns.

The Revenue also gave, in substance and effect, the particulars upon which the assessment was based. This was the return of income in respect of income/salary from Sentinel and share of profits from the partnership.

The burden of proving the losses of the partnership must remain upon the taxpayer and he has failed to adduce evidence to prove his assertion that the assessment is excessive. He who asserts must prove.

The appeal fails and costs are to the Revenue to be taxed if not agreed.

I do hope that with respect to the 1994 tax which the Revenue seems to concede was overpaid, that the Revenue will not shelter behind the Limitations of Actions Act so as to prelude the refund of such sums with appropriate interest.