IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN MISCELLANEOUS

SUIT NO. M 122 OF 1999

IN THE MATTER of Section 23A of the General Consumption Tax Act

AND

IN THE MATTER of interpretation of an Agreement between Consulting Services Limited (now Premium Investments Limited) and DHC Ocho Rios Hospitality Corp

AND

IN THE MATTER of the liability for the Collection and paying over to the Commissioner of GCT the General Consumption Tax collected by the Operator of the hotel known as "The Enchanted Garden."

BETWEEN	PREMIUM INVESTMENTS LIMITED	1ST	APPLICANT
AND	TOWN & COUNTRY RESORTS LIMITED	2ND	APPLICANT
AND	THE COMMISSIONER OF GENERAL CONSUMPTION TAX		RESPONDENT

Emile George QC, & Juliana Mais instructed by Dunn, Cox, Orrette & Ashenheim for the Applicants

Hugh Small QC, Drum Drummond and Thalia Francis instructed by Frank Williams for the Respondent

Heard on the 24th and 25th day of January and the 4th day of February, 2000.

CORAM: ORR J.

INTRODUCTION

This application is by way of originating summons in which the applicants seek the determination of the court on the following questions:

1. Whether on a proper construction of Section 23A of the General Consumption Tax Act the entity liable for the collection and payment to the Commissioner of the tax chargeable on a taxable activity is the operator of the Resort known as The Enchanted Garden.

2. Whether on a proper construction of the Management Agreement by and Between Premium Investments Limited (formerly Consulting Services Limited) and DHC OCHO RIOS HOSPITALITY CORPORATION, the 2nd Applicant Town and Country Resorts Limited can be deemed to be the operator of the resort known as "The Enchanted Garden" within the meaning of Section 23A of the General Consumption Tax Act.

3. Whether on a proper construction of the said Management Agreement DHC OCHO RIOS HOSPITALITY CORPORATION is the entity responsible to collect the tax chargeable in respect of the taxable activities supplied by The Enchanted Garden and the entity responsible to pay the tax to the Commissioner in accordance with the provisions of Section 33 (1) of the General Consumption Tax Act."

Affidavits were filed by each side but there was no conflict of fact on the affidavits. What separated the parties was the question of the nature of the inferences which should be drawn from the facts; and whether certain representations were representation of fact or of law.

At this point it is appropriate to say something briefly about the nature of General Consumption Tax (G.C.T.).

THE NATURE OF G.C.T.

General Consumption Tax is a value added tax which was introduced in Jamaica in 1991. It is a broadly based **consumption** tax imposed under the Act, on the supply of goods and services in Jamaica, and on goods imported on or after 22nd October, 1991. All commodities except those such as money and real property which are exempted by virtue of the definitions of goods and services, are governed by the Act; either as taxable, zero rated (section 24 and Part 11 of the First Schedule) or exempt (Section 25 and the third Schedule).

General Consumption Tax is **not** a tax on business profits or turnover. It is a tax on consumption. The thinking behind the tax is that ultimately the tax is borne by the end user or consumer. Tax is paid at each step along the chain of ownership, until the goods or services reach the end user. In this way the registered taxpayer who makes the supply, "collects" the tax and makes returns to the Revenue.

This explains why a business that is insolvent may yet be required to pay General Consumption Tax.

PRIMARY FACTS FOUND

The following facts were admitted or proved.

Both the First Applicant Premiun Investments Limited ("Premium") and the Second Applicant, Town and Country Resorts Limited ("Town and Country") are companies incorporated under the Companies Act.

The Right Honourable Edward Seaga P.C. is a company director and the Chairman of both companies. Premium was at first incorporated with the name Consulting Services Limited but a change of name was effected after 1993.

Town and Country is a wholly owned subsidiary of Premium, which is "the registered proprietor and/or lessee of the Apartment Complex and Gardens known as The Enchanted Garden," and Town and Country held sub-leases in respect of The Enchanted Garden.

Premium holds an incentive under the Hotels (Incentives) Act pursuant to an Order entitled "The Approved Hotel Enterprise (Enchanted Garden Hotel Enterprise) Order, 1992 signed by the Minister of Tourism on the 29th day of January, 1992.

In its application for registration under the General Consumption Tax Act, Town and Country gave its trade name as "The Enchanted Garden;" and its taxable activity as "Tourist Resort." Town and Country was registered on January 11, 1992.

The tax registration number of Town and Country in respect of The Enchanted Garden is 1022768. That number appears on General Consumption Tax returns filed by Town and Country.

On December 12, 1991 a Tourist Board licence was granted to Town and Country in respect of The Enchanted Garden.

D.H.C. Ocho Rios Hospitality Corporation is neither a registered taxpayer nor a company registered under the Company's Act.

The Enchanted Garden is in arrears regarding payments of General Consumption Tax to the Commissioner.

In correspondence on the letterhead of The Enchanted Garden, Winston Tomlinson, Financial Controller of the Enchanted Garden wrote to the Deputy Commissioner of General Consumption Tax under the caption "Re Town And Country Resort T/A The Enchanted Gardens, Reg # 1022768.

Mr. Hugh Hart attorney-at-law on behalf of Town and Country wrote a letter to the Commissioner on March 24, 1999 under the caption "Re: Town and Country Resorts Limited"

He wrote:

> "Further to our discussions the lender who is raising funds for the Enchanted Garden (Town and Country Resorts Limited) has given an undertaking...." (emphasis supplied)

On a letterhead of Town and Country, The Right Hon. Edward Seaga, Chairman of Town and Country wrote to the Commissioner:

"Re: Town and Country Resorts Limited/The Enchanted Garden

> Please find enclosed cheque for $4,000,000 for Town and Country Resorts Limited (Operator of The Enchanted Garden) in favour of The Collector of Taxes – G.C.T. that we confirmed we would make available today." (emphasis mine)

Town and Country has filed returns and paid General Consumption Tax in respect of The Enchanted Garden for several years.

On 18th March, 1999 Andrew Holness Company Secretary wrote to the Commissioner, thus:

> Enclcosed is the requested form designating the responsible officer for Town and Country Resorts T/A The Enchanted Garden".

In that form signed by Mr Holness was the following information:

> "Name of Company Town and Country Resorts T/A The Enchanted Garden.
>
> Taxpayer Registration Number: 1022768.
>
> Name of Responsible Officer:
> Frederick Marsh.
> Title: General Manager"

Two informations were laid against Town and Country on 16th April, 1999 for failure to pay General Consumption Tax for $12,822,800.07 and $27,288,677.14 respectively.

There were discussions between representatives of Town and Country and the General Consumption Tax Commissioner on a number of occasions from 1997. In all those discussions there was no challenge to the liability of Town and Country for the tax due from the Enchanted Garden. On the contrary liability was admitted and various promises of payments were made; for example on May 6, 1997 on the letter head of the Enchanted Garden, Frederick Marsh who signed as "Managing Director" wrote in part to the Commissioner as follows:

> "We refer to discussions held with the Right Honourable Edward Seaga on the arrears of General Consumption Tax payments. It is our intention to effect the following payment plan with total liquidation by 28th of November, 1997."

The Commissioner relied on the various representations made by representatives of Town and Country that Town and Country was willing to pay the General Consumption Tax owed by The Enchanted Garden.

On 28th June 1999, Mr Raymond Clough, Attorney-at-Law gave an undertaking to the Resident Magistrates Court in Saint Ann that the full tax liability of The Enchanted Garden would be liquidated by the next court date.

On that date Mr Clough told the court that because of the harsh economic conditions in the country, the Company, along with others like it, was forced to use General Consumption Tax collected to finance its business, and that the company needed more time to negotiate a loan to liquidate the tax debt.

On the 26th July 1999 Mr A. Dabdoub, Attorney-at-Law told the Court that the firm of Dunn Cox Orrett and Ashenheim had been appointed escrow agents for a loan which would be used to pay the tax owed.

On or about the 3rd of August, 1999 Mr Dabdoub for the first time raised the issue that another company might be liable for the tax.

In 1997 in discussions with Mr Gladstone Turner, Director of Compliance of the General Consumption Tax Department, Mr Frederick Marsh represented himself as General Manager of Town and Country Resorts.

There was tendered in evidence an agreement made between Consulting Services Limited (now Premium) and DHC Ocho Rios Hospitality Corp (D.H.C.) making DHC the exclusive operators of Enchanted Gardens. The agreement bears a date subsequent to the registration of Town and Country.

An affidavit of Daniel Ambrose has been filed by the applicants, in which the affiant states that DHC did manage and operate The Enchanted Garden, that only DHC collected General Consumption Tax for The Enchanted Garden and that DHC used Town and Country to make returns of General Consumption Tax.

THE SUBMISSIONS ON BEHALF OF THE APPLICANT

Mr. George made the following submissions:

Admittedly, Town and Country held itself out as liable to tax, but only the operator of the resort is responsible for General Consumption Tax.

Neither Premium nor Town and Country is the operator, but rather DHC.

The Commissioner in requesting Town and Country to pay the tax had made an illegal demand. To demand tax from someone other than the "true operator" is outside the Act and therefore, unlawful; and the tax should be refunded.

Two cases support this submission:

Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] A.C. 70 and British Steel plc vs Customs and Excise **Commissioners [1997] 2 All ER 366. The latter case showed that a refusal to grant relief in circumstances where it should have been granted, amounted to an unlawful demand for payment.**

The management agreement between Premium and DHC has an important bearing on this case. It gives exclusive supervision and control of the operation of the resort (Enchanted Garden) to DHC, without interference from Premium.

Although the operation of The Enchanted Gardens included "the collection of all revenues" the definition of "Gross Revenues" in the agreement expressly provided that:

> "Gross Revenues shall not include any excise, sales, use or value Added Taxes or similar impositions collected directly from patrons or guests or included as part of the sales price of any goods or services, net income or losses from currency exchange transactions or transfer fees or costs of General Consumption Tax on room or other taxes". (emphasis supplied)

The tax was demanded during the life of the agreement, that is, within eight (8) years of December 1, 1993 when the agreement became effective.

Daniel Ambrose, formerly Chief Financial Officer of DHC made the following avertments in his affidavits:

(i). DHC did operate Enchanted Gardens, and that all "taxes whatsoever, including General Consumption Taxes in respect of the management and operation of the Enchanted Garden..... were in fact collected by DHC ...." and not by Town and Country, its predecessor, or Premium.

(ii). No such taxes were even paid over to Town and Country, he, Daniel Ambrose was not aware that DHC should have been registered under the General Consumption Tax Act as a taxpayer and that DHC "used the existing local company Town and Country Resorts Limited to make all returns."

(iii). To the best of his knowledge information and belief none of the returns filed in the name of Town and Country was signed by an officer or employee of that company "and that Town and Country Resorts Limited during this period collected or had responsibility (sic) under the Management Agreement to collect taxes."

Mr George also relied on the following submissions:

No one can contract out of the Act, and General Consumption Tax is a statutory debt so it cannot be novated. Hence liability remains with DHC. Liability cannot be varied by agreement or otherwise.

Though made aware of the "error" the Commissioner did not correct it.

Even if Town and Country had made a positive representation as to liability, such a representation is one of law and not of fact. Liability is always a question of law.

There can be no estoppel against a statute.

A representation of law cannot give rise to an estoppel – Re Hooley Hill Rubber Chemical Company Limited and Royal Insurance Company Limited [1920] 1 KB 257 London County Territorial Auxiliary Forces Association v Nicholls [1948] 2 All E.R 432 at 435, Kai Nam (A Firm) v Ma Kam Chan [1956] AC 358 at 367.

The payments made by Town and Country were made under a mistake of law and are therefore recoverable .

DHC had an obligation to inform the Commissioner that they were the operators of Enchanted Gardens, not Town and Country.

In view of his responsibility to collect tax, it behoves the Commissioner to ascertain who is the operator of the resort.

The question as to who is the operator of The Enchanted Gardens is a question of law as defined in the statute. Even if the court should find that Town and Country made a representation of fact, it could be argued that any money paid by Town and Country would not be refundable, but the representation could not be used as a sword, but only as a shield.

DHC was the business concerned with operating The Enchanted Gardens. In 1993 when the management agreement was signed Town and Country ceased to be the operator..

THE SUBMISSIONS ON BEHALF OF THE RESPONDENT [COMMISSIONER

Mr. Small drew my attention to Section 3 of the General Consumption Tax Act which imposes the tax, and Section 23A which makes special provisions with regard to the payment of General Consumption Tax in respect of tourist accommodation and services.

He pointed out that the General Consumption Tax Act Section 23 (a) makes reference to Section 2 of the Tourist Board Act, and submitted that it is proper for the court to have regard to the enterprise which was licenced under the Tourist Board Act to operate The Enchanted Gardens.

He also discussed Sections 32 and 33 of the General Consumption Tax Act and Section 17 (d) of the Revenue Administration Act. He then led me through the various affidavits filed and the exhibits attached thereto to highlight many instances in which he said Town and Country was held out as being the operator and liable to pay General Consumption Tax in respect of the Enchanted Gardens.

He further pointed to documentary evidence which he submitted showed that contrary to the position of Town and Country, Mr Frederick Marsh was held out as an employee of that company.

He argued also that the management agreement contemplated that the responsibility for the payment of General Consumption Tax was not that of D.H.C.

Finally, he stressed that the court should deny the relief sought in the summons.

ANALYSIS AND CONCLUSION

In addition to the primary facts noted earlier I also find the following:

(1). Town and Country had never indicated to the Commissioner before August 3, 1999, that it had ceased to be the operator of The Enchanted Garden.

(2). By its conduct Town and Country held out itself as the operator of The Enchanted Garden and therefore is liable to pay General Consumption Tax in respect of the operations of the latter.

In the Woolwich case the House of Lords by a majority, held that:

> Although the common law had previously only admitted recovery of money exacted under an unlawful demand by a public authority where the payment had been made under a mistake of fact or under limited categories of compulsion ..... (modern conditions) warranted a reformulation of the law of restitution so as to recognise a prima facie right of recovery based solely on payment of money pursuant to an ultra vires demand by a public authority.

As noted earlier the British Steele case established that a refusal by a public authority to grant relief in circumstances where it should have done so, amounts to an unlawful demand. I accept these principles.

The Relevant Statutory Provisions

(A) The General Consumption Tax Act

The undermentioned sections provide as follow:

"3.-(1) Subject to the provisions of this Act, there shall be imposed, from and after the 22nd day of October, 1991, a tax to be known as general consumption tax-

(a) on the supply in Jamaica of goods and services by a registered taxpayer in the course of furtherance of a taxable activity carried on by that taxpayer; and

(b) on the importation into Jamaica of goods and services, by reference to the value of those goods and services."

23A.-(1) Whether a taxable activity consists of the supply of-

(a) tourist accommodation; or
(b) services offered to tourists through the operation of a tourism enterprise as defined in section 2 of the Tourist Board Act,

It shall be the responsibility of the operator of the accommodation or services to collect the tax chargeable in respect of that taxable activity and pay the tax to the Commissioner, in accordance with the provisions of section 33 (1).

(2) In subsection (1)-

"operator" means the person who owns the business concerned with the operation of the tourist accommodation or services referred to in that subsection and includes the manager or other principal officer of that business;

"tourist" has the same meaning as in section 2 of the Tourist Board Act;
"tourist accommodation" means accommodation offered to tourists in an apartment, a hotel, resort cottage or any other group of buildings within the same precinct."

32.-(1) Every person who is registered under this Act shall notify the Commissioner in writing of-

(a) the transfer of ownership by him of his taxable activity or part thereof stating-

(i) the date on which ownership or part thereof is transferred;
(ii) the name of the new or part owner;
(iii) the address of the new or part owner;

(b) any change in the name, address, constitution or nature of any taxable activity carried on by him;
(c) any change of address from which, or the name in which any taxable activity is carried on by that person;
(d) the date of cessation of his taxable activity; and
(e) any change of persons who are partners in a partnership, within twenty-one days of such transfer, change or cessation, as the case may be.

(2) A person who acquires a taxable activity or part thereof from a person registered under this Act shall so inform the Commissioner in writing within twenty-one days of the date of acquisition.

PART VII
ADMINISTRATION OF TAX RETURNS

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.

(2) A registered taxpayer who ceases to be so registered shall furnish to the Commissioner not later than one month from the date of so ceasing, a final return in respect of the last taxable period during which he was so registered.

(3) The Commissioner may require a registered tax payer (whether in his own behalf or as agent or trustee) to furnish the Commissioner with such other information relating to the returns as the Commissioner considers necessary.

As Mr Small submitted, Section 32 (1) makes it clear that Town and Country had a duty, if as it says, it was not operating the Enchanted Garden to so inform the Commissioner in writing; And by virtue of Section 32 (2) D.H.C., if it acquired the taxable activity of operating the resort should have informed the Commissioner in writing.

Then too, by Section 33, a registered taxpayer such as Town and Country is obliged to submit returns to the Commissioner, whether or not he makes a taxable supply. I agree with Mr Small that one must consider Town and Country's protest that it does not operate the Enchanted Garden, in the light of its failure to report the alleged change, and its dutiful compliance with Section 33 in filing returns as the operator of The Enchanted Garden.

(B) **The Revenue Administration Act**

The following provisions within Section 17D of the Revenue Administration Act are apposite:

17D.-(1), In this section-

"Registration Authority" means the Revenue Board or such other body as the Minister may, by order, designate;
"taxes" has the same meaning as in section 2 of the Tax Collection Act.

(2) Every person (hereafter in this section referred to as the taxpayer) who, pursuant to any enactment, is liable to pay taxes or to do any acts matters or things in relation thereto, shall apply in the prescribed form and manner to the Registration Authority for registration under this Part.

.....

(5) Every taxpayer who transacts with a Revenue department any matter pertaining to taxes shall, for the purposes of that transaction, supply the registration number assigned to that taxpayer and the registration number of any other person in respect of whom he has an obligation to withold taxes in relation to that transaction.

.....

(7) Where there is any change in the information relating to taxpayer's registration, the taxpayer concerned shall as soon as practicable after the occurrence of the change, inform the Registration Authority thereof.

(8) Any person who, without reasonable cause or lawful excuse-

> (a) neglects or fails to apply for registration; or neglects or fails to furnish any information which he is required to furnish pursuant to this section, commits an offence.....

In view of Mr. George's frank admission (he could not do otherwise) that Town and Country had represented repeatedly to the Commissioner that that Company is liable to pay General Consumption Tax for The Enchanted Garden, the crucial issue which is decisive of this matter is whether this representation has the effect of creating an estoppel against Town and Country.

Mr. George as noted above argues that it is a representation of law and therefore unable to give rise to an estoppel. Mr. Small says it is a representation of fact.

It is helpful to quote from the third edition of Spencer Bower and Turner on Estoppel by Representation. The learned authors give the following analysis at paragraphs 40 and 41 which I respectfully adopt. They write:

> "40" A statement <u>of fact</u> accompanied by, or involving, an inference or proposition of law, where such inference or proposition is not distinct or severable from the statement of fact, is wholly and for all purposes a representation (of fact). But a statement <u>of a rule, principle, or proposition of general law,</u> or a statement of the legal effect of facts which form the subject matter of another and a distinct and severable statement, or which are within the common knowledge of the parties, is a representation to the same extent only as any other statement of opinion; that is to say, it is not a statement of the fact of the law being thus, or thus, and there is no estoppel against a subsequent assertion that the law is otherwise; but it is an implied statement by the representor

> of the fact that the opinion expressed as to the law is actually entertained by him, or by the person to whom it is attributed."…..
>
> 41….Of the two main types of statement above indicated, the former is by far the more common, for as pointed out, and illustrated with a variety of instances from ordinary life, by Jessel M.R. it is extremely difficult to make any statement in a matter of business which does not involve some inference or proposition of law. Such statements, however, are not, merely by this circumstance, rendered statements of law, if law and fact are inextricably interwoven as the compound substructure of the statement."… (emphasis supplied)

Thus a representation as to the powers of a company under private acts of parliament has been held to be a representation of fact. – West London Commercial Bank Limited v Kitson and Others (1883-84) 13 QBD 300. The headnote illustrate the issues involved and decided. It reads as follows:

> " A bill of exchange payable to order and addressed to the B & I Company which was incorporated under local Acts and had no power to accept bills, was accepted by the defendants, who were two of the director's of the company, and also by the secretary, as follows: 'Accepted for and on behalf of the B & I Company, G.K., F.S.P. directors; B.W. secretary; The bill was so accepted and given by the defendants to the drawer, the engineer of the company, on account of the company's debt to him for professional services, and although he was told by the defendants that they gave him the bill on the understanding that he should not negotiate it, but merely as a recognition of the company's debt to

> him, as the company had no power to accept bills, yet the defendants knew that he would get it discounted, and they meant that he should have the power of doing so. The bill was indorsed by the drawer to the plaintiffs for value and without notice of the understanding between him and the defendants:-
>
> Held, affirming the decision of the Queen's Bench Division, that the defendants were personally liable, as by their acceptance they represented that they had authority to accept on behalf of the company, which being a false representation of a matter of fact and not of law, gave a cause of action to the plaintiffs who acted upon it.

In Sidney Bolson Investment Trust Ltd v E Karmios & Co., (London)Ltd [1956] 1 QB 529 at 540, Denning L.J. as he then was, said:

> "Now I quite agree that a representation about the legal position – about the legal effect of a document – can give rise to an estoppel. That is amply shown by De Tchinatchef v Small Coupling Ltd – [1932] 1 Ch. 330 – to which Mr. Buchee referred us and the Privy Council Case (Calgary Milling Co. Ltd., v The American Society Co., of New York) therein referred to as well as several later cases. But in order to work as an estoppel, the representation must be clear and unequivocal, it must, be intended to acted upon; I would add a man must be taken to intend what a reasonable person would understand him to intend. In short, the representation must be made in such circumstances as to convey an invitation to act on it." (emphasis mine)

The case of Lyle – Meller, A. Lewis & Co., (Westminister) Ltd. [1956] 1 W.L.R. 29 illustrates that a representation of a mixed question of law and fact may create an estoppel. The

headnote encapsulates the issues involved and the reasoning of the court. It reads as set out hereunder:

> "On December 24, 1952, an agreement was entered into between the plaintiff, who had lodged at the Patent Office three applications for letters patent and certain foreign applications in connexion with gas-filled lighters and refills, and the defendants, who were then manufacturing and selling such goods. The agreement provided, inter alia; (a) that the plaintiff should himself discontinue the selling of lighters; (b) that when the patents should be granted, the plaintiff should grant to the defendants sole and exclusive licences under such patents (with power to grant sub-licences) for the full term thereof; (c) that pending the grant of such licences the defendants should be entitled to use and exercise the plaintiff's inventions as if licences under the patents had in fact been granted; (d) that during the continuance of the agreement the plaintiff should not himself use or exercise his inventions; (e) that during the continuance of the agreement the defendants should pay to the plaintiff specified royalties on goods sold which embodied the inventions or any of them so long as the inventions embodied should be protected by valid letters patent in the United Kingdom; (f) that the defendants should periodically (g) render accounts and pay royalties to the (h) plaintiff, and (g) that if the royalties (i) should not amount to L2,00 in any one year (and in certain other events) the plaintiff could terminate the licences.
>
> In accordance with the agreement, the plaintiff discontinued the sale of lighters and refills, and from time to time the defendants rendered accounts and paid what were called "royalties" in respect of sales made by them. The plaintiff's

complete specifications were accepted published, but no patents had ever been granted. In December, 1954, the defendants sent a statement to the plaintiff showing that the sum of L7,123 was due for royalties but shortly afterwards repudiated this liability, and asserted that no royalties were, or ever had been payable, as under the agreement royalties were not payable until British letters patent were granted; and as their lighters and refills did not, on the true construction of the complete specifications as published, embody the plaintiff's inventions. In an action brought to recover the L7,123 stated to be due, Lloyd-Jacob J. gave judgement for the plaintiff. On Appeal by the defendants:-

Held, (1) that on the true construction of the agreement the defendants were liable to pay the stipulated royalties during its existence, whether or not British letters patent had been granted; (2) that the conduct of the defendants in paying royalties over a period, thereby inducing the plaintiff to adhere to the agreement in the belief that they admitted that their goods embodied his inventions, constituted an estoppel preventing them from contending otherwise, notwithstanding that the representations arising from such conduct might involve representations of law regarding the true construction of the specifications, and representations as to the defendant's future conduct.

Per Denning L. J. This assurance was binding, no matter whether it is regarded as a representation of law or fact or a mixture of both, and no matter whether it concerns the present or the future. It may not be such as to give rise to an estoppel at common law, strictly so called, for that was confined to representations of existing fact; but we have got far beyond the old common law estoppel now. We have reached a new estoppel which affects legal relations.

Per Hodson L.J. The estoppel set up by the

> plaintiff was of the kind well recognized at common law. The representations by conduct which the defendants made were perfectly clear and unambigious, namely, that the articles which they made embodied the inventions which covered the subject-matter of the agreement. That, to my mind, is a representation of fact. It matters not that questions of law may be involved and that it may be necessary to construe the agreement in order to find out whether there is an embodiment. That there may be a mixed question of law and fact does not destroy the estoppel. Nor does it matter that questions of patent law may be involved in considering whether or not there is an invention that is covered by a patent.
>
> Per Morris L.J. It was really a question of fact. Decision of Lloyd-Jacob J. (1955) 72 R.P.C. 307 affirmed. (emphasis supplied)

I shall now refer to a case which is illustrative of Denning L. J's dictum in Lyle – Meller (Supra) that a representation though regarded as one of law may yet found an estoppel. The questions which arise in The Matter Of The Local Government Superannuation Acts, 1937 and 1939, Algar v Middlesex County Council [1945] 2 All ER. 243, were whether the applicant by virtue of his appointment as an interim registrar of birth and deaths was a contributory employee within the meaning of the Local Government Act, 1937, Section 3 (2) (a) and (b) and whether the respondents were estopped by their conduct from seeking to prove that the applicant did not qualify for the superannuation fund. The headnote sufficiently states the issues and ruling of the court. It reads thus:

> The applicant was an assistant collector to the Willesden Board of Guardians and, by the Local Government Act, 1929, s 119, he was transferred to and became an officer of the respondents, the Middlesex County Council, as from April 1, 1930. He

exercised the option given to him by sect. 124 of the 1929 Act of remaining subject to the provisions of the Poor Law Officers' Superannuation Act 1896, for superannuation purposes. From the time he was transferred to the service of the respondents the applicant continued as an assistant collector in the finance department of the respondents, and also held the office of deputy registrar of births and deaths for the Harlesden registration sub-district, to which he had been appointed on Jan. 10, 1914 by the registrar of births and deaths, who was also a vaccination officer. On Sept. 30, 1938, the registrar resigned his office and, in accordance with the Births and Deaths Registration Act, 1874, s 25, the applicant became "interim registrar" of birth and deaths. On Sept. 12, 1938, the respondents wrote to the applicant in reference to his continuing to act as interim registrar until the respondents' scheme for the revision of registration districts came into operation; and by letter dated Sept. 16, 1938, the applicant agreed to this proposal on the understanding that he would be granted leave of absence from his office as assistant collector during the period of his duties as "interim registrar" and at the same time he asked for an assurance that his superannuation rights would be protected. There was no reply to the applicant's letter. On Sept. 28, 1938, the Registrar-General wrote to the applicant notifying him that as from Oct 1, 1938, he was to carry out all the duties of an interim registrar until further notice. The applicant also became temporary vaccination officer as from Oct. 1, 1938, and, only as such, he was in the employment of the respondents and pensionable as a contributory employee under the Local Government Superannuation Act,1937, as applicable to transferred Poor Law employees, and

the period of service in this capacity from Oct. 1, 1938, to Apr. 1, 1939 was to be reckoned for superannuation purposes. By notice dated Apr. 28, 1939, served upon the applicant by the respondents and purporting to be given pursuant to regulations made by the Minister of Health under the Local Government Superannuation Act, 1937, the applicant was informed that on Apr. 1, 1939, the 1937 Act became applicable to him and that he would be a contributory employee for the purposes of that Act. A letter dated Nov. 23, 1940, was written by the Middlesex County accountant to the applicant stating that, until a ruling had been obtained from the Minister of Health regarding the application of the 1937 Act to the applicant's appointment as interim registrar, contributions to the superannuation fund could not be accepted, and that contributions paid by the applicant since his appointment were being returned to him. This question was referred to the Minister and subsequently the respondents decided that as interim registrar the applicant was not superannuable under the 1937 Act as a contributory employee. The questions for the determination of the court were (j) whether the applicant in respect of his office as interim registrar of births and deaths was a contributory employee within the meaning of the Local Government Act, 1937, s 3 (2) (d); (ii) whether as between the applicant and the respondents, the respondents were not estopped by their conduct, in relation to the terms upon which the applicant accepted his appointment as interim registrar and to the circumstances in which he continued in such appointment

after Apr. 1, 1939, from relying on such facts (if any) as tend to establish that the applicant was not entitled to the benefits of the respondents superannuation fund:-

Held: (i) the word "interim" as part of the description of an appointment, did not qualify the position of an appointee but limited the time for which he was appointed, from the date when the applicant became "interim registrar" he was performing all the functions attaching to the office of registrar of births and deaths; and, although he had remained so ever since, he was a contributory employee with a right to participate in the benefits of the appropriate superannuation fund under Part 1 of the Local Government Superannuation Act, 1937.

(ii) by their conduct the respondents had allowed the applicant to alter his position on the assumption that his superannuation rights were assured. The respondents, therefore, were estopped from relying on any facts which would tend to establish that the applicant was not entitled to the benefits of their superannuation fund.

It must also be noted that once estoppel by representation is created it is permanent between the parties, in that the party against whom it is established, cannot for example by giving suitable notice, resume his former position and asset his old rights.

Because estoppel operates to prevent a party to litigation from reprobating representations made by him and on which the other party has relied and which has led the other party to change his position, it follows that estoppel cannot operate pro tanto. In Avon County Council v Howlett [1983] 1 All ER 1073, a school teacher who was overpaid spent some of the

overpayments. The employer sued for moneys had and received. The employer was estoppel from asserting any overpayment at all by reason of his representations, and not merely overpayment of the sums spent by the teacher.

In Australia, Deane J in Foran v Wright (1989) 168 CLR 385 at 435 said:

> "The distinction between a representation of fact and a representation of law is, in the context of the principles constituting the doctrine of estoppel by conduct, essentially illusory unless one subscribes - and I do not – to the view that the law has no factual existence at all."

I now turn to the cases on estoppel cited by Mr. George. In Kai Nam v Ma Kam Cham [1956] A.C. 358, a decision of the Privy Council, the alleged misrepresentation was constituted by a notice which a landlord gave to a tenant, and which purported to increase the rent pursuant to an Ordinance. It was submitted that this procedure constituted a representation that the provisions of the Ordinance applied to the tenancy and that the tenant's payment of the increased rent amounted to a detriment sufficient to support an estoppel. The Court rejected the plea of estoppel. Lord Cohen giving the advice of the Board, dismissed these submissions in a single paragraph with the bald statement that if the documents could be regarded as containing representations, they must be representations of law not of fact.

But in Harman Singh v Jamal Pirbhai [1951] A.C. 688, the Privy Council held that an estoppel was established on a mixed question of law and fact not very different from that in Kai Nam's case (supra)

With respect therefore, I am of opinion that Kai Nam's case should be regarded as a decision on its facts and not laying down any binding principle.

In Re Hooley Hill Rubber and Chemical Company and Royal Insurance Co, [supra]. The headnote reads in part as follows:

> "During negotiations between the manufacturers and an agent of an insurance company for the issue of a fire policy the manufacturers asked the agent whether the company's fire policy covered damage done by an explosion following a fire. The agent in reply quoted the terms of the condition mentioned above and informed the manufacturers that damage caused by an explosion resulting from a fire would be covered by the company's ordinary fire policy save that loss or damage as specified in the condition would be excepted. The manufacturers understood the qualification to refer only to an explosion due to hostile action, "loss or damage occassioned by foreign enemy" being one of the excepted risks in the condition.
>
> Held, by Bailhache J., that the representation by the agent was a representation, not of fact, but of law-namely, as to the meaning and effect of the condition,-and that therefore the insurance company when sued on the policy was not estopped from contending by way of defence that the loss was caused by an explosion.

Bailhache J. said at page 263:

> "I think the true position is that the writer was giving his view as to the meaning of a policy which contained this particular clause."
> "If the statement was a statement of existing fact, independent of any question of construction of a written document which would be a question of law or partly of law and partly of fact, I think there would be an estoppel."

This case involving oral statements is unremarkable, and hardly assists in assessing the circumstances of a case where it is being claimed that estoppel by conduct arises.

The headnote in Territorial and Auxiliary Forces Association of the County of London v Nichols [1949] 1 K.B. 35 reads in part:

> "A county Territorial Association let unused premises to a member of the public on a weekly tenancy. Before the letting the landlord's agents had written to the applicants for the tenancy: "We wish to make it clear that this tenancy will only be a weekly "one and will be subject to one week's notice at any time." After the applicant had accepted the tenancy, the agents supplied him with a rent book which contained references to the Rent Restriction Acts and to the standard rent of the premises. Notice to quit having been given, the validity of which was not challenged, the tenant continued in possession of the premises. In an action for possession the tenant claimed that the Association was estopped from alleging that the premises were not controlled, by reason of the representation, express or implied, to the effect that the premises were controlled, upon which representation, the tenant had acted to his detriment by not thereafter seeking other premises to occupy in lieu thereof:-
>
> Held, that the Association was not so estopped, since (1)., having regard to the facts, the representation on which it was said that the estoppel was founded was not precise and unambigious , and (2) was a representation, not of fact, but of law."

Scott L.J. giving the judgement of the court said at page 50:

> "A further ground on which, in our view, the plea of estoppel must fail is that the statements in the rent book, if amounting to a representation at all, constitute a representation of law and not of fact. The view advanced on behalf of the defendant Nichols was that the statements represented that the premises which were the subject of his tenancy were within the Rent Restriction Acts; in other words that they were controlled premises. That is not a representation of fact; it is a statement of

> the result obtained by applying the provisions of the Acts to the circumstances of the particular case. It is no easy matter sometimes as the many decided cases on the subject show, to say whether premises are or not within the Acts, and a statement to the one effect or the other cannot in our judgment be fairly regarded other than a representation of law."

This case is easily distinguishable from the instant case. The statements in that case were written and as the court said, were a matter of applying the provisions of the Act to the facts and circumstances of the case. In the instant case the representation is by conduct and in my view in the vast majority, 99 percent, of instances it should be a very simple matter for employees or directors of a company which has as it taxable activity the operation of a tourist resort to know whether the company is concerned with operation of such an entity.

In all the circumstances I hold that Town and Country made a representation of existing fact and not of law, namely that as a fact, that company is concerned with the operation of tourist accommodation or services know as The Enchanted Garden. I hold also that even if the representation or statement of fact involves or is accompanied by a proposition of law, such proposition is not severable from the representation of fact. - see quotation from Spencer Bower and Turner (supra)

I must add, that I find that the Commissioner did not make an unlawful demand of Town and Country, and therefore Woolwich and British Steele do not apply.

I must make two further comments on Mr George's submission. He has urged that the question of whether Town and Country is the operator of The Enchanted Garden is a question of law thereby implying in my view that it is mainly a matter of interpreting the Section 23 (1) (a) of the General Consumption Tax Act. I have rejected this argument. But even if it were purely a question of construction of the statute, this could be a fit case to apply the maxims nullus commodum capere potest de injuria sua propria (no one should be allowed to profit from his own wrong doing) and nemo ex suo delicto meliorum suam condictionem facer potest (no one

can improve his position by his own wrong doing – in this case assuming that Town and Country had ceased to operate The Enchanted Garden its failure to report this to the Commissioner, would be wrong. The courts have from time to time given a purposive and strained construction even in a taxing Act. Thus in a case involving income tax, Luke v 1 IRC [1963] AC 557 Lord Reid said at 577:

> "To apply the words literally is to defeat the obvious purpose of the legislation and produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result we must do some violence to the words." (emphasis mine)

My second comment concerns Mr George's reference to the dictum of Birkett L.J. in Combe v Combe [1951] 2 KB 215 at 224 that estoppel must be used "as a shield and not as a sword." But it should be noted that the High Court of Australia has abondoned this position as regards equitable or promissory estoppel. In Walton Stores (Interstate) Ltd v Maher (1988) 164 C.L.R. 387, the effect of the estoppel was to prevent the defendants from denying that there existed a contract upon which the plaintiff sued when in fact no such contract had been made!

Deane J. said at 428-9:

> In my opinion, to establish an equitable estoppel, it is necessary for a plaintiff to prove that (1) the plaintiff assumed that a particular legal relationship then existed between the plaintiff and the defendant or expected that a particular legal relationship would exist between them and, in the latter case, that the defendant would not be free to withdraw from the expected legal relationship; (2) the defendant has induced the plaintiff to adopt that assumption or expectation; (3) the plaintiff acts or abstains from acting in reliance on the assumption or expectation; (4) the defendant knew or intended him to do so; (5) the plaintiff's action or inaction

will occasion detriment if the assumption or expectation is not fulfilled; and (6) the defendant has failed to act to avoid that detriment whether by fulfilling the assumption or expectation or otherwise. For the purposes of the second element, a defendant who has not actively induced the plaintiff to adopt an assumption or expectation will nevertheless be held to have done so if the assumption or expectation can be fulfilled only by a transfer of the defendant's property, a dimunition of his rights or an increase in his obligations and he, knowing that the plaintiff's reliance on the assumption or expectation may cause detriment to the plaintiff if it is not fulfilled, fails to deny to the plaintiff the correctness of the assumption or expectation on which the plaintiff is conducting his affairs.

This is such a case, as a brief recapitulation of the facts will show. The terms of the proposed contract had been agreed between the solicitors and set out in the counterpart Deed executed and delivered to Waltons' solicitor by way of exchange. In the days immediately following Mr. Roth's receipt of the executed counterpart Deed, Waltons could properly have had the document returned and could have withdrawn from the negotiations. But the counterpart Deed was not returned; it was retained presumably on the terms on which it had been delivered, that is, by way of exchange. The retention of the counterpart Deed and the absence of any demur as to the schedule of finishes or terms of the Deed was tantamount to a promise by Waltons that it would complete the exchange. That would not have sufficed to raise an equitable estoppel unless the Mahers acted on the promise to their detriment. But, after Waltons knew that Mr. Maher had

> an equity is raised against Waltons. That equity is to be satisfied by treating Waltons as though it had done what it induced Mr Maher to expect that it would do, namely, by treating Waltons as though it had executed and delivered the original Deed. It would not be appropriate to order specific performance if only for the reason that the deteriment can be avoided by compensation. The equity is fully satisfied by ordering damages in lieu of specific performance. The judgment of Kearney J. is supported by the first basis of estoppel. The second and third bases may be disposed of briefly.

I am of the view that even if I were wrong in holding that Town and Country made a representation of fact and also that therefore estoppel by representation did arise, then the doctrine of estoppel by convention would arise. This common law estoppel is based on the principle that an assumption was adopted by both parties as the conventional basis of their relationshp. This form of estoppel is mutual.

Gibbs C.J. Mason, Wilson, Brennan and Dawson J.J. said in Con-Stan Industries of Australia Pty Ltd. v Norwich Winter Insurance (Australia) Ltd. (1986) 160 C.L.R. 226 at 244.

> "Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted upon by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying." (emphasis mine)

In the result I hold that the applicant Town and Country by its conduct has held out itself as not only liable for General Consumption Act in respect of The Enchanted Garden, but also as the operator of that resort and so had allowed the Commissioner to alter his position (he could have required D.H.C. to be registered by virtue of Section 33 (3) of the General Consumption

Tax Act) on the assumption that Town and Country is the operator of The Enchanted Garden. Town and Country therefore are estopped from relying on any facts, which would tend to establish that Town and Country is not the operator of The Enchanted Garden.

Accordingly, I determine question 1 of this summons as follows: I find and declare that Town and Country is the entity which has the responsibility to collect the tax chargeable in respect of the taxable activity of the resort known as The Enchanted Garden, and pay the tax to the Commissioner of General Consumption Tax in accordance with the provisions of Section 33 (1) of the General Consumption Tax Act.

As regards question 2, I decline to construe the management agreement referred to therein having regard to my findings and the declaration in answer to question 1. Also having regard to the very important fact that DHC is not a registered taxpayer for the purposes of the General Consumption Tax Act.

As regards question 3, I decline to grant the relief sought for the reasons given regarding question 2, and for the further reasons as submitted by Mr. Small, that DHC is an entity which is not before the court and has not had a chance to be heard.

The costs of this application shall be paid by the applicants Premium and Town and Country to the Commissioner. Such costs to be taxed if not agreed.

I wish to thank counsel for their able submissions.

commenced work and (as it must have known) that Mr Maher had done so in the expectation that Waltons would execute and deliver the original Deed, Waltons remained silent in order to have the benefit of the proposed contract if and when Waltons should decide to execute and deliver the original Deed. As Waltons (by its solicitor) knew that Mr Maher (by his solicitor) had said that he would commence the work only if an agreement was concluded, Waltons must have known that Mr Maher either assumed that the contract had been made or expected that it would be made and that Waltons was not free to withdraw. Waltons intended that Mr Maher should continue to build the store in reliance on that assumption or expectation. Then, if not before, the time had come for Waltons to elect between terminating the negotiations or allowing Mr Maher to continue on the footing that Waltons was bound to enter into the proposed contract. Waltons' silence induced Mr Maher to continue either on the assumption that Waltons was already bound or in the expectation that Waltons would execute and deliver the original Deed as a matter of obligation. It was unconscionable for Waltons subsequently to seek to withdraw after a substantial part of the work was complete, leaving the Mahers to bear the detriment which non-fulfilment of the expectation entailed.

Having elected to allow Mr Maher to continue to build, it was too late for Waltons to reclaim the initial freedom to withdraw which Waltons had in the days immediately following 11 November. As the Mahers would suffer loss if Waltons failed to execute and deliver the original Deed,