[2021] JMRC 6

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

REVENUE COURT

APPEAL NO. 2020 RV 00003

BETWEEN	**YABYANAS LIMITED**	**APPELLANT**
AND	**THE COMMISSIONER GENERAL TAX ADMINISTRATION JAMAICA**	**RESPONDENT**

Maurice Manning Q.C. and Allyandra Thompson instructed by Nunes, Scholefield, Deleon & Co, Attorneys-at-Law for the Appellant.

Cecilia Chapman-Daley and Maxine Johnson, Attorneys-at-Law for the Respondent.

Heard: 20th, 21st, 22nd September and 3rd December 2021

Revenue Law - General Consumption Tax Act - Part V First Schedule - General Consumption Tax Regulations - Regulations 14 (7) (a) and (b) - Hotel Incentives Act - Fiscal Incentives (Miscellaneous Provisions) Act.

Wheter company part of an approved hotel enterprise is entitled to the concessionary GCT rate under Part V of First Schedule to the General Consumption Tax and entitled to claim input tax credit on material used in the construction or repair of hotel property leased to its subsidiary licenced hotel operator - Whether specified tourism activity consisting of the supply of the services of a hotel must be done pursuant to a hotel operating licence issued under the Tourist Board Act - Whether lessor of hotel property is engaged in the supply of services of a hotel.

C. BARNABY, J

INTRODUCTION

[1] The Appellant is a locally incorporated company whose core business is land development and holding. In 2012 it acquired property in Negril which has been operated as hotels known as Beaches Sandy Bay, Seashore Bay Beach Resort, Azul Beach Resort Sensatori Jamaica, Azul Sensatori Jamaica and Azul Beach Resort Negril (hereinafter called "the Property"). Being new to the Jamaican tourism market, the Appellant sought to make improvements to the Property through construction and repairs, in order to bring it to a standard commensurate with that of other hotel property holdings and operations of the group of companies of the which it was a part. At the material time the Appellant was a wholly owned subsidiary of KHJ Holdings Limited, an 89% owned subsidiary of Karisma Hotels & Resorts de las Americas Limited, which was wholly owned by Karisma Hotels and Resorts Corporation Limited (hereinafter called "Karimsa").

[2] On the 1st November 2012 the Appellant entered into a lease agreement (hereinafter called "the Lease") with its locally incorporated subsidiary, KMS Jamaica Limited (hereinafter called "KMS"), which was licensed under the Tourist Board Act to operate the hotel comprised in the Property. The Appellant and KMS were therefore part of an international group of companies and connected entities, with separate legal personalities, and were discrete registered taxpayers.

[3] A General Consumption Tax (hereinafter called "GCT") assessment was raised against the Appellant by the Respondent for the period January 2014 to June 2017. After objections and an appeal to the Revenue Appeals Division (hereinafter called "the RAD"), an assessment to GCT in the sum of **One Hundred and Seventy-Seven Million, Eight Hundred and Ninety-Eight Thousand Six Hundred and Ninety-Nine Dollars ($177,898,699.00)** was confirmed. This confirmation is contained in the Notice of Decision of the RAD dated 12th October 2020. That decision is appealed to this Court by way of rehearing.

[4] As there was at the level of the RAD, there were two main issues on this appeal. Whether the lease of the Property by the Appellant to KMS was at "open market value" and therefore an arm's length transaction; and whether the Respondent correctly disqualified some of the Appellant's input tax credit claims, in particular, claims relating to material used in the repair and construction of the Property. Those input tax credit claims were disallowed on the basis that the Appellant was not engaged in tourism activities within the meaning of Part V of the First Schedule to the *General Consumption Tax Act, 1991* (hereinafter called "the GCTA").

[5] It was conceded by the Respondent, albeit at the close of the Appellant's submissions in this appeal, that the lease between the connected companies was in fact done at arm's length, its value being within the bracket of acceptable valuations.

[6] The second issue, which concerned the disallowance of input tax credit continued to be joined between the parties. The Appellant challenges the disallowance on two grounds set out in its Notice of Appeal which read as set out below.

> *7. The Respondents erred and were unduly restrictive in their interpretation of **regulation 14(7)(a)** of the General Consumption Tax Act and Part v of the First Schedule to the Act and its applicability to the Appellant given the undisputed evidence that the Appellant was involved in the hotel construction and had been so registered as providing hotel services. Consequently, on any fair and reasonable interpretation, the Appellant was entitled to the benefit of input tax credit in respect of the construction costs on a hotel property that was on the Respondent's case, leased to a connected party which itself held a hotel license and the property owned by the Appellant and on which the input tax was claimed was the same subject of the license.*

8. *The Respondents erred in not seeking to reconcile their view that the Appellant was a "connected person" with its Lessee under the Income Tax Act with its position that the Appellant could not be treated as the registered tax payer providing hotel services under either **regulation 14(7)(a)** of the General Consumption Tax Act and Part v of the First Schedule to the Act or the Fiscal Incentives (Miscellaneous Provisions) Act in respect of which the Appellant was owner of a hotel property and the Lessee, that the Respondent found was connected to it was in possession of a licence in respect of that property for the provision of hotel services.*

[7] The complaints arise on the following observations and findings of the RAD contained in its Notice of Decision dated 12th October 2020.

92. *The Appellant's representatives have submitted that the initial property was bought in the year 2012 and in 2013 they did major repairs to the property in order to bring it up to the standard of other hotels owned in other countries. The input tax paid on material used in construction or repairs to a premises by the Appellant during those periods up to 31 December 2013 would not have been claimable as a tax credit as at that time **Regulation 14(7) (a)** and the proviso **(i)** of paragraph **(a)** of the **GCT Act** would not have allowed the Appellant to do so since the Appellant was not in the business of supplying any of the services mentioned in **Part V** of the **First Schedule** to the **GCT Act.** The same conclusion would relate to the periods subsequent to December 2013. The evidence supplied during the appeal confirms that the Appellant was in the business of property development and the leasing of premises. Further, the Appellant is a separate and distinct legal entity from its affiliate, KMS Jamaica Limited, whose core activity was hotel services. It is KMS Jamaica Limited, in my opinion, that is the relevant company involved in tourism activities pursuant to **Part V** of the **First Schedule**; and it is the entity*

eligible to pay tax at the 10% rate and to make a claim under the relevant provision…

95. *According to the letter of 31 December 2014 …, the Appellant elected on the instant date and thus its* termination date *pursuant to [section 5(5) (b) of the Fiscal Incentives (Miscellaneous Provisions) Act] would take effect on 1 January 2015. However,* ***subsection (6)(b)*** *of ...* ***Section 5*** *states that where a continuing beneficiary has an entitlement to fiscal incentives under* ***The Hotels (Incentives) Act*** *or* ***the Resort Cottages (Incentives) Act*** *who has not elected to terminate that entitlement before 1 July 2014 then from 1 July 2014 until the termination date, the continuing beneficiary shall be liable to pay general consumption tax at the rate specified in* ***Section 4(1)(a)*** *of the* ***GCT Act****, which is 16.5% for the periods under this appeal. Thus, the Appellant's entitlement under [The Approved Hotel Enterprises (Seashore Beach Bay Resort) Order, 2013] would cease with effect from 1 July 2014 and the cessation of entitlement would in effect mean that the Appellant would be levied GCT on imported building materials for construction purposes at the standard rate of 16.5%.*

96. *Additionally, the hotel licence for the property in question was granted with effect from April 14, 2014 under* ***Section 23*** *of the* ***Tourist Board Act*** *and only KMS was the named beneficiary, being the hotel operator. Therefore, only KMS would be allowed to claim input tax incurred on materials for construction and or repairs to premises as a tax credit by virtue of* ***Regulation 14(7)(a)(i)*** *of the* ***GCT Act****.*

[8] Whether the Respondent erred in disqualifying some of the Appellant's input tax credit claims relating to material used in the repair and construction of the Property and whether the RAD erred is confirming his assessment is dependent on the answer to two sub-issues which I have framed as follows.

(i) Did the Appellant's status as a beneficiary of an approved hotel enterprise under the Hotel (Incentives) Act, which was repealed by the Fiscal Incentives (Miscellaneous Provisions) Act automatically permit it to access the tourism industry related benefits under the General Consumption Tax Act?

(ii) Are all the specified tourism activities listed in Part V of the First Schedule to the GCTA to be construed as being supplied pursuant to a license issued under the Tourist Board Act?

(iii) Is the Appellant entitled to claim input tax credit in respect of materials used in the construction of or repairs to the Property from which a hotel is operated by its lessee?

[9] For reasons, which are set out below, I find that these issues and the challenge to the Revenue's decision to disallow input tax credit for construction and repair material are to be determined in favour of the Respondent. The Respondent having accepted that the lease between the Appellant and KMS was transacted within the range of acceptable open market values however, the appeal must nevertheless be allowed in part.

REASONS

[10] It is necessary to construe a number provisions across various legislative instruments in order to resolve the issues which arise on this appeal. This requires something to be said about the approach to the interpretation of revenue statutes before treating with the issues identified above.

[11] In *Digicel Jamaica Ltd. v Commissioner of Taxpayer Appeals* [2014] JMCA Civ 36, para. [78], Morrison JA (as he then was) cited with approval the following dicta appearing in the conjoint judgment in *Barclay's Mercantile Finance Ltd v*

Mawson (Inspector of Taxes) [2005] 1 All ER 97, para. [32] which he regarded as an amplification of the post Ramsay approach (referencing what is widely regarded as a watershed moment in revenue statute interpretation).

> *"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."*

[12] He then went on to say that in discovering whether section 18(4) of the *General Consumption Tax Act* applied to proceeds of an insurance settlement received by Digicel in accordance with the terms of its insurance policy (the issue in that appeal),

> *[79] ... it [was] necessary to have regard to the clear words of the Act, looked at against the context, scheme and purpose of the Act as a whole and section 18(4) in particular.*
>
> *[80] The Act, it will be recalled, imposes GCT on the supply of goods and services by a registered taxpayer in the course or furtherance of a taxable activity carried on by that taxpayer. A taxable activity is an activity, whether carried on for pecuniary profit or not, which involves the supply of goods and services to any other person for a consideration. GCT is broken down into input tax and output tax. Input tax is the tax charged to a registered taxpayer by a third party or parties, on the supply to the registered taxpayer of goods and*

> *services required by him wholly or mainly for the purpose of making taxable supplies. A taxable supply is any supply of goods and services on which tax is imposed by the Act. Output tax is the tax charged by a registered taxpayer on the making by him of taxable supplies. GCT is calculated by reference to the value of the goods and services supplied. A registered taxpayer is required to pay over to the revenue periodically all output tax collected by him, but he is permitted to claim, as a credit against his output tax liability, any input tax paid by him in respect of taxable supplies made to him during a taxable period, being supplies used by him in carrying out his taxable activity.*

[13] The extract is generally instructive on the approach to be taken to interpretation and aptly summaries the context of the GCTA as a whole.

(i) Did the Appellant's status as a beneficiary of an approved hotel enterprise under the Hotel (Incentives) Act, which was repealed by the Fiscal Incentives (Miscellaneous Provisions) Act automatically permit it to access the tourism industry related benefits under the General Consumption Tax Act?

[14] The Appellant bought the Property on which a hotel was operated by KMS sometime in 2012. Later in that year and by an application dated 9th November 2012 the Appellant applied to have the Property, which related to the hotel establishment operated by KMS declared an approved hotel enterprise by the Minister pursuant to section 3 of the *Hotels (Incentives) Act*, 1968 (hereinafter called "HIA"). The Appellant applied in its capacity as owner of the Property. By the *Approved Hotel Enterprise (Seashore Beach Bay Resort) Order*, 2013, dated 20th February 2013 (herein after called "the Hotel Enterprise Order"), the hotel establishment was declared an approved hotel enterprise. It provides that for the purposes of HIA, 1st December 2012 is the deemed date of commencement

of the operation of the titular hotel, and prescribed a concession period of ten (10) years, which was also deemed to commence on 1st December 2012 with an end date of 30th November 2022.

[15] Under section 2 of HIA, "hotel" and "hotel enterprise" were defined thus.

> *"hotel" means any building, or group of buildings within the same precinct containing or intended to contain when complete an aggregate number of not less than ten bedrooms and facilities for meals for the accommodation of transient guests, including tourists, for reward, together with the precinct thereof and all other buildings and structures within such precinct;*
>
> *"hotel enterprise" means the business concerned with the establishment or operation of a hotel; …*

[16] Among other incentives, a company which was the owner or tenant comprising any hotel enterprise, whether or not the operator or entitled to receive profits from the operation of the hotel which was the subject of an order made pursuant to section 3 of HIA, were entitled to import into Jamaica free of Customs duties and GCT the articles specified in the Second Schedule to the Act. The incentive was also available to a company not being the owner of the hotel but who operates it in accordance with an agreement between itself and the owner or tenant, and certified by the Minister to be acceptable for the purposes of the Act. To benefit from the incentive, the company importing articles was required to satisfy the Commissioner of Customs that the articles were not prohibited from importation and were being imported for constructing or equipping the hotel or an extension to it. Among the articles specified in the Second Schedule are *"[a]ll building materials".*

[17] Having regard to these provisions, both the Appellant and KMS as owner, and tenant and hotel operator respectively, were exempt from GCT on the importation into Jamaica of all building material while the concession under the Hotel Enterprise Order subsisted.

[18] During the subsistence of the concession under the Hotel Enterprise Order however, the tax incentive regime in Jamaica was overhauled. One of the primary legislative instruments for this purpose was the *Fiscal Incentives (Miscellaneous Provisions) Act, 2013* (hereinafter called "FIMPA"). It had among its objectives the repeal of some enactments which granted fiscal incentives to specific sectors of the economy, and the enhancement and harmonisation of fiscal incentives throughout the economy. Among the sector specific fiscal incentives repealed was HIA, pursuant to section 4(d) of FIMPA.

[19] The repeal notwithstanding, a "continuing beneficiary" was regarded as continuing to be entitled to fiscal incentives under a repealed enactment, such as HIA, subject to other provisions of the Act. This is provided at section 5 of FIMPA. A "continuing beneficiary" is defined at section 2 to mean *"a person who, immediately before the coming into operation of [the] Act, was entitled to fiscal incentives under a repealed enactment for a period of time specified pursuant to the enactment".* Both the Appellant and KMS were therefore "continuing beneficiaries" on the 1st January 2014, the day on which FIMPA came into operation, being the beneficiaries of the concession under the Hotel Enterprise Order.

[20] As relevant, HIA was to be regarded as continuing to apply until the "termination date" of the entitlement which the continuing beneficiary had under it. The termination date of the entitlement is determined in one of two ways as seen from the below provision which appears at section 2 of FIMPA.

> *"[T]ermination date", in relation to a person's entitlement to fiscal incentives under a repealed enactment, means the earlier of -*
>
> > *(a) the end of any period of time specified pursuant to the enactment during which a person is entitled to the fiscal incentives; and*

> *(b) the date when the person's entitlement to the fiscal incentives is terminated by virtue of an election made under section 5; ...*

[21] Pursuant to section 5(3) of FIMPA, *"a [c]continuing beneficiary may make an election to terminate the entitlement of the continuing beneficiary to fiscal incentives under the relevant repealed enactment."* The written document which would evidence the Appellant's election was no placed before the court and on enquiry, learned Q.C. Mr. Manning advised that the Appellant was guided by the indication at paragraph 95 of the RAD's Notice of Decision that the election was made by letter of 31st December 2014.

[22] Provision is made at section 5(5) as to the effective date of an election. In respect of an election for the purposes of the tax type the subject of this appeal, sub-paragraph (b) provides that,

> *5 (5) An election made under subsection (3) shall take effect –*
>
> *(a) …*
>
> *(b) for the purposes of the* General Consumption Tax Act*, from the first day of the taxable period next following the date when the election was made; …*

[23] There is no dispute that the Appellant's election took effect on 1st January 2015 as stated by the RAD at paragraph 95 of its Notice of Decision. The concession under the Hotel Enterprise Order was scheduled to come to an end on 30th November 2022. The "termination date" in respect of the Appellant's entitlement to fiscal incentives under the HIA being the earlier of those two dates, the concession under the Hotel Enterprise Order was terminated by the Appellant on the 1st January 2015.

[24] If the Legislature was to achieve its objective of harmonization of fiscal incentives across the economy with the passage of FIMPA however, it could hardly afford to allow incentives granted under repealed legislation to continue to apply

indefinitely while a continuing beneficiary pondered an election which would bring those continuing entitlements to an end. Consequently, to ensure that the objective of harmonization was met within a desirable period, the legislature enacted the following provision at section 5(6) of FIMPA.

> *5(6) Where a continuing beneficiary has an entitlement to fiscal incentives under the* Hotel (Incentives) Act *or the* Resort Cottages (Incentives) Act ***and has not, before the 1st day of July, 2014, made an election under subsection (3) to terminate that entitlement, then, as from the 1st day of July, 2014 until the termination date*** *in respect of that entitlement –*
>
> > *(a) the 10% rate of tax referred to in Part V of the First Schedule to the* General Consumption Tax Act *shall not apply in respect of the continuing beneficiary; and*
> > *(b) the continuing beneficiary shall be liable to pay general consumption tax at the rate specified in section 4(1)(a) of the* General Consumption Tax Act.
>
> ***[Emphasis added]***

[25] This provision effectively brought to an end the GCT incentives given to the statutory being designated as a *"hotel enterprise"* under the HIA on the 1st July 2014. A *"hotel enterprise"*, which was defined to mean "… *the business concerned with the establishment or operation of a hotel"*, would have undoubtedly included the Appellant as well as its lessee KMS. FIMPA had become operational in the preceding months on the 1st January 2014.

[26] The result for the Appellant is that between the 1st July 2014 and 1st January 2015 when the election to terminate HIA entitlements took effect, it was precluded from benefiting from the 10% concessionary rate of tax prescribed in Part V of the First Schedule to the GCTA and was required to pay GCT at the standard rate of 16.5% specified in section 4(1)(a) of the GCTA, including on the importation of building materials which were exempt from GCT and Customs

duties under HIA if used for the specified purposes, in respect of the hotel which was the subject of the Hotel Enterprise Order.

[27] On the clear words of section 5(6) of HIA, had the election been made by the Appellant by the 1st July 2014, it would have been entitled, as a former beneficiary under that Act to the concessionary GCT rate of 10% across the board, including on building supplies. This is an entirely different facility to the allowance made for input tax credit in respect of materials used in the construction of or repairs in relation to the supply of the specified taxable tourism activities in Part V of the First Schedule to the GCTA to which I now turn.

(ii) Are all the specified tourism activities listed in Part V of the First Schedule to the GCTA to be construed as being supplied pursuant to a license issued under the Tourist Board Act?

[28] On 15th June 2012, almost a year and a half before FIMPA and the repeal of the HIA, the provisions in Part V of the First Schedule to the GCTA went into effect. A concessionary GCT rate of 10% is made applicable to tourism activities consisting of the supply of the services specified in the Schedule. Part V of the First Schedule provides as follows.

Category	*Rate of Tax*	*Effective Date*
Tourism activities consisting of supplying the services of - *(a) a hotel;* *(b) a resort cottage;* *(c) a site or other facilities for camping;*	*10%*	*June 15, 2012*

(d) tourist accommodation not specified in paragraph (a), (b), or (c);

(e) water sports;

(f) an attraction;

(g) a tour operator, pursuant to a licence issued under the Tourist Board Act.

2. Notwithstanding section 7, the value of a taxable supply of any of the services specified in paragraph 1 shall not include the value of gratuities paid to employees.

[29] How does that impact the subject of the current dispute, the disallowance of input tax credit for repair and construction material? The answer lies in the input tax regime under the GCTA and the General Consumption Tax Regulations (hereinafter called the "GCTR").

[30] The input tax regime in this jurisdiction is not unlike that which exists in many value added tax systems globally, such as the Australian GST on which Hill J in the judgment of the Full Federal Court in *HP Mercantile Pty Ltd. v Commissioner of Taxation* (2005) 143 FCR 453, [13] had occasion to remark. Those remarks were cited with approval by the Administrative Appeals Tribunal in *Re Electrical Goods Importer v Commissioner of Taxation* [2009] AATA 854, para. [44], a case relied upon by the Respondent. It is this,

> *[t]he genus of a system of value added taxation, of which the GST is an example, is that while tax is generally payable at each stage of*

commercial dealings (supplies) with goods, services or other "things", there is allowed to an entity which acquires those goods, services or other things as a result of a taxable supply made to it, a credit for the tax borne by that entity by reference to the output tax payable as a result of the taxable supply. That credit, known as an input tax credit, will be available, generally speaking, so long as the acquirer and the supply to it (assuming it was a "taxable supply") satisfied certain conditions, the most important of which, for present purposes, is that the acquirer makes the acquisition in the course of carrying on an enterprise and thus, not as a consumer. The system of input tax credits thus ensures that while GST is a multi-stage tax, there will ordinarily be no cascading of tax. It ensures also that the tax will be payable, by each supplier in a chain, only upon the value added by that supplier.

[31] What are the conditions to be satisfied in the context of this appeal? The enquiry can properly begin by recounting the applicable provisions at regulation 14 of the GCTR.

> *14 (1) Subject to paragraphs (2), [and paragraphs (3), (4), (5), (6), (6A) and (16) which are not immediately relevant], a registered taxpayer shall, in respect of a taxable period, be entitled to claim as a credit any input tax payable by him under section 3(1) of the Act, during that period.*
>
> *(2) For the purposes of paragraph (1), the input tax in relation to which a credit may be claimed shall be the sum of –*
>
> *(a) any amount stated as tax on a tax invoice issued to the registered taxpayer in respect of taxable supplies made to him during a taxable period;*
>
> *(b) any input tax paid by that registered taxpayer on the importation of taxable supplies into Jamaica; and*
>
> *(c) the tax chargeable on goods imported*

which is accounted for by the registered taxpayer on a return in accordance with section 42 [which deals with the deferment of payment of GCT on importation of specified goods].

…

(7) A registered taxpayer shall not be entitled to claim as a tax credit any input tax which he is charged –

(a) in respect of any materials used in the construction of or repairs to any premises in relation to his taxable activity; or

(b) …

Provided that -

(ii) sub-paragraph (a) shall not apply to any taxable activity specified in Part V of the First Schedule to the Act;

(iii) *…*

[Emphasis added]

[32] As seen in regulation 14(1), the entitlement to claim input tax credit is generally premised on input tax being payable by the registered taxpayer pursuant to section 3(1) of the GCTA during the taxable period. To the extent relevant, section 3 of the GCTA provides thus.

(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 or 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.

(2) …

[33] There is no absolute entitlement to input tax credit however. A registered taxpayer is not generally permitted to claim input tax credit in respect of material used in the construction or repair to any premises in relation to his taxable activity as proscribed by regulation 14(7)(a) of the GCTR. That prohibition is not unqualified as the proviso at regulation 14(7)(i) expressly states that *"sub-paragraph (a) shall not apply to any taxable activity specified in Part V of the First Schedule to the Act."*

[34] In respect of the supply of services of "a hotel" which appears at paragraph (a) of the said Schedule, the tourism activity of particular concern on this appeal, I make three preliminary observations.

[35] Firstly, in respect of the supply of services, that where the supply is not of a good or the sale of real property, it must have been made for consideration. I arrive at this position in light of section 18(8) of the GCTA which defines "services" as the provision of the matters which are specified in the Fourth Schedule to the Act. This corresponds with the meaning of "services" at section 2 of the GCTA. So far as is relevant to this appeal, paragraph 1 of the Fourth Schedule states that

> *[t]he following shall be regarded as the provision of services -*
>
> *(a) …*
>
> *(c) hiring (other than under a hire-purchase agreement), leasing or renting of goods;*
>
> *(d) the supply, other than the sale of real property, of anything for a consideration which is not the supply of goods; …*

"Goods" is defined at section 2 of the GCTA to mean *"all kinds of property other than real property, money, securities or choses in action".*

[36] Second, that a "tourism activity consisting of supplying the services of a hotel" contemplates the provision of services as a tourist accommodation. This is having regard to paragraph (d) which provides for "tourist accommodation" not already mentioned at paragraphs (a) through (c). Arising from the first observation, the supply of services as a hotel must be made for consideration.

[37] Third, on the face of the text, there cannot be said to be any requirement that a claim to input tax credit in respect of construction and repair material is dependent on a hotel being operated *"pursuant to a licence issued under the Tourist Board Act"* as contended by the Respondent. Those words are used only in respect of the supply of services as a tourist operator and appears as part of paragraph (g).

[38] The Respondent nevertheless contends that licensing under the *Tourist Board Act, 1955* (hereinafter called "the TBA") is required to enable a taxpayer to claim input tax credit in respect of construction and repair material on the basis that he is engaged in supplying the services of any of the tourism activities listed in Part V of the First Schedule to the GCTA.

[39] Although the legal basis for invoking the TBA in interpreting a provision in the GCTR was not explored in argument before, I make my own observation that the TBA and the GCTA cannot be said to be *in pari materia,* in that one is a revenue statute and the other a statute for the regulation of an industry. As a result, I am not permitted to consider the former as part of the context of the latter in deciding whether the reference to "a hotel" in the GCTR means a hotel operated pursuant to a licence issued under the TBA. As stated by the learned editors of *Cross on Statutory Interpretation*, 3rd edn. 2005, LexisNexis however, that is not the only assistance which a court may derive from statutory instruments in determining the meaning of another legislation. They state that

> *[g]uidance by contrast or analogy may sometimes be derived from a provision of a statute other than that under consideration although there*

is no question of them being in pari materia*, but there is no obligation on the judge to consider such statutes as there is in the* case *of those* in pari materia.

[40] The meaning of the words in Part V of the First Schedule of the GCTA must be looked at against the context, scheme and purpose of the GCTA and GCTR as a whole, and the tourism activities which appear there, to determine the nature of the transactions or taxable activities to which the provisions intend to apply. That is what a purposive construction demands. Although not *in pari materi,* the TBA is in my view capable of providing the guidance contemplated by the learned editors of *Cross on Statutory Interpretation.*

[41] Of the tourism activities listed in the Schedule, only the supply of services as a tour operator is expressly required to be "*pursuant to a licence issued under the Tourist Board Act".* It therefore appears to me that in determining whether or not *"tourist activities consisting of supplying the services of a hotel"* or any of the specified tourist activities at paragraphs (b) to (f) are to be construed to mean the supply of services pursuant to a licence issued under the TBA, an attempt must be made to ascertain, if possible, the purpose for treating differently the supply of services by a tour operator.

[42] "Tour operator" is not a term used in the TBA. That notwithstanding, the legislation makes provision for the regulation of a tourism enterprise which is defined at section 2, and appears below.

> *"[T]ourism enterprise" means, subject to section 23A, the provision in Jamaica of –*
>
> > *(a) any car rental or U-drive services or any service of rental of motor vehicles as defined in section 11 of the Road Traffic Act;*
> >
> > *(b) sites and other facilities for camping;*
> >
> > *(c) water sports services;*
> >
> > *(d) any other service,*

utilized by or offered to tourists and declared by the Minister, by order, to be a tourism enterprise; …

[43] In the *Tourist Board (Tourism Enterprises Order), 1985* which was made in exercise of the powers conferred on the Minister by section 2 of the TBA, *"services involving sight-seeing tours, including sea and river cruises"* and *"services involving the organization of - (i) special events such as feasts and parties; (ii) equestrian activities; (iii) safaris; (iv) river rafting"* have been declared tourism enterprises pursuant to ord. 2 (d) and (f) respectively. Pursuant to section 23A (1) of the TBA, *"… no person shall operate or maintain any tourism enterprise unless such a person is the holder of a licence granted under section 23 B."* A like observation could be made in respect of the specified tourism activity, "attraction", which appears at paragraph (f) and yet the words "*pursuant to a licence issued under the Tourist Board Act"* does not follow *"an attraction"* as it does *"a tour operator".*

[44] Other than the activities previously mentioned in the preceding paragraph and others which are not immediately relevant, the *Tourist Board (Tourism Enterprises Order), 1985* also declares at ord. 2(e), that *"services involving exhibition or use of - (i) historical sites; (ii) great houses; (iii) spas; (iv) caves; (v) bird sanctuaries; (vi) waterfalls; (vii) lakes; (viii) lagoons" are* tourism enterprises. These are undoubtedly tourist attractions. As stated previously, no person is authorised to operate or maintain any tourism enterprise unless he is the holder of a licence granted under section 23 B of the TBA. No basis for treating these tourism activities differently was supplied in submissions and I am unable to discern any which are either obvious or reasonable.

[45] **"**Hotel", "resort cottage" and "tourist accommodation" are all defined at section 2 of the TBA however as follows,

"hotel" means an establishment falling within any of the categories of buildings prescribed by regulations made under this Act as constituting hotels for the purpose of this Act;

…

"resort cottage" means subject to section 16 (1) (b) any building containing not less than two furnished bedrooms, a furnished living room, bathroom facilities and facilities for the preparation and consumption of meals, and used for accommodation of transient guests, including tourists, for reward;

…

"tourist accommodation" means, subject to section 16 (1) (b), a hotel, resort cottage or any other premises or any vehicles, boats, ships or places where accommodation is offered to tourists for reward; …

Section 16 (1) (b) empowers the Minister to make regulations which provide for

[T]he categories -

(ii) *of lands and buildings which constitute hotels and resort cottages;*

(iii) *of premises, vehicles, boats, ships or places which constitute or may be treated as other tourist accommodation,*

and the circumstances in which and the terms on which any such lands, buildings, premises, vehicles, boats, ships or places may be exempted from any requirements of this Act; …

[46] Regulations 2 and 3 of the *Tourist Board Regulations, 1969* go on to provide that

2. [T]he following buildings are hereby prescribed as constituting a hotel for the purposes of the Act, namely, any building, or any buildings within the same precinct and under the same management, containing bedrooms for the accommodation of guests for reward where -

(a) the aggregate number of such bedrooms is not less than ten; and

(b) such bedrooms are used mainly for the accommodation, for reward, of tourists,

together with all buildings within the same precinct and under the same management as such building or buildings as aforesaid.

3. Every application for a licence in respect of a hotel shall be in the form set out in the Schedule.

[47] Pursuant to section 22 (1), (2) and (3) of the TBA, no person shall operate a hotel, resort cottage, or any tourist accommodation not being a hotel or resort cottage respectively, unless a licence granted under the Act is in force in respect of the accommodation.

[48] Although not cited in argument before, I find instructive what I believe to be the incontrovertible observation of Lord Hodge in a strong majority judgment delivered in *Project Blue Ltd (formerly Project Blue (Guernsey) Ltd) v Revenue and Customs Commissioners* [2018] 3 All ER 943, para. [31], that *"… it is without question a legitimate method of purposive statutory construction that one should seek to avoid absurd or unlikely results*". The statement appears to be premised on the long established presumption that in enacting legislation, Parliament intends to act reasonably, an aspect of which is that the legislature did not intend an absurd result. In respect of the latter presumption, Lord Millett in *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209, paras. [116-7] stated,

[116] … The courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.

[117] But the strength of these presumptions depends on the degree to which a particular construction produces an unreasonable result.

The more unreasonable a result, the less likely it is that Parliament intended it …

[49] The regulation of the tourist industry in the manner prescribed in the TBA and subsidiary legislation, including the licencing regime, undoubtedly contributes to the *"attainment and maintenance of integrity and the highest standards of service by persons who offer or provide by way of trade or business any goods, entertainment, transportation, accommodation, food or drink to or for tourists"*. This is but one of the many duties of the industry regulator, the Jamaica Tourist Board. Where these standards are attained and maintained, the risk of reputational damage to the tourism product and industry, on which Jamaica is fiscally reliant in a significant way, is minimised.

[50] Having regard to the regulatory regime for the tourist industry and the context of Part V of the First Schedule to the GCTA vis a vis its limited applicability to "tourism activities", I cannot find any reasonable basis for the legislature permitting a registered taxpayer who supplies services of any of the tourism activities at paragraphs (a) to (f) to claim input tax credit for construction and repair material where he supplies those services without a TBA license on the one hand, and on the other hand single out and effectively bar a registered tax payer supplying services as a tour operator from claiming input tax credit where he does not supply that service pursuant to a license issued under the TBA.

[51] The tourism industry and supply of tourism services is not unregulated, the result being that the supply of services which constitute the specified tourist activities must be subject to the regulatory regimes under the TBA which requires licensing thereunder. To construe *"tourist activities consisting of supplying the services of a hotel"* and indeed all the activities specified at (a) to (e) as not being subject to a license issued pursuant to the TBA when they are required by law to be so licensed produces consequences which are objectionable and undesirable, which Parliament could not have intended.

[52] It is therefore my judgment that each of the specified tourism activities at Part V of the First Schedule to the GCTA must be construed to mean the supply of the specified service, pursuant to the relevant license issued under the TBA. I can find no error in the Respondent's conclusion in this regard. In respect of the supply of services of a hotel in particular, the contemplated taxable supply is the provision of accommodation to tourists for reward pursuant to a licence issued under the TBA for that purpose. I am unable to agree with learned Q.C Mr. Manning that the provision should extend to the supply of "facilities for use in the hotel industry by a hotel service provider". That goes beyond the bounds of a purposive construction.

(iii) Is the Appellant entitled to claim input tax credit in respect of materials used in the construction of or repairs to the Property from which a hotel is operated by its lessee?

[53] It is contended on behalf of the Appellant that it should be permitted to claim input tax credit for material used in the repair and construction of the Property, and that the Respondent and the RAD erred in concluding otherwise. In so doing, learned Q.C. submitted that the Appellant is not simply a property holding entity but was integral to and involved in aspects of the hotel's management.

[54] In urging the court that it correctly disallowed input tax credit in respect of repair and construction material, the Respondent submits that in order to be entitled to input tax credit on the basis of the exemption at regulation 14 (7) (b), the Appellant must have been licensed under the TBA to operate the hotel; and that the Appellant's taxable activity was not the supply of the services of a hotel within the meaning of Part V of the First Schedule. I find that there is merit in these submissions.

[55] As stated previously, pursuant to section 23A (1) of the TBA, *"… no person shall operate or maintain any tourism enterprise unless such a person is the holder of a licence granted under section 23 B."* This is to be contrasted with section 22

(1) of the Act which provides that *"... no person shall operate a hotel unless there is in force in respect of such hotel a licence granted under this Act."* On the face of these provisions it seems that while the "operator" of a tourism enterprise is required to hold a licence to operate the enterprise, it is the hotel which is required to be licenced under the Act for lawful hotel operation.

[56] Regulation 3 of the *Tourist Board Regulations, 1969* provides however, that *"every application for a licence in respect of a hotel shall be in the form set out in the Schedule."* On a review of the form in the Schedule, among other information which does not arise for consideration, the owner or director of the operating company of a hotel or the manager of the hotel applies for the grant of a licence to keep the hotel in accordance with section 22 of the TBA, in their capacity as "keeper of the hotel". The applicant for the grant of a licence is required to declare the number of bedrooms for the accommodation of guests for reward; the owner of the hotel and his address and date of incorporation if a company; and the name of the operator of the hotel and his address and date of incorporation, if a company. A list of all of the Directors of the operating company is also required to be attached.

[57] Pursuant to section 24 (3) of the TBA,

> *Every person who operates a hotel in contravention of section 22 shall be guilty of an offence and shall be liable on summary conviction before a Judge of the Parish Court to a fine not exceeding ten thousand dollars and in default of payment thereof to imprisonment for a term not exceeding two years, and where such offence is continued after conviction such person shall be guilty of a continuing offence and in respect of each day during which such offence continues shall be liable to a fine not exceeding five hundred dollars.*

[58] When these provisions are taken together it seems clear to me that while the hotel itself must be the subject of a licence, in light of the need for the operator who may in fact be distinct from the owner of the property to be known and

identified during the licencing process, any licence to operate must be issued for his benefit. It is therefore my view that it is the person named as operator who is authorised to supply the services of a hotel accommodation to guests for a reward.

[59] While article 3.1. (a) of the Lease between the Appellant and KMS provided that the latter shall apply for all licences, including any hotel operating licences in its own name or in conjunction with the Appellant, it was conceded that the licence to operate the hotel was not in the Appellant's name. The Respondent's evidence, which is unchallenged, is that a hotel licence was issued to KMS under the TBA on 14th April 2014 to operate the hotel Azul Sensatori Jamaica, a name which is no longer in operation. There is no evidence before me as to the date on which the use of the name ceased, and neither a copy of the application for the license nor the license issued to KSM have been produced as evidence in these proceedings.

[60] Even if I am wrong in concluding that it is the person named as hotel operator pursuant to a licence issued under the TBA who is authorised to supply the services of a hotel, I am still unable to resolve the issue in favour of the Appellant. I cannot on the evidence find that its taxable activity consisted of the supply of the services of hotel accommodation as contemplated by Part V of the First Schedule.

[61] In the Appellant's incorporating documents its core business is stated as *"land development company; land holding".* In the Lease between KMS and the Appellant, the Appellant is described as the owner of the "Real Property" upon which the hotel is located and KMS is designated as the operator of the hotel. KMS was permitted to "*use the Property for the purpose of operating a hotel resort and for any other lawful purposes"* in accordance with article 2.2. It also provides at article 6.2. that the

> *"Landlord represents, warrants and covenants that Tenant may peaceably hold and enjoy the Property* ***with exclusive control and possession thereof during the Term, subject only to the terms and conditions of this Agreement****."* **[Emphasis added]**

[62] KMS was also obliged to engage sufficient management, staff and employees necessary to operate the "Property" and at the commencement date all persons whose normal place of performing their duties located at the "Property" became its employees pursuant to article 7.1.

[63] While a right to inspect the "Property" and accounts, and to take copies of accounts was reserved to the landlord by article 9.1, these rights were subject to inspection at reasonable times and on notice to the general manager of the tenant, and on written notice respectively. The Appellant was prohibited from interfering with the operations of the Property but if it had comments they were to be in writing and directed to the person designated by KMS as the general manager.

[64] The provisions of the Lease overwhelmingly point to KMS being the operator of the hotel comprised in the "Property" which is its subject.

[65] The Appellant has also put into evidence a copy of a "Long Term Hotel Accommodation Agreement" for the provision of hotel accommodations at "Azul Sensatori Jamaica". The hotel operating licence issued under the TBA to KMS on 14th April 2014 was in respect of the said hotel. Among other things, the agreement makes provision for the allocation of rooms and included services at the hotel to TUI UK Limited, a travel and tourism company, for guaranteed occupancy, at specified rates. The contracting parties are TUI UK Limited and Karisma Hotels and Resorts Corporation Limited, the latter being the parent of the group of companies to which both the Appellant and KMS belong. Neither the Appellant or KMS as separate legal entities are privy to that contract.

[66] The agreement is clearly for the supply of services of a hotel and there can be no doubt that it was brokered for the benefit of the TBA licensed hotel, "Azul Sensatori Jamaica". In fact, the contract says so expressly. That hotel was operated by KMS. The agreement is therefore incapable of providing proof that the Appellant was engaged in the supply of services of a hotel within the meaning of Part V of the First Schedule to the GCTA. In fact, the returns to the Revenue for Guest Accommodation Room Tax (GART) which were filed tells otherwise. It was KMS, the licensed hotel operator and not the Appellant who filed those returns. It accounts for the rooms supplied by the taxpayer making the returns and the applicable tax for the supply of the hotel accommodation.

[67] The Appellant also contends that it is artificial to treat it as being limited to the business of property development and leasing for input tax credit purposes but otherwise connected for the purpose of determining the "open market value" of the lease between it and KMS; and that the RAD and Respondent have failed to reconcile the differences. These submissions are without merit.

[68] An "open market value" determination is aimed at determining the value of a taxable supply where there is a transaction between connected parties, for which provision is made at section 7 (2) of the GCTA. It is aimed at ensuring that transactions between related entities are made on terms and conditions which would have been agreed between entities which are not related for comparable uncontrolled transactions. The Appellant having leased the Property to its subsidiary, the value of the supply of that distinct taxable activity is properly determined by reference to the connectivity of the parties to the transaction, to ensure that the supply of the lease is not undervalued for tax purposes.

[69] The supply of services of a hotel is a separate and distinct taxable activity for which special accommodation is made under the GCTR in respect of an entitlement to input tax credit in respect of materials used in the construction of or repairs to any premises in relation to that taxable activity by the registered taxpayer, pursuant to regulation 14 (7). There is no evidence before me of KMS

supplying the services of a hotel as contemplated by Part V of the First Schedule of the GCTA, to the Appellant. There is therefore no basis for treating them as connected parties so as to determine the value of the supply of hotel accommodation which is the taxable activity of KMS.

[70] While the arm's length principle on which the "open market value" determination is based necessarily has an element of artificiality, the difference in the approach to determining the value of the taxable supply of the lease between the Appellant and KMS; and the determination that the Appellant is not entitled to input tax credit in respect of materials used in the construction of or repairs to premises the subject of the lease is neither artificial nor impermissible. The Legislature was at liberty to provide and did provide that only one of several entities which would have comprised the statutory being known as the "Hotel Enterprise" under HIA was entitled to claim and receive input tax credit for construction and repair material. That entity was the taxpayer engaged in the tourism activities consisting of supplying services as a hotel accommodation.

[71] In all these circumstances I find that the Respondent and the RAD were correct in concluding that the Appellant is not entitled to input tax credit in respect of repair and construction material on the bases that it was not the licensed operated of the hotel; and or that the Appellant's taxable activity was not the supply of services of hotel accommodation within the meaning of Part V of the First Schedule to the GCTA so as to displace the prohibition at regulation 14 (7) (a) of the GCTR in respect of input tax credit for repair and construction material. I agree with the RAD and the Respondent that KMS is the entity which is entitled to make the claim for input tax credit in those regards.

[72] The appeal in respect of disallowance of input tax credit in respect of materials used in the construction of or repairs to the Property is accordingly dismissed.

COSTS

[73] While the time spent by Counsel in arguing the input tax credit challenge was comparatively less than the time devoted to arguments on the value of the supply of the lease between the Appellant and KMS, the former is in fact a significant issue in this appeal. Consequently, notwithstanding that the Respondent conceded at the close of the Appellant's submissions that the lease between the connected companies was within the bracket of acceptable valuations and therefore at "open market value" based on its own methodology, none having been provided by the Respondent in the various proceedings below or in the appeal, I believe it is appropriate that the Appellant recovers only one half of the costs of this appeal.

ORDER

1. The appeal against the decision of the Revenue Appeals Division delivered on the 12th October 2020 in respect of the value of the supply of the lease is allowed.

2. The appeal against the decision of the Revenue Appeals Division delivered on the 12th October 2020 in respect of Input Tax credit disallowed is refused.

3. One half of the costs in this court to the Appellant to be taxed if not sooner agreed.

4. The Appellant's Attorneys-at-Law are to prepare, file and serve this order.

Carole S. Barnaby
Puisne Judge