

**IN THE SUPREME COURT OF BELIZE, A.D. 2017**

**CLAIM NO: 527 of 2017**

**BETWEEN**

**MAESTRE'S INDUSTRIES LIMITED**

**CLAIMANT**

**AND**

**COMMISSIONER OF GENERAL SALES TAX**

**ATTORNEY GENERAL OF BELIZE**

**DEFENDANTS**

**Keywords:** Sections 3(d) and/or 17 of the Constitution of Belize;  
constitutionality and/or legality of Statutory Procedure under  
General Sales Tax Act; arbitrary or unlawful or compulsory  
deprivation of property;  
General Sales Tax; General Sales Tax Act;  
Assessment, charging, collection and or/or recovery of GST;  
Determination of whether interest and penalties relating to GST;  
Meaning of 'taxable supply'; sale of strata title;  
Liability for Interest and Penalties under General Sales Tax Act

**Before the Honourable:** Mr. Justice Courtney A. Abel

**Hearing Dates:** 14<sup>th</sup> February 2017  
16<sup>th</sup> February 2017  
21<sup>st</sup> February 2018.

**Appearances:**

Mr. E. Andrew Marshalleck, SC, for the Claimant.

Ms. Briana Williams and Mrs. Samantha Matute-Tucker for the Defendants.

## WRITTEN JUDGMENT

### **Introduction**

- [1] This is a contested claim brought by a taxpayer against the Government of Belize (“GOB”) in relation to an assessment for general sales tax (“GST”) under the applicable taxing statute, the General Sales Tax Act<sup>1</sup> (“the Act”).
- [2] The claim concerns the liability of the Claimant to pay GST in relation to the sale of certain real property which the Claimant owned and sold.
- [3] The facts and circumstances of the case are largely uncontested.
- [4] The central issue for the determination of this court is the question whether the real property in question was a ‘taxable supply’ under the Act which involves an interpretation of the Act in the context of the peculiar facts and circumstances of the present case.
- [5] This Court is required to construe the Act and to make a determination whether the Claimant was properly assessed by the First Defendant.
- [6] Also raised for determination by this Court is the constitutionality and/or legality of the statutory procedure under the Act for the assessment of GST and also a determination of whether interest and penalties were properly chargeable by the GOB and are due?

### **Background**

- [7] The Claimant is a company duly formed and existing under the laws of Belize. It is the owner and developer of a commercial building situate at No. 1 Coney Drive, Belize City, called Gordon House, (“Gordon House”) and it has a number of other real estate holdings throughout Belize which it rents on a commercial basis.
- [8] The witness Christopher Roe is the managing director of the Roe Group of Companies of which the Claimant and the purchasers of the real estate are a part.

---

<sup>1</sup> No. 49 of 2005.

- [9] Gordon House is the subject of strata title under the provisions of the Strata Title Registration Act. Gordon House was subject to and included strata parcels of land known and registered as Parcels 5011 H2, 5011 H3, 5011 H5, and 5011 H6 Block 16 Caribbean Shores Registration Section (“the strata titles”).
- [10] The Claimant is in the business of renting residential and commercial spaces including office spaces, and the strata titles.
- [11] The First Defendant is a servant or agent of the GOB and is by virtue of section 51(2) of the Act responsible for the administration, assessment, collection, and recovery of GST in Belize for and on behalf of the GOB.
- [12] The Second Defendant is sued as legal representative of the GOB of Belize pursuant to section 42 of the Belize Constitution.
- [13] The Claimant was registered from the 30<sup>th</sup> day of June 2006 for GST, when the construction of Gordon House commenced. The Claimant following its completion, in 2007, had been operating from it.
- [14] In the application for GST the Claimant stated its business activity as being that of “rental of building space” as the only particular.
- [15] The Claimant was required to file GST returns pursuant to the Act.
- [16] The Claimant between 2014 and 24<sup>th</sup> June 2015, as investment opportunities to benefit the purchasers, and/or for continued occupation by them, though not advertised to the public, nor offered on the open market, the strata titles to two of its related<sup>2</sup> (or affiliated) companies, RF&G Insurance Company and RF&G Life, being under a common ownership, (“the Purchasers”).
- [17] The sales took place on two separate occasions, for the total appraised price of \$5.9 million.
- [18] The Purchasers had previously been renting the strata titles which they bought and the Claimant had been paying GST on them.
- [19] The Claimant, however, did not pay GST on the strata titles.

---

<sup>2</sup> As defined by Section 7 of the GST Act.

- [20] The proceeds of sale of the strata titles were then used by the Claimant to build further real estate which it then proceeded to develop into a mixed (offshore data centre and housing) and which is exempted from GST, and for which the Claimant claimed input credits for GST.
- [21] In the first quarter of 2015 there were spikes in claims by the Claimant for input tax credits (being a credit for input tax allowed under section 32 of the Act etc).
- [22] In or around August 2016 the witness, Kirk Archer, as the Auditor of the 1<sup>st</sup> Defendant, reviewed the Claimant's file and observed that high input credits were being claimed by the Claimant for the period 2015. This prompted him, the Auditor, to send the Claimant a letter dated the 30<sup>th</sup> day of August, 2016 notifying the Claimant that the Claimant had been selected by the 1<sup>st</sup> Defendant, for an audit.
- [23] An assessment was then carried out by the First Defendant between 5<sup>th</sup> of September to the 21<sup>st</sup> October 2016.
- [24] On the 12<sup>th</sup> September, 2016 the Auditor, commenced an audit on the Claimant and made his first visit to the Claimant's office. At this visit the auditor met Ms. Esther Popper, who worked in the Claimant's Accounts Department, and was assigned by the Claimants to work with the Auditor on the audit.
- [25] During the audit the Auditor observed that the Claimant was purchasing a significant amount of construction material, and queried the cause of this. The auditor was informed that this pertained to houses in Belmopan that the Claimant was building, for which the Claimant was making input claims.
- [26] The Claimant, knowing that residential buildings were exempted, had apparently made their own corrections in subsequent claims. These corrections had been done by increasing sales and adjusting purchases in the subsequent claims.
- [27] Upon these corrections having been brought to the attention to the Auditor she explained that such corrections ought not to have been made by them, but instead by the Department of GST only after the Claimant had gone

through the purchase ledger and by noting the months of the purchases in which the claims were made for the houses. The Department of GST could then have disallowed the purchases for the houses and decreased the input claims.

- [28] In reviewing the Claimant's sales the Auditor requested to see the Claimant's records and banking information, and noticed a deposit of one million dollars, which he immediately queried. The Auditor was then informed that the deposit was in relation to the sale of the strata titles. As a result the First Defendant was led to conclude that there may be GST implications in relation to the sale of the strata titles, because, it was felt, they could not be treated as capital assets, and had to be treated as a taxable supply pursuant to the GST Act.
- [29] The Claimant was then later informed that there were GST implications for the sale of the strata titles and it was also explained to the Claimant that assessments had to be done for the tax period, during which the sales occurred, to determine what the GST implications would be; but that if there were any objections to the determined GST implications they could request a meeting to have further discussions.
- [30] The audit, as part of the assessment, was concluded on the 21<sup>st</sup> day of October 2016. A report of the auditor's findings was generated.
- [31] After some discourse between the Claimant and the First Defendant on the auditor's findings, a first notice of assessment was duly sent to the Claimant dated the 5<sup>th</sup> day of May 2017 which notice included reassessment for GST for the tax periods between July and October 2014, as well as February, March, May, June, December 2015, and July 2016.
- [32] The total amount of the reassessments was and is for \$1,172,871.36 which included interest (\$293, 618.61) and penalty charges (\$79, 932.05).
- [33] The due date used by the Commissioner of for the payment of GST is the date when the GST return for the period in question should be filed (this court considers it to mean 'ought' to have been) which is 15 days after the end of the tax period to which it relates.

- [34] The Claimant opted to seek a review of the assessments made by way of the said notice.
- [35] An initial letter signed by the Witness Edd Usher, for the 1<sup>st</sup> Defendant, was sent to the Claimant's attorney on the 11<sup>th</sup> day of July 2017 in which a request was made that a security of 20% (amounting to \$811,111.00) of the total assessment be paid pursuant to the GST Act.
- [36] However, the review never happened because the Claimant disagreed with having to pay a portion of the assessment prior to the review as required by the First Defendant.
- [37] At no time were there submissions made on the Claimant's ability to make the 20% security deposit, but rather a protest was made against it all together.
- [38] It was held by the First Defendant that the security deposit was discretionary and that the 20% was fair and reasonable and ought to be paid.
- [39] In relation to the dispute which had arisen the Claimant made an application to have the reassessments reviewed, but no review was allowed because the Claimant would not pay the requested portion of the assessments as required by the First Defendant prior to review.

### **The Court Proceedings**

- [40] As a result of the unresolved dispute the Claimant filed a Fixed Date Claim Form on the 25<sup>th</sup> of August 2017 seeking a number of declarations challenging the constitutionality of the assessments and also disputing the requirement to pay a portion of the assessed taxes before allowing a review; and also applied for two injunctions restraining any further breach of its alleged constitutional rights.
- [41] In the Fixed Date Claim Form the Claimants claimed against the Defendants the following reliefs:
- 1) A Declaration that the sale of real property held as capital assets by a registered taxpayer is not a taxable supply on a true construction of the provisions of section 15 of the General Sales Tax Act when read

together with section 23(2)(ii) of the Act specifically and the other provisions of the Act as a whole;

- 2) A declaration that the assessment, charge, collection and/or recovery of General Sales Tax on the sale by the Claimant of Parcels 5011 H2, 5011 H3, 5011 H5 and 5011 H6, Block 16 Caribbean Shores Registration Section which were held by the Claimant as capital assets is outwith the charging provisions of the General Sales Tax Act and constitutes an arbitrary or unlawful deprivation and/or compulsory acquisition of property of the Claimant in breach of sections 3(d) and/or 17 of the Constitution of Belize;
- 3) An injunction restraining the First Defendant and her servants or agents or otherwise howsoever from unlawfully assessing or charging and/or seeking to enforce the collection of General Sales Tax from the Claimant on the sales of the above-mentioned capital assets;
- 4) A declaration that the assessment by the First Defendant of penalties and/or interest against the Claimant in a First Notice of assessments issued in or about May, 2017, for the tax periods July 2014, October 2014, February 2015, March 2015, May 2015, June 2015, December 2015 and July 2016, are in breach of the provisions of sections 35, 39 and 58 of the General Sales Tax Act and are therefore without lawful authority and constitutes an arbitrary or unlawful deprivation and/or compulsory acquisition of property of the Claimant in breach of sections 3(d) and/or 17 of the Constitution of Belize.
- 5) An injunction restraining the First Defendant and her servants or agents or otherwise howsoever from unlawfully assessing or charging and/or seeking to enforce the collection of penalties and/or interest from the Claimant for the above-mentioned tax periods;
- 6) A declaration that the decision of the First Defendant to require the Claimant to make payment of 20 percent of a total value of taxes, penalties and/or interest claimed by a First Notice of reassessments for General Sales Tax issued in or about May 2017, for the tax periods

July 2014, October 2014, February 2015, March 2015, May 2015, June 2015, December, 2015 and July 2016 before proceeding to a review of the assessments in the circumstances of the Claimant's application for review, without reasons and/or in the absence of duly enacted amendments to the General Sales Tax Act setting forth relevant criteria governing the exercise of the discretion to require such payment, is unreasonable and in breach of the Claimant's constitutional right guaranteed by section 6 of the Belize Constitution to equal protection of the law and to access to a court or competent tribunal to determine the existence or extent of any civil right or obligation;

- 7) Such further or other relief as the Court considers just; and
- 8) Costs.

- [42] The Claim Form was supported by An Affidavit of Mr. Christopher Roe, a director of the Claimant, which was filed on the same day as the Claim Form. The Claimant asserted that the assessment, charge, collection and/or recovery of GST, penalties and interest under the assessments of May 5<sup>th</sup>, 2017, are in breach of its constitutional rights and asks for the reliefs which it sought pursuant to section 20 of the Belize Constitution.
- [43] The Case was managed by this Court and directions given on the 16<sup>th</sup> October and 21<sup>st</sup> October 2017.
- [44] On the 13<sup>th</sup> October 2017 the Defendants filed the 1<sup>st</sup> Affidavit of Mr. Edd P. Usher, a legal officer for the Department of GST<sup>3</sup>, in which the Claimants claims were entirely contested.
- [45] On the 2<sup>nd</sup> November 2017 the Defendants filed the First Affidavit of Kirk Archer, an Auditor of the Department of GST of the Defendants, who deposed to the audit of the Claimant which took place and the results, including events leading to the assessments.

---

<sup>3</sup> Which is by section 53 of the Act is headed by and under the control of the 1<sup>st</sup> Defendant.



- [46] On the 16<sup>th</sup> November 2017 the Defendants filed the 2<sup>nd</sup> Affidavit of Mr. Christopher Roe in support of its claim which sought to respond to the Affidavit evidence of the Defendants (specifically in relation to the sale of the strata titles).
- [47] The parties on the 13<sup>th</sup> February 2018 filed written Submissions and also have agreed a joint Pre-Trial Memorandum.
- [48] At the trial, apart from the evidence of Christopher Roe, who was subjected to cross-examination, the evidence of the other Witnesses were admitted into evidence without challenge.

### **Issues**

- [49] Whether the sale of the Strata Parcels by the Claimant were taxable supplies pursuant to section 15 of the GST Act.
- [50] Whether the Strata Parcels sold by the Claimants at the times of sales had been held by the Claimant as capital assets?
- [51] Whether the inclusion of interest in the reassessments on the additional taxes assessed is unlawful?
- [52] Whether the inclusion of penalties in the reassessments is unlawful?
- [53] Whether the requirement to make an arbitrarily determined payment prior to review as security for an assessment or otherwise is unconstitutional?

### **The Law**

#### **The Constitution of Belize**

- [54] Section 3 of the Belize Constitution provides:

*“Whereas every person in Belize is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed, or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –*

- (a) *Life, liberty, security of the person, and the protection of the law;*
- (b) *Freedom of conscience, of expression and of assembly and association;*
- (c) *Protection for his family life, his personal privacy, the privacy of his home and other property and recognition of his human dignity; and*
- (d) *Protection from arbitrary deprivation of property'*

*the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.”*

[55] Section 17 of the Constitution states:

- (1) *“No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under a law that-*
  - (a) *Prescribes the principles on which and the manner in which reasonable compensation therefor is to be determined and given within a reasonable time; and*
  - (b) *Secures to any person claiming an interest in or right over the property a right of access to the courts for the purpose of-*
    - (i) *Establishing his interest or right (if any);*
    - (ii) *Determining whether that taking of possession or acquisition was duly carried out for a public purpose in accordance with the law authorizing the taking of possession or acquisition;*

- (iii) *Determining the amount of the compensation to which he may be entitled; and*
  - (iv) *Enforcing his right to any such compensation.*
- (2) *Nothing in this section shall invalidate any law by reason only that it provides for the taking possession of any property or the acquisition of any interest in or right over property-*
  - (a) *In satisfaction of any tax, rate or due;”*

### The GST Act

[56] The Act, states, as its objective, that it is an act *“to make new and comprehensive provisions for the imposition and collection of a broad based tax on the consumption of goods and services in Belize”*.

[57] Section 2(1) of the Act goes on to define the following terms contained within it in the following ways:

*“capital assets”* as:

*“...an asset, whether tangible or intangible, acquired by a person for use in the person’s business but does not include,*

*(a) consumables or raw materials; or*

*(b) an asset acquired for the principal purpose of resale in the ordinary course of carrying on the person’s business, whether or not the asset is to be sold in the form or state in which it was acquired.”*

*“goods”* as *“any tangible property, whether real or personal, but does not include money”*.

*“GST”* or *“general sales tax”* as *“the tax imposed under this Act, and included any amount to the extent that it is treated as GST for the purpose of this Act, including interest or a penalty payable under this Act, and in the absence of a specific reference to the inclusion of such amounts in a*

*particular provision should not be taken to imply that they are not included in the CST referred to in that section”*

*“real property” as including “an estate, interest, easement, or right, whether equitable or legal, in, to, or out of land, and includes things attached to land or permanently fastened to anything attached to land”.*

*“strata corporation” as “a corporation established under section 5 of the Strata Titles Registration Act or any similar person including, without limitation, a trust, a company, or another person if units in the trust, shares in the company, or other membership interests in the person carry with them an entitlement for the holder to occupy any land or part thereof for any period”*

[58] Under Section 3(1) of the Act a “business” is also defined as follows:

*“to be taken to include the following activities, whether or not carried on for pecuniary profit:*

- (a) A trade, profession or vocation;*
- (b) An activity that involves or is intended to involve, in whole or in part,, the supply of goods or services to another;*
- (c) An activity that involves or is intended to involve the supply of membership, facilities, or advantages to its members by a club, association, or organization, including a strata corporation;*
- (d) An activity involving the admission of person to any premises.”*

[59] In considering whether an activity amounted to a trade, and possibly even a business, the intention of the person in question may be relevant. It has been authoritatively and relevantly noted in relation to trading (also applicable in determining what is a business) that:

*“Trading requires an intention to trade: normally the question to be asked is whether the intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into trading stock – and, I suppose, vice versa. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company’s accounts, and possibly, a liability to tax; See Sharkey v Wernher.*

*What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor for it to possess an indeterminate status- neither trading stock nor permanent asset. It must be one or the other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that situations are open to review.<sup>4</sup>”*

[60] Thus the intention of the party may be taken into account by a Court in determining what a business is and what is involved in any business activity.

[61] Section 3(2) the Act then goes on to provide provides that:

*“Anything done in connection with the commencement or termination of a business shall, for the purposes of this*

---

<sup>4</sup> Lord Wilberforce in *Simmons v I.R.C.* [1980] 1 W.L.R. 1196.

*Act, be regarded as done in the course of, or furtherance of, the business.”*

[62] Section 5 of the Act defines a “*supply of goods*”, as: “*a sale, exchange, or other transfer of the right to dispose of goods as owner but does not include a supply of money*”; and makes provisions for how goods or services should be treated when a taxable person receives input tax credits.

[63] Section 5(4)(c) of the Act specifically states in relation to a “*supply of goods*” as follows:

*“(4) If a taxable person,*

*(a) applies goods or services wholly to a private or exempt use; or*

*(b) having used the goods wholly or partly in its business, applies them in the manner described in paragraph (a) from a particular time onwards; and*

*(c) the taxable person is or has been allowed an input tax credit in respect of part or all of the input tax incurred on the acquisition or importation of the goods or services,*

*the application is treated as a supply of the goods or services by the taxable person.”*

[64] A “*fair market value*” in relation to a supply of goods is then defined by the Act to include:

“

*(a) the consideration the supply would fetch in an open market transaction freely made between unrelated persons”, or,*

*(b) if it is not possible to determine an amount under paragraph (a), the consideration a similar supply would fetch in an open market transaction freely made between unrelated persons, adjusted to take account of the differences between such supply and the actual supply, determined on the basis of the market conditions, including*

*the registration status of the supplier, prevailing at the time and place of the actual supply”<sup>5</sup>.*

[65] Section 15 of the Act sets out the charging provision for GST and state the general conditions that would have to exist in order for a person to make a taxable supply, and would therefore be liable for the payment of GST under the Act. It states:

*“(1) A supply of goods or services is a “taxable supply” if the supply,*

*(a) is made in Belize;*

*(b) by a taxable person;*

*(c) in the course or furtherance of a business carried on by that person; and*

*(d) is not an exempt supply.*

*(2) Where a registered person ceases to carry on a business, or ceases to be registered but continues to carry on business, the person shall be deemed at that time to have made a taxable supply of goods or services on hand at that time, but only if the person was allowed an input tax credit in respect of the acquisition or importation of those goods or services, or in respect of the acquisition of goods or services which have been subsumed into those goods or services.”)*

[66] The office of the First Defendant, is responsible for the collection of the GST payable on taxable supplies<sup>6</sup> assisted and supported by the Department of GST headed by the incumbent.

[67] The time of the supply is generally when an invoice for the supply is issued by the supplier or when any of the consideration for the supply is received<sup>7</sup>.

[68] Section 28 of the Act, in relation to notification of changes, goes on to state:

---

<sup>5</sup> See Section 6 of the GST Act.

<sup>6</sup> See Section 16 and 51 of the GST Act.

<sup>7</sup> See Section 18 of the GST Act.

*“(1) A registered person shall, within seven days of the relevant event give the Commissioner notice in writing of,*

*(a) any change affecting the accuracy of the particulars provided by him in his application to be registered;*

*(b) the business in respect of which the person is registered closing down; or*

*(c) any other matter of which he is required by the regulations to give the Commissioner notice.*

*(2) Where a registered person,*

*(a) dies;*

*(b) becomes bankrupt;*

*(c) goes into liquidation or receivership; or*

*(d) becomes a party to an amalgamation,*

*the registered person or the person responsible for the affairs of the registered person shall, within twenty-one days, give the Commissioner notice in writing thereof.*

*(3) Where the Commissioner has not been given notice as required by this section of any matter relating to a registered person, he may assess that person under this Act and otherwise exercise his powers under this Act as if the matter of which the notice was required to be given under this section had not taken place, and the registered person, or the estate of the registered person is liable accordingly.*

*(4) A person contravening this section commits an offence and is liable on summary conviction to a fine of not less than one*



*thousand dollars and not more than three thousand dollars, and an additional fine of one hundred dollars in respect of each day during which the offence has continued, or to imprisonment for a term not exceeding one year, or to both such fine and imprisonment.” (Emphasis added)*

[69] Section 30(3) of the Act provides for the making of GST returns as follows:

*“A GST return shall be furnished to the Commissioner at the address specified on the form –*

*(a) within fifteen days after the end of the tax period to which it relates; or*

*(b) where the person ceases to be registered during a tax period, within fourteen days after the person ceases to be registered,*

*or within such further time as the Commissioner ay, in writing allow.”*

[70] Thus a registered person is required to account for and to pay GST tax for each tax period (or part) during which the person is registered; and to file a GST return in accordance with the GST Act.

[71] Section 35(1) of the Act provides, in relation to a GST return, that

*“a person who is required by section 30 to furnish a GST return in respect of a tax period shall within the time allowed by that section for furnishing the return, pay to the Commissioner the amount of tax, if any, calculated in accordance with this Act as being payable in respect of that period.”*

[72] And section 35(4) then goes on to provide that:

*“Subject to the provisions contained in Division 6 of this Part, the amount specified in a GST return as being the*

*amount of tax payable, or the amount of refund due, in respect of a tax period shall be conclusively deemed for the purposes of this Act to be correct.”*

[73] Section 39(1) (a) provides for a ‘best judgment’ assessment by the Commissioner when a person fails to submit a GST return in accordance with the Act.

[74] The provisions contained in Section 39 (1) - (3) of the Act may be of relevance and is as follows:

*“(1) Where –*

*(a) A person fails to furnish a GST return in accordance with this Act;*

*(b) A person requests the commissioner, in writing, amend a GST return that the person has furnished under this At;*

*(c) The Commissioner is not satisfied with a GSt return made y any person or as to any matter on the basis of which the return is prepared; or*

*(d) A taxable person who is not registered makes a taxable supply,*

*The Commissioner may assess, in the best of his judgment, the amount of tax that should be payabnler, by, or the refund that should be due to, that person in respect of the tax period concerned and the amount so assessed is payable in lieu of trhe tax that would otherwise be payable, or refund that would otherwise be due, to that person in respect of that tax period.*

*(2) An assessment under paragraph (1)(d) does not prevent the imposition of penalties under section 22 for failure to apply for registration.*

*(3) Where a person who makes a supply –*

- (a) *Falsely represents that GST is charged on that supply;*
  - (b) *Falsely represents the amount of GST charged on that supply; or*
  - (c) *Otherwise recovers or seek to recover an amount falsely represented to be in respect of GST,*
- The Commissioner may assess that person as being liable to pay an amount of tax on the basis of so much of the amount that was represented to be charged as tax as appears to the Commissioner to exceed the amount, if any, payable in relation to the supply.”*

[75] Section 39(1(a) of the Act provides for a best judgment assessment when a person fails to submit a GST return in accordance with the Act and section 39(3) provides for an assessment where a person who makes a supply – (a) falsely represents that GST is charged on that supply; (b) falsely represents the amount of GST charged on that supply; or (c) otherwise recovers or seeks to recover an amount falsely represented to be in respect of GST.

[76] Thus Section 39(3) provides for an assessment where a person who makes a supply – (a) falsely represents that GST is charged on that supply; (b) falsely represents the amount of GST charged on that supply; or (c) otherwise recovers or seeks to recover an amount falsely represented to be in respect of GST.

[77] Section 39(4) also confers a discretion on the Commissioner to include penalties in an assessment in certain limited circumstances. It provides

*“where an assessment of the tax payable by a person is made or amended under this section wholly or in part as a result of an act or omission of that person that constitutes an offence against this Act, the assessment may include such additional amount by way of penalty as the Commissioner sees fit, but so*

*that the additional amount does not exceed three times the amount of GST (other than penalty) that is included in the assessment or amendment as a result of the act or omission that constitutes the offence.”*

[78] Section 39(7) of the Act (which also deals with Assessments) requires that the Commissioner provides a written notice as follows:

*“The Commissioner shall give to the person to whom an assessment relates notice in writing of the assessment, or of the amendment or vacation of the assessment, and any amount required by the assessment or amended assessment to be paid by that person shall be paid within 30 days after the notice is given.”*

[79] As GST Board is appointed under the Act and exists to hear and determine objections against assessments made under the Act; or to determine other matters where an appeal lies under the Act<sup>8</sup>. Time limits and a procedure are provided for under the Act<sup>9</sup>.

[80] If the Commissioner or a person is dissatisfied with a determination of the Appeal Board, either of them may then appeal, on a point of law, to the Supreme Court as provided for by the Act<sup>10</sup>.

[81] Section 45 of the Act then has a somewhat stringent, some may say draconian provision, of a so-called ‘pay to play’ provision as follows:

*“An application for review by the Commissioner under section 42, or for an appeal to the Board or the Supreme Court under Sections 43 and 44 shall not be entertained or heard unless and until the appellant has paid to the Commissioner at least 50% of the tax which is the subject of the appeal or review.”*

---

<sup>8</sup> See Section 41 of the GST Act.

<sup>9</sup> As above and at Section 41-43 of the GST Act.

<sup>10</sup> See Section 44 of the GST Act.

[82] Section 58 (1)-(3) of the Act then goes on to provide for interest and penalties for outstanding GST in the following terms:

*“(1) Where any amount that a person is required to pay to the Commissioner is not paid by the due date, the amount outstanding shall bear a penalty of ten percent and in addition there shall be levied interest at the rate of 1½% per month or part thereof.*

*(2) The Commissioner may, where he is satisfied that the circumstances of the case justify the reduction or waiver of a penalty arising under subsection (1), reduce or waive the penalty accordingly.*

*(3) in this section “due date” is the date specified in section 30(3) as the due date when the GST return for the period in question should be filed, save that where tax is assessed under section 39(1)(a) or (3), the due date is twenty-one days after the end of the tax period to which the assessment relates or in which the supply to which the assessment relates was made.”*

[83] The meaning of section 58(3) appears on its face to be clear. But the apparent simplicity of its apparent formulation is belied by the somewhat complicated, or careful and painstaking reading which is required to decipher its meaning.

**Whether the sale of the Strata Parcels by the Claimant were taxable supplies pursuant to the Charging Provision (Section 15) of the General Sales Tax Act?**

**Claimants Submissions on Charging Provision**

[84] The Claimant generally accepts: (a) that the Claimant is a taxable person (b) that the sale of the strata lots took place in Belize, and (c) that these lots are not exempt supplies.

- [85] It is however submitted that there is an evident ambiguity in the charging section of the GST Act, Section 15, with regard to the Claimant's capital assets, the strata lots sold, which ambiguity this court has to resolve in accordance with the principle against ambiguous governmental imposition<sup>11</sup>.
- [86] The Claimant relies on, what it considered to be, the well-established legal meaning which has been given to the phrase in relation to other taxing provisions, notably in the UK, in which is included the phrase: "*in the course or furtherance of a business*". This meaning, the Claimant submits, is to the effect that for an activity to constitute a business: "*the activity must ...involve the making of supplies over an appreciable tract of time and with such frequency as to amount to a recognizable and identifiable activity of the person on whom the tax liability is to fall*"<sup>12</sup>.
- [87] The Claimant therefore submits that the sale of the strata lots were part and parcel of a reconfiguration of the Claimant's real estate investments and were simply not in furtherance or in the course of a business of the Claimant because: (i) they were isolated transactions over a short period of time; (ii) the lots were not offered to the public for sale but sold to related parties only; and (iii) there was never any intention to engage in the trade of selling strata lots.
- [88] The Claimant then submits that the sales by them, of strata lots, which gave rise to the reassessments, were unusual and outside the scope of its usual business activity of renting office spaces. But that they were indeed isolated activities done with a view to reorganize the Claimant's capital investments, and were not of the requisite frequency, or done over an appreciable tract of time, with such frequency, as to constitute a trade or a business.

---

<sup>11</sup> See *Speednet Communications Ltd v Public Utilities Commission* [2016] CCJ 23.

<sup>12</sup> <sup>12</sup> See Halsbury's 4<sup>th</sup> Edition Volume 49(1) para. 23 et. seq.

- [89] The Claimant submits that its interpretation is consistent with the situation in the case of Welcome Trust Ltd. v Customs and Excise Commissioners<sup>13</sup>.
- [90] Also, the Claimant submits, that the confinement of sales only to related or affiliated companies further support its argument that the sales were a none-business activity, because of the small number of sales, the limited nature of the advertising, and the company's selectivity in accepting purchasers<sup>14</sup>.
- [91] The Claimant also submits that it was never its intention, when constructing the commercial building at Gordon House, to sell off strata lots within the building, as 'a' business activity. That for this simple reason, the sale of what are capital assets, is excluded from the charging provisions of the Act as taxable supplies when properly construed.
- [92] The Claimant therefore submits that the assessments of GST on the sales of strata lots by the Claimant were accordingly outside the charging provision of the GST Act.

#### Defendants' Position on Taxable Supplies

- [93] The Defendants submit that Section 2(1) of the Act is clear in that a capital asset is one acquired to be used in a person's business. Also that the building constructed by the Claimant for the purpose of renting office space, has already been the subject of claimed input tax and that under Section 5 the parcels are to be treated as a taxable supply, since the Claimant has already received input claims for the construction of the building.
- [94] The Defendants also submit that upon the sale of the parcels the Claimant ceased to carry on the business of renting those specific unit or office space (which were initially acquired as capital assets for the furtherance of its rental business) and as such, and by the sale, created a service which was subject to the payment of tax under the GST Act.

---

<sup>13</sup> [1996] ALL ER (EC) 589,

<sup>14</sup> In Rainheath Limited, Rainheath which was registered for VAT in respect of its pig farming business and the company bought a boat. It claimed that the boat was to be used for chartering to the public.

[95] It is finally submitted by the Defendants that the Act is very clear on the provisions of what is a taxable good or supply, and that in the instant case the Claimant, having held the parcels as a capital asset, no longer did so when the sale was carried out. That the parcels then became a taxable supply, since the sale was outside of the scope of the Claimant's business activity, and the Claimant received input credits for the construction of the property.

### Determination

[96] I have carefully looked at the applicable provisions of the Act and the all the possible interpretations which I have been asked to consider.

[97] In particular I have carefully read, considered and have been assisted by the written and oral submissions of Counsel for all parties (for which I am grateful).

[98] I consider that in relation to the present issue the simple question which this court has to answer is whether, on the facts and in the circumstances of the present case, there is a taxable supply by the Claimant.

[99] In the present context a taxable supply would involve the sale by the Claimant, in Belize (which is uncontested) to the purchasers, of the strata titles, which sales are constituted or effected by the supply<sup>15</sup>, of goods (in this case real property which strata tiles are), in the course or furtherance of a business carried on by the Claimant.

[100] The only real question therefore for determination by this court is whether such sale was '*in the course or furtherance of a business carried on by*' the Claimant.

[101] This court does not find any ambiguity within the terms of the charging provision (Section 15 of the GST Act); nor in its application to the facts of the present case (which is largely undisputed) as already found.

---

<sup>15</sup> The sale, exchange, or other transfer of the right to dispose of goods as owner.



- [102] This court does not consider there is any, or any reasonable, doubt about the meaning of this provision; and, in any event, would therefore determine, on balance, that the sale of the strata lots were done in the course of and/or in furtherance of a business carried on by the Claimant.
- [103] This court has no hesitation in determining that the sale was clearly, and even undoubtedly, done as a business which was being carried on by the Claimant.
- [104] This court considers, after looking at all the facts and circumstances of the case, that the Purchasers bought the strata titles as investment opportunities and/or for occupation. That though not advertised to the public nor offered for sale on the 'open market', all four strata titles were sold, not merely transferred, nor otherwise gifted, to two of its related (or affiliated) companies, but were sold for the considerable, and the appraised price, totaling \$5.9 million. That the transactions clearly had a significant commercial, likely the fair market, value, as the purchasing companies had previously been renting the Units which it bought, and therefore it would no longer have to pay any rent for them, and the Claimant had previously been paying GST on the rental of these Units, and the properties were valued before sale.
- [105] The Claimant went to great lengths to establish the commercial and business nature and the bona fides, of the transaction to its affiliated or related companies. As such the transaction might be deemed '*an open market transaction*' freely made between related persons. Alternatively the transaction may be considered as being for a consideration for which a similar supply would fetch in an open market transaction freely made as if done between unrelated persons adjusted to take account of the differences between such supply and the actual supply, and determined on the basis of the market conditions, including the registration status of the Claimant prevailing at the time and place of the actual supply.

- [106] The transactions was in furtherance of a business of the Claimant as in addition to taking steps to ensure that something of a 'fair market value'<sup>16</sup> was obtained, by getting an appraisal, the proceeds of sale were then in fact used to fund further commercial opportunities which the Claimant was pursuing, namely the building or development of further business ventures by way of property transactions for a profit. So clearly it was a part, or in the course or even in furtherance of a business, which the Claimant was carrying on, pursuing or indeed operating.
- [107] This court does not therefore accept the Claimants argument that there is an evident ambiguity within Section 15, the charging section, of the Act, nor in the application of this section to the facts and circumstances of the present case.
- [108] With regard to the Claimant's arguments relating to the sold strata titles being capital assets, this court finds that this argument has no relevance to the issue under consideration. That indeed it is a 'red herring' or to mix metaphors, that it is a 'smoke screen' used to confuse the issue under consideration. This court, based on its interpretation of the charging provision of the Act under consideration does not therefore derive or find any assistance from any of the cases upon which the Claimants has relied, in the face of the Court's interpretation of the GST Act.
- [109] This court therefore finds that the principle against ambiguous governmental imposition does not apply to the Charging provisions and has no application to the facts of the present case.
- [110] If this court is wrong about its interpretation, in deference to the arguments raised by the Claimants, it will consider the other arguments raised by the Claimant under this issue.
- [111] This court does not agree with the Claimant that on the facts of the present case that the sales of the strata lots were part and parcel of a 'reconfiguration' of the Claimant's real estate investments. The evidence of such a 'reconfiguration' was to say the least thin.

---

<sup>16</sup> As defined by Section 6 of the GST Act.

[112] Further this court has carefully considered the facts of the present case and has concluded that in effect the four transactions involving the sale of four strata titles, in the course of what likely was about 18 months, could not be considered 'isolated' transactions over a short period of time. This court considers that such four transactions, for a total of \$5.9 million, is clearly significant transactions which were far from isolated; indeed that in fact such four transactions clearly established a pattern of trading by selling real estate which it owned. The fact that the lots were not offered to the public for sale but were sold to related parties in the circumstances of the present case, was neither 'here nor there', as it were, as clear steps had been taken, including by selling at appraised values, to establish some kind of market-value and to put some commercial or business distance between the purchasers and the Claimant.

[113] This court is also of the view that the state of the evidence in relation to the Claimant's intention, including, as alleged by it, in relation to the constructing of the commercial building at Gordon House, was not to sell off strata lots within the building as a business activity, may clearly be within the power of the Claimant to disguise, or not to disclose. But has concluded that looking objectively, from all the facts and circumstances of the case as found by this court, on balance, even with the burden being on the Defendant to disprove such an intention, which it may not be as the Defendant are not making the assertion but the Claimant is making this assertion and has to prove it, that there is a sufficient basis, outlined already (including the short space of time of the sales, number of transactions and course of dealings of the Claimant), for this court to determine that the Claimant had a clear intention to engage in the trade of selling strata lots.

[114] This court cannot in the circumstances of the present case find that the sales by the Claimants of the strata lots, which gave rise to the reassessments, were unusual and outside the scope of its usual business activity of renting office spaces, done with a view to reorganize the Claimant's capital investments, but this court finds, as already determined

by it, but that such sales were of a nature in the course of and or/or in furtherance of its trade or a business.

[115] This court is not assisted by the case referred to by the Claimant of *Welcome Trust Ltd. v Customs and Excise Commissioners*<sup>17</sup>. In that case the Trustees were by a court order required to make all reasonable efforts to avoid engaging in trade when exercising their investment powers. The Claimant was and is not under any such prohibition.

[116] The court is not persuaded by the Claimants self-imposed, as it were, confinement or restriction of sales only to affiliated (or related) companies; as well as the so-called limited nature of the advertising; and the decision of the Claimant itself to impose on itself selectivity in accepting purchasers. This Court is, however, persuaded, as has already been found, that it was engaged in business activity, of 4 strata titles for a significant sum, in a relatively short period of time.

[117] This Court therefore has determined that the assessments of GST on the sales of strata lots by the Claimant were accordingly clearly within the charging provision of the GST Act.

**Whether the Strata Parcels sold by the Claimants at the times of sales had been held by the Claimant as capital assets?**

The Claimant's Submissions

[118] The Claimant submissions under this heading, as a largely economic argument, is somewhat involved.

[119] The Claimant submits that the strata lots sold by them were fixed capital of the Claimant, which operated to generate income therefrom.

[120] The Claimant also submits that the GST, as a broad based consumption and value added tax, and by its very nature as a tax on the value of gross income of goods and services produced by a business, it would make no economic sense whatsoever to tax depreciation, and that therefore from a

---

<sup>17</sup> [1996] ALL ER (EC) 589,

conceptual standpoint it is therefore very difficult to see why or how such a broad based consumption tax should be made to apply to capital.

[121] This, the Claimant submits is because the value added by business activity takes the form of and is measured by the flow of money generated from sales in the course of business activity over time, and that its Capital, as goods used in the production of income, is consumed in and by the production process itself, and is “depreciation”, which cannot or ought not to be taxed.

[122] The therefore submits that it is highly doubtful from a conceptual standpoint that sales of capital assets by a business should be treated as taxable supplies and subjected to a broad based consumption and value added tax such as the GST.

[123] The Claimant in making this submission relies on the provisions of section 22(2) (ii) of the GST Act, which expressly provides that the value of a supply by way of sale of one or more capital assets of a person is not to be taken into account when determining whether or not the supplies of a person meet the threshold requirement for registration for GST.

[124] Finally the Claimant submits that the sale of a capital asset in the course of a reorganization of capital is simply not a supply in the course or in furtherance of a business within the meaning of section 15 of the Act.

#### The Defendant’s Submissions

[125] The Defendants submit that the strata titles which the Claimant sold were not capital assets at the times when they were sold.

[126] The Defendant relies on Section 2(1) of the Act and its definition of “*capital assets*” as “*acquired by a person for use in the person’s business*”:

[127] The Defendants submit that from this section, and definition, it is clear that a capital asset is one acquired to be used in a person’s business, but that Gordon House, which contained the strata parcels sold, it is to be deduced by design, was constructed by the Claimant for the purpose of the commercial renting of office space. That as such, the Claimant having

already claimed input tax credits for the construction of the said building, it could not be considered capital assets.

[128] Further, the Defendants submit, that Section 5 of the Act defines a supply of goods and services, and makes provisions for how goods or services should be treated when a taxable person receives input tax credits.

[129] The Defendants therefore submit that in consideration of Section 5 of the Act the parcels are to be treated as a taxable supply, since the Claimant has already received input claims from the construction of the building.

### Determination

[130] Within the context of the present issue, relating to the charging provision of the Act, and with regard to the Claimant's arguments relating to the sold strata titles being capital assets, this court having already found that this argument did not have any relevance to the previous issue, similarly this court so finds, and necessarily must similarly so find, in relation to the present issue under consideration.

[131] This court is not able to find and is therefore unable to determine that the strata lots sold by them, either comprised or even largely comprised, prior to its sale, fixed capital of the Claimant, which only operated to generate income therefrom. This court is not able to find any, or any sufficient, evidence of such intention by the Claimant.

[132] This court is also not persuaded by the Claimant's argument that the GST, as a broad based consumption and value added tax, and by its very nature as a tax on the value of gross income of goods and services produced by a business, that it makes no economic sense whatsoever to tax depreciation, and that therefore from a conceptual standpoint it is therefore very difficult to see why or how such a broad based consumption tax should be made to apply to capital. This argument, which is not necessarily accepted, may make economic sense, but it certainly does not, in the determination of this court, make any legal sense as a tool for interpreting the provisions of the

Act. Neither has sufficient evidence been produced to this court to enable it to come to any such conclusion.

- [133] The economic arguments may make good economics but in and of themselves do not, and cannot, make good law, for not taxing it. This court was not assisted in relation to this issue by the economic argument about the value added by business activity, the flow of money generated from sales in the course of business activity over time which created Gordon House, being the alleged Capital, which was used in the production of income, and being consumed in and by the production process itself, constituting “depreciation” which is not taxable.
- [134] This conceptual argument this court found to be singularly unhelpful along with that of the argument that sales of capital assets by a business ought not to be treated as taxable supplies and subjected to a broad based consumption and value added tax such as the General Sales Tax.
- [135] This court is not assisted by the provisions of section 22(2) (ii) of the Act, which expressly provides that the value of a supply by way of sale of one or more capital assets of a person is not to be taken into account when determining whether or not the supplies of a person meet the threshold requirement for registration for GST. This issue does not concern the registration for GST but whether there is a ‘taxable supply’. Also that this is a specific statutory exemption which does not and cannot assist the Claimant.
- [136] Further the evidence that the strata titles sold were capital assets, such as it is, is self-serving and unsupported by any objective facts, and as such this court is not persuaded by it.
- [137] That for these reasons, this Court has concluded that the sale of the strata lots were not necessarily, nor likely, capital assets, and is therefore excluded from the charging provisions of the Act, as taxable supplies, when properly construed.
- [138] Finally this court is not able to find, on the facts of the present case that the sale of the strata parcels was in the course of any reorganization of the

Claimant's capital. This court has already determined that it was in the course of the Claimant's business which it had embarked upon and is simply a supply in the course or in furtherance of a business within the meaning of section 15 of the Act.

[139] This court similarly finds, in relation to the present issue, that this is a 'smoke screen' used to confuse the issue under consideration.

**Whether the inclusion of interest in the reassessments on the additional taxes assessed is unlawful?**

[140] Having found that the claim herein is absolutely without any basis and ought to have been paid by the Claimant this court could considers that both the payment of interest and penalties may be due.

Claimant's Submissions

[141] The Claimant submits the charging of the interest from the dates of the relevant tax periods included in the assessments were nonetheless unlawful.

[142] The Claimant submits that under Section 58 of the Act interest can only be assessed from the period running 21 days from the end of the tax period to which the assessment relates in two exceptional cases: (i) where there is an assessment for the failure to submit a return; and (ii) where there is an assessment for misrepresenting the nature or amount of GST charged, neither of which are applicable in the instant case.

[143] It is also submitted to this Court that the meaning of section 58(3) is clear. That is that the due date for the payment of GST by a registered taxpayer is the same as the due date for the filing of the tax return which is within 15 days after the end of the tax period to which the return relates save where (i) there is an assessment in accordance with section 39(1)(a) or 39(3), when the due date is instead twenty-one days after the end of the tax period to which the assessment relates or whether the taxpayer ceases to be registered within 14 days after ceasing to be registered or within such further time for the payment of the tax as the Commissioner allowed.



- [144] It is therefore submitted that in accordance with section 58, interest can therefore be charged running from 21 days after the date of the end of the tax period to which an assessment relates where there is an assessment pursuant to section 39(1)(a) or 39(3).
- [145] It is further submitted that none of the assessments under consideration accordingly come within the exceptional circumstances provided for by section 58 for the due date for additional taxes on an assessment to relate back to the relevant tax period.
- [146] The result of the statutory scheme, it is submitted by the Claimant, is that the GST is payable on the submission of a GST return on the amount calculated in the return as payable unless and until there is an assessment in which case the additional GST assessed is due within 30 days of the notice of assessment. And interest can only be charged on additional taxes assessed pursuant to the provisions of section 58(3) in an assessment for the period running from 21 days after the end of the relevant tax period to the date of the assessment where the assessment is made on the basis of section 39(1) (a) or 39(3) only of the Act.
- [147] It is submitted that apart from the two exceptional types of assessments described by section 58(3) (which do not apply in the instant case), additional taxes assessed as payable for any tax period simply are not due and payable during the period running from the date of the relevant tax period to the date of assessment so that no interest or penalties can attach thereto in accordance with the provisions of section 58 of the Act during that period.
- [148] The Claimant says that no criminal offence has been alleged or proven against the Claimant arising out of the reassessments or otherwise so that the First Defendant could not have levied penalties in the assessments on the basis of section 39 (4).
- [149] It is therefore submitted by the Claimant that the assessments of interest on the value of GST assessed on the sales of strata lots by the Claimant were

accordingly entirely outside the charging provision of the General Sales Tax Act.

### Defendants' Submissions

[150] The Defendants submit that the inclusion of interest in the reassessments were lawful and done in accordance with the provisions in the Act, because section 58 of the Act empowers the First Defendant to apply them starting from the due date when the GST return for that period in question should have been filed.

[151] Therefore, it is submitted, because the Claimant filed for input credits on residential homes, which are exempted, and then proceeded to correct the error in their own way, the relative periods of GST returns had to be reassessed so the errors could have been properly corrected.

[152] Also, that in the period of the sale of the parcels it had to be reassessed since the Claimant did not charge the necessary GST on those sales. As a result of these reassessments, the Defendants respectfully submit, that the Claimant was found to have been in arrears for GST for the periods in questions, and that hence it is completely lawful within the Act to add penalties and interest.

### Determination

[153] The question arises in relation to this issue: when is the due date?

[154] The answer to this question, this court has determined, is any of the following, as the date when the GST return for the period in question should be filed

- (a) within fifteen days after the end of the tax period to which it relates;
- (b) within fourteen days after the person ceases to be registered (where the person ceases to be registered during a tax period).
- (c) within such further time as the Commissioner may, in writing allow;

Or,

The due date is otherwise twenty-one (21) days after the end of the tax period to which the assessment relates or in which the supply to which the assessment relates was made where tax is assessed in the following stipulated statutory circumstances:

- (a) Where a person fails to furnish a GST return in accordance with this Act;
- (b) Where a person who makes a supply falsely represents that GST is charged on that supply;
- (c) Falsely represents the amount of GST charged on that supply; or
- (d) Otherwise recovers or seek to recover an amount falsely represented to be in respect of GST,

[155] This court determines, contrary to the Claimant's submission, that under Section 58 of the Act, a person is required to pay to the Commissioner interest on any amount outstanding from 21 days after the end of the tax period to which the assessment relates or in which the supply to which the assessment relates was made where tax is assessed, in the following stipulated statutory circumstances:

- (a) Where a person fails to furnish a GST return in accordance with this Act;
- (b) Where a person who makes a supply falsely represents that GST is charged on that supply;
- (c) Falsely represents the amount of GST charged on that supply;  
or
- (d) Otherwise recovers or seek to recover an amount falsely represented to be in respect of GST,

[156] Such circumstances do not amount to merely so-called, two cases, but a number in excess of the two exceptional stated cases which the Claimant has stipulated which it has set out as follows: (i) where there is an assessment for the failure to submit a return; and (ii) where there is an

assessment for misrepresenting the nature or amount of GST charged, neither of which are applicable in the instant case.

[157] This court has carefully considered the facts and circumstances of the present case and has concluded that, in not furnishing a GST return for the taxable supply in relation to the strata titles, the Claimant is and was a person who failed to furnish a GST return in accordance with this Act.

[158] Also if this court had to rule on the issue on the evidence before it would have found that the Claimant is more likely than not a person who falsely misrepresented the amount of GST which was to be charged on that supply by such failure. But this court in view of the position which it takes does not have to go so far and does not make such a finding. This court certainly, however finds, on the evidence before it that the Claimant is likely not a person with clean hands in relation to the payment of the GST on the strata titles.

[159] It appears to this court, upon such a careful reading of the possible applicable provisions that the due date for the filing of the tax return is indeed within 15 days after the end of the tax period to which the return relates.

[160] This court does correspondingly does not find that the provisions relating to their having been an assessment relevant to the present case and therefore find that section 39(1)(a) or 39(3), does not apply and the due date is not instead twenty-one days after the end of the tax period to which the assessment relates. Neither it is the provision relevant relating to the taxpayer having ceased to be registered – the due date possibly being within 14 days after ceasing to be registered.

[161] The provision relating to the Commissioner allowing further time similarly does not apply.

[162] In accordance with section 58, interest is chargeable from is within 15 days after the end of the tax period to which the return relates,

[163] This court has carefully looked at and considered the applicable provisions and has determined that, though these provisions have not been helpfully

drafted for the benefit of any taxpayer – they are somewhat complicated - this court considers that they are clear enough and as drafted the Claimant falls squarely within Section 58 (1) of the Act.

[164] Therefore this court considers that of the arguments outlined above on behalf of the various parties, this court would prefer the interpretation and application of the provisions by the Defendants.

[165] This court will therefore find that that the interest claimed, being consistent with the determination of this court above, are lawful and due by the Claimants as stated by the Defendants.

**Whether the inclusion of penalties in the reassessments is unlawful?**

[166] This court has carefully looked at and considered the applicable provisions to penalties and has determined that the position in relation to interest generally applies in like manner as they relate to interest as they contain the same provisions principles.

[167] There is a difference, however in that Section 58(2) of the Act contains a statutory discretion, whereby the Commissioner may, if satisfied that the circumstances of the case justify the reduction or waiver of a penalty arising from the provision allowing for the charging of the penalty, reduce or waive the penalty accordingly.

[168] In relation to the exercise of this discretion I would invite the First Defendant, in view of my determination appearing below, on the Constitutionality of 'pay to play' provision', to waive they penalty.

[169] I must say that it would have been preferable for there to have been a waiver of the penalty rather than create a situation where the jurisdiction of this court, as a constitutional court and/or a court of equity to have been invoke a mechanism to resolve the dispute which has arisen between the parties.

[170] I certainly consider that it was reasonable for the Claimant to have pursued his remedy to seek to invalidate the pay to play provision in the Act.

[171] This court considers as a constitutional court, and as a court of equity, it has jurisdiction to review the imposition of this statutory penalty, imposition of a

lump sum which may be seen to be arbitrary, and as an unreasonable fetter to the review process under the Act.

[172] This court however, understands the statutory purpose of providing an incentive and encouragement for the payment of taxes due.

[173] This court considers that the presence of a provision granting a discretion to the Commissioner to mitigate the harshness of the provision is, in the view of this court, no adequate palliative to the possible unfairness of such a measure.

[174] In any even this court considers that in any even the Commissioner could not have more powers or discretion than this Court, whether statutory or otherwise, and would in any event, in the circumstances of the present case, may be entitled to exercise its equitable jurisdiction to consider waiving the imposition of the penalty or to consider that the Commissioner ought to have waived its imposition.

**Whether the requirement to make an arbitrarily determined payment prior to review as security for an assessment or otherwise is unconstitutional?**

[175] This court has looked at and considered the applicable provisions and the cases cited by the parties, including this court's decision in the case of the Belize Bank V AG & Commissioner of Income Taxes<sup>18</sup>.

[176] This court does not consider that the present case is in any relevant way different from the decisions arrived at in earlier cases of this court find the 'pay to play' provision unconstitutional and would 'blue pencil' this provision in like manner to the earlier decisions of this court.

[177] This court considers that it may be appropriate to provide guidance on the criteria which the Commissioner may be required to apply, but on the facts and circumstances of the present case, the position not having been fully argued, the court is not in a position to provide such guidance.

[178] Because of the findings of this court, however, it follows that the taxing by the First Defendants of the sale of the subject strata titles did not constitute

---

18

an arbitrary or unlawful deprivation and/or compulsory acquisition of property of the Claimant in breach of sections 3(d) and/or 17 of the Constitution of Belize.

### **Costs**

[179] Because the Defendants have largely, if not wholly succeeded, it is entitled to its cost in relation to its claim for the sum taxes due on the basis prescribed by Rules of Court with the value of the claim being the amount of the tax which is due which is \$1,092,938.60.

### **Disposition**

[180] This court will therefore:

- a. dismiss the Claimants' claim for a Declaration that the sale of Parcels 5011 H2, 5011 H3, 5011 H5 and 5011 H6, Block 16 Caribbean Shores Registration Section ("the subject strata parcels") were held as capital assets by the Claimant and is not a taxable supply on a true construction of the applicable provisions of the General Sales Tax Act;
- b. dismiss the Claimants claim for a declaration that the assessment, charge, collection and/or recovery of General Sales Tax on the sale by the Claimant of the subject strata parcels as the same were not held by the Claimant as capital assets is outwith the charging provisions of the General Sales Tax Act.
- c. dismiss the claim for an injunction restraining the First Defendant and her servants or agents or otherwise howsoever from unlawfully assessing or charging and/or seeking to enforce the collection of General Sales Tax from the Claimant on the sales of the above-mentioned capital assets;

- d. dismiss the claim for a declaration that the assessment by the First Defendant of penalties and/or interest against the Claimant in a First Notice of assessments issued in or about May, 2017, for the tax periods July 2014, October 2014, February 2015, March 2015, May 2015, June 2015, December 2015 and July 2016, are in breach of the provisions of sections 35, 39 and 58 of the General Sales Tax Act and are therefore without lawful authority and constitutes an arbitrary or unlawful deprivation and/or compulsory acquisition of property of the Claimant in breach of sections 3(d) and/or 17 of the Constitution of Belize.
  - e. dismiss the claim for an injunction restraining the First Defendant and her servants or agents or otherwise howsoever from unlawfully assessing or charging and/or seeking to enforce the collection of penalties and/or interest from the Claimant for the above-mentioned tax periods;
- (e) This court will however grant a declaration that the decision of the First Defendant to require the Claimant to make payment of 20 percent of a total value of taxes, penalties and/or interest claimed by a First Notice of reassessments for General Sales Tax issued in or about May 2017, for the tax periods July 2014, October 2014, February 2015, March 2015, May 2015, June 2015, December, 2015 and July 2016 before proceeding to a review of the assessments in the circumstances of the Claimant's application for review, without reasons and/or in the absence of duly enacted amendments to the General Sales Tax Act setting forth relevant criteria governing the exercise of the discretion to require such payment, is unreasonable and in breach of the Claimant's constitutional right guaranteed by section 6 of the Belize Constitution to equal protection of the law and to access to a court or competent tribunal to determine the existence or extent of any civil right or obligation;
- (f) The Claimant is to pay the Defendants its costs on the claim relating to the taxes found to be due on the basis prescribed by Rules of Court with the



value of the claim being the amount of the tax which is due which is \$1,092,938.60.

---

**The Hon. Mr. Justice Courtney A. Abel**

**22nd March 2018**