Income Tax Act – S67 (1), 67(2), 67(3) – Procedure and Power of Commissioner of Income Tax to make assessment – Jurisdiction of R.M. Court – jurisdiction of C.A. to make declaration unholding order of R.M. Court

Appeal by Commissioner of Income Tax dismissed.

Crossappeal dismissed.

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE MISCELLANEOUS APPEAL NO. 2/86

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A. (AG.)

BETWEEN	COLLECTOR OF TAXES (MONTEGO BAY)	COMPLAINANT/APPELLANT
A N D	WINSTON LINCOLN	DEFENDANT/APPELLANT

Enos Grant for Appellant

William Alder for Crown

November 23, 24, 1987 and February 5, 1988

ROWE P.:

Section 67 (1) of the Income Tax Act provides inter alia that every person liable to pay income tax in respect of any year of assessment shall deliver or cause to be delivered by his agent to the Commissioner or the Collector or Assistant Collector of Taxes for the parish in which he resides a true and correct return of the whole of his income from every source whatsoever for that year of assessment, and shall if absent from the Island, give the name and address of an agent residing in the Island. Section 67 (2) specifies that the time fixed for the delivery of such return is the 15th day of March in the year next following such year of assessment with a proviso that the Commissioner may by writing extend the time for the delivery of any person's return. Section 67 (3) provides that the Commissioner may attach conditions to the extension of time for filing the return.

Winston Lincoln, the defendant/respondent did not file and deliver to the Commissioner any income tax returns as required by Section 67 (1) above for the years of assessment 1978-1984 both inclusive. The

Commissioner proceeded to act under Section 72 (3) of the Income Tax Act (hereinafter called "the Act") to raise an assessment against the respondent for the years of assessment 1981-1983 and under Section 72 (4) of the Act to raise additional assessments for the years of assessment 1978-1980. We are told that these assessments totalled a sum in excess of fifteen million dollars.

Notices of the Assessment were served upon the respondent in late 1984. He went in to see the Commissioner of Income Tax and agreed with the Commissioner that he would pay the sum of three million dollars in "full settlement of the taxpayer's liability to income tax for the years of assessment 1978-1984 inclusive, and of the forbearance of the Commissioner from instituting any criminal prosecutions or other legal proceedings which he might have been entitled to institute under the Income Tax Act."

On August 2, 1985 summonses were issued by the Collector of Taxes, Montego Bay, against the respondent to recover the sums assessed. The agreement referred to above was reached between the taxpayer and the Commissioner on September 27, 1985. Nevertheless the action for recovery of the original sum assessed proceeded to trial on February 27, 1986 when the learned Resident Magistrate ordered the taxpayer to pay the sum of three million dollars as agreed upon between the Commissioner and the taxpayer but varied the terms of payment. The Collector of Taxes appealed and this drew a cross-appeal from the respondent against the variation order.

In this application the respondent seeks to deny the jurisdiction of the Resident Magistrate to make an order for payment grounded upon the assessments and challenges the jurisdiction of this Court to make any decision upholding the order of the Resident Magistrate in the instant case. The respondent took the following preliminary objection to the hearing of the appeal:

> "That the learned Resident Magistrate had and/or this Honourable Court has no jurisdiction to make any order in this matter.
>
> AND TAKE NOTICE that the grounds of the said objection are as follows:

" (a) That the Notices of Assessment, the subject matter of information Nos. 294-299/85 are a nullity for the following reasons:

(i) The said Assessments are ultra vires the powers of the Commissioner under the Income Tax Act; and/or

(ii) That the said Assessments do not comply with the Income Tax Act, in that, they do not disclose the particulars as required by the Act; and/or

(iii) That the said Assessments are contrary to the principles of Natural Justice and/or unfair; and/or

(iv) That the Commissioner of Income Tax did not serve any Notice requiring the Defendant/Respondent to deliver Returns and/or Statements of any profits or gains or any accounts or any documents whatsoever in respect of the Defendant/Respondent's Income and/or assets for any of the relevant Years of Assessment; and/or

(v) That the said Notices of Assessment were made without any prior notification to the Defendant/Respondent and/or without giving the Defendant/Respondent any opportunity to make any representations and/or submissions as regards the Defendant/Respondent's Income in respect of the said Years of Assessment.

(vi) The said Assessments are manifestly enormous and/or arbitrary.

(b) That the said Assessments and/or the proceedings pursuant to the Tax Collection Act are unconstitutional, in that, the rights of the Defendant/Respondent under Section 18 of the Constitution are being thereby contravened;

(c) That as the said Notices of Assessment are a nullity the subsequent proceedings, in particular, the agreement made the 27th day of September, 1985, are themselves nullities. "

Mr. Grant's opening submission was that the Commissioner of Income Tax has no power under the Income Tax Act to make an ex-parte assessment, that is to say, he has no power to make an assessment, without:

(a) first considering a return submitted by the taxpayer; or

(b) first requiring the taxpayer to submit a return.

He submitted that nothing in the Act precludes this Court from enquiring whether the procedure adopted for the assessment follows the procedure laid down in the Act and that this Court can exercise that power when the Revenue seeks to enfore the collection of the sum assessed. For these propositions he relied on two cases from Africa:

(1) Board of Inland Revenue v. Joseph Rezcallah & Sons Ltd (1962) 1 All N.L.R. 1.

(2) Ola v. Federal Inland Revenue Board (1976) 1 A.C.R. Comm. 85 (Nig.) and one from the Privy Council, Mandavia v. Commissioner of Income Tax (1958) Eastern African Reports 696.

I will deal first with the Board of Inland Revenue v. Rezcallah supra, a decision of the Federal Supreme Court of Nigeria. The evidence adduced was that the Board of Inland Revenue, without giving notice to the taxpayer Company requiring it to deliver a return of income, assessed the Company. The Company did not object or appeal. The Chairman of the Board then brought an action to recover the tax assessed and penalties. It was held on appeal, inter alia:

" (5) the special procedure of objection and appeal, provided by the income Tax Act for disputing an income Tax assessment, was not exclusive;
.....

(7) an assessment cannot be made under the Income Tax Act generally, it must be made under some section of the Act;

(8) an Income Tax assessment made without a request for a Return of Income is made without jurisdiction, is null and void, and must remain null and void;

(9) the sections of the Income Tax Act on objections to and appeals from assessments provide a method for having an assessment reviewed or revised, on the pre-supposition that the assessment was made with jurisdiction;

(10) the defence of nullity may be made in an action to recover tax under an assessment that was made without jurisdiction. "

That case was decided on a statutory basis which is similar to that which existed in Jamaica prior to the establishment of the Revenue Court. The interesting argument advanced in that case on behalf of the Revenue was that the High Court of Nigeria had no inherent jurisdiction to declare the assessment invalid in the proceedings for the recovery of tax. It was said that if a statute creates new rights and duties and appoints a specific tribunal to decide disputes on matters under the statute then the ordinary courts are not vested with any inherent jurisdiction to enquire into those matters and recourse must be had to that specific tribunal alone and this is particularly so where a right of appeal from the tribunal is allowed to the aggrieved parties. The issue as the Court saw it was whether the special procedure for appealing against an assessment was conclusive so as to deprive the High Court of jurisdiction to enquire into the validity of the assessment on a claim to recover the tax alleged to be due. The Court after examining the legislation to discover if the legislature had taken away the power of the Court to enquire into the validity of the assessment, concluded that under the Nigerian Act, the assessment was only conclusive as to amount but not as to other matters and that the Court had a power to enquire into validity. Section 55 (1), (2) and (3) of the applicable Nigerian Income Tax Act is substantially the same as Section 72 (1), (2) and (3) of the Income Tax Act of Jamaica.

> "Section 55 provides that:
>
> (1) The Board shall proceed to assess every person chargeable with the tax as soon as may be after the expiration of the time allowed to such person for the delivery of the return provided for in section 47.
>
> (2) Where a person has delivered a return the Board may -
>
> (a) accept the return and make an assessment accordingly;
>
> (b) refuse to accept the return and, to the best of his judgment, determine the amount of the chargeable income of the person and make an assessment accordingly.

"(3) Where a person has not delivered a return and the Board is of the opinion that such person is liable to pay tax, he may, according to the best of his judgment determine amount of the chargeable income of such person and make an assessment accordingly, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return."

As to Section 55 above, Bairamian F.J. said:

"Section 55 pre-supposes that a person has been asked to deliver a return within a certain time, before he is assessed; if he has been asked, he can be assessed after that time has passed, even though he has not delivered a return. The request to render a return is a condition precedent to assessment; the waiting for the time allowed in the request to pass is also a condition precedent; both conditions are intended to protect a person by affording him an opportunity of stating his income and other relevant matters, and an assessment which does not fulfil either of those conditions is made without jurisdiction and is null and void."

Ola v. Federal Board of Inland Revenue, supra was a first instance decision of Omo-Eboh J., and was concerned with the raising of additional tax. It is important in another context for what the Court said about "particulars" and only incidentally on the question of notice. Omo-Eboh J., was of the opinion that neglect of the taxpayer, even wilful default, on his part, to make a return as to his taxable income did not permit the Revenue to make a best of judgment assessment without providing him with particulars.

Mandavia v. The Commissioner of Income Tax, supra went to the Privy Council and the opinion of the Board was delivered by Lord Somervell. The appellant had resided in Kenya since 1921. Prior to 1953 he made no income tax returns and he had not been served with any notices calling for such returns. After some oral negotiations, on May 26, 1953 the Commissioner sent notices by post to the appellant requiring returns under the relevant statutes to be furnished not less than thirty days from the service of the notices. The taxpayer who was then out of the country asked for time to be extended for about a month to await his return to East Africa. The Commissioner would have none of it, and he straightway issued estimated assessments on June 26, i.e. less than thirty days after service of the

notice. The appellant appealed claiming that the assessments were ultra vires and void having been made before the expiration of the notice issued by the Commissioner.

When the case reached the Privy Council the Revenue argued that Section 72 (the equivalent of Section 72 (4) of the Jamaican Statute) covered any case in which a taxpayer had not been assessed whether he had had a notice and a "time allowed" under Sections 59 and 71 or not (Jamaican equivalent 70 (1) and 72 (1). It was conceded that Section 72, (K) [72 (4) (J)] did not apply to current cases and that for current assessments Sections 59 and 71 were intended to be the normal machinery.

Lord Somervell in delivering the opinion of the Board said:

> "Their Lordships have come to the conclusion that the construction submitted by the appellant is right for the following reasons:
>
> If the power to make assessment under s. 72 applies to the making of an original assessment their Lordships are unable to imply a term restricting it to back cases or making it ultra vires to operate it at any time.
>
> One would expect an opportunity to make a return to be a condition precedent to assessment. This is supported by the provisions for personal allowances in Part VI of the Act. If the respondent is right any person can be assessed without having any such opportunity. There would be two concurrent jurisdictions one providing reasonable protection for the taxpayer and the other providing no protection quoad the original assessment, apart from a right of appeal.
>
> Such a construction seems to their Lordships inconsistent with the general and mandatory provisions of s. 71. That section is providing how all original assessments are to be made." (Emphasis mine)

The Court went on to hold that Section 72 (K) [S. 72 (4) (J)] is dealing with the re-opening of cases which had been settled under the normal procedure.

Under the Kenyan statute "time allowed" for the making of an income tax return is found in one section of the Act, that is Section 59 (1) and the "time allowed" is fixed by notice from the Commissioner of Revenue or where no such time is fixed by notice, Section 59 (3) sets the time at October 15 in the year following the year of income that is chargeable. October 15 therefore becomes an automatic cut-off date for the voluntary filing of income tax returns.

In Mandavia's case, the Privy Council made reference to Section 59 (1) and to "time allowed" under Section 59 (1) for arriving at its decision that the Commissioner was obliged to serve a notice on the taxpayer before proceeding to assessment. The automatic cut-off date was not a relevant consideration for the Court because the Commissioner had in fact served a notice on the taxpayer. It does not seem, however that the Privy Council would have come to a different conclusion if they had been dealing with an automatic cut-off date having regard to the manner in which they approached the case. Their concern was that the taxpayer should be given an opportunity to make a return before assessment and not just to be left with the remedy of appealing against an assessment when made.

Section 67 (6) provides that "every return shall be in the prescribed form" and by virtue of Section 2 (1) of the Act "prescribed" means, "prescribed by the Commissioner". It is prima facie reasonable to infer that a taxpayer could not comply with Sections 67 (1) and (2) to provide returns until there was presented to him personally or by post, a form prescribed by the Commissioner on which to make the return. On the face of it the procedure relative to returns commences with the Commissioner and it would seem that he can proceed to a "best judgment" assessment under Section 72 (3) only after the taxpayer has failed to deliver a return of income on the prescribed form despatched to him by the Commissioner.

Mr. Alder submitted that there is a Code of Procedure established by the Income Tax Act and the Act provides the only procedure by which an assessment can be challenged as to validity, quantum or any incidental question of law or fact and for this principle he relied upon

Simon's Taxes - General Principles and Procedure, revised 3rd Edition at Division A 3.9 under the rubric "Judicial Review" where it stated:

> "The Code of procedure by appeal to the Commissioners within stated time limits as laid down by the Act provides generally the only method by which an assessment may be challenged as to validity, amount or any incidental question of law or fact. A line of cases going back to the days of the Assessed Taxes Acts recognises that, where the legislature has constituted an authority to which appeals may be made and no appeal is in fact made, the subject is afterwards effectively bound as to any matter which he could have raised on appeal."

This same point is made in the case of Allen v. Sharp (1848) 2 Ex. Rep. 352 per Parke B at 363 where he said:

> "We may reject from our consideration the question whether, under circumstances like the present, replevin will lie. That point is settled by the case of George v. Chambers. The objection is not that the action of replevin will not lie, if a replevin be granted; but that the process of the Crown ought not to have been delayed by a return of the goods. The real question is, whether an action of trespass would lie. I am clearly of opinion that it would not. On a careful consideration of these acts of Parliament, they seem to me to differ from the statute of Elizabeth, as to poor-rate (a), and that the legislature intended that the assessment of the assessors appointed by the commissioners should be final and conclusive, unless appealed from, in the first place, to the commissioners, and further, if necessary, to the judges of the superior courts. It would be singular if there were no such provision; for, what a flood of litigation would follow, if every subject of the Crown, who was dissatisfied with the judgment of the assessors, had a right to dispute the propriety of their assessment in an action against the collectors. Actions would be innumerable, juries would have to decide on facts without end, judges on law, and cases would be carried to the highest tribunal, when the exigencies of the state required a speedy determination. Without referring to the statutes, I should say, a priori that the object of the legislature was to make the decision of the assessor final and binding, unless disputed in the manner pointed out. On reading the statutes, I come to the same conclusion." [Emphasis mine]

And at page 364 he continued:

> "In that special case, the legislature has expressly made the assessment final and conclusive; and unless the party can bring himself within the exception, he has no opportunity of appealing. That being so, if a party, who has an opportunity of appealing, does not avail himself of it, it would be reading that act very inconsistently to say that he is not equally bound by the assessment."

Submissions similar to those made above by Mr. Alder were made to the Federal Supreme Court in the Rezcallah case supra, that the Court had no inherent jurisdiction to declare an assessment invalid in proceedings for the recovery of tax. It was argued in that case that if the statute created new rights and duties and appoints a special tribunal to decide disputes on matters under the statute, then the ordinary courts are not vested with any inherent jurisdiction to enquire into those matters and recourse must be had to that specific tribunal alone and this was particularly so where a right of appeal from the tribunal was still allowed to the aggrieved parties. The Federal Supreme Court after examining the relevant statutes concluded that the section of the Income Tax Act provided that the assessment was final as regards the amount of the chargeable income but was not conclusive as to other matters and in subsequent proceedings the Court could enquire into the validity of the assessments.

Sections 72-76 of the Income Tax Act contain provisions as to assessments and appeals from such assessments. Section 75 (1) requires the Commissioner of Income Tax to cause a notice of assessment to be served personally or by registered post on a person who is assessed by him to income tax. Such notice must state the amount at which he is assessed, the amount of tax payable by him and must advise the person of his right to dispute the assessment within thirty days. Section 75 (7) contains an important provision. It says:

> "Where no valid objection or appeal has been lodged within the time limited by this Act ... against an assessment as regards the amount of the chargeable income assessed thereby, or where the amount of the chargeable income has been agreed to under subsection (6), or where the amount of such chargeable income has been determined on objection or appeal, the assessment as made or agreed to or determined on appeal, as the case may be, shall be final and conclusive for all purposes of this Act as regards the amount of such chargeable income." [Emphasis mine]

The declaration of validity contained in Section 75 (7) is narrowly confined. It relates only to chargeable income and it is the amount of chargeable income which under the section is made final and conclusive where there is no objection to the assessment within the prescribed time. This section leaves untouched any of the issues which might arise prior to assessment and which might affect the validity of the assessment. In particular this section has no relevance to the question of notice, that is to say, whether or not the process of assessment can only commence with the issue of a notice by the Commissioner to the taxpayer.

Section 67 of the Income Tax Act which requires every individual liable to pay tax to make a return of the whole of his income to the Commissioner, contains as sub-section (8), the sanction for failure so to do. It is provided in Section 67 (8) as follows:

> "Any person who wilfully fails to comply with the provisions of this section shall be guilty of an offence against this Act and if the failure continues he shall at the expiration of each period of thirty days, be guilty of a further offence against this Act."

There is no specific provision in the Income Tax Act to the effect that if a person fails to make his return as required in Section 67 the Commissioner may assess him to tax without further notice. Section 72 (1) of the Act ought not to be construed liberally to include the two situations where the Commissioner has in fact served a notice and also the circumstances where he has served no such notice. It was held in Ola's case supra, that:

> "It is well settled that the provisions of a taxing Statute are always strictly interpreted, and likewise, where ambiguities arise in the procedure in taxation matters, it is the presumption that is more favourable to the taxpayer that should be adopted."

When this rule is applied to the instant case any ambiguity in Section 72 (1) as to the meaning of "time allowed to such person for the delivery of his return" must be resolved in favour of the taxpayer. Consequently in my opinion Section 72 (1) should be confined to cases where the Commissioner has served a notice under Section 70 of the Act.

This construction of Section 72 (1) of the Jamaica Statute would, as Lord Sommervell said in Mandavia's case, provide reasonable protection for the taxpayer before an assessment is made. In Ola's case, the Court was of the clear view that the taxpayer ought not to be penalized for his delinquency in filing his tax returns. Omo-Eboh, J., said at p. 105 of the Report:

> "It is my view that though there is clear and abundant evidence that the appellant was guilty of failure or wilful default in the supply of information or disclosure concerning his sources of income, the officials of the Board have no right or power under the law to inflict any assessment which is or tends to be of a punitive nature upon him. ...."

It follows inexorably that if the statute lays down a procedure for assessment and that procedure contains a condition precedent to any assessment, then unless that condition is fulfilled, no assessment can be validly made. A purported assessment in those circumstances would be a nullity and on a process for execution of the amount of the assessment, the Court can declare the purported assessment to be a nullity.

Mr. Grant complained that the Notices of Assessment for the years 1981, 1982 and 1983 were each made under Section 72 (3) of the Income Tax Act but that all three Notices of Assessment did not contain any particulars. The appellant was assessed to income tax of $79,601.00 in 1981, $1,824,776.00 in 1982 and $3,466,667.00 in 1983. Each Notice of Assessment contained a sub-heading "Notice of Assessment." This column was left

completely blank in each of the Notices of Assessment for 1981-1983.

Section 75 of the Act deals generally with the service of Notices of Assessment and sets out the procedure for objections to the assessments so notified. In sub-section 2 of Section 75 notices which are defective in form may be saved in the specified circumstances. Section 75 (3) provides a saving clause for an assessment or the duty charged thereon from attack on the ground of specified mistakes or a variance between the notice and the assessment. Because of the importance of the Proviso to 75 (3) I will set out the entire sub-section:

> "75 (3) As assessment or the duty charged thereon shall not be impeached or affected -
>
> (a) by reason of a mistake therein as to -
>
> (i) the name or surname of a person liable; or
>
> (ii) the description of any income; or
>
> (iii) the amount of the tax charged; or
>
> (b) by reason of any variance between the notice and the assessment;
>
> Provided that in cases of assessment the notice thereof shall be duly served on the person intended to be charged and such notice shall contain, in substance and effect, the particulars on which the assessment is made."

Mr. Grant submitted that the provisions of the proviso to Section 75 (3) are enacted in a mandatory manner and those provisions form a condition precedent to the validity of the Notice of Assessment. In the first place there must be proof of service of the notice upon the person to be charged and in the second place the notice must contain in substance and effect the particulars on which the assessment is made.

In Ola v. Federal Board of Inland Revenue supra, the provision of the Income Tax Act which fell for construction was the proviso to Section 35 of the Personal Income Tax (Lagos) Act 1961 which read as follows:

> "Provided that in cases of assessment the notice thereof shall be duly served upon the taxable person intended to be charged or the person in whose name such taxable person is chargeable and such notice shall contain, in substance and effect, the particulars on which the assessment is made."

The underlined words above are identical with the wording in the Proviso to Section 75 (3) of the Income Tax Act (J) quoted above. The learned trial judge in the Ola case said in relation to the proviso:

> "The provision of the law as contained in the above quoted proviso is mandatory and it requires that the 'particulars' must be stated in the notice of assessment; therefore, such a provision can neither properly nor validly be varied or modified by what the respondent's counsel describes as 'the usual practice by the Board's Officials' and the like."

He continued:

> "Such particulars are not only necessary but essential to enable an assessee to know the sources and or basis for the assessment of his chargeable income and to enable him to see that he is not charged to tax twice in respect of the same income. ....."

The reason advanced herein as to the possibility of double taxation on the same income was not intended to be exhaustive. The prescribed Income Tax Forms 56A and 57B to be used for raising additional and original tax respectively make provision for the insertion therein of "Particulars of Assessment and Tax Charged" with a sub-head for "Sources of Income". Under the sub-head "Sources of Income" the Commissioner is obliged, in my opinion, to state at the minimum sources of income e.g. - trade, profession, business, real property, personal property and reference may also be made to the consumerism of the taxpayer and of members of his family.

I am entirely persuaded that a Notice of Assessment is defective if it does not contain in substance and effect, the particulars on which the assessment is made. Nothing in Section 75 (7) can save an assessment which is defective as to particulars as that sub-section is only concerned with either the assessment of the amount of chargeable income or the assessment of the amount of income tax.

On the evidence available it has not been shown that the Commissioner of Income Tax made a request to Winston Lincoln under Section 70 (1) of the Income Tax Act requiring him to make a return of his income. In the absence of such a request for a return of income, I am of the view

that the assessment was made without jurisdiction and is null and void. I hold, too, that the failure of the Commissioner to include particulars in the Notice of Assessment rendered the assessment invalid.

On these findings the appeal by the Collector of Taxes, Montego Bay, filed on March 12, 1986 praying that the order of the Resident Magistrate be varied by substituting the figure $15,070,188.74 for the amount of $3,000,000.00 is not maintainable as therein he sought to enforce assessments which are held herein to be null and void.

The taxpayer Winston Lincoln cross-appealed on March 12, 1986 on the single ground that:

> "The period of time allotted by the Learned Resident Magistrate for the payment of the sum of Three Million Dollars is unreasonable having regard to the amount involved and the circumstances of the appellant."

There is no appeal by Winston Lincoln against the quantum of $3,000,000.00 and a preliminary objection in one appeal cannot substitute for an appeal against a particular order. No evidence was before the Court as to the circumstances in which the Agreement dated September 27, 1985 made between the Commissioner and Winston Lincoln was concluded and it would be untenable to argue that because there existed an ultra vires assessment, the taxpayer and the Commissioner could not in any circumstance arrive at a valid agreement as to the income tax liability of the taxpayer.

I would refuse the declaration sought at paragraph (e) of the Notice of Motion that as the said Notices of Assessment are a nullity the subsequent proceedings, in particular, the Agreement made the 27th day of September, 1985 are themselves nullities.

WRIGHT J.A.:

I have had the benefit of reading the judgments in draft of the President and Downer J.A. (Ag.) and I agree with both that the assessments are invalid for the reasons stated i.e. non-compliance with conditions precedent.

Let me make a few comments about the $3,000,000.00 in respect of which an order for payment was made by the learned Resident Magistrate. It is interesting to note that although the proceedings before the Court were at the instance of the Collector of Taxes for the collection of some $15,000.000.00 the proceedings were taken over by the consideration of the validity of the agreement which the taxpayer tendered in his effort to estop the Collector of Taxes from pursuing his claim. There was no information before the Court seeking to enforce the payment of the debt arising from this agreement which was propounded by the taxpayer as evidence of his tax liability for the period in respect of which the Collector of Taxes was seeking to collect the $15,000,000.00. Consideration of this agreement then became the substantial matter for the attention of the learned Resident Magistrate. Finding nothing to impeach its genuineness the learned Resident Magistrate went further than proclaiming its validity. She made an order for payment which was not sought by any process and which varied the terms agreed, though it must be stated that at that date the taxpayer was already in breach of those terms.

Before us Mr. Grant would have the agreement go the way of the invalid assessments. In other words he wants to both have his cake and eat it. When it suited the taxpayer's purpose he presented the agreement as genuine but having succeeded thus far he wishes again for the taxpayer's purpose, to obtain the reverse result. I do not think this can be allowed. In the same proceedings the agreement cannot be both valid and invalid. The liability for the $3,000,000.00 in my opinion should stand but since the order for payment made by the learned Resident Magistrate falls outside the method provided for the collection of income tax I am not persuaded that that order was competently made. In the result therefore, the appropriate measures for collection of this sum can now be pursued.

I agree that there should be no order as to costs.

DOWNER: J.A. (AG.)

The taxpayer through his counsel has taken a preliminary objection to these proceedings which, if successful, would result in the purported assessments made on him by the Commissioner of Income Tax being declared nullities and the order made by learned Resident Magistrate, Miss Kay Beckford, exercising her jurisdiction in the parish of St. James, would be set aside. That order required the taxpayer to pay $3,000,000.00 on or before 31st August, 1986 although there was no complaint by the Tax Collector which sought to recover that amount. To appreciate the nature of the issues of law raised in the objection, it is necessary to advert to the informations or complaints laid by the Collector of Taxes, the agreement between the taxpayer and the Commissioner of Income Tax, and the order in the Court below.

It is fair to point out, as Mr. Grant for the taxpayer did at the outset of this appeal, that the jurisdictional points now being pursued was not raised at first instance. In fact the learned Resident Magistrate perhaps anticipating an appeal said:

> "The court has not been given the benefit of perusing either the Notice of Assessment or the Notice of Objection. In any event this Court is not a Court of review. The Court has been called upon to determine whether the agreement was validly entered into after the Collector of Taxes has started an action for recovery of income taxes;"

Also pertinent is that the unchallenged affidavit of the taxpayer which states that although he was served with six notices of Assessment for the years 1978-83 inclusive, that he was never requested to deliver any returns as to his profits or gains during that period. He further stated that he was not asked to furnish any accounts or produce documents as to his income or assets for that period. Therefore, the taxpayer complains that he was never once afforded an opportunity to make representations concerning the total amount demanded by the tax-gatherer which including and interest/penalties was over Fifteen Million Dollars ($15,070,188.74).

There was an agreement entered into by the parties on the 27th September, 1982 whereby the taxpayer agreed to pay Three Million Dollars ($3.M) in settlement on condition that the taxgatherer would not institute any criminal or civil proceedings in respect of this matter under the Income Tax Act. Prior to that on 2nd August, 1985 the Collector of Taxes in St. James had laid informations or complaints in the Resident Magistrate's Court for the full sum of $15,070,188.74. At that stage of the proceedings, the taxpayer contended that the agreement was valid and succeeded in persuading the Resident Magistrate to so order. The tax-gatherer on the other hand has appealed against that order and is still seeking to recover the full amount of Fifteen Million Dollars. Not to be outdone, the taxpayer has cross-appealed on the basis that his successful submission that the agreement was valid should be set aside, as the amount of $3,000,000.00 was unreasonable. It is pertinent to point out at this stage that there was a previous preliminary objection by the taxpayer which was overruled. He had contended that the proceedings were criminal while the Court held that they were civil. See Collector of Taxes v. Winston Lincoln R.M. Misc. Appeal No. 2/86. It is in these circumstances that the preliminary objection was taken by the taxpayer that the assessment was ultra vires. Therefore it was submitted there could be no valid proceedings in the Resident Magistrate's Court to recover the assessment of $15,000,000.00 nor could there be any recovery for a lesser amount of $3,000,000.00 as it was based on an assessment which was void ab initio.

The foundation of Mr. Grant's submissions was that the Commissioner acted contrary to the mandatory provisions of the Income Tax Act and therefore the assessments being without any legal basis must be declared void. He further contended that the failure to follow the provisions of the statute resulted in denying the taxpayer an opportunity to make representations concerning the assessments made. Also that in

those circumstances arbitrary and excessive assessments were made and that amounted to an abuse of power. It was further submitted that those were also grounds for having the assessment declared ultra vires. These submissions which were skillfully developed, raised points of law of general public importance for the administration of the Income Tax Act. Mr. Alder for the Revenue, on the other hand contended that there were special procedures provided for appealing against assessments of the Commissioner of Income Tax and that once those procedures were ignored the assessments became final and conclusive, so that it was not open in those circumstances for the Resident Magistrate to question the assessment or for this Court to do so.

In resolving this dispute, therefore, it must be considered whether it was open to the taxpayer to show at the outset of this appeal that a purported assessment not being an assessment at all was not final and conclusive in collateral proceedings before the Resident Magistrate. To succeed, the taxpayer will have to establish in principle and authority that if the assessments were ultra vires, that would be a good defence in proceedings instituted pursuant to Section 80 of the Income Tax Act, to collect the debt when the Collector of Taxes has laid a complaint for recovery.

In this regard, it should be noted that the informations and complaints of the Collector of Taxes aver that the taxpayer was a person duly assessed. It was, therefore open to the taxpayer to challenge the assessment at that stage unless he was precluded by some statute from so doing. It is true that there is a special appeal procedure to the Revenue Court pursuant to Section 76 (1) of the Income Tax Act. It reads:

> "76. (1) Any person (hereafter in this Act referred to as the 'objector') who has disputed his assessment by notice of objection under section 75, and who is dissatisfied with the decision of the Commissioner therein, may appeal to the Revenue Court within thirty days of the date of receiving the Commissioner's decision referred to in subsection (6) of section 75 or within such longer period as may be permitted by or pursuant to rules of court."

It was open to the taxpayer to take that route and it is an appropriate route even if the assessment was ultra vires. But it was not the only route if the challenge was to the jurisdiction of the Resident Magistrate to hear and determine whether the debt being sued for was in fact a debt within the meaning of Section 80 of the Income Tax Act. Perhaps it is pertinent to set out this section to understand the contention that if the assessment was indeed invalid there could be no debt pursuant to the section. Section 80 reads:

> "80. Income tax and any interest payable pursuant to section 79, may be sued for and recovered in the Revenue Court, or in a Resident Magistrate's Court by a Collector of Taxes, with full costs of suit, from the person charged therewith as a debt due to the Government, as well as by the means provided for in section 79."

If this jurisdictional point could be taken before the Resident Magistrate, then since there is a right of appeal pursuant to Section 25 of the Judicature (Resident Magistrates) Court Act then it was proper of the taxpayer to take the point before this Court.

To determine whether the taxpayer was duly assessed as the information avers, there ought to be an enquiry into the provisions of the Income Tax Act as to how an assessment must be made. This is the basis on which the debt becomes due to the revenue. There is a duty on the taxpayer to make returns and that is stipulated in Section 67 (1) which reads:

> "67. (1) Subject to the provisions of Part 1 of the Second Schedule, every person liable to pay income tax in respect of any year of assessment shall deliver, or cause to be delivered by his agent, to the Commissioner, or to the Collector or Assistant Collector of Taxes for the parish in which he resides, a true and correct return of the whole of his income from every source whatsoever for that year of assessment and shall, if absent from the Island, give the name and address of an agent residing in the Island."

So far as sanctions are concerned, if a taxpayer wilfully fails to comply with section 67 he would be guilty of a criminal offence.

The Act has further important provisions empowering the Commissioner to require the taxpayer to deliver a return of his income. The tax-gatherer is an inquisitor and as such he is clothed with powerful means of enquiry before he makes his assessment. But the Act gives the taxpayer ample opportunity to state his case and present his accounts. So important are these powers that it is necessary to set them out to appreciate the necessity for compliance with them before an assessment is made. Of particular importance is Section 70 (1) which emphasises the obligation of the Commissioner to serve a notice on the taxpayer to require him to make and deliver a return before he proceeds to assessment. Section 70 reads:

> "70. (1) Every person, whether he is or is not liable to pay income tax, upon whom the Commissioner may cause a notice to be served requiring him to make and deliver a return of his income or the income of any person, shall, within fifteen days after the date of the service of such notice, make and deliver to the Commissioner a return as aforesaid.
>
> (2) The Commissioner may, by not less than fourteen days' notice in writing, require any person to attend before him and give evidence with respect to his income.

(3) The Commissioner may require any person to deliver a statement of the profits or gains arising to him from any trade, profession or vocation, and where such person fails to deliver such statement or where the Commissioner is not satisfied with the statement delivered by any such person, he may serve on that person a notice in writing requiring him to do any of the following things, that is to say:

(a) to deliver to the Commissioner copies of such accounts (including balance sheets) relating to the trade, profession or vocation as may be specified or described in the notice within such period as may be therein specified including, where the accounts have been audited, a copy of the auditor's certificate;

(b) to make available within such time as may be specified in the notice, for inspection by the Commissioner, all such books, accounts and documents in his possession or power as may be specified or described in the notice, being books, accounts and documents which contain information as to transactions of the trade, profession or vocation.

(4) If any person on whom any such notice is served fails without reasonable excuse to comply with the requirements of the notice, he shall be guilty of an offence against this Act.

If these statutory powers are not complied with then the specific complaint in the Notice of Motion that the assessments were in breach of the fair hearing requirements contemplated by the statute was well founded and the further complaint, that the resulting assessments were arbitrary is legitimate. On this basis the condition precedent stipulated in Section 70 (1) to make a valid assessment was not followed as no notice was served and consequently there would be no assessment within the meaning of the Act.

There are authorities from common law jurisdictions which support this contention. In Federal Board of Inland Revenue v. Joseph Rezcallah & Sons Ltd., 1 All N.L.R. 1 at page 10, Bairamian, F.J., construing the Nigerian statute puts it thus:

Section 55 provides thus:

> "55. (1) The Board shall proceed to assess every person chargeable with the tax as may be after the expiration of the time allowed to such person for delivery of the return provided for in section 47.
>
> (2) Where a person has delivered a return the Board may -
>
> (a) accept the return and make an assessment accordingly;
>
> (b) refuse to accept the return and, to the best of his judgment, determine the amount of the chargeable income of the person and make an assessment accordingly.
>
> (3) Where a person has not delivered a return and the Board is of the opinion that such person is liable to pay tax, he may, according to the best of his judgment, determine amount of the chargeable income of such person and make an assessment accordingly, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return.
>
> (The 'he may' and 'his judgment' should perhaps read 'the Board may' and 'the Board's judgment'.)
>
> Section 55 presupposes that a person has been asked to deliver a return within a certain time, before he is assessed; if he has been asked, he may be assessed; after that time has passed, even though he has not delivered a return. The request to render a return is a condition precedent to assessment; the waiting for the times allowed in the request to pass is also a condition precedent; both conditions are intended to protect a person by affording him an opportunity of stating his income and other relevant matters; and an assessment which does not fulfil either of those conditions is made without jurisdiction, and is null and void."

In Mandavia v. The Commissioner of Income Tax (1958) E.A. 697, the Privy Council had to consider the provisions of the Income Tax Act of Kenya which was in some respects similar to ours. Lord Somervell stated at page 697:

> "59. (1) The Commissioner may, by notice in writing, require any person to furnish him within a reasonable time, not being less than thirty days from the date of service of such notice, with a return of income and of such particulars may be required for the purposes of this Act with respect to the income upon which such person appears to be chargeable."
>
> (3) Where any person chargeable with tax has not furnished a return within nine months after the end of the year of income, it shall be the duty of every such person notwithstanding that no notice has been served upon such person under sub-s (1) to give notice to the Commissioner before October 15 in the year following the year of income that he is so chargeable."

Then at page 700 Lord Somervell continues:

> "The appellant submitted that s. 71 (1) lays down the procedure which has to be followed in all cases. The words 'time allowed', and this is not disputed, refer to the time allowed for the furnishing of the return under s. 59 (1). If therefore the Commissioner believes someone to be assessable or possibly assessable he must serve a notice." (Emphasis supplied)

After these citations and interpretations of the statute, Lord Somervell reiterated on page 701 that - "One would expect an opportunity to make a return to be a condition precedent to assessment."

The provisions relating to the assessment of tax reinforce the contention that before there can be a valid assessment, the tax-gatherer must comply with the rprovisions of serving a notice on the taxpayer to make a return. Section 72 (1) reads thus:

> "72. (1) The Commissioner shall proceed to assess every person liable to the payment of tax as soon as may be after the expiration of the time allowed to such person for the delivery of his return."

Further, the Act contemplates three situations, where the return is accepted, where it is rejected, and where no return is made. The provision reads thus:

> "72. (2) Where a person has delivered a return, the Commissioner may:
>
> (a) accept the return and make an assessment accordingly; or
>
> (b) if he has reasonable ground for thinking that the return is not a true and correct return, refuse to accept the return and, to the best of his judgment, determine the amount of the income of the person and assess him accordingly.
>
> (3) Where a person has not delivered a return and the Commissioner is of the opinion that such person is liable to tax, he may, according to the best of his judgment, determine the amount of the income of such person, and assess him accordingly, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return."

It is manifest that the Commissioner made a best judgment assessment pursuant to 72 (3) as the taxpayer did not deliver a return. But such an assessment could only be made if the Commissioner had required a return of him. Also of importance is the taxpayer's insistence that the Noticesof Assessment served on him did not contain the particulars of the substance and effect on which the assessments were made and that such a failure to comply with the proviso of Section 75 (3) of the Act rendered the assessments invalid. This submission appears to be well founded as without the particulars, the Commissioner would not have obeyed an essential requirement of the statute and the taxpayer would not know on what basis the assessment was made. However, it was Mr. Alder's contention that the taxpayer's only relief is stipulated in Section 75 (4) which reads:

> "If any person disputes the assessment (any determination or other decision made by the Commissioner before the making of the assessment, and upon which it is based) he may apply to the Commissioner, by notice of objection in writing, to review and to revise the assessment made upon him. Such application shall state precisely the grounds of objection to the assessment and shall be made within thirty days from the date of the service of the notice of assessment."

If this procedure is not resorted to, then counsel for the revenue argued that the provisions of Section 75 (7) is applicable. It states:

> "75. (7) Where no valid objection has been lodged within the time limited by this Act against an assessment as regards the amount of the chargeable income assessed thereby, or where the amount of the chargeable income has been agreed to under subsection (6), or where the amount of such chargeable income has been determined on objection or appeal, the assessment as made or agreed to or determined on appeal, as the case may be, shall be final and conclusive for all purposes of this Act as regards the amount of such chargeable income."

If a valid objection to the Commissioner before assessment or thereafter to the Revenue Court is the only method of challenge open to the taxpayer, and those were ignored, as they were in this case, then the assessment would be final and conclusive for all purposes of this Act. Such a contention ignores the canon of construction which stipulates that if the mandatory provisions of a statute are not followed then the results which flow therefrom are void. There are expressions of principle and authorities which suggest that such a void assessment can be used as a defence in collateral proceedings and they must be examined to see what light they throw on the subject.

Take the case of Allen v. Sharp (1848) 2 Exch. 352, relied on by the revenue. Parke, B., at page 365 gives examples where lack of jurisdiction was relied on by the taxpayer in collateral proceedings where a special procedure was provided. He said:

> "The case of Weaver v. Price (a), which arose under the Poor-rate Act, 42 Eliz. c. 2, is distinguishable; for that act only enables the overseers to rate the inhabitants of a parish, and consequently the justices had no jurisdiction to grant a warrant for enforcing a rate assessed on a party who had no land in the parish. Where, however, the party is an inhabitant, and he is rated for too much, the proper course is to appeal, and trespass will not lie. So, with respect to the case of Charleton v. Alway (b) : there, by the terms of the stat. 20 Geo. 3, the assessors were bound to distinguish between the different descriptions of land; and not having done so, and the plaintiff having paid the assessment in respect of a portion of the land, he was entitled to treat the assessment as a nullity."

Rolfe, B., at page 366 states:

> "But our decision is not that an assessment made without jurisdiction will bind."

An instance where collateral challenge was permitted by prohibition was King v. The Commissioner for General Purposes of Income Tax for Kensington (1914) 3 K.B. 445. In approving of this in Ex parte Hooper (1915) 3 K.B. 768, Lord Reading said:

> "It was also decided by the Court of Appeal in that case that prohibition will lie and is an appropriate remedy if the Commissioners have acted without jurisdiction. The Commissioners for Kensington had assessed, in respect of gains and profits from foreign possessions, the person who was in law assessable by the Commissioners for the City of London only. It was held that the Commissioners for Kensington had no jurisdiction to assess him, and the Court granted the prohibition."

In the Rezcallah's case, Bairamian, F.J., at page 13, after referring to Section 63 of the Nigerian Act which resembles Section 74 (7) of our Act, stated:

> "Finally, there is section 63, which makes the assessment final and conclusive as regards the amount of chargeable income, and the tax becomes recoverable by suit under section 69, upon a certificate of the Board.
>
> It appears that sections 59, 61 and 62, on objections and appeal, were intended to provide a method for having an assessment reviewed and revised, on the presupposition that the assessment was made with jurisdiction: they do not in my view contemplate a case where it was made without jurisdiction. Suppose, for example, that a person is assessed by the Board to pay £90 without having been asked to deliver a return. If he complains to the Board that the assessment was illegal, and the Board does not accede to his complaint, he can go to the Appeal Commissioners, but if they also refuse to listen, there the matter ends. On the argument for the Board, when he is sued under section 69, he cannot advance the defence that the assessment was ultra vires but the Court must give judgment ordering him to pay the tax assessed although it was assessed without jurisdiction and illegal. That is an absurb result, which must be wrong.
>
> He must have a remedy against an illegal assessment. It may be that he can sue the Board for a declaration that the assessment was illegal; but I can see no reason why he should not wait until he is sued by the Board and then make his defence. The Board cannot take shelter under section 60 of the Act, for that section saves an assessment from attack on the ground of mistake, defect or omission "if the same is in substance and effect in conformity with or according to the intent and meaning of this Ordinance:" it does not save it from attack on the ground that it was made without jurisdiction.
>
> I am alive to the provision in section 63 that an assessment becomes final and conclusive as to the amount of the chargeable income. I think that presupposes that it was made with jurisdiction; for if it was null and void ab initio, it must remain null and void."

Earlier, Unsworth, F.J., at page 8 of that case, said:

> "It will be noted that the section provides that the assessment is final, as regards the amount of the chargeable income. In my view however, it is not conclusive as to other matters, and the Court in subsequent proceedings can inquire into the validity of the assessment except in so far as it is restricted by section 58 (section 60 revised), which is not relevant to the matters inquired into by the High Court in this case. This view is supported by the fact that section 60 (16) (62 revised) provides that there is no appeal to the High Court under the special procedure where an assessment does not exceed £100 and, if the assessment be conclusive as to validity, a person assessed at £100 or less would have no recourse to the Courts to dispute the validity of the assessment.
>
> In reaching the above conclusion I have not been unmindful of the fact that a point of law involving validity might be dealt with on appeal to the High Court under the special procedure. It is true that under those circumstances the matter could not be raised again before the High Court on a claim for the recovery of the tax, but the explanation for this is the law of estoppel and not any provision of the Income Tax Act restricting the power of the High Court to inquire into the validity of an assessment."

Further, to demonstrate that final and conclusive can have a limited meaning, St. Lucia Usines & Estates Co., Ltd., v. St. Lucia (Colonial Treasurer) (1924) A.C. 508 was cited at page 513 and it reads:

> "Inasmuch as in their Lordships' judgment the company was in the year 1921 not assessable at all, it was not a person 'required by the Ordinance to make and deliver a return', but was outside the Ordinance altogether, and action taken outside the Ordinance cannot result in anything 'final and conclusive' against the Company."

To my mind the submissions on behalf of the taxpayer were well founded, since the conditions precedent to assessment which required, the Commissioner to request a return from the taxpayer were not complied with and the void assessment which resulted was not final and conclusive in these proceedings. Additionally, the failure to particularise the substance and effect on which the assessment was made as ordained by the statute was fatal and so made the Notices of Assessment exhibited void.

Therefore, I find the preliminary objections as regards assessments succeed and the Collector cannot argue the merits of the appeal to recover the sum of $15,070,188.74 instead of $3,000,000.00 as ordered by the Resident Magistrate.

Apart from challenging the assessments as being invalid, Mr. Grant also challenged the order that the taxpayer should pay $3,000,000.00. Since this is also a preliminary objection, it is necessary to set out the amounts claimed as duly assessed in the complaints, the precise order of the Resident Magistrate, and then examine whether on that basis the Resident Magistrate had any jurisdiction to make the order she did make.

The six complaints to recover debts for the period are as follows:

1978	-	$513,075.60
1979	-	$866,074.80
1980	-	$1,111,899.80
1981	-	$1,990,993.84
1982	-	$667,953.00
1983	-	$6,920,191.70

The order of the Resident Magistrate in respect of the six complaints are as follows:

> "I therefore order that the payment of three million dollars be made on or before the 31st August, 1986."

The Notice of Motion faces the problem, although it was not drafted with precision. At (c) it reads:

> "That as the said Notices of Assessment are a nullity, the subsequent proceedings, in particular, the agreement made the 27th day of September, 1985, are themselves nullities."

If the concentration is on the subsequent proceedings and ignoring the agreement, then there was no jurisdiction to recover as debts the amounts stipulated in the informations or indeed any other amount. Further, since in declaring the assessments a nullity, there is a retrospective effect, the Resident Magistrate could make no order in respect of the informations. It is true that by virtue of 75 (6) of the

Income Tax Act, there can be an agreed assessment, but such an assessment would in the circumstances of this case have to be recovered as a debt by way of complaint. There was no such complaint. To clarify this, it is best to quote Section 75 (6) which is as follows:

> "75 (6) In the event of any person assessed, who has objected to an assessment made upon him, agreeing with the Commissioner as to the amount at which he is liable to be assessed, the assessment shall be amended accordingly, In any other event the Commissioner shall give notice in writing to the person of his decision in respect of the objection."

To my mind, the preliminary objection on this aspect of the case also succeeds, as the Tax Collector laid no complaint to recover such a sum of three million dollars on an amended assessment. The order therefore must be set aside. Because of the failure to take these jurisdictional points below, I think the appropriate order is no order as to costs.