

C.P. R.M. Court - Income Tax - Inland Revenue - Plaintiff to recover \$1,309,479.45 tax and interest under an agreement - Jurisdiction of R.M. Court - locus standi of Commissioner of Inland Revenue. [Order from order of Huntley R.M. dismissing plaintiff on ground that issues were res judicata] Before CA - Preliminary objections (1) Matter not properly before CA (2) Whether R.M. Court has jurisdiction under Sec 80 Income Tax Act to embark upon hearing of plaintiff for claim in excess of \$10,000. HELD: Objection (1) 'wholly unavailing' (2) no objection 2 - R.M. had no jurisdiction - objection upheld - Costs to respondent
IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO: 27/90

COR: THE HON. MR. JUSTICE ROWE - PRESIDENT
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN THE COMMISSIONER OF INLAND REVENUE APPELLANT
AND RAYMOND CLOUGH RESPONDENT

William Alder and Mrs. Heather Dawn-Brown for Appellant

Enos Grant and Miss Jacqueline Hall for Respondent

December 10, 11, 1990 February 11 & June 18, 1991

ROWE, P:

A plaint was filed by the appellant in the Resident Magistrate's Court (Civil Division) Kingston to recover from the respondent the sum of \$1,309,479.45 being income tax and interest thereon due and owing to the Government of Jamaica up to August 15, 1989 as per Agreement dated 17th June 1985. When the matter came on for hearing before His Honour Mr. A.S. Huntley, the Attorney for the respondent, Mr. Grant, took three preliminary objections. Firstly, that the issues were res judicata; secondly, that the claim was in excess of the Court's jurisdiction and thirdly, that the appellant had no locus standi to bring the action. The learned Resident Magistrate upheld the first of the preliminary objections and rejected the other two. Against the Order dismissing the plaint, this appeal has been brought on two grounds both challenging the decision that the principle of res judicata applied.

Before us Mr. Grant took two preliminary objections:

- (a) that the appeal was not properly before the Court and;
- (b) that neither the Resident Magistrate nor this Court has jurisdiction in the matter.

The first point was wholly unmeritorious. What occurred was that the appellant filed his Notice and Grounds of Appeal in the Resident Magistrate's Court on July 9, 1990 within fourteen days after the date of the Judgment which was entered on June 25, 1990 in conformity with Section 256 of the Judicature (Resident Magistrates) Act. Reasons for Judgment were filed by the Resident Magistrate on August 14, 1990. Although the appellant has twenty-one days after notification that the Resident Magistrate has filed his Reasons for Judgment, within which to file his Grounds of Appeal, he is not obliged to await the Reasons for Judgment before filing his Grounds of Appeal. In any event the Court is obliged under Section 266 of the Resident Magistrates Act to liberally construe the provisions relating to appeal in favour of an appellant. This appellant was ahead of time and the misapprehension of the respondent, that the Grounds of Appeal should be filed in the Registry of the Court of Appeal can only benefit the appellant, even if it does not damnify the respondent.

The second preliminary point is one of importance. A number of Sections of the Tax Collection Act prescribe the manner in which taxes may be collected. Section 27 is in these terms:

"In addition to the other remedies given by this Act or any other enactment relating to taxes, the Collector of Taxes or Assistant Collector of Taxes, may proceed for the recovery of any amount claimed for any taxes, and for the penalty thereon, in a Resident Magistrate's Court, and such proceedings may be brought in the name of such Collector of Taxes, or Assistant Collector of Taxes, who shall describe himself by his name and office, and such proceedings shall not abate by the death, removal, retirement or resignation of such Collector of Taxes, or Assistant Collector of Taxes, but may be carried on and enforced by and in the name of his successor."

It seems to me that the process under Section 27 (supra) is of a civil nature and where the Collector of Taxes proceeds under that section, he must go to the Resident Magistrate's Court. In those proceedings there is no limit to the amount for which the claim can be brought as the section clearly states that the Collector of Taxes may in this procedure "proceed for any amount."

Section 46 of the Tax Collection Act may seem to cover much the same ground as Section 27 but on close examination the true purpose of the two sections become apparent. Section 46 (1) provides in part that:

46. (1) All penalties and forfeitures imposed by this Act, or by the Licence and Registration Duties Act or the Property Tax Act, or by any other enactment in force for raising and imposing duties or taxes, may be recovered and all taxes, duties, and arrears required to be paid to the Collector of Taxes, and not paid to him pursuant to the provisions of this Act, or other such enactments as aforesaid, as well as the penalty thereon, may, instead of the process of distress hereinbefore directed, also be recovered in a summary manner in the parish wherein such offence or default was committed, or the offender or defaulter resides; and, in case of non-payment, may be enforced by distress and sale of the offender's or defaulter's goods, or imprisonment not exceeding three months, unless such penalty, taxes, duties, arrears, and costs shall be sooner paid, ...".

In the first place the proceedings under section 46 (1) are criminal in form, although civil in nature - Collector of Taxes v. Winston Lincoln R.M. Miscellaneous 2/86, judgment delivered on 5th June, 1987. In the second place a sanction of imprisonment is provided in section 46 (1) whereas no such sanction appears in section 27. It appears, too, that section 27 was intended to provide a third alternative method to enforce the payment of unpaid tax etc, in that the section commences with the words:

"In addition to the remedies given by this Act or any other enactment relating to taxes."

Mr. Grant submitted that the summary process provided by the Tax Collection Act can only be used to collect taxes which are the result of an assessment whether that assessment be under the provision of the Tax Collection Act or the Income Tax Act and consequently an agreement made outside of the provisions for assessment under the Income Tax Act does not fall to be dealt with for recovery under the Tax Collection Act. He buttressed his argument by reference to Section 51 of the Tax Collection Act which provides that:

"The powers and provisions of this Act shall apply to the collection and enforcement of all taxes, duties, and penalties which are or shall be raised or imposed by any law not otherwise specifically providing for the collection of the same." [Emphasis added]

and submitted that one must look first at the Income Tax Act to see how tax imposed by that Act can be collected before one has recourse to the Tax Collection Act.

A look at the marginal note to Section 51 (supra), shows that the Act is to apply to taxes the collection of which is not otherwise provided for and this note lends support to the submission of Mr. Grant. It seems to me that in so far as any particular statute sets up its own regime for tax collection that regime should be followed to the exclusion of the Tax Collection Act procedures. If of course the taxing statute incorporates the provisions of the Tax Collection Act, then Section 51 thereof is inapposite.

Sections 77 to 80 of the Income Tax Act make provision for the collection of income tax. Sections 79 (1) (a) and 80 deal specifically with the machinery for collection of taxes which remains unpaid after the due date for payment.

Section 79 (1) (a) provides that:

"(1) Where any income tax, being due and payable, remains unpaid -

- " (a) the Collector of Taxes may proceed to enforce payment under the provisions of the Tax Collection Act in like manner as if an assessment under the provisions of that Act for the enforcement of taxes had been made; ..."

Clearly, the enforcement provisions of the Tax Collection Act are incorporated by reference into the Income Tax Act and the Collector of Taxes can use the tax collection procedures to enforce the payment of overdue income tax.

Section 80 provides:

"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."

Mr. Grant argued before us that the tax which is payable under Section 79 of the Act is that which is contained in the assessment list provided to the Commissioner of Inland Revenue by the Commissioner of Income Tax and from P.A.Y.E. tax-payers. It follows from this that liability to income tax arrived at by any other method, would not, in his submission, fall to be collected under Section 79. He submitted further that Section 80 was intended to deal with situations not covered by Section 79, as for example, when there was an agreement between the Commissioner and the tax-payer. In those circumstances he said, the agreed sum could be sued for by the Attorney General under the provisions of the Crown Proceedings Act as an ordinary debt due to the Government of Jamaica and the collection of this agreed sum would lose any special treatment for facilitating the collection of taxes. If, so the submission goes, a plaint is brought in the Resident Magistrate's Court it would be subject to

the monetary limit of ten thousand dollars fixed by Section 71 of the Judicature (Resident Magistrates) Act.

Mr. Alder is plainly right when he submitted that in the process of the enforcement of taxes due and payable under the Tax Collection Act or the Income Tax Act there is no lis as between the Collector and the tax-payer. The procedure is simply a machinery for collection of taxes. But as the decision in Collector of Taxes v. Winston Lincoln (supra), shows, the tax-payer can raise legal defences in proceedings for the collection of unpaid income tax, e.g. that the assessments were void.

Section 30 of the Income Tax Act provides an alternative method by which the Collector of Taxes may recover unpaid income tax. The primary method under section 79 is by way of summary proceedings using the machinery of the Tax Collection Act. When the provisions of that Act are resorted to, it is beyond question that a Resident Magistrate has jurisdiction, in Petty Sessions, to enforce payment of income tax of any amount whatsoever. (Section 25 Tax Collection Act). If, however, the section 30 procedure is adopted, and the Collector brings a civil action for the unpaid amount of tax, he has a choice of courts in which to bring his suit. In 1927 the Collector could bring suit "in the Supreme Court, or in the Kingston Court or in a Resident Magistrates' Court" - see Section 29 of the Income Tax Law Cap. 39. With the advent of the Revenue Court, that Court is now substituted for the Supreme Court and the Kingston Court has been abolished. Section 30 of the Income Tax Act equates income tax and interest thereon with "debt" for purposes of the proceedings for recovery. Suits for recovery of debt in the Resident Magistrates' Courts are governed by Sections 71 - 74 of the Judicature (Resident Magistrates) Act from which it is clear that, except where there is a written agreement signed by both parties or their Attorneys-at-law

providing otherwise, the jurisdiction of the Resident Magistrate is limited to an amount not exceeding ten thousand dollars. It is also clear that there is no special provision in the Judicature (Resident Magistrates) Act which excludes debts due to government from the statutory regime which fixes the upper limits of the Resident Magistrates' jurisdiction. It would seem to me therefore that an ordinary plaint which claims a sum in excess of a million dollars is beyond the jurisdiction of the Resident Magistrate.

It follows, in my opinion, that as the Resident Magistrate was not properly seized of this plaint he had no jurisdiction to consider the issue of res judicata and to make findings thereon. The proceedings before the learned Resident Magistrate were accordingly a nullity.

I would uphold the preliminary objection on the basis that the Resident Magistrate had no jurisdiction under Section 80 of the Income Tax Act to embark upon the hearing of a plaint where the claim was for an amount in excess of ten thousand dollars. The Respondent is entitled to the costs of the appeal fixed at \$500.00.

FORTE, J.A

I have had the opportunity of reading in draft the opinion of Rowe, P. and agree with the reasons and conclusions therein. Nevertheless, I add a few words of my own. In particular, I am not convinced that the fact that a determination of the income tax liability of a taxpayer is made by the machinery of a waiver of the formality of a return and assessment, that that would take the matter of collection outside of Section 79 of the Income Tax Act and, by reference, Section 27 of the Tax Collection Act, as in my view in coming to the agreement, the parties were doing nothing more, than doing informally what they could have done formally, i.e following strictly the procedures provided for in the Act. I would conclude that the Collector of Taxes could proceed to recover the tax either by virtue of Section 79, or Section 80 of the Income Tax Act, a conclusion which is clearly supported by Section 80 itself which states:

"Income Tax and any interest payable pursuant to Section 79 may be sued for and recovered in the Revenue Court, or in the Resident Magistrate Court by a Collector of Taxes, with full cost 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 (emphasis mine)."

The underlined words indicate two things:-

- (i) that the Collector of Taxes, even proceeding under Section 80, is the Government officer authorized to institute these proceedings, and
- (ii) the procedure provided for in section 80, is in addition to the means provided for in Section 79.

Section 79, however, refers back to the Tax Collection Act for the means of collection, in the following words:-

"Where any income tax being due and payable remains unpaid -

- (a) the Collector of Taxes may proceed to enforce payment under the provisions of the Tax Collection Act in the manner as if an assessment under the provisions of that Act for the enforcement of taxes had been made."

Section 27 of the Tax Collection Act provides for the recovery of tax under that Act by providing that the Collector of Taxes, etc ... 'may proceed for the recovery of any amount claimed for any taxes and for the penalty thereon in a Resident Magistrate's Court'. It follows then that where income tax "due and payable remains unpaid", a Collector of Taxes, may, notwithstanding the amount of such taxes, proceed in a Resident Magistrate's Court for its recovery and also the penalty thereon. I would hold that if the Collector proceeds by virtue of Section 79 (1) of the Income Tax Act, then the Resident Magistrate's jurisdiction in these matters is not restricted to the general jurisdiction of the sum of ten thousand dollars (\$10,000).

However, in the instant case, the Collector elected to proceed by way of Section 80 having instituted civil proceedings by way of plaint for the recovery of the income tax owed.

I concur with the reasons of Rowe, P. for holding that in those circumstances the jurisdiction of the learned Resident Magistrate would be limited to his statutory jurisdiction of ten thousand dollars (\$10,000).

I would therefore uphold the preliminary points urged by the Respondent.

This appeal which comes from His Honour. Mr. A.S. Huntley, a Resident Magistrate exercising civil jurisdiction in Kingston is part of a legal conflict between the taxpayer Mr. Raymond Clough on the one hand, and the tax-gatherer, the Commissioner of the Inland Revenue. The previous skirmishes commenced by the taxpayer have been fought out, before the Commissioner of Income Tax, Marsh J in the Revenue Court, and Smith J, in the Supreme Court. Now for the first time an aspect of the conflict comes on appeal to this Court.

The previous proceedings before Marsh J, on the 1st June, 1987 was concerned with the taxpayer's chargeable income over the years 1977 - 1982. That order was made after the agreement was in force and payments made. That before Smith J, on 15th September, 1989 was concerned with the validity of assessments over the period 1977 - 1982.

This case deals with the different question of whether the sum of \$1,309,479.45 can be recovered in the Resident Magistrate's Court or elsewhere by virtue of the agreement to discharge tax liability for the years 1977 - 1984.

That both sides have been unyielding is not surprising, since \$1,900,000.00 as tax has been paid into the Consolidated Fund which the taxpayer proposes to reclaim. The issue to be resolved on appeal is whether the balance of \$1,100,000.00 which the taxpayer agreed to pay can be recovered under either section 79 or 80 of the Income Tax Act, where the Revenue has chosen the Resident Magistrate's Court as the appropriate forum. This case is also in some aspects a sequel to the important case of Collector of Taxes v Winston Lincoln No. 2 R.M.C.A. No. 2 of 86 delivered February 5th 1988, a case in which the Revenue having withdrawn their appeal at the door of their Lordships' Board, the order of this Court was affirmed. In Winston Lincoln No. 2 there

was also an agreement to pay and that aspect awaits adjudication on appeal. ✓

Before the Resident Magistrate, Counsel for the taxpayer took three preliminary points of law, to the particulars in the plaint instituted to recover unpaid taxes and interest. Firstly, it was contended that, the Commissioner was not the appropriate party to have instituted proceedings. Secondly, it was argued that the amount claimed was beyond the Resident Magistrate's jurisdiction. Thirdly, it was submitted that the issue of recovery was disposed of in previous proceedings so that the Commissioner was precluded on the basis of estoppel from claiming the unpaid balance in Court. The Resident Magistrate decided for the taxpayer on the third issue, while he was in favour of the Revenue on the other points of law. Since the alleged estoppel ought to have been proved after evidence marshalled by the Revenue the Resident Magistrate had no jurisdiction to decide the matter as a preliminary point of law. It was therefore not necessary to call on the Revenue to dispose of the Resident Magistrate's ruling on that aspect of the matter. However, in view of the ruling on estoppel the Revenue appealed as their claim was struck out. The taxpayer promptly responded, by raising the two preliminary points on which he had lost below, as the basis on which to affirm the order in the Resident Magistrate's Court.

Was the Resident Magistrate correct in ruling that the Commissioner of Inland Revenue was a competent party to institute these proceedings by

- a) virtue of the Tax Collection Act?
- b) virtue of the Crown Proceedings Act?

THE TAX COLLECTION ACT

(a) It is helpful to set out the reasons the Resident Magistrate gave for ruling in favour of the Revenue on this issue. It was a matter of determining the status of the Commissioner.

Here is the Resident Magistrate's ruling on this point.

"I come now to the absence of legal authority by Plaintiff. I interpret section 27 of the Tax Collection Act in conjunction with the Revenue Administration Act 12/85 and in particular section 5 thereof as being a complete answer to the objection raised by Defendant. In my opinion this is so notwithstanding anything appearing in the Crown Proceedings Act. I hold therefore that the Plaintiff was legally capable of instituting the present proceedings."

The crux of the Resident Magistrate's decision on this aspect, was that a claim to recover \$1,309,497.45 being income tax and interest could be heard and determined by him when proceedings were instituted by the Commissioner. This was the appropriate way to approach the problem, since the issue was being decided on a preliminary point of law. The plaint must now be examined. It reads thus:

"The Plaintiff's claim is against the Defendant to recover the sum of \$1,309,479.45 being income tax and interest thereon due and owing to the Government up to the 15th day of August, 1989 as per agreement dated 17th day of June, 1985.

And the Plaintiff claims costs and Attorney's costs."

Since the agreement is referred to in the Particulars of Claim, it is appropriate to set out the relevant part of it at at this stage. Here it is -

"1. The appellant will pay to the Respondent the aforementioned sum of \$3,000,000.00 in the manner and on the dates set out hereunder.

On the execution of this Agreement	\$500,000.00
30th November, 1985	500,000.00
30th May, 1986	500,000.00
30th December, 1986	200,000.00
30th June, 1987	200,000.00
30th December 1987	200,000.00
30th June, 1988	200,000.00
30th December, 1988	200,000.00
31st March, 1989	200,000.00
30th June, 1989	200,000.00
30th September, 1989	100,000.00
	<u>\$3,000,000.00"</u>

The inference from the contract referred to in the plaint is that \$1,900,000 of the previous instalments had already been paid and the payments sought to be recovered must be those listed from 30th December, 1987 to 30th September, 1989 together with the interest. So \$1,100,000.00 represents tax which the taxpayer on the face of it agreed, was "being due and payable" and the relevant interest was computed according to section 79(I)(b) of the Income Tax Act. It would have been helpful to have specified whether section 79 or 80 of the Income Tax Act was being relied on to recover taxes. Had that been done, it would have been clear from the plaint that section 27 of the Tax Collection Act was the basis on which it was sought to recover taxes as the Resident Magistrate assumed and ultimately accepted.

Section 79(I) of the Income Tax Act is relevant so it is convenient to set it out -

It reads -

"79. - (I) Where any income tax, being due and payable, remains unpaid --

(a) the Collector of taxes may proceed to enforce payment under the provisions of the Tax Collection Act in like manner as if an assessment under the provisions of that Act for the enforcement of taxes had been made....."

(Emphasis supplied)

Be it noted that the Collector may proceed for recovery as if an assessment had been made under the provisions of the Tax Collection Act for enforcement of taxes. Here is how an assessment is done under that act. Section 23 reads in part -

"23. When no return, in respect of the duties or taxes, or any of them, imposed by any enactment of this Island, as shall be by such enactment required, shall be made to the Collector of Taxes, or other officer as aforesaid, such officer shall assess the person neglecting to make such return to the best of his judgment, and according to such information as he may be able to obtain....."

This section continues thus -

The Collector of Taxes or other officer as aforesaid shall deliver to the person assessed, or leave at his usual or last known place of abode, or on the premises assessed, a statement of such duties and taxes and penalty, and if within fifteen days after such service, the person so

"charged shall not make a return as required by the law or laws in that respect, and pay the duties or taxes for which, by such return, he shall be liable, together with the penalty imposed under this section, the assessment shall be binding and conclusive upon the person charged."

(Emphasis supplied)

There are certain features to be emphasised about this section. Firstly, section 23 implies that there is a duty on the taxpayer to make a return and if he fails to do so, the Collector of Taxes "shall assess the person neglecting to make such return to the best of his judgment." Secondly, the assessment must be made known to the taxpayer. But before there can be an assessment whether by "best judgment" or on the basis of estimated assessment in a return, there must be a liability imposed, and section 5 of the Income Tax Act is the provision in the enactment referred to in section 23 as 'imposed by any enactment of this Island'. That section reads -

"5(1) Income tax shall, subject to the provisions of this Act, be payable by every person at the rate of or rates specified hereafter for each year of assessment in respect of all income, profits or gains respectively described hereunder."

Statutes do not operate in a vacuum and once a liability is imposed, there are statutory means provided for recovery.

As for quantification that may be by assessment as the statutes provide but an agreement between the parties is not excluded. Turning to the statutory provisions for recovery, section 79 of the Income Tax Act refers to section 27 of the Tax Collection Act. Here is the section referred to:

"27. In addition to the other remedies given by this act or any other enactment relating to taxes, the Collector of Taxes or Assistant Collector of Taxes, may proceed for the recovery of any amount claimed for any taxes, and for the penalty thereon, in a Resident Magistrate's Court, and such proceedings may be brought in the name of such Collector of Taxes, or Assistant Collector of Taxes, who shall describe himself by his name and office, and such proceedings shall not abate by the death, removal, retirement or resignation of such Collector of Taxes, or Assistant Collector of Taxes, but may be carried on and enforced by and in the name of his successor."

(Emphasis supplied)

This is a crucial section for understanding the problem posed in this case. As regards the plaintiff, the Collector of Taxes is specifically named. Section 5(2) of the Revenue Administration Act entrusts the Commissioner of Inland Revenue with the power of a Collector of Taxes throughout the Island, so he is an appropriate Plaintiff.

On this aspect of the case the Resident Magistrate was certainly correct. But did the plaint indicate that the Revenue was proceeding under the Tax Collection Act as the Resident Magistrate assumed? I think not. The particulars of plaint above gave no such indication.

If the Revenue had intended to resort to the recovery provisions of the Tax Collection Act, they would not have expressly stated in the Particulars of Claim that the Income Tax and interest due was as per agreement dated 17th day of June, 1985. That Act makes no provision for recovery where the basis for enforcement in the Courts was dependent on breach of a contractual agreement between tax-gatherer and taxpayer. Section 27 recognises that other remedies apart from recovery in the Resident Magistrate's Court were given in the Tax Collection Act, as for example the authority to distrain in section 24 and recovery in a Court of Petty Sessions given in section 46. Further it acknowledged that other taxing Acts would also have recovery provisions. What it does do, is to enable the Collector to recover any amount of taxes, but implicit in section 23 is that recovery proceedings must follow the mandatory provisions of the statute. This is the logical stance to take, because the legislature was conferring an exceptional jurisdiction on the Resident Magistrate's Court. It was a 'special statutory summary jurisdiction' so the Revenue must comply with its provisions at the outset in the averment. What are the special provisions? They are to be found in section 23 of the Tax Collection Act referred to above.

If no return has been made the statute empowers a revenue officer to make an assessment on the basis of information as he might have been able to obtain. It is an administrative function

and such assessment must comply with the form and substance of the Income Tax Act. That was the principal point in an issue in Winston Lincoln No. 2.

How does the Commissioner of Inland Revenue get the statutory statement of such duties and taxes' in respect of the taxpayer? The means is to be found in section 77(1) of the Income Tax Act which states -

COLLECTION OF INCOME TAX

"77. (1) The Commissioner shall from time to time forward to the Commissioner of Inland Revenue for collections of income tax, extracts from the assessment lists containing the names and addresses of every person assessed in respect of income together with the amount of income tax payable."

Further proof is facilitated by section 79(3) of the Income Tax Act. That section states -

"(3) A certificate of a Collector of Taxes that any amount of tax or interest due thereon is payable under this Act and that payment has not been made to him, or, to the best of his knowledge and belief, to any other Collector of Taxes or to any other person acting on his behalf or on behalf of another Collector of Taxes, shall be sufficient evidence that the sum mentioned in the Certificate is unpaid and is due to the Government, and any document purporting to be such a certificate as is mentioned in this subsection shall be deemed to be such a certificate unless the contrary is proved."

To my mind, it is clear that the Resident Magistrate's jurisdiction under the Tax Collection Act is limited to recovery of assessments penalties and interest embodied in the Commissioner's Certificate. It is a simple straight-forward way to recover revenue. But the plaint in the Resident Magistrate's Court must comply with provisions of the statute. If it does not, then the Resident Magistrate will purport to assume a jurisdiction to construe contracts which he does not have under this 'special statutory summary jurisdiction.' Lord Selbourne puts it concisely in the Queen v Hutchings (1880-81) 6 QBD at p. 305 where the Court of Appeal in England was adjudicating on a special jurisdiction of a Court of Petty Sessions to recover £442.0.5. under the 1875 Public Health Act. His Lordship said at p. 305.

"Their only jurisdiction was to make or refuse the order from payment of a certain

"sum of money then claimed as defendant's statutable quota of certain expenses at that time incurred by the urban authority."

Hutchings was referred to with approval in Caffoor v Income Tax Commissioner (1961) A.C. 584. In that case the Board of Revenue and the Courts on appeal had the limited function to determine the amount of assessed income or the chargeable income. This function the Revenue Court performed in this case for the years 1977 - 1982 albeit after an agreement had been entered into between the taxpayer and the Commissioner of Income Tax covering those years as well as 1983 and 1984. The principle on which the Revenue Court must act as stated in Caffoor by Lord Radcliffe at page 598(4) is of importance so it ought to be cited:

"The critical thing is that the dispute which alone can be determined by any decision given in the course of these proceedings is limited to one subject only, the amount of the assessable income for the year in which the assessment is challenged. It is only the amount of that assessable income that is concluded by an assessment or by a decision on an appeal against it (see section 75). Although, of course, the process of arriving at the necessary decision is likely to involve the consideration of questions of law, turning upon the construction of the Ordinance or of other statutes or upon the general law, and the tribunal will have to form its view on those questions, all these questions have to be treated as collateral or incidental to what is the only issue that is truly submitted to determination (cf. Reg. v. Hutchings)."

This certain sum recoverable in Hutchings was to be settled by the Surveyor or in case of dispute by arbitration. In the instant case the certificate of Commissioner of Inland Revenue ought to have been the crucial document. But the agreement between the tax-gatherer and the taxpayer was the document relied on by the Revenue. The taxpayer has succeeded on this aspect of his preliminary point. Although the Commissioner was an appropriate party, he went about recovering it in the wrong way. He should have, if he was able to, proclaimed his Certificate in this plaint as the basis for his collection instead of the agreement referred to in the plaint.

(b) The Crown Proceedings Act

Will the Commissioner fare any better under the Crown Proceedings Act? The initial issue is whether he was entitled to proceed under that Act to recover the amount stated in the plaint. Section 80 of the Income Tax Act on its true construction gave him that power. This section 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 to suit, from the person charged therewith as a debt due to the Government, as well as by the means provided for section 79."

As in section 79 every word is important. Further both sections must be read together and it will be seen that Income Tax may be recovered by a complaint in the Court of Petty Sessions and plaint in the Resident Magistrate's Court under the Tax Collection Act: and by plaint in the Resident Magistrate's Court and by Writ of Summons in the Revenue Court under the Crown Proceedings Act. The Revenue Court is in substance the Revenue Division of the Supreme Court see Hinds v The Queen 1977 A.C. 195.

Although proceedings for recovery in a Court of Petty Sessions and the Resident Magistrate's Court are instances of recovery of taxes by virtue of a 'special statutory summary jurisdiction' there are significant differences in the provisions for appeal. There is also a special provision for agreements after proceedings in Petty Sessions under section 46(2) of the Tax Collection Act which are not to be found elsewhere.

To return to section 80 of the Income Tax Act, the phrase 'as a debt due to the Government' is the legislative reference to section 10 of the Crown Proceedings Act. That section reads as follows:-

"10. Subject to the provisions of this Act, all such civil proceedings by or against the Crown as are mentioned in the First Schedule are hereby abolished, and all civil proceedings by or against the Crown in the Supreme Court shall be instituted and proceeded with in accordance with rules of court and not otherwise."

Then section 18 defines civil proceedings or contemplated in section 10. Those proceedings are defined as follows:-

"18(1) Subject to the provisions of this section, any reference in this Part to civil proceedings by the Crown shall be construed as a reference to the following proceedings only —

- (a) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been by any such proceedings as are mentioned in paragraph 1 of the First Schedule;
- (b) proceedings for the enforcement or vindication of any right or the obtaining of any relief which, if this Act had not been passed, might have been enforced or vindicated or obtained by an action at the suit of the Attorney General or any officer of the Crown as such or by proceedings taken by virtue of any of the enactments set out in the Second Schedule."

(Emphasis supplied)

The feature to note is that tax which may be sued for and recovered by section 79 is tax due and payable which remains unpaid. Tax due and payable is often paid voluntarily. Every instance of payment by a taxpayer where there has been an estimated assessment on the return of the taxpayer which is accepted is a voluntary payment and to promise to pay a certain amount and to pay it, is valid agreement if there is forbearance by the Commissioner and he accepts it. Further, to promise to pay by instalment and to make some payments, and then default on the balance is also payment by agreement and again if there is forbearance the agreement is enforceable. In every such instance, the failure to pay unpaid taxes whether the amount was quantified by an assessment and recovered by virtue of the Tax Collection Act or whether the quantification was by an agreement between the Commissioner and the taxpayer and recoverable, as a debt due to the Government by section 80 of the Income Tax Act, it is taxes being due and payable which remains unpaid. In this neat division it must be noticed that an agreed assessment envisaged by section 75(6) and (7) of the Income Tax Act is still an assessment.

Although there were no decided cases cited from this Court to support the principle of voluntary payments there were abundant authorities from the United Kingdom which were applicable to this jurisdiction. The classic statement is by Lord Dunedin in Whitney v. Inland Revenue Commissioners (1926) A.C. 37 at p. 52. It reads thus -

" My Lords, I shall now permit myself a general observation. Once that it is fixed that there is liability, it is antecedently highly improbable that the statute should not go on to make that liability effective. A statute is designed to be workable, and the interpretation thereof by a Court should be to secure that object, unless crucial omission or clear direction makes that end unattainable. Now there are three stages in the imposition of tax: there is the declaration of liability, that is the part of the statute which determines what property are liable. Next, there is the assessment. Liability does not depend on assessment. That, ex hypothesi, has already been fixed. But assessment particularizes the exact sum which a person liable has to pay. Lastly, come the methods of recovery, if the person taxed does not voluntarily pay."

That revenue statutes in common law jurisdictions are drafted on the pattern adumbrated by Lord Dunedin is evidenced by section 24 of the Tax Collection Act which gives the Collector of Taxes the authority to distrain. It reads in part -

"24. If any person making a return of the duties of taxes imposed upon him by any enactment, shall not therewith pay the said duties or taxes, or if any person assessed shall not make a return of and pay the duties or taxes to which he is liable and the penalty thereon within ten days after the delivery of the assessment to him, the Collector of Taxes, without the necessity for any other authority than is given by this Act, for the recovery of the said duties or taxes so returned, or included in the assessment, and the penalty thereon and the costs of distress, may distrain the goods and chattels of the person so liable as aforesaid to the said duties and taxes wheresoever found."

For a West Indian statute and authority which illustrates the distinction between liability and the machinery for assessment see Hughes v. Income Tax Commissioner (1961) 3 W.I.R. 224.

Rennie J puts the matter cogently thus at p. 228.

"It therefore seems clear to me that it does no more than provide a small part

"of the machinery for assessing the tax on federal emoluments which by section 6 is made liable to tax. Section 14(2) does not in my view, tax territorial income."

On the face of the contract referred to in the plaint, the taxpayer has undertaken to pay voluntarily. The taxpayer frequently pays voluntarily and he does so after he has made an estimated assessment in his return. See sections 67 to 71 of the Income Tax Act which deals with returns. Section 67(5) in which the phrase "indicating how much (if any) of that tax remains unpaid" is applicable to every person delivering a return of income and it is a clear indication that the statute presumes voluntary payments. Significantly, section 67(5) also states that the amount unpaid "shall be treated as if it had been the subject of a notice of assessment served on that person."

Equally revealing is that the initial section under the cross heading of Assessments reads -

"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:

Provided that where the whole amount of tax remaining unpaid is the subject of a deemed assessment under subsection (5) of section 67 it shall not be necessary to make an actual assessment."

This is a clear indication that the statute recognises that self assessment or an estimated assessment by the taxpayer is a significant part of tax administration and if there is an agreement reduced to writing as to the amount of tax to be paid, the Revenue was entitled to argue that, the amount could be the sum to be recovered, by virtue of the enforceable agreement. That the contract between the taxpayer and the taxgatherer was the basis of this claim is evidenced by the fact that it was referred to in the Particulars of Claim. The presumption is that the Revenue thought that such a contract could be used as the basis of recovery instead of assessments, and the Certificate of the Collector of Taxes. It is against the background of the preliminary points that the cases helpfully brought to our attention by both Counsel must be examined to show that a contract

between the Commissioner of Income Tax and the taxpayer can be resorted to, in order to discharge tax liability.

In W.H. Cockerline v. The Commissioner of Inland Revenue 16 T.C. 1 it was decided that where there was an agreement as to the amount liable and there was no assessment, the amount paid was finally determined and there could be no appeal on a point of law. Lord Hanworth M.R. quoted a useful passage on page 19 of Cockerline from the unreported decision of Williams. It reads thus -

" I cannot see that the non-assessment prevents the incidence of liability, though the amount of the deduction is not ascertained until assessment. The liability is imposed by the charging section, namely section 38, ' which is excess Profits Duty ' the words of which are clear. The subsequent provisions as to assessment and so on are machinery only. They enable the liability to be quantified, and when quantified to be enforced against the subject, but the liability is definitely and finally created by the charging section and all the materials for ascertaining it are available immediately. With the greatest respect to the learned Judge, I think he has attached quite undue importance to the machinery of assessment and recovery and too little importance to the creation and the charge of the liability. 'The liability, like other liabilities, has to be discharged or provided for out of the profits of the Company.' I was a party to the judgment in that case, and I associate myself now, as I did then, with those words of Lord Justice Sargant."

The inference from this passage is that liability can be discharged by voluntary agreement. On that basis the agreement determines the right of the parties. The agreement covers the \$1,900,000 previously paid into the Consolidated Fund. See section 3 of the Financial Administration and Audit Act. Once liability is admitted and taxes are paid as they were in this instance, the presumption was that payments were voluntary. Such a presumption can be rebutted but that entails a hearing on the merits. On this Lord Hanworth is instructive. He said at page 29 -

".....but it is to be noted that it would be unfortunate if the subject were not able to make an agreement unless and until some assessment had been made."

Since the statute presumes that there can be an agreement to pay tax, then there can be a waiver as regards the assessment. Slessor, L.J. in Cockerline supports this position and he further said at p. 26 -

"I would add only this, that I agree with my Lord that there is nothing in the machinery and the scheme of the Income Tax Acts to prevent a subject paying, if he will, an amount in settlement of the liability which the Act imposed upon him, without an assessment....."

Earlier on page 24 Slessor L.J. made a significant statement. It is this -

".....it is possible under those circumstances to say that after both parties had fully and fairly discussed the whole matter and arrived at an ascertained sum, which in fact was not only agreed to but paid without any question or demur and, as I understand it, never disputed at all until the 21st February, 1929, there remained any question before the 10th December which was undetermined?"

That the taxpayer may waive the assessed sums seems to have been recognised in Jamaica from as early as 1886 in Payne v Jenoure 11 Step, Report 1886 at 1930 where the Supreme Court (Curran and Northcote, JJ) said:-

"the Defendant having neglected to avail himself of the provisions of the law in his favour with reference to appeals to the Parochial Board, is not I think entitled to raise the question of correctness of the District Court."

The appeal was dismissed but before parting an important statement of principle was made against the background of the Tax Collection Act.

The taxpayer had contended that the Tax Collector had waived the assessment. The Court rejected that contention but of the taxpayer this was said -

"Everyone has a right to waive and to agree to waive the advantage of a law or rule made solely for the benefit and the protection of the individual in his private capacity and which may be dispensed with without infringing on any public right or public policy but where public policy requires the observance of the provision it cannot be waived by an individual."

The dicta in the above cases show that unpaid taxes are debts due to the Crown, which are based on contract, were recoverable by Latin or English Informations and after the Crown Proceedings Act (UK) 1947 were recoverable by ordinary action in the Revenue List in the Queen's Bench Division. The same legislative developments took place in Jamaica and with it the abolition of Latin and English Informations, see Schedule 1 of the Crown Proceedings Act. Recovery of revenue is now to be in accordance with the Crown Proceedings Act and Regulations see Jamaica Gazette Supplement Proclamations Rules and Regulations July 10, 1959.

Attorney General v. Johnstone 10 T.C. 758 pertains to a case where the taxpayer was sued for the balance he had agreed to pay in consideration of proceedings for penalties not being taken. It is to be noted that penalties were specifically mentioned in the agreement referred to in the plaint. Here is how that part of the agreement ran -

"WHEREAS

(1) The Respondent has assessed the Appellant for the years of assessment 1977 to 1982 inclusive to additional income tax and penalties in the sum of eight million eighty-nine thousand and ninety dollars and forty-three cents (\$8,089,090.43).

The statutory basis for the agreement in Johnstone was section 222 of the Income Tax Act 1916 (UK) which is similar to section 103 of our Income Tax Act which reads -

"103. The Commissioner may in his discretion stay or compound any proceedings for the recovery of any fine or penalty incurred under this Act or accept a pecuniary settlement instead of instituting any such proceedings."

Here is how Rowlatt, J interpreted the U.K. provision at page 763 of Johnstone.

"It is quite clear, I think, that the section means that a fine or penalty which the Commissioners honestly think

"the facts may support, may be compounded by them without taking any proceedings. Therefore, I think that point fails. It is a practice that has long been pursued. It is an extremely beneficial and merciful practice to the party, because these parties can always get advice, and if they are people with large incomes worth troubling about, they always have advice and they can always get it, and they should be able to come to the Commissioners of Inland Revenue and put their cards on the table and make an arrangement with them to pay something in respect of the penalties on account of the injustice which they have inflicted on the other taxpayers is, I think, very advantageous to them."

So it is clear that this agreement is also capable of being supported by section 103 of the Income Tax Act. Commissioner of Inland Revenue v. Richards 33 T.C.1 followed Johnstone. Richards & Johnstone are instances of recovery by means of Latin Informations. Attorney General v Duke of Richmond No. 2 (1904) is a case of recovery by means of an English Information. For a Jamaican example of a Latin Information see A.G. v Manderson (1846-1849) VI Moo. P.C. 239 or 11 Step 1921 where the Crown sued in an action for recovery for taxes as a debt due to the Crown. The urgency for revenue was felt even then as the Crown leap-frogged the Court of Appeal and went directly to the Privy Council. They succeeded in obtaining a venire de novo.

Then clause 4 of the agreement reads -

"(4) The appellant having filed no returns for the years of assessment 1983 and 1984 inclusive, the Respondent proposes to raise assessments for income tax and penalties for those years of assessment in the sum of six hundred and seventy-nine thousand six hundred and fifty dollars (\$679,650.00)."

and clause 5 reads:

"(5) The appellant and the Respondent are agreed that the appellant's income tax liability for the years of assessment 1983 and 1984 should be settled without resort to the objection and appeal procedures of the Income Tax."

It is for a trial Court to construe the contract in the light of authorities to determine its scope and effect as a whole and in particular whether it could discharge the tax liability as determined by the agreement.

Why did Mr. Grant argue that the Commissioner had no standing to sue for taxes as a debt due to The Government?" He relied on section 13(1) of the Crown Proceedings Act which reads -

"13. (1) Civil Proceedings by the Crown shall be instituted by the Attorney General."

and from that he submitted that the Attorney General was the only party competent to sue for recovery under Section 80 of the Income Tax Act. What this submission ignored was that recovery of revenue has always had special treatment by statute and the common law. This was given recognition in the Crown Proceedings Act, by section 33 which reads -

SUPPLEMENTAL "33. (1) Except as therein otherwise Savings expressly provided nothing in this Act shall
(a) - (e)
(f) affect any proceedings for the recovery of any taxes within the meaning of the Tax Collection Act or any fines or penalties, or for the forfeiture and condemnation of any goods."

The true legal position is that section 13(1) of the Crown Proceedings Act must be read in conjunction with section 80 of the Income Tax Act to grasp the reality that Parliament has also accorded the tax-gatherers status under the Crown Proceedings Act, to recover taxes in civil proceedings as a debt due to the Government. It is fitting that this should be so, since section 62 of the 1954 Income Tax Law which was replaced by Section 80 of the Income Tax Act also accorded status to the Collector of Taxes the power to recover taxes as a debt due to the Government. Another privilege the tax-gatherer retains is exemption from the operation of the Limitation Act in instituting an action for the recovery of revenue except where a special Act provides expressly for a limitation period - 'nullam tempus occurrit regi' - Even if the Limitation Act did apply, time began to run from 31st December, 1987.

Longstanding rules which prevent set-off and counter-claims for recovery of taxes recoverable under the Tax Collection Act are still applicable; see Attorney General v. Guy Motors Ltd. (1926) 2. K.B. 78. As they are not expressly provided for in relation to taxes as defined by the Tax Collection Act, set-off

and counter-claims cannot be resorted to under the Crown Proceedings Act for recovery of taxes. There is a special machinery in section 81 and 81A of the Income Tax Act for recovery of overpaid taxes, so the inability to claim set-off or counter-claim in recovery proceedings is not unfair. It is futile to rely on declarations for recovery of over-paid taxes see re Vandervells Trust (1971) A.C. 937. Also there are special provisions regarding estoppel. See Society of Medical Officers of Health v Hope (1960) A.C. 551 at 563 per Lord Radcliffe and p. 569 per Lord Keith.

Be it noted that nothing precludes the Commissioner from briefing The Attorney General from appearing on his behalf, for by the Constitution he is the 'principal legal adviser to the Government' and it would be expected that in cases of difficulty his advice would be sought and his appearance in Court requested. Since the recovery of debt is civil proceedings, my conclusion on this aspect is that the Commissioner did have and still has standing to sue in the appropriate Court for the recovery of taxes under the Crown Proceedings Act based on the agreement.

It is one thing to have competency to sue for recovery, but under the Crown Proceedings Act, the Resident Magistrate exercises his general common law jurisdiction and there are limits to the amount that can be sued for in his Court. When those limits are exceeded recourse must be had to the Revenue Court. Section 74 of the Judicature (Resident Magistrates) Court Act sets the limits for any action for debt. It states -

"Where in any action the debt or demand claimed consists of a balance not exceeding ten thousand dollars, after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the Court shall have jurisdiction to try such action."

From the outset therefore the Resident Magistrate had no jurisdiction to try this case. There is an important point to note about section 80 of the Income Tax Act which by necessary

implication refers to the Crown Proceedings Act. While the debt recoverable may be as a result of an enforceable agreement, because a tax debt was regarded as a debt on the record, section 80 may also be resorted to when an assessment has been made, or the contract is embodied in a deed if tax remains unpaid. See Manderson's case referred to earlier.

Yet the simplicity of the proceedings under section 79 of the Income Tax Act means, that section 80 will be rarely used by the Revenue. This is especially so since assessments and an agreed assessment for unlimited amounts can be recovered before the Resident Magistrate through the machinery of the Tax Collection Act.

CONCLUSION

The Revenue, chose the wrong forum for recovering taxes where there has been an agreement to pay a sum in excess of \$10,000.00. The sum claimed could still have been recovered, had they obtained the written consent of the taxpayer or his Attorney at Law. See section 72 Judicature (Resident Magistrates Act). Section 172 of that act reads -

"172 - Where any civil proceeding is brought in any Resident Magistrate's Court which the Court has no jurisdiction to try, the Magistrate shall, unless the parties consent to the Court trying the same, order the cause to be struck out, and shall have the power to award costs in the matter, as if the Court had jurisdiction in the matter of such plaintiff, and the plaintiff had not appeared or had appeared and failed to prove his demand."

So the Resident Magistrate struck out the Revenue's claim. To my mind that order was correct. However the Resident Magistrate erred as the Revenue was not proceeding under the Tax Collection Act as His Honour found and it seems the Revenue assumed. His Honour was therefore not entitled to make any decision on the matter of the alleged estoppel. The Revenue was proceeding under the Crown Proceedings Act for a debt in excess of \$10,000.00 due to the Government and it was on that ground that I have found in favour of the taxpayer.

The Revenue need obtain no consent if they wish to

institute proceedings in the Revenue Court for the recovery of the tax claimed. It is of importance that the public revenue is collected. Statute and the common law has accorded to the Revenue great privileges but then as other public authorities they must act in accordance with the Constitution and the law of the land, in the performance of their duties. This case is also of importance to the taxpayer, for he has made grave allegations against the Revenue authorities in affidavits. A Supreme Court action in the Revenue Court, with its constitutional guarantee of a fair hearing before an impartial tribunal, is the appropriate means to resolve this longstanding conflict between the tax-gatherer and the taxpayer. Costs are to the taxpayer in the sum of \$500.00.