IN THE REVENUE COURT
REVENUE COURT APPEAL NO. 4 OF 2005
IN RE THE INCOME TAX ACT

BETWEEN	**DENNIS MURRAY**	**APPELLANT**
AND	**THE COMMISSIONER OF TAXPAYER APPEALS (INCOME TAX)**	**RESPONDENT**

Mr. Herbert Hamilton for the Appellant; Ms. Kathy Pike and Ms. Cecelia Chapman for the Respondent.

Heard February 5 and 6, and May 25, 2007

ANDERSON J.

This is an appeal by Dennis Murray, (the Appellant) against the decision of the Commissioner of Taxpayer appeals made on the 27th April 2005, whereby it was ordered that the assessments made on the appellant by the Commissioner Taxpayer Audit & Assessment Income Tax, ("The Commissioner" or Commissioner TAAD") in the amounts of the additional tax for the years of assessment 1997 to 2001 be confirmed in the following sums:

Year of Assessment	Tax
1997	625,000.00
1998	750,000.00
1999	953,274.13
2000	1,659,826.00
2001	2,017,338.00

The Grounds of Appeal relied upon by the Appellant are as follows:

A. That the Notices of Assessment are a nullity for the following reasons:
    a. That the Commissioner did not serve any notice requiring the Appellant to deliver returns and/or statements of any profits or gains or any accounts or

any documents whatsoever in respect of the Appellant's income and/or assets for any of the relevant years of assessment *prior* to raising the assessments

b. The said notices of assessment were made without any prior notification to the Appellant and/or without giving the Appellant any opportunity to make any representations and/or submissions as regards the Appellant's income in respect of the said years of assessment.

c. That the said assessments do not comply with the Income Tax Act in that they do not disclose *the basis* as required by the Act.

d. The said assessments are *ultra vires* the powers of the Commissioner under the Income Tax Act.

The Commissioner of Taxpayer Appeals ("the Respondent") in response to the Notice of Appeal filed a Statement of Case setting out the bases upon which the assessment had been made and confirmed, and asking this court to dismiss the appeal and confirm those assessments. In his Statement of Case, the Respondent set out the principal facts upon which he purported to rely in making the assessment. Those facts are as follows:

(a) The Appellant is the Managing Director of Murray's Wrecking Service and Auto Parts Limited. He also operates Mandeville Cesspool Service as a sole trader and receives rental income.

(b) The relevant history of the matter begins when the Appellant filed income tax for the period 1996 to 1999.

(c) The Commissioner TAAD raised additional assessments on the Appellant for years of assessment 1996 to 1999 which contained adjustments increasing the Appellant's chargeable income in the following amount:

Year	**Tax**
1996	$3,731,045.62
1997	$ 937,500.00
1998	$1,125,000.00
1999	$2,017,338.00

(d) The said adjustments to the chargeable income resulted from the Commissioner TAAD treating the consideration of $10,000,000.00 used by the parish of Manchester as being income obtained from an unreported source.

(e) A Form 13 dated the 8th of October 2000 was served on the Appellant requiring him to make and deliver returns of his income to the Commissioner TAAD for the years of assessment 2000 and 2001.

(f) The Appellant failed to file returns for the years of assessment 2000 and 2001. Pursuant to section 72 of the Income Tax Act the Commissioner of TAAD made estimated assessments for the years 2000 and 2001 totalling $3,667,164.00 inclusive of penalty.

(g) By letter dated January 10, 2003 the Appellant objected to the Notice of Assessment for years 1996 to 1999 on the basis that:

- The estimated assessments under section 72 are excessive and do not agree with the client's accounting records, or income tax returns already submitted.
- The assessments provide no details regarding income stated to exist from sources which were not disclosed by the client. The Appellant strongly denied the existence of any such additional income.
- The accountant/Tax adviser asked that the Appellant be presented with the information regarding these additional sources of income so that the related grounds of objection could be stated more extensively.
- The surcharge applied is therefore not relevant.

(h) The representatives of the TAAD met with the Appellant's accountant on January 28, 2003 with a view to setting the objection. At the said meeting it was agreed that a Capital Statement would be submitted to the TAAD within a reasonable time.

(i) The Appellant on March 31, 2003 by telephone promised to deliver the said Capital Statement to TAAD before the 7th day of April 2003.

(j) By letter dated August 25, 2003 the Commissioner of TAAD again requested from the Appellant the said capital statement to be produced by September 10, 2003, in order to substantiate his objection, failing which the objection would cease to have effect.

(k) The Appellant by letter dated September 9, 2003 requested an extension of time until September 24, 2003 within which to submit the Capital Statement.

The Appellant failed to submit the said Capital Statement within the time specified and again by letter dated September 29, 2003 requested a further extension of time from the TAAD until October 10, 2003 within which to submit the said Capital Statement.

(l) By letter dated September 30, 2003 the Commissioner of TAAD confirmed the assessments and informed the Appellant that she was unable to grant the further extension of time requested as sufficient time had been given since the objection.

(m) The Appellant by letter dated October 31, 2003 appealed to the Respondent, the decision of the Commissioner of TAAD and enclosed the said Capital Statement.

(n) A hearing was held on March 16, 2004 at the Taxpayer Appeals Department, where additional information was then requested from the Appellant to support some balances in the Capital Statement to be presented on or before May 17, 2004.

(o) A meeting was held with the Appellant's representative on April 22, 2005 where certain arithmetic as well as constructional errors contained in the Capital Statement were pointed out by the Respondent's representative.

(p) The Appellant by letter dated April 22, 2005 responded to the issues raised at the meeting and provided a revised Capital Statement to the Respondent.

(q) This revised Capital Statement still contained arithmetic and constructional errors and when corrected showed the Appellant owing more taxes than that for which he was assessed by the Commissioner of TAAD./

(r) By letter dated April 26, 2004 the representative of Respondent informed the Appellant of the Department's position in light of the revised Capital Statement and the information presented.

(s) On the 27th of April 2005 the Respondent issued his Notice of Decision, vacating the additional assessment for 1996, while confirming the additional assessment for years 1997 to 1999 and the estimated assessments for 2000 and 2001. The penalties for 1997 to 1999 were however removed.

The Respondent further set out reasons on the basis of which it was submitted the assessment should be confirmed by this court and the appeal dismissed.

Reasons

(a) The Appellant failed to deliver to the Commissioner of TAAD true and correct returns of his income from every source whatsoever for the years of assessment 1996 to 1999. The Commissioner acted correctly in making an additional assessment in respect of the said period of assessment.

(b) The Commissioner's assessment for years 2000 to 2001 was properly made to the best of her judgment in accordance with section 72 (3) of the Income Tax Act.

(c) Pursuant to section 70 (6) of the Income Tax, the non-delivery of a notice requiring the Appellant to deliver returns and or statements of any profits or gains or any accounts or any documents whatsoever in respect of the Appellant's income and or assets for any year of assessment before an assessment is made upon that person does not invalidate the assessment. Despite this fact the Commissioner of TAAD served a notice upon the Appellant requiring him to file his returns for the years of assessment 2000 to 2001

(d) The Notice of Assessment served upon the Appellant by the Commissioner disclosed a sufficient basis on which the assessment was made.

(e) In exercise of her powers under section 75 (5)(a)(ii) of the Act, the Commissioner of TAAD requested that the Appellant produce documentary proof in the form a capital statement to substantiate his objection. The Appellant failed to appreciate that the onus of proof rests with him and did not provide the capital statement requested. Consequently, the Commissioner correctly confirmed the assessments.

(f) The Respondent gave the Appellant adequate opportunity to be heard and to provide documentary proof of his claim. The Appellant however failed to discharge this burden and the Respondent correctly confirmed the decision of the Commissioner of TAAD for years of assessment of assessment 1997 to 2001.

Let me deal at the outset with facts which are in issue. Although there are some minor differences in the facts as recounted by the Appellant and the Respondent herein, there is substantial agreement between the parties. In so far as there are differences, they appear to turn upon the following:

a) Whether at a meeting held on January 28, 2003 between representatives of TAAD and the Appellant's accountants, the Respondent had asked for and the Appellant had agreed to supply, a capital statement.
b) Whether a capital statement was submitted on time in accordance with a request or agreement, or at all.
c) Whether the Appellant had been served with any notice requiring the Appellant to deliver returns before the raising of the assessments.

The Appellant in his affidavit evidence says he "does not recall having made any agreement to submit a capital statement." However, there was no averment in the Respondent's Statements of Case that the Appellant was at the meeting of January 28, 2003 at which this was agreed with his accountants. In addition, there are several indicators in the correspondence from his accountants that they were, in fact, preparing to submit the statement, and indeed, they specifically asked for extensions of time to submit it. In those circumstances, the court has little difficulty in accepting as fact that the Appellant did have an obligation to provide a capital statement to the Revenue.

Secondly, I accept that such a statement was in fact provided some considerable time after it was expected by the Revenue, and indeed, at the filing of the appeal against the decision of the Commissioner TAAD. I would add that I do not agree with the implications of the Appellant's averment in his affidavit that the statement which he submitted to the Revenue and which was the subject of its analysis, "did not support the assessments". If one looks at the Edman affidavit, paragraph 10, to which reference is made, it is clear that Edman is saying that the Revenue did not accept the position of the Appellant, but were prepared to make a concession with respect to the treatment of one item on the statement.

On the question of notice, according to the Respondent's Statement of Case, a Form 13 notice was served on the Appellant on the 8th October 2000 requesting him to make returns for the years of Assessment 2000 and 2001. This was pursuant to section 70(1) of the Act, set out herewith.

> Every person, whether he is or is not liable to pay income tax, upon whom the Commissioner of Inland Revenue 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 of Inland Revenue a return as aforesaid.

The notice itself was in the following terms:

> TAKE NOTICE that pursuant to section 70 (1) of the Income Tax Act, you are hereby required to make and deliver to the Commissioner of Taxpayer and Assessment Department a return of your income for the Year of Assessment 2000-2001, WITHIN 15 DAYS after the date of service hereof upon you.
>
> AND FURTHER TAKE NOTICE that if you fail without reasonable excuse to comply with the requirements of this notice, proceedings may be taken against you pursuant to section 70(4) of the said Act.
>
> Dated the 8th day of October, 2002

It is not in dispute that there had been a failure to file the returns required under section 70(1). Accordingly, the Commissioner TAAD raised "estimated assessments" on the Appellant for those years of assessment. Appellant avers in his affidavit that although the notice was issued, "the prescribed forms mandated by section 67(5) and 67(6) were not provided". Appellant argues, therefore, that as a result, the notice and the assessments were invalid. I hold that the Commissioner TAAD did, in fact, issue a Notice requiring the Appellant to make and deliver returns under section 70(1) of the Income Tax Act. Later in this judgment, I shall give my view on the submission that the section mandates the Commissioner to provide "either personally or by post" the return and other prescribed form to the taxpayer. The sub-sections mandate that a "return" and a statement "in the prescribed form *or* such form as may be agreed by the Commissioner of Inland Revenue, of the tax chargeable on that income under this Act" are to be delivered to the Commissioner. Subsections (5) and (6) of section 67 are as follows:

> (5) Every person delivering a return of income shall include with the return a statement in the prescribed form or such form as may be agreed by the Commissioner of Inland Revenue of the tax chargeable on that income under this Act, indicating how much (if any) of that tax remains unpaid; and tax so indicated as unpaid shall be treated as if it had been the subject of a notice of assessment served on that person and specifying as the collection date the 15th of March next following the end of the year of assessment.
>
> (6) Every return shall be in the prescribed form.

Issues

Counsel for the Appellant submits that the issues to be determined are as follows:

A. The validity of the **additional** assessments raised for Y/A 1997 to 1999;

B. The validity of the **estimated** assessments for Y/A 2000 and 2001.

C. The validity of the surcharges imposed.

The Respondent's counsel frames those issues in the following way:

1) Whether the Estimated Assessments in respect of the years 1997 to 2001 are null and void for reasons that they are:
   a) Defective, in that the basis for the assessment is not stated.
   b) The assessments were made in the absence of the performance of conditions precedent to the making of an assessment that is delivery to the appellant of notices to file returns and the requisite prescribed form for completion of the said return.
   c) The assessments were made without prior notification to the Appellant and no opportunity was provided to the Appellant to make representation on the assessment.
2) Whether a determination of liability to pay was made by the Commissioner of TAAD before best judgment assessments were raised.
3) Whether the imposition of surcharge is valid.

The Appellant's counsel submits, firstly, that the onus is on the Commissioner to show that sums assessed upon a taxpayer derive from sources delineated in section 5 of the Income Tax Act. He cited **C.I.R v Reinhold, 1953 – 34 T.C. 388** and **Karl Evans Brown 1989 Revenue Court Appeal No: 43/86 at page 6.** In the Reinhold case, Lord Keith at page 2396 stated.

> "It is for the Revenue to bring the Respondent within the taxing provisions of the statute and this they can only do if they established that he is caught by paragraph 1 (a)(ii) and Case I of Schedule D"

Counsel submitted that the additional sums assessed (i.e. the 1997, 1998 and 1999 additional assessments) were stated to be derived from "sources not stated elsewhere." Such a characterization does not exist in, and cannot be brought under, the ambit of section 5 of the

Act. It was, accordingly, his view, that by virtue of that fact, the Revenue had failed to discharge the onus placed on it, to bring the sums within the charging section.

In the local case, **Karl Evans Brown** in the Court of Appeal, Carey J.A. in his judgment at page 6 of the report said.

> "The Act places the burden of proving that the taxpayer is liable to pay on the Commissioner."

I understand from the citations by Appellant's counsel that he is positing that the Commissioner must not only indicate that the assessed sums are indeed income, but also under which head of income, of the various heads in section 5 of the Act, the sum falls.

With respect to a second issue raised by the Appellant in counsel's submission, it is stated that the Commissioner is obliged to show "the grounds on which she formed her opinion that the Appellant is liable to pay tax before she can make an assessment to the best of her judgment". He cited the case of **ARGOSY CO LTD (In Voluntary Liquidation) v C.I.R. [1971] 15 W.I.R. 502** as well as **Karl Evans Brown** referred to above. In **ARGOSY**, the headnote reads as follows:

> The Appellant company was incorporated in Guyana where it carried on the business of printers publishers stationers and booksellers. In 1961 it sold all the sections of its business except the bookselling which it continued. This in turn ceased when the company went into voluntary liquidation in March 1962. Thus, in 1961, -the relevant year of income- the company carried on its entire business up to March, and thereafter carried on the bookselling section only.
>
> Although it was the liquidator's duty to submit a return in 1962 for the purpose of income tax assessment, he failed to do so because all the books of the company had been destroyed by fire in February 1962, Acting under section 48(4) of the Income Tax Ordnance, the Commissioner raised an assessment in the sum of $25,000.00.as a result of which the exigible tax was $11,250.00. From 1958 onwards, the bookselling section showed a progressively increasing profit, but the company's activities as a whole showed a trading loss.
>
> HELD: that even though the onus was on the taxpayer to show that the assessment was excessive, the Commissioner must show the grounds on which he formed the opinion that the company was liable to pay tax before he could make an assessment to the best of his judgment and as there had

> been no evidence before him on which he could have formed such an opinion, and further, as a strong prima facie had been made out that the Commissioner had formed an opinion on liability which no reasonable person could hold, the assessment was bad.

It was the submission of counsel for the Appellant that on the basis of the authority cited, the Commissioner could only make a best judgment assessment after she had formed the opinion that the Appellant was indeed liable to tax. He submitted this proposition was supported be section 75(3) of the Act. That section provides that the notice of assessment "shall state the bases on which the assessment is made". It was submitted that because of the failure to comply with the authorities and the Act, the assessments were flawed and invalid.

Another basis on which the assessments were challenged was that a condition precedent laid down in the procedure for making an assessment had not been followed in the circumstances of the issue of the form 13 notice. Mr. Hamilton submitted that pursuant to section 67(5) and (6) of the Act, the return and statement requested by the Commissioner by notice under section 70(4), are to be included with the notice. It was suggested that the case of **WINSTON LINCOLN V COLLECTOR OF TAXES. (1988) 25 JLR 44**, per Rowe, P. at page 49, was authority for the proposition that the Appellant was entitled to be presented with the prescribed forms whether personally or by post. There his Lordship had stated:

> 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 with 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 dispatched to him by the Commissioner.

Arguendo, since this had not been done, there had been a failure to comply with a mandatory procedural requirement and the consequent assessments were in terms of the Act, nullities. The learned President also stated at page 51 of the said judgment:

> "It follows inexorably that if a 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.

With respect to the surcharges imposed by the Commissioner TAAD, Appellant's counsel also submitted that these should be discharged. Section 72, subsections (4) and (6) set out below, provides for the circumstances in which surcharges may be imposed.

(4) Where it appears to the Commissioner that any person liable to tax in respect of any year of assessment has not been assessed or has been assessed to a less amount than that which ought to have been charged the Commissioner may, within the year of assessment or within six years after the expiration thereof, assess such person at such amount or additional amount or surcharge as according to his judgment ought to have been charged:

Provided that where any form of fraud or willful default has been committed by or on behalf of any person in connection with or in relation to income tax, assessments, additional assessments and surcharges on that person to income tax for that year may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or willful default, be made as aforesaid at any time:

Provided further that any person who disputes such assessment, additional assessment or surcharge, may appeal to the Revenue Court in the same manner as an appeal may be made against an assessment.

(6) (a) If the Commissioner –

(i) has made a charge to tax in respect of a sum in excess of the amount contained in a return of a person to be charged; or

(ii) discovers that a charge to tax in respect of a sum in excess of such amount ought to be made, and an assessment is made, at any time within the year of assessment or within three years after the expiration thereof,

he may, unless the person to be charged to his satisfaction that the omission by him did not proceed from any fraud, covin, art or contrivance or any gross or willful neglect, charge that person, in respect of such excess, in a sum not exceeding treble the amount of the tax on the amount of the excess.

(b) If the person to be charged has neglected or refused to deliver a return, the Commissioner may charge him in a sum not exceeding treble the amount of the tax with

> which, in his judgment, he ought to be charged, and such sum shall be added to the assessment.

Although surcharges had been imposed in respect of the years of assessment 1997, 1998 and 1999, these had subsequently been removed on the basis that the Appellant "had not been given an opportunity of a hearing to explain the reason for understating your income". Counsel submitted that the same reason should have sufficed for the discharge of the surcharges with respect to years of Assessment 2000 and 2001. The Commissioner had refused this request on the basis that since no returns had been submitted by the taxpayer, different principles applied. Appellant's counsel was of the view that this situation was specifically covered by section 72(6)(b) of the Act which provides for "treble the amount of tax, as against the excess." That section is set out above. The Appellant himself, in his affidavit, also suggested that the imposition of the surcharges at the rate they were imposed for 2000 and 2001 were unfair because the notice would have induced him to the view that the only penalty that he was likely to suffer by virtue of the reference to section 70(4),was a fine of five thousand dollars ($5,000.00)

I propose to deal with the respective grounds of appeal filed by Appellant's counsel and I shall seek to relate them to the submissions which were made. I shall endeavour to link the grounds with the articulation of the issues proposed and submissions made by counsel for the Appellant. In doing so I shall also advert to the counter submissions made by counsel for the Respondent and confirm as to which of the submissions I accept.

The first ground of appeal is in the following terms:

> That the Commissioner did not serve any notice requiring the Appellant to deliver returns and/or statements of any profits or gains or any accounts or any documents whatsoever in respect of the Appellant's income and/or assets for any of the relevant years of assessment prior to raising the assessments

The Appellant contends that the assessments are invalid and are to be discharged because the Commissioner TAAD did not send to the Appellant notices to file Returns. **WINSTON LINCOLN** (supra), is cited in aid of this submission. In further support of this contention it is asserted that the Income Tax Act (ITA) imposes mandatory procedural requirements whereby the Commissioner is required to issue to the Appellant notice to deliver returns,

which operate as a condition precedent to the raising of estimated assessments. Furthermore it is asserted that the notice must be accompanied by the prescribed form, failing which a procedural irregularity arises which invalidates the assessment.

Based upon the evidence which I have accepted, the assessments for the years in question may be divided into two; those for years of assessment 1997 to 1999, for which the taxpayer had filed returns, and those for years of assessment 2000 and 2001 for which no returns were filed. The Respondent's counsel submitted that the argument that the Commissioner did not serve any notice requiring the Appellant to deliver returns or statement for any profits and gains was erroneous. It is pointed out that with respect to the years 1997 to 1999, returns were filed by the Appellant and assessments were made in accordance with the powers accorded to the Commissioner TAAD under section 72 in particular section 72(2) upon a rejection of the returns filed. Section 72(2) is in the following terms.

> Where a person has delivered a return the Commissioner may –
> *(a)* accept the return and make an assessment accordingly; or
> *(b)* refuse to accept the return and, to the best of his judgment, make an assessment upon that person of the amount at which he ought to be charged.

Counsel for the Respondent points out that, in any event, with respect to the period 2000 - 2001 a Form 13 Notice was served on the Appellant and this is confirmed by the affidavit of Michael Williams.

I hold that where the taxpayer has filed a return then, pursuant to section 72 of the Act, the Commissioner may either accept the return *and* make an assessment accordingly, or refuse to accept it and "to the best of his judgment, make an assessment upon the person". There is no statutory requirement that the Commissioner serve a notice on the taxpayer who has filed a return, the correctness of which the Commissioner has not accepted.

Appellant had also cited the judgment of Rowe P. in the **WINSTON LINCOLN** sections of which I have quoted above, as authority for the further proposition that unless the notice was accompanied by the forms referred to in sections 67(5) and (6) that would also invalidate the assessment. The learned President had said at page 49 of the report:

> 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 dispatched to him by the Commissioner.

Section 72(3) of the Act relates to where the taxpayer has failed to file a return and it states.

> Where a person has not delivered a return and the Commissioner is of the opinion that such person is liable to pay tax, he may, according to the best of his judgment, make an assessment upon such person of the amount at which he ought to be charged, 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 Respondent's counsel has in her written submissions made the observation that the Jamaican tax system is premised upon a process of self assessment. I agree. The dicta of the learned President Rowe that the "procedure relative to returns commences with the commissioner" can only relate to the situation where the taxpayer has failed to submit his return. Indeed, his lordship was addressing the procedure to be followed under subsection (3) of section 72; that is, where no return has been filed. It seems clear that under section 67 "every person liable to pay income tax in respect of any year of assessment shall deliver a true and correct return of the whole of his income from every source". Thus, it would seem that once a taxpayer has a liability to tax he is obliged to submit a return. Under section 70, whether or not he has a liability, once the commissioner serves him a notice, he must provide the return and/or the other documents which the commissioner may require of him. I regret that I am unable to accept for the purposes of this decision, that the commissioner must also provide personally or by post the return and any form referred to under section 67 (5) and (6). In any event, subsection (6) of section 70 now puts the matter of notice beyond doubt by providing that the issuance of a notice is not a condition precedent to the making of a valid assessment. It states:

> Nothing in this section shall be construed as requiring the Commissioner of Inland Revenue to cause a notice to be served upon any person before an assessment is made upon that person.

Accordingly, whether or not notices had been served on the Appellant, the assessments would have been valid. Thus the first ground of Appeal must fail.

The second and third Grounds of Appeal filed by the Appellant are in the following terms:

> The said notices of assessment were made without any prior notification to the Appellant and/or without giving the Appellant any opportunity to make any representations and/or submissions as regards the Appellant's income in respect of the said years of assessment.

And

> The said assessments do not comply with the Income Tax Act in that they do not disclose *the basis* as required by the Act.

Respondent's counsel suggested that with respect to these two grounds of appeal, the Appellant sought to impugn the integrity of the assessments on what she refers to as "three plinths".

- The Assessment was made without any prior notification to the appellant ,and he was not provided with any opportunity to make representation on the matter,
- There is no evidence that the Commissioner made a determination whether the Appellant was liable to tax prior to the best judgement assessment as required by **section 72(3)** ,
- That the Notices of assessment are defective in that there is no indication of the basis on which the sums assessed are derived; a characterization of the basis as sources not stated elsewhere being insufficient to come within **section 5** of the Act.

The Appellant submits that the Commissioner had not notified him, or discussed with him, any concerns which she may have had about his returns for the years 1997 – 1997 prior to raising assessments. As a consequence, Appellant states, the assessments are properly characterized as "arbitrary, unreasonable and unfair". Although the lack of notification seems specifically related to the years 1997 to 1999, given the wording of the second and third grounds of appeal, I take it that the Appellant is referring to all the assessments, being both the additional assessments as well as the estimated assessments. It is appropriate to look briefly at the provisions in sections 67 to 75 which deal with the assessment procedures to understand the scheme of the Act. I will not, however, dwell upon the years of assessment 1997 to 1999 since it will be apparent from my reasoning above that I am of the view that assessments may, in any event, under the scheme of the Act, be made on a taxpayer without notification, for example, where the taxpayer has filed a return that is not accepted by the Commissioner. Where the return has been filed then, under section 72(2), she has the right to

accept it, or to reject it and raise a best judgment assessment. Section 72 (1) clearly confers on the commissioner the requirement to assess "every person liable to the payment of tax" as soon after the expiration of the period by which returns are to be filed. Certainly, section 67(1) imposes an obligation on every person who is "liable" to pay income tax an obligation to file a return of income together with such other document as may be required by section 67 (5) and (6). Section 68 (1) requires every person who is in receipt of income in excess of the threshold amounts set out therein, to give notice of that fact to the Commissioner by the following February 15. This mandatory requirement exempts, by proviso, those employed persons who would be included on the returns of their employers. Section 70 also imposes an obligation on any person, whether or not liable to pay income tax, upon whom the commissioner serves the appropriate notice, to make and deliver a return of income and tax. Further, in circumstances in which the Appellant had filed returns for years of assessment 1997 to 1999 which the commissioner had rejected, it would seem highly illogical that she would still have to serve any notification of an intention to raise an assessment. On the other hand, where as in years 2000 and 2001 the Appellant had failed to file appropriate returns, there was, as I have found, a notice was issued under section 70(1). I am of the view that neither with respect to the additional assessments nor the estimated assessments is there any breach of a duty to notify the Appellant.

It is also instructive, as Respondent's counsel points out, that where the intention of the statute is to provide for notice to the taxpayer, it explicitly provides therefor. Also, where the intention is to provide for a hearing this is spelt out. Respondent's counsel submits, and I agree, that according to the scheme of the Act, there is a self-assessment system which is premised upon the taxpayer filing a return to start the process. The taxpayer is not generally accorded the right to a hearing prior to the making of an assessment. That normally arises upon service of a notice; hence the right to object and appeal. Section 75(4) and (6a) of the Act appear to reinforce the scheme of the Act as one of self-assessment with the trigger being the filing of the return by the taxpayer, on or before the "voluntary cut-off date, March 15, of the succeeding year of assessment. Section 75 (4) provides that:

> If any person disputes the assessment (including 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 service of the notice of assessment.

Section 76 provides for appeals to the Revenue Court.

On my reading of this subsection (4) of section 75, even where there is a (preliminary) determination or decision by the commissioner with which the taxpayer may differ, it is only when the assessment is made that the taxpayer is put on notice that time begins to run in respect of his right to appeal. In these circumstances a person is afforded ample opportunity to contest an assessment. In this regard, counsel for the Respondent cites **DeZura v Minister of National Revenue [1948] 1DLR, 465**. At 1103- 1104 of this case, it is stated and I adopt the views expressed there:

> The object of an assessment is the ascertainment of the amount of the taxpayer's taxable income and the fixation of his liability in accordance with the provisions of the Act. If the taxpayer makes no return or gives incorrect information either in his return or otherwise he can have no just cause for complaint on the ground that the Minister has determined the amount of tax he ought to pay provided he has a right of appeal therefrom and is given an opportunity of showing that the amount determined by the Minister is incorrect in fact. Nor need the taxpayer who has made a true return have any fear of the Minister's power if he has a right of appeal. The interests of the revenue are thus protected with the rights of the taxpayers being fully maintained. Ordinarily, the taxpayer knows better than any one else the amount of his taxable income and should be able to proved it to the satisfaction of the Court. If he does so and it is less than the amount determined by the Minister, then such amount must be reduced in accordance with the finding of the Court. If, on the other hand, he fails to show that the amount determined by the Minister is erroneous, he cannot justly complain if the amount stands. If his failure to satisfy the Court is due to his own fault or neglect such as his failure to keep proper accounts or records with which to support his own statements, he has no one to blame but himself.

It will be recalled that the Appellant's third ground of appeal was that "the said assessments do not comply with the Income Tax Act in that they do not disclose *the basis* as required by the Act". In support of this proposition the Appellant submitted that the onus was on the Commissioner to show firstly, that the taxpayer had a liability to tax. Further, it was also submitted that, before she could make a best judgment assessment, "she had to show the grounds on which she had formed her opinion that the Appellant is liable to tax". It was submitted that "an examination of the evidence presented provides no information whatsoever as to the basis on which the Commissioner formed the view that the Appellant was liable to pay additional/estimated tax for Y/A's 1997-2001. This, it is argued, is not

only in breach of the principle enunciated by the cases, but also of the statutory requirement that the notice of assessment "shall state the basis on which the assessment is made" - Section 75(3). The assessments are for these reasons also flawed". Appellant cites the Argosy case and Karl Evans Brown, both already cited above in support of his submissions.

I believe that the protestations in these submissions are profoundly misconceived and an examination of the very authorities cited will indicate that all that is a necessary is a reasonable or "rational" basis for believing that the taxpayer has a tax liability. Thus for example, if the taxpayer had received taxable income from his employment in the previous year and remained in that employment, it would not be unreasonable to believe that a liability will arise in the current year, at least assuming no adjustment of the threshold. The Argosy case can thus be distinguished on the basis of the irrationality of raising the assessment in the circumstances of that taxpayer. In looking at the Karl Evans Brown case, I find Carey JA's judgment very instructive and supportive of the way the Commissioner proceeded. In that case his lordship delivered himself of the following:

> Mr. Grant called our attention to **Argosy Co. Ltd. (In Voluntary Liquidation) v. Commissioner of Inland Revenue [1971] 15 W.I.R. 502** which was an appeal from the Court of Appeal of Guyana to the Privy Council and raised a question of the construction of a provision analogous to Section 72(3). Their Lordships held, as the headnote accurately reflects, that even though the onus was on the company to show that the assessment was excessive, the commissioner must show the grounds on which he formed the opinion that the company was liable to pay tax before he could make an assessment to the best of his judgment. Certain observations of Lord Donovan who delivered the advice of the Board are permit to this appeal. At pages 504-505 the learned Law Lord said this:
>
> > Once a reasonable opinion that liability exists is formed there must be necessarily be guess work at times as to the quantum of liability. A resident may be known to be living well above the standard which his declared income would support. The commissioner must make some estimate, or guess, of the amount by which the person has understood his income. Or reliable information may reach the Commissioner that the books of account of some particular taxpayer have been falsified so as to reduce his tax. Again the Commissioner may have to make some guess of the extent of the reduction. Such estimates or guesses may still be to the best of the Commissioner's judgment—a phrase which their Lordships think simply means to the best of his judgment on the information available to him. The contrast is not between a guess and a more

> sophisticated estimate. It is between, on the one hand, an estimate or a guess honestly made on such materials as are available to the Commissioner, and on the other hand some spurious estimate or guess in which all elements of judgment are missing.
>
> In my judgment, the matter stands thus: *There are two distinct burdens of proof in an appeal to the Revenue Court. There is first, the burden on the appellant to show that the assessment is excessive. This onus is a heavy one because of his duty to make a full disclosure of all his income from whatsoever source. The burden on the Commissioner is the lighter one because in the vast majority of cases, the objector is not claiming that he is not liable to tax; he is challenging quantum. The burden on the Commissioner is evidential. It only arises or shifts to him when the tax-payer on whom the initial burden rests, leads evidence that he is not liable for any tax whatever. The Commissioner's Statement of Case need, therefore, only show that the objector is liable to tax and the amount is assessed on the basis of material he has. Thus, to give two examples which are suggested in* ***Argosy v. Commissioner of Inland Revenue*** *(supra), the objector's acquisition of property which he has not returned or books he has not produced or which have been falsified, could constitute the material on which the Commissioner could rely, to show taxpayers prima facie liability to tax. Indeed, it appears to me that the Commissioner could have acquired his information for any source whatever. That material may be cogent or hearsay or evidence inadmissible in a Court of law.* (Emphasis mine)

It will be apparent from the above that his lordship accepts the twin burdens of proof in respect to liability and the issue of whether the assessment is excessive. As his lordship carefully points out, the burden on the Commissioner is a far lighter one because typically, the taxpayer is not saying "I have no liability to tax". Rather he is saying: "The amount is less than that for which you have assessed me". In the instant case, the fact that returns were submitted for 1997-1999 showing a tax liability means that the Commissioner's burden is already met. The taxpayer has admitted that there is a "liability". Further, as regards the discharge of this burden, which, be it noted, only arises "*when the tax-payer on whom the initial burden rests, leads evidence that he is not liable for any tax whatever*", the commissioner had information concerning the acquisition of property which was inconsistent with the information disclosed on the returns and the capital statement which the taxpayer had supplied. Thus Carey JA referred to the two examples cited in Argosy as being sufficient to indicate liability. But moreover, he also suggested obiter and I adopt his reasoning here, that "*it appears to me that the Commissioner could have acquired his information for any source whatever. That material may be cogent or hearsay or evidence inadmissible in a Court of law.*

With respect to the estimated assessments for 2000 and 2001, again the taxpayer has not raised any claim that he is not liable to tax. The Commissioner does not have to respond to that burden until the taxpayer raises it as a block to any assessment. But it seems to me that even if there was an attempt to make such an assertion, and there is none, the Commissioner would be well within his rights to infer, based upon the fact that there had been a substantial tax liability with income arising from different sources in the three (3) previous years, that there would be a liability in 2000 and 2001. In any event Carey JA's judgment also speaks to this situation.

He refers to section 67(1) of the Act which makes it clear that the burden is on the taxpayer to file his return. He states:

> Section 67(1) of the Income Tax Act should be noted. It is in the following form:
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> > 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."
>
> The effect of these provisions is that a tax-payer is bound by law to make a full disclosure of all his income from all sources whatsoever. The Act places the burden of proving that the tax-payer is liable to pay on the Commissioner, but if the tax-payer has not filed a return, the Commissioner is authorized by Section 72(3) to make an assessment "according to the best of his judgment" [Section 72(3) provides]:
>
> > Where a person has not delivered a return and the Commissioner is of the opinion that such person is liable to pay tax, he may, according to the best of his judgment, make an assessment upon such person of the amount at which he ought to be charged, but such assessment shall not affect any liability otherwise incurred by such person by reason of his failure or neglect to deliver a return.

I adopt the reasoning of the learned judge and form the view that with respect to the estimated assessments for 2000 and 2001, the Commissioner acted correctly and within the statutory requirements of the Act in raising those estimated assessments.

Before going on to deal with the question of the validity of the surcharges raised as another ground in the Appellant's case, I wish to consider the submissions that the Commissioner has not identified the "source" of the income, and that the notices of assessment are invalid because they do not state the basis on which it is made and is accordingly in breach of section 75(3) of the Act. The proviso to section 75 (3) states that any notice of assessment "shall state the basis on which the assessment has been made". In the words of the Appellant's submissions:

> The onus rests on the Commissioner to show that the sums assessed derive from sources delineated in paragraph (sic) 5 of the Income Tax Act (the Act) (**CIR v Reinhold 1953 34 TC 388**) at page 396; **Karl Evans Brown (unreported) (1989) RCCA 43/86) at page 6**.
> Submit that on the basis of the principle enunciated (supra) the assessments are ex facie flawed. This is so because the sums assessed are stated to have been derived from "*sources not stated elsewhere*", and such a characterization cannot be brought within the ambit of Section 5 of the Act. It is clear that the Commissioner failed to discharge the onus of bringing the Appellant within the charge to tax and that as a result all the assessments are fundamentally flawed, and should be discharged.

It seems to me that there are at least two (2) reasons why this submission, attractive on its face, ought to be rejected. Firstly, the self-assessment scheme of the Act is premised upon the taxpayer making "full disclosure of his income from all sources". This is because he is in the best position to know what those sources are. This is why the heavy burden of proving that an assessment is excessive is on the taxpayer because he is the one who can show from his own records, a source and application of funds. An averment that "I have no other source of income", is the mirror image of the proposition that "the assessment is excessive". Further, as Lord Donovan said in **Argosy**, where the Commissioner makes a best judgment estimate of income, it is necessarily a guess and based upon "such information as he may have available" at the time he makes the estimate. That information does not necessarily include the identification of the source. Consider the following as an example.

Let us assume that the taxpayer at the end of year of assessment 2004 has submitted a return along with a net worth statement. And further assume that the taxpayer says his only source of income is salary from employment and his net worth is one million dollars ($1,000,000.00). If at the end of 2005 his return still only shows employment income but his net worth is now eleven million dollars ($11,000,000.00) reflecting the added value from a new house bought in 2005 for ten million dollars ($10,000,000.00). There is no mortgage

obligation outstanding, no evidence of gift nor winnings from gambling or lottery nor any other explanation of some substantial capital gain on sale of a capital asset. Ought the Commissioner to await being in a position to positively identify the "source" of the money used in the purchase of the property before making an assessment, or ought she to make the assessment on the basis that there are "other sources" which have not yet been identified, thus leaving it to the taxpayer to show that the assessment is "excessive" because there is no other source of income?

Secondly, I am of the view that the characterization by the Commissioner as being income "from sources not stated elsewhere" is not to define it as being income outside of the heads of income in section 5 of the Act. Rather, it is to define it as being income not included among the heads of income included in the taxpayer's return which she had rejected, as she had a right to do. This situation is to be distinguished from one in which the Commissioner seeks to charge tax on a certain sum on the basis that it is income, while the taxpayer claims that the sum is not income. (See my ruling in DR Holdings, a decision also delivered today as well as my earlier views in the Air Jamaica pension fund case which came before this court last year and in which my decision was overturned by the Court of Appeal).

Insofar as the issue of whether the notices stated the "basis" of the assessment is concerned, the Respondent submits and I agree, that it is instructive that the provision concerning the notice has been amended since the decision in Winston Lincoln. At that time the provision required that the assessment provide notice "in substance and effect", of the particulars on which the assessment was made. There was, accordingly, a need for a more fulsome explanation as to the source of the income. In any event, I do not believe that the expression "the basis of the assessment" is to be given some special technical meaning. When one looks at the notice of decision issued on April 27 2007, the letter contains a clear exposition as to how the Commissioner TAAD had arrived at the additional assessments for 1997 to 1999 as well as estimated assessments for 2000 and 2001. In the case of the additional assessments, the basis of the assessments was the Commissioner's view that the taxpayer had failed to disclose all his income from all sources, and that this view had been reinforced by the figures which emerged from a review of the Appellant's capital statement. With respect to the estimated assessments for 2000 to 2001, the Commissioner had also indicated the sources of

trade, business, profession and farming as being the basis upon which the assessment had been made.

Even if I am incorrect in the view expressed above, I would be prepared to hold that subsection (2) and (3) of section 75 operate to validate the assessment. Section 75 (2) states:

> No assessment charge or other proceedings purporting to be made in accordance with the provisions of this Act shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Act, and if the person charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.

Subsection (3) also protects from invalidation assessments in which there are particular mistakes made as to name or surname, description of income or amount of tax. It seems to me to follows that if a mistake in the description does not invalidate an assessment, then a failure to state the "basis" could have no more serious consequences. Moreover, the saving provision in subs. (2) also applies as long as the assessment "is in substance and effect in conformity with or according to the intent and meaning of the Act". I would in these circumstances that the validity of the assessments and/or the notices thereof have not been impugned.

The fourth ground of appeal urged by the Appellant was that "the said assessments are ultra vires the powers of the Commissioner under the Income Tax Act". It is a part of this ground that it is submitted that the surcharges imposed are invalid. The Appellant refers almost en passant, to a provision section 72(6)(a)(ii) suggesting that this mandates assessments to be made within the year of assessment or within three (3) years thereafter. This paragraph does nothing of the sort. In fact it starts off with the words: "If the Commissioner"..... What subsection (6) does is to permit the Commissioner in the limited circumstances set out in sub-paragraphs (i) and (ii), to impose a surcharge of up to three (3) times the amount of the tax on the excess as determined therein.

That provision is in the following terms:

> (6) (a) If the Commissioner –
>
> (i) has made a charge to tax in respect of a sum in excess of the amount contained in a return of a person to be charged; or

(ii) discovers that a charge to tax in respect of a sum in excess of such amount ought to be made, and an assessment is made, at any tie within the year of assessment or within three years after the expiration thereof,

he may, unless the person to be charged proves to his satisfaction that the omission by him did not proceed from any fraud, covin, art or contrivance or any gross or willful neglect, charge that person, in respect of such excess, in a sum not exceeding treble the amount of the tax on the amount of the excess.

(b) If the person to be charged has neglected or refused to deliver a return, the Commissioner may charge him in a sum not exceeding treble the amount of the tax with which, in his judgment, he ought to be charged, and such sum shall be added to the assessment.

Thus, it is clear that an opportunity must be given to the taxpayer in the circumstances of sub-paragraphs (i) and (ii), to be heard in explanation in relation to the imposition of a surcharge.

Counsel for the Appellant submits that assessments and surcharges made in 2003 in relation to years of assessment 1997 and 1998 were outside of the period allowed by the Act and were so ultra vires. It seems clear to me that pursuant to section 72(4), the Commissioner is well within her rights to raise an assessment and the surcharge in the year of assessment or within six years after the expiration thereof in relation to both tax and surcharge. Section 72(4) provides as follows:

> Where it appears to the Commissioner that any person liable to tax in respect of any year of assessment has not been assessed or has been assessed to a less amount than that which ought to have been charged the Commissioner may, within the year of assessment or within six years after the expiration thereof, assess such person at such amount or additional amount or surcharge. As according to his judgment ought to have been charged:
>
> Provided that where any form of fraud or willful default has been committed by or on behalf of any person in connection with or in relation to income tax, assessments, additional assessments and surcharges on that person to income tax for that year may, for the purpose of making good to the Crown any loss of tax attributable to the fraud or willful default, be made as aforesaid at any time:

In the instant case, the Commissioner agreed to withdraw the surcharges in relation to the years 1997 to 1999, on the basis that the taxpayer had not been given the opportunity to explain the differences between his return and that as adjusted by the additional assessments.

explain the differences between his return and that as adjusted by the additional assessments. It is clear, however, that pursuant to sub-paragraph (b), there is no obligation to grant any hearing where the taxpayer has "neglected or refused to deliver a return", a situation which applied to the years 2000 and 2001.

I therefore hold that the surcharges which were upheld by the Respondent in relation to the Commissioner's decision for the years 2000 and 2001 were properly imposed.

In the result, I hold that the Appellant has failed to satisfy me on any of its grounds of appeal and the appeal is accordingly dismissed. Costs are to be the Respondent's to be taxed if not agreed.