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Privy Council Appeal No. 44 of 2002

(1) Premium Investments Limited and
(2) Town and Country Resorts Limited *Appellants*

v.

The Commissioner of General Consumption Tax *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 30th July 2003

Present at the hearing:-

Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Hope of Craighead
Lord Walker of Gestingthorpe
Sir Philip Otton

[Delivered by Lord Walker of Gestingthorpe]

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1. The general consumption tax ("GCT") was introduced in Jamaica in 1991. It is regulated principally by the General Consumption Tax Act (Act 16 of 1991) as amended ("the Act"), by regulations made under the Act and (in relation to collection and recovery of the tax) by the Tax Collection Act (Law 6 of 1960) as amended. It has many features similar to the value added tax charged in the United Kingdom (and indeed throughout the European Union), including the fact that it is charged and paid mainly by registered taxpayers who are traders, but its ultimate burden falls on the consumers to whom goods and services are supplied.

2. The principal charging provision is section 3(1) of the Act:

"Subject to the provisions of this Act, there shall be imposed, from and after the 22nd day of October, 1991, a tax to be known as general consumption tax –

(a) on the supply in Jamaica of goods and services by a registered taxpayer in the course or furtherance of a taxable activity carried on by that taxpayer; and

(b) on the importation into Jamaica of goods and services,

by reference to the value of those goods and services."

Section 3(2) imposes liability for GCT (so far as now relevant) on a registered taxpayer.

3. Every person who carries on a taxable activity (widely defined in section 2(1) of the Act) is required to register, and becomes a registered taxpayer if his turnover exceeds the statutory limits (sections 26 and 27). Every registered taxpayer is required in respect of each taxable period (prescribed by regulations as a calendar month) to make returns in the prescribed form and to pay whatever tax is due (section 33(1)). Section 33(2) provides that a registered taxpayer who ceases to be registered shall within one month furnish to the Commissioner a final return in respect of his last taxable period. Every registered taxpayer is also under a duty to inform the Commissioner of changes in his taxable activity, including its cessation (section 32(1)) and to keep records and to produce them if required (section 36).

4. This appeal is concerned with the meaning and effect of section 23A of the Act, which was inserted by the General Consumption Tax (Amendment) Act 1995 ("the amending Act"). The new section (inserted into Part V of the Act, headed "Miscellaneous provisions relating to tax") is as follows:

"(1) Where a taxable activity consists of the supply of –

(a) tourist accommodation; or

(b) services offered to tourists through the operation of a tourism enterprise as defined in section 2 of the Tourist Board Act,

it shall be the responsibility of the operator of the accommodation or services to collect the tax chargeable in respect of that taxable activity and pay the tax to the Commissioner of Inland Revenue, in accordance with the provisions of section 33(1).

(2) In subsection (1) –

'operator' means the person who owns the business services referred to in that subsection and includes the manager or other principal officer of that business;

'tourist' has the same meaning as in section 2 of the Tourist Board Act;

'tourist accommodation' means accommodation offered to tourists in an apartment, a hotel, resort cottage or any other group of buildings within the same precinct."

Before commenting on this section their Lordships think it appropriate to summarise the facts as they appear from the affidavit evidence and exhibits filed in support of the originating summons which launched this litigation.

5. The originating summons was issued on the application of two companies incorporated in Jamaica, Premium Investments Limited ("Premium") and Town & Country Resorts Limited ("Town & Country"). The only respondent was the Commissioner of General Consumption Tax. Town & Country is a wholly-owned subsidiary of Premium and the principal affidavit in support of the originating summons was made by the Right Honourable Edward Seaga, the chairman of both companies.

6. Premium was the registered proprietor of a leasehold interest in a tourist complex known as The Enchanted Garden at Carinosa Gardens, Ocho Rios. The complex included numerous units of accommodation (described as town houses, studios and apartments), hotel and restaurant facilities and gardens. Premium was head lessee of most of this property and Town & Country was sublessee. Both companies were registered taxpayers for GCT purposes but in practice Town & Country was treated as running the tourist business. Between 1991 and 1993 it was Town & Country which made GCT returns and paid the tax.

7. In 1993 Premium entered into a written management agreement with a Delaware company called DHC Ocho Rios Hospitality Corporation ("DHC"). Town & Country was not a formal party to the management agreement but it was stated to have consented to it. The agreement, dated 1 December 1993, was governed by the law of the State of New York. Its general effect appears from clause 1.01 ("Owner" meaning Premium and "Manager" meaning DHC):

> "Owner hereby appoints and employs Manager as Owner's exclusive agent to supervise, direct and control the management and operation of the Resort for the term provided in section 1.04 [eight years unless terminated on default]. Manager accepts such appointment and agrees to

manage the Resort during the term of this Agreement in accordance with the terms and conditions hereinafter set forth. The performance of all activities by Manager authorised hereunder or described as an activity Manager is required to perform hereunder shall be for the account of Owner."

8. It is unnecessary to go far into the detail of the management agreement. It combined a high degree of autonomy for the manager (illustrated by clauses 1.02, 4.01 A to L, and 14.01A) with continuation of the owner's entitlement to the fixed and current assets and net profits of the business (after payment to the manager, under clause 5.01, of a fixed base management fee and a variable incentive management fee). The owner (or its affiliated companies) were also to be the employers of all staff (clause 14.01). GCT was excluded from the definition of gross revenues (clause 2.01G) but that is not surprising since registered taxpayers (or their agents) are in effect charging GCT not for their own benefit, but as unpaid tax-collectors on behalf of the government.

9. Mr Seaga deposed that in December 1993 DHC began running the resort in accordance with the management agreement, and used an account at the Bank of Nova Scotia, New York, for the purposes of the business. DHC made monthly returns of GCT in the name of Town & Country. This last point was confirmed by affidavits of Mr Daniel Ambrose (who was at one time Chief Financial Officer of DHC Hotels and Resorts Management Corporation) and Mr Carlton Prendergast (who in January 1999 succeeded Mr Winston Tomlinson as Financial Controller of DHC). Mr Prendergast deposed that he had in 1999 signed a tax return in the name of Town & Country while employed not by that company but by DHC, and that Mr Tomlinson had done the same in tax returns which he had made during 1997 and 1998. However Mr George QC (appearing for the appellants, Premium and Town & Country) accepted (as is implicit in Mr Seaga's affidavit) that DHC as manager had authority to make returns in the name and on behalf of Town & Country. The General Manager of the resort was Mr Frederick March, an employee of DHC. He did not make any affidavit in the proceedings.

10. In 1997 payment of GCT in respect of the resort was falling into arrears. There were discussions between officers of the General Consumption Tax Department and representatives and advisers of Town & Country. For about two years these discussions proceeded and some payments of GCT were made by Town & Country, on the basis that it acknowledged its obligations and was

trying to solve its cash-flow problems. There was no suggestion that Town & Country was not liable for the tax.

11. In 1999 matters came to a head. On 18 March 1999 Mr March was appointed, no doubt under pressure from the Collector of Taxes, as "responsible officer" in respect of Town & Country for the purposes of section 52 of the Tax Collection Act. On 16 April 1999 the Collector of Taxes laid an information against Town & Country in the resident Magistrate's Court for the parish of St Ann. The proceedings were adjourned several times. Then on or about 3 August 1999 Town & Country's advisers raised, for the first time, the suggestion that that company was not liable for GCT at all. On 27 September 1999 Premium and Town & Country issued the originating summons which has led to this appeal.

12. The originating summons raised three questions. The first question skirted round the real point:

> "Whether on a proper construction of section 23A of the General Consumption Tax Act the entity liable for the collection and payment to the Commissioner of the tax chargeable on a taxable activity is the operator of the Resort known as The Enchanted Garden."

The second and third questions related to the construction of the management agreement, yet DHC was not made a party to the proceedings. The originating summons was not therefore a satisfactory means of getting at the real issues, and it was criticised, especially by Downer JA in the Court of Appeal, on that account. But both courts below sensibly treated the first question as if it had squarely raised the real issue between Town & Country and the Commissioner.

13. At first instance Orr J held that Town & Country was the entity which had the responsibility of collecting the GCT charged in respect of the taxable activity of the resort known as The Enchanted Garden. He declined to answer the other questions. His decision (in a reserved judgment given on 4 February 2000) was based largely on estoppel.

14. Premium and Town & Country appealed to the Court of Appeal. On 6 April 2001 the Court of Appeal unanimously dismissed the appeal. Downer JA was critical, not only of the procedure adopted by the appellants, but also of the evidence of Mr Ambrose (who was at the time Chief Financial Officer of DHC and, it seems, of its ultimate holding company) that he was unaware that

principal reason for dismissing the appeal was based not on estoppel but on section 33(2) of the Act. The appellants' advisers had, he said, failed to recognise that Town & Country could not as the operator in the eyes of the law divest itself of its legal obligation by entrusting the management of the hotel to unregistered hands.

15. Bingham JA and Smith JA (Ag) also found it unnecessary to have recourse to estoppel. Smith JA (Ag) concluded that despite the coming into force of the management agreement Town & Country remained the operator. He based that conclusion primarily on the construction of the Act and the undisputed facts as to Town & Country's continued registration as a registered taxpayer for GCT purposes.

16. Before their Lordships the argument has focused on the purpose and effect of section 23A of the Act. It was introduced in 1995 by the amending Act. It appears to be a more or less free-standing amendment, except that it makes a reference to section 33(1) of the Act. The Board was asked to look at a ministerial statement made by the Minister of State on 7 March 1995 when the amending legislation was before Parliament. But in their Lordships' view it is unnecessary to refer to parliamentary material in order to see the general purpose of the new section, and how it was intended to fit into the scheme of the GCT legislation.

17. Section 23A is not without its difficulties, but some points are reasonably clear. It is not a charging provision but is directed to responsibility for the collection and payment of tax (charged under section 3 of the Act). It is directed exclusively at a particular type of taxable activity (defined partly by reference to the Tourist Board Act), that is the provision of tourist accommodation and services offered to tourists through a tourism enterprise. These are activities which will often involve a combination of inward investment and local management services. The section cuts across the general scheme of Part VI of the Act ("Registration of persons to whom Act applies") in that it does not in terms require the operator (as defined in section 23A(2)) to be a registered person or a registered taxpayer (but it does require GCT collected by the operator to be paid in accordance with section 33(1) of the Act, which imposes obligations on a registered taxpayer). Section 23A does not indicate that the "responsibility" of the operator (an expression which echoes the provisions relating to a "responsible officer" in section 52 of the Tax Collection Act) is to oust the liability of any other person who is (or ought to be) the registered taxpayer in respect of the taxable activity.

18. These pointers enable the Board to identify the purpose and effect of the section. It is not intended to alter the general structure of the GCT legislation but to improve the means of collecting tax payable in respect of the particular activities, connected with tourism, to which it relates. A typical case would be that of an absentee landlord of holiday apartments. The landlord might have failed to register under the Act or, even if registered, might not be readily amenable to the usual processes for collection and recovery of tax. In such a case it makes for efficient administration to impose a statutory obligation on local agents who are actually concerned with the day-to-day management of the business, whether or not they might otherwise be accountable under section 58 of the Act (which makes an agent responsible for the obligations of a non-resident registered taxpayer, but imposes only a criminal sanction). In neither of these cases (nor in the case of a responsible officer designated under section 58 of the Tax Collection Act) does the agent's responsibility exclude the concurrent (and primary) liability of a person who is a registered taxpayer.

19. In the present case the manager was, paradoxically, a Delaware company with an address in New York, whereas the owner and its subsidiary were Jamaican companies whose chairman is a well-known public figure in Jamaica. Mr George QC asserted in the course of argument before the Board that DHC did have a presence in Jamaica, but that point was hardly explored in the evidence before the lower courts. From the documents before the Board it appears that DHC presented a very low profile (for instance Mr Prendergast's appointment letter of 22 January 1999 was typed on paper headed "The Enchanted Garden" and was signed by Mr March, but it omitted to identify the company of which Mr Prendergast was being appointed as Financial Controller).

20. However these unusual facts cannot alter the way in which the legislation has to be interpreted and applied. Town & Country was the registered taxpayer for the whole of the relevant period (December 1993 until August 1998) in respect of the taxable activity and it (or its holding company – the contractual arrangements between the two companies were another matter not explored below) is or was the owner of the resort business and its assets. DHC was the owner of the separate business of running the resort as an agent, remunerated partly by a fixed fee and partly by reference to profits. So DHC, although an agent, may well have been the operator for the purposes of section 23A. But, like the courts below, their Lordships refrain from any definite finding to that effect, since DHC is not a party to the proceedings.

21. But assuming (without deciding) that DHC was the operator, their Lordships are of the clear opinion that that does not exclude the liability of Town & Country as registered taxpayer in respect of the taxable activity carried on at The Enchanted Garden. Concurrent liability of an agent under section 23A cannot exclude the principal's liability any more than it does under section 58 of the Act or section 52 of the Tax Collection Act. It is not therefore necessary to consider estoppel.

22. The declaration made by Orr J (and upheld by the Court of Appeal) was substantially correct, so far as concerns the practical consequences for Town & Country. But in order to accord with the Board's reasoning the declaration should be amended to a declaration that Town & Country as the registered taxpayer remains liable to pay GCT, in accordance with section 33(1) of the Act, in respect of the taxable activity of the resort known as The Enchanted Garden. Subject to that minor amendment their Lordships will humbly advise Her Majesty that the appeal should be dismissed with costs.