

WMS.

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 28/2000

**BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE SMITH J.A.(Ag.)**

BETWEEN: PREMIUM INVESTMENTS LTD. 1ST APPELLANT

TOWN & COUNTRY RESORTS LTD. 2ND APPELLANT

AND THE COMMISSIONER OF G. C. T. RESPONDENT

**Emil George, Q.C. & Julianne Mais instructed by Dunn
Cox Orrett & Ashenheim for the Appellants**

**Hugh Small Q.C. and Drum Drummond instructed by the
Director of State Proceedings for the Revenue**

January 22, 23, 24. February 13, 14, and April 6, 2001

DOWNER, J.A.

There are pending before the Resident Magistrate in St. Ann two informations numbered 50 and 51 of 1999 sworn on the 16th of April of that year for failure to pay General Consumption Tax. The named taxpayers are Town & Country Resorts Ltd. (the second appellant) and Frederick March, the 'responsible officer' designated by the second appellant pursuant to section 52 of the Tax Collection Act.

These informations were mentioned on at least five occasions during the period 26th April to 27th September before Her Honour Mrs. Carol DaCosta. On this latter date, Mr. Dabdoub for the second appellant informed the Court that proceedings had been instituted in the Supreme Court by way of an Originating Summons and an adjournment was requested and granted. It is exceptional to resort to such a procedure when the

Resident Magistrate either in her Court or a Court of Petty Sessions has jurisdiction to determine all matters of law and fact pertaining to the recovery of taxes. Since the contention is that the second appellant is not the taxpayer, then there could have been resort to the supervisory jurisdiction of the Supreme Court by way of judicial review which is enshrined in Sec. 1(9) of the Constitution. The basis would be that the Resident Magistrate had exceeded her jurisdiction as the named taxpayers were not liable in law. See **Collector of Taxes v Lincoln** (1988) 25 JLR p.44 at pp.58- 59. Alternatively after the Resident Magistrate had heard and determined the matter, appeal proceedings could be instituted in the Circuit Court. Since the proceedings were instituted in the Court of Petty Sessions, thereafter there could have been an appeal to this Court by way of case stated. See Sec. 49 of the Justice of the Peace (Appeals) Act. I will return to this important issue later after dealing with the order in the Supreme Court by, the late esteemed Courtenay Orr. J.

The proceedings before Orr, J.

It is clear that the jurisdiction of the Supreme Court, was invoked pursuant to section 531A of the Judicature (Civil Procedure Code) Law which reads:

"531A. Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a Law or an instrument made under a Law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed."

Section 531D is important as it emphasizes the discretionary nature of the order sought, and in fact the learned judge rightly declined to answer two of the questions posed.

The discretionary section reads:

"531D. The Court or a Judge shall not be bound to determine any such question of construction if in their or his opinion it ought not to be determined on originating summons."

Assuming that these were permissible proceedings, they were collateral. The main proceedings are pending before the Resident Magistrate. The questions posed before Orr J. were as follows:

- "1. 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.
2. Whether on a proper construction of the Management Agreement by and Between Premium Investments Limited (formerly Consulting Services Limited) and DHC OCHO RIOS HOSPITALITY CORPORATION the 2nd Applicant Town & Country Resorts Limited can be deemed to be the operator of the resort known as "The Enchanted Garden" within the meaning of Section 23A of the General Consumption Tax Act.
3. Whether on a proper construction of the said Management Agreement DHC OCHO RIOS HOSPITALITY CORPORATION is the entity responsible to collect the tax chargeable in respect of the taxable activities supplied by The Enchanted Garden and the entity responsible to pay the tax to the Commissioner in accordance with the provisions of Section 33 (1) of the General Consumption Tax Act."

Here is how Orr J. answered the questions:

"Accordingly, I determine question 1 of this summons as follows: I find and declare that Town and Country is the entity which has the responsibility to collect the tax chargeable in respect of the taxable activity of the resort known as The Enchanted Garden, and pay the tax to the Commissioner of General Consumption Tax in accordance with the provisions of Section 33 (1) of the General Consumption Tax Act."

Then as to questions 2 & 3 the learned judge declined to answer them thus:

"As regards question 2, I decline to construe the management agreement referred to therein having regard to my findings and the declaration in answer to question 1. Also having regard to the very important fact that DHC is

not a registered taxpayer for the purposes of the General Consumption Tax Act.

As regards question 3, I decline to grant the relief sought for the reasons given regarding question 2, and for the further reasons as submitted by Mr. Small, that DHC is an entity which is not before the court and has not had a chance to be heard.

The costs of this application shall be paid by the applicants Premium and Town and Country to the Commissioner. Such costs to be taxed if not agreed.

I wish to thank counsel for their able submissions."

At this point it is convenient to refer to the specific Order made in the Supreme Court. It reads:

- "1 Town & Country Resorts Limited is the entity which has the responsibility to collect the tax chargeable in respect of the taxable activity of the resort known as The Enchanted Gardens, and pay the tax to the Commissioner of General Consumption Tax in accordance with the provision of Section 33 (1) of the General Consumption Tax Act."

It is appropriate to endorse the answers given by the learned judge and to add to his reasons. The management agreement was between Premium Investments Ltd., the 1st Appellant, and DHC Ocho Rios Hospitality Corporation a Delaware Corporation which was not registered under the Companies Act. See Part X of that Act. Nor was that Company a registered taxpayer pursuant to Sec. 26 and 27 of the General Consumption Tax Act (The "Act"). The Delaware Corporation was part of the informal economy beyond the reach of the tax gatherer. It is true that the second appellant is mentioned thus in Exhibit 1 of the Agreement:

- "2. Town and Country Limited, a wholly owned subsidiary of the Owner, holds subleases from the Owner of the Townhouses and Apartments leased to Owner, and has consented to this Management Agreement and to the terms hereof."

In any event clause 22.05 of the Agreement reads:

"22.05 **Applicable Law; Jurisdiction; Venue.** This Agreement shall be construed under and shall be governed by the internal laws of the State of New York without giving effect to principles of conflicts of law. The parties hereto hereby subject themselves to the jurisdiction of the state and federal courts located in the State, City and County of New York. Each party represents and warrants to the other that it is not entitled to the defense of sovereign immunity in any matter in connection with the Agreement or the ownership, management, or operation of the Resort."

Additionally, there is Article XXI of the Agreement which contains an Arbitration Clause which reads:

"21.03. **Uniform Arbitration Act.** All provisions of the Uniform Arbitration Act, New York Civil Practices law and Rules Section 5501, et seq., shall apply unless otherwise modified by this Agreement."

As regards question 3, since DHC Ocho Rios Hospitality Corporation Limited is not registered under the Companies Act nor as a taxpayer under the Act the learned judge rightly declined to answer questions 2 & 3.

Why Orr J. was correct to declare that the 2nd Appellant was the proper taxpayer

The specific section which Orr J. was asked to construe was section 23A of the Act which reads:

"23A.-(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, in accordance with the provisions of section 33 (1)."

So Section 23 A(1) must be read in conjunction with Sec. 33 (1) to determine who the operator is in the eyes of the law. Be it noted that this amendment was by an

Act of 1995. The licence granted by the Jamaica Tourist Board pursuant to the Tourist Board Act was granted on or about 12th December 1991. See the evidence of Lorna Dunkley at pages 121-122 of the Record. The application for the licence states that Town & Country Resorts Ltd operated the hotel and that Consulting Services Ltd. the predecessor of Premium Investments Ltd. was the owner. See page 124 of the Record.

Here is relevant evidence from Vinette Keene the Acting Commissioner of General Consumption Tax at page 92 of the Record.

- "9. That, having done so, I have found that the taxes due in these matters are based on monthly returns which were all filed by and in the name of Town and Country Resorts Limited for the period August 1995 to December 1998; and that the tax that was paid over this period in these matters, was paid by and in the name of Town and Country Resorts Limited. This Department had relied on these representations.
10. That, for example, I exhibit hereto as "VK1" a copy of a return filed by the Company as recently as January of this year (1999), and another return filed by the Company in July of 1997, and all the other returns are similar."

Be it noted that the management agreement referred to in Questions 2 and 3 of the Originating Summons was dated 1st December 1993. So although it is being claimed that D.H.C. Ocho Rios Hospitality Corporation was the operator during that period the second appellant made returns and paid the taxes. Since the second appellant is the registered company it would retain lawyers, accountants and auditors as well as a Secretary. Some of these are mentioned in the affidavits. How did the second appellant manage to pay the taxes over this period? How were payments reflected in its accounts?

Then as to the licence from the Tourist Board, paragraphs 14 and 15 continues thus:

- "14. That I am also informed by the Jamaica Tourist Board, and do verily believe, that the entity to which a licence has been granted for the operation of the Enchanted Gardens is Town and Country Resorts Limited, and not DHC.
15. That I exhibit hereto as "VK3" a copy of a letter from the Jamaica Tourist Board confirming this."

Exhibited to Mrs. Keene's affidavit is the application by Town & Country Resorts dated September 10, 1991 and Tax Returns were also exhibited which demonstrated that returns were made by the taxpayer up to 1999.

As regards the registration of the second appellant as a registered taxpayer the following letter dated September 21, 1999, is of importance:

**"THE REVENUE BOARD
THE OFFICE CENTRE
10TH FLOOR, KINGSTON MALL
12 OCEAN BOULEVARD
KINGSTON**

**Mrs. Vinette Keene
Actg. Commissioner
General Consumption Tax
191 Constant Spring Road
Kingston 8.**

Dear Mrs. Keene,

**RE: Town & Country Resorts Ltd/DHC Ocho Rios
Hospitality Corporation**

In reference to the abovementioned companies, please be advised of the following findings:

Name : Town & Country Resorts Ltd.

Trade Name : Enchanted Gardens

TRN : 001-022-768

Address : Eden, Ocho Rios, St. Ann
To date our records show that no TRN has been assigned to DHC Ocho Rios Hospitality Corporation.

Should you require any additional information please call.

Yours truly,
TAXPAYER REGISTRATION CENTRE."

Also Sec. 23A (2) of the Act reads:

"(2) In subsection (1) –

"operator" means the person who owns the business concerned with the operation of the tourist accommodation or 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."

Section 23 of the Act specifically provides for the transfer of the operations from one registered taxpayer to another registered taxpayer. The relevant section reads:

"23.-(1) Subject to subsection (2), where a registered taxpayer ceases to be a registered taxpayer, tax shall be payable on any taxable supply forming part of the assets of his taxable activity immediately before he so ceases.

(2) Tax shall not be payable pursuant to subsection (1) if –

- (a) the taxable activity is transferred as a going concern to another registered taxpayer;
- (b) the taxable activity is carried on by some other person after the registered taxpayer is declared bankrupt or is certified to be otherwise incapable of carrying on that taxable activity or has died; or

..."

If the management agreement dated December 1 1993 was effective in this jurisdiction then the taxable activity could be transferred pursuant to Sec. 23(2). However that was

not the case and the second appellant continues to be the only registered taxpayer and made returns up to January 1999.

Section 26(1) of the Act makes registration compulsory and is conclusive until the taxpayer ceases in law to be registered. There is no dispute on the issue that the second appellant complied with this section which reads:

"26.-(1) Every person who, on or after the coming into operation of this section, carries on a taxable activity is liable to be registered under this Act and shall apply to the Commissioner in such form as may be prescribed or approved by the Commissioner to be so registered."

Had DHC Ocho Rios Hospitality Corporation been registered as a company in Jamaica then the following section might have been applicable:

"28.-(1) Where the Commissioner has reason to believe that a person who is liable to be registered under this Act is not so registered he shall by notice in writing inform that person accordingly and require him to make an application within fourteen days of the date of the receipt of the notice."

There are provisions for Cancellation of Registration in Section 31 of the Act which read:

"31.-(1) Subject to the provisions of this section, the Commissioner shall cancel the registration –

(a) of any registered person if he is satisfied that the person is no longer carrying on a taxable activity; or

(b) of any registered taxpayer if he is satisfied that the registered taxpayer no longer qualifies for registration as such.

(2) Before taking a decision under subsection (1), the Commissioner shall notify the person concerned in writing of his intention to do so, stating the reasons therefor

(3) Any person notified pursuant to subsection (2) may, in accordance with section 40 (1), object to the proposed cancellation.

(4) If after considering any objections made under subsection (3) the Commissioner decides to cancel

registration under this Act, he shall inform the registered person in writing of such decision and the right of appeal conferred by section 40, and where that person is a registered taxpayer he shall return the certificate of registration to the Commissioner."

The Act has further provisions which stipulate the obligations on the taxpayer whose status is altered. We are dealing with a company with a "responsible officer" by the name of Frederick March who was named as such since March 18, 1999. He was not represented in these proceedings. In effect he is the compliance officer in relation to G.C.T. and as soon as he was named he ought to have examined the position before he was appointed so that the current position could have been sorted out. He would be well advised to obtain the opinion of counsel. It may well be that he is not liable for any taxes before the date of his designation as "responsible officer". See Sec. 52(7) of the Tax Collection Act.

Section 23 of the Act (supra) which deals with the transfer of operations must be read in conjunction with Section 32 which stipulates the obligations of the registered taxpayer who ceases his taxable activity in law. If, as Mr. George Q.C., submitted the second appellant is not the taxpayer then he should show compliance with Section 32 of the Act which reads:

"32.-(1) Every person who is registered under this Act shall notify the Commissioner in writing of –

(a) the transfer of ownership by him of his taxable activity or part thereof stating –

(i) the date on which ownership or part thereof is transferred;

(ii) the name of the new or part owner;

(iii) the address of the new or part owner;

(b) any change in the name, address, constitution or nature of any taxable activity carried on by him;

(c) any change of address from which, or the name in which any taxable activity is carried on by that person;

(d) the date of cessation of his taxable activity; and

(e) any change of persons who are partners in a partnership,

within twenty-one days of such transfer, change or cessation, as the case may be.

(2) A person who acquires a taxable activity or part thereof from a person registered under this Act shall so inform the Commissioner in writing within twenty-one days of the date of acquisition." [Emphasis supplied]

Section 33 concerns the Administration of Tax and is specifically referred to in

Section 23A (2) supra. It reads:

"33.-(1) A registered taxpayer shall, within such period as may be prescribed, whether or not he makes a taxable supply during any taxable period –

(a) furnish to the Commissioner a return in a form prescribed or approved by the Commissioner containing such particulars as may be prescribed; and

(b) pay to the Commissioner the amount of tax, if any, payable by that registered taxpayer in respect of the taxable period to which the return relates.

(2) A registered taxpayer who ceases to be so registered shall furnish to the Commissioner, not later than one month from the date of so ceasing, a final return in respect of the last taxable period during which he was so registered. [Emphasis supplied]

(3) The Commissioner may require a registered taxpayer (whether in his own behalf or as agent or trustee) to furnish the Commissioner with such other information relating to the return as the Commissioner considers necessary."

The combined effect of Sec. 23A and Sec. 33 ensures that the operator must be registered and if the second appellant as the registered taxpayer makes some private

agreement with a party not recognized by law, then the registered operator remains liable in law to make the returns and pay the tax. A contrary view goes against the plain words of the Act.

Section 33(2) is of vital importance. This would be the final return which ought to have been presented to the Resident Magistrate to exonerate the second appellant. It is a return which ought also to have been presented to this Court. The learned judge specifically refers to Sec. 32 (1) and Sec. 32(2) and stated thus at page 146 of the Record:

"As Mr. Small submitted Section 32(1) makes it clear that Town and Country had a duty if as it says it was not operating the Enchanted Gardens to so inform the Commissioner in writing. And by virtue of Section 32 (2) D.H.C., if it acquired the taxable activity of operating the resort should have informed the Commissioner in writing."

These statutory provisions ought to have concluded the matter. However, Orr J. embarked on a learned exposition of estoppel at the invitation of Mr. George Q.C. I do not find it necessary to comment on the learning of this aspect of the law except to say that estoppel is irrelevant in view of the statutory obligations imposed on the second appellant as a registered taxpayer. It is true that there are criminal sanctions that could be imposed on a registered taxpayer pursuant to Section 17 D of the Revenue Administration Act, but even if such sanctions were imposed that would not excuse the registered taxpayer from his liability for tax.

The scope of the Act is so wide that it provides for liability of third parties. If D.H.C. Ocho Rios Hospitality Corporation were registered as a company in this jurisdiction then Sec. 50(1) of the Act could have been brought into operation to recover the tax on the assumption that they collected it. Sec. 50 reads:

"50.-(1) Where a registered taxpayer is in default of payment of tax, in whole or in part, the Commissioner may, at any time by notice in writing to a person (hereafter in this section referred to as the "debtor") who, in connection with

any business owned or operated by the registered taxpayer is required to make a payment in money to, or who keeps or retains money on behalf of, the registered taxpayer, require the debtor to pay over to the Commissioner for the account of the registered taxpayer within the time specified in the notice the amount stated therein.

(2) The Commissioner shall send forthwith a copy of the notice referred to in subsection (1) to the registered taxpayer.

(3) Where any amount is to be paid over to the Commissioner by a debtor pursuant to subsection (1), the registered taxpayer shall be entitled to receive from the debtor a statement in writing giving details of that amount.

(4) A debtor shall, for the purposes of this section, be deemed to be acting on the authority of the registered taxpayer and shall, in respect of any payment made, be indemnified to the extent of the payment made.

(5) A notice under subsection (1), may at any time be revoked by the Commissioner if he is satisfied that any amount of tax owed by the registered taxpayer has been paid."

During the course of the submissions of Mr. George Q.C., he emphasised that D.H.C. Ocho Rios Hospitality Corporation was in fact the operator who had collected the tax. The evidential basis for these submissions is to be found in the affidavit of David Ambrose who stated thus:

- "2. That I was employed as the Chief Financial Officer for DHC Hotels and Resorts Management Corporation, a Company duly registered under the Laws of the State of Delaware in the United States of America and DHC Ocho Rios Hospitality Corporation, a Company duly incorporated under the Laws of the State of Delaware in the United States of America which company DHC Hotels and Resorts Management Corporation managed DHC OCHO RIOS HOSPITALITY CORPORATION.
3. That on the December 1st 1993 DHC OCHO RIOS HOSPITALITY CORPORATION entered into a Management Agreement with CONSULTING SERVICES LIMITED to manage and operate THE ENCHANTED GARDEN and I beg to refer This

Honourable Court to the said Management Agreement which is exhibited to the Affidavit of Edward Seaga and marked "S 1" for identity sworn to on the 24th day of September, 1999 and filed herein

4. That DHC OCHO RIOS HOSPITALITY CORPORATION did in fact pursuant to the said Management Agreement manage and operate the Hotel on a daily basis and in fact hired Mr. Frederick Marsh as their Manager of THE ENCHANTED GARDEN."

Here it should be recalled that Frederick Marsh is answerable to the Resident Magistrate as taxpayer pursuant to Sec. 52 of the Tax Collection Act. Even if the affidavit of David Ambrose is correct in this particular, the Corporation has no status as it was not registered under the Companies Act nor is it registered as a taxpayer in this jurisdiction.

The affidavit continues thus:

- "5. That the operations involved DHC OCHO RIOS HOSPITALITY CORPORATION marketing THE ENCHANTED GARDEN and collecting all Hotel revenue. These funds were deposited into a Bank Account No. 1751-10 at the Bank of Nova Scotia, New York Agency, 26th Floor, One Liberty Plaza, New York, New York 10006 and the signatories on the said account were Sam Haigh, President of OCHO RIOS HOSPITALITY CORPORATION, John A. Callaghan, Secretary of OCHO RIOS HOSPITALITY CORPORATION, Gilfie Timoll, Financial Controller employed by OCHO RIOS HOSPITALITY CORPORATION and Frederick Marsh, General Manager employed by OCHO RIOS HOSPITALITY CORPORATION.
6. That to the best of my information, knowledge and belief, no taxes whatsoever, including General Consumption Taxes, in respect to the management and operation of THE ENCHANTED GARDEN were ever collected by CONSULTING SERVICES LIMITED, PREMIUM INVESTMENTS LIMITED or TOWN AND COUNTRY RESORTS LIMITED and all such taxes, including General Consumption taxes, were in fact collected by DHC OCHO RIOS HOSPITALITY CORPORATION and that DHC

OCHO RIOS HOSPITALITY CORPORATION has never paid over to the said CONSULTING SERVICES LIMITED, PREMIUM INVESTMENTS LIMITED or TOWN AND COUNTRY RESORTS LIMITED any taxes collected in respect to the operations of THE ENCHANTED GARDEN. That all outgoing in respect to the operation of THE ENCHANTED GARDEN was paid by funds transferred from the aforesaid account at The Bank of Nova Scotia."

It would seem that in the light of this account that the second appellant as the registered taxpayer may have a good cause of action in New York against DHC Ocho Rios Hospitality Corporation for recovery of the taxes which has been transferred from the jurisdiction. There are two further puzzling paragraphs of this affidavit which read as follows:

- "7. That I was not aware that DHC OCHO RIOS HOSPITALITY CORPORATION should have been registered under the General Consumption Tax as a taxpayer and that DHC OCHO RIOS HOSPITALITY CORPORATION used the existing local Company Town and Country Resorts Limited to make all returns.
- 8. That to the best of my knowledge, information and belief none of the returns filed in the name of Town and Country Resorts Limited was signed by any employee, officer or Director of Town and Country Resorts Limited and that Town and Country Resorts Limited during this period collected or had responsibility under the Management Agreement to collect the taxes."

It is an extraordinary affidavit. Presumably D.H.C. Ocho Rios Hospitality Corporation retained lawyers and accountants who ought to have brought to its attention the requirement under the Companies Act and the revenue Acts in this jurisdiction.

The other affidavit on which the appellants rely is that of Carlton S. Prendergast who states as follows at page 127-128 of the Record:

- "1. That I reside and have my true place of abode and postal address Lot 157, Saint Mary Country Club, Tower Isle in the parish of St. Mary and I am employed as the Financial Controller for DHC Ocho Rios Hospitality Corporation ("DHC"), a company duly incorporated in the United States of America. I swear this Affidavit from facts and matters within my own personal knowledge save where stated by me to the contrary and I verily believe the contents of this Affidavit to be true.
2. I crave leave of this Honourable Court to refer to the Affidavit of Vinette Keene sworn on the 25th October, 1999 ("the Keene Affidavit") and the Affidavit of Daniel Ambrose sworn on the 18th January, 2000.
3. To the best of my knowledge, information and belief monthly returns for the material period were filed in the name of the 2nd Applicant for the reason that the 2nd Applicant Company was registered under the General Consumption Tax Act as a registered taxpayer and DHC was not so registered.
4. I have seen the Affidavit of Vinette Keene sworn on the 21st September, 1999 and exhibited to paragraph 25 of the Keene Affidavit, in particular the returns dated 30th June, 1999. The said returns dated the 30th June, 1999 were signed by me and were so signed as the Financial Controller and employee of DHC and not of the 2nd Applicant. I exhibit hereto marked "CP" for identification my letter of employment dated the 22nd January, 1999.
5. That to the best of my knowledge information and belief, Winston Tomlinson, whose name appears as signatory for the remaining returns exhibited to the Keene Affidavit, including the returns dated in January of 1999 and in May of 1997, was on the date of signing these returns an employee of DHC and not of the 2nd Applicant. Mr. Tomlinson was employed as the Financial Controller of DHC immediately before my appointment to that position."

This affidavit does not assist in the determination of the legal issues in this case.

Attached to it is a letter of appointment dated January 22, 1999 on the note paper of The Enchanted Gardens which appointed him Financial Controller. The letter is signed

by Frederick Marsh who presumably is the same person named as the 'responsible officer' for the second appellant in accordance with Sec. 52 of the Tax Collection Act.

I thought it fair to the registered taxpayer that this hearing ought to be adjourned so that the necessary formalities as to registration under the Companies Act and the Act could take place. Additionally, I had thought that if Sec. 50 of the Act was applicable, then the matter might have been settled between the registered taxpayer DHC Ocho Rios Hospitality Corporation as the debtor and the Commissioner within the intendment of Sec. 50. My conjectures were ill founded. There was an adjournment and at the resumed hearing Mr. George Q.C. informed this Court that D.H.C. Ocho Rios Hospitality Corporation no longer operates Enchanted Gardens and would not cooperate with the registration of that company. I have thought it necessary to state these facts because of the widespread publicity surrounding this case, because the Chairman of the second appellant happens to be The Right Honourable Edward Seaga, a former Prime Minister and now the Leader of the Opposition.

This basic analysis of the Act is within the competence of any Resident Magistrate in Jamaica and the failure of the second appellant, the registered taxpayer to comply with Sec. 33(1)(b) of the Act made it necessary for the Collector of Taxes to lay the informations exhibited in this case. The more appropriate phraseology would be to say the Collector of Taxes made complaints concerning unpaid taxes.

Why the resort to an Originating Summons was not the appropriate procedure

At this point it is necessary to refer to one of the informations exhibited to explain the ample jurisdiction conferred on the Resident Magistrate in her Court or the Court of Petty Sessions for the recovery of taxes. Although the process is labelled information, in substance it is a complaint and should be so captioned to emphasise that there are summary civil proceedings either in the Resident Magistrate Court or Court of Petty Sessions. The distinction between an information and a complaint is

fundamental and it runs throughout the Justices of the Peace Jurisdiction Act. Sections 7, 9 and 58 are illustrations of this distinction. Hereafter I will refer to the Information as a Complaint as that is the proper designation. Here is the complaint for \$12,822,800.07 and it reads:

**"INFORMATION
FOR FAILURE TO PAY
GENERAL CONSUMPTION TAX**

Parish of St. Ann

The information and complaint of J. Bullock Collector of Taxes for the Parish of St. Ann made and taken upon oath before the undersigned, this day of April in the year of our Lord One Thousand Nine Hundred and Ninetynine who saith that one Town & Country Resorts Ltd. of Eden Bowen Hill Ocho Rios in the parish of St. Ann and within the jurisdiction of this Court, being a registered taxpayer under and by virtue of the General Consumption Tax Act and Frederick Marsh of Eden Bowen Hill in the parish of St. Ann and within the jurisdiction of this Court, being the responsible officer of the said registered taxpayer under and by virtue of Section 52 of the Tax Collection Act, from where certain taxes, penalties, surcharge and interest thereunder are payable pursuant to Section 33 (1) and 54 (2), (3) and (4) of the General Consumption Tax Act and being required by the Collector of Taxes for the parish aforesaid to pay the sum of \$12,822,800.07 being the amount of such Taxes, penalties, surcharge and interest payable as aforesaid pursuant to the provision of Section 48 (1) of the General Consumption Tax Act and Section 46 (1) of the Tax Collection Act providing for the payment and collection of taxes, unlawfully has not paid the said sum of \$12,822,800.07 against the PEACE of our SOVEREIGN LADY THE QUEEN, HER CROWN AND DIGNITY, and thereupon the said complaint according to Law.

Taken and sworn to before me at Claremont in the parish of St. Ann this 16th day of April, One Thousand Nine Hundred and Ninety-Nine.

.....
JP/Clerk of the Courts for the Parish."

The other complaint is for \$27,288,677.14.

It is necessary to examine this complaint to ascertain in which of the two summary courts the Collector of Taxes has instituted proceedings. That there are two Summary Courts is evidenced by Sec. 3 of the Interpretation Act which reads:

"court of summary jurisdiction" means –

- (a) any justice or justices of the peace to whom jurisdiction is given by any Act for the time being in force, or any Resident Magistrate sitting either alone or with other justices in a Court of Petty Sessions;
- (b) a Resident Magistrate exercising special statutory summary jurisdiction;"

A significant difference between the two summary courts is this. The Justices of the Peace Jurisdiction Act provides for the jurisdiction of the Court of Petty Sessions. Other Acts prescribe the subjects over which this court exercise jurisdiction e.g. The Towns and Communities Act. On the other hand, the Judicature (Resident Magistrates) Act confers jurisdiction over specific subjects under this Act. Additionally, subjects are prescribed by other Acts e.g. Sec. 27 of the Tax Collection Act. This is the special statutory summary jurisdiction defined in Sec. 3 (b) of the Interpretation Act.

The affidavit of Mr. Frank Williams, counsel for the Revenue Board before the Resident Magistrate states:

"3. That in response thereto I say that on the 26th day of July, 1999, I was the Attorney-at-Law who represented the Commissioner of General Consumption Tax in respect of Summonses 50 and 51 of 1999 in the Resident Magistrate's Court/Court of Petty Sessions."

He may not have realised it, but he was representing the Collector of Taxes for St. Ann. The Resident Magistrate Court and the Court of Petty Sessions exercise a concurrent jurisdiction under the Tax Collection Act. In this instance the Collector of Taxes perhaps unwittingly has chosen the Court of Petty Sessions by specifically citing Section 46(1) of the Tax Collection Act.

The better choice for the Collector of Taxes would always be the Resident Magistrate's Court. Be it noted that a **complaint** is the process applicable to both Courts for the defaulter to answer for unpaid taxes. See Sections 284 and 285 of the Judicature (Resident Magistrates) Act which reads:

"284. The attendance as well of accused persons as of witnesses before any Court may be enforced by the same officers, by the same process, and in the same way, as the attendance of such persons before Justices may be enforced under the provisions of the Justices of the Peace Jurisdiction Act."

Then Section 285 reads:

"285. Nothing in this Act shall be deemed to prevent the Magistrate from hearing and disposing of, in his Court, any cases which by law may be dealt with summarily that may be brought before him:

Provided, that there shall be but one description of process in summary cases for both the Court and the Court of Petty Sessions, and such process shall be subjected, in either case, to the Court fees payable in the latter Courts, and to all rules prevailing in the said Courts as to payment of the same; and any process issued shall be made returnable indifferently at one Court or at the other, having regard to convenience in respect of time and place."

Section 2 of the Justices of the Peace Jurisdiction Act is headed Summary Convictions and Orders and the relevant part reads:

"...and also in all cases where a complaint shall be made to any such Justice or Justices upon which he or they have, or shall have, authority by law to make any order for the payment of money or otherwise, then and in every such case it shall be lawful for such Justice or Justices to issue his or their summons (according to Form (1) in the First Schedule), directed to such person, stating shortly the matter of such information or complaint, and requiring him to appear at a certain time and place before the same Justice or Justices, or before such other Justice or Justices of the same parish as shall then be there to answer to the said information or complaint, and to be further dealt with according to law;"

Then as to tax and penalties Sec. 54 (2A)(3), (4), & (5) of the Act reads as follows:

"(2A) Every person who fails to pay the full amount of tax due and payable under section 33 in respect of a taxable period shall be liable to a penalty of fifteen per cent of the amount unpaid.

(3) Where a registered taxpayer does not, on the prescribed date, make a return or pay tax for two or more taxable periods within a twelve month period that person shall, in addition to a penalty under subsections (2) and (2A), be liable to a surcharge, in respect of the third and each subsequent taxable period for which the return is not made or tax is not paid, of ten per cent of the amount of tax due and payable.

(4) Interest shall be chargeable at the rate of two and one-half per cent per month or part thereof on the amount of any tax, penalty or surcharge payable under this Act from the date on which such tax, penalty or surcharge becomes due until the date of payment thereof."

These are the sections which impose the tax on the registered taxpayer.

Then Section 55 reads:

"55. Any penalty, surcharge or interest payable under this Act may be added to any tax due and payable and may be recovered as if it were tax."

As for the recovery of the tax, see Sec. 48(1) of the Act which reads:

"Recovery of Tax

48.-(1) The provisions of the Tax Collection Act concerning payment, collection and recovery of tax and the enforcement of payment thereof shall apply to tax imposed under this Act.

(2) In addition to any other remedy provided under this Act, tax and any penalty, surcharge or interest payable thereon may be sued for and recovered in the Revenue Court or in a Resident Magistrate's Court by a Collector of Taxes as a debt due to the Government."

Section 46 (1) of the Tax Collection Act which is specifically mentioned in the Complaint refers to summary proceedings. These proceedings are referred to in Section 3 of the Interpretation Act:

"summarily", "in a summary manner" or "on summary conviction" means respectively before a court of summary jurisdiction"

Then Section 9 of the Justices of the Peace Jurisdiction Act specifies how a complaint is to be made. It reads:

"9. Every such complaint upon which a Justice or Justices is or are or shall be authorized by law to make an order and every information for any offence or act punishable upon summary conviction, unless some particular enactment of this Island shall otherwise require, may respectively be made or laid without any oath or affirmation being made of the truth thereof, except in cases of information where the Justice or Justices receiving the same shall thereupon issue his or their warrant in the first instance to apprehend the defendant as aforesaid; and in every such case where the Justice or Justices shall issue his or their warrant in the first instance, the matter of such informations shall be substantiated by the oath or affirmation of the informant, or by some witness or witnesses on his behalf, before any such warrant shall be issued, and every such complaint shall be for one matter of complaint only, and not for two or more matters of complaint, and every such information shall be for one offence only, and not for two or more offences; and every such complaint or information may be laid or made by the complaint or informant in person, or by his counsel or solicitor, or other person authorized in that behalf."

Section 10 is important as it states the general rule as to time, for the Court of Petty Sessions and a special provision for the Resident Magistrates Court the other summary Court. It reads:

"10. In all cases where no time is already, or shall hereafter be, specially limited for making any such complaint or laying any such information, in the enactment or enactments of this Island relating to each particular case, such complaint shall be made, and such information shall be laid, within six calendar months from the time when the matter of such complaint or information respectively arose:

Provided that nothing in this section shall be deemed to apply to any case triable by a Resident Magistrate in the exercise of his special statutory summary jurisdiction."

Then Section 11 is important as it sets out how complaints are heard and determined. It reads:

"11. Every such complaint and information shall be heard, tried, determined, and adjudged by one or two or more Justice or Justices, as shall be directed by the enactment upon which such complaint or information shall be framed, or such other enactment or enactments as there may be in that behalf; and if there be no such direction in any such enactment, then such complaint or information may be heard, tried, determined, and adjudged by any one Justice for the parish where the matter of such information shall have arisen; or with the consent of the complainant or informant and the defendant in any case of summary jurisdiction, any single Justice may exercise jurisdiction and adjudicate upon the matter of such complaint or information; and the room or place in which such Justice or Justices shall sit to hear and try any such complaint or information shall be deemed an open and public court, to which the public generally may have access, so far as the same can conveniently contain them, and the party against whom such complaint is made, or information laid, shall be admitted to make his full answer and defence thereto, and to have the witness examined and cross-examined by counsel or solicitor on his behalf; and every complainant or informant in any such case shall be at liberty to conduct such complaint or information respectively, and to have the witnesses examined and cross-examined by counsel or solicitor on his behalf."

It is now appropriate to turn to the recovery of the taxes in a summary manner chosen by the Collector of Taxes:

"Recovery of Penalties, Forfeitures and Taxes

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, and may be enforced under the provisions of any Statute in respect to summary proceedings, and the forms of any such Statute, or other Statutes, may be adapted to meet the requirements of this Act or other enactment as aforesaid; the taxes, duties, and arrears, and the surcharge, and any penalty attaching to such non-payment, may be included in, and recovered in one proceeding, notwithstanding any provision in any enactment relating to summary proceedings providing to the contrary." [Emphasis supplied]

Then there is provision under 46(2) for suspension of an order made pursuant to

Section 46(1). Section 46(2) reads:

"(2) Subsequently to the order of the court under subsection (1), the Collector of Taxes or other officer as aforesaid, may, if he is satisfied that any action taken to enforce the order can be effectively suspended, receive any sum offered by the defaulter on account of taxes, duties, arrears and penalty thereon: so that the defaulter arranges, to the satisfaction of such Collector or other officer on such terms and conditions as may be fixed by such Collector or other officer, for payment of the amount remaining unpaid of such taxes, duties, arrears and penalty, and notwithstanding anything in this Act or in any other enactment contained, or any provision, or rule of law to the contrary the receipt of any sum under this subsection shall not have the effect of vitiating the said order:

Provided, however, that where the said order is to be enforced by distress and sale of the defaulter's goods, the distress shall be abated proportionately by the amount of such payment, and where the said order is to be enforced by imprisonment, the court making the original order shall vary the term of imprisonment accordingly."

Further, the six month limitation imposed by Section 10 of the Justices of the Peace Jurisdiction Act is not applicable by virtue of Section 47 of the Tax Collection Act.

"47. Nothing in any law relating to summary proceedings shall preclude the Collector of Taxes or Assistant Collector of Taxes from proceeding by distress, or under the provisions of section 46, for the recovery of the said taxes, duties, arrears, and surcharge, at any time until full payment shall have been made to the Government of this Island for the same."

As for the Resident Magistrate's duties in the Court of Petty Sessions, Sec. 63 of the Judicature (Resident Magistrates) Act speaks of it. It reads:

"63. It shall be the duty of every Magistrate, in the parish or parishes, or at any station or stations therein, to which for the time being he may be assigned by the Governor-General, to attend as Magistrate all Courts of Petty Sessions, and when present at any such Court, he shall be entitled to preside thereat; and every Magistrate shall, when sitting alone in any such Court, whether within the limits aforesaid, or elsewhere in this Island, have all the powers and authority which are now, or which may hereafter be, by law committed to and exercisable by any two or more Justices associated and sitting together:

Provided always, that nothing herein contained shall be taken to invalidate anything done at any Court or Petty Sessions at which the said Magistrate is not present:

And provided always, that when the Magistrate for any reason fails to attend a Court of Petty Sessions, the Clerk at such Court shall receive his orders and such directions as may be necessary for completing the business of the Court from the presiding Justice."

Sec. 27 of the Tax Collection Act also confers jurisdiction on the Resident Magistrate's Court exercising a special statutory summary jurisdiction. It reads:

"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."

This special statutory summary jurisdiction is in addition to original statutory summary jurisdiction conferred by Sec. 65 of the Judicature (Resident Magistrates)

Act. It reads:

"65. Each Magistrate shall preside in the Resident Magistrate's Court of the parish, and shall there, to the amounts, and to the extent, and in the manner hereinafter provided, have and exercise the civil and criminal jurisdiction hereinafter assigned to the said Court, and shall also have and exercise a jurisdiction in all cases in bankruptcy under the provisions of the Bankruptcy Act and in the recovery of all penalties or forfeitures to the Crown, and of fines in the nature of penalties, under all statutes now or hereafter to be in force relating to the public revenue, and in cases under the Affiliation Act, and in all such causes, enquiries, and matters civil or criminal in which by any law any special jurisdiction, duty or power is given to or imposed on any Judge of a District Court, the Magistrate shall, within his parish have, exercise and perform such jurisdiction, duty, or power:

Provided, that in the exercise of his civil jurisdiction, the Magistrate may call upon one or more of the Honorary Justices of the parish to assist him in any particular matter, and thereupon such Honorary Justice or Justices shall have an equal jurisdiction with the Magistrate."

There is a previous analysis of these issues in **Collector of Taxes v Lincoln** (1987) 24 JLR 232 at 234-235 where **Clarke v White** Vol. 2 Stephens Report at p. 1924 and **Collector of Taxes v Innis** in the same Report at p.1938 were cited. Incidentally the third case in the trilogy of the **Lincoln** cases was **Winston Lincoln v Collector of taxes** unreported RMCA 47/90 delivered 13th May 1993. **Lincoln** succeeded on a jurisdiction point namely that there was no jurisdiction to recover taxes by way of an agreement pursuant to Sec. 27 or Sec. 46(1) of the Tax Collection Act.

It seems unusual for a Collector of Taxes to choose Sec. 46(1) instead of Sec. 27 of the Tax Collection Act. The appeal pursuant to Sec. 46(1) of the Tax Collection Act goes to a Supreme Court judge in Chambers pursuant to Sec. 3 of the Justices of the Peace (Appeal) Act which is effectively a retrial. See Sec. 34 of the aforesaid Act. On the other hand, an appeal from the Resident Magistrate's Court goes directly to the Court of Appeal by way of a rehearing. See Sec. 251 of the Judicature (Resident Magistrates) Act. That section in part reads:

"251. Subject to the provisions of the following sections, an appeal shall lie from the judgment, decree, or order of a Court in all civil proceedings, upon any point of law, or upon the admission or rejection of evidence, or upon the question of the judgment, decree, or order, being founded upon legal evidence or legal presumption, or upon the question of the insufficiency of the facts found to support the judgment, decree, or order; and also upon any ground upon which an appeal may now be had to the Court of Appeal from the verdict of a jury, or from the judgment of a Judge of the Supreme Court sitting without a jury."
[Emphasis supplied]

Section 48(2) of the Act envisages recourse to the Crown Proceedings Act by use of the phrase – "as a debt due to the Government". See Sections 10, 18 and paragraph 1(1) to the First Schedule of that Act. Generally, the Attorney-General would be the plaintiff pursuant to Sec. 13 of that Act but in the case of the recovery of taxes pursuant to the Sec. 48(2) of the Act, the plaintiff is the Collector of Taxes. Proceedings in the Resident Magistrates Court would be by plaint and would be limited, while in the Revenue Court the matter would be at large. See Sec 71 and 143 of the Judicature (Resident Magistrates) Act and Sec. 11 of the Crown Proceedings Act. A word of explanation is necessary concerning Section 10 and the First Schedule to the Crown Proceedings Act. Latin and English Informations were the processes by which debts to the Crown were recovered. They are now abolished by Sec. 10 of the Crown Proceedings Act and Government debts are now recovered by that Act.

These statutory provisions in the Act pertaining to the two summary Courts with access to the Supreme Court by way of judicial review or by appeal, preclude a direct approach by way of originating summons to the Supreme Court. I have recently analysed the law on this issue in **Info Channel v Cable & Wireless** SCA 99/2000 delivered December 20, 2000 and it would be superfluous to reiterate those principles which are adumbrated in **Barraclough v Brown** [1897] A.C. 615. The other basis for finding that an Originating Summons was the wrong procedure is that the party named by the appellants is the Commissioner of General Consumption Tax. However the tax gatherer in the recovery of the taxes before the Resident Magistrate is the Collector of Taxes for St. Ann. To summarise the position, an Originating Summons is the appropriate procedure to decide issues where the original jurisdiction lies in the Supreme Court. It is not an appropriate procedure with which to conduct judicial review of proceedings which originate in tribunals of inferior jurisdiction. Had the proper procedures been invoked a wide range of remedies would have been open to this court. They would be prerogative orders as well as a declaration or injunction.

Conclusion

It is fair to point out that the second appellant has claimed that it was not aware of the 1995 amendment to the G.C.T. Act which made the registered operator of the hotel liable for tax, so it did not notify the Commissioner pursuant to Sec. 33(2) of the Act and forward a final return as required. Also, the second appellant did not notify the Commissioner in writing that D.H.C. Ocho Rios Hospitality Corporation operated the hotel since 1st December, 1993. But companies should retain the services of accountants and auditors as well as lawyers. In this case there was also Frederick March a 'responsible officer' since March 18, 1999, who should have pointed out the previous omissions so as to ensure compliance with the Act. It was the failure of the employees and accountants retained or employed to Town & Country Resorts Ltd., the

registered taxpayer, to play their part which has caused this unfortunate affair. It is unfortunate, because during its sojourn in Jamaica, D.H.C. Ocho Rios Hospitality Corporation was part of the informal economy beyond the reach of the General Consumption Tax. Also it could neither be seen or heard in the Courts in this jurisdiction. The moral of this story is that the lawyers and accountants should have been summoned when the second appellant was entering into the Management Agreement. If they tender negligent advice then they can be sued. They should also be retained to advise on the legal impact of changes in the law.

In this context, the following paragraphs of the affidavit of the Right Honourable Edward Seaga, the Chairman of the 2nd appellant, tells the story. It reads thus:

- "13. That GCT returns were made by DHC but were in fact made in the name of the 2nd Applicant
14. That GCT payments are in arrears and as a result I became aware that the returns were being made in the name of the 2nd Applicant. Discussions were conducted with officers of the GCT Department and representatives of the 2nd Applicant including myself at times.
15. That at all material times these discussions were centred on arrangements to be made by the 2nd Applicant to pay the taxes, penalty and interest assessed as we were not aware that it was the responsibility of the operator as opposed to that of the owner to collect the GCT and pay same over to the Commissioner.
16. That the Company was summoned to Court by the Commissioner of GCT and I then retained the services of Attorneys-at-Law who indicated to me that by law it was the responsibility of the operating entity and not the owner who is responsible for the collection and payment over of GCT.
17. I am advised by my Attorneys-at-Law and do verily believe that he brought the matter to the attention of the Attorney-at-Law representing the Commissioner at the Resident Magistrate's Court in late July, 1999 and that on August 3rd 1999 he

supplied the Commissioner with a copy of the said Management Agreement exhibited hereto.

18. That the GCT Department are of the view, notwithstanding the Management Agreement, that the 2nd Applicant is the entity responsible pursuant to the provisions of the General Consumption Tax Act.
19. That the 2nd Applicant is prepared to pay such debts as it is legally responsible for but in view of its legal advice seeks to have it determined as to whether it can be liable when it was not the operating entity of The Enchanted Garden in respect of which the GCT is due payable.
20. I therefore pray that This Honourable Court determines for the guidance of the Applicants and the Commissioner of GCT the questions raised in the Originating Summons filed herein."

Paragraphs 15 and 16 encapsulates the error which runs through the second appellant's case. They failed to recognize that the second appellant cannot 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.

In the light of the foregoing analysis, the hearing should be resumed before the Resident Magistrate in Petty Sessions as the Collector of Taxes has chosen. To my mind the Resident Magistrate in her Court pursuant to Sec. 27 of the Tax Collection Act ought to be the more convenient forum. This would require minor amendments to the complaints permissible pursuant to Sec. 190 of the Judicature (Resident Magistrates) Act. The appeal is dismissed, the declaratory Order in the Court below affirmed; so the appellants should pay the taxed or agreed costs of this appeal.

BINGHAM J.A.:

I have had the opportunity of reading in draft the judgments prepared in this matter by Downer J.A. and Smith J.A. (acting). I wish to state that I am in agreement with their reasoning and the conclusions reached that this appeal be dismissed and there be an order for costs to the respondent, such costs to be taxed if not agreed.

I too share the view expressed by Smith J.A. (acting) that as the questions raised both below and before us relate to a construction summons there was no need for the learned judge below and for this court to go on an excursion into the realm of the law of estoppel. As the evidence in the matter clearly established that the 2nd named appellant Town and Country Resorts Limited was at all material times represented to be the operator of the Resort known as the Enchanted Gardens. They were granted the licence to operate the facility from 1991. They were the Registered Taxpayer in respect of the facility. In 1997, they applied for and was issued with a T.R.N. Number. Moreover, at all material times, they as the operator were fixed with the responsibility for collecting the Consumption Tax and paying over the same to the Commissioner and making the necessary returns required under the Act. This state of affairs continued from 1991 and throughout the succeeding years. It was in August 1999, when Mr. A.J. Dabdoub, an Attorney-at-law representing the 2nd named Appellant and Frederick March, the General Manager of the resort, for the first time sought to raise the question that some other body might be the operator of the facility. This was against the background of a situation that when Town and Country Resorts were charged on two informations with tax liability in respect of defaulting on payments to the Revenue for the General Consumption Tax collected no issue was raised then, that some other body was responsible, but arrangements were made over time with the Commissioner, Mr. Gladstone Turner, in an attempt to discharge the debt including a payment of \$4M Dollars.

As the evidence before Courtenay Orr J. below established that Town and Country Resorts Limited was the operator of the resort and when the provisions of Sections 23A and 33(1) of the General Consumption Act are examined in my view, the learned judge was correct in coming to the conclusion he did, on the basis of that evidence that the Commissioner, Mr. Gladstone Turner, was acting within the requirements of the Act in making a demand on Town and Country and its responsible officer in respect of their tax liability. The two cases cited by Mr. George, Q.C. viz. **Woolwich Equitable Building Society v Inland Revenue Commissioners** [1993] A.C. 70, and **British Steel plc v. Customs and Excise Commissioners** [1997] 2 All E.R. 366, in the light of the particular facts are of no application to this case.

The learned judge was correct in declining to construe the Management Agreement referred to in Question 2 for the reasons he gave that D.H.C. Ocho Rios Hospitality Corporation was neither a Registered Taxpayer nor was it registered under the laws of Jamaica to conduct business in the Island.

He was also correct in declining to grant the relief sought in question 3 for the reasons he gave, and, equally for the more compelling reason that, the Corporation was not a party to the proceedings and, as such, having no *locus standi* it had no right to be heard.

SMITH, J.A.(Ag)

This appeal concerns the judgment of Courtenay Orr, J delivered on 4th February, 2000 whereby he declared that the Second Appellant, Town and Country Resorts Ltd., is the entity responsible to collect the tax chargeable in respect of the taxable activity of the resort known as The Enchanted Garden and to pay the tax to the Commissioner of General Consumption Tax in accordance with the provisions of Section 33 (1) of the General Consumption Tax Act.(the "G.C.T" Act).

The First Appellant is a company duly incorporated under the companies Act. It was first incorporated with the name Consulting Services Ltd. Its name was changed to Premium Investments Ltd. in 1993.

The Second Appellant is a Company duly incorporated under the Companies Act and is a wholly owned subsidiary of the First Appellant. The First Appellant is the registered proprietor and/or lessee of the Apartment complex and Garden known as The Enchanted Garden. The Second Appellant held sub-leases in respect of the said Apartment Complex and Garden. Both appellants are registered taxpayers.

The Background:

The background to these proceedings is admirably set out in the judgment of Orr.J. From 1997 there were discussions between representatives of the Second Appellant and the Respondent concerning the failure of the Second Appellant to pay the taxes, penalty and interest assessed. Liability to pay was admitted by the Second Appellant and various promises of payments were made. For example on May 6, 1997 on the letterhead of The Enchanted Garden, Frederick March who signed as "Managing Director" wrote to the Commissioner.

"We refer to discussions held with the Right Honourable Edward Seaga on the arrears of General Consumption Tax payments. It is our intention to effect the following payment plan with total liquidation by 28th of November, 1997".

On the 16th April, 1999 two informations were laid against the Second Appellant for failure to pay GCT for \$12,882,800.07 and \$27, 288.677.14.

On the 28th June, 1999 Mr. Raymond Clough, Attorney-at-Law gave an undertaking to the Resident Magistrate Court in St. Ann that the full tax liability of the Enchanted Garden would be liquidated by the next court date.

On or about 3rd of August, 1999, Mr. Dabdoub for the First time raised the issue that another company, DHC Ocho Rios Hospitality Corporation (DHC) might be liable for the tax.

On the 27th September, 1999 an Originating Summons was filed in the Supreme Court. The proceedings in the Resident Magistrate Court were adjourned pending the hearing of the Originating Summons.

The Originating Summons

By this summons the appellants sought the decision of the Supreme Court on the following questions:

1. 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 Tax chargeable on a taxable activity is the operator of the Resort known as The Enchanted Garden.
2. Whether on a proper construction of the Management Agreement by and between Premium Investments Ltd. (formerly Consulting Services Ltd) and DHC Ocho Rios Hospitality Corporation the Second Applicant Town and Country Resorts Ltd. can be deemed to be the operator of the resort known as "The Enchanted Garden" within the meaning of Section 23A of the General Consumption Tax Act.
3. Whether on a proper construction of the said Management Agreement DHC Ocho Rios Hospitality Corporation is the entity responsible to collect the tax chargeable in respect of the taxable activities supplied by The Enchanted Garden and the entity responsible to pay to the Commissioner in accordance with the provisions of Section 33(1) of the General Consumption Tax Act.

In a closely reasoned judgment Orr J, held that the Second Appellant by its conduct had held out itself as not only liable for General Consumption Tax in respect of The

Enchanted Garden but also as the operator of that resort and so had allowed the Respondent to alter his position on the assumption that Town and Country was the operator of the Enchanted Garden.

Accordingly, in answering question 1 he declared that the Second Appellant Town and Country was the entity which had the responsibility to collect the tax chargeable in respect of the taxable activity of the resort known as The Enchanted Garden and pay the tax to the respondent in accordance with the provisions of Section 33 (1) of the G.C.T Act. As regards question 2, the learned judge declined to construe the management agreement in light of his declaration in answer to question 1 and also because DHC was not a registered taxpayer for the purposes of the GCT Act. As regards question 3, he also declined to grant the relief sought for the reasons given in respect of question 2 and also for the reason that DHC was not before the Court.

Grounds of Appeal

Nine grounds of appeal were filed on behalf of the appellants. In grounds 1,2,3,4 and 7 the appellants challenge the decisions of the learned judge concerning the issues of representations and estoppel by word or conduct or convention.

In grounds 5,8 and 9 the appellants contend that the judge erred in applying sections 32 and 33 of the GCT Act in coming to his decision that the Second Appellant is the "operator" of the resort within the meaning of s.23A.

In ground 6 the appellants state that the judge misapplied the *maxims* "*nullus commodum capere potest de injuria sua propria*" (no one should be allowed to profit from his own wrong doings) and "*nemo ex suo deducto meliorum suam conditionem facere potest*" (no one can improve his position by his own wrong doing).

No direct challenge is made to the learned judge's decision to decline to answer questions 2 and 3. However, since in dealing with some of the grounds of appeal

counsel for the appellants made mention of a management agreement between the First Appellant and DHC Ocho Rios Hospitality Corporation, I propose to look at the judge's decision in this regard, briefly.

The Management Agreement

As said before the agreement was between the First Appellant and DHC Ocho Rios Hospitality Corporation "DHC". Under this agreement DHC was responsible for the operation of the Enchanted Garden including the collection of all revenues without interference from the applicant. A copy of this Agreement was exhibited in this affidavit evidence sworn by the Right Honourable Edward Seaga the Chairman of the appellants.

The Agreement was executed on the First December, 1993. DHC is a Delaware (USA) Corporation which up to the commencement of this appeal was not registered under the Companies Act. It was not registered as a taxpayer. A Taxpayer Registration Number is a prerequisite for being registered under the GCT Act. Mrs. Vinette Keene (then acting Commissioner of GCT) at para. 22 of her affidavit sworn to on the 25th October 1999 stated:

"I have caused a search to be made of the department's records and this search has shown that DHC is not a registered taxpayer or a registered person under The General Consumption Tax Act and has no dealings with this Department at all".

Also DHC was not granted a licence to operate the resort by the Tourist Board; see para. 23 of Mrs. Keene's affidavit.

It is important to note that clause 22.05 of the Agreement provides as follows:

"22.05 Applicable Law; Jurisdiction; Venue

This agreement shall be construed under and shall be governed by the internal laws of the State of New York without giving effect to principles of conflicts of law The

parties hereto hereby subject themselves to the jurisdiction of the state and federal courts located in the State, City and Country of New York.

Each party represents and warrants to the other that it is not entitled to the defence of sovereign immunity in any matter in connection with this Agreement or the ownership, management, or operation of the Resort".

In the circumstances, I am in entire agreement with the Mr. Small, Q.C. that the trial judge was right in declining the reliefs sought in paragraphs 2 and 3 of the summons because:

- (i) DHC was not a legally constituted entity in Jamaica and not a registered taxpayer for the purposes of the GCT Act.
- (ii) DHC was not before the Court and was not a party to the summons before Orr, J.
- (iii) The Agreement was between the First Appellant and DHC and the First Appellant was not before the St. Ann Resident Magistrate's Court in respect of the taxes that were due and owing as a debt to the Respondent.
- (iv) The provision of Clause 22.05 of the Agreement.

Indeed even if there were such a private treaty between the registered taxpayer (the 2nd Appellant) and DHC relief would have to be sought elsewhere by the appellants for recovery of the taxes which DHC received and misappropriated.

Estoppel

Mr. George Q.C. in his customary elegant manner addressed the Court at length on the issue of estoppel by words, conduct and convention. In so doing he referred the Court to many authorities.

Mr. Small Q.C. would not be tempted into any discourse on this issue. It was his view that there was no necessity to conduct an excursion into the arcane aspect of the law of estoppel.

It is fair to state that at the hearing before Orr, J, the respondent relied on the various representations made by representatives of the Second appellant that it was

liable and was willing to pay the GCT sued for by the respondent. This apparently led counsel for the appellant to broach the issue of estoppel.

The judge put it thus:

"Mr George also relied on the following submissions. Even if Town and Country had made a positive representation as to liability such a representation is one of law and not of fact. There can be no estoppel against a statute. A representation of law cannot give rise to an estoppel" (several cases were cited in support of this contention.)

This prompted the learned judge to discourse at great length on estoppel by representation etc. However, in addressing question 1 of the Originating Summons it was not really necessary for the judge to deal with estoppel. This in my view was a digression.

For the purposes of this appeal, it is not necessary for this court to determine whether the conclusion of Orr, J on the issue estoppel is right or wrong.

Misapplication of Maxims

The learned trial judge in answering the First question in the Summons took into consideration matters such as who was the registered taxpayer? who paid the taxes? who made the returns? In his written judgment he stated that Mr. George, Q.C., had urged that the question of whether the Second Appellant was the operator of The Enchanted Garden was a question of law alone thereby implying that it was mainly a matter of interpreting Section 23 A(1) of the GCT Act. He rejected that argument. He went on to say that even if it were purely a question of construction of s.23 A(1) it "could be a fit case to apply the maxims" which I have already mentioned.

In my view the judge was correct in holding that a determination on question 1 of the Summons involves much more than a mere construction of section 23 A (1) of the GCT Act.

Accordingly, the question of the applicability or otherwise of the two maxims invoked by the trial judge should not in my view, detain this Court. I will now proceed to deal with what is and must be the real issue in this appeal: that is, whether the judge's determination that the Second appellant was the operator of the Resort within the meaning of s. 23A, is correct

Was the Second appellant the 'operator' of the Resort during the material period of time within the intendment of Section 23A of the GCT Act

Section 23 A provides:

"23 A---(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, in accordance with the provisions of section 33 (1).

(2) In subsection (1)—

'operator' means the person who owns the business concerned with the operation of the tourist accommodation or 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".

Section 33 (1) reads:

"33.---(1) A registered taxpayer shall, within such period as may be prescribed, whether or not he makes a taxable supply during any taxable period—

- (a) furnish to the Commissioner a return in a form prescribed or approved by the Commissioner containing such particulars as may be prescribed; and
- (b) pay to the Commissioner the amount of tax, if any, payable by that registered taxpayer in respect of the taxable period to which the return relates".

The Evidence

The appellants relied on the affidavit evidence of the Rt Hon Edward Seaga, Mr. Daniel Ambrose, and Mr. Carlton Prendergast. It is not in dispute that G.C.T payments are in arrears. Mr. Seaga spoke to the Management Agreement to which reference has already been made. In his affidavit he stated:

"12. That neither the First applicant nor the Second applicant have been responsible for the collection of any revenues in relation to the operation of Enchanted Garden and at all material times DHC was the entity responsible for same and did in fact carry out their responsibilities.

13. That G.C.T. returns were made by DHC but were in fact made in the name of the Second applicant".

He further stated that arrangements were made by the Second applicant to pay the taxes, penalty and interest as assessed as they were not aware that it was the responsibility of the operator as opposed to that of the owner to collect GCT and pay over same to the Commissioner. It was only after the Second applicant was summoned to Court that they knew that the collection and payment over of G.C.T was the obligation of the operating entity. He deponed that on the 3rd August, 1999 this matter was brought to the attention of the Commissioner and the latter was supplied with a copy of the Management Agreement.

Mr. Daniel Ambrose, the then Chief Financial Officer for DHC in his affidavit stated that DHC did in fact operate the Enchanted Garden with Mr. Frederick March as their Manager. DHC, he said, collected all the hotel revenues and deposited them into an account at a branch of the Bank of Nova Scotia, New York. It is his evidence that all G.C.T moneys were in fact collected by DHC and that DHC had not paid over such taxes to Consulting Services Ltd. or to the appellants.

He further stated that he was not aware that DHC should have been registered under the G.C.T Act as a taxpayer and that DHC used the Second Appellant to make all returns.

Mr. Carlton Prendergast, the Financial Controller of DHC, deponed that monthly returns were filed in the name of the Second Appellant because DHC was not a registered taxpayer whereas the Second Appellant was. According to his evidence the tax return signed by Mr. Winston Tomlinson, his predecessor, and himself were signed by them in their capacity as employees of DHC not of the Second Appellant.

Some six affidavits were filed on behalf of the respondent. Orr, J in his judgment summarised the contents of these affidavits as follows:

"In its application for registration under the General Consumption Tax Act, Town and Country (Second Appellant) gave its trade name as 'The Enchanted Garden'; and its taxable activity as 'Tourist Resort' Town and Country was registered on January 11, 1992.

The tax registration number of Town and Country in respect of the Enchanted Garden is 1022768. That number appears on General Consumption Tax returns filed by Town and Country.

On December 12, 1991 a Tourist Board licence was granted to Town and Country in respect of The Enchanted Garden.

D.H.C. Ocho Rios Hospitality Corporation is neither a registered taxpayer nor a company registered under the Companies Act.

The Enchanted Garden is in arrears regarding payments of General Consumption Tax to the Commissioner.

In correspondence on the letterhead of The Enchanted Garden, Winston Tomlinson, Financial Controller of the Enchanted Garden wrote to the Deputy Commissioner of General Consumption Tax under the caption "Re Town and Country Resort T/A the Enchanted Gardens, Reg. # 1022768."

Mr. Hugh Hart, Attorney-at-Law on behalf of Town and Country wrote a letter to the Commissioner on March 24, 1999 under the caption "Re: Town and Country Resorts Limited".

He wrote:

'Further to our discussions the lender who is raising funds for the The Enchanted Garden (Town and Country Resorts Limited) has given an undertaking...' (emphasis supplied)

On a letterhead of Town and Country, The Right Hon. Edward Seaga, Chairman of the Town and Country wrote to the Commissioner:

'Re: Town and Country Resorts Limited/The Enchanted Garden

Please find enclosed cheque for \$4,000,000 for Town and Country Resorts Limited (Operator of The Enchanted Garden) in favour of The Collector of Taxes – G.C.T that we confirmed we would make available today' (emphasis mine).

Town and Country has filed returns and paid General Consumption Tax in respect of The Enchanted Garden for several years.

On 18th March, 1999 Andrew Holness Company Secretary wrote to the Commissioner, thus:

'Enclosed is the requested form designating the responsible officer for Town and Country Resorts T/A The Enchanted Garden, Taxpayer Registration Number 1022768.

Name of Responsible Officer:
Frederick Marsh,
Title: General Manager".

Mr. George, Q.C. submitted that the learned judge erred in applying Section 32 and 33 of the GCT Act to this case. The failure of the Second Appellant to comply with the provisions of sections 32 and 33 of the Act could not and did not make them the "operator" of the resort. He contended that the learned judge erred in law when he held that the Second Appellant had the responsibility to collect the tax chargeable in respect of the taxable activity known as The Enchanted Garden although he made no findings as to who actually collected the tax.

He argued that it was the responsibility of the person who in fact collected the tax to pay it over to the Commissioner. Thus he submitted, the learned trial judge should have ascertained the person who actually collected the tax before he could place responsibility on who was to pay the tax and not vice versa. Further he submitted, that the judge erred in holding that because the Second Appellant was registered as the taxpayer under the GCT Act and because it failed to inform the Commissioner that it no longer collected tax then it did not cease to be the "operator".

Mr. Small Q.C. on the other hand submitted that the judge's interpretation of Section 23A is correct in law and should not be disturbed for the following reasons:

- i) The Second Appellant was registered as a taxpayer under the Act.
- ii) By virtue of s.3 (2) of the Act GCT is payable by
 - “(a) a registered taxpayer; and
 - (b) any other person, who imports into Jamaica any goods or services”.
- iii) The 2nd Appellant trades as Enchanted Garden
- iv) The 2nd Appellant was registered in respect of the taxable activity of operating a tourist resort with the trade name "Enchanted Garden" (see Mrs. Keene's affidavit para. 16).
- v) The 2nd Appellant trading as Enchanted Garden was registered with a TRN on 13th February 1997: see paras. 2 and 3 of affidavit of Ms. Noelle Llewellyn.

- vi) The 2nd Appellant was issued a licence in respect of The Enchanted Garden on 12th December, 1991 – see para. 2 of affidavit of Miss Lorna Dunkley.
- vii) The 2nd Appellant made returns under sections 20 and 33 of the GCT Act – see Earldine Brown's affidavit.
- viii) The 2nd Appellant made returns dated 30th June, 1999 and September 1997 for tourism activity using the TRN 1022768 which was issued in respect to Enchanted Garden – Ms. Keene's affidavit.

The first question to be considered may be formulated in this way: Can the assumption by an unregistered entity of the responsibility for the operation of a taxable activity exonerate the registered taxpayer in respect of the taxable activity from his liability for the collection and payment of GCT within the intendment of the GCT Act? This question calls for an analysis of the GCT Act. We have seen that section 23A of the Act (supra) fixes the 'operator' of a taxable activity consisting of tourist accommodation and services with the responsibility to collect and pay GCT to the Commissioner. 'Operator' means the owner of the tourist business and includes the manager of the business. S. 3(2) of the Act provides :

“(2) General consumption tax shall be paid by—

- (a) a registered taxpayer; and
- (b) any other person, who imports into Jamaica any goods and services”.

Thus there is no legal obligation on a person who is not registered and who does not import into Jamaica any goods and services, to collect and pay GCT. Section 23 (1) of the Act deals with the situation where a registered taxpayer is no longer registered. It reads:

“23. – (1) Subject to subsection (2) where a registered taxpayer ceases to be a registered taxpayer, tax shall be payable on any taxable supply forming part of the assets of his taxable activity immediately before he so ceases.

(2) Tax shall not be payable pursuant to subsection (1) if—

- (a) the taxable activity is transferred as a going concern to another registered taxpayer;
- (b) the taxable activity is carried on by some other person after the registered taxpayer is declared bankrupt or is certified to be otherwise incapable of carrying on that taxable activity or has died; or
- (c) the registered taxpayer proves to the satisfaction of the Commissioner—
 - (i) that he was allowed no credit for input tax in respect of the taxable supply; or
 - (ii) that the taxable supply was not part of the assets of the taxable activity acquired by him from some other registered person."

"Taxable supply" means any supply of goods and services on which tax is imposed pursuant to this Act. See section 2 (1) of this Act.

From this section it can be gleaned that a registered taxpayer who transfers his taxable activity to a person who is not registered may yet be liable to pay tax on any supply of goods and services on which tax is exigible.

Section 26 provides that persons carrying on taxable activity shall apply within 21 days after the commencement of such activity to the Commissioner in the form as may be prescribed for it to be registered.

Section 27 deals with the registration of applicants. Section 31 gives the Commissioner the power to cancel registration. Section 32 is in my view very relevant, it provides for the transfer of ownership of a taxable activity. It reads:

"32—(1) Every person who is registered under this Act shall notify the Commissioner in writing of—

- (a) the transfer of ownership by him or his taxable activity or part thereof stating—
 - (i) the date on which ownership or part thereof is transferred;
 - (ii) the name of the new or part owner.

(iii) the address of the new or part owner;

(b) any change in the name, address, constitution or nature of any taxable activity carried on by him;

(c) any change of address from which, or the name in which any taxable activity is carried on by that person;

(d) the date of cessation of his taxable activity; and

(e) any change of persons who are partners in partnership,

within twenty-one days of such transfer, change or cessation, as the case may be.

(2) A person who acquires a taxable activity or part thereof from a person registered under this Act shall so inform the Commissioner in writing within twenty-one days of the date of acquisition."

It is as clear as can be that if no notification of such transfer is given to the Commissioner then the Commissioner may hold the registered taxpayer liable to collect and pay the General Consumption Tax (see s. 3(2) (a)). When such a notice is given to the Commissioner he may pursuant to s. 31 cancel the registration of the taxpayer and pursuant to s.28 require the person who acquires the taxable activity to make an application for registration. If the registered taxpayer disputes the decision of the Commissioner to hold him responsible for the collection and payment of GCT as a consequence of his failure to notify the Commissioner, the taxpayer may, within thirty days of the date of the decision apply to the Commissioner for a review of the decision. S.40 (1). An appeal from the decision of the Commissioner lies to the Revenue Court – s. 40 (7).

Section 33 makes it obligatory for the registered taxpayer to file returns:

"33.---(1) A registered taxpayer shall, within such period as may be prescribed, whether or not he makes a taxable supply during any taxable period –

(a) furnish to the Commissioner a return in a form prescribed or approved by the Commissioner

containing such particulars as may be prescribed;
and

- (c) pay to the Commissioner the amount of tax, if any, payable by that registered taxpayer in respect of the taxable period to which the return relates.

(2) A registered taxpayer who ceases to be so registered shall furnish to the Commissioner, not later than one month from the date of so ceasing, a final return in respect of the last taxable period during which he was so registered.

(3) The Commissioner may require a registered taxpayer (whether in his own behalf or as agent or trustee) to furnish the Commissioner with such other information relating to the return as the Commissioner considers necessary."

In light of the above statutory provisions and the undisputed facts it is beyond debate that the assumption of the responsibility for the operation of The Enchanted Garden by DHC an unregistered entity could not exonerate the registered taxpayer – the Second Appellant, of its liability to collect and pay G.C.T.

Even if it were established that there was a management agreement between the First and Second Appellants on the one hand, and DHC on the other hand, whereby the latter was responsible for the operation of The Enchanted Garden including the collection of all revenues, that could not alter the conclusion that the Second Appellant remained the "operator" within the meaning of Section 23A of the General Consumption Tax Act. This conclusion is based on the following undisputed facts:

- (i) DHC is not a registered taxpayer. It was not at the material time registered as a legal entity under Part X of the Companies Act and as such was not a person within section 26A of the Act.
- (ii) The 2nd Appellant was the registered tax payer with² Tax Registration Number.
- (iii) The 2nd Appellant filed returns as the operator of the taxable activity pursuant to s. 33 (1)

- (iv) The 2nd Appellant failed to furnish a final return to the Commissioner pursuant to s. 33 (2).
- (v) The 2nd Appellant made returns under s. 20 of the Act.
- (vi) The 2nd Appellant did not notify the Commissioner of a transfer pursuant to s. 32 (a) (1) or of the date of the cessation of his taxable activity (sec 32 (1) (d)).
- (vii) DHC failed to inform the Commissioner that it had acquired a taxable activity.

CONCLUSION;

For the above reasons I would dismiss the appeal with costs to the respondent.

ORDER:

DOWNER, J.A.:

- (1) The appeal is dismissed;
- (2) The declaratory order below is affirmed;
- (3) The hearing before the Resident Magistrate of St. Ann should be resumed;
and
- (4) The appellants must pay the taxed or agreed costs of this appeal.