

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

MISCELLANEOUS

SUIT NO. H. 62/1987

REGINA V THE COMMISSIONER OF STAMP DUTIES
AND TRANSFER TAX EX PARTE GORSTEW LIMITED.

Hugh Small Q.C. and Steve Shelton for the Applicant

Neville Fraser and Wendell Wilkins for the Respondent

Heard: November 26, 1987 and February 15, 1988.

CORAM: WOLFE, ELLIS and PANTON JJ.

WOLFE J.

The Applicant Gorstew Limited is the registered proprietor of certain parcels of land part of Rutland Pen in the parish of Hanover totalling 9.350 acres and registered at Volume 1108 Folio 582 in the Registered Book of Titles.

By a Lease made on the 22nd of December, 1986 the Applicant leased the said premises to Sandals Negril Limited for a term of eleven (11) months with options for renewal.

Sometime in January, 1987 the Applicant through its attorneys-at-law presented the lease agreement to the Commissioner of Stamp Duties and Transfer Tax for the applicable stamp duty to be impressed upon the document in accordance with the Stamp Duty Act. Accompanying the lease agreement was a cheque in the amount of \$1.25 to cover the duty payable on the said lease agreement, this being the amount the applicant contends is properly payable as duty in accordance with the Schedule to the Stamp Duty Act.

The Commissioner of Stamp Duty assessed the duty payable on the Lease Agreement at \$41,251.25. the Commissioner having made his assessment refused to stamp the document in the amount of \$1.25.

On the 1st day of October 1987 the applicant applied for leave to apply for an Order of Mandamus and obtained from Patterson J. an order in the following terms.

It is hereby Ordered:-

"Leave be granted to the Applicant Gonstew Limited of 3 Haughton Avenue, Kingston 10 in the parish of Saint Andrew, to apply for an Order of Mandamus requiring the Commissioner of Stamp Duty and Transfer Tax to impress stamp duty in accordance with the Provisions of the Stamp Duty Act on a lease agreement submitted in or about January, 1987 by the Applicant in respect of premises comprised in Certificates of Title registered at Volume 1108 Folio 562 and Certificates of Title for adjoining parcels of land."

The Applicant now moves this court for an Order of Mandamus in the terms of the order made by Patterson J.

Small Q.C. submitted that under the provisions of the Act the schedule of duty payable related to two different kinds of lease agreements

- (a) Leases for a period of one year or more and
- (b) Leases not otherwise charged in the schedule.

The Applicant further submitted that the lease agreement in the instant case being for a term of eleven (11) months only, duty there on had to be assessed under the category of leases not otherwise charged in the schedule. This submission is in my view sound in law.

It is indubitably clear that lease agreement was drafted in the form it is to reduce the amount of duty payable, but it is not for this court to look behind the written agreement. It is a well established principle of law that stamp duty is charged on instruments not on transactions. This principle is fundamental because if there is no instrument, there can be no duty.

It seems obvious that the Stamp Commissioner arrived at the duty payable on the basis of the options contained in the agreement.

However in Limer Asphalt Paving Company v I.R.C. (1872) L.R. 7 Ex. p211 at p217 M p217 Martin B said:

"There is no better established rule as regards stamp duty than that all that is required is that the instrument should be stamped for its leading and principal object, and that this stamp duty covers everything accessory to this object."

This leads to the question as to what was the effect of the transaction between the parties? The clear answer must be that the agreement created a lease for a term of eleven months. The option is something in the future. It may or may not be exercised.

The Learned author of Pinson on Revenue Law at p566 expressed the following view:

"Before a taxing statute can be applied in relation to any given transaction the Revenue (or the court) must first ascertain the effect of the transaction as between the parties, that is, the rights and obligations created by the transaction must be determined in accordance with general principles of law."

This point was amply illustrated in I.R.C. v Duke of West Minister 1936 A.C.1.

"In this case deeds of covenant were executed by the Duke in favour of employees. The deed provided that the payments were to be without prejudice to any claim for remuneration to which the employee might thereafter be entitled but it was understood by the employee that he was not expected to make any such claim so long as the amount received under the covenant and any other payments he received equalled his current salary."

The Revenue contended that although the transaction was in the form of a grant of an annuity or annual payment in substance the transaction was an agreement by the employee to continue in service at an annual salary.

No doubt in the instance case the Stamp Commissioner was contending that although the lease was initially for a period of eleven (11) months by virtue of the option to renew the lease was effectively for a period of twenty (20) years.

In dealing with the contention of the Revenue in I.R.C. v Duke of West Minister supra Lord Tomlin stated the position as follows:

"It is said that in revenue cases there is a doctrine that the court may ignore the legal position and regard what is called 'the substance of the matter' and that here the substance of the matter is that the annuitant was serving the Duke for something equal to his former salary or wages, and that therefore, while he is so serving,

the annuity must be treated as salary or wages. This doctrine seems to rest for its support upon a misunderstanding of language used in some earlier cases. The sooner this misunderstanding is dispelled, and the supposed doctrine given its quietus, the better it will be for all concerned Every man is entitled if he can to order his affairs so (as to) that the tax attaching under the Appropriate Acts is less than it otherwise would be. If he succeeds in ordering them so as to secure this result, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers may be of his ingenuity, he cannot be compelled to pay an increased tax. This so called doctrine of the substance seems to be nothing more than an attempt to make a man pay notwithstanding that he has so ordered his affairs that the amount of tax sought from him is not legally claimable."

Lord Russell of Killowen uttered similiar views at pages 24 - 25 *ibid*.

For the reasons stated herein I am of the view that the amount properly payable as duty on the agreement is \$1.25.

The Commissioner of Stamp Duty and Transfer Tax has stated in an affidavit that he has not refused to stamp the document but that he has assessed the duty payable as \$41,251.25 and is willing to stamp the document in that amount. To my mind that is mere semantics. Implied in that statement is a refusal to stamp the document in the amount of \$1.25. This is a failure to perform a public duty, in accordance with the provisions of the Act.

I would therefore grant the motion in terms of the summons viz that the document be stamped in the amount of \$1.25 which is the duty properly payable.

Costs of the Application to the Applicant to be taxed if not agreed.

ELLIS J.

I agree.

PANTON J.

I agree.