NMCJ

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 11/99

BEFORE: THE HON. MR. JUSTICE RATTRAY, P.
THE HON. MR. JUSTICE BINGHAM., J.A.
THE HON. MR. JUSTICE PANTON, J.A. (Ag.)

BETWEEN	REAL RESORTS LIMITED	APPELLANT
AND	THE COMMISSIONER OF GENERAL CONSUMPTION TAX	RESPONDENT

Angela C. Hudson-Phillips, Q.C. and Richard Evans, instructed by Patterson, Phillipson & Graham, for the appellant

Barbara Lee and Frank Williams, instructed by The Revenue Board, for the respondent

July 12, 13, 14, 15 and October 11, 1999

RATTRAY, P.:

By a Memorandum of Understanding dated 6th February, 1995, the appellant Real Resorts Limited agreed, inter alia, with Beaches Management Limited (hereinafter referred to as "Beaches") and Gorstew Limited (hereinafter referred to as "Gorstew") that a hotel planned to be constructed on lands at Negril by the appellant would be completed and equipment leased from the appellant and operated by Beaches, a wholly-owned subsidiary of Gorstew

under the name Beaches Negril Hotel. Annexed to the Memorandum of Understanding was a form of lease of the hotel and a form of guarantee. These draft documents were to be executed and entered into when construction of the hotel was completed.

In an addendum to the Memorandum of Understanding dated 5th June, 1996, it was further agreed that Beaches would install a water supply system for the hotel at its own cost the system to remain the property of Beaches.

Professional fees for the services of architects, etc., incurred in construction of the hotel were paid by the appellant and in respect of these payments General Consumption Tax was also paid.

By letter dated 4th July, 1995, the appellant claimed from the Commissioner of General Consumption Tax as refund of input tax the General Consumption Tax paid by the appellant in respect of the architectural fees aforementioned. The application for this refund was refused by the Commissioner by letter dated 23rd November, 1995. Following submissions by Messrs. Pryce Waterhouse on behalf of the appellant to the respondent a formal decision by the respondent upholding the refusal was given by letter dated 20th February, 1997.

The appellant appealed the decision of the respondent to the Revenue Court by Notice dated 18th March, 1997. On the hearing of a summons for extension of time within which to file a statement of case, which was taken out by the respondent, by virtue of agreement between the parties the Judge of the

Revenue Court, Orr J., treated the summons as a hearing of the substantive appeal and after submissions of Counsel for the parties on the 23rd and 24th October, 1997, reserved his judgment which he delivered on the 18th December, 1998, in favour of the respondents. It is this decision which comes before us now on appeal.

Certain facts have been agreed by the parties as follows:

> "**1.** That construction of the hotel was not completed during the taxable periods subject of this appeal and that no lease had commenced during those periods.
>
> **2.** That the appellant had, prior to the taxable periods subject of this appeal, entered into a Memorandum of Understanding dated February 5, 1995, copy of which is handed up to the court.
>
> **3.** That the appellant procured that the hotel be constructed for it by an independent contractor.
>
> **4.** That the $800,ᴜ ` bi-monthly in respect of which the appellant had returned output tax does not relate to rental income in respect of the hotel.
>
> **5.** That the hotel was first leased to Beaches Management Limited after the relevant period subject of this appeal."

The trial judge found, inter alia, as follows:

> "I am of opinion that the fees paid by the appellant for professional services to architects etc. are not sufficiently closely connected with the taxable activity of the appellant, namely, the leasing/rental of the proposed hotel, nor with the commencement of such activity. So too there was no direct and immediate link with the commencement of the appellant's taxable activity.

> In the light of the above the appellant's appeal must fail."

It was necessary to determine the "taxable activity" in which the appellant was engaged. Was the trial judge correct in determining that this "taxable activity" intended to be engaged in when the hotel was completed was the leasing/rental of the hotel? This is the first challenge by Mrs. Hudson-Phillips, Q.C., on behalf of the appellant.

The General Consumption Tax Act imposed from and after the 22nd October, 1991, a General Consumption Tax, inter alia:

> "**(a)** On the supply in Jamaica of goods and services by registered tax payer in the course or furtherance of the taxable activity carried on by that tax payer ... by reference to the value of those goods and services." (Section 3(1)(a) of the Act).

As defined, "taxable activity" means:

> "...any activity, being an activity carried on in the form of a business, trade, profession, vocation, association or club, which is carried on continuously or regularly by any person whether or not for a pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods and services (including services imported into Jamaica) to any other person for a consideration; ..." (Section 2 of the Act).

There are exclusions which are not relevant for our purposes.

Section 2(2) reads:

> "For the purposes of this Act, a taxable activity includes anything done in connection with the commencement or termination of that activity."

This subsection was inserted by an amendment of 1995.

Mrs. Hudson-Phillips, Q.C., submits that the building of the hotel which required the payment of architects fees and the General Consumption Tax thereon was a "taxable activity" done in connection with the commencement of the "taxable activity" of the construction and leasing of the hotel. She submits "that the payment of the professional fees in connection with the construction of the hotel form part of a logical sequence of activities beginning with the design and leading to the commencement of the leasing of the hotel."

How did the trial judge deal with this issue? He stated:

> "...by the time the arguments had been completed, it became apparent that the appellant's entitlement to a credit for input tax paid hinged on whether it could be found to have commenced its taxable activity at the time the input tax was paid. It was also agreed that at the time the input tax was paid the appellant had not yet begun to lease or rent a hotel, as the construction of the hotel had not yet been completed, and the tax was on fees for professional services rendered by architects etc., in the construction of the hotel."

The trial judge distinguished the case of ***Vallambrosa Rubber Co. Ltd. v. Farmer (Surveyor of Taxes)*** (1910) 5 Tax Cases 529, relied upon by Mrs. Hudson-Phillips, Q.C., which concerned a deduction of expenses in relation to a rubber plantation in which one-seventh of the whole plantation produced rubber and six-seventh under cultivation, not having yet reached the state of production. The Court of Sessions (Scotland) per Lord Cullen, in dealing with a sum of £2,022 rejected by the Commissioners as deductible, stated:

> "Now this sum of £2,022 represents various matters - superintendence, allowances, weeding, and so on - and the way in which the Commissioners dealt with the case in the argument for the Assessor was

> certainly startling. They did not really go into the question of whether these were proper ordinary expenses or not, but they said this:- The rubber tree, it is admitted, is not commercially valuable till it is six or seven years old. They said: We find from your own admission that at present, in this year, only a seventh of your rubber trees are in full bearing, and therefore, they say, we shall hold that only one-seventh of these expenses can be expenses of the ordinary business and as such deductible, and that the other six-sevenths are not deductible. Now, that somewhat startling result was before your Lordships argued on two grounds. The Junior Counsel for the Crown, encouraged by certain expressions which he found used by various learned Judges who had given judgments in Tax Cases, wished your Lordships to accept this proposition, that nothing ever could be deducted as an expense unless that expense was purely and solely referable to a profit which was reaped within the year. I think that proposition has only to be stated to be defeated by its own absurdity."

And at page 535:

> "Because what does it come to? It would mean this, that if your business is connected with a fruit which is not always ready precisely within the year of assessment you would never be allowed to deduct the necessary expenses without which you could not raise that fruit. This very case, which deals with a class of thing that takes six years to mature before you pluck or tap it, is a very good illustration, but of course without any ingenuity one could multiply cases by the score. Supposing a man conducted a milk business, it really comes to the limits of absurdity to suppose that he would not be allowed to charge for the keep of one of his cows because at a particular time of the year, towards the end of the year of assessment, that cow was not in milk, and therefore the profit which he was going to get from the cow would be outside the year of assessment. As I say, it is easy to multiply instances, but the real truth is that it is just one of those mistakes which are made by fixing your eyes too tightly upon the words of Rules and Cases which are given in the Act of 1842.

> These, after all, are only guides, because the real point is, What are the profits and gains of the business?"

The trial judge, Orr, J., in relation to this case, stated:

> "The important point in that case is that the expenses for weeding and superintendence took place after the trade of the company had commenced albeit that the claim in issue concerned an area of land which had not yet been planted. In the instant case there were no buildings ready for leasing or being leased at the time the input tax was paid; in the ***Vallambrosa*** case the trade had begun and the questioned expenses were the natural development or an expansion of the already existing trade."

The real question of course is whether the taxable activity of the leasing or renting of the hotel had commenced. When did that trade or business commence?

The admitted facts disclosed an absence of connection between "the $800,000 bi-monthly in respect of which the appellant has returned input tax" and any rental income from the hotel which during the relevant taxable periods had neither been completed nor leased to Beaches.

The learned trial judge was, therefore, correct in holding that:

> "Professional fees for the services of architects etc. rendered in connection with the construction of a hotel, albeit a hotel which the appellant intends to lease or rent when completed, cannot in my opinion be said to be fees paid in connection with the commencement of leasing or renting of the hotel. There is no direct or immediate link between such fees and the commencement of the leasing or rental of the hotel."

It is also to be noted that the hotel was being constructed for the appellant by an independent contractor.

I would adopt the language of the Tribunal Chairman in ***Hargreaves Lansdown Asset Management Ltd.*** (Vat Tribunal's Decisions case No. 12030) that the appellant's payments in relation to General Consumption Tax on the architectural fees:

> "...did not qualify for exemption because they were not sufficiently part of or closely connected with the ... transactions."

in this case, the leasing and rental of the hotel. The payments, therefore, in this regard would not, as correctly submitted by Mrs. Lee, counsel on behalf of the respondent, amount to input tax in respect of which a credit would be allowable by virtue of Regulation 14 of the General Consumption Tax Regulations.

Consequently, I would dismiss the appeal with costs to the respondent to be taxed if not agreed.

BINGHAM, .A.:

I agree.

Panton, J.A. (Ag.):

I also agree.