IN THE REVENUE COURT

REVENUE COURT APPEAL
NO. 2 OF 1997

BETWEEN	**REAL RESORTS LIMITED**	**APPELLANT**
A N D	**THE COMMISSIONER OF GENERAL CONSUMPTION TAX**	**RESPONDENT**

Mrs. Angella Hudson Phillips Q.C. and Richard Evans for the Appellant instructed by Evans and Gore.

Mrs. Barbara Lee for the Respondent instructed by Frank Williams.

Heard on 23rd and 24th days of October 1997 and the 18th day of December 1998.

JUDGMENT

COURTENAY ORR J.

The appellant claims an input tax credit for General Consumption Tax paid by the appellant on fees for professional services rendered to it.

The appellant's taxable activity is the leasing and rental of premises. The claim for a credit of input tax covers the period april 1995 to November 1996.

By a memorandum of understanding dated June 5, 1996, made between the appellant of the one part and Beaches Management Limited of the other part, hereafter referred to as "the proposed lessees", the appellant agreed inter alia, to construct and lease to the proposed lessees, a hotel of the type and size agreed upon by the parties.

The appellant submitted returns for the period December 1994 to May 1995, and sought a refund of input tax paid on purchases and expenses

incurred in respect of the above-mentioned hotel which had been approved under the Hotel (Incentives) Act. The respondent refused the claim. Thereafter the appellant was audited by the respondent, and the appellant filed revised returns for the period April 1995 to November 1996. After further correspondence the respondent by letter dated 20th February 1997, issued his decision advising that refunds claimed for input tax credit in respect of the taxable periods between April 1995 and November 1996 inclusive, would not be granted.

The reason stated in his letter was that he was of the opinion that the rental of hotel property as from the thirty-first consecutive day of occupancy, was an exempt activity in accordance with the Third Schedule of the General Consumption Tax Act. (hereafter referred to as "the Act") The company appeals.

The following are the grounds of appeal:

"1. That the leasing by the Appellant of a hotel constructed by it as commercial premises is not within the contemplation of item 4 of Part 11 of the Third Schedule to the G.C.T. Act.

2. That the Appellant's taxable activity commenced when it commenced its business prior to December 1994.

3. That the leasing of an entire hotel constructed to operate as a business is a taxable activity not an exempt activity pursuant to item 4 of Part 11 of the Third Schedule to the G.C.T. Act.

4. That the word "hotel" referred to in the said item 4 refers to residential premises of the type ejusdem generis with inns and guest houses where tenants or lessees occupy the premises as a home for extended periods of time in excess of thirty days.

5. That the amendment of the said item 4 in March 1995 to include the words 'as from the thirty-first consecutive day of occupancy' indicates the intention of the legislature to restrict the exemption from G.C.T. to the leasing or renting of residental hotels."

This hearing is on a Respondent's Summons for an extension of time within which to file a Statement of Case in response to the appellant's notice and grounds of appeal.

I hope I do no injustice to Counsel by summarising their very helpful arguments relatively briefly.

THE SUBMISSIONS ON BEHALF OF THE RESPONDENT/APPLICANT

The Court has a wide discretion to allow the application. The appellant will suffer no hardship as his status remains the same. Matters concerning assessments and audit will be made in due course, and any money due to him would be refunded. The delay though long is not necessarily fatal to the application.

THE SUBMISSIONS ON BEHALF OF THE /APPELLANT

By Rule 10(2) of the Revenue Court Rules 1972 an appeal may be allowed where the respondent fails to file a statement of case within the time allowed. Rule 40 provides that the practice and procedure of the Supreme Court may be followed, so far as applicable, except otherwise provided.

The Court ought to treat the respondent's application like an application for leave to defend, hence the affidavit in support should indicate that the respondent has a good arguable case and the reasons for this opinion.

The appellant could have taken out a summons to have the appeal allowed under rule 10(2) which contains the following provision:

> "(2) If the Respondent fails to file a Statement of Case within the time allowed by this Rule or within such further time as may be allowed under Rule 32 the appeal may be allowed by the Court or Judge with costs."

The Respondent's affidavit showed an attitude of nonchalance on behalf of those responsible for instructing counsel.

The proposed Statement of Case discloses no arguable case.

The appellant would be prejudiced by further delay in that, it has spent considerable sums and time putting forward legal submissions with which the respondent now agrees.

The interest rate on refunds of input tax is considerably less than the commercial rate.

If the Court holds that the respondent is entitled to rely on new reasons, he should still show that there is an arguable case.

The first two reasons advanced by the respondent in support of his prayer that the appeal should be dismissed are irrelevant as the appellant has made no claim relating to the operation of the hotel or materials used in its construction.

The construction of the hotel had not been completed during the relevant period so the question of rental income could not arise. Reason (c), that a claim for input tax in respect of construction is not allowable, was irrelevant as that is not the appellant's taxable activity.

The suggestion in reason (d) that the definition of input tax and the effect of regulation 14 (2) of the General Consumption Tax Regulations precluded a claim such as the appellant's was misguided, having regard Section 2 (2) (b) of the Act which says that "a taxable activity includes anything done in connection with the commencement or termination of that activity."

The amendment of the G.C.T. Act in 1995 to include section 2 (2) (b) quoted above indicates that the legislature wished to make clear that a company's business activity starts long before it begins to earn income.

Support for this proposition is found in the case of Villambrosa Rubber Co v Farmer 5 TC 529, and more so the Dutch case of D A Rompelman & E A Rompelman - Van Pellen vs. Minister Van Financien. [1985] 3 CMLR 392. In Rompelman it was held that "preparatory acts, such as the acquisition of assets and therefore the purchase of immovable property, which form part of those transactions must themselves be treated as constituting economic activity."

In the instant case the appellant was required to pay tax on professional services supplied to him in the course or in the furtherance of its trading activity, such fees are in furtherance of its taxable activity. Such input tax paid cannot be described as too remote. So the appellant is entitled to input tax credit.

The interests of justice would not be served by the enlargement of time. So far as the Revenue Court is concerned, and in particular in a matter involving the General Consumption Tax Act, that power to enlarge time is circumscribed.

In paragraph 3 (3) of the respondent's proposed Statement of Case the respondent had conceded that the decision appealed from could not be supported on the reasons given, but seeks to justify it on other grounds. This cannot be done because Section 41 (3) of the Act states that an appeal shall be limited to the grounds stated in the notice of objection, unless the Court should permit the grounds of appeal to be amended.

Further subject to the Courts power to grant amendments, Rule 13 states that "It shall not be competent on the hearing of an appeal, for the appellant or the respondent to rely upon any facts not set out in the Notice of Appeal, Statement of Case or Reply as the case may be."

The appellant came to Court to deal not only with the decision of the respondent but specifically with the reasons given, and cannot now be asked to deal with other reasons which appear for the first time in the respondent's proposed Statement of Case.

There is no arguable defence to the appellant's grounds.

FURTHER SUBMISIONS ON BEHALF OF THE RESPONDENT IN RESPONSE TO APPELLANTS ARGUMENTS

There is no requirement that the respondent recite any grounds in his Statement of Case.

The only issue is whether actions taken by the appellant and for which it had to pay input tax can be said to be connected with the commencement of its taxable activity.

It is agreed that the taxable activity was rental/leasing of commercial property i.e.: a hotel; and also that at the time the issue arose the appellant had not yet started leasing or renting the property. So tax paid in fees for professional services rendered in the construction of the hotel would not be considered to be input tax wholly or mainly for making the taxable supply - it being too far removed from leasing or renting.

Fees for professional services such as preparing documents, engineers reports etc. are for activities which fall under the Third Schedule, Part 11. Services exempt from tax; in particular Part 11:1(e).

The case of Rompelman concerns peculiar terms which do not appear in our legislation. Under section 3 (1) (a) what is taxed is the taxable supply. i.e. the leasing of the hotel; and therefore a supply is not possible in the instant case because the taxpayer had nothing to rent or lease.

THE COURT'S ANALYSIS AND CONCLUSION

By the time the arguments had been concluded both sides were agreed that there was a serious question of interpretation to be decided - "Had the appellant commenced its taxable activity by the period for which it was claiming a credit for input tax?"

It also was evident that the parties wished that should the Court be minded to grant the application for an extension of time, then the crucial question of interpretation be decided without any further hearing. The Court welcomed this position.

SHOULD LEAVE BE GRANTED?

The existence of a serious question of legal interpretation is a factor in favour of the grant of leave; but some other issues arise.

Delay

The period of delay is long. The Notice of Appeal was served on the respondent on March 18, 1997. The summons for extension of time was not filed in the Revenue Court until June 27, 1998 - 101 days later! Further there is no proper explanation of the delay. Such explanation as is offered indicates nonchalance both on the part of the respondent and the officer to whom he delegated the responsibility of dealing with the matter. Even though the former became aware on May 8, 1997 " that nothing had been done in the matter" he merely handed the letter from his attorneys

informing him of that situation to an officer, and obviously did nothing to follow up his instructions until he received a second letter from his attorneys; and then all he did was to give the second letter "to the aforesaid officer."

Thereafter there was silence on his part until on June 23, 1997, he received a telephone call from his attorneys advising him that up to then no instructions had been received. At last he gave the matter to a different officer and soon this application was filed - within a matter of a few days!

However, the most persuasive authorities indicate that the Court should not look at delay alone, but should consider the matter of prejudice to the other side - see Finnegan vs. Parkside Health Authority [1998] 1 ALL ER 595.

Before dealing with the matter of prejudice, I must advert to Mrs Hudson-Phillips' submission that the situation was so circumscribed by the respondent's admission that his reasons for his decision were erroneous, the rules of the Court, and the Act, that the Court was bound to refuse leave and allow the appeal.

Rule 32 of the Revenue Court Rules 1972 reads as follows:

> "The Court or Judge may on the application of any party by way of Summons enlarge or abridge the time for doing any act or taking any proceedings under these rules or under any other rules of procedure governing the exercise of the jurisdiction of the Court or Judge upon such terms as it may think fit; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed, or the Court or Judge may direct a departure from the rules in any other way, where this is required in the interest of justice." (emphasis supplied)

It is instructive to compare the wording of this rule with Order 3 Rule 5 of the English Rules of the Supreme Court (under which Finnegan's case, supra, was decided). It provides in part as follows:-

> "(1) The Court may on such terms as it thinks fit, by order extend or abridge the period within which a person is required or authorised by these rules, or by any judgment order or direction, to do any act in any proceedings.
>
> (2) The Court may extend any such period as referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.
>
> (3) The period within which a person is required in these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose."

It will be observed that Rules 5 (1) and (2) are similar to Rule 32 of the Revenue Court Rules, and that the portion underlined in Rule 32 embodies in writing a principle recognised by the common law under the inherent jurisdiction of the Court. Thus Sir Jack Jacob writes in his article : "The Inherent Jurisdiction of the Court", 23 Current Legal Problems page 23 at 25"

> "The inherent jurisdiction of the Court may be exercised in any given case, not withstanding that there are Rules of Court governing the circumstances of such case. The powers conferred by Rules of Court are, generally speaking, additional to, and not in substitution of, powers arising out of the inherent jurisdiction of the Court. The two heads of power are generally cumulative, and not mutually exclusive, so that in any given case the Court is able to proceed under either or both heads of jurisdiction."

It is true that the learned author was writing of the Supreme Court in England, but the same would apply to the Supreme Court of Jamaica, and therefore to the Revenue Court also, which is of equal status as the

Supreme Court except that it deals only with taxation. This is so in that the Revenue Court judge by law is a judge of the Supreme Court who is assigned to the Revenue Court.

Both sets of rules, that is the Rules of the Supreme Court in England and the Revenue Court Rules, prima facie confer the widest measure of discretion on the Court in applications for extension of time, but the Courts have from time to time laid down guidelines, by which the Courts will exercise this discretion. Such guidelines, of a very comprehensive nature were laid down in Finnegan's case (supra) in which all the leading English authorities were fully considered and where they were in conflict a choice was made as to the preferred position.

The submission of Mrs Hudson-Phillips, attractive though it may be, finds support neither from the principles of statutory interpretation nor in the rules of procedure which have guided the Courts of an appellate nature for over a century.

(i) Interpretation of the Relevant Legislation

(a) Section 41 (3) of the Act

I again set out, for ease of reference Section 41 (3) of the General Consumption Tax Act which forms the main plinth of Mrs Hudson-Philips' argument. section 41 (3) provides:

> "An appeal shall be limited to the grounds stated in the notice of objection but the Revenue Court may, in its discretion, permit the grounds of appeal to be amended."

What does the word appeal mean? Her argument can be right only if the word "appeal' in this context is not limited to the documents embodying the appellant's application to the Court for a review of the

decision of the respondent, but includes the respondent's riposte and any reply by the appellant thereto.

I shall now list a number of meanings drawn from various dictionaries: The Oxford Advanced Learner's Dictionary, Encyclopedic edition 1992:

> "Verb (3) (law) take a decision to a higher Court where it can be heard and a new decision given."
>
> "Noun: act of appealing (appeal 3).
>
> The New Shorter Oxford English Dictionary (in two volumes):
>
> "Noun: The submission of a case to a higher Court in the hope of altering the judgment of the lower one; a request to a higher authority for alteration of a decision." (emphasis supplied)
>
> The Concise Oxford Dictionary English edition 1990:
>
> "N....3 Law the referral of a case to a higher Court" (emphasis added)
>
> Webster's New Dictionary and Thesaurus, Concise edition 1990:
>
> "v. to transfer a lawsuit to a higher court
>
> n. act of appealing ;..... transference of a lawsuit for rehearing." (emphasis mine)

All these definitions are at one is showing that what constitutes the appeal is the taking, submission, referral or transfereence of a case from a lower Court to a higher one. It is the appellant who does this. The respondent has no choice but to follow him there. What happens when all the documentation is completed is the hearing of the appeal. The appeal is all the work of the appellant. As the Shorter Oxford Dictionary puts it, it is he who appeals "in the hope of altering the judgment of the lower Court"; it is the

appellant who makes "a request to the higher authority for the alteration of a decision."

The very statute on which Mrs. Hudson-Phillips relies recognises this principle and makes this very important distinction between the appeal and the "hearing" of the appeal. The subsection immediately before the one relied on by Mrs Hudson-Phillips points to this. It reads thus:

> "41 (2) The Revenue Court may, or an application by the Commissioner, order that the amount assessed or such portion thereof as the Court may specify, be paid or security be given therefor in such form and amount as may be approved by the Commissioner or the Court, as a condition precedent to the hearing of an appeal under this Section." (emphasis added)

So "appeal" in the first line of Section 41 (3) really means "grounds of appeal." that is why the subsection goes on to say:

> "but the Court may in its discretion permit the grounds of appeal to be amended."

It is the grounds of appeal only, that are limited to the grounds stated in the notice of obection, which forms the basis of the hearing below.

The language used by the appellate Courts in announcing their decisions is indicative of the fact that the appeal is the application by the appellants and not the hearing. Invariably the Court uses some such phraseology as: "The appeal is dismissed or The appeal is allowed. The order of the Court below is confirmed." Surely this cannot mean that the hearing in the Court below is dismissed or allowed. Rather, it is the application for an alteration of the earlier decision that is denied or granted.

Moreover, as the New Shorter Oxford English Dictionary states, an appeal is submitted "in the hope of altering the judgment of the lower Court, and is a request to a higher authority for alteration of a decision." It is

the judgment or decision which the appellant seeks to have changed. Therefore logically the judgment or decision should not be altered if it is correct, for that would be a travesty of justice. Hence, if the decision is correct but the respondent (Commissioner) gave the wrong reasons for his decision he is entitled to say "My decision is correct but regrettably at the time I made it, I gave the wrong reasons;" and so hence the Court should uphold his decision.

(b) The Rules of the Revenue Court.

I again set out Rule 13. It reads thus:

> "Subject to Rule 12 (which provides for the amendment of a statement of case or a Reply) it shall not be competent on the hearing of the Appeal for the Appellant or the Respondent to rely upon any facts not set out in the Notice of Appeal, Statement of case or Reply as the case may be."

This rule clearly anticipates that as often happens where the appeal is contested, there will be counter allegations of fact in the Statment of Case as opposed to those in the notice of appeal, and the Reply if any would deny some or all of the allegations of fact in the Statement of case and/or allege further facts, or reiterate those stated previously. The rule clearly does not and logically could not limit the respondent to the allegations of fact contained in the grounds of appeal.

The wording of the forms set out in the schedule for the Statement of case (form C) and the Reply (Form D), supports the conclusions stated in the proceeding paragraph.

Paragraph 2 of Form C reads:

> "And Further Take Notice that the facts upon every point specified by the appellant in his Notice of Appeal herein as a Ground of Appeal are as follows: ....." (emphasis supplied)

In Form D (the Reply), after the usual heading are the following words:

> "Take Notice That the Appellant herein [admits the facts set out in the Respondent's Statement of Case filed in this appeal]
>
> or
>
> does not admit the facts set out ..... and hereby states that the facts are as follows: .....
>
> or
>
> admits the facts set out at paragraphs ....and .... of the Respondent's Case but does not admit those set out at paragraphs ..... and ..... and in respect of which the Appellant states that the facts are as follows: ....."

(ii) Rules of Procedure developed by the Courts.

One of the basic rules of an appellate Court is that a Court of appeal will not normally allow a party to raise for the first time a point which was not taken in the Court below.(see Halsbury's Laws of England 3rd edition vol. 30 paragraph 884) Re Walton, Exparte Reddish (1877) 5 CH D 882 - a decision of the English Court of appeal shows that this rule is over a century old. Other cases which enshrine this principle are Wilson vs. United Counties Bank Ltd. [1920] AC 102 (HL) Karunaratne vs. Ferdinandus [1902] AC 405 at pp 409, 410, a decision of the Privy Council.

For a respondent however, the rule is different, as the appeal is not of his choice and it is felt he is brought unwillingly to Court. Thus in Erington vs. Erington [1952] 1 KB 290 at 300 Denning L. J as he then was, said:

> "[I]t is always open to a respondent to support the judgement on any ground."

In Property Holdings Co. Ltd. vs. Clark [1948] 1 KB 630, the respondent won in the Court of Appeal on a contention "which though not raised in the Court below, he was, as respondent, entitled to raise in this

Court, in order to hold his judgment." (per Scott L. J at p 637. Asquith and Evershed L JJ concerning). But there is an important qualification to the rule, namely, that the point should be one which is open to the respondent on the facts found below; for as stated by Somervell L.J, with whom Tucker and Cohen L JJ concurred, a respondent cannot take a point which rests on facts not investigated below. - Bostel Bros. Ltd. v Hurlock [1949] 1 KB 74 at 84.

It will be seen therefore that both the General Consumption Tax Act Section 41 (3) and Rule 13 merely embody and adapt for the purposes of appeals relating to the peculiarities of taxation cases, rules which have long been laid down by the Courts; so that the respondent is entitled to seek to justify his earlier decision by new reasons.

THE SUBSTANTIVE ISSUES TO BE DECIDED

(a) Are The payments Made By The Appellant For Professional Services Exempt From Tax?

Mrs. Lee submitted that the payments which form the basis of the appellant's claim for a credit of input tax, are exempt from tax, and therefore the claim must fail.

She based this submission on Part II, paragraphs 1 (a) to (e) of the Third Schedule of the Act. The paragraphs read as follows:

"PART II -Services

1. The following operations -

   (a) the construction, alteration, repair, extension, demolition or dismantling of any building or structure, including offshore installations, that is to say, installations which are maintained or intended to be established for underwater exploitation;

   (b) the construction, alteration, repair, extension or demolition of any works forming or intended to form, part of the land, including (without

prejudice to the generality of the foregoing) walls, road works, powerlines, telegraphic-lines, aircrafts runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water-mains, wells, irrigation works, sewers, industrial plant and installation for purposes of land drainage, coast protection or defence;

(c) the installation in any building or structure of systems of heating, lighting, ventilation, power supply, drainage, sanitation, water supply, fire protection, air conditioning, elevators or escalators;

(d) the internal cleaning of buildings and structures so far as carried out in the course of their construction, alteration, extension, repair or restoration;

(e) operations which form and integral part of, or are preparatory to, or are for rendering complete, such operations as are described in paragraphs (a) to (d), including site clearance, earth moving excavation, tunnelling or boring, laying of foundation, erections of scaffolding, site restoration, landscraping and the provisions of roadways and other access works;"

Mrs Lee laid particular emphasis on paragraph 1(e), and argued that the services for which the appellant paid, especially those rendered by architects, were covered by the description "operations as are described in paragraphs (a) to (d) ."

Words in a statute must be interpreted in the context in which they are used and must be given their ordinary meaning. The Concise Oxford Dictionary gives as one of the meanings of the word operation "a piece of work, esp. one in a series. (often in pl.: begin operations)." I regard this as the appropriate meaning in the context of this paragraph.

I regard subparagraphs (a) - (d) as constituting a genus of physical activity involving land, buildings, water (e.g. wells, waterworks) and so on.

The last three sentences of subparagraphs (e) read in part "including site clearance, earth moving excavation, tunnelling or boring ...." The apparently wide words of the earlier part of the subparagraph must be read ejusdem generis with the latter portion and so restricted to physical operations like earth moving excavation, and not used in the modern sense which would encompass the work of an architect. The sumbission therefore fails.

(b)**When Did the Appellant Commence Its Taxable Activity?**

As noted earlier 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.

I shall now deal with the cases cited by Mrs. Hudson-Phillips.

The headnote in the case of Villambrosa Rubber Co. Ltd. v Farmer (supra) reads as follows:

> "A Rubber Company have an estate, of which in the year under review one-seventh only produces rubber, the other six-sevenths being in process of cultivation for the production of rubber. (Rubber trees do not yield rubber until they are six years old.) Expenditure for superintendence, weeding, etc. is incurred by the Company in respect of the whole estate.

> Held, that in ariving at their assesable profits the Company are entitled to deduct the expenditure for superintendence, weeding etc, on the whole estate and not one-seventh of such expenditure." (emphasis mine)

In dealing with the Crown's argument that such expenses were not deductible in calculating the profits of the company the Lord President said at 535:

> "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 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..."

Lord Johnston said at 536:

> "It appears to me that, as at present worked, the trade manufacture adventure or concern of the Company is the cultivation and production for sale at profit of rubber and other tropical products. For this purpose land had to be acquired, cleared and drained, roads made and buildings erected before the cultivation began. What was expended for those purposes was I think capital expenditure, and not, in the sense of the Income Tax Act, money laid out and expended for the purposes of the trade. But once the cultivation began with the planting, expenditure on cultivation, production, and marketing was I think revenue expenditure for the purposes of the trade.." (emphasis supplied)

It is to be observed that the Court disallowed a sum of £492.00 claimed for "cleaning and draining £330.00 and making roads and drains £162.00."

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 Villambrosa

case the trade had begun and the questioned expenses were the natural development or an expansion of the already existing trade.

The headnote effectively summarises the decision in Rompelman's case (supra). I now set it out:

> "Acts preparatory to the carrying on of an economic activity, in case the acquisition of real property the dealing in which will constitute the economic activity and even the entering into legal relationships prior to such acts, in case, a binding contract to convey on completion a building which is in the course of construction, form part of the economic activity in question within the meaning of Article 4 of the 6th VAT Directive and therefore entitle the taxpayer to deduct input tax incurred at that preparatory stage notwithstanding that the actual exploitation of the property has not yet begun."

Mr. and Mrs. Ropelman had acquired property rights in two units - The property rights acquired were described in both cases as a right to "future joint ownership". The units purchased were showrooms and the Rompelmans declared to the Inspector of Taxes that the units were intended for letting, and sought a refund of input tax payable on the sale of the property to them. The Inspector refused to grant the refund and the Gerechtshof confirmed his decision. They held inter alia that the carrying on of a business includes the exploitation of tangible property, which means the actual use in society of property which is in existence; the property in question was not in existence (the Rompelmans only had a claim to the provision of rights in the future,) therefore, they did not constitute an undertaking.

The Court of Justice of European Communities overturned that decision and held as noted above. At paragraph 25 the Court said:

> "....the acquisition of a right to the future transfer of property rights in part of a building yet to be constructed with a view to letting the property in due course may be regarded as an

> economic activity within the meaning of Article 4 (1) of the 6th Directive. However, the provision does not preclude the tax administration from requiring the declared intention to be supported by objective evidence such as the planned premises being specifically suited to commercial exploitation."

The Court pointed out that paragraph 2 of Article 4 provides that "economic activities referred to in paragraph 1 (i.e. activities of a 'taxable person") shall comprise all activities of producers, traders and persons supplying services.

This case may easily be distinguished on the basis of the wording of the legislation concerned, which is quite different from the relevant provisions in the General Consumption Tax Act.

Secondly, the method of interpretation used in the European Community is very different from the method adopted in Jamaica, and in England before it joined the European Community. Lord Denning who tried to persuade the House of Lord to adopt the European method, described it in this way in James Buchanan & Co. Ltd. v Babco Forwarding & Shipping (UK) Ltd. [1977] 2 WLR 107 at 11. He said:

> "(European judges) adopt a method which they call in English by strange words - at any rate strange to me - the "schematic and teleological" method of interpretation. it is not really as alarming as it sounds. All it means is that the judges do not go by the literal meaning or by the grammatical structure of the sentence. They go by the design or purpose ..... behind it, when they come upon a situation which is to their minds within the spirit - but not the letter of the legislation, they solve the problem by looking at the design and purpose of the legislature - at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired efffect. This means they fill in gaps, quite unashamedly, without legislation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly."

The English Courts are required to follow the ruling in

Rompelman and have done so in a number of cases. In Lister v Forth Dry Dock and Engineering Co. Ltd. [1990] 1 AC 546 the House of Lords held, in the words of Lord Templeman at 558 that where necessary to implement their purpose, "the Courts of the United Kingdom are under a duty to follow the practice of European Courts by giving a purposive construction to directives and to regulations issued for the purpose of complying with directives."

In that case the applicants, employees of Forth Dry Dock, were dismissed one hour before Forth Dry Dock's transfer to Forth Estuary Engineering took effect.

Held: They must be treated for the purposes of the Transfer of Undertakings (Protection of Employment) regulations 1981, regulation 5, as having been employed by Forth Dry Dock immediately before the transfer. Otherwise there would be no compliance with the spirit of European Community Directive 77/187 at 5, the clear object of which is to protect the rights of employees in the event of a change of employer. (emphasis mine)

Notwithstanding, the caution noted, there are some cases from English Courts which may be of assistance. Firstly, the Case of Neuvale Ltd and another v Customs and Excise Commissioners [1989] STC 395. The headnote captures adequately the issues involved. It reads as follows:

> "The taxpayer companies were wholly-owned subsidiaries of a company (PSL) acquired by H in order to develop a site comprising a warehouse and other buildings. The purpose of the development was to produce small storage units and office and light industrial accommodation for letting (an exempt supply for the purposes of value added tax). The taxpayer companies agreed with PSL, which purchased the site and converted the warehouse for storage, to supply H's services to PSL to develop the storage business, in consideration of quarterly payments. the supply of those services was a taxable supply for the purposes of value added tax and the taxpayer companies, which were registered for value added tax,

accounted to the commissioners for the value added tax charged on the payments as output tax. The taxpayer companies carried out the development of the buildings in the site, part of which sold to them by PSL. That development involved payments for goods and services, which attracted value added tax, and ranked as input tax for the taxpayer companies. The taxpayer companies claimed they were entitled to deduct the input tax under SS 14a and 15b of the Value added tax 1983. A value added tax tribunal rejected the claim, holding that the word 'business' in S15(I) of the 1983 Act meant a business activity involving the making of taxable supplies and that tax paid on a supply for the purposes of a business which did not involve the making of taxable supplies was not deductible as input tax. the taxpayer companies appealed, contending that since all the supplies made by them were in fact taxable supplies (no accommodation having been rented yet) the input tax was deductible under S 15(I) (a) of the 1983 Act. The commissioners contended that input tax was deductible under S 15 (I) (a) of the 1983 act only so far as attributable to the taxable supplies concerned.

Held - The goods and services supplied for the development of the taxpayer companies' premises were used for the purposes of a business to be carried out by the companies, within the meaning of S 14(3) of the Vallue Added Tax Act 1983, since the renting of accommodation was plainly a business. However, an activity which neither made nor was intended to make taxable supplies was not a business for the purposes of S 15(I)(a) of the 1832 Act, and under that section tax on inputs could only be set off against tax on the outputs to which the inputs related. Accordingly, the tribunal was right in its analysis of the law and in the conclusion it reached. The appeal would therefore be dismissed."

This case lends support to the respondent's position.

There are two income tax cases which show that preparing to commence a trade is not the same thing as commencing a trade. Firstly, Cannon Coal Co. Ltd. v IRC [1918] 12 TC 31. In that case the appellant company was formed in 1906 for the purpose of mining coal in the Forest of Dean.The sinking of the pits was commenced in the same year, but not completed until late in 1911. Prior to July, 1912, output from the pits was negligible, and prior to April 1912, the proceeds of sale of coal from the pits

were credited to capital. In 1908, however, a drift had been made in a hillside, 400 yards distant from the pits , but communicating underground with the pit workings, for the purpose of obtaining coal for the pit-sinking machinery. The drift yielded more coal than was required for this purpose, and from 1909 onwards a substantial quantity was sold at a profit. (The company was assessed to income tax in respect of its profits from 1909 onwards, and its income tax returns for 1912-13 onwards were made on the three years' average basis, and not on the supposition that the business was a new one as from June, 1912.)

In making excess profits duty assessments on the company the Commissioners of Inland Revenue based the pre-war standard on the profits of two of the last three pre-war trade years. The company appealed to the Special Commissioners and contended that the trade or business was not commenced until July 1, 1912, or alternatively April 1, 1912, and that under the provisions of Rule 4 of Part II of Finance (No. 2) Act 1915, Schedule IV. (repealed), the company was accordingly entitled to a pre-war standard based on the profits of the last pre-war trade year.

The Special Commissioners decided that the appellant company had been carrying on its trade or business for three pre-war trade years, and that the pre-war standard had been rightly computed by the Commissioners of Inland Revenue:- Held: the question of the date of commencement of the company's business was one of fact, and there was evidence on which the Special Commissioners could come to their conclusion.

It was important in this case that the sales were substantial. In one year 68% of the coal was resold, and in another 84%.

Secondly, Birmingham District Cattle By Products Co. Ltd. v IRC [1919] TC 92. The appellant company was incorporated on June 20, 1913, and between that date and October 6, 1913, the directors arranged for the erection of works and the purchase of plant and machinery and entered into agreements relating to the purchase of products to be used in the business and to the sale of finished products. On October 6, 1913, the installation of plant and machinery being completed, the company commenced to receive raw materials for the purpose of manufacture into finished products.

(The income tax assessment on the company for the year 1913-14 was based on accounts furnished by the company for the period October 6, 1913, to April 4, 1914.)

On receipt of audited accounts for the period October 6, 1913, to December 31, 1914, the Commissioners of Inland revenue, in accordance with Rule 4, of Finance (No.2) act 1915 Sched. IV, Part II. (repealed), computed the pre-war standard for the purpose of excess profits duty assessments on the company on the basis of the statutory percentage on the average amount of capital employed during the accounting period. The company, however, contended that it had commenced business on the date of its incorporation, viz., June 20, 1913, and that the pre-war standard should be based on the profits shown by revised accounts for the period June 20, 1913 to June 30, 1914:- Held: the company commenced to carry on its trade or business on October 6, 1913, and that the pre-war standard fell to be computed on the basis adopted by Commissioners of Inland Revenue.

As noted earlier both sides are agreed (1) that the taxable activity of the appellant is the leasing/rental of commercial premises - a hotel (2) that the construction of the hotel had not been completed during the relevant period.

When therefore did the appellant commence its taxable activity?

Section 2 (I) provides in part as follows:

"Input tax in relation to a registered taxpayer means:-

(a) tax charged under Section 3 (I) on the supply of goods and services made to that taxpayer.....being goods and services required wholly or mainly for the purpose of making taxable supplies." (emphasis supplied)

Taxable supply in the above mentioned section 2 (I) is defined in these terms:

" 'taxable supply' means any supply of goods and services on which tax is imposed pursuant to this Act."

Now as noted above services which are supplied to a particular taxpayer and which have attracted tax under Section 3 (I) (i.e. General Consumption Tax), must relate to, indeed be required wholly or mainly for the purpose of making taxable supplies by the claimant taxpayer, in this case the appellant, if he is to benefit from an input tax credit. So then such supply must be for the purposes of his taxable activity.

In Section 2 (I) the following definition of taxable activity is given:

> " '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 pecuniary profit, and involves or is intended to involve in whole or in part, the supply of goods and services (including services imparted into Jamaica) to any other person for a consideration but does not include:-

> (a) any activity carried on essentially as a private recreational pursuit or holiday,
>
> (b) any engagement, occupation or employment under any contract of service or as a director of a company; or
>
> (c) any activity specified in the Third Schedule."

Section 2 (1) (b) further amplifies the meaning of the phrase 'taxable activity' by the following provision:-

> " (b) a taxable activity includes anything done in connection with commencement or termination of that activity."

Faced with the realization that it could not be said that the operations of the appellant satisfied the definition in Section 2 (1) (a), Mrs. Hudson-Phillips argued that they would be caught by the definition in Section 2 (I) (b), things "done in connection with the commencement" of the appellant's taxable activity.

She submitted that in order for the appellant to reach the stage of leasing/renting the hotel, it was necessary to construct it, and therefore if the appellant had to incur professional fees, those fees can logically be described as incurred in connection with the commencement of the appellants taxable activity.

Mrs. Hudson-Phillips also argued that to hold that the amounts in question did not qualify for a credit of input tax would be contrary to the principle of Regulation 14(2) of the General Consumption Tax Regulations. To place the matter in it proper context I shall set out Regulation 14 (I) and (2). They read in part as follows:-

> "14 - (I) Subject to paragraphs (2), (3), (4), (5), (6) and (6A). a registered taxpayer shall, in respect of a taxable period, be entitled to claim as a credit any input tax payable by him during that period and any other amounts specified in this regulation.

> (2) For the purposes of paragraph (I), the input tax in relation to which a credit may be claimed shall be the sum of -
>
> (a) Any amount stated as tax on a tax invoice issued to the registered taxpayer in respect of taxable supplies made to him during a taxable period; and
>
> (b).....
>
> being supplies <u>used by the registered taxpayer in carrying out his taxable activity</u>." (emphasis added)

She laid emphasis on the fact that the appellant was merely claiming an amount stated as tax on a tax invoice issued to it in respect of taxable supplies made to it. This argument gives little weight to the words underlined and takes for granted the very issue which has to be decided - whether the supplies were used by the appellant in carrying out its taxable activity. It also overlooks the principles governing the use of subordinate legislation in the interpretation of a statute. The law is well stated in paragraph 884 Volume 44 of the Fourth Edition of Halsbury's Laws of England. It states as follows:

> "884 <u>Subordinate legislation as an aid to construction</u>. It has been said that where a statute provides that subordinate legislation made under it is to have effect as if enacted in the statute, such legislaation may be referred to for the purpose of construing a provision in the statute itself. Where a statute does not contain such a provision, and does not confer any power to modify the application of the statute by subordinate legislation, it is clear that subordinate legislation made under the statute cannot alter or vary the meaning of the statute itself where it is unambiguous and only in exceptional cases may such legislation be referred to for the purpose of construing an expression in the statute, even if the meaning of the expression is ambiguous."

No such provision appears in the Act and there are no exceptional circumstances which give rise to the Court using the regulations as an aid to the construction of section 2 (I) and (2).

I adopt the words of the learned authors of Halsbury's laws of England, Fourth Edition, Volume 47 at paragraph 865:

> "Words are primarily to be construed in their ordinary meaning or common or popular sense, and as they would have been generally understood the day after the statute was passed, unless such a construction would lead to manifest and gross absurdity, or unless the context requirees some special or particular meaning to be given to the words."

No manifest and gross absurdity would arise upon construing the words of Section 2 (2) in their ordinary or popular meaning.

I shall now consider the meanings given to the words "commencement" and "commence" in a number of dictionaries. The New Shorter Oxford English Dictionary Volume 1, defines the verb "commence" thus:

> " I. V. t. to begin, enter upon.
>
> "2. V. L. make a start or begining, come into operation."

The noun "commencement" is defined as:

"The action process or time of begining."

The Oxford Advanced Learner's Dictionary, encyclopedic edition gives the meaning: "beginning."

Professional fees for the services of architects etc. rendered in connection with the constitution 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.

Although the English Value Added Tax legislation is not identical to that of Jamaica, yet it is sufficiently similar in some areas to be worthy of comparison. Indeed in some instances it is far more in the taxpayers favour.

Section 14 (3) (a) of the Value Added tax act 1983 contains the following provision:

> "Subject to subsection (4) below, "input tax" in relation to taxable person means the following tax, that is to say -
>
> (a) tax on the supply to him of any goods or services, being (in either case) goods or services used or to be used for the purpose of any business carried on by him; and output tax means tax on supplies which he makes."

It will be seen that the English legislation is kinder to the taxpayer in that it does not stipulate that the goods or services supplied should be required wholly or mainly for the purpose of making taxable supplies, but rather that they be goods "used or to be used" for the purpose of any business carried on by him." Accordingly in this regard, a look at some decisions in English cases is helpful.

Firstly: BLP Group v C&E Comms. [1996] 1 WLR 174. [1995] STC 424. A holding company provided management services to a group of subsidiary trading companies. In 1991 it disposed of 95% of the shares in a German subsidiary company. It was accepted that this disposal was an exempt supply within what is now VATA 1994 9th Schedule groups. However, the company reclaimed input tax in respect of professional services supplied in relation to this disposal by a merchant bank, a firm of solicitors and a firm of accountants. The Commissioners issued an assessment to recover the tax, with the exception of small portion which they accepted as

forming part of the company's general expenses and as not being directly used for the disposal in question. The tribunal dismissed the company's appeal, holding that the tax was not deductible since it related entirely to the making of an exempt supply. [1992] VATTR 448. The company applied for the case to be referred to the Court of Justice of the European Community. That Court upheld the tribunal's decision but on different grounds. They held that input tax was only deductible under article 17 of the EEC Sixth Directive, if the goods or services had a direct and immediate link with taxable transactions. The fact that the ultimate aim of the taxable person was the carrying out of a taxable transaction was irrelevant.

Secondly, Hargreaves Landdown Management Ltd. v C&E Commrs. Tolley's Vat cases 1997, No 25. 15.

A company carried on a business of providing financial advice. It assisted a merchant bank to launch a new investment trust, and did not account for output tax on the fee paid to it by the merchant bank. The Commissioners issued an assessment charging tax on the payment; and the company appealed, contending that the payment should be treated as exempt under what is now VATA 1994, 9th schedule, group 5.

The tribunal dismissed the appeal, finding the company's activities were "of a promotional and marketing nature" and "were not sufficiently part of nor sufficiently closely connected with, the share transactions themselves, to make them exempt ."

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. this means that the appellant can suffer no hardship if an extension of time is given to the respondent in which to file his Statement of Case.

I therefore grant the enlargement of time sought by the respondent in terms of paragraphs 1 and 2 of the summons dated 25th day of June 1997, and treat the draft Statement of case as filed. I further treat the hearing of this application as the hearing of the appeal. The appeal is dismissed; the decision of the respondent made on 20th February 1997, is hereby affirmed but on grounds other than those put forward by him.

In view of the origin and outcome of these proceedings, there shall be no order as to costs.