IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN FULL COURT

SUIT NO. M68 OF 1989

CORAM: THE HON. MR. JUSTICE ORR, J.

THE HON. MR. JUSTICE WALKER, J.

THE HON. MR. JUSTICE PANTON, J.

REGINA VS COMMISSIONER OF INCOME TAX

EXPARTE DONALD PANTON.

IN THE MATTER of an application by Donald Panton for leave to apply for Orders of Certiorari and Mandamus.

A N D

IN THE MATTER of the Income Tax Act

A N D

IN THE MATTER of Assessment Nos 451086/A153C, A132C, A91B and A62B - Years of Assessment 1983 - 1986.

Mr. Enos Grant and Miss Jacqueline Hall, instructed by Messrs Clough, Long & Co. for Applicant.

Mr. Wendel Wilkins, instructed by the Director of State Proceedings for Respondents.

Heard: 5th, 6th, 7th and 8th March, 1990

PANTON, J.

By notice of motion, the applicant sought an order of certiorari in respect of notices of assessment issued by the Commissioner of Income Tax, and served on the applicant, for the years 1983 to 1986 inclusive. The application was heard by us on the 5th, 6th and 7th March, 1990, and on the 8th March, 1990, we announced that we had unanimously agreed that the application should be granted and the order should issue with costs to the applicant to be agreed or taxed. At the time of the announcement of our decision, we indicated that we would put our reasons in writing. This we now do.

THE BACKGROUND

It is necessary to set out the history of the relationship between the Commissioner of Income Tax and the applicant.

In June, 1987, the applicant was served with notices of assessment in relation to the payment of income tax for the years 1981 to 1986 inclusive. He filed a notice of objection. There followed correspondence between him and the Commissioner of Income Tax. Eventually, the Commissioner deemed the applicant's objection as being of no effect, and declared the assessments conclusive. The applicant challenged, before the Full Court, the validity of the Commissioner's actions. The Full Court, in suit M84 of 1987, on the 19th January, 1988, unanimously granted the Orders of Certiorari and Mandamus that were sought by the applicant. The Court held that the assessments had not been validly made as certain preconditions had not been complied with.

Notwithstanding the decision of the Full Court, the Commissioner by "Notice of Decision" dated 19th February, 1988, confirmed the said assessments. The applicant appealed to the Revenue Court on the 23rd March, 1988. The appeal was listed for hearing over the period 24th to 28th October, 1988. On the 20th October, the Chairman of the Revenue Board wrote thus to the Registrar of the Revenue Court:

> "The Commissioner of Income Tax has been advised to discharge the assessments the subject matter of this appeal.
>
> Consequently, this Appeal which is set down for hearing on the 24th to the 28th of October, 1988, will not be argued by us."

This letter was copied to the attorneys-at-law for the applicant.

On the 24th October, 1988, in the presence of the attorneys-at-law for the parties, the Revenue Court made the following order -

"By consent Appeal allowed in terms of Paragraph 2 of Notice of Appeal dated the 23rd March, 1988. Varied as follows:

(1) Aforementioned decision be set aside.

(2) 1981 - $32,815.00

(3) 1982 - $38,600.00

(4) 1983 - $48,600.00

(5) 1984 - $58,600.00

(6) 1985 - $68,600.00

(7) 1986 - $78,600.00

Costs to be agreed or taxed."

It is obvious from this order that paragraph 2 of the Notice of Appeal contains the substance of the Revenue Court's Order. The Notice of Appeal reads thus -

"1. Take notice that the Revenue Court will be moved as soon as the appellant or his attorney-at-law can be heard ...

2. For an Order:-

(1) That the aforementioned decisions be set aside

(2) That the Appellant's chargeable income for the year of assessment 1981 be varied to the sum of $32,815.00

(3) That the Appellant's chargeable income for the year of assessment 1982 be varied to the sum of $38,600.00

(4) That the Appellant's chargeable income for the year of assessment 1983 be varied to the sum of $48,600.00

(5) That the Appellant's chargeable income for the year of assessment 1984 be varied to the sum of $58,600.00

(6) That the Appellant's chargeable income for the year of assessment 1985 be varied to the sum of $68,000.00

(7) That the Appellant's chargeable income for the year of assessment 1986 be varied to the sum of $78,000.00

(8) That the Respondent do pay the Appellant the costs of and incidental to the hearing of this Appeal.

(9) Further or other relief."

After the Order had been made by the Revenue Court, an attorney-at-law for the Commissioner tried to persuade the Court to alter the order. This was refused. Not to be deterred, the Commissioner appealed to the Court of Appeal, which, on the 17th July, 1989, recorded its judgment thus -

"Preliminary objection upheld.
Application for leave to appeal misconceived.
Motion for leave to appeal refused.
Costs to the respondent to be agreed or taxed."

Since the decision of the Court of Appeal, the applicant has paid the tax which was stated as due in the order of the Revenue Court.

On the 6th November, 1989, the Commissioner served further notices of assessment in respect of the very same years. The applicant objected to these assessments, and on the 9th November, 1989, he filed a precautionary notice of objection. These further assessments have given rise to the application before this Court.

THE GROUNDS FOR THE APPLICATION

The notice of motion lists the following grounds for the application -

ILLEGALITY

The Commissioner of Income Tax has acted in excess of her jurisdiction under the Income Tax Act; and/or the Commissioner of Income Tax has misconstrued her powers of assessment under the Income Tax Act, in particular Sections 70, 72 and 75 of the Income Tax Act; and/or

IRRATIONALITY

Having regard to the returns and capital statements filed by the Applicant and the representations made in response to previous requests made by the Commissioner of Income Tax in dealing with purported assessments for the same Years of Assessment and the fact that the Commissioner of Income Tax did not contest the Applicant's Appeal but consented to the Order of the Revenue Court in Appeal No. 2 of 1988, the abovementioned assessments are arbitrary and/or unfair and/or unreasonable and/or punitive and/or vindictive; and/or

No reasonable authority would in all the circumstances of this matter make the abovementioned assessments; and/or having regard to the enormity of the said assessments and the absence of any reasonable basis and/or new facts, the purported assessments are arbitrary and/or unfair and/or unreasonable and/or punitive and/or vindictive; and/or

PROCEDURAL IMPROPRIETY

As the chargeable income of the Applicant had been determined by the Revenue Court in Appeal No. 2 of 1988 with the consent of the Commissioner of Income Tax and the Appeal of the Commissioner of Income Tax therefrom, Civil Appeal No. 73 of 1988, had been struck out, the Applicant has a right not to be assessed in respect of the same Years of Assessment; and/or

The Commissioner of Income Tax acted unfairly, in particular, as the chargeable income of the Applicant had been determined by the Revenue Court in Appeal No. 2 of 1988 with the consent of the Commissioner of Income Tax and the Appeal of the Commissioner of Income Tax therefrom, Civil Appeal No. 73 of 1988, had been struck out, the Applicant has a legitimate expectation that he would not be assessed in respect of the same Years of Assessment, without prior notification or being given an opportunity of making representations; and/or

Before purporting to make the said Assessment, the Commissioner of Income Tax did not give the Applicant an opportunity of making representations in relation to the proposed assessment; and/or

Before purporting to make the said assessments, the Commissioner of Income Tax did not serve the Applicant with any notice to file and deliver a return of his income pursuant to Section 70 of the Income Tax Act in relation to the proposed assessment; and/or

The Commissioner of Income Tax failed to give the "substance and effect" or sufficient "substance and effect" of particulars of the purported assessments; and/or

The Commissioner of Income Tax included surcharges in the purported assessments, although there was no basis for the imposition of a surcharge.

PRELLIMINARY OBJECTION

At the commencement of the proceedings before us, the learned attorney-at-law for the Commissioner, Mr. Wilkins, submitted that the Full Court had no jurisdiction to hear and dispose of the application. The proper Court, he said, was the Revenue Court. He contended that having regard to the Judicature (Revenue Court) Act, the intention of the legislature was to establish a specialized Court to deal exclusively with income tax and revenue matters as set out in the Schedule to the Act. Mr. Wilkins submitted that the issues raised by the applicant involved Section 72(4) of the Income Tax Act, which is one of the Sections referred to in the Schedule to the Judicature (Revenue Court) Act. Further, he pointed to the fact that the proviso to Section 72(4) gave a right of appeal against an additional assessment, such appeal being to the Revenue Court. According to him, the existence of a right of appeal excluded any application to the Full Court or any other Court.

In reply, Mr. Grant submitted that Section 72(4) merely gave the taxpayer an optional procedure. He said that the applicant had previously brought a similar application (referred to earlier) before the Full Court and no objection was taken then to the Court's jurisdiction.

The Commissioner, he submitted, was subject to the supervisory power of the Full Court. However, his main submission was that the applicant was not really concerned with the details of the assessment so there was no reason to go to the Revenue Court. What the applicant was concerned about was the jurisdiction of the Commissioner to act as she did. It being a challenge to jurisdiction, he submitted that the Full Court was the appropriate forum.

It is, I think, useful to remind ourselves of what Lord Justice Atkin said in Rex v. Electricity Commissioners (1924) 1 K.B. 171 at 204:

> "Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The Full Court is in a position similar to the King's Bench Division.

Lord Diplock in the case IRC v. Federation of Self-Employed (1981) 2 A.E.R. 93 at 102 said:

> "Judicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful, but not for acts done lawfully in the exercise of an administrative discretion which are complained of only as being unfair or unwise."

These two quotations remind us of the purpose of and reason for judicial review. Now, the question is: should the mere existence of an alternative remedy be sufficient to exclude such an important process?

In Rex v. Postmaster General Exparte Carmichael (1927) 1 KB 291 a certificate issued by the Chief Medical Officer was ordered quashed although the applicant had a statutory right of appeal. The Court found that the certificate was issued by someone who was not authorized so to do. On that basis, Lord Hewart, C.J., said:

> "I do not think, therefore, that the argument that the beneficial remedy of appeal is open is at all fatal to the applicant for this rule."

Avory, J. said:

> "But even if that remedy is open to her, it is undoubtedly good law that if the application for a certiorari is made by a party aggrieved, then it ought to be granted ex debito justitiae, and the Court has not the general discretion which it would have when the application is made by one of the public who is not personally concerned. This was decided long ago in the case Reg. v. Surrey Justices and on that principle, even although she has the remedy by appeal in this case, I am prepared to agree that certiorari should go, seeing that the application is being made by the applicant as the party aggrieved."

In Reg. v. Paddington Valuation Officer Exparte Peachey Property Corporation Ltd. (1966) 1 Q.B. 380 Lord Denning M. R. at pages 399 & 400 said:

> "The first question is whether the remedy by certiorari or mandamus is open at all, seeing that there is a remedy given by statute."
>
> "Mr. Eric Blain contended strongly before us that, as Parliament had provided this specific remedy, the Peachy Property Corporation ought to go by it. There was a code of procedure, he said, specially designed by Parliament, to deal with grievances such as those. That was their proper course. Indeed, their only course. Such specific remedy being given, they could not resort to the remedy of certiorari or mandamus."

P. 400

> "Now these cases certainly warrant the proposition that if the Peachy Property Corporation were attacking the assessment of any one particular hereditament, or any small group of hereditaments, such as all the houses in a particular terrace, their only remedy would be that statutory remedy. By which I mean that if, and in so far as they are attacking particular assessments within a valid valuation list, they must go by the remedy which Parliament has provided, namely, to make proposals to alter those assessments. But if and in so far as they are attacking the valuation list itself and contend that the whole list is invalid (as they do), then I do not think they are confined to the statutory remedy for the simple reason that the statutory remedy is in that case, nowhere near so convenient, beneficial and effectual as certiorari and mandamus."

Mr. Wilkins cannot be unmindful of the fact that this case is not the first within this jurisdiction in which an alternative remedy was available to the citizen but the citizen chose to come to the Full Court, and was heard. One that readily comes to mind is Reg. v. Kingston and St. Andrew Corporation, Exparte Ewart Mason in which the applicant who was dismissed from his post as a fireman chose to apply to the Full Court instead of excersing his right of appeal to a tribunal. At page 7 of my unreported jusgment in the said case - M 71/85, 69, 70, 72 and 73/85 - I said this:

> "He was immediately advised by the disciplinary committee of his right to appeal within eight days of the date of the decision. He chose not to exercise that right of appeal. Instead, as is his right, he came to the Full Court seeking an order to quash the decision of the disciplinary committee."

That judgment was delivered on April 2, 1986.

In my view, Mr. Wilkins was rather bold to be making such a submission at this stage of our legal history. The Full Court was introduced in our statute law thirty years ago. Its powers are supervisory. It watches diligently over the administrative acts of statutory creatures such as the Commissioner. The citizen should not be denied the opportunity to have an illegal, irrational or procedurally improper act quashed by the Full Court, unless Parliament specifically excludes the right to apply. Even then, the language of Parliament would have to be clear beyond any doubt.

DID THE COMMISSIONER COMMIT AN ERROR OF LAW?

The most important question to be determined in this review is whether there was legal authority for the Commissioner to have acted as she did.

The Commissioner is required and, indeed, is expected to understand and apply the alw that regulates her decision-making powers.

In this case, the relevant law is the Income Tax Act.

Section 70(1) provides:

> "Every person, whether he is or is not liable to pay income tax, upon whom the Commissioner may cause a notice to be served requiring him to make and deliver a return of his income or the income of any person, shall, within fifteen days after the date of the service of such notice, make and deliver to the Commissioner a return as aforesaid."

Section 72(1) states:

> "The Commissioner shall proceed to assess every person liable to the payment of tax as soon as may be after the expiration of the time allowed to such person for the delivery of his return."

In the instant situation it is common ground that the applicant was not notified by the Commissioner of the need for him to make a return. As far as he is concerned he had already made a return and had paid his due. For there to have been a further assessment, the Commissioner would have firstly had to "cause a notice to be served requiring him to make and deliver a return of his income."

So the Commissioner commenced the process of raising the additional assessments without serving the notice required by Section 70(1). She was thereby committing an error of law. That however was not her only error of law. She went on to disregard Section 75(7).

Section 75 deals with the service of notice of assessments and the process of objection to assessments. It also deals with the status of an assessment after there has been an agreement or a determination on appeal.

Section 75(7) provides:

> "Where no valid objection or appeal has been lodged within the time limited by this Act against an assessment as regards the amount of the chargeable income assessed thereby, or where the amount of the chargeable income has been agreed to under subsection (6), or where the amount of such chargeable income has been determined on objection or appeal, the assessment as made or agreed to or determined on appeal as the case may be, shall be final and conclusive for all purposes of this Act as regards the amount of such chargeable income:
>
> Provided that nothing herein contained shall prevent the Commissioner of Inland Revenue from making any refund under the provisions of Section 81, or the Commissioner from making any assessment or additional assessment for any year of assessment which does not involve reopening any matter which has been determined on appeal for the year."

The above subsection provides, among other things, that where an assessment has been agreed or determined on appeal, such assessment is final and conclusive for all purposes of the Act as regards the amount of the chargeable income.

The Order of the Revenue Court referred to earlier specifically fixed the chargeable income for each year of assessment. The appeal against that Order was dismissed. The assessments are therefore final and conclusive for all purposes of the Income Tax Act.

The proviso to the subsection recognizes that the Commissioner may make additional assessments for any year of assessment but forbids her from reopening any matter which has been determined on appeal for the year of assessment.

Mr. Wilkins has submitted that this is not a reopening of the assessments. However he has also said that the Commissioner had no new information on which the additional assessments were based. He advanced a strange submission. It was to the effect that the Commissioner had merely earlier agreed to take a portion of what was due and had now sought to recover the balance. Needless to say, he was unable to advert the Court's attention to any evidence of such an agreement between the Commissioner and the applicant.

In my judgment, the action of the Commissioner was clearly in breach of Section 75(7). She had no new information; yet, she raised assessments in relation to those years the assessments for which were final and conclusive.

In view of the clear breaches of Section 70 and Section 75, there is really no good reason to consider the other grounds on which the applicant relies.

However, I would observe that in committing these errors of law, the Commissioner has also proceeded in a manner which demonstrates procedural impropriety. She has not acted fairly in that she has raised additional assessments without giving the applicant any notice, and has reopened matters which were final and conclusive.

For these reasons I joined my learned brothers in agreeing that certiorari should go to quash the additional assessments.

ORR, J:

I have had the opportunity of reading in draft the judgment of Panton J. For the reasons given, I also agree that certiorari should issue to quash the additional assessments.

WALKER J.

These proceedings were in the nature of judicial review proceedings which, undoubtedly, this Court had jurisdiction to entertain. They were attended by special circumstances and illustrate, as did the case of Regina vs Inland Revenue Commissioners Ex Parte Preston (1985) 1 A.C. 835, H.L. (E) cited by counsel for the applicant, the circumstances in which it would be appropriate to subject to judicial review a decision of a public officer such as the Commissioner of Income Tax. By Notices of Assessment dated May 18, 1987 and served on the applicant on June 2, 1987, the applicant, a director of several companies, was assessed by the Commissioner of Income Tax (hereinafter referred to as "the Commissioner") for income tax due in the sum of $1,000,000.00 for the year 1983, $1,200.000.00 for the year 1984, $1,500.000.00 for the year 1985 and $2,400.000.00 for the year 1986 (hereinafter referred to as "the relevant years"). By Notice of Objection dated June 30, 1987 the applicant disputed these assessments and in turn submitted Returns to the Commissioner asserting that his liability for income tax for the relevant years amounted to $48,600.00, $58,600.00, $68,000.00 and $78,600.00, respectively. Following this negotiations between representatives of the applicant and the Commissioner were pursued. Eventually on February 19, 1988, purporting to act under the authority of section 75 (5) (c) of the Income Tax, the Commissioner came to a decision that the applicant's Notice of Objection should cease to have effect and that her original assessments should stand and be final and conclusive. That decision was successfully challenged by the applicant before the Full Court of the Supreme Court which ruled on January 19, 1988 that certiorari should go to quash the decision, and further that mandamus should go directed to the Commissioner and requiring her "to hear and determine according to law and in accordance with the provisions of sub-sections (4) and (6) of section 75 of the Income Tax Act, the Applicant's.....objection to the said Assessments" (vide Supreme Court suit No. M84/87). Subsequently, by Notices dated February 19, 1988 and served on the applicant the Commissioner confirmed her original assessments for the relevant years. Again the applicant successfully resisted her action, this time by way of appeal to the Revenue Court. On October 14, 1988 that Court presided over by Marsh J. made an Order in the following terms;

> "By consent appeal allowed in terms of paragraph 2 of Notice of Appeal dated 23rd March, 1988 with costs to be agreed or taxed."

Paragraph 2 of the appellant's Notice of Appeal read inter alia as follows:

> "(4) That the Appellant's chargeable income for the year of assessment 1983 be varied to the sum of $48,600.00.
>
> (5) That the Appellant's chargeable income for the year of assessment 1984 be varied to the sum of $58,600.00.
>
> (6) That the Appellant's chargeable income for the year of assessment 1985 be varied to the sum of $68,600.00.
>
> (7) That the Appellant's chargeable income for the year of assessment 1986 be varied to the sum of $78,600.00."

Now in making this Order the learned judge of the Revenue Court had before him a letter dated October 20, 1988 signed by W. W. Alder for the Chairman of the Revenue Board. That letter informed the Court that the Commissioner had been advised to discharge the assessments, the subject matter of the appeal, and, consequently, that the appeal would not be argued by the respondent. Following upon this, by notices dated October 28, 1988 but received by applicant's attorney-at-law on October 24, 1988, the applicant was advised by the Commissioner that his tax liability for the relevant years had been discharged. Thereafter the Commissioner, still undaunted, applied to the Court of Appeal for leave to appeal against the order made by the learned judge of the Revenue Court. Yet again the applicant triumphed when on July 20, 1989, the Commissioner's application was refused by the Court of Appeal (vide C.A. No. 73/88). Incredibly, what happened next was that the Commissioner served on the applicant four notices of additional assessment of income tax due for the relevant years. These additional assessments credited the applicant with money which had in the meantime been paid by him and which represented full payment of the sums owing in terms of the consent order made by the Revenue Court. But having been so credited, the applicant was now required to pay a balance of $820,582.50 due for the year 1983, $811,957.50 due for the year 1984, $717,082.50 due for the year 1985 and $416.734.50 due for the year 1986. It is against these additional assessments that the applicant complained to this Court.

In my judgment this matter may quite shortly be disposed of by reference to section 75 (7) of the Income Tax Act which provides as follows:

> "Where no valid objection or appeal has been lodged within the time limited by this Act against an assessment as regards the amount of the chargeable income assessed thereby, or where the amount of the chargeable income has been agreed to under sub-section (6), or

> where the amount of such chargeable income has been determined on objection or appeal, the assessment as made or agreed to or determined on appeal, as the case may be shall be final and conclusive for all purposes of this Act as regards the amount of such chargeable income.
>
> Provided that nothing herein contained shall prevent the Commissioner of Inland Revenue from making any refund under the provisions of section 81, or the Commissioner from making any assessment or additional assessment for any year of assessment which does not involve re-opening any matter which has been determined on appeal for the year."

Mr. Wilkins for the respondent did not expressly concede that in raising these additional assessments the Commissioner must necessarily have re-opened a matter which had been determined on appeal, namely the matter of the chargeable income of the applicant for the relevant years. However, it seems to me that this must have been so. How otherwise could the Commissioner have now arrived at fresh figures for income tax payable by the applicant for those years? I am in no doubt that the Commissioner acted in breach of s. 75 (7) in raising these additional assessments which, for this reason, cannot be allowed to stand and must be quashed. In my opinion, therefore, certiorari should go and I would order accordingly.

Finally, before parting with this matter, I feel constrained to observe that this was a glaring instance of bureaucratic bungling. The income tax liability of the applicant may very well have been more than he has paid. However, the fact is that in pursuing the applicant's case the Department of the Commissioner of Income Tax committed error after error and, in the final analysis, succeeded only in producing a comedy of errors in which it would appear the applicant has had the last laugh.