NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE REVENUE COURT
REVENUE COURT APPEAL NO: 1 OF 1999
IN RE THE GENERAL CONSUMPTION TAX ACT

BETWEEN	STEWARTS HARDWARE LIMITED	APPELLANT
AND	THE COMMISSIONER OF GENERAL CONSUMPTION TAX	RESPONDENT

CONSOLIDATED FOR PURPOSES OF THIS HEARING WITH

IN THE REVENUE COURT
REVENUE COURT APPEAL NO: 2 OF 1999

BETWEEN	DOMINION HOUSE LIMITED	APPELLANT
AND	THE COMMISSIONER OF GENERAL CONSUMPTION TAX	RESPONDENT

Heard May 14, 2001; December 10, 12, 13, 2001; January 14, 15, 16, 17; April 16, 17, 2002 And June 30, 2005

Mr. Herbert Hamilton instructed by Dan Kelly, Esq. of Dan Kelly and Associates for the Appellant in both matters.

Mr. Lackston Robinson, Ms. Donna Dodd, Mr. Duane Thomas, Ms. Thalia Francis and Ms. Annalisa Lindsay instructed by the Director of State Proceedings for the Respondent.

ANDERSON J.

In both of these cases, the taxpayer appeals against decisions of the Commissioner of General Consumption Tax and seeks to overturn them, while the Respondent Commissioner seeks to

uphold those decisions. As can be seen from the respective notices including Grounds of Appeal, the issues raised in both cases are substantially the same and it was for that reason that it was decided that the cases be consolidated and heard together. For ease of Reference, I set out below the respective Grounds of Appeal being argued by the Appellants in Appeals No. 1 and No. 2 of 1999.

Appeal No: 1 of 1999

That the Assessment as varied by the Respondent's decision is invalid because-

(a) the Respondent failed to hand down her decision within the statutory time limit mandated by Section 40(4)(b) of the General Consumption Tax Act (GCT).

(b) the Respondent had no power to alter and/or make a new assessment as she purportedly did in making her decision.

(c) the Respondent failed to elect the sub-section of the Act under which the assessment was made.

(d) the Respondent failed to raise assessments in respect of each taxable period.

(e) the Respondent failed to compute and relate penalties, surcharge and interest allegedly due, to specific taxable periods.

(f) the use of "Industry Standard Ratios" to compute the tax assessed, and the refusal to disclose the basis on which the ratios were compiled.

(g) it did not accord with the facts before the Respondent: in particular the Respondent refused to consider the Schedules, computations and detailed critique of the audit findings made by the Appellant's accountants.

(h) It failed to take into account the sum of $1.1 m paid as disclosed in paragraph 6(k) above

Appeal No:2 of 1999

That the Assessment as varied by Respondent's decision is invalid because –

(a) the Respondent had no power to alter and/or make a new assessment as she purportedly did in making her decision.

(b) the Respondent failed to elect the sub-section of the Act under which the assessment was made.

(c) the Respondent failed to raise assessments in respect of each taxable period.

(d) the Respondent failed to compute and relate penalties, surcharge and interest allegedly due, to specific taxable periods.

(e) the use of "Industry Standard Ratios" to compute the tax assessed, and the refusal to disclose the basis on which the ratios were compiled.

(f) it did not accord with the facts before the Respondent: in particular, there was no explicit recognition by the Respondent that she considered the schedules, computations and detailed critique of the audit findings made by the Appellant's accountants.

Further, it should be noted that while each side has included a statement of facts upon which it intends to rely in support of its position, the basic facts are not substantially in dispute. Where the parties have a dispute is in the interpretation of, and the inferences to be drawn from, the facts as alleged. Thus in the Stewarts Appeal, the Appellant states.

> The facts upon which the Appellant will rely at the hearing *of* this Appeal are:
> (a) The Appellant is a company incorporated and carrying on business in Jamaica and with registered office at 75 Manchester Road, May Pen in the parish of Clarendon.
> (b) The Appellant carried on business of hardware merchants during the relevant period of assessment.
> (c) During 1998 the Respondent commenced a comprehensive audit *of* the Appellant's accounts for the period September I 1994 to December 1997 by using auditors from the Revenue Board. During the conduct *of* the audit the Revenue Board Auditors were replaced by investigators from the General Consumption Tax Department who, armed with a warrant, removed and confiscated all the records and documents of the Appellant to which, prior to this intervention, they had full and free access. The Appellant's staff was given no opportunity to check or record the documents being removed and this posed a problem when seeking to review the findings of the Respondent's audit.
> (d) The Appellant has always been scrupulous in submitting its return and meeting its tax liabilities so that the Respondent's conduct in seizing its records came as a complete surprise: in fact officers from the General Consumption Tax Department had audited the Appellant's accounts in June 1994 and given it a clean bill of health.
> (e) As a result of the audit of the Appellant's accounts the Respondent on the 4th day of March 1999 raised an assessment in an additional amount of tax amounting to $12,440,248.02 for the period September 1994 to

December 1997. The audit found, inter alia, that the Appellant's input tax was overstated by $11,087,795.00 while output tax was understated by $1,352,452.96.

(f) The Appellant immediately engaged the services of Deloitte and Touche a firm of Chartered Accountants (the Accountants) to review the findings of the Respondent and restore, if necessary, the integrity of its accounting system.

(g) By letter dated 5th day of March 1999 the Appellant's Accountants delivered an objection to the aforesaid assessment made by the Respondent for the period September 1994 to December 1997 on the grounds that it was excessive and not in keeping with the Returns submitted.

(h)Based on a preliminary examination of the Appellant's accounting system, the Accountants found that errors had been made because of flaws in the computerised accounting system being used and that a great deal of double counting was included in the computerised figures for sales which had to be adjusted manually. They set about making the corrections and invited the Respondent to convene a meeting so that the necessary revision of the Returns could be made.

(i) The Respondent's investigators did in fact revisit the office and appear to have accepted the fact that a great deal of double counting had taken place because of the computerised accounting system in place.

(j) By letter dated 19th day of July 1999 the Appellant's Managing Director wrote to the Respondent enclosing revised schedules and computations in support of its contention that the assessment was excessive: in particular, the point was made that while the output tax which had been revised on the basis of actual monthly schedules was the same as the output tax audited, the final figure has been altered on the basis of a review of the entire sales return; and that having regard to the nature of the business, consideration be given for an allowance for pilferage.

(k) By letter dated the 4th day of August 1999 the Appellant again wrote to the Respondent inviting her to review the schedules and computations which had been submitted since they showed a substantial reduction in the tax assessed and as an earnest of its good faith and desire to settle the matter made a payment of $1,100,000.00 towards any additional liability which might be due

(l) By Notice of Decision received on the 6th day of September 1999 the Respondent without considering the schedules and revised computations submitted to her on the 19th day of July 1999 arbitrarily reduced the aforesaid assessment to the sum of $11,915,869.00 subject to interest and penalty.

(m) By letter dated the 8th day of September 1999 the Accountants on behalf of the Appellant wrote to the Respondent requesting that she provide reasons for her decision in writing. The reasons which were not supplied by the Respondent until the 15th day of September 1999 confirmed that her decision was based upon the use of "Industry Ratios"

(n) By letter dated the 17th day of September 1999 the Appellant's Accountants requested that the Respondent provide the sources from which the Hardware industry ratios used to compute the tax were derived. The Appellant was advised that these had been compiled in-house and the sources were confidential and could not be disclosed.

The Respondent, in its Reply, sets out the following as constituting the facts.

(a) The Appellant is a registered taxpayer under and by virtue of the General Consumption Tax Act (hereinafter referred to as "the Act").
(b) The Appellant is required pursuant to s. 33 of the Act, and Regulation 6 of the General Consumption Tax Regulations (hereinafter referred to as "the Regulations") to file returns and pay tax every calendar month.
(c) The Appellant filed returns for the period September, 1994 to December, 1997 inclusive, and upon an examination of the said returns and other records of the Appellant by auditors employed to the then Revenue Board it appeared that the returns were incomplete or incorrect and/or otherwise not in accordance with the requirements of the Act. Consequently, the said auditors reported the matter to the Investigations Branch of the General Consumption Tax Department. As a result of this, the Respondent, through her authorized officers, conducted an investigation of the Appellant's operations and records for the said period.
(d) That several discrepancies were discovered on the input tax working papers, which appeared to the Respondent's officers to be as a result of alterations made to those documents.
(e) On the basis of the investigations, the Respondent was of the opinion that the Appellant's records should be further examined as it was suspected that an offence under the Act had been committed. The Appellant's Director refused to allow full and free access to records and documents. It, therefore, became necessary for the Respondent to obtain a search warrant. In executing the warrant and seizing the relevant records, the Respondents Officers ensured that the Department's procedure in executing warrants was scrupulously followed
(f) That save that an audit was conducted in June 1994, the facts specified by the Appellant at paragraph 2(d) of the Notice of Appeal, the facts therein are not admitted. The Respondent will say that the return filed in June 1994 is outside the period of assessment under appeal.
(g) Save that the Respondent's investigators did in fact revisit the Appellant's office, the facts stated at (i) of page 4 of the Notice of Appeal are not admitted,
(h) That the Respondent in an effort to give careful consideration to the Appellant's objections and the arguments and documents that it advanced in support thereof, held several meetings with the Appellant's directors and one or other of its accountants. For example:

i) There was a meeting on the 3rd day of May, 1999 with Mrs. Lorna Lewis, the Appellant's accountant.

ii)There was a meeting on the 19th day of May, 1999, again with Mrs., Lorna Lewis the Appellant's accountant.
iii)There was a meeting on the 10th day of June 1999, again with Mrs. Lorna Lewis, the Appellant's accountant.
iv)There was another meeting with Mrs. Lewis, on the 17th day of June, 1999.

i) That the Department considered all the new computations and documents put forward by the Appellant, in particular those submitted with its letters dated the 28th day of May, 1999 and its letter dated the 19th day of July, 1999.
j) That it was impossible for the Department to accept the documents and new calculations put forward by the Appellant because, in large part, they were either based on the Appellant's same documents that the Department had earlier in the process found to be unreliable in part; or on new documents, mostly relating to sales, and which, when analyzed against the background of the industry standards and ratios, (and the other matter(s) more particularly described in the explanation of the Notice of Decision) were unacceptable to the Respondent.
k) The Appellant also submitted conflicting figures to what its tax liability should be, claiming on one occasion that should be $4-5M; and, on another that the assessment should be reduced by $1.1 M.
1) That the discussions that the Department held with the Appellant in trying to assist it in resolving this matter were characterized by delay on the part of the Appellant. For example, it requested time for Mrs. Lorna Lewis to familiarize herself with the matter when she first became involved; and it sought to explain, its other instances of delay, on the basis that it had to undertake a comprehensive review of its accounting system, and that, in this review, the resignation of several employees whose assistance would be invaluable to the process, hindered the Appellant.
(m) That these delays on the part of the Appellant made it impossible for the Respondent to have given its decision earlier than it did.
(n) That an audit was subsequently conducted which confirmed, *inter alia,* that the said returns were incomplete or incorrect and/or otherwise not in accordance with the requirements of the Act for the following reasons:

(i) A physical examination of the Appellant's records (in particular, the input tax working papers) indicated that some of them had been altered in such a manner as to reduce the liability of the Appellant.
(ii) A further examination of the records indicated that there were a number of inaccuracies or mis-statements, including the input tax being incorrectly computed, invoice totals incorrectly treated as input tax, and duplication of invoices- all of which resulted in the input tax being overstated,
(iii)Calculations done using the Appellant's Purchases Journal and customs entries for December, 1996, revealed a vast difference (of some $1,765,521) between the amount claimed for input tax for this period by the Appellant, and that indicated by the Appellant's own records.

(iv)In respect of its returns for 12½% taxable supplies that were treated as tax-exclusive but that should have been treated as tax-inclusive, the Appellant made erroneous adjustments to some of its figures, including its input tax.

(v) In March, 1996 the Appellant erroneously applied the tax rate of *12½%* to the output tax computed on the construction materials it sold, resulting in the output tax returned being understated by some $1,099,134.00.

(vi)An examination of the Appellant's Inventory Control Transaction Register (used in computing the output tax on construction materials) revealed that the Appellant's sales for April 1996 were understated.

(vii)A comparison of the Appellant's GCT returns with those of other companies engaged in the same taxable activity and in the same sector as the Appellant revealed that the Appellant was returning far less tax than similar-sized and even smaller companies in the said sector.

(viii)That the Respondent duly considered the schedules and computations offered by the Appellant, but found that these could not be relied on.

(ix) That the Appellant failed to give a satisfactory account for goods which no longer formed part of his taxable supply, and the Appellant furnished returns which were incomplete and incorrect therefore the industry standard ratios were used as the basis of the decision

(o) The foregoing irregularities confirmed to the Respondent that the Appellant's returns for the aforesaid taxable period were incomplete or incorrect, and that the tax returned by the Appellant was understated by approximately $12,440,248.02 (with input tax being overstated by $11,087,795.06; and the output tax being understated by $1,352,452.96). As a result of this, the Respondent, acting pursuant to s.38(2) of the Act, on the 4th day of March 1999, raised an assessment in this matter in the sum of $12,440,248.02, together with penalty and interest and adjusted the Appellant's returns accordingly.

(p) By letter dated the 5th day of March, 1999, the Appellant, through its agent Messrs. Deloitte & Touche, objected to the said assessment on the grounds that it was "excessive and not in keeping with the returns submitted",

q) The Respondent's Notice of Decision under section 40(4) of the Act was issued on September 3, 1999. As indicated in the Decision given to the Appellant, and in the detailed explanation of adjustments that followed it, the said figure of $12,440,248.02 was the median figure between a figure of *$12,567,305.00* (arrived at by computing the net tax payable, using output tax returned), and a figure of $11,915,869.00 (arrived at by computing the net tax payable, using the input tax returned, and the industry-standard ratios).

r) By Notice of Appeal dated the 5th day of October 1999 and served on the Respondent on the 7th day of October 1999, and by Supplemental Notice of Appeal dated the 31st day of May 2001 and served on the Respondent on June 1 2001, the Appellant appealed to this Honourable Court against the Respondent's said Decision.

3. AND FURTHER TAKE NOTICE that, save as is hereinbefore expressly admitted or not admitted, the Respondent denies each and every allegation contained in the Notice of Appeal as if the same were set out herein, and specifically traversed *seriatim*.

As will be apparent from a review of the "facts" stated by both parties, there are significant areas of agreement and the main differences are in the details and seem to relate to the Respondent's contention that the delays in finalizing the decision were the result of the on-going consultations with the taxpayer through its officers and agents; its contention that it did in fact review documents and schedules supplied by the Appellant, and found major shortcomings in the Appellant's records. The Respondent also highlights the fact that the Appellant purported that it had difficulties with securing relevant information in a timely fashion on account of some of the critical staff having left its employ at a crucial time.

The Commissioner's Decision is out of time.

The first ground of appeal pursued by the appellant referred to the time when the decision was served on it. According to the Respondent, the decision was served by fax to the office of the Appellant on September 3 1999 and served personally on the company's managing director on September 6, 1999. The Appellant denies receiving any fax as alleged and says that its only service was that on the company's managing director at 4:52 p.m. on Monday September 6, 1999. It claims that pursuant to section 40(4)(b) of the General Consumption Tax Act ("The Act") service was not timely. Section 40(4) is in the following terms:

Where a person has objected to an assessment made upon him –

(a) in the event of his agreeing with the Commissioner of Taxpayer Audit and Assessment as to the amount at which he is liable to be assessed, the assessment shall be confirmed or amended accordingly.

(b) In any other event that Commissioner shall give notice in writing to that person of his decision in respect of the objection, so, however, that where that Commissioner fails to hand down his decision within six months of the receipt by him of the objection and the delay is not attributable to the person's omission or default, the assessment shall be null and void.

Counsel for the Appellant relied upon **SWAINSTON v HETTON VICTORY CLUB LIMITED [1983] 1 All E.R. 1179** which purported to apply strictly the relevant law with respect to time limits. He submitted that fax service was not proper service for the purposes of this legislation and that accordingly, the personal service on September 6 was the only "proper" service and given the time frames mandated by the Act, the decision was late. In **SWAINSTON,** the statute concerned was the English Employment Protection (Consolidation) Act 1978. The complainant in that case had been dismissed from his employment on September 7, 1981 and under the terms of the legislation, he had until midnight on December 6 1981, which was Sunday, to present a complaint of unfair dismissal. Although the office of the complaints tribunal was closed on the weekend, there was a letter box to the street of which the complainant could have made use but he failed to deliver his complaint until the following Monday. The Court of Appeal held that he was out of time. Mr. Robinson for the Respondent says that the case must be confined to the application of the employment legislation upon which it arose. While I do not necessarily agree with Mr. Robinson, it is clear that the Court must satisfy itself that the six months allowable has run. What is the evidence before me? Mr. Haase's affidavit confirmed that he had received the objection from the company's agents, (Deloitte) "on March 5, 1999". I believe that the terms of that letter are sufficiently important to be set out in full.

> "On behalf of our above-mentioned client we hereby object to the assessment raised in respect of the period September 1994 to December 1997 on the grounds that is excessive and not in keeping with the returns submitted.
>
> It appears that all the input tax in respect of the three largest suppliers to this company has not been included in the GCT Returns and time is needed to do further investigations in this regard. This matter has been discussed with the Audit Supervisor, Mr. Andrew Edwards.

Equally important are the terms of Mr. Edwards' letter to Deloitte dated April 26, 1999, some fifty two (52) days after the letter of objection.

> I write to confirm certain agreements reached in our telephone conversations (Edwards/McCarthy) on Thursday April 15, 1999 regarding your client Stewarts Hardware Limited.
> We had discussed:
> 1. The fact that the Taxpayer's notice of objection dated March 5, 1999 was erroneously addressed to the "Commissioner of Income Tax", and
> 2. Your concern that the taxpayer would need more time to analyze the audit findings.
>
> It was agreed that the taxpayer would be allowed until Friday May 14 1999 to submit records supporting grounds of the objection. Please acknowledge confirmation of the above by signing and returning the attached copy of this letter.

What is to be deduced from the foregoing letters? It seems clear from the Deloitte letter that the taxpayer through its agent was saying: "Our GCT returns have omitted the input tax figures for our three largest suppliers and are accordingly, wrong". Secondly; "We need time to research our records to provide the evidence which supports our contention that because of this, the assessment is excessive". Thirdly; "This has been the subject of discussion with the Audit Supervisor, Mr. Edwards". Equally clearly, the April 29/99 letter from Mr. Edwards indicates that the parties had reached agreement on the matters purportedly discussed on April 15, for the signed copy of the letter is appended to Mr. Haase's affidavit. I note particularly the following statements: a)"Your concern that the taxpayer would need more time to analyze the audit findings" and "It was agreed that the taxpayer would be allowed until Friday May 14 to submit records *supporting grounds of the objection*". (My emphasis) I would hold that in these peculiar circumstances, the objection was a preliminary one which would be finalized on the production of the supporting evidence. Now, it is clear that when the taxing authority raises an assessment, the taxpayer's only duty under the law is to object. Generally, he need not give reasons for objecting beyond the assertion that it is "excessive". It is for the taxing authority to show why the assessment is a good one. However, one has to look at the specific words of section 40(1) of the Act, which requires that where the taxpayer objects to an assessment, he may "apply to the Commissioner of Taxpayer Audit and Assessment by notice of objection in writing to review the assessment or other decision, as the case may be, stating precisely the grounds of his objection". Here, the taxpayer says: "The input tax in relation to my three biggest suppliers was not included

in my returns". The effect of section 40(1) here would seem to be that the terms of the subsection are not fulfilled until the submission of the precise evidence. The precise grounds consist of that evidence for the taxpayer says "I have the evidence which will show that the assessment is wrong and if you give me the time, I will provide it by a certain date"; in effect it is saying, it will finalize ***that objection*** on that date. This is the clear inference to be drawn from Mr. Andrews' letter and I would suggest that the exchange quoted above, is incapable of any other meaning, consistent with good sense.

Allow me to review this conclusion by way of an analogy. Suppose the Taxpayer had said to the Commissioner on May 15, 1999 that its research was not complete but would be complete by September 1, 1999. And let us suppose further that on that date it had provided reams of evidence in support of its position which the Commissioner then had to review. And further, the Commissioner with great diligence completed his review on September 7, 1999 and concluded that the alleged evidence was quite unhelpful. He immediately issues his decision. Or take an even more extreme example. The taxpayer says: "I will provide concrete evidence to prove that the assessment is excessive by August 5", but after agreeing with the taxpayer's request to extend the period to a date in early September, the taxpayer fails to produce the evidence until September 15 and after an immediate review of the submitted evidence, the Commissioner issues his decision on September 16. Is it to be suggested that the decision thereby issued was invalid? I think not. Nor is my view altered by the recognition that the schedules and calculations were forwarded to the Commissioner in July 1999. In light of my view of the tenor of the letters and the inference reasonably to be drawn from them and the clear agreement thereby communicated, I do not need to examine the issue of whether fax service on September 3, 1999 was good service under the previous Judicature (Civil Procedure Code) Law. I hold that the decision of the Commissioner was not issued outside of the time allowed by the statute. In the words of the statute, I would consider that the delay was attributable to the Appellant's "delay or omission" in sending the alleged evidence, some four (4) months after its objection and its promise to provide the schedules.

No Ground to amend Assessment

The second ground of objection of the Appellant was that the Commissioner had no authority to amend the assessment. The Appellant relied upon section 38(7) and (8) as well as section

40(4)(a) of the Act in support of its proposition. Section 40(4)(a) has already been cited above and sub-sections 38(6),(7)(8) and (9) are in the following terms.

> 38(6) It shall not be lawful for the Commissioner of Taxpayer Audit and Assessment, after the expiration of six years from the end of any taxable period, to make an assessment or alter an assessment so as to increase the amount payable thereunder.
>
> (7) Notwithstanding subsection (6), where a registered taxpayer with intent to defraud fails to make full disclosure of all the material facts necessary to determine the amount of tax payable for any taxable period, it shall be lawful for the Commissioner of Taxpayer Audit and Assessment at any time to make or alter an assessment.
>
> (8) Notice of any assessment made or altered pursuant to this section shall be served upon the taxpayer concerned.
>
> (9) An assessment shall, subject to any amendment on objection or any determination on appeal, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this part in relation thereto.

It is the Appellant's submission that the power of the Commissioner to alter an assessment only arises "where a registered taxpayer with intent to defraud fails to make full disclosure of all material facts" (sub-section (7)) or where an objector agrees with the Commissioner 'as to the amount at which he is liable to be assessed'", pursuant to section 40(4)(a). These are the only situations in which an assessment may be altered. The Appellant further submits that since by virtue of sub-section (9), "an assessment once made is deemed to be valid and binding notwithstanding any error, defect or omission therein", the Commissioner is only allowed "one bite at the cherry", and in the absence of the circumstances referred to above, there can be no alteration of the assessment. The Appellant and the Respondent disagree upon the import of sub-section (9). The Appellant is clearly of the view that the reference to 'any amendment' in that sub-section only refers to the two types of amendment which it says the statute allows as above. The Respondent, on the other hand, seems to be of the view that the sub-section allows any amendment which the Commissioner chooses to make as a consequence of the receipt of an objection. In support of this proposition it cites section 38(5) of the Act.

> (5) Where an amount which is payable by a registered taxpayer has been assessed and notified to a taxpayer, the amount shall, subject to section 40, be deemed to be the amount of tax due from that taxpayer and may be

> recovered accordingly, unless the assessment has been withdrawn or reduced.

It seems to me that when section 38(5) and 40(1) are read together, the only conclusions to be drawn from them are that the Commissioner can "withdraw or reduce" an assessment, and that there is a power to review an assessment upon the receipt of an objection, and this may be an objection to an assessment or a decision. I accept the submission made by counsel for the Respondent that the word review, as defined by the New Shorter Oxford Dictionary means "to look over or through in order to correct or improve; revise; view, inspect or examine a second time or again". If that is correct and I am prepared to adopt that definition, then it can only and must be taken to mean that in appropriate circumstances, the Commissioner may amend his assessment. For how else could he withdraw or reduce an assessment as he is empowered to, under section 38(5)? I hold that the limitations upon amending are restricted to the circumstances in section 38 (6) where

> (a) Six years have elapsed since the end of the taxable period;
> (b) An assessment is purportedly or altered in respect of the amount payable for that taxable period; and
> (c) The making or the alteration *increases the amount payable in respect thereof.*

Thus, section 40(4) is to be seen not as setting some parameters outside of which the Commissioner may not amend his assessment, but rather as stating the truism that where there is an agreement between the taxpayer and the Commissioner, the assessment will be as agreed. In Appellant's counsel's submission concerning the Revenue only having "one bite at the same cherry", he cites **De Voil, Value Added Tax** Part A, A15.39. (Hereinafter "De Voil") That citation refers to the "true construction" to be given to the United Kingdom Value Added Tax Act 1983 Schedule 7 para 4 which "precludes any change of mind by the Commissioners to the detriment of the taxpayer until evidence of further facts comes to light". This clearly imposes a condition for the making of an amended assessment which *"is to the detriment of the taxpayer without new facts".* While the precise terms of the relevant English section were not quoted by counsel so that it could be compared with the local provisions, it is clear that, even on the most generous reading of the section cited, it does not purport to completely deny the ability to amend assessments. Indeed, I find instructive the following taken from the paragraph cited by counsel: "Issuing a replacement assessment, which is all that happened in the foregoing cases, ***may affect***

the validity of the first assessment. (Emphasis mine) There does not appear to be any automaticity in such issue. It seems clear on the authorities that the Respondent cannot issue more than one assessment for a single period "unless and until further evidence comes to their knowledge". In **Jeudwine v Customs and Excise Commissioners [1977] V.A.T.T.R. 113**, a subsequent assessment increasing the previous assessment was held to be bad because the additional amount assessed was based, not upon new evidence, but upon a different view of existing evidence. This was a case where the Commissioners sought to *increase* the amount assessed. There does not appear to be any authority where there was *both* new evidence **and** a reduction of the previous assessment where a subsequent **replacement** assessment was held to be bad. **Jeudwine** is not such an authority. Appellant's counsel submits: "The legislative intent is clear: once the assessment (is) made by the Commissioner, it stands and is not to be altered or amended except in the limited circumstances provided by the Act. Further, the Respondent has no statutory power to make a new assessment. The Respondent's decision to alter and/or make a new assessment is ex facie, bad". According to this submission, even where the Respondent was able to get new evidence which invalidated a prior assessment, he would be unable to issue a new or replacement assessment. I regret that I am unable to accept that this is the correct view of the Act here.

Commissioner's Failure to elect Ground of Assessment.

The third ground submitted by the Appellant as a basis for overturning the assessment, is that the Commissioner failed to elect under which particular provision of the Act the assessment had been raised. The Respondent stated in its Statement of Case that the assessment had been made under section 38(2), but asserts that, in any event, there is no obligation to specify a particular provision as long as the assessment was raised in accordance with section 38. According to counsel for the Appellant, if the Appellant's return was "incomplete or incorrect", then the assessment must be made under section 38(1) and not 38(2). Further, if made under section 38(2), the Commissioner is obliged to state "the general basis on which the assessment was made". Counsel then argues by way of a syllogism that, "if, as asserted at paragraph 2(e) of the Statement of Case the Appellant's returns were incomplete or incorrect", then the assessment could not have been raised under section 38(2). Further, "given the statutory scheme, the Commissioner was under a duty to assess each taxable period separately, and to state

unambiguously the subsection under which this was done. Her failure to do so invalidates the assessment".

It is useful to look at section 38, the point of reference here. Section 38 states:

> 38(1) Where a registered taxpayer-
> (a) fails to furnish a return as required by this Act;
> (b) Furnishes a return which appears to the Commissioner of Inland Revenue to be incomplete or incorrect,
> that Commissioner shall refer the matter to the Commissioner of Taxpayer Audit and Assessment who shall make an assessment in writing of the tax payable by that registered taxpayer.
>
> 38(2) Where the Commissioner of Inland Revenue is not satisfied with the calculations on any return furnished by a registered taxpayer or the basis on which the return is prepared, the Commissioner of Inland Revenue shall refer the matter to the Commissioner of Taxpayer Audit and Assessment who –
> (a) may make an assessment of the amount he thinks the registered taxpayer ought to have stated on the return; and
> (b) shall in such assessment, state the general basis upon which it was made.

Counsel for the Appellant apparently takes the view that the provisions of section 38(1) (b) and 38(2) are mutually exclusive. But is this necessarily so? It seems to me that a return could be both "incorrect and incomplete", at the same time being one in respect of which the Commissioner of Inland Revenue is not "satisfied with the calculations". Counsel also submitted that the Commissioner had erroneously produced a global assessment, that is, one not related to specific taxable periods as required by the statute, and it is because of this global assessment that she was unable to determine under which provision the assessment was raised.

I am of the view that the section does not necessarily mandate the Commissioner to elect between raising the assessment under subsection (1) or (2). It simply outlines instances in which the Commissioner of Inland Revenue shall refer matters to the Commissioner of Taxpayer Audit and Assessment. Under section 38 (1) (b), if the Commissioner of Inland Revenue determines that the taxpayer's returns are either incomplete or incorrect, she must refer the matter to the Commissioner Taxpayer Audit and Assessment who must then make an assessment. Under section 38 (2), if the Commissioner of Inland Revenue is either not satisfied with a) the

taxpayer's calculations of his returns, or b) the basis upon which his returns were prepared, then the matter must be referred to the Commissioner, (TAAD). In the second case however, the Commissioner (TAAD) may make an assessment but, having done so, must state the general basis on which the assessment was made.

The Respondent's Statement of Case set out above stated at paragraph (n):

> That an audit was subsequently conducted which confirmed, inter alia, that the said returns were incomplete or incorrect and/or otherwise not in accordance with the requirements of the Act for the following reasons:

It then set out in nine (9) subparagraphs {sub-paragraphs (i) to (ix)} the facts which it claimed gave rise to the conclusion in the foregoing paragraph (n). For ease of reference, I set these out here again.

> (i) A physical examination of the Appellant's records (in particular, the input tax working papers) indicated that some of them had been altered in such a manner as to reduce the liability of the Appellant.
> (ii) A further examination of the records indicated that there were a number of inaccuracies or mis-statements, including the input tax being incorrectly computed, invoice totals incorrectly treated as input tax, and duplication of invoices- all of which resulted in the input tax being overstated,
> (iii)Calculations done using the Appellant's Purchases Journal and customs entries for December, 1996, revealed a vast difference (of some $1,765,521) between the amount claimed for input tax for this period by the Appellant, and that indicated by the Appellant's own records.
> (iv)In respect of its returns for 12½% taxable supplies that were treated as tax-exclusive but that should have been treated as tax-inclusive, the Appellant made erroneous adjustments to some of its figures, including its input tax.
> (v) In March, 1996 the Appellant erroneously applied the tax rate of *12½%* to the output tax computed on the construction materials it sold, resulting in the output tax returned being understated by some $1,099,134.00.
> (vi)An examination of the Appellant's Inventory Control Transaction Register (used in computing the output tax on construction materials) revealed that the Appellant's sales for April 1996 were understated.
> (vii)A comparison of the Appellant's GCT returns with those of other companies engaged in the same taxable activity and in the same sector as the Appellant revealed that the Appellant was returning far less tax than similar-sized and even smaller companies in the said sector.

> (viii)That the Respondent duly considered the schedules and computations offered by the Appellant, but found that these could not be relied on.
> (ix) That the Appellant failed to give a satisfactory account for goods which no longer formed part of his taxable supply, and the Appellant furnished returns which were incomplete and incorrect therefore the industry standard ratios were used as the basis of the decision

Aspects of those averments are supported by the Affidavit of Andrew Edwards dated November 28, 2001, as well as a letter from Deloitte and Touche, the accountants acting on behalf of the Appellant exhibited thereto. In that very instructive letter, dated November 10, 1998, to Mr. Edwards, the writer *inter alia,* says:

> It has been discovered that the calculation of input tax as indicated on the Return is incorrect as the schedules prepared from the invoices in respect of purchases were incorrectly added and that, in fact, some invoices were not included. The additional tax payable is $139,687 in respect of January 1995.
>
> Our investigations show that:
>
> (a) the GCT in respect of the items subject to tax at 12½% have in most cases up to July 1997 have been incorrectly calculated;
>
> (b) the input tax has not been correctly calculated as the schedules have been incorrectly added. This again was a task assigned to Mrs. Shim Hue;
>
> (c) the GCT (Input Tax) related to administrative expenses are not being apportioned in accordance with the ration of taxable sales to exempt sales;
>
> (d) The GCT Returns are not being filed in accordance with the law.

The letter adds:

> "It is indeed unfortunate that when Mrs. Shim-Hue did not understand the job that she was assigned, she did not seek assistance".

Although making specific reference to aspects of the returns being incomplete or incorrect {S38 (1){b)}, the evidence on behalf of the Respondent also revealed obvious dissatisfaction with the calculations of the returns as well (S38{2)).

If, for instance, the Commissioner of Inland Revenue examines the returns of a Taxpayer and (1) realizes that he has incorrectly applied GCT to tax exempted goods and (2) is dissatisfied with the calculations on the returns received, is the Commissioner still expected to proceed under *either* Section 38{1)(b) or Section 38(2)? I do not believe that is in keeping with the tone of the section. It is possible for cases to arise which could be considered to fall under both.

Even if this view is incorrect, one is still forced to recognize that there are subtle differences in interpretation here. It could be argued that the substance of the Respondent's arguments went beyond its words in making the assessment under S38 (2), simpliciter. Rather, there is a case to be made that the Respondent was neither satisfied with the calculations nor the basis upon which the returns were prepared. This dissatisfaction may have arisen as a result of the returns being incorrect or the totality of what was before her. If this analysis is correct, that would seem to provide a fair basis for the Commissioner TAAD to state in writing, the general basis upon which the assessment had been made. I am of the view that this has been done. The section asks for a "general basis". It does not require a specific basis.
In light of the foregoing, I hold that the purported failure to "elect" in relation to a specific subsection of the Act is not fatal to the validity of the assessment.

In support for the submission that the non-election was fatal to the assessment, but also as support for the a second string to this bow, (Global assessments are per se invalid) counsel presses the court to accept that there is "no statutory basis for the issue of a global assessment – that is where a single amount is notified in relation to the entire period of assessment". He adds: "Such an assessment should, in any event, set out on its face precisely and accurately the specific taxable periods involved". It was also submitted that "A global assessment must be considered as a whole. It is either wholly valid or wholly invalid". The unreported case **Barber v C & E Commissioners MAN 91/541** is cited as authority for this proposition.

On a closer reading of the **Barber** case in **De Voil** from which it is taken, it is not at all clear that that the case supports that proposition. The following is the summary:

> The Appellant carried on business as a dealer in motor parts. He appealed against an assessment made in November 1990 covering a period from 1February 1987 to 31 October 1989. The tax assessed was not allocated to individual accounting periods and including tax covered by an earlier assessment ("the first assessment") made in August 1988 in respect of the accounting periods ended May, August and November 1987 and February 1988. The assessments had been made following a comparison of the appellant's bank statements with the Output tax declared in his VAT returns. The assessment under appeal ("the second assessment") had been reduced to take account of the tax already included in the first assessment but the period covered by the assessment was not altered. The appellant disputed the second assessment on its merits as regards the proportion of his sales which were exported. But as a preliminary issue he argued that, in the absence of any new evidence coming to the knowledge of the Commissioners since the making of the first assessment, the inclusion in the single period specified in the second assessment of periods covered by the first assessment invalidated the second assessment as a whole. The Commissioners contended that the reduction of the second assessment had effectively removed from that assessment any tax already assessed and tax on other unidentified income alleged to have arisen during the periods covered by the first assessment. As amended, the assessment was, in the Commissioners view, wholly valid. The first assessment had been made during a control visit in June 1988. In June and August 1990 a different VAT officer made two visits to the appellant. When she subsequently made the second assessment, she overlooked the fact that some of the tax had already been assessed as a result of the original control visit. The tribunal found that no new evidence relating to the periods covered by the first assessment had come to the Commissioners' knowledge since that assessment was made. In reducing the second assessment the Commissioners had accepted that the evidence relied upon by the second VAT officer may have been available to the officer who made the original visit. In the tribunal's opinion the interpretation of existing information did not amount to new evidence of facts. The tribunal also rejected as irrelevant a change in the nature of the appellant's business following the original control visit and the second VAT officer's mistaken belief that she was examining bank statements for a different bank account from the account checked on the original visit. Because of the second VAT officer's failure to realize that her assessment duplicated to some extent the assessment already made, the second assessment had not been made to the best of the Commissioners' judgment (VATA Schedule 7 para 4(1). In the absence of new evidence the Commissioners were not entitled to make a further assessment for a period already assessed. (**Jeudwine v Comrs of C & E [1977] VATTR 115**). (See above) Further, in the case of global assessments

> where the tax assessed was not allocated to different periods, the validity of the assessment had to be judged by considering the assessment as a whole. The Commissioners could not abandon the bad part of such an assessment and seek to maintain the rest of it as valid (**International Language Centres Ltd. V C & E Comrs [1983]STC 394 at 396**). The tribunal did not accept that a distinction could be made for this purpose between an assessment which was "void" and one which was "invalid". An assessment which was not made to the best of the commissioners' judgment was invalid or void and could not be validated by reduction of the amount assessed. Accordingly, the second assessment remained invalid and the appeal was allowed with costs, if not agreed, to be determined by the VAT tribunal.

There are two aspects of the case which are extremely instructive and to which we must turn our attention in order to ascertain whether it assists the court in deciding the instant matter. The first is that on the appeal to the VAT tribunal the taxpayer took a preliminary point which *related to the purported validity of a second assessment of a period previously assessed* without any new evidence being adduced. The issue was decided upon that preliminary point. In that respect, the success on that preliminary point takes us no further than **Jeudwine** to which the tribunal made reference. Secondly, what was held by the tribunal was that *in the absence of new evidence*, the second assessment was not made *to the best of the Commissioners' judgment*. An assessment which is not made to the best of the commissioners' judgment is, per se, invalid. This is, decidedly, is not the position in the instant case, and I do not accept that these submissions about global assessments in the context of the purported failure by the Commissioner to "elect" a particular provision pursuant to which the assessment has been raised, provide any help for this Appellant. There is nothing in De Voil's note on this case which expressly, or by necessary implication, suggests that global assessments are *per se*, bad.

GLOBAL ASSESSMENTS

Counsel for the Appellant also submitted the following. Section 20(1) of the Act stipulates that tax is to be calculated and paid in respect of each taxable period. The relevant taxable period according to paragraph 6(1)(a) of the GCT Regulations, is one calendar month. Pursuant to section 33(1) of the Act and paragraph 7 of the Regulations, the taxpayer is to furnish a return and pay the tax shown thereon for the taxable period whether or not he makes a taxable supply. Section 37 requires the Commissioner to issue a Notice of Decision where a taxpayer fails to pay

the tax. Regulation 17 mandates the information which must be provided to the taxpayer in order to constitute a proper basis for subsequent action. These are:

(a) the period for which tax has not been paid;
(b) the amount of tax payable;
(c) the rate and amount and penalty on the unpaid amount of tax;
(d) the rate and amount of surcharge and interest;
(e) the period within which payment of tax penalties, surcharge and interest is to be made.

It was also submitted that the Commissioner must assess the amount which the taxpayer ought to have paid on his return {section 38(1) and (2)and that liabilities to penalties, surcharge and interest arise in respect of a taxpayer's default in a taxable period {section 54 (2), 2a, (3) and (4).

In light of the above, Appellant's counsel submitted that: "Whatever rule of construction was adopted, literal or purposive, the legislative intent is clear from the foregoing provisions that an assessment must be made in respect of a single taxable period and the taxpayer told 'what he has to pay and not merely given the information from which a skilled adviser would be able to decide the tax eventually demanded'". (See **Hallamshire Industrial Finance Trust Limited v IRC [1979] 1 WLR p. 620**). It was suggested that "the scheme of the Act admits of no other interpretation". Counsel also cited and relied upon the dicta of Neill J. in **S.J. Grange Ltd. v Customs and Excise Commissioner [1979] 2 All E.R. 90** to support the proposition that an assessment must be confined to a single prescribed accounting period.

> "I do not consider that it would be necessary to produce a piece of paper showing a separate assessment for each prescribed accounting period, but I am satisfied that an assessment to be valid must show what tax is due from the taxpayer in respect of each prescribed accounting period to which it relates".

The first instance decision in the **Grange** case was reversed by the Court of Appeal which found that there was nothing in the statute to indicate that an assessment should be confined to a single prescribed accounting period. (Interestingly, both the Appellant and the Respondent relied upon Grange as supporting its position). It was argued that this was the result of a purposive construction of the UK statute to give effect to policy. The UK statute was subsequently amended to reflect the interpretation given by the Court of Appeal. The Appellant also suggested that section 37 of the Act as to which there was no parallel in the UK legislation made it

mandatory for a Demand Notice to issue to taxpayers in the case of non-payment of tax. Section 37 is in the following terms:

> Where a registered taxpayer fails to make payment on account of tax, the Commissioner shall issue a notice (hereinafter referred to as a "demand notice") to the registered taxpayer for payment of such tax.

It was submitted that this provision underscored the view that tax, penalty, surcharge and interest must be computed in respect of *a taxable period.* Appellant's counsel conceded that the approach in the Grange case was an example of an increasing trend towards a purposive construction of statute, he urged to court to be guided by the principle set out in **Cape Brandy Syndicate v IRC [1921] K.B. 64 at page 71:** "In a taxing Act, one must look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used". He also adopted Lord Simmonds famous dictum in **IRC v Wolfson [1949] 1 All E.R**: "It is not the function of a Court of law to give words a strained and unnatural meaning because only thus will a taxing section apply to a transaction which, had the legislature thought of it, would have been covered by appropriate words".

Counsel for the Respondent submitted that the submissions of Appellant's counsel with respect to global assessment were not on point. The Court of Appeal decision in the Grange case was cited as supporting the proposition that to accept the submission of the Appellant would lead to injustice and absurdity under the Act. De Voil at A15.33 page A2153 states: "The amount of tax notified to a trader under VATA 1983 Schedule 7 para 4 (1) or (6) may relate to two or more prescribed accounting periods. The document sent or handed to the trader may comprise a separate assessment for each prescribed accounting period or a single assessment (known as a "global assessment") for the prescribed accounting periods as a whole". Also: "The question whether the document comprises a global assessment or a number of separate assessments is resolved by construing the document concerned". (See **International language Centres Ltd. v C & E Commissioners [1983] STC 394 at 398.**) This case is also cited as authority for the proposition that it is acceptable to include a series of assessments for different periods within a single document. It would also seem to be the case that where the document has some, but not all, the amounts in a schedule to the document identified by reference to stated prescribed

accounting periods, this would be a global assessment. According to De Voil in its section on "Global Assessments", the learned author is of the view that "Commissioners may make a global assessment if they are unable to identify the specific prescribed accounting period(s) for which the tax claimed is due". Further: "The better view is that the Commissioners are not bound to make an assessment for specific prescribed accounting periods and that a global assessment is valid if they choose not to do so". Respondent's counsel states that in the Jamaican legislation, the Commissioner's power to make assessments is given under section 38. Such assessments may be raised for each taxable period and this was in fact done. It was submitted that this was evidenced by the schedules attached to the Notice of Assessment which showed the input tax on each return, the input tax as audited and the difference between these two figures for each taxable period; the output tax stated on each return, the output tax as audited and the difference between the two figures as well as the sum total of the amount of tax due for each period. It was further submitted that the Respondent notified the taxpayer of these assessments in one document, the notice of Assessment which incorporated the schedules outlining the assessment for each taxable period. Accordingly, it is one assessment referable to each taxable period from September 1994 to December 1997. Section 38 (8) of the Act which prescribes that notice of any assessment made is to be served upon the taxpayer concerned, does not prescribe a form for this notice. As long as the Appellant is not uncertain of the period for which it has been assessed, then it would have been given adequate notice of the assessment. This principle was applied in the case of **Ahmed (trading as Lister Fisheries) v Customs & Excise Commissioners [1999] STC 408.** In that case, the Commissioners issued a notice of assessment in respect of seven accounting periods. Several accompanying documents listed those periods and contained schedules that showed, inter alia, the computation for the tax payable for each period. The taxpayer appealed on the grounds, inter alia, that the assessment was invalid because there had been a failure to adequately notify it of the period covered by the assessment. The court held that a taxable person was entitled to receive adequate notice of an assessment including the period covered by the assessment. In considering whether taxable person had received adequate notice, not only the notice itself but also a schedule to a notice of assessment was relevant. Where the taxable person was advised by professional accountants, it was necessary to consider the assessment and any schedules objectively to see whether the reasonable recipient would have been in any doubt as to the assessment.

In my view, although the Jamaican legislation does speak to the payment of tax by reference to specified taxable periods, there is nothing in it which precludes the Commissioner raising a so-called global assessment if the taxpayer is adequately advised of the liability with which he is being charged in respect of each taxable period within the so-called global assessment. There is nothing in the Act which requires a court to hold invalid, an assessment which gives the taxpayer the information that is necessary for him to understand the assessment and its relation to specific periods. I should add, *en passant*, that if I were in any doubt as to the willingness of the courts to now apply a purposive interpretation to the statute here, such doubt would be quickly removed by looking at the approach of the learned law lords of the Judicial Committee of the Privy Council in the case of the **Commissioner of Stamp Duty and Transfer Tax v Carreras Ltd**. (See **Privy Council Appeal No 24 of 2003** delivered April 1, 2004: Per Lord Hoffman)

> The Jamaican legislation, although it uses much of the same language, is concerned with a different kind of tax. A restricted interpretation of the transaction contemplated by paragraph 6(1) would produce the result that exemption from tax could be obtained by a formal step inserted in the transaction for no purpose other than the avoidance of tax. *This would not be a rational system of taxation and their Lordships do not accept that it was intended by the legislature. They agree with the majority of the Court of Appeal that the relevant transaction for the purposes of this legislation comprised both the issue and the redemption of the debenture and that such transaction, taken as a whole, could not be appropriately characterized as an exchange of shares for a debenture.* (My emphasis)

In light of the foregoing purposive interpretation of our own Transfer tax Act, an approach which I accept, it will come as no surprise that I am not persuaded as to the submission of Appellant's counsel which would hold that the taxpayer/Appellant has been the subject of an invalid global assessment. I hold that the assessment is not invalidated on the grounds of it being a global assessment

I would wish to note in passing that with respect to the question of the issue of a demand notice under Regulation 17 of the regulations under the Act, I do not believe that this is a matter on which I have to adjudicate. Section 37 is the section referred to above which relates to the demand notice and the regulations set out in some detail what the demand notice must contain. I am not of the view that the Appellant is saying that the assessment is invalid because of the inadequacy or absence of a demand notice. But if that is the submission, I would suggest without

needing to decide the issue for the purposes of this case that I take the view that a demand notice may be issued once the amount payable has been determined by the court process or by agreement between the taxpayer and the Revenue, or the taxpayer has submitted his return showing a liability but without attaching the tax due. This need not detain us here.

The Use of Industry Standard Ratios (ISRs)

The next substantive submission made by the Appellant is that the Respondent's resort to Industry Standard Ratios invalidates the assessment. It is submitted that even to use those as an indicative measure is impermissible because the Appellant had filed returns for the entire period assessed. It was counsel's submission that "only three of the forty taxable periods" were impugned by the investigations of the Commissioner. This is an overstatement as the correct proposition to be deduced from the Statement of Case was that there were three that were specifically mentioned as being faulty. He stated that the Commissioner was under a duty to show why she considered the monthly returns submitted by the Appellant to be incomplete or incorrect or not calculated or prepared on a satisfactory basis, and to show the amounts which the taxpayer should have paid. Counsel submitted: "The attempt to discharge that duty by the use of ISRs was clearly untenable and in contravention of the provisions of the Act. Modus was fundamentally flawed because of Commissioner's refusal to disclose the date used in establishing the ratios on the grounds of confidentiality. Counsel cited **Goodhew v C & E Commissioner 1975 VATTR 111** where it was stated that "in our view, the representatives of the Commissioner cannot refuse to answer such questions on the grounds that the figures which they have put in have been obtained from 'confidential information' which they are not at liberty to disclose. By putting in such figures the Commissioners, in our opinion, necessarily waive any privilege resulting from the receipt of confidential information from other traders". He also cited **Bridge Street Snack Bar v C & E Commissioners** where an assessment was held to be invalid because no evidence of comparability was provided, and **Read and Smith (a firm) v C & E Commissioners [1982] De Voil B 3 1188 at page 1356** where an assessment was discharged because the Commissioners had disallowed a claim for input tax on account of the fact that the taxpayer had lost the relevant invoices. Finally, counsel made the submission that the

Commissioner was not in a position to issue an assessment until she had clear and satisfactory evidence that an understatement had taken place, established its extent and obtained the necessary figures from which the quantum can be established. He cited De Voil which at paragraph A 15.37 states:

> The decided cases suggest that there is a distinction between facts which justify an investigation and facts which justify an assessment. Thus, if the Commissioners become aware of facts which lead them to believe that an understatement of tax may have occurred or will occur, this is insufficient information on which to base an assessment; it is no more than adequate ground for an investigation. The commissioners are not in a position to issue an assessment until they have confirmed that an understatement of tax has taken place, established its extent and obtained the necessary figures from which the quantum can be established.

In responding to submissions for the Appellant, counsel for the Respondent submitted that the Commissioner's power to make assessments is in no way fettered by a requirement that the assessment be arrived at by the use of a particular methodology, neither is there any statutory requirement that the commissioner must rely on the taxpayer's records in making any assessment. She cited section 38(2) which gives the Commissioner power to make an assessment of "the amount *he thinks* the registered taxpayer ought to have stated on the return", and section 38(4) allows for assessments to be made "*to the best of his judgment*". (Emphasis supplied) Counsel makes the point and it is supported by the evidence before me, that the taxpayer was audited and the returns were determined to be incorrect. The evidence is that the Respondent inspected suppliers' invoices, bills and other source documents. These figures on the source documents which were used to prepare the taxpayer's returns in many cases differed from the figures on the returns prepared from those source documents. I also accept the evidence of the Respondent's witnesses that there were erasures and manipulations of the figures on the Appellant's input tax working papers. It is also instructive to note that from documents provided to the court in the bundles, that even the taxpayer conceded that much of its work was flawed. For example, the letter from Mrs. Lorna Lewis of November 10, 1998, states: "The GCT in respect of the items subject to tax at 12½% have in most cases up to July 1997 been incorrectly calculated; the input tax has not been correctly calculated as the schedules have been incorrectly added; the GCT (input tax) related to administrative expenses are not being apportioned in accordance with the ratio of taxable sales to exempt sales; GCT returns are not being correctly

filled in accordance with the law". The letter from Mrs. Lewis then requested a meeting with Mr. Edwards "to be convened as quickly as possible to discuss this matter and to work out a timetable for the necessary revision of the returns". It is also instructive that Mrs. Lewis' letter in the second paragraph said: "One of our directors, Mrs. Arscott has now done a reconciliation of the GCT return for January 1995 and it has been discovered that the calculation of the input taxes indicated on the return is incorrect as the schedules prepared from the invoices in respect of purchases were incorrectly added and in fact some invoices were not included. *The additional tax payable is $139,687 in respect of January 1995".* (My emphasis) It seems clear that the Appellant accepted that it had problems in determining the correct extent of its liability and was willing to co-operate in working out what that liability should be.

In addition there is the evidence in the enclosures of the letter of May 28, 1999, from Mr. Baron Stewart to the GCT Department, in response to the assessment, that the taxpayer acknowledged that "there were flaws in our operating procedures and a breakdown of the controls". The letter continued: "We are asking for your consideration in reviewing the assessment on these areas of weakness. They are:

1. Bad debts for the period under review;
2. High cost of sales ratio
3. absence of our physical inventory records
4. absence of physical inventory adjustment records;
    a. Damaged goods
    b. Obsolete goods
    c. Pilferage
5. Reports for the daily movements of inventory were not being kept up to date.
6. Return sales on which return sales tax should have been calculated cannot be found for most of the earlier periods under review. They were never applied at the time returns were prepared.
7. Several cases where goods were invoiced and output tax calculated no actual sale took place. These are
    a. Goods used in the maintenance of the business.
    b. Goods transferred from main hardware store to the stores at Mocho and Lionel Town.
    c. Discounts are given to all customers on request
    d. Donations
8. Sales figures on returns different from audited financial statements
9. There is much difficulty in validating/challenging the assessment raised on the Input T because of disarray of the payable files as a result of its

> heavy use in recent months. Invoices and in some cases complete files cannot be found".

I have adverted to this evidence because in the affidavit of Denzil Haase, dated November 28, 2001, he avers that each of the issues discussed in Mr. Stewart's letter had been considered by the Commissioner when the submission was made. That evidence which I accept as true, would seem to negative the assertion in the Appellant's counsel's submission that: "It was unreasonable for the Commissioner to reject the Appellants computations which were based on a comprehensive vouching audit without considering them". Mr. Haase's affidavit clearly suggests that the schedules submitted by the Appellant along with Mr. Stewart's letter had been taken into account by the Commissioner in arriving at her assessment. Nor do I accept that **Read and Smith** (above) cited by Mr. Hamilton is authority for the proposition that wherever a registered taxpayer loses his documentary records, the revenue is obliged to accept the figures put forward by the taxpayer in the absence of those lost documents. Rather it supports the proposition that where the registered taxpayer loses his records, the revenue is not entitled to reject the figures he puts forward merely because he has lost them

It seems to me that the question to be answered in relation to this ground of Appeal is whether the assessment made has complied with the Act or whether the use of ISRs somehow compromises that assessment. It is appropriate therefore to go back to section 38(2) of the Act which allows the making of an assessment and see what the Act requires. It seems clear that the Commissioner must exercise her best judgment in arriving at the assessment. The question is whether she has done so. It is common ground that the Revenue did in fact carry out an audit of the taxpayer's records. It is also true that there were meetings between the parties at which their respective positions were exposed. It is equally clear that if what is meant by the "use of ISRs" is that the Commissioner used figures from an industry sample to *determine and fix* the amount of the taxable supplies or the quantum of the assessment, then I would have to say that such would invalidate the assessment. For I accept Mr. Hamilton's submission above citing De Voil A15 37, that there is all the difference between *facts giving rise to investigations* and *evidence which justifies an assessment* (My emphasis.)

Both the affidavit of Andrew Edwards dated November 28, 2001 and that of Denzil Haase of the same date make it clear that a considerable amount of research and auditing of both processes

and documents of the taxpayer was carried out by the Revenue. The letter from Deloitte dated November 10, 1998 acknowledged several areas of problems which the taxpayer had with its own system and documents, not unconnected with an in-house accountant who seemed not to understand what she was doing. Mr. Edwards's affidavit at paragraph 14 indicates that: *"I then audited the available records of the Appellant and raised an assessment in the sum of $12,440,248.02 for the period September 1994 to December 1997"*. The schedules appended to the Notice of Assessment raised by Mr. Edwards appear to give a complete explanation of the adjustments made by the Revenue over the period September 1994 to December 1997. The Notice of Assessment itself which was sent to the taxpayer stated:

> Take notice that the Commissioner of General Consumption Tax has assessed you under section 38 of the General Consumption Tax Act for an additional amount of tax amounting to $12,440,248.02 for the period September 1994 to December 1997.
> This assessment is based on an audit, the findings of which are either attached to this notice, or have earlier been provided to you by the Commissioner of General Consumption Tax.

On the face of the assessment as well as the schedules, there is nothing which indicates that there was any external factor which was used in arriving at the quantum of the assessment. By this I mean, the quantum of the assessments was based entirely upon the audit of the taxpayer's available documents and reflected the auditor's view of what the true picture emerging ought to be. Neither Mr. Haase nor Mr. Edwards in their affidavits suggested that a factor representing the product of Industry Standards Ratios was used to arrive at the extent of taxable supplies, nor the tax due. Accordingly, what I understand the Revenue to be saying is that part of the motivation for proceeding with the audit which gave rise to the assessments was a view the Revenue had developed that the Figures in the taxpayer's returns was significantly out of line with taxpayers of comparable size and location. Mr. Norris Miller's affidavit suggested that the application of the ratios to the assessment, actually operated to reduce the assessment.

Mr. Robinson for the Respondent, suggested that with respect to the ISRs, the test is not whether there is a juridical basis for a particular methodology, but whether the methodology employed has satisfied the legal requirements. Is the methodology unfair, unreasonable or capricious? He submitted that this must be the question in light of the wide, though not unfettered, powers given to the Commissioner under the statute. He argued that the statute does not specify or stipulate for

any particular methodology as that is for the Commissioner to determine. But in exercising her discretion as she thinks fit, or in her opinion, she must ensure that the method that she uses in arriving at the amount assessed, is not unfair or unreasonable. He cited with approval the authority of **Von Boeckel v Customs and Excise Commsrs. [1981] STC 292,** and the judgment of Woolf J, (as he then was) at pages 292 to 293 of the report. Since the particular part of the judgment cited speaks so eloquently to the twin issues of the primary responsibility of the taxpayer to make returns base upon his own records, and the nature of the legal duty upon the Commissioner making an assessment, I can do no better than to reproduce at some length, the relevant part and I set this out below.

> "The issue, which arises on the appeal before this court, is whether or not the Commissioners, in making their assessment, complied with the requirement that the assessment must be for the amount of tax which, to the best of the Commissioner's judgment, is due from the taxpayer. There is no issue as to the compliance with the conditions, which have to be fulfilled before the right to make an assessment arises.
>
> The provisions of s 31(1) of the 1972 Act are very similar to provisions which have appeared in Revenue legislation in this country and in the legislation of Dominions. So far as this country is concerned, the power to assess for income tax is dealt with in s 29(1) of the Taxes Management Act 1970; and in the appropriate circumstances the inspector of taxes, under that legislation, may make an assessment to tax to the best of his judgment.
> Both in relation to the income tax legislation and the value added tax legislation, the power to make an assessment is an important element in the Revenue's machinery for the recovery of tax. *Value added tax, in the first instance, relies on the taxpayer making a return which is a form of self assessment of the tax which is due. If the taxpayer does not perform that function properly then the Commissioners are dependent on the powers contained in the 1972 Act, including s 31(1), to enforce their right to recover the amount of tax which is payable from a taxpayer*. (My emphasis)
>
> The contentions on behalf of the taxpayer in this case can be summarised by saying that on the facts before the tribunal it is clear, so it is contended, that the assessment in question was not valid because the Commissioners had *taken insufficient steps to ascertain the amount of tax due* (my emphasis) before making the assessment. Therefore, it is important to come to a conclusion as to what are the obligations placed on the Commissioners in order properly to come to a view as to the amount of tax due, to the best of their judgment. As to this, the very use of the word "judgment" makes it clear that the Commissioners are required to exercise their powers in such a way that they make a value judgment on the material which is before them. Clearly they must perform that function honestly and bona fide. It would be

misuse of that power if the Commissioners were to decide on a figure which they knew was, or thought was, in excess of the amount which could possibly be payable, and then to leave it to the taxpayer to seek, on appeal, to reduce that assessment.

Secondly, clearly there must be some material before the Commissioners on which they can base their judgment. If there is no material at all it would be impossible to form a judgment as to what tax is due.

Thirdly, it should be recognized, particularly bearing in mind the primary obligation, to which I have made reference, of the taxpayer to make a return himself, that the Commissioners would not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due. In the very nature of things frequently the relevant information will be readily available to the taxpayer, but it will be very difficult for the Commissioners to obtain that information without carrying out exhaustive investigations. In my view, the use of the words 'best of their judgment' does not envisage the burden being placed on the Commissioners of carrying out exhaustive investigations. What the words 'best of judgment' envisage, in my view, is that the Commissioners will fairly consider all material placed before them and, on that material, come to a decision, which is one which is reasonable and not arbitrary as to the amount of tax which is due. As long as there is some material on which the commissioners can reasonably act, then they are not required to carry out investigations which may or may not result in further material being placed before them.

Some support for this approach to the relevant provisions of s 31(1) are to be found in two decisions of the Privy Council. The first is the case of the **Comr. of IncomeTax,United and Central Provinces v Badridas Ramari Shop (1937) 64 LR Ind App 102**. In giving the opinion of the Privy Council in that case, Lord Russell, in relation to a similar provision in the relevant Indian legislation said (at 114-115):

> 'It remains for consideration the point whether the assessment can be attacked on the ground that it was not made by the officer to the best of his judgment within the meaning of s. 23, sub-s. 4. The Judicial Commissioners have laid down two rules which impose upon the officer the duty of (i.) conducting some kind of local inquiry before making the assessment under s. 23, sub-2. 4, and (ii.) recording a note of the details and results of such inquiry. Their Lordships find it impossible to extract these requirements from the language of the Act, which after all is, in such matters, the primary and safest guide. The officer is to make an assessment to the best of his judgment against a person who is in default as regards supplying information. He must not act dishonestly, or vindictively or capriciously, because he must exercise judgment in

> the matter. He must make what he honestly believes to be a fair estimate of the proper figure of assessment, and for this purpose he must, their Lordships think, be able to take into consideration local knowledge and repute in regard to the assessee's circumstances, and his own knowledge of previous returns by and assessments of the assessee, and all other matters which he thinks will assist him in arriving at a fair and proper estimate: and though there must necessarily be guesswork in the matter, it must be honest guesswork. In that sense, too, the assessment must be to some extent arbitrary. Their Lordship think that the section places the officer in the position of a person whose decision as to amount is final and subject to no appeal; but whose decision, if it can be shown to have been arrived at without an honest exercise of judgment, may be revised or reviewed by the Commissioner under the powers conferred upon that official by s. 33.'

The reference by Lord Russell to the assessment being to some extent arbitrary must be considered in the context in which it is used, and as in no way derogating from what he had said earlier about the assessment not being made capriciously.

The other decision of the Privy Council was in **Argosy Co. Ltd. v Inland Revenue Comr. [1971] 1 WLR 514**. The legislation which was there under consideration was the Income Tax Ordinance of Guyana in which again the words 'to the best of his judgment' appear. As in the case of s 31 of the 1972 Act there was a condition, precedent to the right to assess, to be fulfilled before it was open to the commissioner to assess to the best of his judgment. Dealing with the exercise of the assessing process once the condition had been fulfilled, Lord Donovan, giving the judgment of their Lordships, said this (at 516-517):

> 'Once a reasonable opinion that liability exists is formed there must necessarily be guess-work at times as to the quantum of liability. A resident may be known to be living well above the standard which his declared income would support. The commissioner must make some estimate, or guess, at the amount by which the person has understated his income. Or reliable information may reach the Commissioner that the books of account of some particular taxpayer have been falsified so as to reduce his tax. Again the Commissioner may have to make some guess of the extent of the reduction. Such estimates or guesses may still be to the best of the Commissioner's judgment – a phrase which their Lordships think simply means to the best of his judgment on the information available to him. The contrast is not between a guess and a more sophisticated estimate. It is between, on the one hand, an estimate or a guess honestly made on such materials as are available to the Commissioner, and on the other hand some

> spurious estimate or guess in which all elements of judgment are missing. The former estimate or guess would be within the power conferred by section 48(4): the latter without.'
>
> I draw attention to that passage, particularly because of the fact that Lord Donovan stresses the requirement that the guess should be made honestly on the material which is available to the Commissioner.

In the passage above, I would draw attention particularly to a small section which I have emphasized, and which speaks to the obligation on the taxpayer for the provision of adequate and proper records and the right of the Commissioner where that obligation is not carried out, to make his best judgment assessment consistent with the provisions of the Act. That section I set out again for ease of reference and adopt both the logic of the reasoning and the conclusion therein.

> *Value added tax, in the first instance, relies on the taxpayer making a return which is a form of self assessment of the tax which is due. If the taxpayer does not perform that function properly then the Commissioners are dependent on the powers contained in the 1972 Act, including s 31(1), to enforce their right to recover the amount of tax which is payable from a taxpayer.*

Mr. Robinson submitted that there is nothing in Woolf J's dicta that admits of any interpretation that would restrict the methodology of making an assessment. He also cited the judgment of Carey J.A. in **Karl Evans Brown v Commissioner of Income Tax [1987] 24 J.L.R.277 at 281**. This was a case involving an assessment under the Income Tax Act but the reasoning of Carey J.A. as to the nature of proceedings before the Revenue Court is instructive. He said.

> In my judgment, the matter stands thus: There are two distinct burdens of proof in an appeal to the Revenue Court. There is first, the burden on the Appellant to show that the assessment is excessive. This duty is a heavy one because of his duty to make a full disclosure of all his income from whatever source. The burden on the Commissioner is the lighter one because in the vast majority of cases the objector is not claiming that he is not liable to tax; he is challenging the quantum. The burden on the Commissioner is evidential. It only arises or shifts to him when the taxpayer on whom the initial burden rests, leads evidence that he is not liable for any tax whatever. The Commissioner's Statement of Case need, therefore, only show that the objector is liable to tax in the amount assessed on the basis of material he has. Thus, to give two examples which are given in Argosy v Commissioner of Inland revenue (supra) the objector's acquisition of property which he has not returned or books he has not produced or which have been falsified, can constitute the material on which the Commissioner could rely to show taxpayer's prima facie liability to tax. Indeed, it appears

> to me that the Commissioner could have acquired his information from any source whatever. The material may be cogent or hearsay or evidence inadmissible in a Court of Law.

In that case the taxpayer had sought to elicit information concerning an assessment which the Commissioner of Income Tax had raised against him by a request for further and better particulars. Carey J.A. said that that procedure was not available in the Revenue Court. In the instant matter, one of the contentions of Appellant was that the failure of the GCT Commissioner to respond affirmatively to requests for information concerning who were the companies whose data was used in developing the ISRs, also made the use of those standards unfair or wrongful. Mr. Robinson said that the authorities did not support this view at all. He emphasized that the methodology was irrelevant, as what was at issue was the fairness of the process. There was no special reason for preferring one method over any other. He also cited the case **Akbar and Others (trading as Mumtax Paan House) v Customs and Excise Commissioners[2000] STC 237** in support for the proposition that as long as there was material upon which the Commissioners could reasonably make a 'best judgment assessment', there was no requirement to make further investigations which might or might not result in further material being placed before them and, accordingly, their assessment would not be second-guessed. This principle was also stated by Woolf J., in **Van Boeckel** above.

In **Akbar**, his Lordship, Dyson J., in considering the question of "best judgment", considering the decision of the tribunal made in the matter before him quoted from that decision as follows: Thus, it is plain from the decision in Von Boeckel that:

1. The Commissioners must consider fairly all material placed before them and, on it, come to a reasonable as opposed to an arbitrary, decision as to the amount of tax due.
2. There must be some material before the Commissioners on which they can base their judgment;
3. Unless there is no material before the Commissioners on which they can reasonably base an assessment, they are not required to make investigations;
4. The Commissioners are not required to do the work of the taxpayer in order to reach a conclusion as to the amount of tax due from him; and
5. The Commissioners are required to exercise their powers in such a way that they make a value judgment on the material before them.

Mr. Robinson argued that this is clear authority for the proposition that it is not whether the assessment is wrong or right, but whether it is fair. Further, he cites the provision of the Revenue Administration Order that places the onus on the Appellant to prove that the assessment excessive.

Mr. Hamilton in response to the **Von Boeckel** and **Akbar** authorities stated that in both those cases, the Commissioners had had the benefit of covert observation of the operations of the taxpayers. This had given them an additional basis upon which to found their raising of the appropriate assessment. He deduces from this an obligation to make such observation or to do some other act in support of the decision. I cannot agree. Nor do I agree that on the totality of the evidence before me, that the only question was the carrying out of a mathematical exercise as suggested by Lorna Lewis. In fact, Mrs. Lewis' letter of November 10, 1998 is one of the most compelling pieces of evidence, given that it is against the Appellant's own interest, that all was far from well in the Appellant's GCT affairs.

The Respondent also calls in aid the authority **Majid & Partners v Customs and Excise Commissioners [1998] STC 585**, where the Commissioners made an assessment in default of proper returns by the taxpayer. In this case, the Commissioners, based upon the evidence of a till roll from the cash register relating to a single day's sales which indicated that the takings for the day were not £181 as declared, but £392.33 thereby showing that the suppressed sales were 54% of true turnover. The taxpayer's records were also inspected and they revealed that there was a suppression of purchases ranging from 23% to 39%, the majority being in the 30% to 40% range. The commissioners decided to make assessments to VAT for under-declared output tax on sales made by the appellants for the period 1 January 1985 to 31 March 1990, on the assumption that an additional 40% of sales should have been assessed to VAT for the whole of that period. The appellants appealed against the assessment overall and submitted, inter alia, that there had been no suppression of sales, and that the machine producing the till rolls often functioned incorrectly. The VAT tribunal considered that on the available evidence, the Commissioners had used their best judgment in deciding to make the assessment. It concluded, with regard to the amount of the assessment, that it saw nothing unfair in the method or conclusions reached as to the amount of tax which was due. The appellants appealed contending that the tribunal had erred in law in

applying a constant suppression rate of 40% to sales; in concluding that the till readings were indicative of a suppression of sales. The Commissioners argued that they had based the assessment on the rolls for particular days which indicated that sales for particular days had been suppressed by 40% and on the evidence of the suppression of purchases. It was held that a tribunal could only overturn the Commissioners' decision to make an assessment to the best of their judgment if it was satisfied that the Commissioners had not been entitled on the material before them to reach that decision. It was not for the tribunal to substitute its own views for those of the Commissioners. However, if the Commissioners had acted to the best of their judgments in making the assessment, the tribunal would still be entitled to consider the amount of the assessment for itself and would have regard to any material that was placed before it. The Commissioners were entitled to use the 40% figure as a guide, and although there was a deficiency of only 20% in one set of the Appellant's figures, this did not provide a basis for the commissioners to come to the view that a figure of less than 40% was appropriate for the suppression of sales for the whole period.

Mr. Norris Miller's affidavit to which Mr. Hamilton made reference in his response does not, in my view, add anything to the views I have expressed above. Mr. Miller says that the ISRs are used to "identify taxpayers who appear to be filing incorrect returns and to guide the assessment when a taxpayer does not have adequate or reliable records". But as will be apparent from my findings above, it was Mr.. Edwards who did the assessment. There are other aspects of Mr. Miller's affidavit which are instructive. He says:

> The Appellant objected to an assessment raised by the Respondent and Mr. Denzil Haase, the officer handling the assessment requested my assistance in the review of the Appellant's assessment, and with a view to determining whether, and to what extent, a reduction of the assessment could be made.
> On my examination of the records of the Appellant it was disclosed that their several inaccuracies rendered them unreliable.
> The reduced assessment figure of $11,915,869.00 was arrived at by applying the industry standards/ratio to the input tax figures for each year, obtained from the Appellant's records".

Based upon my view of the affidavit evidence of Haase, Edwards and Miller, it would seem that the ISR was used in two (2) ways; 1)in alerting the Respondent to the probabilities of inaccuracies in the Appellant's figures, and 2) in reducing the original assessment to the later

figure. In neither case would I be prepared to hold that the assessment was compromised and invalid.

Penalties, Surcharge and Interest.

The Appellant through its attorney-at-law submitted that "based on section 54 and the general scheme of the Act, the taxpayer is entitled to know what is the true extent of his liability including penalties, surcharges and interest to which he is liable", and that the failure of the Respondent to articulate these elements of the liability in relation to each taxable period, invalidate the assessment. Further, it is claimed that the relevant date for the purposes of calculating these incidents is September 6, 1999. Mr. Robinson for the Respondent contends that section 38(9) is authority for the proposition that the assessment is deemed valid and binding notwithstanding any error, defect or omission. Section 38(9) states:

> An assessment shall, subject to any amendment on objection or any determination on appeal, be deemed to be valid and binding notwithstanding any error, defect or omission therein or in any proceeding under this Part in relation thereto.

It was submitted that this is clearly a proceeding under this Part VII of the Act and accordingly the Commissioner's assessment should not be considered invalid on account of the failure to state the penalties, surcharge and interest. He argued that the final amount of the assessment is not determined until the court pronounces on it or there is agreement with the taxpayer. Indeed, **Majid** above makes it clear that the VAT tribunal itself, under that legislation, has the right to look at the figure of the assessment and this is so notwithstanding that they have found that the Commissioners did use their "best judgment". Moreover, as Mr. Hamilton himself was to submit later, in proceedings in the Revenue Court, the approach is that every issue of fact is res integra. That includes a finding on the sum assessed. It is only then that penalties, surcharge and interest are calculable accurately.

In regard to these submissions, it appears to me that the proper approach is to look at the legislation as follows. Sections 33(1)(b) and S38(5) speak to when tax becomes due and payable.

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

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

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

38(5) Where an amount which is payable by a registered taxpayer has been assessed and notified to that taxpayer, the amount shall, subject to section 40, be deemed to be the amount of tax due from that taxpayer and may be recovered accordingly, unless the assessment has been withdrawn or reduced.

Section 54 of the Act relates to penalties thereunder. The relevant subsections are set out below.

54(2A) Every person who fails to pay the full amount of tax due and payable under section 33 in respect of a taxable period shall be liable to a penalty of fifteen per cent of the amount unpaid.

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

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

(5) Where the total amount under subsection (4) remains unpaid for one month or part thereof after it is due and payable interest shall be chargeable on that amount at the rate specified in that subsection until the date of payment thereof.

Sections 38(5), 38(9) and the above cited subsections of section 54, when read together, suggest the following.

An assessment is deemed valid and binding, subject inter alia, to adjustments made on appeal or on agreement. Penalties, surcharges and interest are payable in their respective degrees, to tax outstanding and tax may be considered to become outstanding upon the statement of a final figure as determined by the Court or such agreement. This will be in accordance with its findings that is, whether an assessment has been confirmed or altered. If this is correct, then it would seem that it is sufficient for the Revenue to have advised the taxpayer of the tax exigible along with stating that penalties, surcharge and interest will become applicable under S54. This section

outlines clearly the relevant proportions to be charged in the outlined circumstances. This would be sufficient to give the taxpayer adequate notice of the applicable PSI. Any specific figure would only be an approximation as the true amount of penalty, surcharge and interest would be dependent on the court's ruling.

It will be apparent that I do not accept Mr. Hamilton's ingenious submission that since no amount has been stated for penalty, surcharge and interest, there is no assessment in respect of those aspects of the Appellant's liability. The taxpayer must be told his liability. Yet he goes on to say: "The PSI should have been computed up until the date when the assessment was notified with a note that the interest charge was continuing in accordance with section 54(4) and (5)". Even with the stating of these propositions, it must immediately become apparent that both aspects cannot be correct and in my view, the basic submission does not stand up to examination up.

Assessment Excessive

Appellant's counsel submitted that the assessment was excessive in particular, because it did not take account of the payment of $1.1 million paid by the taxpayer to the Revenue on August 4, 1999, "a full month before the Decision dated 3rd September 1999 was made. No recognition in the decision nor Pleadings of this payment which makes it patently clear that the sum demanded ($11,915,869.00) is wrong".

Let me deal with this very briefly. Mr. Hamilton as part of his main submissions has said that an attempt to alter an assessment is not allowable. So that there does not seem to me to be any way in which the Respondent, on Mr. Hamilton's submission, could have accounted for the payment in seeking to defend her assessment. There is no dispute as to the payment of this sum which was stated to be a payment to establish the Appellant's bona fides in pursuing discussions towards a reduction of the assessment. That sum is held on trust for the Appellant and nothing that the Respondent does can change that fact. Secondly, counsel has said that it is "patently clear that the sum demanded, is wrong". But his own submissions are to the effect that there has been no "Notice of Demand", and indeed there has not been. For, as I suggested above, the demand will be made once the court has satisfied itself that the assessment is both good, in the sense of being done to the best judgment on the material at hand, and the amount properly owed.

He submitted also that the Respondent has proffered no evidence to controvert the Appellant's claim that no additional tax is payable and he cites Mrs. Lewis' affidavit at paragraph 12 thereof. I have to say that is a gross over-simplification. For it does not reveal that in the letter by which the $1.1 million was paid, the Appellant through its Managing Director had also referred to a letter sent July 19, 1999 which enclosed "additional schedules and supporting documents" which "when taken into account will reduce the GCT payable for the period under review by you to $4,557,885.86". It is instructive to note that Mrs. Lewis' Supplemental affidavit dated 23rd November 2001 says in paragraph 9:

> That by letter dated 4th August 1999the Company reminded the Respondent that all the schedules and supporting documents had been submitted and urged her to review them as a matter of urgency. The company also paid the sum of one million one hundred thousand dollars as an indication of its serious intent to have the matter resolved"

The "schedules and supporting documents" to which Mrs. Lewis makes mention are those sent by Mr. Stewart in the letter in which he acknowledged an indebtedness of over $4.557 million dollars. Crucially, with respect to Mrs. Lewis' evidence and its impact upon this case, she says that she "conducted a vouching audit of the Company's original/source documents for the relevant period and prepared schedules which confirm that no tax was due or wrong". She appends these schedules. But the question remains. When was this "vouching audit" done? There is nothing in Mrs. Lewis affidavit to suggest that this was done prior to the issue of the decision on September 3, 1999, let alone prior to the date of the assessment earlier. Indeed, it is this same Mrs. Lewis who in her letter of November 10, 1998 highlighted a catalogue of problems with the taxpayer. There is no direct evidence that the components and source documents or the results were ever available to the Respondent when she made her assessment. Mr. Norris Miller in his sworn testimony did say that Mrs. Lewis' figures kept changing. So the validity of the assessment must still be determined by answering the question whether it was a best judgment based upon the material which the Respondent had at the time it was made. In passing I should note that in relation to Dominion, Mr. Miller's affidavit of 30th November 2001 states categorically that with respect to Dominion: "At no time prior to the receipt of the Appellant's Reply dated February 17, 2000, did the Appellant submit schedules, computations and a detailed critique of the audit findings made by the Appellant's accountant". Mr. Miller also specifically

denies that there was ever any agreement that the returns of the Appellant "were correct", an allegation made by counsel in his submissions in relation at least, to Stewarts.

Mr. Hamilton also suggested that the Appellant was entitled to "alter input tax documents" as a way to recover an overpayment of that tax. Whatever the meaning or virtue of that submission, it cannot be intended to suggest that a taxpayer can arbitrarily alter his documents, change the figures, which the Revenue must examine in order to verify taxpayer compliance. I accept the evidence of the Respondent that there were "erasures" and insertions of new figures and hold that whatever the lessons of **C & E Commissioners v Fine Arts Developments 1989 STC 85**, it cannot be taken as giving the taxpayer this right. The taxpayer is more than adequately protected by the provisions of section 46 which allow him to apply for a refund of tax overpaid. That case contemplated correcting errors in subsequent returns not going over previous records and massaging figures to arrive at the result desired. This case does not help the Appellant at all.

I am constrained to say that I do not find, on a balance of probabilities, sufficient evidence of excessive assessment to allow me to disagree with the assessment of the Commissioner.

It will be recalled that this was a consolidated case and although I believe that I have dealt with all the issues which arise, I would wish to note some submissions which were made in the context of Dominion. Citing Viscount Simmonds in **Hochstrasser v Mayes 15 T.C. 490,** counsel for the Appellant submitted: "It is for the Crown seeking to tax the subject to prove that the tax is exigible, not for the subject to prove that his case falls within exceptions which are not expressed in the statute but arbitrarily inferred from it. And he suggests that this approach is not displaced by any statutory provision as is the case with section 76(2) of the Income Tax Act (See **Hill v Baxter [1958] 1 QB 277**. It is suggested that since under the Act the Appellant is a mere conduit, it is the Respondent who has "more knowledge than taxpayer, unlike under Income tax". With respect, this is not correct and is not supported by the authorities. See for example Kerr J.A. in **Edward Shoucair v Commissioner of Income Tax SCCA 58/79 (Unreported)**, judgment given March 31, 1982, who stated at page 22 in relation to the Income Tax Act: "The burden of proving that assessments are unreasonable lies on the taxpayer". But see also the dicta from **Von Boeckel** above which clearly states that VAT "*in the first instance, relies on the taxpayer making*

a return which is a form of self assessment of the tax which is due". See also Majid and Argosy referred to above. I say, with respect, that I do not believe that the **Sangsters Book Store** case cited by Mr. Hamilton provides any assistance to this court.

I should mention that one of the fundamental allegations in the Dominion case is that an examination of the available records at Dominion revealed that total sales on the financial statements for the period 1993 to 1996 differed from the figure given for total sales for the same period on the GCT Returns. There was also ample evidence, not denied by Mrs. Lewis or the Appellants, that there was a dissonance between the purchases, inventory levels and sales which, despite promises was never explained by the taxpayer. Indeed, a letter from the Appellant Dominion stated that: "Audited financial statements for the period were incorrectly stated. GCT Returns were incorrectly computed. Both Input Tax and Output Tax overstated. Some of our invoices cannot be located". However, the taxpayer agreed that there was a positive liability of some "$578,338.79 less previous adjustments of $90,033.00"

On a minor point, one of Mr. Hamilton's subsidiary submissions was that the Respondent's Statement of Case in which it is bound to set out the facts and law upon which she relies binds the Respondent and so she cannot rely upon facts which are not in the Notice of Appeal, Statement of Case or Reply. The fact is that where affidavits are filed and served and there are no counter affidavits objecting to those affidavits and they become part of the record of proceedings, it seems to me that either party may apply to amend its "pleadings" in light of the evidence. In any case, my reading of Kerr J.A's judgment in Shoucair above would lead me to the view that where the evidence is adduced whether by affidavit or by viva voce evidence, (as it may be in the Revenue Court), there must be room to allow appropriate amendment of Statement of Case and Reply as the case may be, to bring the pleadings in line with the evidence. Accordingly, I do not accept that there is any reason to treat as inadmissible per se, facts in the relevant affidavits not included in the pleadings, and this would apply as much to Mrs. Lewis affidavit as to those of Norris Miller.

This has been a matter of some weight and complexity and I wish to commend counsel on both sides for their industry. I apologize for the fact that handing down my decision has taken this

long especially when the matter was filed as long ago as 1999 and I believe some elements were dealt with before the then judge of this court, the late Courtney Orr J. I have spent much time considering the submissions and the relevant legislative provisions. I confess that one of the areas which troubled me as I commenced my deliberations upon the submissions was the use of Industry Standards Ratios. As it is now clear, I found that the use of these in the manner suggested by the evidence before me, did not compromise the assessment. However, I would urge the GCT Department in particular, and the Revenue in general, to be more open with some of their procedures which will assist in taxpayer compliance without compromising the ability of the Department to ensure that taxpayers adhere to the letter of the law. I am satisfied that, whatever the precise nature ISRs, (and there was the evidence in the affidavit of Mr. Miller as to how they were developed and used), they did not, per se, account for the assessments nor for the amounts therein. I am satisfied that the assessments are proper and were raised in the Respondent's best judgment with the material which was at her disposal. I need to make the particular point that I am far from satisfied with the credibility of the affidavit evidence of Mrs. Lorna Lewis, the only witness for the Appellant. I do not believe that her evidence can be relied upon.

In the circumstances it will be apparent that my finding is that these appeals must fail and make the following Orders:

1. The assessment of the Commissioner of General Consumption Tax is confirmed in the case of Stewarts Hardware Limited at the reduced figure of $11,915,869, subject to penalty and interest;
2. The assessment of the Commissioner of general Consumption Tax is confirmed in relation to Dominion House Limited at the reduced figure of $3,138,964 subject to penalty and interest.
3. The Court recommends that Penalty and interest on the tax due in each case shall not apply beyond May 2001 when the matter commenced before me in the Revenue Court. I concede that it is not clear that the court may make such an order. If the better view is that it may not, then I would urge the appropriate Commissioner to recommend the remission by the Minister of such sums as may exceed the sums payable under this order if it is correct.
4. Costs of this Appeal to the Respondent, to be taxed if not agreed.
5. Execution of Judgment stayed for 28 days.