

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 78/87

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WHITE, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.

BETWEEN GORDON TEWANI PLAINTIFF/APPELLANT
AND THE COMMISSIONER OF INCOME TAX DEFENDANT/RESPONDENT
AND THE ATTORNEY GENERAL FOR JAMAICA DEFENDANT/RESPONDENT

Mr. C. Rattray, Q.C., Mr. F.M.G. Phipps, Q.C.
and Mr. E.P. Delisser for Appellant

Mr. N. Fraser and Mr. Burcheson for Respondents

December 17 and 18, 1987 and March 7, 1988

KERR, J.A.:

The Plaintiff, a taxpayer, by an Originating Summons dated 25th August, 1987 sought in the main:

"A Declaration that the Plaintiff is entitled to have the Notice of Restriction issued against him dated the 6th day of February, 1986 by the Commissioner of Income Tax lifted without condition.

Alternatively that such Notice be lifted so that the Plaintiff can leave Jamaica from time to time to perform his legitimate business outside of Jamaica."

Theobalds J. on October 12, 1987 dismissed the summons with costs to the defendants.

Against this decision the Plaintiff appealed. We dismissed the appeal and affirmed the decision of the Court below. I now set out ~~herein~~ my reasons for concurring in that judgment.

The appellant is a merchant of Kingston, Jamaica, dealing in jewellery, clocks and electronic equipment at his place of business known as the "Mall Jewellers" at the Mall Plaza, Constant Spring, St. Andrew. He acknowledged his Income Tax liability in the sum of SIX MILLION FOUR HUNDRED AND EIGHTY-SEVEN THOUSAND EIGHT HUNDRED AND NINETY-FOUR DOLLARS (\$6,487,894.00). On February 6, 1986, the Commissioner of Income Tax, on the basis of this unpaid tax, pursuant to Rule 2 of the Income Tax Rules, served on him a Restriction Order, the operative parts of which read:

"TAKE NOTICE that pursuant to the provisions of Part II of the Second Schedule to the Income Tax Act, you are required not to leave the Island unless at the time of leaving you have in your possession a certificate issued by the Commissioner of Income Tax within the preceeding ninety days stating that you:-

- (a) do not owe any Income Tax, or
- (b) have made satisfactory arrangements for the payment of Income Tax payable by you.

AND FURTHER TAKE NOTICE that if you fail to comply with the requirements of this notice, you may be taken into custody by an Immigration Officer and render yourself liable to penalties as provided by the said Income Tax Act."

By letter dated 12th January, 1987 from the Commissioner of Income Tax, permission was granted to him to leave the island. The letter addressed to the appellant reads:

"You are hereby given permission to leave and re-enter Jamaica at anytime during the period 12th January to 30th April, 1987 as you have made satisfactory arrangements for guaranteeing the payment of your tax liability.

On the 1st May, 1987, the Restriction Order dated 6th February, 1986 will automatically come into force again.

Please show this letter to the Immigration Officer on your departure."

The appellant deposed that within the permitted period, he travelled and returned to Jamaica on several occasions. On 6th July, 1987 a meeting was held at the Revenue Board Office ~~between~~

the appellant and the following Revenue Officers:-

"Mr. McLaughlin - Commissioner of Inland Revenue,
Mr. Brent Harris - Commissioner - Revenue Board,
Mr. Linton Minott - Commissioner - Revenue Board,
Mr. Alfred Martin - Commissioner - Revenue Board,
Mr. James Hamilton - Legal Officer - Revenue Board,
Mr. Moore - Income Tax Department."

to discuss proposals for the settlement of the appellant's Income Tax liability. This "Revenue Committee", as for convenience I shall call the group of officers, proposed the following terms as acceptable arrangements -

"Deposit	\$2,500,000
31.12.87	1,000,000
30.6.88	1,000,000
30.12.88	1,000,000"

and the balance by June, 1989.

Notwithstanding, a letter dated July 9, 1987, from the appellant's Attorney, Clough Long and Company was addressed to the Commissioner of Inland Revenue and copied to the Income Tax Department for Mr. W.N. Moore's attention, to Mr. Brent Harris of the Revenue Board, and to the applicant. The letter, a copy of which was exhibited, after referring to the meeting of July 6, continued thus:

"We are instructed to make a final offer of payment of the amount of \$6,487,894.00 as follows:-

1. An initial payment of \$2,000,000.00
2. The balance payable by half-yearly instalments of \$500,000.00 the last instalment being \$487,894.00.

We are instructed to let you know that if conditions improve, our client will endeavour to pay more than the amount of the half-yearly payments.

We ask for your usual prompt reply."

In keeping with his offer the appellant forwarded a cheque of \$2 million to the Commissioner of Income Tax. This was acknowledged by letter dated July 13, 1987 from the Commissioner of Inland Revenue to the said Attorneys which in its operative parts read:

" Re: Gordon Tewani

I hereby acknowledge receipt of your letter dated July 13, 1987 enclosing cheque in the sum of \$2M. I have to point out, however, that there is no record in my Department of the receipt of your letter dated July 9, 1987.

I hereby confirm that the terms of agreement as discussed at the meeting held on July 6, 1987, and set out below remain unaltered:

Deposit	\$2,500,000
31.12.87	1,000,000
30.6.88	1,000,000
30.12.88	1,000,000
30.6.89	<u>987,894</u>
	<u>\$6,487,894</u>

The integrity of the agreement depends upon prompt action by your client and in this connection, I wish that the balance of the first payment, i.e. \$500,000 be forwarded to me immediately, and the draft Agreement incorporating the terms of payment submitted for approval."

A draft guarantee form had been sent to the Attorneys under a covering letter from the Chairman of the Revenue Board dated July 21, which reads:

"As promised I enclose draft Guarantee embodying the terms which are considered necessary for suspending the restriction notice placed upon Mr. Gordon Tewani.

As indicated to you yesterday (July 20, 1987) payment of the balance of the first tranche (i.e. \$500,000.00) is also a condition precedent for suspending the notice."

In letter dated July 21, 1987 to the Commissioner of Income Tax from the appellant's Attorneys, the letter from the Chairman of the Revenue Board was acknowledged and continued:

"Enclosed find Original Guarantee and copy duly executed by Bank of Credit and Commerce International.

Our client cannot at this time pay the additional \$500,000.00 and settle the balance, as proposed by The Commissioner of Inland Revenue, by payments of three (3) instalments of \$1,000,000.00 at six-months rests with final payment of \$987,894.00.

Your Tax Liability is \$6,487,894.00. Our client has paid \$2,000,000.00 and the enclosed Guarantee, which is for \$4,500,000.00, covers the remainder of your Tax Liability.

Mr. Tewani's liability is now guaranteed in full.

We hereby ask that permission be given for our client to travel between the period 22nd July, 1987 to 6th August, 1987."

To this request for permission to leave the island, no favourable reply having been received, the appellant instituted these proceedings.

The concise grounds challenging the decision of the learned trial judge read:

- "1. That the finding of the learned Trial Judge that the Commissioner of Income Tax had exercised his discretion under Rule 2 (1) of the Income Tax Rules was contrary to the evidence and the weight of the evidence.
2. That the learned Trial Judge never considered adequately, or at all, the significance of the Commissioner of Income Tax having delegated his functions under Rule 2 (1) of the Income Tax Rules to the Commissioner of Inland Revenue. Alternatively,
3. That the finding of the Trial Judge that the Commissioner of Income Tax had exercised his discretion judicially was contrary to the evidence and the weight of the evidence."

It is difficult even on the most generous interpretation of these grounds to place within their ambit Mr. Rattray's first submissions. These were to the effect that once satisfactory arrangements were made for the payment of the tax, as was the case here, and, as a result the restriction had been lifted by the letter of the 12th January, 1987, the attempt to limit the lifting of the restriction was of no effect because neither in law nor in the rules is there any authority given to impose a time restriction on the certificate permitting the applicant to leave the island. Since the certificate of 12th January was issued on the basis that satisfactory arrangements to pay the income tax owing by the applicant had been made, the attempt to impose a time limit was surplusage and the certificate is unfettered by a time limit.

The Income Tax Rules so far as is relevant read:

"2. If the Commissioner thinks fit he may serve on any person a notice requiring that he shall not leave the Island unless at the time of leaving he has in his possession a certificate issued by or on behalf of the Commissioner within the preceding ninety days stating that he -

- (a) does not owe any income tax, or
- (b) has made satisfactory arrangements for the payment of income tax payable by him.

On the application of any person on whom a notice under paragraph (1) has been served, the Commissioner shall issue to him within thirty days after the date of the application, a notice of assessment in respect of all income tax that will be due by him at the date of his intended departure from the Island.

3. Where a notice has been served on a person under paragraph (1), and it has not been withdrawn by a further notice served on him by the Commissioner, that person shall, if he leaves the Island in contravention of the notice, be guilty of an offence and liable on summary conviction to a fine not exceeding fifty dollars or a term of imprisonment not exceeding three months, or to both.

4. A person who leaves or attempts to leave the Island in contravention of these Rules may be taken into custody without warrant by an Immigration Officer for a period not exceeding twelve hours."

This question now argued by Mr. Rattray was not raised before the learned trial judge, but it is of sufficient general import and interest to merit attention. The fault in the argument lies in the falsity of the premises. It is based on the interpretation that the letter of the 12th January lifted or put an end to the restriction order. The basis for the permission to leave the island was, as the letter expressly stated, that the appellant had made "satisfactory arrangements for guaranteeing the payment of your tax liability". I apprehend that the guarantee covered the period for which the permission was granted, and the fact that on 6th July, 1987 a meeting was held to discuss "various proposals for the settlement of (appellant's) income tax liability,"

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indicated indubitably that the "arrangements" of January 1987 were but a temporary guarantee of liability and could not by any stretch of the imagination be considered "satisfactory arrangements for the payment of income tax payable" by the appellant within the contemplation of the Rules. Therefore, the letter in reality granted no more than an amnesty for the period stated therein.

More in keeping with the grounds filed is Mr. Rattray's alternative submission that the discretion to issue the notice under Section 2 of the Income Tax Rules rests with the Commissioner of Income Tax and that discretion must be exercised by the Commissioner of Income Tax and by none other.

Ex parte George Stapylton Barnes (1896) A.C. 147 at page 150.

Further, the words "by or on behalf of the Commissioner", in the rule refer only to the issue of the certificate. Accordingly, the arrangements must be to the satisfaction of the Commissioner of Income Tax and the discretion must be exercised on the basis of his being so satisfied. See Padfield v Ministry of Agriculture (1968) 1 ALL E.R. at page 710. He contended that on the basis of paragraphs 9 and 10 of the affidavit of Woodrow Moore, there was a delegation of his functions by the Commissioner of Income Tax to the Commissioner of Inland Revenue. Further, the payment of \$2 million and the guarantee of \$4.5 million was sufficient because the entire liability was secured by "satisfactory arrangements". Accordingly, on a proper exercise of his discretion by The Commissioner of Income Tax the certificate permitting the appellant to leave the island should have been issued to the appellant. These questions, contended Mr. Rattray, were not dealt with by the learned trial judge and there was an obvious non-sequitur in his reasoning.

Mr. Fraser in reply submitted that no satisfactory arrangements for the payment of the Income Tax due and owing by the appellant had been made. The offer made by the appellant was not satisfactory to the Commissioner of Income Tax and accordingly the appellant was not entitled to have the restriction lifted. Further, from the tenor of the correspondence there was an agreement, but the terms of the agreement had not been met by the appellant. He contended that there was no usurpation of the discretionary power of the Commissioner in relation to the Restriction Order. Further that having regard to the fact that under the Revenue Administration Act, the collection of revenue including income tax is the responsibility of the Commissioner of Inland Revenue; the Commissioner of Income Tax can only know whether or not a tax-payer has paid up his income tax or that the arrangements made by the tax-payer for the payment of income tax liability is being honoured from the information supplied by the Commissioner of Inland Revenue. Accordingly, when a certificate is granted it must be on the basis of information received from the Commissioner of Inland Revenue.

The learned trial judge in his oral judgment said: (p.31)

"(i) There is an issue between the Commissioner of Income Tax and the Appellant as to whether or not the terms of discussion and agreement made between them has been adhered to;

(ii) In the Affidavit of Woodrow Moore at paragraph 8, it was stated:-

'That I have been informed and verily believe that the Plaintiff has considerable assets abroad and is therefore in a position to meet the terms of payment agreed on at the meeting of the 6th of July, 1987'.

(iii) It is my view that neither (i) and (ii) above are relevant."

Now, while the learned trial judge was eminently correct that issue (ii) as identified in his judgment was irrelevant, the same cannot be said of issue (i) because it is the contention of the

appellant before him as before us, that "satisfactory arrangements had been made" and, accordingly, the appellant was entitled to a certificate under Rule 2 of the Income Tax Rules.

Now it is clear from the correspondence that nothing less than a down payment of \$2.5 million and instalments of \$1 million every six months would be considered satisfactory arrangements by the Government Departments concerned, and Mr. Rattray frankly conceded that the Government never accepted the "final offer" of the appellant. Nor was there any obligation on the part of the Commissioner of Income Tax to do so. Accordingly, there existed no satisfactory arrangements for the payment of the income tax due and owing by the appellant.

It was, however, Mr. Rattray's contention that the payment of \$2 million and the guarantee of \$4.5 million was sufficient arrangements to warrant the lifting of the Restriction Order because the debt was fully secured. The argument was erroneously based (i) on equating the present worth of the guarantee, which only is demandable on the happening of certain events, and having a life span from July 22, 1987 to January 31, 1988, with the amount of its face value, and (ii) that the guaranteeing of the liability for a period after which a portion of the debt is still outstanding is "sufficient arrangements" within the contemplation of the Income Tax Rules.

As indicated earlier there is a substantial difference between a temporary guarantee for the amount of the income tax liability and an arrangement to satisfy that liability.

I now turn to Mr. Rattray's argument that the determination whether or not satisfactory arrangements had been made was a matter for the Commissioner of Income Tax and not for the Commissioner of Inland Revenue and that from the evidence in the instant case, there was an abdication of his function by the Commissioner of Income

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Tax and usurpation of that function by the Commissioner of Inland Revenue. The Revenue Administration Act (Act 12 of 1985) Part II established an Inland Revenue Department and the establishment is headed by a Commissioner of Inland Revenue whose functions are defined in Section 5 (1) thus:

"The Commissioner of Inland Revenue shall be responsible for -

- (a) the general administration of the Inland Revenue Department;
- (b) the collection throughout the Island of all revenue except -

- (i) Post Office revenue; and

- (ii) any other revenue which, pursuant to this Act or any other enactment, is required to be collected by some other public officer,

and shall have such other functions in connection with the revenue as may be assigned to him by or under this Act or any other enactment."

Subsection 2 expressly confers on him the powers of a Collector of Taxes under Section 3 of the Tax Collection Act and any other enabling enactment. Subsection 3 extends the powers to Assistant Collectors, while Subsection 4 empowers the Commissioner of Inland Revenue to authorise the Commissioner of Income Tax to collect taxes on behalf of the Commissioner of Inland Revenue.

Part III of the Revenue Administration Act established the Income Tax Department headed by a Commissioner of Income Tax and Section 8 (1) defines the functions of the Commissioner thus:

"The Commissioner of Income Tax shall be responsible for the general administration of the Income Tax Department and shall have such functions relating to income tax as may be assigned to him by or under this Act or any other enactment."

while subsection (2) by reference incorporates the powers of subsection (2) and (3) of Section 5 where the Commissioner of Income Tax is authorised by the Commissioner of Inland Revenue to collect income tax under the provisions of Section 5 (4).

It is manifest that the Revenue Administration Act has introduced a division of labour in relation to Income Tax; - entrusting the collection of income tax to the Commissioner of Inland Revenue while leaving the administration of the Income Tax Department to the Commissioner of Income Tax. The obvious intent of the Act is that the two Departments should be complementary to each other and, accordingly, although overlapping in the exercise of respective functions may not be inconceivable, it ought not to be presumed.

Now in the instant case, Counsel on both sides are not in conflict that the discretionary power to issue a stop order as well as the granting of a certificate permitting an indebted income tax payer to leave the island rests with the Commissioner of Income Tax. What is in argument is whether or not the refusal of the application to leave the island was the decision of the Commissioner of Income Tax.

In his judgment the learned trial judge said: (p.2)

"It seems as a matter of common sense, that if satisfactory arrangements had been made, for the payment of the Appellant's income tax liability, the Notice of Restriction would be lifted. This matter is solely for the Commissioner of Income Tax. If I granted the Declaration I would be removing the discretion placed in the Commissioner of Income Tax alone. The mere fact that the Notice of Restriction is not lifted means that the Commissioner of Income Tax is not satisfied."

The criticism by Mr. Rattray of this paragraph in the judge's reasoning is not unmerited. It is enough to say that this passage contained a number of non-sequiturs. The learned trial judge, however, went on to say: (p. 32)

"I am satisfied that the Commissioner of Income Tax is not happy or satisfied with the arrangements made and has refused to lift the Travel Restriction."

The pertinent question is: Is there evidence to support that finding? The Income Tax Commissioner's nominee, Mr. Woodrow Moore, Income Tax Officer, in his affidavit stated that at the meeting of the 6th July the terms laid down for the payment by the appellant of his outstanding income tax were as set out in the letter of 13th July to the appellant's Attorney. The inference is inescapable that all the members of the 'Revenue Committee', including himself, were ad idem in relation to those terms. The cheque for \$2 million was duly passed by the Commissioner of Income Tax to the Commissioner of Inland Revenue. There is nothing in the correspondence or affidavits to indicate that the Commissioner of Income Tax had resiled from his position or changed his demands from the terms laid down and approved by his nominee on the 6th July. Accordingly, the finding that the appellant's counter-offer was not accepted by the Commissioner of Income Tax was reasonable. Nothing short of a down payment of \$2.5 million would seem acceptable in the circumstances, and it was open to the Commissioner of Income Tax to decline to grant a permit to leave the island on the terms offered by the appellant. There was, therefore, no basis for lifting the Restriction Order. Accordingly, it has not been shown that in refusing his application for permission to go abroad, the Commissioner failed to exercise his discretion or erred in principle in so doing.

In view of this finding, it is not essential to the determination of the appeal to decide whether, based on the statements in the affidavit of Woodrow Moore, there has been a general abdication of the functions of the Commissioner of Income Tax in relation to Restriction Orders. The following are the paragraphs in the affidavit of Moore which formed the basis for this argument -

"9. That the Commissioner of Income Tax can only lift the notice of Restriction on leaving imposed when he is informed by the Commissioner of Inland Revenue that the person on whom the restriction was imposed has made satisfactory arrangements to pay the amount of income tax owing.

"10. That to date the Commissioner of Inland Revenue has not so informed the Commissioner of Income Tax and therefore the restriction has not been removed."

These two paragraphs, infelicitously worded as they are, contain an expression of opinion by Mr. Woodrow Moore. As indicated earlier, the lifting of the Restriction Order is in the discretion of the Commissioner of Income Tax, and I accept as correct Mr. Fraser's interpretation that the role of the Commissioner of Inland Revenue is to provide the Commissioner of Income Tax with the necessary information as to the state of the tax-payer's income tax liability, and whether such arrangements as have been made are being honoured, to enable the latter officer to exercise his discretion whether or not to grant a certificate permitting the tax-payer against whom a Restriction Order existed to leave the island.

For these reasons, I concurred that the appeal should be dismissed and the order in the Court below affirmed. The points of law raised in this appeal were considered of such general and public importance that no order for costs of appeal was made.

WHITE, J.A.

I accept the reasoning of Kerr, J.A. in his written judgment for dismissing this appeal.

WRIGHT, J.A.

I agree with the reasoning of Kerr, J.A. and have nothing to add.