IN THE SUPREME COURT OF BELIZE, A.D. 2013

CLAIM NO: 482 of 2013

BETWEEN

THE BELIZE BANK	**CLAIMANT**
AND	
THE ATTORNEY GENERAL	**1st DEFENDANT**
THE COMMISSIONER OF INCOME TAX	**2nd DEFENDANT**

Keywords: Sections 3, 6 and 17 of the Constitution of Belize: Due Process; Arbitrary Deprivation of Property;

Arbitration: London Court of International Arbitration; Arbitral Award; Enforcement and Implementation of Arbitral Award; Deed of Settlement; Set-off;

Procedure: Availability of Alternative Statutory Remedy; Income Tax Appeal Board;

The Income and Business Tax Act (IBTA): Liability of a Financial Institution for Business Tax; Assessments and Reassessments for Business Taxes; Demand Notices under the IBTA; Payment of Business Tax; Limitation Period & Demand for Taxes Statute Barred;

Public Law: Legitimate Expectation; Abuse of Power by Public Authority.

Before the Honourable Mr. Justice Courtney A Abel

Hearing Dates:

4th February 2014
23rd May 2014
16th July 2014
14th October 2014
29th January 2015
4th February 2015
6th March 2015.

Appearances:

Mr. Eamon H Courtenay, SC and with him Miss Pricilla Banner for the Claimant.

Mr. Nigel Hawke and with him Miss Magalie Perdomo for the Defendants.

JUDGMENT
Delivered on the 6th day of March 2015

Introduction

[1] The Claimant is a financial institution licensed as a bank under the Domestic Banks and Financial Institutions Act and is part of a group, known as BCB Holdings Limited, a Public Investment Company[1] ("**PIC**").

[2] The Claimant, as a PIC Group Bank, is and was at all material times, liable to pay business tax under the Income and Business Tax Act[2] ("**IBTA**").

[3] These proceedings concern the decision of Mr. Kent Clare, the current Commissioner of Income Tax, the 2nd Defendant ("the Commissioner") to issue Business Tax Demand Notices dated 13th August, 2013 ("**the Demand Notices**") demanding that the Claimant pays the sum of BZ$30,534,849.11.

[4] The Commissioner alleged in the Demand Notices that the Business Tax was underpaid by the Claimant for the quarters, 1st January 2001 to 31st December 2005 (the "**relevant period**"), of which the sum of BZ$12,569,624.35 was Business Tax for this period and the balance was interest and penalties arising from such underpayment of Business Tax.

[5] The Claimant has always maintained that it has duly paid the Business Tax for the relevant period (by an agreed set-off as confirmed by a Settlement Deed) and that the 2nd Defendant's demand contained in the Demand Notices is without basis.

[6] During the course of the present proceedings, and after a draft judgment in relation to a large number of issues in the case had been shared with Counsel in the case, the parties agreed, subject to the other determinations which this court had to make on other questions raised (including whether the adjusted taxes claimed were paid for the relevant period), that the total tax debt, after the credit had been applied, is indeed BZ$9,487,370.31 determined as follows:

[1] As defined in Part XI of the International Business Companies Act ("IBCA")
[2] Chapter 55, of the Revised Edition 2000 Laws of Belize.

Description	**Amount**
Tax debt for period 2001 to 2005	BZ$12,569,624.32
Agreed sums paid to Income tax Department in October 2006 to be applied as credit	BZ$3,082,254.01
Balance of Tax Debt	**BZ$9,487,370.31**

[7] As a result of the agreement, the sum of BZ$9,487,370.31 is now the figure which the court has accepted from the parties as being the business Tax for the relevant period being claimed (subject to the question whether this sum was paid for the relevant period and the other issues raised) with appropriate adjustments being made for interest and penalties.

[8] The facts of the present case have also been complicated by additional confusions within the Government of Belize ("**GOB**"), involving some of its various officials, and the parties to the present proceedings.

[9] Significant and many questions of law have been raised by the Defendant as additional complicating factors to the resolution of the present dispute, including such as relate to the Settlement Deed and attempts to settle such disputes by arbitration proceedings before the London Court of International Arbitration ("**LCIA**").

[10] The recent decision of the Caribbean Court of Justice (**"CCJ"**) in CCJ Appeal No CV 7 of 2012, **BCB Holdings Limited & The Belize Bank Limited v The AG of Belize**[3], ("**CV 7 of 2012**") which fully and finally resolved a dispute about the enforcement of an arbitral award made by the LCIA, the law and facts of which interlock with the facts of the present case, also arise as legal obstacles to easy navigation of the issues. The upshot of **CV 7 of 2012** is that the Defendants are

[3] [2013] CCJ 5 (AJ) CCJ Appeal No CV 7 of 2012; BZ Civil Appeal No 4 of 2011. – BCB Holdings Limited; Belize Bank Limited v The Attorney General.

alleging that the Settlement Deed is invalid and that the Defendants are now free to collect the underpaid business taxes and surcharges contained in the Demand Notices; while the Claimant is alleging that it has paid all of such taxes due and that **CV 7 of 2012** does not impact its claim that it has paid the claimed business taxes.

[11] Legal hurdles have also been placed by the Claimant in the Defendants' path to collecting on the Demand Notices which include diverse constitutional and other alleged public order violations by the Defendants, which should entitle the Claimant to succeed in obtaining, inter alia, a declaration that the Demand Notices are unlawful, null, void and of no effect and are unenforceable.

[12] I will now as briefly as possible, with the advantage of a full trial and information provided by the parties to me, plot as simple and straightforward a path through the facts, and by a summary process find a route through these facts and the law; in order to find a resolution of the dispute between the parties.

[13] The major issue for consideration is the following question: whether the Claimant has, as a matter of law and/or fact, duly paid the Business Tax for the relevant period?

Factual Background

[14] On 24th March 1999, the Solicitor General of Belize, at the time, Mr. Gian Gandhi, wrote a letter ("**the Gandhi Letter**") to Belize Holdings PLC (the then parent company of the Claimant) purporting to clarify the basis on which PIC Group companies would have to pay Business Tax and income tax, in light of proposed legislation (in the form of a Bill).

[15] By letter dated 27th March 2000 the then Commissioner, Mr. E. D. Eusey, wrote to Mr. Philip Osborne of the Carlisle Group Ltd[4] with regard to the "pressing issue" of the returns for Business Tax that had been filed by the Claimant and their computation. The Commissioner stated that they were not in agreement with the rates applied and that they needed to discuss the issue of penalties and interest for late filing and payment. In particular the Commissioner stated that:

[4] A company related to the Claimant.

"Mr. Gandhi's letter of 24th March 1999 comes up with a formula that is not in our view consistent with the PIC provisions of the IBC Act and The Business Tax Amendment Act.[5]"

[16] By letter dated 4th May 2000, the Commissioner wrote to Philip Osborne of the Claimant's then holding company, Carlisle Holdings Limited[6], to inform Mr. Osborne that "*the filings for the Belize Bank Ltd. and Advance Systems and Computer Ltd. for Business Tax have been agreed up to 31st March, 2000.*" Based on the sums agreed, payment was duly made by the Claimant.

[17] On 13th June 2002 Mr. Philip Johnson, the President of the Claimant, wrote to the then Commissioner, Mr. Eric Eusey, of the Income Tax Department[7], and also to the Hon. Ralph Fonseca, the then Minister of Budget Planning and Management[8]. The said letter attached a copy of the Gandhi Letter and was in relation to the methodology for the computation of Business tax, where he stated:

"*I trust that the attached will provide the necessary explanation for the tax computations previously submitted by the Bank, and for all future filings I look forward to your confirmation in this regard*".

[18] There were differences at the time between the two sides as to which tax computation was correct.

[19] There was no reply to the letter of the 13th June 2002 from the Commissioner, nor from the Minister of Finance, but instead a reply was sent from the then Minister of Budget Management, Investment and Home Affairs, Hon Ralph H. Fonseca, by letter dated 25 November 2002, in which he stated:

"I confirm that the method used by the Belize Bank Limited to calculate business tax from July 1998 to date, as outlined in your letter to Mr. Eric Eusey of the Income Tax Department dated 13 June 2002 is correct

[5] Under which the provisions Bill in the Gandhi Letter had in its final form as an Act.
[6] As its present holding, BCB Holdings Limited was previously known.
[7] At the time the Commissioner of Income Tax.
[8] Incidentally not the relevant Minister responsible for business taxes, who was the Minister of Finance.

and should form the basis for future filings of business tax payable, therefore there is no additional tax nor penalties payable".

[20] There was therefore at this time, it would appear, no accepted method of computation of Business Tax as between the two sides (the Claimant and the then Commissioner) or indeed the Ministry of Finance, with respect to the requirements of the IBTA. There was clearly a dispute about the computation and the seeds sown for bureaucratic problems and confusion.

[21] The IBTA required financial institutions to pay Business Tax on a quarterly basis. The Claimant filed its Business Tax returns on this basis, and all of the returns filed in relation to the relevant period were accompanied by worksheets which clearly stated how the amount of tax due was calculated. The returns, and payments made pursuant thereto, were made to and accepted by the Revenue.

[22] For the period 1st January 2001 to 31st December 2004 the Claimant then paid business tax to the Revenue in accordance with the rate and methodology and on the most advantageous basis to it, namely the Gandhi Letter.

[23] There is, however, not surprisingly, a difference in tax between the rate and basis contained in the Gandhi letter and the rate which the Commissioner was claiming to be due under the IBTA of BZ$12,569,624.35, and this ultimately became the subject of the Demand Notices and the claim herein by the Commissioner for underpayment. It is therefore this difference, together with interest and penalties, which was in dispute at the commencement of the present proceedings.

[24] On or about the dates stated on the face of the respective assessments[9], the Commissioner raised notices of assessment against the Claimant for the period 1st January 2001 to 31st March, 2005 (together "**the 2001-March 2005 Notices**").

[25] The Claimant alleges, however, that at no time have assessments or reassessments been issued in respect of the period 1st April 2005 to 31st December 2005 and this has been disputed by the Defendants. The Defendants allege that there were assessments for this period received by the Claimant and that is why they did not

[9] All issued between 17th April 2001 and 4th March 2005.

write to the 2nd Defendant to say that assessments were issued and the Claimant was assessed for this period.

[26] On balance, based on the cross-examination of Mr. Coye, the Court is prepared to accept that there were assessments for this period and to consider this case on this basis.

[27] In broad terms, the 2001-March 2005 Notices assessed tax based at the rate, without adjustments, to reflect the methodology in the Gandhi Letter, together with interest and penalties.

[28] The Claimant alleges that between the period January 2001 and March 2005 it filed quarterly Business Tax returns with payments attached.

[29] In 2005 there was a further dispute between the then Commissioner and the Carlisle Croup (of which the Claimant was a part) with regard to tax liabilities totaling approximately $10.5 million and which resulted in a claim in arbitration by the Carlisle Group.

[30] These liabilities were purportedly settled by way of a set-off which was to take amounts which were apparently (or deemed) owed to Carlisle Group (including the Claimant) by the GOB against tax liabilities.

[31] The set-off found its way on the 22nd March 2005 into a Settlement Deed which was executed on this date between the GOB and Carlisle Holdings Limited and which, inter alia, purportedly attempted to settle in full "*all and any liabilities, assessments and claims…arising in respect of Business Tax*" in respect of all periods up to and including 31st March 2005 in exchange for Carlisle Holdings Ltd (including the Claimant) agreeing to withdraw and to abandon its claim against the 1st Defendant.

[32] In the Settlement Deed the set-off in respect of the alleged liabilities consisted of three main components:

(a) The first component was a deferred consideration with a value of $6.9 million.
(b) The second was BTL dividends due to the Carlisle Group in the amount of $4.2 million; and,

(c) The third component was unquantified, but it was to be the value of concessions given to another party, the Prosser Group, against the amount deemed as owed to the GOB by the Claimant.

[33] As contemplated by and as a result of the Settlement, the Carlisle Group withdrew and abandoned its said arbitration claims.

[34] On 4th May 2006 the then Commissioner issued a demand notice against the Claimant demanding payment of in excess of BZ$3,000,000.00 in Business Tax and interest for the period 1st April 2005 to 31st December 2005.

[35] There was then a similar dispute between the Commissioner and the Claimant with regard to the fiscal year ending March 2006 and these liabilities were settled with the payment of approximately BZ$4,280,000.00 to the GOB.

[36] On 12th June 2006 the Commissioner wrote to the Claimant a detailed letter clarifying the methodology used by the Income Tax Department to calculate the tax liability of the Claimant under the IBTA and the IBCA.

[37] On 21st June 2006 an Amendment to the Settlement Deed (" **Deed**") was executed and the parties agreed, inter alia, that upon the payment by the Claimant of further Business Tax of approximately $4,280,000.00 for the year ending 31st March 2006, no further Business Tax would be due from the Claimant for that period.

[38] The Claimant agreed to waive its entitlement to carry forward all prior losses for the period up to 31st March 2006, and the 2nd Defendant agreed not to impose any interest and penalties on the Claimant for the period ended 31st March 2006.

[39] The demand for payment being referred to was the demand for payment above[10] for the period 1st April 2005 to 31st December 2005 for $3,196,830.71, and reference to $4,288,037.34 (approximately $4,280,000.00) includes 1st January 2006 to 31st March 2006[11].

[10] In paragraph 33.
[11] This court has found the precise figures in relation to the demand and liability for taxes difficult to reconcile and has therefore referred (or resorted) to approximate figures.

[40] The Claimant was accepting in 2006 that these liabilities were owed up to March 2006 (which included or covered the period April 2005 to March 2006).

[41] On 10th July 2006 the then Commissioner again wrote a letter to the Claimant further clarifying the methodology used by the Income Tax Department in relation to the IBTA and the IBCA. This letter was stated to replace that of 12th June 2006. Both of these letters were copied to the Minister of Finance as well as the Financial Secretary and neither were copied to the Minister of Budgeting and Planning; and neither letter referred to the Gandhi letter.

[42] On 10th October 2006 the Commissioner wrote to the Claimant stating that "*with the payment of the sum of $4,288,037.34 Bze, the Belize Bank Limited have [sic] settled all outstanding arrears of Business Tax up to the period 31st March 2006.*"

[43] Claims were then made and heard before the LCIA in an arbitration which the Claimant and its holding company had commenced against the GOB. The claims were subsequently withdrawn, and the Claimant alleges that consideration was given by it for the withdrawing of this claim.

[44] On 25th October 2006, the Claimant, acting, inter alia, on the representation of the Commissioner contained in his letter of 10th October 2006, paid the sum of BZ$4,288,037.34 to the Revenue.

[45] A further dispute arose and this was taken to the LCIA by the Claimant and BCB Holdings Limited against the GOB. In this arbitration claim the GOB took no part. Nevertheless, this arbitration claim resulted in an award by the LCIA against the GOB on 20th August 2009 in favour of the Claimant and BCB Holdings Limited, inter alia, in the sum of BZ$40,843,272.34 for breach of contract by GOB ("**Award**").

[46] The Award was then sought to be enforced in the Supreme Court of Belize by the Claimant and BCB Holdings Limited and ultimately found its way to the CCJ as CV7 of 2012[12].

[12] See Note 2 above.

[47] The CCJ in CV7 of 2012 decided that it would be contrary to public policy to recognize and to enforce the Award[13]. The resolution of the present dispute will in some measure turn on the interpretation by this court of the decision in this case which involved factual and legal issues which interlock with the present proceedings.

[48] On 13th August 2013 the Commissioner then wrote to the Claimant enclosing the Demand Notices requiring payment by the Claimant of the claimed sum of BZ$30,534,849.11.

[49] In support of the Demand Notices the Commissioner relied on the CCJ judgment of **CV7 of 2012** alleging, that the Demand Notices for payment of the sum claimed:

> *"…had been in abeyance pending the resolution of litigation in which the Bank had claimed that a Settlement Deed signed with the Government of Belize effectively absolved it from further tax liability for those years."*

[50] This was the first time that the notion that the amounts in the Demand Notices were stated to have been "in abeyance".

[51] The Claimant by letter written by its Attorney-At-Law, Courtenay Coye LLP, dated 28th August 2013, wrote to Mr. Kent Clare, the 2nd Defendant, in response to the Demand Notices and requested that the 2nd Defendant re-consider his decision to issue such Notices and to formally withdraw them and in the meantime sought the written undertaking of the 2nd Defendant not to take any further action to enforce payment pending resolution of the matter.

[52] The reasons given by the Attorneys for the Claimant in the 28th August 2013 letter in support of its request for re-consideration of the decision to issue the Demand Notices, later formed essential planks of its case at the present trial and the absence of a response resulted in the Claimant successfully applying for an injunction as well as commencing the present action.

[13] Much more will be said later of this seminal decision.

[53] For the avoidance of doubt it is worth stating, in concluding this detailed summary of the factual background, that the way in which the facts and matters developed as between the Claimant and the 2nd Defendant, in particular, and with the GOB in general, leads this court to conclude that there was, unfortunately, significant bureaucratic confusion and misunderstandings which has not made the consideration of this case easy.

[54] There exists, in this court's view, however, some facts and matters for consideration, and some questions for resolution, based on or independently of the Deed, as to whether there was an understanding that such claimed tax debt had been paid.

The Court Proceedings

[55] On the 13th day of September 2013, the Claimant filed a Fixed Date Claim Form (for numerous Constitutional Reliefs by way of Declarations) and an injunction against the 2nd Defendant also dated 13th September 2013.

[56] More specifically the Claimant claimed:

(a) A Declaration that the Demand Notices are unlawful, null and void and are unenforceable as in issuing them the 2nd Defendant

(i) acted irrationally and/or in bad faith,

(ii) abused his power;

(iii) acted in breach of the Claimant's legitimate expectation that the Claimant had satisfied all its tax liabilities for the period January 2001 to December 2005.

(b) A Declaration that any action to enforce the Demand Notices will breach the Claimant's legitimate expectation that the Claimant had satisfied all of its tax liabilities for the period January 2001 to December 2005.

[57] The Fixed Date Claim Form was supported by the First Affidavit of Michael Coye dated 13th September 2013.

[58] Along with the Fixed Dated Claim Form were filed a Notice of Application for an Injunction dated the 13th September 2013 and the Affidavit of Michael B. Coye dated 13th September 2013.

[59] The Application was heard on the 4th October 2013, and the Court granted an injunction restraining the 2nd Defendant from seeking to enforce the payment of the claimed Business Tax until the hearing and determination of the claim.

[60] On the 15th November 2013, this court then gave certain consent directions for the trial of the claim which was fixed for 4th February 2014. The directions were substantially complied with and the claims eventually came on for trial on the 4th February 2014. The court heard the evidence of Mr. Michael Bernard Coye and the uncontested evidence of Ms. Daphne McFadzean for the Claimant and the evidence of Mr. Kent Derrick Clare for the Defendants.

[61] Substantial written Submissions of the parties were filed, which assisted the court greatly. Oral Submissions were made by the Claimant on the 23rd May 2014 and by the Defendants on the 16th July 2014.

[62] On the 14th October 2014, I handed down a judgment in draft and requested Counsel in the case to assist the court by making further submissions on certain matters which required further arguments and assistance.

[63] I am very grateful to Counsel for their patience and for providing the requested assistance in the form of further written submissions and oral arguments which allowed me to finalize the present Judgment.

[64] For convenience and to make the present judgment readable, I have decided to incorporate the amendments made to the draft judgment and the additional matters seamlessly into this final judgment. I hope this approach will lead to an efficient, effective and convenient disposal of the case.

The factual and legal contentions of the parties to the proceedings

The Claimant's Contentions

[65] The Claimant makes a large number of factual and legal (including constitutional and other public law) contentions, which the court will not attempt to fully

enumerate at this stage. But suffice it to say that the Claimant contends that the central point of the claim falls within a very narrow compass and raises fundamental issues of public law.

[66] The Claimant's main contention is that it has paid the taxes in question by way of the Deed (and the consideration contained therein) by which it has entirely discharged the tax debt claimed or any debt.

[67] The Claimant also contends that the interest and penalties claimed are not due to the Defendants.

[68] In these circumstances, the Claimant asks the court to grant the reliefs claimed in its Fixed Date Claim Form.

[69] Based on the above contentions, the main question is whether the Claimant, as a matter of law and/or fact, has duly paid the business Tax for the relevant period.

The Defendants' Contentions

[70] The Defendants by way of a preliminary point contend that there is a statutory alternative remedy provided by Sections 42 and 43 of the IBTA (to object to a statutory Income Tax Appeal Board against the Assessments and thereafter to appeal to the Supreme Court) and the Claimant, as a matter of law, ought to be required to exhaust that remedy before coming to this Court for redress. That this court, therefore, should bifurcate the issue of constitutionality from the question of quantum in order not to usurp the functions of the Income Tax Appeal Board, and should now therefore confine itself to the issue of constitutionality and not go into questions of quantum.

[71] The Defendants in addition attempt to answer many of the Claimant's legal and constitutional contentions but crucially contends that the CCJ has authoritatively determined that the provisions of the Deed were repugnant to the legal order of Belize, were unconstitutional and void and therefore illegal; and that there is no legal impediment to collecting the taxes claimed[14] (whether on constitutional or

[14] Now agreed to be BZ$9,487,370.31.

other public law grounds or otherwise) and that the claimed statute of Limitation does not arise.

The Issues

[72] It should immediately be obvious that the dispute between the parties are complex and involved and could easily have become unmanageable if not approached appropriately (to cut the Gordian knot presented by a pragmatic and logical as well as simple approach to the matter).

[73] The central issue for determination, whether the Business Taxes have been paid, is that simple approach, towards dissolution of the dispute between the parties including possibly resolving the questions of liability and quantum. This issue will also aid in resolving any question of credibility of the parties.

[74] But the question posed by the Defendants (the Alternative Remedy Point) must first be resolved.

[75] This court will not be able to avoid the many legal questions which have been raised by the parties before making a final determination and disposition of the remaining issues in the case. These legal questions are as follows:

(a) Was the Alleged Denial of due Process contrary to Section 6 of the Constitution?

(b) Was there an Arbitrary Deprivation Contrary to Sections 3 and 17 of the Constitution?

(c) Did the Commissioner act unfairly, irrationally or abuse his powers in issuing the Demand Notices.

(d) Is the Demand for Taxes Statute Barred?

(e) Did the Demand Notices issued by the Commissioner breach the Claimant's Legitimate Expectation that its Taxes had been Settled?

(f) Were the Demand Notices in violation of the IBTA and therefore unlawful?

[76] Additional questions arise in public law relating to the interest and penalties which the Defendants are claiming.

[77] But first an outline of the constitutional and statutory (IBTA) frameworks is necessary.

The Law

The Constitution of Belize

[78] Section 2(1) of the Constitution of Belize provides:

> *"This Constitution is the supreme law of Belize and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.*

[79] Section 3(d) of the Constitution of Belize, as part of its protection of Fundamental Rights and Freedoms, provides that every person in Belize is entitled to:

> *"..protection from arbitrary deprivation of property"*

[80] Section 6(1) of the Constitution of Belize provides:

> *"All persons are equal before the law and entitled without discrimination to the equal protection of the law."*

[81] Section 17(1) of the Constitution of Belize then spells out in some considerable detail the nature of the constitutional protection from arbitrary deprivation of property, including that:

> *"No property of any description shall be compulsorily taken possession of an no interest in or right over property of any description shall be acquired except by or under a law"* [providing for reasonable compensation, right of access to the courts etc.].

The Income and Business Tax Act

[82] Income taxes generally (and business taxes as a subset of such taxes) are governed by the IBTA.

[83] The Minister with responsibility for Income and Business Tax under the IBTA is the Minister of Finance[15].

[84] Under Section 3 of the IBTA the Governor-General appoints a Commissioner of Income Tax who is one of the persons (if not the principal person) responsible to determine, receive and account for income tax. Such Commissioner is specifically responsible, under the IBTA, for preparing assessments records and for generally carrying out its provisions and exercising powers under it delegated or vested in him/her.

[85] The IBTA is divided into three Parts.

[86] Part I[16] deals with general matters (including establishing a system and provisions of and for the imposition, assessing, collecting, administering and dealing with disputes in relation to such taxes).

[87] Part II[17], which has no relevance to the present claim, deals specifically with Income Tax arising from Petroleum Operations.

[88] Part III[18] relevantly deals with Business Tax. As noted the provisions specifically applicable to Business Tax in the IBTA is to be found in Part III, but by Section 104 the provisions of Part III is made to apply "*notwithstanding anything to the contrary contained in Parts I and II of the IBTA or any other law*". Thus the provisions of Part III shall apply where such provisions conflict with any provision of Part I or II. In other words Part III trumps any other part.

[89] Under the provisions contained in Section 38 of the IBTA, the Commissioner is empowered to make assessments, and it is provided that: *"Liability for tax shall not be affected by the fact that no assessment has been made.[19]"*

[90] The Commissioner is required by the IBTA to prepare assessment records and is required to serve a notice stating the amount of the tax payable and informing the

[15] See Section 41 of the Belize Constitution and Section 2 of the IBTA (the Interpretation Section).
[16] Sections 1 to 97 of IBTA.
[17] Sections 98 – 103 of IBTA.
[18] Sections 104 – 120 of IBTA.
[19] By Section 38(8).

person of their rights[20]; and it is also provided that if any person disputes the assessment that such person may apply to the Commissioner by notice in writing to review and to revise the assessment made upon him/her and that such notice shall state the precise grounds on which the assessment is disputed[21].

[91] A whole procedure for disputing an assessment is established within the IBTA with a right of application to the Income Tax Appeal Board ("**the Board**") to hear and determine objections against assessments. The Board, following a hearing in accordance with a prescribed procedure and the determination of the merits of any objection, then establishes the assessment with the result that the tax payable is determined.

[92] There is then established by the IBTA a further appeal on a point of law to a judge in chambers to determine any question of law arising on the objection and the decision of the Board.

[93] This procedure, established within the IBTA for disputing an assessment, is the subject of the 'alternative remedy' point being raised by the Defendants as a procedure which the Claimant was required to exhaust before making any constitutional challenge before this court. I will later deal with this point separately under its own heading.

[94] It is to be noted that the provisions contained in Section 53 (2) and (3), which have been challenged by the Claimant as unconstitutional are, specifically:

> *"(2) A notice of a review or an objection or an appeal against the assessment made by the Commissioner shall not result in the suspension of such assessment, and the entire tax due as determined by the Commissioner shall be payable before any such review, objection or appeal is entertained.*

[20] By Section 42.
[21] Section 42(2).:

(3) The Chief Collector shall in every case enforce payment of the tax as assessed by the Commissioner irrespective of any pending review, objection or appeal."

[95] These latter provisions, which have been, in some quarters described as a "pay to play" clause, will later in this judgment be the subject of more detailed consideration.

[96] Section 55 then makes provision for the imposition of a penalty for non-payment of tax, and for the enforcement of payment by serving a demand note[22] and specifically states that if any tax is not paid within the period prescribed the Chief Collector shall serve a demand note upon the person assessed, and if payment is not made within thirty days from the date of service of such demand note, the Chief Collector may proceed to enforce payment as provided in Sections 57 to 59.

[97] Under Section 57 it is provided that:

All taxes, penalties, costs or other amounts payable under this Act, or under any rules made thereunder, are debts due to the Crown and recoverable as such in any court of competent jurisdiction or in any other manner provided by this Act.

[98] Under Section 106 of the IBTA is established the tax to be known as "business tax" which is levied upon and paid by every company (whether corporate or unincorporated) at the rates specified in Section 107 of the IBTA on defined receipts in Belize or elsewhere. The tax on such monthly receipts, under Section 107, commencing from July 1, 1998, shall be levied at the rates set out from time to time in the Ninth Schedule to this Act.

[99] The Ninth Schedule to the IBTA contains the provision relating to Receipts of financial institution licensed under the Banks and Financial Institutions Act, such as the Claimant, which was stated to be 10% provided that in the case of a financial institution which falls within a "Pic Group" as defined in the International Business Companies Act, the rate shall be 4%.

[22] This being the provision under which the Demand Notices were served on the Claimant.

[100] It is common ground between the parties that under the IBTA, the Claimant, being part of a PIC Group, under the International Business Companies Act, sets what the applicable rate of tax for the relevant period is and that none of the receipts of the Claimant are exempt from such tax.

[101] Part III of the IBTA then sets out provisions for financial institutions, such as the Claimant, to file a return quarterly[23] and, inter alia, imposes a penalty of ten percent of the amount due or assessed for each month or part of a month in which the return was not delivered, as well as for the payment of interest[24].

[102] Specifically Section 109(2) & (3) of the IBTA provides:

> *"(2) Whoever fails to file a return required under subsection (1) of this section commits an offence and shall be liable on summary conviction to a fine not exceeding ten thousand dollars and in default of payment of fine, to imprisonment for a term not exceeding two years.*
>
> *(3) Without prejudice to subsection (2) above, every person who fails to file a return and pay the tax due, within the prescribed time, shall be liable to pay a penalty of ten percent of the amount due or assessed for each month or part of a month in which the return was not delivered continuing for a period of twenty four months, and in addition, shall be liable to pay interest at the rate of one and a half per centum per month."*

[103] Under the IBTA, the Commissioner may then accept the return and make an assessment or refuse to accept the return and determine to the best of his judgment the amount of tax payable and assess accordingly[25], or where a return has not been delivered the Commissioner may then use his/her best judgment to determine the proper amount of tax due and make an assessment accordingly[26].

---

[23] Section 109 (1) of the IBTA.
[24] Section 109 (3) of the IBTA.
[25] Section 110 (1) of the IBTA.
[26] Section 110 (2) of the IBTA.

[104] To aid in making an assessment the Commissioner may require a company to furnish a return of receipts and to produce the company's books, bank accounts, statement or other documents to him/her[27].

[105] The provision of Section 110(5) of the IBTA, when read alongside Section 53 has been challenged by the Claimant as part of the impugned unconstitutional "pay to play" section as it provides:

> *"The Tax assessed under this section is payable to the Commissioner by the person or entity assessed as a debt due and payable without further demand notwithstanding any review or appeal made under this Act and such tax or part thereof shall be refunded if the review or appeal is determined in favour of the person or entity."*

[106] It is undoubtedly the case that the conjoined effect of Sections 53(2), 53(3), 57 and 110(5) of the IBTA when read together effectively denies or significantly curtails the Claimant's or any tax payer's right of access to the review and appellate processes established by the IBTA. As this is so, if the Claimant, and indeed any other taxpayer, does not have the monies to pay the claimed taxes they effectively lose the right to such legal processes. I will have to therefore decide whether this is constitutionally permissible and be allowed to stand or be struck down; which I will do later under its separate heading.

[107] The IBTA then makes provision for additional assessments where it appears to the Commissioner that any person or entity liable to pay tax has not been assessed or has been assessed at a lower amount than that which ought to have been charged.

[108] Section 111(1) of the IBTA makes provision for additional assessments as follows:

> *"Where it appear to the commissioner that any person or entity liable to pay tax has not been assessed or has been assessed at a lower amount than that which ought to have been charged the*

[27] Section 110 (3) of the IBTA.

Commissioner may, at any time within the year of assessment or within six years after the expiration thereof, assess such person or entity at such additional amount as according to his judgment ought to have been charged, and the provisions of this Act as to notice of assessment, appeal and other proceedings shall apply to such assessment or additional assessment and to the tax charged thereunder."

[109] Thus by this provision the Commissioner is allowed at any time within the year of assessment or "*within six years after the expiration thereof"* to assess such person or entity at such additional amount "*as according to his judgment ought to have been charge*" with the provisions of this Act as to notice of assessment, appeal and other proceedings applying to such assessment or additional assessment and to the tax charged thereunder.

[110] The question also arises whether this provision establishes a limitation period which may bar the bringing of claim outside of the six- year period, and whether this provision is applicable to the facts of the present case.

[111] Section 111(5) of the IBTA then goes on to provide that the provisions relating to assessments, review, objections, appeals, collections and the recovery of income tax contained in Part 1 of the Act applies to assessments, review, objections, appeal, collections and the recovery of tax under this Part.

The Alternative Remedy Point

The Case of Bevans v Public Service Commission

[112] The Belize Court of Appeal case of **Bevans v Public Services Commission**[28], dealt with the question which may arise, such as within the IBTA, where a statute provides an alternative appeals procedure, such as the IBTA in relation to the Board and on appeal therefrom to a Judge, and whether the Supreme Court could be approached, by way of judicial review of a decision of a Commissioner, before

[28] [1996] 3 BLR 155.

following the statutory appeals procedure, or whether a person aggrieved must first exhaust such alternative procedure and remedy.

[113] The case of **Bevans v Public Services Commission**, is binding on this court, and in my view, establishes and provides support for the following applicable legal propositions:

(a) Generally, where there is an alternative remedy, and especially where Parliament has provided a statutory appeal procedure, it is only exceptionally that judicial review would be granted.

(b) In determining whether an exception should be made, and judicial review should be granted, the Court while looking carefully at the suitability of the statutory appeal process in the context of the particular case and in the context of the statutory provisions, must ask itself what is the real issue to be determined and whether the statutory appeal procedure is suitable to determine it.

(c) In the application of the above principle, and in determining whether there are exceptional circumstances (which phrase may defy definition), it is not necessarily inadvisable to rely on prior cases.

(d) Where, as in the case under review, the only issue raised is the jurisdiction - of the Board in the present case – although one which can be decided by it, is clearly an issue fit for judicial review.

(e) There must be exceptional circumstances to justify the application for judicial review rather than the appeal procedure provided and the court in exercising its discretion to judicially review a decision will do so very rarely where there is an alternative remedy.

(f) Such exceptional circumstance would be an unusual circumstance where it is wholly indistinguishable from "the general run of cases" which would come before the appeal body (in the present case the Board).

(g) An unusual, and therefore exceptional or rare circumstance, would be a case, such as then being considered by the Court of Appeal, which involved a

challenge to jurisdiction, as such a challenge might not be appealable through and by the statutory process and may have to await the full determination of all the issues before challenging the question of jurisdiction which may then succeed.

[114] As noted above[29], the Defendants have made submissions regarding the availability of an alternative statutory remedy and the bifurcation of the issue of constitutionality from the question of quantum.

The Case of Dean Boyce v Attorney General of Belize

[115] The Defendants have also relied on the Judgment of Legal J in the case of **Dean Boyce v Attorney General of Belize**[30] which is a case in which the Commissioner of Income Tax assessed the Claimant for Income Taxes and in which the decision of **Bevans v. Public Services Commission** is relied upon.

The Submissions

[116] The Defendants submit that while the constitutional challenge to Sections 53(2) and 53(3) of the IBTA cannot be decided by the Board, that on the facts of this case (including that the claim hinges on the set-off and the Deed as well as their "untenable" argument on the CCJ decision) all the other issues raised in the claim challenge the tax assessed by the Commissioner and ought to be reserved for consideration by the Board.

[117] The Claimant on the other hand argues that:

(a) the provisions contained in Sections 42 and 43 are not alternative remedies as these sections are in relation to assessment notices and not demand notices (which are the subject matter of the present claim);

(b) the Board does not have jurisdiction to consider and determine the issues raised in the present proceedings as there is no right of appeal from demand notices; and,

[29] In paragraph 67.
[30] Claim No. 472 of 2010

(c) the present case goes to both the lawfulness of the demand notices and to the jurisdiction of the Commissioner which are both a major part of the Claim.

This Court's Conclusions

[118] I have carefully considered the arguments and have accepted the reasoning of the Claimant in their opposition to the preliminary point of the Defendants.

[119] On the facts of the present case I have concluded that there is no alternative remedy provided by Sections 42 and 43 of the IBTA as the present proceedings relate to Demand Notices and not Assessments as required by the IBTA.

[120] In addition, I have concluded that even if such sections did provide an alternative remedy, on the facts of the present case, and its issues, exceptional grounds do arise for entertaining an application for judicial review.

[121] In my view the multifarious issues raised for determination (including constitutional and other public law issues) also makes the Board a wholly unsuitable tribunal for the consideration of such issues.

[122] In addition, because of the multiplicity of interlocking issues, the present proceedings exceptionally falls into one of those rare cases (and is distinguishable from 'the general run of cases') where judicial review ought to be entertained by this court.

[123] Also, I have determined that the bifurcation of such issues, such as suggested by the Defendants, would not result in completely and finally determining all matters in controversy between the parties, but would rather result in an unnecessary and undesirable fragmentation of the proceedings resulting in a multiplicity of legal proceedings and of all the matters in controversy between the parties. This in my view would result in an inefficient and wasteful use of this court's time and resources, contrary to, and as required by good practice[31] and the overriding objectives of the Civil Procedure Rules.

[31] See Section 38 of the Supreme Court of Judicature Act, Chapter 91 Revised Edition Laws of Belize.

[124] Finally, I have also determined that this application should have been made at an earlier stage, such as at case management, on an application to direct a separate trial of an issue, and ought not to have been taken as a preliminary point after the action had been set down for trial.

Due Process Contrary to Section 6 of the Constitution and the Right of Access to the Review and Appellate Processes In the IBTA.

[125] The Claimant submits that Sections 53(2), 53(3), 57 and 110(5) of the IBTA, (the conjoined effect of which is that any objection or review does not in the interim suspend the assessment, enforcement, recovery or the payment of the tax assessed pending) when read together, and when applied effectively denies its right of access to the review and appellate processes set out in the IBTA, with the effect that the guarantee of due process secured by Section 6 of the Constitution is denied.

[126] The Claimant further submits that these sections simultaneously deprive it of its right to protection from arbitrary deprivation of property.

[127] The Claimant relies on the case of **British American Insurance Company Limited v The Attorney General of Antigua and Barbuda**[32], **Tolstoy Miloslavsky v. The United Kingdom**[33], **Harvest Sheen Ltd. and Another v The Collection of Stamp Revenue**[34] and the case of **In R v Home Secretary ex parte Saleem**[35], and inter alia submits, that its due process rights, secured to it by Section 6 of the Belize Constitution, require that it has access to the Board. That the right of access may be limited, reasonably and proportionately, but any such limitation must not restrict or reduce the very essence of the right of access, and must pursue a legitimate aim and be proportional to the aim sought.

[128] The Claimant also referred to the case of **Anderton v Clwyd County Council (No 2)**[36] and submits that in the instant case the effect of Sections 53(2), 53(3) and 110(5) of the IBTA, which confer no discretion on the Commissioner or the Board

[32] Civil Appeal No. 20 of 2002.
[33] [1995] ECHR 25.
[34] 1997] HKCFI 76.
[35] [2001] 1 WLR 443.
[36] [2002] 1 WLR 3174.

to ameliorate the situation in such a case as the Claimant presently finds itself, is to restrict and reduce its right of access to the extent that the very essence of the right to access the appellate process is denied. This is because of the disproportionate effect that payment would have on the Claimant should it exercise its rights of appeal under those sections.

[129] The Claimant also submits that there is no legitimate aim secured by insisting that the Claimant must pay the full amount claimed before it can be heard by way of objection. It is manifestly punitive. As such, the clog on the Claimant's right to review or appeal is decidedly disproportionate and should be struck down as unconstitutional.

[130] The Claimant further submits that Sections 53(2), 53(3) and 110(5) contain policy issues which fall outside the jurisdiction of this Court. That it was not open to the Court to use the blue pencil to modify the section of the Act to bring it into conformity with the Constitution. That Sections 53(2), 53(3) and 110(5) must therefore be struck down as unconstitutional to the extent that they are in violation of the Bank's right to due process as secured by Section 6 of the Constitution.

[131] The Defendants rightfully, in my view, appear to be conceding that Sections 53(2), 53(3) 57, and 110(5) of the IBTA, when read together, and when applied, effectively denies the Claimant a right of access to the review and appellate processes set out in the IBTA, with the effect that the guarantee of due process secured by Section 6 of the Constitution is curtailed or denied.

[132] But, it is submitted by the Defendants, that such provisions should not be struck down as unconstitutional but that in accordance with Section 2 of the Constitution this Court is entitled to modify, or 'blue pencil' the relevant sections of the IBTA to bring them into conformity with the Belize Constitution.

[133] I therefore invited the assistance of Counsel on both sides in my draft judgment, to make further submissions to the court as to what 'blue pencil' may be used in relation to the relevant provisions of the IBTA so that the impugned provisions may be brought in line with the Constitution of Belize. I expressed my preliminary view,

then, that on the facts of the present case that it is absolutely necessary for this court to make a definitive determination on this question.

[134] This question, which is a first order question, in my view needs to be considered at the outset, and can, in my view, be disposed of much more easily than at least one of the other questions on which I sought further assistance. This is so because there is a consensus that sections 53(2), 53(3) 57 and 110(5) of the IBTA, when read together, and when applied, effectively denies or at the very least significantly curtails the Claimant's a right of access to the review and appellate processes set out in the IBTA, with the effect that the guarantee of due process secured by Section 6 of the Belize Constitution may be denied.

[135] But, it is submitted by the Defendants, that such provisions should not be struck down as unconstitutional but that in accordance with Section 2 of the Belize Constitution this Court is entitled to modify, or 'blue pencil' the relevant sections of the IBTA to bring them into conformity with the Constitution.

[136] Upon careful review of the impugned sections and having heard Counsel on both sides I have determined that the best approach is to strike down the offending parts of the Act without the need of any further blue penciling, by way of amending, any part of it.

[137] This is in accordance with the CCJ case of **The Attorney General of Belize v Philip Zuniga et al**[37], where the CCJ applied the doctrine of severance to read down the unconstitutional or offending parts of the impugned law. The Court stated that:

> *"In mandating that a law inconsistent with the Constitution is void to the extent of its inconsistency, the Constitution sanctions the principle of severance and encourages its exercise where possible. When faced with a statute that contains material that is repugnant to the Constitution, the court strives to remove the repugnancy in order, if possible, to preserve that which is not. As long as the*

[37] [2014] CCJ 2 (AJ).

constitutional defect can be remedied without striking down the entire law, the court is obliged to engage in severance. In some cases it is not difficult to do this. But in other cases it is necessary to invalidate an entire Act so that, if it wishes, Parliament can have another go at the legislation. The court will do this because, broadly speaking, what remains after judicial surgery is incoherent or so impairs the legislative object that the constitutionally valid part cannot be said to reflect what Parliament originally intended.[38] *"*

[138] I will therefore excise the offending part of Section 53(2) and (3) which is:

"….and the entire tax due as determined by the Commissioner shall be payable before any such review, objection or appeal is entertained.

(3) The Chief Collector shall in every case enforce payment of the tax as assessed by the Commissioner irrespective of any pending review, objection or appeal."

[139] Specifically Section 53 (2) and (3) as excised (with the offending part struck through) will now appear as follows:

"(2) A notice of a review or an objection or an appeal against the assessment made by the Commissioner shall not result in the suspension of such assessment~~, and the entire tax due as determined by the Commissioner shall be payable before any such review, objection or appeal is entertained.~~

~~(3) The Chief Collector shall in every case enforce payment of the tax as assessed by the Commissioner irrespective of any pending review, objection or appeal~~."

[140] Once excised it is for the Parliament, if it so desires, to make any additional amendment to add any other provision (which it considers necessary or desirable)

[38] Ibid at paragraph 88.

to effect any policy consideration, provided it is in conformity with the Belize Constitution.

[141] In my view the above surgical excision is sufficient to remove the repugnancy in order, if possible, to preserve that which is not, and the constitutional defect can be remedied merely by a surgical removal of the offending part without striking down the entire law and thereby without any difficulty, the court engaging, in the business of invalidating the entire Act. Parliament can have another go at amending the legislation if it so desires. Thus, broadly speaking, what remains after excision is not, in my view incoherent or so impairs the legislative objective, that the constitutionally valid part cannot be said to reflect what Parliament originally intended.

[142] In my view, any further need of any 'blue pencil' is obviated and there is no further need for tinkering with the provisions of the IBTA to bring it in line with the Constitution.

Whether the Claimant has duly paid the business tax for the relevant period ?

[143] In seeking to make a final determination of the issues in this case, I will now first address the central question for determination: whether the Claimant, as a matter of law and/or fact, has duly paid the Business Tax for the relevant period?

[144] The Claimant alleges that the Commissioner's demand for payment (in the Demand Notices and as adjusted by agreement of the parties) is in error as it has paid the taxes by way of set-off as contained in the Deed by the three components described above[39].

[145] The Claimant relies on the evidence of the 2nd Defendant who, when he was crossed-examined on the question of the Deed and of the payment of taxes by way of the set-off, stated that he was not in a position to speak for the Government and he did not deny that the taxes had in fact been settled as asserted by the Claimant. That in answer to the suggestion that the GOB accepted that it had been paid by way of the set-off, the 2nd Defendant merely stated:

[39]See Paragraph 32 above..

"A. Well here is what I can speak to, the Income Tax Management at the time, including myself, were not of the opinion that those taxes had been settled, that is what I can speak to, what I know. In terms of whether the Government accepted that those had been satisfied I cannot express an opinion."

[146] The Claimant therefore submits that as a matter of fact, and in the absence of any evidence from the GOB on this question of fact, but merely evidence from the Commissioner, this Court ought to conclude that the taxes were in fact settled as testified by Mr. Coye.

[147] The Defendants on the other hand rely almost entirely on the CCJ's decision in **CV7 of 2012**, to ground their case that there was no settlement of the taxes now being demanded by the Commissioner.

[148] I have in detail carefully examined this CCJ decision to determine if there is any merit in this submission. I have also carefully looked at the facts on which the CCJ based its decision and carefully scrutinized the issues which it considered (particularly the public policy point in relation to the enforcement of the Award), as well as the reasoning of the CCJ in arriving at its decision, and the decision which was reached in the case.

[149] I will not here set out at any length the process by which I analysed the CCJ's decision but I will simply observe the conclusion to which I arrived.

[150] The CCJ's decision in **CV7 of 2012** significantly and authoritatively determined:

(a) That implementation of the provisions of the Deed, without legislative approval, and without the intention on the part of its makers to seek such approval, is indeed repugnant to the established legal order of Belize; and

(b) That in a purely domestic setting, they would have regarded the implementation and enforcement of the Deed as unconstitutional, void, and completely contrary to public policy.

[151] I also noted that in the circumstances of the case, on which the CCJ expressly based its decision, the CCJ decided that it would be contrary to public policy to recognize and to enforce the Award.

This Court's Conclusion on the Payment of Taxes, Legality of the Deed and CCJ Case

[152] I have concluded that the question of the appropriate rate of Business Tax leading to the calculation of taxes, arising from confusion created by the Gandhi letter is, not a real issue. The Gandhi letter being an expression of opinion about a Bill, not the IBTA, is an opinion which emanated not from the tax department or the Commissioner (as it ought to have done to be authoritative), but from a person or body outside of it.

[153] In the event of confusion, as there clearly was, the opinion of the Commissioner, as the person responsible under the IBTA to determine tax matters etc. should be operative and should certainly, in my opinion, trump that of the Solicitor General.

[154] Ultimately, I have noted, therefore, and subject to the determination which this court has to make on the question of principle under consideration in this case (as to whether the taxes were paid for the relevant period), the parties agree that the total tax debt, after the credit has been applied is BZ$9,487,370.31 and this agreement, which is determinative of the calculation of the tax I have accepted from the parties, and will therefore determine, as follows:

Description	**Amount**
Tax debt for period 2001 to 2005	BZ$12,569,624.32
Agreed sums paid to Income tax Department in October 2006 to be applied as credit	BZ$3,082,254.01
Balance of Tax Debt	**BZ$9,487,370.31**

[155] It must be stated at the outset on the other factual matters for determination that generally I preferred the evidence of the present Commissioner who gave

evidence for the Defendants and whose evidence, being evidence in the case[40] I found to be careful and knowledgeable. I also considered him to be a fair witness. Although I must say that I was initially somewhat confused by his answer to a question (about the 6 year limitation period being advanced) which he could not and did not answer, and to which he said that he merely stated he was considering the answer. Nevertheless, generally I preferred the 2nd Defendant's evidence to that of the witness for the Claimant (Mr. Coye) and upon careful examination of the facts of the case, I now fully appreciate and understand why the 2nd Defendant answered in the way that he did.

[156] Also upon careful consideration of the matter, and taking into account the credibility of the witnesses on the subject, and the burden of proof on the Claimant, even to a high standard which might be required of a taxing statute, as noted in the background facts, that there was an assessment for the full period January 2001 – December 2004.

[157] I have thus concluded that the real issue between the parties was not about the rate of Business Tax and the method of its calculation (and now even the amount) but whether it was paid or the tax debt was discharged.

[158] This latter question is, on the facts of the present case, in my view, a mixed question of law and fact; and not merely a factual question (as submitted by the Claimant); or a legal question (as submitted by the Defendants).

[159] This mixed question of law and fact can be considered and determined by disentangling its factual aspects from its legal aspects and considering each of them separately and then together.

[160] The burden to prove this fact falls squarely on the Claimant as the party which has brought this claim; and also, in my view, falls on the Claimant in terms of the provisions of the IBTA.

[40] Not only for the 2nd Defendant but also for the 1st Defendant representing the 1st Defendant and also the GOB.

[161] Clearly the best evidence that the tax had been paid, from a factual point of view, would have been evidence that the Claimant had paid to the Department the sum claimed (as amended by agreement) by depositing such sum in the appropriate account of the Treasury - which was obviously not done.

[162] There appears to be a suggestion by the Claimant that monies were paid to the GOB, other than the Tax Department, and that this payment together with the set-off and the Deed generally ought to be used to discharge the Business Tax claimed (or as amended by agreement) or as a credit towards such tax.

[163] Resort has therefore been had, by the Claimant, to payment by some other means of the subject tax and to such payment to some other Government Department or body - and it is this which has created the conditions for doubt about the payment of such tax debt. All of which has resulted in the Claimant having to rely on other documentation such as letters from the Commissioner and legal documentation generated by the parties and involving officials of the parties, to establish the bona fides of such payments.

[164] This Court, upon careful consideration, is not satisfied with the nature of the Claimant's factual proof that it has paid the tax claimed in the Demand Notices.

[165] From a factual point of view, I am generally not satisfied that the Claimant has paid the taxes in question (being the underpayment claimed in the Demand Notices as amended by agreement of the parties).

[166] Ultimately, it seems to me that this case has to be resolved by determining the legal question of whether the set-off contained in the Deed was effective or successful in discharging or satisfying the tax debt.

[167] The business of determining whether the tax debt was discharged by the Deed is a far more difficult question than the factual question, being a question of law and requiring a careful examination of the CCJ's decision (which I attempted to do); and/or by this court making its own determination as to the legality of the Deed.

[168] This court is not entirely happy about having to resort to resolving a question about whether taxes has been paid by such means, because the court is being

encouraged to delve into the commercial arrangements between the GOB and the Claimant; and other related businesses, which are not directly within the scope and contemplation of the provisions of the IBTA. And, in addition, the court may also be encouraged to speculate or otherwise get into a very grey area of Government a course which the CCJ itself had to express negative opinions upon and clearly could not have relished doing.All this having been said, this court will now consider this case from the purely legal basis according to the CCJ's decision before making its own determination and interpretation of the legality of the Deed.

[169] The CCJ's main focus, it seems to me, was with regard to the implementation or enforceability of the Deed. The legality of the Deed was not part of the CCJ's *ratio decidendi;* but it still none the less authoritatively determined and arrived at a conclusion on the legality of the Deed in its consideration of the issues before it, or by way of, as it were, obiter dicta, to its main decision.

[170] The CCJ authoritatively did determine that the implementation of the provisions of the Deed, without legislative approval and without the intention on the part of its makers to seek such approval, is indeed repugnant to the established legal order of Belize.

[171] In my view the comment by the CCJ that "*in a purely domestic setting the implementation of the Deed, they would have regarded it as unconstitutional, void, and completely contrary to public policy to implement*" is merely obiter. This is because the case it was considering was not in a purely domestic setting. Instead, the case was in relation to the enforcement of an international arbitral award concerning the obligations of the GOB made by an international arbitration tribunal.

[172] Upon a careful review of the CCJ's decision, I have come to the conclusion that the CCJ did not finally and conclusively determine the question of the legality of the Deed as part of its consideration of the issues with which it was primarily concerned (the enforcement and implementation of the Deed).

[173] Having said that I consider the comments by the CCJ, albeit obiter, must carry some considerable weight with this Court and that in the context of the overall case when taken as a whole, I consider dispositive of the issue under consideration.

[174] I would therefore hold that, for the reason given by the CCJ in its very careful and deliberate decision, the Deed is indeed unconstitutional, void, and completely contrary to public policy and as such illegal; and that the Deed was ineffective or unsuccessful in discharging or satisfying the tax debt.

[175] The dangers inherent in finding for the Claimant was eloquently expressed by the CCJ as follows:

> *"Prime Ministerial governance, a paucity of checks and balances to restrain an overweening Executive, these are malignant tumours that eat away at democracy."*

[176] The dangers of holding the Deed, valid, outweigh, in my view, the benefits of holding it as valid.

[177] Generally, I believe that the Claimant's case was fatally flawed in that it relies too heavily on, and merely sought to exploit, the obvious and bureaucratic confusion which existed, and I might add, inefficiencies (to put it mildly) which also existed, at various times, specifically within the Tax Department (also generally within the GOB and its administration).

[178] Also, the Claimant did not fully appreciate that the burden was on it, as Claimant, to prove its case on this central issue that it had paid its taxes – which in my view it signally failed to do.

Was there an Arbitrary Deprivation Contrary to Sections 3 and 17 of the Constitution?

[179] The Claimant advances a further and alternative argument that the set-off between the parties is factual and freestanding and gives rise to rights in favour of the parties. The Claimant gave up its claims, the Government received the value of the Claimant's rights as payment for the taxes assessed as due and payable, the

Claimant settled the tax claim against it and the Government was relieved of its obligations to it.

[180] The Claimant submits that the rights of the Claimant, arising from the freestanding set-off, constitutes property and that the effect of the Demand Notices is that the Commissioner interfered with the Bank's business and that consequent on the set-off, the Bank cleared its tax liability for January 2001 to December 2004 which improved the financial position of the Bank, by ridding it of the said debt until August 2013 when the Demand Notices were issued.

[181] The Claimant submits that in August 2013, the financial position of the Claimant changed as the Demand Notices purported to put the Claimant in debt to the Government for the amount of $30,534,849.11.

[182] The Claimant relies on the case of **Paponette v Attorney General of Trinidad & Tobago**[41]. This case I will resist the temptation to delve into as I consider it unnecessary to do so.

[183] The Claimant also submits that it had a legitimate expectation that its taxes for the period January 2001 to April 2005 had been finally settled and also constitutes property, and that the decision by the Commissioner, as an emanation of the State, to issue the Demand Notices had the effect, if legal, of appropriating the right/property of the Bank and its legitimate expectation that its taxes had been settled in exchange for its rights and property which had been set-off.

[184] It is submitted that this amounted to an unlawful and arbitrary deprivation of the Claimant's property by the State without compensation, contrary to sections 3 and 17 of the Constitution.

[185] The Claimant submits that the deprivation was arbitrary as:

i) it was not done legally pursuant to any law;

ii) it was done without giving the Claimant an opportunity to establish its right to the benefit of its property;

iii) no compensation had been given to the Claimant;

[41] [2010] UKPC 32.

iv) it has not furthered any legitimate aim;

v) it is conspicuously unfair as it prejudices only the Claimant, whilst the Government retains the benefit of the set-off, and

vi) it breached the legitimate expectation of the Claimant that its taxes for the period January 2001 to December 2004 had been finally settled.

[186] The Claimant submits that the GOB has offered no evidence to justify the change in its position other than the reference to the CCJ's decision and that on a proper analysis, the CCJ Decision does not provide any justification for the Commissioner to conclude that the set-off is invalid, and that therefore the taxes are due. The Commissioner cannot justify his interference with the business of the Claimant and the breach of its legitimate expectation on the ground that it was discharging its duty to collect taxes.

[187] The Claimant further submits that aside from the reliance on the CCJ's decision as justification, there is no credible evidence from the Commissioner to explain why he issued the Demand Notices.

[188] The Claimant also relies on the case of **Stretch v UK**[42] in which the Applicant entered into a 22 year lease with an option to renew which he sought to renew for a further term. In 1990 the Applicant sought to renew the lease when the West Dorset County Council informed him that the option could not be exercised as the grant of the option was ultra vires the powers of the County Council. The Applicant contended that he had a legitimate expectation that he would be entitled to renew the lease, and that the refusal to do so r by the County Council was in breach of his legitimate expectation.

[189] For the reasons which would be clear from findings of fact and law which this court has already made, this court is unable to accede to the Claimant's submission under this heading.

[190] This court could find no basis for determining that the 1st Defendant had appropriated the right/property of the Claimant and its legitimate expectation nor

[42] (2004) 38 EHRR 12.

that its taxes had been settled in exchange for its rights and property which had been set-off.

Did the Commissioner act unfairly, irrationally or abuse his powers in issuing the Demand Notices?

[191] My findings above in relation to the central question already considered, have influenced my approach and perspective in relation to the determination of many of the other issues in the case and has assisted me in finding a route through such issues.

[192] The factual matrix which is relevant to this issue and assisted me in finding a route through it, includes :

(a) The general and on-going confusion which I have determined existed as set out earlier .

(b) There existed outside interference in the operations of the IBTA by GOB officials.

(c) The CCJ determined that the Deed unlawfully and unconstitutionally purported to create and to guarantee a unique and unalterable tax regime.

(d) The enforcement and implementation of the confidential agreement entered into by a previous administration of the GOB was later successfully challenged before the CCJ by a later Government on the basis I have described.

(e) The CCJ has, by implication, determined that the Deed was unlawful; and,

(f) The factual and legal determination that I have found, namely, that the Claimant did not pay the subject tax.

[193] In these circumstance I have determined:

1) The delay in raising demands for taxes for the period 2001 – 2004 was not in my view inordinate given the confusions and uncertainty created by the confidentiality of the Deed, the special tax regime, the arbitration proceedings, and, the litigation which resulted in the CCJ decision.

2) It was not clear, in my view, that the Commissioner was accepting payment of taxes for the period 2001 – 2004.

3) The Commissioner had not taken steps to reserve his position causing the Claimant to reasonably believe that the Clamant had settled its taxes. It seems clear from the factual background, as I have found them, and the decision of the CCJ, that the letter of the 10th October 2006, was not written with legal precision, was not indeed, what it appeared to have been, confirmation that the subject taxes had been settled and discharged.

4) The Commissioner did not unreasonably assess and then collect some $4,288,037.34 in taxes for 2005 to March 2006 without demanding any taxes for the period 2001 – 2004.

5) The Commissioner demanded and collected, by way of judgment debtor summonses, $11,423,532.99 in taxes interest and penalties for April 2006 to June 2008 without demanding any taxes for the period 2001 – 2004.

6) The Commissioner, belatedly and suddenly, issued the Demand Notices on the 13th August 2013 without the need of raising any reassessment against the Claimant. On a careful review of the facts of the present case this court is unable to find that the 2nd Defendant has indeed (as pejoratively claimed by the Claimant) changed its position. Rather, that once the dust had been settled by the decision of **CV7 of 2012** the position relating to the payment of the claimed taxes had become clearer.

7) The court, however, accepts the uncontested evidence of Mr. Coye, which he gave in some detail, of the material adverse impact the payment of the taxes now being demanded would have on the Claimant. That this may mean that:

   i. The Claimant has to liquidate $30 million in investments leading to a loss of investment income, with the Claimant's fully unimpaired capital and reserves breaching the statutory requirement.

ii. The Claimant's capital adequacy ratio would fall below the legal 9% which could result in fines of $10,000 per day.

iii. The Claimant would have to call in loans because it would be in breach of the threshold set by Section 57(2) of the Domestic Banks and Financial Institutions Act.

[194] I have determined that due to the confusion and resultant inaction by the Commissioner, and the decision that the subject taxes had "being in abeyance" for some 8 years and 5 months, amounting to the claimed $17,659,911.07 in interest and $305,313.69 in penalties, may have been unreasonably allowed to accrue unbeknownst to the Claimant and possibly even unknown to the Commissioner.

[195] As this court initially had not been fully and adequately addressed on the question which resulted from this court's initial findings (namely whether the 2nd Defendant's conduct may have amounted to unfairness to the Claimant with respect to the interest and the penalties claimed, including the question whether no reasonable authority, on the facts and circumstance of the present case, may have claimed the same) I invited the parties to further address me on this matter. This aspect of the case I will consider under a separate heading later on.

[196] I have, however, determined that in relation to the subject taxes (that which was claimed and/or was agreed by the parties) the Commissioner has not acted in a "high-principled way", and has not breached his "stricter duty of fairness"; and neither has he failed to act in "the spirit of fair dealing which should inspire the whole of public life": **Ex p. Unilever PLC** (supra).

[197] In short this court has determined that the Commissioner has not acted irrationally in issuing the Demand Notices (due allowance being made for the agreed reduction in the amount of the tax debt to BZ$9,487,370.31).

Is The Demand for Taxes Statute Barred?

[198] The Claimant submits that the Commissioner is seeking, pursuant to the Demand Notices, to collect taxes for the period January 2001 to March 2005 and which period (from March 2005 to August 2013) being 8 years and 5 months is time-

barred by the 6 year limitation period that is contained in the provisions of Section 111(1) of the IBTA.

[199] The Clamant submits that the IBTA and its subsidiary regulations provide a regime for keeping of relevant records and books of account, the raising of assessments and further assessments, collection and recovery of taxes, the repayment of overpayments, and the prosecution of offences all of which is limited to a period of six years and is designed to encourage the Commissioner to collect and the taxpayer to pay taxes and settle all issues within such a time limit.

[200] The Claimant submits that in relation to the period from January 2001 to March 2005, prior to the CCJ Decision, the Commissioner had taken the position that the tax had been paid, but that since such decision was made he has now determined that the amounts paid by way of set-off were not received by his Department, although under cross-examination he did not deny or confirm that the Government had received payment.

[201] The Claimant's case is that the GOB and the Commissioner have made clear and unequivocal representations to the Bank that their taxes have been duly paid for the period January 2001 – April 2006. This I have not found as can be seen from the factual background and other findings of fact which I have made.

[202] The Claimant also submits that the GOB and Commissioner have unambiguously conducted themselves in such a way as to confirm those representations and to lead the Bank to believe that their taxes had been paid and to allow them to act in a manner inconsistent with this fact (that the taxes had been paid for the said period) and should not be permitted by this court. Such conduct and confirmation this court has been unable to find and has not therefore found.

[203] The Claimant alleges that the Commissioner has changed his position which is an impermissible breach of the Bank's legitimate expectation. Again the court has been unable to find such change of position and therefore has not found this allegation as having been made out.

[204] Also the Claimant submits that as a result of the alleged change of position that in order to lawfully trigger a demand in 2013 for taxes for the January 2001 – December 2004 period, the Commissioner was statutorily obliged to raise further assessments against the Bank to claim the amount that he apparently now believes is due, and that he can now only lawfully proceed under the Section 111(1) of the IBTA by issuing further assessments. Again this court is unable to make such a finding and has therefore not found this allegation is made out.

[205] The Defendant is maintaining that they are relying on the assessments issued back in 2005 (in any event within a 6 year period of the years of assessment in question) to ground the Demand Notices and which this this Court has accepted.

[206] This court having found that the Claimant did not pay the subject taxes (whether by set-off or otherwise), and not having revised or withdrawn such assessments, such assessments remain due and payable as taxes owed by the Claimant. This court can find no difficulty with this position and certainly is not in a position to find any failure to comply with due process in the claimed regard in relation to the subject taxes or find any abuse of power.

[207] This court therefore finds that the Demand Notices in relation to the underpaid taxes being claimed are not in breach of Section 111(1) of the IBTA, and are perfectly lawful and valid as far as the claimed taxes are concerned and are not statute barred.

[208] In relation to Section 111(1), I do not seek to interpret its provisions in so far as any claimed limitation period is concerned as I do not consider such provision is applicable to the present case. Having carefully considered the position, I can now perfectly understand the Commissioner's answers under cross-examination, in reserving his position, as I now do, on its interpretation in relation to the present case.

Did the Demand Notices issued by the Commissioner breach the Claimant's Legitimate Expectation that its Taxes had been Settled?

[209] The Claimant submits that as a matter of common law, the conduct of a taxation authority can give rise to a legitimate expectation on the part of a taxpayer. This court has no difficulty with this proposition.

[210] The Claimant then goes on to outline the legal concept of substantive legitimate expectation generally and specifically in relation to taxing authorities; again with which this court does not have any quarrel.

[211] The Claimant then relies upon the settlement of the claimed taxes by way of set-of, and the representation by and unfairness of the Revenue Authorities, upon which this court has already ruled.

[212] The Claimant then submits that it therefore reasonably and legitimately expected that the Commissioner was satisfied that the taxes due from the Bank for the relevant period had been paid by the set-off. This expectation, according to the Claimant, arose from the written representations and the conduct of the Commissioner and has been illegitimately and unfairly disappointed or breached by the 2nd Defendant changing its position following the decision of the CCJ and by issuing the Demand Notices, even though the CCJ decision "*did not touch on or speak to the set-off*".

[213] With all due respect to the Claimant's submissions, this court has determined that the set-off is illegal and unenforceable and that there was much confusion surrounding the payment of taxes, as a result of the facts and events which were taking place before and following the assessments on which the Demand Notices were based.

[214] On the basis of such determination by this court in relation to the claimed taxes this court fully accepts the submissions by the Defendants that once it is established that the Minister had no authority to make the promises made to the Claimant in the Deed and it is held invalid, all expectations flowing from the set-off would have no legitimacy.

[215] I also agree with the submissions supported by authority that if the expectation is unlawful it is no answer that the Claimant relies on that expectation. Also, that the

unlawfulness of the expectation is a complete answer to the question of whether the public authority should be bound by any such expectation.

Were the Demand Notices in violation of the IBTA and therefore unlawful?

[216] On the facts of the present case the Claimant asks whether procedurally the Commissioner is permitted to issue the Demand Notices (out of the blue as it were) in 2013 for taxes allegedly due from 2001 - 2005?

[217] The Claimant submits no; neither because it was held in abeyance, nor because the 2nd Defendant can be allowed to change his position following the decision of the CCJ, and also not because of such change of position a reassessment was required.

[218] It is submitted by the Claimant that the Commissioner used the Demand Notices as a 'colourable device' to attempt to circumnavigate the legal obstacle set out in Section 111(1) of the IBTA and is seeking, unfairly, to use the Demand Notices to collect taxes which the IBTA no longer regards as collectable and by so doing is abusing his power.

[219] In my view this is merely another way of submitting what has already been submitted and rejected by this Court.

[220] This court therefore finds that the Claimant did not have any reasonable and/or legitimate expectation that the Commissioner was satisfied that the taxes due from the Bank for the relevant period had been paid by the set-off.

Possible Unfairness of Imposition of Interest and Penalties?

Claimant's Supplemental Submissions

[221] Counsel for the Claimant refers the court to Section 109(2) & (3) of the IBTA which contains the provisions relating to fines and penalties for failing to file a return and pay the tax due within the prescribed time[43].

[222] Counsel for the Claimant submits that on the facts of the case there was no attempt by the Claimant to avoid payment and thereby incur the substantial interest and penalties; but rather its action was based on a clear and unequivocal representation, assurance and/or conduct of and from the Commissioner, upon which, to its detriment, the Claimant relies, until the decision of the CCJ (and more importantly the Demand Notices), and as a consequence there was no failure to pay the tax due as there was no demand as required by Section 109(2) & (3) of the IBTA.

[223] In addition, the Claimant submits, that given the facts and circumstances of the case there was no failure to file a return and pay tax within a prescribed time and that it would therefore be significantly prejudiced as only by the decision of this court, in an action which the Claimant brought against the Defendants, it is now aware that some taxes (indeed less than that claimed by the Defendants) are due and payable and now ought to be settled, and that therefore the imposition of either penalties or interest in the sum of $17,965,224.76 is not warranted as a matter of fact and/or under the law.

[224] The Claimant in addition relies on the UK tax case of **R v Inland Revenue Commissioners Ex p. Unilever Plc[44]** which it submits is authority for the proposition that the Commissioner's demand for the penalties and interest in 2013, for the period 2006 to 2013, is unreasonable and unfair, analogous to the situation of this **Unilever** case in which the Inland Revenue refused Unilever's claim to a tax benefit on the ground that it was made outside a two-year statutory time limit.

[225] On the facts of the Unilever case the Inland Revenue (in the **Unilever** case) had previously allowed such late claims by Unilever thirty times over a period of 25

[43] See Paragraph * above.
[44] [1996[STC 681 at 695.

years. The Court of Appeal held that this change in approach to late applications, without any warning, was so unfair as to amount to an abuse of power, notwithstanding that the Court accepted that Unilever could not rely on the doctrine of legitimate expectation. The Court found that the Inland Revenue Commissioner's decision not to exercise his discretion in favour of Unilever was unlawful in the circumstances.

[226] In this case Sir Thomas Bingham MR, after summarizing the particular facts of the Unilever case, and setting out the decision of the court below, and making reference to the itemised searching criticism of such decision by Counsel for the Revenue, expressed his uneasiness at the conclusion which was being advanced, and noted with approval that:

> *"(1) The courts have not previously had occasion to consider facts analogous to those here. The categories of unfairness are not closed, and precedent should act as a guide not a cage. Each case must be judged on its own facts, bearing in mind the Revenue's unqualified acceptance of a duty to act fairly and in accordance with the highest public standards……..*
> *(10) On an objective but untechnical view, it would be hard to regard Unilever as owing £17 million additional tax to the Crown. If this tax is due it can be fairly be regarded as an adventitious windfall, accruing to the Crown through the understandable error of an honest and compliant taxpayer, shared over many years by the Crown.*[45]*"*

[227] The learned MR then concluded, on the unique facts and history of the case, that:

> *"….to reject Unilever's claims in reliance on the time-limit, without clear and general advance notice, is so unfair as to amount to an abuse of power. Although our attention was drawn to the correspondence summarized in section II above, it*

[45] At page 6 & 7 of his Judgment.

was not seriously argued that that correspondence amounted to such notice. It was in any event too late by then for Unilever to make a timely claim in relation to the two earlier accounting years.[46]*"*

[228] The MR observed that "*a general public law discretion must in the ordinary way be exercisable in favour of the citizen when its non-exercise would involve serious unfairness or injustice to him*[47] "

[229] The MR then concluded that :

"any decision-maker fully and fairly applying his mind to this history, and in particular to factors (1) to (10) listed in section IV above, could have concluded that the legitimate interests of the public were advanced, or that the Revenue's acknowledged duty to act fairly and in accordance with the highest public standard was vindicated, by a refusal to exercise discretion in favour of Unilever."

[230] Lord Justice Simon Brown also noted, in arriving at the same conclusion as the MR:

"Of course legal certainty is a highly desirable objective in public administration as elsewhere. But to confine all fairness challenges rigidly within the MFK formulation — requiring in every case an unambiguous and unqualified representation as a starting point — would to my mind impose an unwarranted fetter upon the broader principle operating in this field: the central Wednesbury principle that an administrative decision is unlawful if "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" — per Lord Diplock in CCSU v Minister for Civil Service [1985] 1 AC 374 at 410. The flexibility

[46] See Page 7 of the Judgment.
[47] See Page 8 of the Judgment

necessarily inherent in that guiding principle should not be sacrificed on the altar of legal certainty.

"Unfairness amounting to an abuse of power" as envisaged in Preston and the other revenue cases is unlawful not because it involves conduct such as would offend some equivalent private law principle, not principally indeed because it breaches a legitimate expectation that some different substantive decision will be taken, but rather because either it is illogical or immoral or both for a public authority to act with conspicuous unfairness and in that sense abuse its power. As Lord Donaldson MR, said in R v ITC ex parte TSW:

The test in public law is fairness, not an adaptation of the law of contract or estoppel.

In short, I regard the MFK category of legitimate expectation as essentially but a head of Wednesbury unreasonableness, not necessarily exhaustive of the grounds upon which a successful substantive unfairness challenge may be based.[48]"

[231] The Claimant submits that the penalties and interest demanded by the Commissioner amounts to an "*adventitious windfall*" which arises out of the Commissioner's failure to notify the Bank that it had reserved its position regarding the tax debt notwithstanding its clear statement to the Bank by letter dated 10th October 2006, that it had settled "*all outstanding arrears for Business Tax up to the period 31st March, 2006*", amounting to an estoppel from demanding payment of the penalties and interest.

[232] The Claimant also relies on the UK case of: **HMD Response International v Revenue and Customs Commissioners**[49] , in which the appellant taxpayer appealed against a penalty of £500.00 which had been imposed by the respondent commissioner for the late filing of a return. The Tribunal allowed the appeal of

[48] See at page 9 of his Judgment.
[49] [2011] UKFTT 472 (TC).

the appellant. The Tribunal considered the purpose of a penalty, the burden of proof and also the delay by the commissioner in demanding the penalty payment. The Claimant relies on the fact that the Tribunal found that:

"i. Purpose of Penalty and Burden of Proof – a surcharge or penalty was normally levied where a specified default had taken place. The default might be a failure to file a document or to pay a sum of money. In such circumstances, the person alleging the default should bear the onus of proving the allegation made. In such a case the commissioners would be required to prove facts within their own knowledge as to the failure of the appellant in paying the penalty due. In this case, the commissioner had produced no or insufficient evidence and the appeal therefore succeeded.

ii. Reasonable Excuse – the appellant had established a "reasonable excuse" for the entire period of the default.

iii. Delay – Even if the appellant could not establish a reasonable excuse, the penalty demanded by the Commissioner would have been reduced from £500 to £100 given that the commissioners had deliberately desisted, in accordance with their usual practice, from sending out notice of the penalty until September, 2010 by which time it could demand the higher penalty of £500."

[233] The Claimant also notes that in respect of the issue of delay, the Tribunal stated that:

> *"[18] Thus, in our judgment, the appellant is entitled to rely upon the common law duty of a public body to act fairly not just in its decision-making process but also in administering its statutory powers. We are in no doubt that such a body does not act fairly when it deliberately desists from sending a penalty notice, for four months or more, knowing that the effect will be to impose a minimum penalty of £500 upon somebody whose sin may amount to no more than oversight or forgetfulness."*

[234] The Claimant also notes that the Tribunal observed as follows:

"[31] HMRC is a manifestation of the State. It is no function of the State to use the penalty system as a cash generating scheme. The penalty system has a legitimate aim, which is to ensure that appropriate filings take place on good time and to discourage default. Given that that is the legitimate aim, it is inexplicable why HMRC deliberately delays sending out a penalty notice for four months, with the effect that a penalty for five months becomes payable, that is, £500. In our judgment it would be a very simple matter for HMRC to set its computer settings so that a default or penalty notice is sent out soon after 19 May in any year, instead of some four months later. That fair approach might generate less penalty cash for the State, but it would be fair and conscionable as between the taxpayer and the State (acting by HMRC)."

...

"[33] It has long been part of the common law of this country that manifestations of the State must act fairly and in good conscience with its citizens. In our judgment there is nothing fair or reasonable in setting a computer system so that it does not generate a penalty notice until four months have gone by from the date of default, thereby ensuring that a penalty of not less than £500 would be due. We are in no doubt that the computer system could easily be set to generate a single £100 penalty notice soon after the 19 May in each year. That is the course that a fair manifestation of the State, acting in good conscience towards the citizens of the State, would adopt."

[235] The Claimant therefore submits that the demand by the Commissioner of penalties and interest on the fact of the case as found by the court, after a period of 7 years, is manifestly unfair, unreasonable and unlawful, illogical and irrational amounting to an abuse of power and unfairness on behalf of the Commissioner. That this vitiates the Demands, and in light of the court's own observations, even if there is not a substantive legitimate expectation, amounted to unfairness to the

Claimant (akin to the unfairness found in Unilever). And that as a result that this court ought to find that the Commissioner's conduct did (not may) amount to unfairness to the Bank with respect to the interest claimed and the penalties, as no reasonable authority, should have made a claim for such interest and penalties.

[236] In addition, the Claimant, relying on the case of **Welch v United Kingdom**[50] submits that the imposition of penalties are criminal in nature and the standards applying to the imposition of criminal liability apply, including that the retrospective imposition of criminal liability is offensive to fundamental rights (whether at common law or under the Constitution).

[237] The Claimant submits that the situation here whereby ex post facto the Commissioner has informed the Bank that it now is liable for these taxes and these penalties, on the facts of the present case, is analogous to the retrospective imposition of criminal liability and thus unlawful and unfair.

Defendants' Supplemental Submissions

[238] The Defendants submit that the Commissioner acted reasonably when all the circumstances of this case are viewed.

[239] The Defendants also submit:

(a) There is a legal duty on the Commissioner to assess every person chargeable to be taxed in respect of a particular year of Income which arises after the date for filing tax returns has passed or where no income and business tax has been paid.

(b) This duty was breached, and relying on the case of **Ramlakhan v. Inland Revenue Commissioner**[51], underscores the importance of the Notice and the actions of the Commissioner, this court ought to find that the Commissioner acted reasonably in accordance with his statutory duty to assess the five year period.

[50] (1995) 20 E.H.R.R. 247.
[51] (1974) 21 WIR 305.

(c) The Defendant also relies on the case of **Bi Flex (Caribbean) Ltd v. Inland Revenue Board**[52], a case that concerned a best judgment assessment by the Commissioner, in which the Judicial Committee of the Privy council found that Commissioner acted in a reasonable manner when records of the Company could not be traced for years 1971 to 1974. The Board found that in the absence of records an acceptable method was used to calculate the taxes outstanding.

(d) As a result, it is submitted that in view of the CCJ's pronouncements in respect of the Settlement Deed, the Commissioner of Income Tax acted reasonably in seeking to carry out his statutory duty to collect outstanding taxes.

This Court's Determination on the Question of Fairness of Interest and Penalties

[240] This court considered that Counsel for the Claimant and the Defendants were talking past each other and that they were not looking at the question in issue from the same standpoint.

[241] Counsel for the Claimant was looking at the situation from a public law position with a view to this court determining, as a matter of reviewing the 2nd Defendant's decision for its public law fairness and legality; while the Defendants' Counsel was looking at it from the standpoint of the reasonableness of the actions of the 2nd Defendant in assessing the Claimant for the full extent of the taxes and penalties which the Claimant might be liable to pay.

[242] In my view, the Counsel for the Defendants missed the valid point being raised by Counsel for the Claimant which was whether this court, looking at the facts and circumstances of the case, could properly conclude that the 2nd Defendant, from a public law point of view, was acting unfairly and unreasonably such that it ought not be sanctioned by this court.

[52] (1990) 38 WIR 344.

[243] In relation to the interest and penalties and the question whether the 2nd Defendant's conduct may have amounted to unfairness to the Claimant, this court prefers the arguments of the Claimant.

[244] This court considers that it might take a very independently minded Commissioner acting without any bureaucratic, or even political constraints or limitations, who would objectively and feeling fettered unfettered, would consider the case dispassionately and arrive at or make a decision which would reflect the justice and fairness of the case; and would then have the freedom much less the courage to implement such a decision.

[245] Realities being what they are, it might be more realistic not to expect someone in the position of the 2nd Defendant to make a decision which would result in him/her not opting for the maximum demand that could be made and expecting the courts, upon review, to make any appropriate adjustment downwards in relation to any interest and penalty which could be claimed.

[246] As a result, it may be more reasonable to expect that caution may dictate that the full amount be claimed by such a decision maker and that it be left to the court to make a final determination, objectively, and on the facts and circumstances and taking into account the merits of the case as to what is fair and reasonable from a public law point of view. And thus it is from this perspective that the case has to be considered – and not whether the Commissioner was in fact reasonable to have acted one way or the other.

[247] From a public law point of view this court has therefore, on the peculiar facts and circumstances of the present case, which this court has found, considered that on balance, the court is inclined to conclude that a decision favourable to the Claimant ought to be made.

[248] The reasons for arriving at this conclusion, is that it would be patently unfair to the Claimant to do otherwise, and include:

(a) As stated by the Commissioner in the Demand Notices, the sum in such notices were being held "in abeyance", unbeknownst to the Claimant, when

the Claimant would reasonably have had no reason to think that there was any obligation by it to make any payment, or that it would be exposed to a later claim for penalties and interest in respect of unpaid taxes; and

(b) The Claimant therefore had no opportunity to pay any such claimed or agreed sum in order to prevent interest and penalties from accruing.

[249] This court has therefore concluded that such conduct by the Defendants (Particularly the 2nd Defendant) amounts to an unequivocal representation, assurance and/or conduct of and from the Commissioner, or at the very least acquiescence, or silence of a substantial enough kind, upon which, to its detriment, the Claimant could properly rely.

[250] Thus it could now be said that there could be no failure, by the Claimant, prior to the Demand Notices, to pay any tax which was alleged to be due as there was no demand as required by Section 109(2) & (3) of the IBTA.

[251] Moreover this court has concluded that given the facts and circumstances of the case there was no failure to file a return and pay tax within a prescribed time and that it would therefore be significantly prejudiced as only by the Demand Notices and definitively by the decision of this court, in an action which the Claimant has brought against the Defendants, it is now aware that some taxes (indeed less than that claimed by the Defendants) are due and payable and that such sum ought to have been settled.

[252] This court has found the Claimant's argument irresistible and that therefore has determined that the imposition of either penalties or interest in the sum of $17,965,224.76 is not warranted as a matter of fact and/or under the law until the date of the final decision of this court (which is today's date). This aspect of the case is especially puzzling as it was only as a result of the draft judgment that the concession was made by the Defendants in relation to the agreed sum of BZ$9,487,370.31 in place of the sum claimed in the Demand Notices

[253] This court finds the reasoning of the UK tax case of **R. v Inland Revenue Commissioners Ex p. Unilever Plc,** by analogy, useful, instructive and persuasive and has concluded that the 2nd Defendant's demand for the penalties and interest in 2013, for the period 2006 to 2013, is unreasonable, unfair and

unlawful, and that to sanction a change of approach by the Defendants, whether based on the decision of the CCJ or otherwise, without any warning, was so unfair as may amount to an abuse, notwithstanding that this court accepted that the Claimant could not rely on the doctrine of legitimate expectation and the Defendants could rely on the decision of the CCJ.

[254] It is the view of this court that the Defendants, particularly the 2nd Defendant has an unqualified duty to act fairly and in accordance with the highest public standards and that the payment of the interest and penalties claimed would amount to an 'adventitious windfall' accruing to the GOB through the understandable reliance of the Claimant, a taxpayer, based on assurances, or at the least, acquiesces or silence, by the 2nd Defendant in circumstances where the Claimant had no reasonable expectation that it would have to pay such interest or penalties.

[255] This court has therefore concluded that no reasonable authority, on the facts and circumstance of the present case, ought to be allowed to claim the interest and penalties which it has claimed.

[256] Also, that to allow the Defendants to claim the interest and penalties which has been claimed would amount to this court sanctioning that the interest and penalty provision be used as a cash generating scheme, likely abusive to the Claimant, and not in furtherance of the Defendants legitimate aim, which is to ensure that appropriate filings take place in good time; and to discourage default.

Disposition

[257] For the reasons given above this court Declares that :

(a) The Demand Notices are lawful and enforceable against the Claimant in the sum agreed by the Claimant and Defendants after the agreed credit has been applied, as representing the total business tax debt namely, BZ$9,487,370.31.

(b) The Claimant is not required to exhaust the process and procedure under the IBTA for disputing a tax assessment to the Board and appealing to a Judge before making the present applications to this court.

(c) Sections 53(2), 53(3) 57, and 110(5) of the IBTA, should not be struck down as unconstitutional but that in accordance with Section 2 of the Constitution this court is entitled to excise, the parts in Section 53(2) of the IBTA as indicated in the above Judgment to bring them into conformity with the Constitution.

(d) The Defendants (or either of them) have not unlawfully and arbitrarily deprived the Claimant of its property as alleged.

(e) The 2nd Defendant has not unreasonably, unlawfully or irrationally abused its power nor breached the Claimant's legitimate expectation in issuing the Demand Notices.

(f) The sum BZ$9,487,370.31 which is due to the Defendants on the facts of the present case, are not statute barred and shall be paid by the Claimant to the Defendants.

(g) It would be unfair, unreasonable and abusive, on the facts and circumstances of the present case, for the Claimant to have to pay to the Defendants the claimed or any interest or penalty, but that as of today's date such interest and penalty should now accrue at the statutory rate of 6%[53] for the benefit of the Defendants.

[258] The injunction granted by this court to the Claimant on the 4th October 2013 restraining the 2nd Defendant from seeking to enforce the payment of so much of the Demand Notices up to the sum of BZ$9,487,370.31 which shall accrue from today's date until payment is discharged.

Costs

[259] Upon careful review of the overall result, which in terms of results of the number issues (rather than merely the amount of monies involved) I had to consider and that in terms of the results they have roughly balanced out as between the Claimant and Defendants, and as the parties have not been able to agree costs; and taking into account the general rule as to costs in applications for administrative orders[54] that

[53] Under the Supreme Court of Judicature Act
[54] Rule 56.13(6) of the Civil Procedure Rules, 200.

"*no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.*", I consider that the correct, appropriate and just order in relation to costs should be that there is no order for costs.

[260] I therefore make no order as to costs.

The Hon. Mr. Justice Courtney A. Abel