

IN THE SUPREME COURT OF BELIZE, A.D. 2019

CLAIM NO: 327 of 2018

BETWEEN

THE BELIZE BANK LIMITED

CLAIMANT

AND

**THE COMMISSIONER OF
INCOME AND BUSINESS TAX**

THE ATTORNEY GENERAL OF BELIZE

DEFENDANTS

Keywords: Sections 114 (2) & (3) of Belize Constitution; Parliamentary Appropriation of Funds; Collection of Government Debt;

Concurrent Debts; Cross-Debts; Foreign Arbitral Award; Enforcement and Implementation of Arbitral Award; Set-Off; Process of Enforcing & Collecting Debt;

Section 58(1) and (2) of the Income and Business Tax Act (IBTA); Business Tax; Exercise by Commissioner of Discretion; Fairness; Categories of Fairness Spirit of Fair Dealing in Public Life; Unfairness; Substantive Unfairness;

Judicial Review; Equitable Set-Off; Whether Decisions of Commissioner Unlawful, Disproportionate and Unreasonable; Abuse of Power of Public Authority;

Section 25 of the Crown Proceedings Act; Enforcement of Debt;

Garnishment in Relation to Judgment Debt.

Before the Honorable: Mr. Justice Courtney A. Abel

Hearing Dates: 22nd January, 2019

Appearances:

Mr. Eamon H. Courtenay SC and Ms. Iliana N. Swift for the Claimant.

Mr. Yohhahnseh Cave for the 1st Defendant.

Mrs. Samantha Matute-Tucker for the 2nd Defendant

WRITTEN JUDGMENT
Orally Delivered on the 22nd day of January 2019

Introduction

- [1] This is a claim by a bank, the Belize Bank Limited (“the Bank”), against two (2) representatives of the Government of Belize (“GOB”, the Commissioner of Income and Business Tax (“the Commissioner”), and the Attorney General (“AG”), to review, impugn and override the Commissioner’s decisions. The decisions being to collect business taxes which the Bank undoubtedly owes GOB under an arbitral award. The basis of the present application for judicial review is that GOB owes a much larger sum to the Bank and that, in this circumstance of the present case, it would be unfair and inequitable to allow the Commissioner to proceed with such collection while GOB is unwilling to proceed to satisfy the debt due to the Bank.
- [2] There does not appear to be any dispute by the parties that both the taxes due to GOB and the debt due to the Bank are in fact outstanding.
- [3] In essence, the Bank is arguing that because GOB owes the Bank a sum much greater than the business tax due, that the decisions of GOB to insist on payment of taxes flies in the face of legality, proportionality and reasonableness. As a result, such decisions ought to be reviewed by this Court, quashed and in effect replaced with a decision that GOB simply holds its enforcement hands in the sum which is owed to it by reason of the outstanding sums which is owed by GOB to the Bank.
- [4] GOB, on the other hand, is arguing that the Bank, by the present claim for judicial review, is attempting to achieve an impermissible “backdoor enforcement” of the debt by bringing the present procedure for judicial

review to prevent payment of the taxes which are due. That the Bank is required to seek enforcement of the debt due to it by GOB by other enforcement means than by the present proceedings.

- [5] The present dispute appears to be therefore about the appropriate process which ought to be adopted by the Bank for staying enforcement of GOB's debt.

Issue

- [6] Whether the Claimant is procedurally entitled to make the present application for judicial review?

Background

- [7] As at 13th April, 2018, GOB was undoubtedly indebted to the Bank in the sum of \$92,154,628.46 plus costs of \$536,817.71 ("the Judgment Debt") with interest accruing thereon at a rate of 6.0% per annum.
- [8] On the same day, 13th April, 2018, the Bank authorized the Commissioner to set-off its Business Tax in the sum of \$8,545,135.02 ("the Taxes") for the first Quarter 2018 against the Judgment Debt obtained by way of an arbitral award. For as long as the Judgment debt and/or the Taxes remain unpaid the sum which is sought to be set-off by the Bank will not remain static.
- [9] The Commissioner is also entitled under section 58 of the Income and Business Tax Act ("the IBTA") to collect the Taxes by way of garnishment against the Judgment Debt but has refused to do so.
- [10] Notwithstanding being duly authorized by the Bank to satisfy the Taxes due by way of set-off or garnishment against the Judgment Debt, the Commissioner refused to set-off the Business Tax or to garnish said taxes until the Commissioner had obtained approval to do so by the Minister of Finance. It appears that no such approval has been obtained to date.
- [11] The Commissioner, even though she is entitled to do so, is also refusing to collect the taxes by way of garnishment against the Judgment Debt. Instead, the Commissioner has opted to enforce collection of the Taxes against the Bank.

- [12] By the present claim the Bank is seeking to impugn the decisions of the Commissioner by alleging that such decisions are unlawful, disproportionate and unreasonable. The Bank is seeking orders of this Court that the Commissioner promptly stays its enforcement hand by reason of the 'equitable set-off' or 'garnishment' in relation to the Bank's tax liability against the Judgment Debt owed to the Bank by the GOB. GOB appears unwilling to take steps to satisfy the debt due to the Bank by taking the necessary means to constitutionally appropriate the funds to discharge the debt to the Bank.
- [13] The Court has been informed that there is a pending claim, in other proceedings, for Mandamus which has been brought by the Bank against GOB to pay the Judgment Debt which GOB owes. This claim is at present before the Hon. Chief Justice and is imminently due for decision.

The Court Proceedings

- [14] On the 15th June, 2018, the Claimant was granted conditional permission to apply for Judicial Review of three decisions of the Commissioner of Income and Business Tax totaling \$8,545,135.02 and \$256,354.06 in interest. The Decisions which are sought to be impugned are:
- (a) The decision of the Commissioner dated 16th April, 2018 to issue a Notice of Assessment against the Bank for the sum of \$8,545,135.02 in Business Tax and \$128,177.03 in interest;
 - (b) The decision of the Commissioner dated 16th April, 2018 refusing to set-off the Bank's tax liability against the Judgment debt owed to the Bank by the GOB; and
 - (c) The decision of the Commissioner dated 22nd May, 2018 to issue a Demand notice against the Bank for the sum of \$8,545,135.02 in Business Tax and \$256,354.06 in interest.
- [15] Directions were also given in relation to the applicable condition, namely the filing of a Fixed Date Claim Form, and for filing the evidence in the case as well as written submissions and a date fixed for hearing.

[16] The conditions were met by the Claimant by the filing of a Fixed Date Claim Form on the 28th June, 2018 in which the Claimant, inter alia, claimed the following reliefs:

- (a) A declaration that the decisions of the Commissioner refusing to set-off the Bank's tax liability against the judgment debt is unreasonable and disproportionate and therefore unlawful;
- (b) An order restraining the Commissioner whether by herself, her servants and/or agents from seeking to enforce the tax liability against the Bank; and
- (c) A declaration that the decision of the Commissioner not to garnish the Bank's tax debt from the judgment debt is unlawful.

The Law

[17] Section 114(2) of the Constitution provides:

“(2) No moneys shall be withdrawn from the Consolidated Revenue Fund except to meet expenditure that is charged upon the Fund by this Constitution or any other law enacted by the National Assembly or where the issue of those moneys has been authorised by an appropriation law or by a law made in pursuance of section 116 of this Constitution.”

[18] Section 115 (3) of the Constitution provides:

“If in respect of any financial year it is found... that a need has arisen for expenditure for a purpose for which no amount has been appropriated ... a supplementary estimate showing the sums required or spent shall be laid before the House of Representatives and the heads of any such expenditure shall be included in a Supplementary Appropriation Bill.”

[19] In the case of *Belize Bank Limited v The Attorney General of Belize*¹ the Caribbean Court of Justice (“CCJ”) ruled that:

¹ [2017] CCJ 18 (AJ)/ 2017

“It is presumed that judicial orders will always be obeyed by those affected, including the Government, but the order for enforcement of a foreign arbitral award does not itself compel payment from the CRF. It is common ground that s 114 of the Constitution requires legislative approval for expenditure which the Government promised to pay by validly entering into the Loan Note. If the Government procures the passage of the relevant legislation there is obviously no illegality in making payment.²”

[20] The CCJ also authoritatively determined that:

“It is, however, accepted that monies payable under s 25 are not charges on the Consolidated Revenue Fund and so need legislative approval in a General Appropriation Act or, if not so budgeted for, in a Supplementary Appropriation Act³.”

[21] In the Grenadian case of *Gairy v Attorney General*⁴ it is recognized by the Judicial Committee of the Privy Council that a judgment debt against the Government is one payable out of the Consolidated Fund. This case suggested that the proper procedure in this instance would be to follow the requirements under *Section 25 of the Crown Proceedings Act*⁵ which provides an exclusive procedure for enforcing money orders against the Crown and subject to the terms of that section the Claimant may seek an order of mandamus compelling payment by the relevant minister or public official proper basis to do so)⁶.

[22] It appears to be legally questionable whether an order of mandamus could be issued to compel payment in circumstances where there was no appropriation of a scope that would render payment of the judgment debt lawful.

² Ibid Para 36.

³ *Belize Bank Limited v The Attorney General of Belize* [2018] CCJ 14 (AJ) at Paragraph 6.

⁴ Privy Council Appeal No. 29 of 2000. See para 8.

⁵ Cap. 167 of the Laws of Belize Re. Ed. 2011.

⁶ *Gairy v Attorney General*. Privy Council Appeal No. 29 of 2000. See paragraphs 20- 28.

[23] It also appears unquestionable that under *Section 25 of the Crown Proceedings Act* that by *Section 115 (3) of the Constitution* a means of appropriation is provided for legislative approval to be obtained to pay the judgment.

[24] Under *Section 58(1) and (2) of the Income and Business Tax Act*⁷ (“IBTA, it is provided, by way of ‘Garnishment of Debts’ that:

“(1) When the Commissioner has knowledge or suspects that a person is or is about to become indebted to or is otherwise liable to make a payment to a person who has failed to make a payment due under this Act or under rules made there under, the Commissioner may, by registered letter or by letter served personally, require such first mentioned person to pay the moneys otherwise payable to such second mentioned person in whole or in part to the Commissioner on account of the liability of the second mentioned person to make a payment due under this Act or rules made there under.

(2) The receipt of the Commissioner for moneys paid as required under this section shall be to the extent of payment a good and sufficient discharge of the original debt or other liability.”

[25] Sir Thomas Bingham in the case of *Regina v Commissioners of Inland Revenues*⁸, a UK tax case, determined that the Commissioner in exercising his or her discretion, such as in the present case, is required not to act unfairly. In relation to such fairness, it was correctly stated:

“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

⁸ 1996 WL 1090368. Also Reported as *Regina v Inland Revenue Commissioners Ex. P. Unilever PLC* [1996] STC 68.

*acceptance of a duty to act fairly and in accordance with the highest public standards.*⁹

[26] Furthermore, it was authoritatively observed by the same judge:

*“Public authorities in general and taxing authorities in particular are required to act in a high-principled way, on occasions being subject to a stricter duty of fairness than would apply as between private citizens.”*¹⁰

[27] It’s also clear, and it was further wisely and properly stated that the, *“Spirit of fair dealing which should inspire the whole of public life”*¹¹.

[28] In the UK case of *R (on the application of Gallaher Group Ltd and Others) v The Competition and Markets Authority*¹² Lord Diplock, however, opined that:

*“[Judicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful, but not for acts done lawfully in the exercise of an administrative discretion which are complained of only as being unfair or unwise”*¹³

[29] In the case of *R (on the application of Gallaher Group Ltd and Others) v The Competition and Markets Authority*¹⁴, Lord Carnwath, also, however, had cause to opine that:

*‘Substantive unfairness on the other hand - or, in Lord Dyson’s words..., “whether there has been unfairness on the part of the authority having regard to all the circumstances” - is not a distinct legal criterion. Nor is it made so by the addition of terms such as “conspicuous” or “abuse of power”*¹⁵

⁹ Ibid 1996 WL 1090368 Page 6.

¹⁰ Ibid Page 11.

¹¹ Ibid.

¹²[2018] UKSC 25 para 32 citing Lord Diplock in *R v Inland Revenue Comrs., Ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 p 637

¹³ Ibid.

¹⁴ [2018] UKSC 25 para 41.

¹⁵ Ibid.

[30] In the case of *Citibank Canada v. Confederation Life Insurance Co*¹⁶, which was not a tax case, it was determined that obligations existing between two parties must be debts, and they must be debts which are for liquidated sums or money demands which can be ascertained with certainty; and that both debts must be mutual cross-obligations, i.e. cross-claims between the same parties and in the same right.

[31] In relation to the question of equitable set-off the UK House of Lords in the case of *Burton (Collector of Taxes) v Melham Ltd*¹⁷, a tax case, by the decision of Lord Walker of Gestingthorpe, in which sympathy was expressed with the view expressed by Buxton LJ in an earlier case in the following terms:

“If Parliament had intended the complicated concept of equitable set-off to apply in this area, it would have said so expressly. Again, I have some sympathy with this view. ...Nevertheless set-off is a general principle founded in simple convenience and fairness even if it has some arcane fringes. It should be taken to apply generally to all liquidated cross-claims unless excluded by statute or contract. I think that the difficulties said to arise in this case are not as intractable as the Court of Appeal took them to be.”

Whether the Claimant is procedurally entitled to make the present application for judicial review?

[32] It's been submitted by Counsel for the Bank that in circumstances where there are cross-debts the Court has equitable jurisdiction to determine whether it is unconscionable to order payment.

[33] Counsel for the Bank also submits that having regard to the debt owed by GOB to the Bank, it is unconscionable for the Commissioner to seek to enforce payment of the tax debt when there is and undoubted debt of

¹⁶ (1996), 1996 Carswell Ont 3219 para 37

¹⁷ [2008] UKHL 22 para 22

\$92,154,628.46 owned by GOB to the Bank. That in discharging the duty to act fairly, the Commissioner ought to act fairly and equitable and set-off the tax debt.

- [34] The Defendants are on the other hand arguing that the Bank's claim ought to fail on the grounds as prayed because the Bank does not meet the requirements to set-off said debt nor to garnish the sum from the Judgment Debt as stipulated by the IBTA.
- [35] The Defendants are submitting that the Bank is attempting a backdoor procedure, in blatant contravention of the Constitution, as there exists proper procedure, which is sought to be circumvented, to satisfy a judgment debt against GOB.
- [36] The Defendants are submitting that equitable set-off is of no recourse to the Bank since there is no connection whatsoever with its tax obligations and its demand for set-off in relation to the Judgment Debt: the two being very distinct and separate obligations. Also that the Bank has not alleged any equitable ground for the set-off to be allowed. That both legal and equitable set-off are not available to the Bank, and that further, statutory set-off under the IBTA is not available to them because the provisions in the above legislation are specific in their delineation of when set-off may occur, that the Bank would be constrained to asserting set-off only in those circumstances stipulated under sections 15, 51 and 115 of the IBTA.
- [37] It is further submitted that GOB's liabilities though due, because of the Judgment Debt, are not yet payable as the same cannot be lawfully paid without the approval by Parliament for an appropriation of funds for a purpose including satisfaction of the debt in order to make the Judgment Debt payable, which has not occurred, and therefore there exists no charge on the Consolidated Revenue Fund ("CRF").
- [38] GOB are also submitting that at Common Law, a set-off may only take place if two parties owe each other liquidated debts which are payable and thus, the Claimant has no basis for a set-off of its tax obligations as determined by the decision of *Gairy v Attorney General*. That the proper procedure in

this instance would be to follow the requirements under *Section 25 of the Crown Proceedings Act* for enforcing money orders against the Crown and subject to the terms of that section the Claimant may seek an order of mandamus compelling payment by the relevant minister or public official.

- [39] It is therefore submitted that the Bank is using the Court's process for a purpose or in a way significantly different from its ordinary and proper use which if granted would bring this Court's processes into disrepute.
- [40] It is also submitted that, giving reverence to the sacrosanct principles of the Constitution, the Judgment Debt of the Claimant even if due is not yet payable since it must follow due procedure as stipulated by section 114 of the Constitution, and as such, the Judgment Debt cannot be set-off or garnished because the Bank is seeking to claim from the coffers of the CRF via a disguise deceitfully dressed in Public Law which is in contravention of the Constitution.
- [41] It is also submitted that under Section 58(1) of the IBTA it is dependent on payment actually being made.
- [42] In relation to garnishment of taxes due from GOB, it is submitted that because there cannot be payment from the CRF without parliamentary authorization, if such authorization is withheld, payment cannot lawfully be made, even if the lack of authorization persists for an extended period of time or indefinitely.
- [43] GOB are submitting that there is no basis to suggest that the Commissioner's exercise of her power under the IBTA was unlawful and that even if proved that the Commissioner abdicated or fettered her power, the Commissioner can still not act contrary to the confines of the law. Thus, the Commissioner would have exercised her powers in the same way or reached the same decision not to set-off or garnish the Judgment Debt, even if it had not fallen into error—if the Court finds that she abdicated or fettered her powers.
- [44] It follows, according to Counsel for the GOB that this Court ought not to quash the decisions of the Commissioner even where there was an error of

law or natural justice if she would have reached the same decision even if she had correctly interpreted the law or taken account of all relevant material.

- [45] Furthermore, Counsel for GOB seems to be adopting a position that equitable set-off does not apply, seeking to rely on the case of *Geldof Metaalconstructie NV v Simon Carves Ltd*¹⁸ in which Rix LJ, so they submit, that in relation to such cross-debts debts there should be a: “*Close relationship between the dealings and transactions which gave rise to the respective claims*”¹⁹. GOB are submitting that there is no such connection.
- [46] Counsel for GOB are submitting that the Commissioner cannot act contrary to express provisions of statute and that in the circumstances of the present case, the Commissioner could not exercise any such discretion or ought not to exercise the discretion which the Bank are urging.
- [47] In relation to the submissions on behalf of the Defendants, I have said they ‘seem’ to be submitting because in their oral submission they seem to be presenting something of a moving target in that Counsel for the Defendants, contrary to their written submissions, were not unequivocal that the present defence is one of ‘process’ as against a defence of substance. It has been therefore very difficult for this Court to completely fathom or understand exactly what the nature of the Defendant’s case is; but I’ll do the best that I can.

Determination

- [48] I accept that the Commissioner, in accordance with clear authority, particularly as contained in *Regina v Commissioners of Inland Revenues* does have a residual discretion to act fairly and that such discretion to act fairly is of particular importance in relation to taxing statute, such as of the present case, where there isn’t really an equality of arms between the Government and a private citizen. This duty to act fairly, it seems to this Court, must be very carefully if not strictly reviewed.

¹⁸ [2010] 4 All ER 847 Page 43

¹⁹ Ibid

- [49] This Court considers that in taxing situations, such as in the present case, where there exists the lack of equality of arms, which can have serious consequences to private citizens, even if the private citizen is a substantial corporate body, such as a bank. There is, in the view of this Court, undoubtedly such an unequal relationship in relation to the payment of the taxes, which may be considered to be embodied in something of a penal statute, in such a situation as the present. In such a situation the duty to act fairly and in accordance with the highest public standards must be carefully scrutinized by the Court to ensure that abuse does not take place, as any such abuse of power can have a deleterious effect on the whole of public life.
- [50] This Court, having reviewed the law and all the facts and circumstances of the case considers that the Bank does meet the requirements of an 'equitable set-off' in relation to tax debt as it would be unfair and inequitable to seek to close the categories of unfairness especially where previous precedent would act as a cage instead of being a guide. This Court considers that 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.
- [51] This Court does not accept the submissions of Counsel for the Defendants that the Bank is attempting a backdoor procedure. The present application for judicial review, in the view of this Court, is not contravention of the Constitution, as this Court will only entertain the present procedure as a shield not a sword: to stay the hand of the Defendants and not as a means to satisfy the Judgment Debt against GOB.
- [52] This Court does not accept that 'equitable set-off' is of no recourse to the Bank in the circumstances of the present case as 'equity' ought not to be allowed to sit idly by simply because there may be no connection between the debt due to the Bank as a result of arbitral proceedings and the Bank's demand for set-off in relation to the Judgment Debt. The two may be very distinct and separate obligations but, in the view of this Court the Bank does

have equitable grounds for the set-off namely that this Court may be complicit in assisting the Defendants to perpetrate an injustice by facilitating payment of the Tax Debt while allowing the GOB the denial of payment of the arbitral debt. That equitable set-off is therefore available to the Bank, even if a statutory set-off, under the IBTA is not available to them because the provisions in the IBTA are specific in their delineation of when set-off may occur. This Court considers, therefore, that the Bank is not completely constrained to asserting set-off only in those circumstances stipulated under sections 15, 51 and 115 of the IBTA.

- [53] This Court accepts that GOB's liabilities though due, because of the judgment debt, may not yet be payable, because as the same cannot be lawfully paid without the approval by Parliament for an appropriation of funds for the specific purpose of satisfying the debt in order to make the Judgment Debt payable. But this Court considers that even though such appropriation has not yet occurred, and therefore there exists no charge on the CRF, yet the debt is nevertheless still due.
- [54] This Court accepts that at Common Law, a set-off may only take place if two parties owe each other liquidated debts which are payable and thus the Bank may have no basis for a set-off of its tax obligations as determined by the decision of *Gairy v Attorney General*. Nevertheless this Court is of the view that its hands are not tied by 'process' or 'procedural' requirements under Section 25 of the Crown Proceedings Act for enforcing money orders against the Crown or that it is entirely at the mercy and subject to the terms of that section. The Court understands that the Bank has sought an order of mandamus compelling payment by the relevant minister or public official which will be governed by the law, facts and circumstances of the case as presented to the Hon. Chief Justice in relation to which this Court makes no comment.
- [55] This Court has therefore concluded that the Bank is not using the Court's process for a purpose or in a way significantly different from its ordinary and

proper use. Rather this Court is of the view that it should only make such orders which are in keeping with its processes.

- [56] This Court is not of the view that the sacrosanct principles of the Constitution comes into play by the present case and the declarations and orders which it is prepared to make, which are not necessarily bounded by the strict terms and letters of Section 58(1) of the IBTA, and is not dependent on payment actually being made.
- [57] In relation to garnishment of taxes due from GOB, this Court does not base its decision primarily in relation to the principles which are applicable to this manner of collecting a debt, because payment from the CRF may be withheld without parliamentary authorization and therefore may not lawfully be made for an extended period of time or indefinitely.
- [58] This Court is of the view that even if the Commissioner's exercise of her power under the IBTA may not strictly be unlawful, because she has fettered her power, the Commissioner is still required to act within the confines of equity.
- [59] Now, this Court is not without some understanding and sympathy for the position of a Commissioner, in a situation such as the present. Frankly, this Court recognizes that it would require of a Commissioner, in a small community such as Belize, some fortitude or strength or moral conviction to take upon herself, as in the present case, the decision to equitably set-off or even garnish, as in the present case, debts or otherwise or not seek to enforce a tax debt which is clearly due. But, if this Court accepts that such a discretion is reposed in the Commissioner by equity, which it clearly is, then the Commissioner is expected to exercise such a discretion with independence and acting in accordance with the highest public standard; and she cannot abdicate her statutory responsibility to taxpayers or other members of the public. It's an onerous duty and a duty which this Court accepts might expose the Commissioner to 'difficulties' to which such a Commissioner might prefer not to be exposed. This Court considers, however, that such a difficult exercise of discretion goes with the territory of

the office and that acting fairly is what is required of a Commissioner once she or he takes on such a position.

- [60] The purpose of judicial review such as in the present case is precisely to protect the citizens, including banks, from any unlawful, unconscionable or improper exercise of discretion, and this Court will not shirk from its responsibility, such as in the present case, to review such a decision or to undertake, in appropriate cases, such decision making involved in such a review to ensure that there is fairness of process in Government life.
- [61] This Court has heard nothing from the Defendants which suggest that the principles of equity are inapplicable to its review of the Commissioners decisions under the taxing statute, such as in the present case, to enforce equity and fairness and to prevent illegality, or more specifically unconscionably or dis-proportionality from taking place.
- [62] This Court is not in a position to say, one way or the other, whether the Commissioner would have exercised her powers in the same way or reached the same decision not to set-off or garnish the Judgment Debt, without consulting with others, which she did, but has concluded that she does appear to have abdicated or fettered her powers.
- [63] It follows that this Court had decided to quash the decisions of the Commissioner as she appeared to have misinterpreted her equitable powers and did not take into account all relevant material including her duty to exercise her discretion equitably in relation to the Bank.
- [64] I cannot accept the submissions by Counsel for GOB by his suggestion that that equitable set-off does not apply and that the Commissioner was bound to act within the four corners of the IBTA in the circumstances of the present case and had discretion or ought not to have exercised the discretion which the Bank are urging.
- [65] This Court has carefully reviewed all the fact and circumstance of the case, none of which are in dispute, especially the reliefs to which the Court has already referred, which are being sought by the Bank.

- [66] This Court has concluded, looking at all the circumstances of the case that it would be unconscionable, disproportionate and unreasonable and as a consequence inequitable for this Court to allow the Defendants to proceed with enforcement actions in relation to the Tax Debt in the circumstances of the present case.
- [67] In arriving at the present conclusion, this Court takes into account the fact that GOB undoubtedly owes the taxpayer, the Bank, enormously in excess of the amounts which is due to the Commissioner or GOB.
- [68] This Court is also taking into account, the fact that all that is being sought, and in any event what this Court will grant based on the facts of the present case, is effectively a restraint on GOB from seeking to enforce the tax liability against the Bank; which liability continues and is not sought to be interfered with by this Court.
- [69] This Court also takes into account that there are other proceedings which are before this Court and which are due for imminent determination by the Honourable Chief Justice for mandamus, which this Court does not make any comment upon. As such, in weighing all the facts and circumstances of the case, this Court considers that no injustice could possibly be caused to the GOB in ordering that it holds its hand in relation to any enforcement of the Tax Debt.
- [70] This Court can only speak to the facts and circumstances which are undisputed in the present case before it. This Court, in arriving at this decision, does so purely on the record before it, and in particular that it has heard nothing to suggest that the principle of equitable set-off is and was not applicable to the facts and circumstances of this case.
- [71] Specifically, this Court carefully considered the suggestion that the two claims must be closely connected but considers that such suggestion is inapplicable to the equitable set-off sought in the present tax case, but is more applicable to other civil cross-claims.
- [72] This Court also considers that the provisions of section 58 of the *Income and Business Tax Act* relating to garnishment of debts is quite separate

from equitable set-off and reposes in the Commissioner a clear discretion, quite separate from equitable set-off, to garnish liabilities which are due to the GOB .

- [73] This Court does not therefore consider that the Bank, by the present claim for judicial review, is attempting to achieve an impermissible “backdoor enforcement” of the debt by the present procedure for judicial review to prevent payment of the taxes which are due.
- [74] This Court considers that the Bank is not precluded by the present application for judicial review to seek enforcement of the debt due to it by GOB by other means than by the present proceedings. This Court considers that the present application to stay GOB’s hand, in the interest of justice and to prevent an abuse of power, which is not therefore an inappropriate process, but a process which may be adopted by the Bank for staying enforcement of GOB’s debt.
- [75] Based on all the above, this Court will grant to the Bank, a declaration that the decision of the Commissioner, refusing to set-off the Bank’s liability against their Judgment Debt, is unreasonable, disproportionate, unlawful and therefore inequitable.
- [76] This Court will also grant a declaration that the decision of the Commissioner not to garnish the Bank’s Tax Debt from the judgment debt is unreasonable and will also grant an order restraining the commissioner whether by herself, her servants and her agents from seeking to enforce the tax liability against the Bank.

Costs

- [77] Because the Bank has wholly succeeded it is entitled to its cost to be agreed or assessed.

Disposition

- [78] This court will therefore grant the following orders:

- (a) A declaration that the decision of the Commissioner, refusing to set-off the Bank's liability against their judgment debt, is unreasonable, disproportionate, unlawful and therefore inequitable.
- (b) A declaration that the decision of the Commissioner not to consider garnishing the Bank's tax debt from the judgment debt is unreasonable
- (c) An order restraining the Commissioner whether by herself, her servants and her agents from seeking to enforce the tax liability against the bank; and
- (d) GOB shall pay to the Bank its cost to be agreed or assessed.

The Hon. Mr. Justice Courtney A. Abel

8th February, 2019