IN THE SUPREME COURT OF BELIZE. A.D. 2018

CLAIM NO. 402 OF 2OI8

IN THE MATTER OF SECTIONS 3, 17, AND 20 OF THE BELIZE CONSTITUTION ACT, CHAP 4 OF THE SUBSTANTIVE LAWS OF BELIZE
AND
IN THE MATTER OF SECTION 33 OF THE GENERAL SALES TAX ACT, CHAPTER 63 OF THE SUBSTANTIVE LAWS OF BELIZE

BETWEEN:
(UC TRADING COMPANY LIMITED **CLAIMANT**
(
(AND
(
(COMMISSIONER OF GENERAL SALES TAX
(ATTORNEY GENERAL OF BELIZE **DEFENDANTS**

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Before: The Hon Justice Westmin R.A. James (Ag)
Date: 25th May 2021
Appearances: Mr William Lindo for the Claimant
Ms Brianna Williams for the Defendant

JUDGMENT
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1. This is a judicial review hearing raising constitutional and administrative law issues around the imposition of and the operation of the General Sales Tax ("**GST**") regime in Belize.

Facts

2. The Claimant is a trading company incorporated under the laws of Belize. During the period April to August 2016 (the "material period") carried on business as, inter alia, general merchants, importers, wholesalers and retailers, made taxable supplies but was not registered for GST during this period. The First Defendant, by virtue of

section 51(2), responsible for the administration of this Act and for the assessment, collection, and recovery of GST.

3. By way of letter dated 27th September, 2016, the First Defendant notified the Claimant that it had been registered retroactively for GST with effect from 1st September, 2016 and that an auditor would assess the Claimant's tax liability in respect of the material period.

4. Further to a request by the First Defendant dated 20th December, 2016 for access to the Claimant's books and records in order to conduct an audit, the First Defendant conducted an audit on the Claimant's books and records in respect of the material period between 29th December, 2016 and 3rd March, 2017.

5. As a result of said audit, the First Defendant issued a first notice dated 13th April, 2017 (the "First Notice") assessing the Claimant to a liability to GST of $32,258.81 (on the basis that the Claimant made sales totalling $258,070.49 for the period April to August 2016) and indicating the sum for penalties and interest for the GST owed. The Claimant did not receive the assessment until the 11th May, 2017. On the 24th May, 2017 and the 23rd January, 2018 the Claimant requested a review of the assessment by the First Defendant.

6. The review was held on the 27th March, 2018 in the presence of the Claimant's representatives Mrs. Amaryllis Cocom and Mr. Wilfredo Cocom. Also present at the review was Mr. Evan Brown, the then Deputy Commissioner of GST, Mr. Edd Usher, the then Legal Counsel for the GST Department, and Mr. Brian Ferguson, the auditor who conducted the audit.

7. The First Defendant reviewed the assessment and sent a letter to Claimant on the 3rd April, 2018 with the Assessment Decision.

8. The Claimant claimed the following reliefs, namely:

    a) *An order of certiorari to quash the decision of the Defendant as contained in its letter dated 3rd April, 2018 (the 'Assessment Decision');*

b) *A Declaration that Section 33(3) of the General Sales Tax Act Chapter 63 of the Laws of Belize, which imposes a six month limit on input tax credits, is unconstitutional as applied to Sections 3 and 17 of the Belize constitution;*
c) *A Declaration that the 1st Defendant's Assessment Decision was procedurally unfair as it is wholly devoid of any reasons as to how the 1st Defendant arrived at her assessment and therefore barred the Claimant from formulating any ground of appeal;*
d) *Further, or alternatively a Declaration that Assessment Decision was irrational as it is wholly devoid of any reasons as to how the 1st Defendant arrived at her assessment and what evidence was taken into account by the 1st Defendant and the sufficiency of inquiry, if any, in arriving at the Assessment Decision;*
e) *A Declaration that the 1st Defendant acted ultra vires the Act in its abject failure and breach of statutory duty to inform the Claimant:*
    a. *That it had a right to appeal the Assessment Decision to the GST Appeal Board; and*
    b. *The timeframe in which to lodge such an appeal.*
f) *Interest pursuant to s.166 of the Supreme Court of Judicature Act on such sums due to the Claimant at such rate and for such period as the Court shall think fit;*
g) *Costs; and*
h) *Such further or other relief as the Court sees fit.*

Issues for Determination

9. The parties have agreed that the following issues are to be determined by the Court:

    i. *Whether Section 33(3) of the GST Act is un-Constitutional when read along with sections 3 and 17 of the Belize Constitution;*
    ii. *Whether the Assessment Decision was procedurally unfair and/or irrational as it was wholly devoid of any reasons; and*
    iii. *Whether 1st Defendant acted ultra vires the GST Act in failing to inform the Claimant that it had a right to appeal and the timeframe in which to lodge such an appeal.*

Issue 1: Whether Section 33(3) of the GST is unconstitutional when read alongside sections 3 and 17 of the Constitution

10. The Claimant having had the benefit of the CCJ's decision in ***Guyana Stores Limited v The Attorney General of Guyana, et al, [2018] CCJ 2 (AJ)***, and in particular paragraph 29 where the CCJ relying on the decision of Crane JA in ***Bata Shoes v CIR and AG [1976] 24 WIR 198***, held a legal tax falls within the limitation section of the Constitution and does not amount to an unconstitutional compulsory acquisition of property, abandoned this aspect of its claim.

Issue 2: Whether the Assessment Decision was procedurally unfair and/or irrational as it was wholly devoid of any reasons

11. The second ground on which the Claimant contends that there was a breach of natural justice was the First Defendant's failure to provide reasons for its decision. Therefore, the issue to be considered is whether the Defendant had a duty to provide reasons, and if it failed to give reasons whether this would have resulted in a breach of natural justice.

12. Section 42(2) of the GST Act stipulates that the First Defendant must put in writing the decision after the review. It states:

> *"The Commissioner shall give to the person so requesting the review notice in writing of his decision upon the review, which may include confirmation, amendment, or vacation of the assessment."*

13. There is no general rule of law that reasons should be given for administrative decisions: ***Stephan v General Medical Council [1999] 1 W.L.R. 1293 at 1300***. The circumstances which give rise to a duty to provide reasons include where it is required by statute; to enable an effective right of appeal; and, where it is required by the common law: ***De Smith's Judicial Review 8th edition at paras 7-098 to 7-103.***

14. In Canada, a common law duty for administrative decision makers to give reasons is also recognized where there is a right of appeal ***Baker v. Canada (Minister of Citizenship and Immigration) (1999) 2 SCR 817*** and also where the decision has *"important significance for an individual."* In the case of ***Mahabir Prasad v. State of***

U.P. (1970) 1 SCC 764, the Supreme Court of India similarly held that if a quasi-judicial order is subject to appeal the law necessarily implies the requirement of reasons otherwise the right of appeal shall become 'an empty formality'.

15. The Claimant and Defendant accepts this position in their submissions. The Claimant goes further to highlight that the increasing modern trend is to provide reasons for the administrative decisions, which they describe as a "modern imperative of good administration".

16. There is indeed now a greater trend towards an administrative body providing reasons. In ***R v Lambeth LBC, Ex Parte Walther Sir Louis Blom-Cooper QC [1993] Times, 6*** asserts:

> *"It seems to me that English law has now arrived at the point where there is at least a general duty to give reasons whenever the statutorily impregnated administrative process is infused with the concept of fair treatment to those potentially affected by administrative action. It was hard to envisage any situation, except possibly where the giving of reasons would reveal some aspect of national security or unintentionally disclose confidential information or invade privacy. In many cases, exceptions to the duty to give reasons might be regarded as justifying more limited forms of reasons, rather than an absence of any duty to give reasons."*

17. Similarly, the Irish Supreme Court in the case of ***Mallak v Minister for Justice, Equality and Law Reform [2012] IESC 59*** held at paragraph 74:

> *" … The developing jurisprudence of our own courts provides compelling evidence that, at this point, it must be unusual for a decision maker to be permitted to refuse to give reasons. The reason is obvious. In the absence of any reasons, it is simply not possible for an applicant to make a judgment as to whether he has a ground for applying for judicial review of the substance of the decision and, for the same reason, for the court to exercise its power."*

18. It is therefore now generally accepted as sound principle in the realm of public law that a failure by a public authority to give reasons, or adequate reasons, for a decision may be unlawful. As explained by Boodoosingh J as he then was,

"There is a lot to be said for the increasing trend of modern decisions to require public authorities to give reasons for their decisions. This would allow all parties to be aware of the issues to which the Authority addressed its mind and the means by which it arrived at its decision. This can only enhance the confidence in the operations of the First Defendant. Further, providing reasons for administrative decisions can lead to improved efficiency in the administration of justice. When a decision is issued, along with the reasons for the decision, this could eliminate matters of the same nature being referred to the Recognition Board as it may become easier to predict the outcome of situations with similar facts. Consequently, this could see a reduction in time used and in resources allocated to respond to similar questions. This will also lead to increased transparency, as there would be a clear indication of the similar factors used to consider similar matters." (see ***CV 2014 – 01230 Pan American Life Insurance v RRCB***)

19. This Court is satisfied that the First Defendant would be under a duty to provide reasons, based on the statute and the tenets of fairness, when they gave a decision.

20. Additionally, the Claimant's view is that the reasons provided by the Defendant must be adequate. The Court of Appeal in ***R v Westminster City Council, Ex parte Ermakov [1996] 2 All ER 302*** at page 9 stated the standard of the reasons to be provided:

> *"It is well established that an obligation, whether statutory or otherwise, to give reasons for a decision is imposed so that the persons affected by the decision may know why they have won or lost and, in particular, may be able to judge whether the decision is valid and therefore unchallengeable, or invalid and therefore open to challenge. There are numerous authoritative statements to this effect: see eg Thornton v Kirklees Metropolitan BC [1979] 2 All ER 349 at 354, [1979] QB 626 at 638 per Megaw LJ and R v Croydon London Borough, ex p Graham (1993) 26 HLR 286 at 291–292 (a case to which further reference will be made), where Sir Thomas Bingham MR said—*
>
> > *'I readily accept that these difficult decisions are decisions for the housing authority and certainly a pedantic exegesis of letters of this kind would be inappropriate. There is, nonetheless, an obligation under the [Housing Act 1985] to give reasons and that must impose on the council a duty to give reasons which are intelligible and which convey to the applicant the reasons*

why the application has been rejected in such a way that if they disclose an error of reasoning the applicant may take such steps as may be indicated.'"

21. The First Defendant sent her Assessment Decision dated the 3rd April, 2018 which stated:

    "At your request and as provided by section 42 of the GST Act, a review was conducted on March 27, 2018, the review was for UC Trading (TIN: 191730).
    After hearing your arguments and looking at the evidence the Commissioner:

    - *Has amended the assessment;*
    - *Found that UC Trading committed an offence because it failed to inform the Department of the change of address when UC moved from Belize City to Orange Walk (section 28 GST Act.) Nevertheless, the Commissioner did not pursue this matter in court;*
    - *Waived the interest of $10,183.07.*
    - *Found that the taxes and penalty due are as follows – Tax $32,258.82 and Penalty $3,225.88 for a total of $35,484.70 payable to the Department of GST.*

    Please note that the GST Act provides that the interest continues to accrue at 1.5% per month until the agreed sum is paid in full."

22. It is important, before considering the particular issue, to understand the context to which this letter originated.

23. As a result of information received an investigation was launched by the First Defendant against the Claimant and requested the Claimant to register. The Claimant registered on 26th September, 2016. The information contained in that registration showed that the Claimant should have been registered for GST pursuant to the Act and since the Claimant was not registered an audit was conducted to determine the taxes owed for the period of non-registration.

24. The audit was conducted on 20th December 2016 and the findings were documented in an audit report dated 3rd March, 2017. The First Notice of Assessment was generated on the 13th April, 2017 which included the period for retroactive assessment, the penalties and interest on the taxes for the period the audit found that the Claimant owed.

25. The Claimant by letter dated 24th May, 2017 wrote to the First Defendant and indicated that they intended to challenge notices of assessments issues on 12th April, 2017 and received on 11th May 2017 for the period April 2016 to August 2016. The proposed challenge as stated in the letter were on the following:

    a. The assessment in the explanation section was generic and provided no reason or considerations taken into account in arriving at the assessment value;
    b. The assessments do not provide the section or subsection of the GST Act under which the assessments were conducted; and
    c. The "exorbitant" nature of the assessments and the seeming non application of input credits in arriving at the assessments.

26. The Claimant by letter dated 23rd January, 2018 followed up on that first letter. The First Defendant by letter dated 5th March, 2018 agreed to conduct a review on the 27th March 2018.

27. The hearing took place on the 27th March, 2018 before the Commissioner and other members of the General Sales Tax Department (the 'Department'). The evidence before the Court is that the Claimant, through its two directors who were present at the hearing and made representations to the Commissioner and her team from the Department.

28. At the review the evidence mainly comes from the First Defendant and the cross examination of the Claimant's director since the Claimant never put in evidence in chief as to what took place at the Review. The First Defendant testified that at the review, they heard from Mr Ferguson who reviewed his findings with the representative for the Claimant. He had determined that based on information provided by the Claimant the total sales from the period April to August 2016 was $258,070.49 and 12.5% of the total sales resulted in the claimant owing $32,258.81 in taxes.

29. She went on to testify that it was explained to the representatives of the Claimant that it had committed two major infractions. The first one was operating a business without registering for GST, which carries a penalty of a fine between $5,000.00-$10,000.00 or imprisonment of not more than two years pursuant to Section 22(4) of the Act. The second was moving the business to Orange Walk and not properly informing the Department, contrary to Section 28 of the Act. Also, it was explained to the Claimant that input credits could not be claimed for a period in which the Claimant was not registered, and nothing in the Act or Regulations would allow for input credits to be applied for a period a tax payer was not registered.

30. She also testified that the representatives of the Claimant made arguments in which they explained that they felt it unfair to pay all the interest and penalties since there was a delay in delivering the audit report. She said they then understood it was as a result of them not informing the Department in a timely manner of the change of address. She also testified that the representatives of the Claimant requested that the interest and penalties be waived, and for the taxes owed to be paid in a payment plan.

31. The First Defendant testified that in an attempt to settle the matter with the Claimant, she agreed to waive a portion of the interest and the use of a payment plan. She said that she did not waive the penalty because the Claimant contributed to the delay, and was at fault for not registering. She also said that she could not include input credits for a period that the Claimant was not registered because the Act would not allow for that. She said at the conclusion of the review it appeared the representatives of the Claimant were in agreement with her offer which is the wording contained in the letter.

32. The Claimants in cross examination did not contradict these facts. The Claimant's witness admitted that they were given reasons for the decision at the review. She accepted that they looked at the audit report. She admitted that they were told the reason why they could not claim input tax. She accepted that all the bullet points in the in the assessment letter were discussed at the meeting. The witness agreed that the waiver of interest was discussed and that it was waived in an attempt to

help the Claimant. She also confirmed that the letter was a synopsis of what was decided in the review meeting.

33. Therefore, the evidence as it stands is that the Claimant was provided with reasons for the decision of the First Defendant at the Review. The reason for the initial assessment of the period for which tax was owed was contained in the audit report and explained to the Claimant's representatives at the Review. The period, penalty and interest were set out in the First Notice and the reasons for the penalty and interest and non-inclusion of input tax were all explained to the Claimant's representatives. The Claimant's representatives were also told why they could not get input tax. Therefore, as a matter of fact, the Claimant was provided with reasons.

34. The Claimant's case is that based on the Assessment Decision that they were left in the dark as to what matters or evidence the First Defendant considered in as to whether the decision was indeed lawfully made. The Claimant's contention seems to be if it wasn't contained in the Assessment Decision no reasons were provided. The Court disagrees with this submission based on the context and circumstances here. Oral reasons were in fact given to the Claimant at the end of the Review. The reasons were in fact provide just not in the form that the Claimant is contending now. It is noted that the Claimant did not write to the First Defendant requesting written reasons as is being claimed. The Claimant did not seek a transcript of the proceedings. Certainly the First Defendant would have responded to either of those requests.

35. The purpose of giving reasons would be for the Applicant to know why they won or lost. The Claimant was provided with that. The Claimant's mind does not need addressing as to what factors were considered when arriving at the First Defendant's decision on review. From the evidence the Claimant's Directors were aware of those factors.

36. Therefore, the Court is satisfied that in the Assessment Decision letter, the Claimant did not need to be informed, any more clearly or with any greater specificity the reason or reasons for the First Defendant's decision. The Claimant's

Directors could not have been left in ignorance and/or confusion from that letter. I would say that the GST Department and the First Defendant in writing the letter should do a bit more in outlining the reasons for its decisions in the Assessment Decision letter so that there could be no misunderstanding or challenge to the fact of reasons.

37. Having considered the evidence advanced and the law cited, I find that on the facts of this case, there was no breach of the duty to provide reasons.

I*ssue 3: Whether 1st Defendant acted ultra vires the GST Act in failing to inform the Claimant that it had a right to appeal and the timeframe in which to lodge such an appeal?*

38. Counsel for the Claimant in submissions indicated that the Claimant no longer perused this claim.

The interpretation and application of section 33 of the GST Act

39. The Claimant in its submission sought a declaration on another issue raised at the trial of the instant claim, namely the interpretation of Section 33 of the Act read along with the Act as a whole and the subsidiary legislation.

40. A review of the Claimant's submissions here would seem to suggest that the Claimant's position is that it is entitled, in accordance with its reading of Sections 33(3) and 2 of the GST Act to claim input tax credits in respect of the periods in dispute (April 2016 to August 2016) when it was not yet registered for GST (such registration, by virtue of a letter dated 27th September, 2016 from the office of the Commissioner, took effect from 1st September, 2016).

41. The thrust of the Claimant's submissions on this point is that it is a taxable person (in accordance with Section 2 of the GST Act). The Claimant further argues that the effect of Section 33(3) is that "*a taxable person has, up to 6 months in which to obtain the necessary documentation as set out further in subsection (4) to claim the input tax credit under the mechanism set out in sections 31 and 32 of the Act.*"

42. In order to understand Section 33, it is helpful to begin by reviewing the general framework of GST in Belize and, in particular, the statutory framework for the recovery of input tax credits.

The Requirement to Register for GST in Belize

43. Section 22(1) imposes a general obligation on persons to register for GST provided that certain requirements as set out therein are met. The procedure for a person seeking to register is set out at s. 22(3). In a population of almost 400,000 persons, the Commission of General Sales Tax would find it impossible to ascertain which persons are within the scope of GST and have a liability. Therefore, it is essential for persons who satisfy the requirements for the imposition of GST in respect of taxable supplies made by them to be registered primarily to notify the GST Commissioner of their associated legal obligations. In fact, so crucial to the public purse is it that a person is registered, the legislature saw it fit to create a criminal offence for failure by a person to apply for registration where such person falls within the statutory requirement in section 22(1) to apply (section 22(4)).

Statutory Interpretation

44. Before delving into the Claimant's submissions, it is worth considering the canons of statutory interpretation. The Claimant rightly points to the CCJ's decision in ***Cruise Solutions Limited, et al v The Commissioner of General Sales Tax, et al, [2018] CCJ 27 (AJ)*** wherein the majority (endorsing the court's earlier decision in ***Speednet Communications Ltd v Public Utilities Regulator*** **[2016] CCJ 23** opined that:

> *"Where more than one construction of any provision of an Act is possible [on which see [27] below], the principles of interpretation require that a construction which promotes the general legislative purpose underlying the provisions is to be preferred to a construction which would not." We also endorsed the principle against doubtful penalisation, though preferring to call it the "principle against ambiguous governmental imposition", and, in particular, endorsed the remarks of Lord Thankerton as to a taxing provision: "if the meaning of the provision is reasonably clear the courts have no jurisdiction to mitigate harshness. On the other hand, if*

the provision is reasonably capable of two alternative meanings, the courts will prefer the meaning more favourable to the subject."

45. Indeed, the position of the CCJ rightly reflects the modern approach to statutory construction of tax statutes which seeks to ensure that, other than instances of clear and unambiguous statutory language which admit only one possible meaning and such a result does not produce an absurdity, the intention of the legislator is given effect by the courts by favouring an interpretation (where more than one is available) that achieves the will of Parliament.

46. As such, in keeping with the guidance handed down by the CCJ, this Court distils three key rules for the interpretation of tax statutes but by no means has the CCJ indicated that this is exhaustive and nor do I make any such finding. Firstly, a court is to proceed on the basis of seeking to determine whether the statutory language in question is clear and does not produce an *"arbitrary and unjust"* result which Parliament could not have intended: see ***Trustees of Seramco Ltd Superannuation Fund v Commissioner of Income Tax*** **[1976] 2 All ER 28 at 34, 35**. Secondly, if and to the extent that an interpretation of a statutory provision admits more than one meaning, a court shall seek to promote the general legislative purpose by preferring such interpretation which gives effect to such purpose where such intention can be determined. Where, however, the intention of the legislator remains unclear, the guidance from the CCJ, recast as principle against ambiguous governmental imposition, ensures that, as a final resort, the taxpayer is not prejudiced.

47. This approach is helpfully discussed at length by Lana Ashby and Jivaan Bennett in their article "*Post-Financial Crisis Construction of Taxing Statutes: Filling State Coffers? (A Commonwealth Caribbean Perspective)*" (2014) 20 Carib. L.R. (13 – 37).

GST Terminology

48. Section 2 of the Act provides the below definitions

"input tax,",

(a) in relation to an acquisition of goods or services by a person, means the GST imposed on the supply to that person of those goods or services; and
(b) in relation to an import of goods by a person, means the GST imposed on that import; and includes any amount that is treated as input tax under this Act or the Regulations;
"input tax credit" means a credit for input tax allowed under section 32 of this Act, or under any other provision of this Act or the Regulations; "

49. Though it may seem blindingly obvious, I find that an "input tax credit" presupposes the existence of "input tax" and provisions in relation to input tax including the granting, restriction, computation of same are, unless the context otherwise requires, to be read as equally applying to an input tax credit, an input tax credit being, in effect, the manner in which input tax is accessed by the taxpayer. See to that effect, Regulation 21(1).

Analysis of Section 33(3)

50. To understand the effect of section 33, it is expedient to assess the provisions around (a) a taxpayer qualifying for the allowance of input tax credits against a taxpayer's liability to account for output GST; (b) the procedural requirements for a valid claim for input tax credits; and (c) any bars restricting a successful claim.

(a) Qualification for Allowance of Input Tax Credits

51. The allowance of input tax credits against GST payable (output tax) is limited by the provisions of section 31(1). Section 31(1) provides:

"*The GST payable by, or the refund due to, a person in respect of a tax period is calculated in accordance with the following formula,*
A-B
where,
A is the total output tax payable by the person in relation to supplies made by the person during the tax period, plus any additional amounts required by this Act to be included in the output tax for the period; and

B is the total input tax credits allowed to the person under section 32 of this Act, in respect of that tax period, plus any additional amounts allowed by this Act to be included in the input tax for the period."

52. Section 32 addresses the recovery of input tax credits. In order for a person to recover input tax credits, such person must come within the scope of Section 32(1) or 32(3).

53. Section 32(1), which deals with situations involving the recovery of input tax where wholly taxable supplies are made, provides that:

> "*If **all of the supplies made by a taxable person during a tax period** are taxable supplies, the person shall be allowed input tax credits for the purposes of section 31 of this Act, for all of the input tax paid or payable by the person on acquisitions or importations made by the person during that period.*" (Emphasis mine)

54. Section 32(3), which deals with situations involving the recovery of input tax where mixed (taxable and exempt) supplies are made, provides that:

> "*If **some, but not all,** of the supplies **made by a taxable person** during a tax period are taxable supplies,*
>
> *(a) the person shall be allowed input tax credits for acquisitions or importations made by the person **during the period** solely for the purposes of making taxable supplies, whether or not those supplies will be made during that tax period;*
>
> *(b) the person shall not be allowed input tax credits for acquisitions or importations made by the person during the period solely for the purposes of supplies that are not taxable, whether or not those supplies will be made during that tax period; and*
>
> *(c) the person shall be allowed input tax credits for all other acquisitions or importations made by the person during the period according to the following formula,*
>
> $A \times B/C$
>
> *where,*

A is the total amount of input tax paid or payable for imports or acquisitions made by the person during the period, less the input tax accounted for under (a) and (b);
B is the value of all taxable supplies made by the taxable person during the period; and
C is the value of all supplies made by the taxable person during the period, other than supplies made through a business carried on by the person outside Belize."

(b) Procedure for Valid Claim of Input Tax Credit

55. GST Regulations pertaining to the refund of input tax or the claiming (allowance) of a tax credit is contained in GST Regulation 17(2) provides that "*For a tax credit to be allowed, the registered person must be in possession of a tax invoice or a certified copy of the single administrative document*." Regulation 20(2) provides that "*Input tax shall normally be claimed on the GST return for the period during which the supplier's tax-point occurs, and for imported goods, the tax- point shall be the period during which the importation takes place*."

(c) Bars restricting a Valid Claim of Input Tax Credit

56. Regulation 18 provides that "*Input Tax shall only be reclaimed by a person who is registered*." Regulation 23 provides that "*Where a person is registered after the appointed day, the amount of allowable input tax for the first tax period after registration shall only be on those supplies that are received during that tax period*."

57. Therefore, reading sections 31(1), 21 and Regulations 17(2), 18, 20(2) and 23 together, one can surmise that in order for a person to make a successful claim for input tax credits (against such person's output GST payable), it is necessary that, in the relevant tax period (i.e., the tax period in which the taxable supply is made to such person), the person be (i) registered for GST and (ii) in possession of a tax invoice or certified copy of the single administrative document. Where the person suffers sums, which would otherwise qualify as input tax and, by extension, be available as an input tax credit (subject to the various restrictions within the Act

and the Regulations) before that person is registered for GST, such person is unable to recover such GST suffered before registration.

58. Turning to the claim in question, the Claimant was registered with effect from 1 September 2016. Applying the court's analysis of the above statutory provisions, it follows that considering in particular Regulations 18 and 23 the Claimant, be he a taxable person or not, is barred from claiming input tax and, by extension, an input tax credit against its output GST payable.

59. There is no need to consider the Claimant's submissions on section 33. Nonetheless, in order to clarify the purpose of Section 33, the court considers its expedient to address this question.

Section 33(3)

60. Section 33 provides that

> *"If,* ***at the time a taxable person submits a GST return for a tax period in which an input tax credit would otherwise be allowable for an acquisition or importation****, the person does not hold the documentation referred to in subsection (4) of this section, the input tax credit is not allowed in that tax period but is instead allowed in the first period in which the person holds the documentation required, provided that tax period occurs within the subsequent 6 months." (****emphasis mine****).*

61. Section 33, by way of derogation, relaxes the strict conditions for a successful claim set out in Regulation 17(2). Section 33 allows a person who is not in possession of the necessary documentary evidence (as specified in Regulation 17(2)) to be able to nonetheless claim input tax in a later tax period provided that this tax period is within the subsequent 6 months from when the input tax ought to have been claimed had it been claimed in the period to which it corresponds. For example, if a taxable person has suffered GST in tax period 1 of 2020 (January 2020) i.e., he has paid the GST due on a taxable supply made to him. However, he has misplaced the tax invoice at the date on which he is seeking to submit his GST return. He is

unable to claim the input tax. Assuming he finds said tax invoice in April 2020 (tax period 4 of 2020), section 33(3) removes the strict harshness of Regulation 17(2) and enables him to claim in that tax period (April 2020) the input tax in respect of the supply made to him in January 2020.

62. However, two important pre-conditions are essential in order to rely on section 33 – (a) the taxable person must have submitted a GST return for the tax period in question and (b) input tax credit must be otherwise allowable i.e., all other conditions (other than satisfaction of the documentary evidence condition) must be satisfied.

63. The Claimant is therefore is unable to rely on this provision in relation to the period under dispute (April 2016 to August 2016) for failure to satisfy both pre-conditions to access section 33(3) treatment. Firstly, the Claimant would be unable to submit a GST return for the periods in dispute as it was not registered during those periods. Counsel for the Claimant has not established that the GST legislative framework provides for a GST return to be submitted in respect of a period when a person is not registered. By contrast, the GST Act suggests by implication at section 30(2) that registration is a pre-requisite to the submission of a GST return. Section 30(2) provides that *"every person shall, within the time required by this section, furnish to the Commissioner a GST return, in a form approved by the Commissioner and signed by the person,* ***relating to the tax period during which he was a registered person."*** (emphasis mine).

64. Further and in any event, the input tax in question was not otherwise allowable. The Claimant has not established that it was registered (which, as discussed at above is a pre-condition to any claim for input tax under Regulation 18. The Claimant has not produced the documentary evidence necessary for a successful claim for input tax (for the purposes of Regulation 17(2)).

Public policy

65. I consider it worth highlighting a further point in relation to the general operation of GST. Although the court finds that the Claimant does not satisfy the criteria set

out in section 32(1) or (3) such that it is entitled to recover input tax credits, section 22(5) specifically provides that a person has a liability to pay the tax assessed under s. 39 even if unregistered. The fact that a person is required to account for output tax but may be unable to recover input tax in relation to such taxable supply may, at first blush, appear unduly harsh. However, this aspect of the legislative regime which broadly mirrors the GST/VAT regime in many other Commonwealth Caribbean jurisdictions as well as the UK and the European Union is wholly in keeping with the public policy of ensuring that a person registers for GST when required to. Should the legislation be interpreted as enabling a person who, having failing to register and, in effect, fails to notify the General Sales Tax Commissioner of its liability to GST, to be able to recover input tax credits, this would create a perverse incentive for persons required to register. If one could simply recover his input tax credits after being assessed, then, besides the threat of a relatively small fine on summary conviction set out in section 22(4), why would anyone comply with the requirement to register under section 22(1)?

66. Under such an interpretation of the Act, such persons opting not to register and gambling that the Commissioner may not audit them find themselves in a win-win situation - (a) they win if they are not audited and therefore are able to unfairly compete against business competitors who have complied with section 22(1) and are charging their customers GST or (b) they win if they are audited as they are able to recover their input tax credits in a similar fashion as they competitors who complied with section 22(1) but without the additional costs and administrative burden of complying with the GST legislation. This interpretation of the GST cannot have been what Parliament intended. Therefore, it is appropriate that legislation pertaining to the recovery of input tax credits not be interpreted to create such a perverse outcome. The Court therefore finds that the Claimant was unable to recover input tax pursuant to section 32 and not a penalty issued by the First Defendant.

67. Therefore, for the above reasons, I would dismiss this ground of the Claimant's claim and hold that the Claimant who was not registered at the material time which, for the purposes of recovery of input tax credits was not a taxable person as defined in section 2 and is not entitled to recover input tax credits.

Disposition and Costs

68. For the reasons given above, this application is dismissed. On the issue of costs, costs must follow the event. The parties have agreed to the sum of #3,500.00. I thank the Attorneys on both sides for their spirited and entirely helpful submissions.

/s/ WJames
Westmin R.A. James
Justice of the Supreme Court (Ag)