

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

CLAIM NO. 256 OF 2013

IN THE MATTER OF an application under Section 20 of the Belize Constitution

AND

IN THE MATTER OF SECTIONS 2(1), 6, 7 AND 8 OF THE BELIZE CONSTITUTION

AND

IN THE MATTER OF THE GENERAL SALES TAX ACT NO. 49 OF 2005 OF THE LAWS OF BELIZE

BETWEEN:

**(JITENDRA CHAWLA
(d.b.a. XTRA HOUSE**

CLAIMANT

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**(ATTORNEY GENERAL OF BELIZE
(THE COMMISSIONER OF SALES TAX**

DEFENDANT

INTERESTED PARTY

BEFORE THE HONOURABLE MADAM JUSTICE MICHELLE ARANA

**Mr. Godfrey Smith, S. C., and Ms. Leslie Mendez of Marine Parade Chambers for the Claimant
Mr. Nigel Hawke, Deputy Solicitor General, for the Attorney General and Interested Party**

J U D G M E N T

The Facts

1. On the 7th of February, 2013 Jitendra Chawla received an arrears notification letter from the Department of Sales Tax advising him that his business, Xtra House, was in arrears of General Sales Tax (“GST”) to the value of one million one hundred twenty thousand seventy two dollars and twenty four cents Belize currency (\$1,127,072.24). Mr. Chawla sent a letter to the Department of Sales Tax querying the basis of the assessment. By the Department’s response, he

became aware that the Commissioner of Sales Tax had conducted an audit of his business for the period of December 2006 to December 2011.

Mr. Chawla alleges that he was not afforded a right to be heard and has not been able to review or appeal the Commissioner's assessment in any way. This is due to the mandatory payment of 50% of the taxes assessed required under section 45 of the GST Act before any authority, tribunal or court is able to review the decision. He further argues that the first step of the review process established under section 42 of the GST Act breaches several components of his right to a fair trial. Mr. Chawla has therefore sought several declarations challenging the constitutionality of section 45, section 42(1), section 42(6), and section 42(7) of the General Sales Tax Act.

The Issues

2. (i) Do section 42 and Section 45 of the GST Act breach the Constitution of Belize?

(ii) Is Mr. Chawla entitled to the relief sought?
3. **The Applicant's Submissions Challenging the Constitutionality of Section 42 and Section 45 of the GST Act**

Section 2 Constitution of Belize:

"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."

Section 6(1) Constitution of Belize:

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

Section 7 Constitution of Belize:

“Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial, and where proceedings for such determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.”

Section 8 Constitution of Belize:

“Except with the agreement of all the parties thereto all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other authority, including the announcement of the decision of the court or other authority, shall be held in public.”

Mr. Smith, SC, on behalf of Mr. Chawla, argues that Section 42 and section 45 of the GST Act offend the principles embodied in Section 6 of the Constitution of Belize.

Section 42 of the GST Act:

“(1) If any person or authority disputes or objects to an assessment as made under section 39(1) of this Act, the person or entity shall apply to the Commissioner by notice in writing within fifteen days of the notice of assessment to review the assessment and every such notice shall state the grounds on which the assessment is disputed.

(6) The onus of proving that the assessment made by the Commissioner is excessive shall be on the applicant.

(7) The proceedings relating to a review under this section shall be held in camera.”

Section 45 of the GST Act:

“An application for review by the Commissioner under section 42, or for an appeal to the Board or the Supreme Court under Sections 43 and 44 shall not be entertained or heard unless and until the appellant has paid to the Commissioner at least 50% of the tax which is the subject of the appeal or review.”

Mr. Smith, SC, submits that the right to access the courts is one of fundamental importance underlying the right to a fair trial. He cites the European Court of Human Rights case of **Tolstoy**

Miloslavik v United Kingdom [1995] ECHR 18139/91 where the Court stated:

“The right of access to a court is inherent in these fair trial provisions. The State is entitled to have procedural rules in place in order to regulate the right of access to a court. However, these limitations must not restrict or reduce a person’s access in such a way or to such an extent that the very essence of the right is impaired.”

Mr. Smith, SC, argues that the regulations of the GST Act under contention are totally incompatible with the Belize Constitution in that they restrict Mr. Chawla’s access to an authority or to courts by requiring him to pay 50% of the tax assessed before he gains access to any authority or court.

Learned Counsel then contrasts the *Tolstoy* case with the case at bar. In *Tolstoy*, the court held that the right to access court was not impaired because:

- 1) There had been a full hearing of the libel case
- 2) A full hearing of the application for security for costs
- 3) The Court of Appeal’s conclusion that there was no substantial grounds for appeal; and
- 4) There was no suggestion that the figure was an unreasonable estimate of the costs for the Appeal.

In Mr. Chawla’s case, he has not had any access to any court, tribunal or authority to review the assessment of the Commissioner, and he has not been afforded any opportunity to be heard before being required to pay 50% of the tax assessed by the Commissioner of Sales Tax.

Mr. Smith, SC, then relies on ***Anglo- Eastern Trust Ltd. V Kermanshahchi*** [2002] EWCA Civ. 198 where the Court of Appeal in considering conditional orders to defend a claim, observed that the Court should not require a Defendant, as a condition of defending a claim, to make a payment which he cannot make. The Court stated that *“the effect of such a requirement would be that judgment in default of defence would be given against him,”* and later that *“the practical effect would be the same as if the court had given summary judgment for the Claimant”*. The Court in

accepting submissions based on the right to a fair trial under Article 6 of the European Convention of Human Rights then cited *Tolstoy* as follows:

*“It is the first restriction which is particularly relevant in this case. An order, such as Judge Hegarty’s order, that a Defendant who has a defence with some prospects of success must pay money into court before he can deploy his defence is a limitation on his right of access to the courts. If he can comply with the order, or if it is reasonable for the judge to believe that he will be able to comply with it, the limitation is not a contravention of art 6. But **if he cannot comply with the order, and if there is material before the court from which it appears that he cannot comply**, the effect of the order goes beyond limiting his right of access to the courts; it impairs the very essence of the right.” (emphasis mine)*

Mr. Smith, SC, urges this court to apply the principles applied in *Kermanshachi* especially in light of the fact that Mr. Chawla was never afforded his right to be heard. He further argues that if the requirements of the Act can be described as merely limiting his client’s right to access the courts, then those limitations must not be arbitrary or excessive. He cites the Privy Council decision in *de Freitas v. Permanent Secretary of Agriculture, Fisheries, Lands and Housing and others* (1998) 53 WIR 131. The Privy Council laid down the following three-tiered test for determining whether a limitation to one of the fundamental rights set out under Part II is arbitrary and excessive and thus unconstitutional:

- i) The legislative objective is sufficiently important to justify limiting a fundamental right;
- ii) The measures designed to meet the legislative objective are rationally connected to it; and
- iii) The means used to impair the right or freedom are no more than is necessary to accomplish the objective.

Mr. Smith, SC, takes no issue with the applicability of the first two limbs of this test to the limitations imposed by Section 42 and 45 of the GST Act. He concedes that the legislative objective behind the limitations (a time limit of 15 days to apply to Commissioner of Sales Tax for a review

and a requirement to pay 50% of the tax assessed before the decision can be reviewed) may be of sufficient importance to justify the restriction of the Claimant's access to court. The time limit provides for the efficient administration of justice and imposes a "Security for Appeal" in order to guard against frivolous and vexatious claims. He also does not argue with the point that the measures are rationally connected to the legislative objective in that the time limits and "deposit" are procedural safeguards against frivolous appeals similar to security of costs.

Mr. Smith, SC, claims that sections 42 and 45 fail the third tier of this three pronged test in that the requirement to pay 50% of the tax assessed has a disproportionately severe effect on those to whom the restrictions apply for the following reasons:

- (a) There is no distinction between strong and weak cases.
- (b) The requirement is imposed in the same manner on all persons regardless of financial status
- (c) The mandatory nature of the requirement to pay a fixed percentage is in itself arbitrary
- (d) The time limit of 15 days to pay the sum before applying for review is too short to pay that amount of money.

4. **The Respondent's Submissions on the Constitutional Challenge to Sections 42 and 45 of the GST Act**

Mr. Nigel Hawke on behalf of the Commissioner of Sales Tax argues that the Claimant is not entitled to the constitutional relief he seeks. Learned Counsel states that the fundamental purpose of section 45 of the GST Act is to compel the taxpayer or a "trustee" of the Government of Belize to comply with his obligations to pay tax and to facilitate the Commissioner's right to receive and recover such tax that is due and payable. He submits that GST is not a tax on any registered person carrying on a business; but rather it is a consumption tax levied on the consumer and paid by that consumer to the registered person carrying on business. That person collects and holds those taxes on trust for the Government of Belize and pays those taxes to the Government

on a monthly basis, on or before the 15th of every month. The Claimant therefore acts as an agent for the Commissioner of Sales Tax.

Mr. Hawke further submits that Mr. Chawla has failed to honor his statutory duty under the GST Act by omitting to submit the monies due and payable to the Consolidated Revenue Fund. The GST is a special tax regime set up to aid the Government in the collection of taxes in order that the Government and people of Belize do not experience financial ruin or dire financial constraints. It is for policy reasons that fifty percent of the assessed amount is required to be paid. The rationale is to 'weed' out frivolous objections to avoid situations where the revenue would be tied up and the economy would not be able to function properly. The levying of taxes is imperative for a government to ensure that it achieves its economic objectives which include the economic development of the country.

Learned Counsel cites *Metcash Trading Ltd v Commissioner for the South African Revenue Service* 2001 1 BCLR 1 where the Constitutional Court held that there must be a balance between the taxpayer's rights and the effective collection of taxes, that in this case that balance had been achieved and the "pay now, argue later" rule relating to VAT was constitutionally sound. Mr. Hawke submits that the VAT regime in South Africa is similar to the regime outlined in the GST Act in Belize. Given the special nature of GST and the purpose it serves in Belize, it is explicit that the provisions of section 42 and 45 which are under constitutional attack are reasonably justified in a society such as ours.

He also contends that on a proper examination of the GST Act, there is no express or implied denial of access to the courts and there is no express revocation of the power of judicial review, whether by the administrative actions of the Commissioner of Sales Tax or by the legislative scheme under the GST Act. In fact, Mr. Hawke argues that the Claimant's ease of access to this

court is irrefutable evidence that the judicial review powers of the court are still very much intact. Mr. Chawla has not been denied access to the court.

Mr. Hawke goes on to draw a distinction between GST and Income Tax. He states that while GST liability arises continuously, income tax liability only arises once an assessment is made. Secondly, vendors (such as Mr. Chawla) act as collection agents on behalf of the GST department and the calculation of GST payments is less complicated than income tax. He submits that the scope of conflict regarding the interpretation of the GST statute or accounting practices is far greater for income tax and that a dispute regarding a GST assessment will often arise owing to adverse credibility findings by the GST Commissioner. He further argues that given the critical importance of the GST to the financial viability of Belize's Revenue base, the provisions of the GST Act are reasonably required in a democratic society. He states that the taxing statutes in most jurisdictions provide for the payment of taxes forthwith as in Mauritius where the percent is 30%, while in other jurisdictions it is 50% and in others it is 100%.

In conclusion, Mr. Hawke submits that, assuming but not conceding, that the sections offend against the Constitution of Belize, then it is open to this court to adopt such modifications to the statute as would bring the section(s) into conformity with the Constitution. This was done in the case of ***British American Insurance Limited v. Commissioner of Inland Revenue*** Civil Appeal No. 20 of 2002 where the Court of Appeal, after recognizing the right of Parliament to make laws in the field of taxation, refused to strike down a provision on the basis that it was unconstitutional to require payment by a taxpayer before his appeal is determined. Mr. Hawke commends this approach to this court in dealing with the provisions of the GST Act which are under challenge in this matter. Finally, he also cites ***Phillip Zuniga et al v. BCB Holdings et. al. CCJ Appeal No. CV 8 of 2012*** where the Caribbean Court of Justice in a majority decision also refrained from striking

down legislation, and opted instead to modify the Supreme Court of Judicature Amendment Act 2010 by severing those sections which it found to be unconstitutional.

5. In his Reply to the Submissions filed on behalf of the Commissioner of Sales Tax, Mr. Smith, SC, points out that Mr. Hawke confined his arguments to the Claimant's ground of right of access to the courts and failed to address the other grounds. He therefore asks the court to grant the relief sought on the other grounds. He also distinguished the case of **Metcash Trading Ltd v Commissioner for the South African Revenue Service** relied on by Mr. Hawke stating that there are fundamental differences between the South African legislative scheme and the Belizean legislative scheme. Section 36 of the VAT Act of South Africa read as follows:

"Payment of tax pending appeal

- 1) *The obligation to pay and the right to receive and recover any tax, additional tax,, penalty or interest chargeable under this Act shall not, unless the Commissioner so directs, be suspended by any appeal or pending the decision of a court of law, but if any assessment is altered on appeal or in conformity with any such decision... a due adjustment shall be made, amounts paid in excess being refunded with interest... and amounts short-paid being recoverable with penalty and interest calculated as provided in section 39(1)."*

The Court in **Metcash Trading Ltd v Commissioner for the South African Revenue Service** found that section 36 of the VAT Act did not impose a prohibition on access to the courts as that section was *"not concerned with access to a court of law and says nothing that can be construed as a prohibition against resort to such a court"*. The court also found that the section was *"not concerned with anything other than a non- suspension of the obligation to pay the assessed VAT and consequential imposts under the Act"*.

Mr. Smith, SC, submits that in contrast, section 45 of the GST Act clearly restricts access to all appeal procedures, particularly the Commissioner, the Board and the Supreme Court. He argues

that the GST Act makes access to a review or appeal conditional upon payment required under the Act, and reduces a person's right to access in such a way that the very essence of the right is impaired. In addition, he contends that the Court's decision in *Metcash* was significantly influenced by the extant power of the Commissioner to suspend the obligation to pay. There is no equivalent provision vesting a reviewable discretion in the Commissioner of Sales Tax in the GST Act. He argues that (in light of the absence of such a discretion) it would be disproportionate to the legislative intent to impose an unwavering obligation on the taxpayer to pay 50% of the tax assessed, without any consideration of the merits of the objection and other relevant factors. He says that the reasoning of the Court in *Metcash* highlights the deficiencies of the GST Act. It was because the obligation to pay under the VAT Act was not absolute that the Court upheld the constitutionality of the section.

Finally, in addressing the Respondent's submission that the Court modify section 45 instead of striking it down, Mr. Smith, SC, concedes that this is an option, but that such a course of action would still not address the challenge to the constitutionality of sections 42(1), (6) and (7) of the GST Act. He argues that the cumulative effect of these sections when read together is to unnecessarily oppress the taxpayer and render those sections unconstitutional. He therefore urges the Court to grant the relief prayed.

6. **Decision**

I am grateful to learned counsel for the Applicant and the Respondent for their extensive research and comprehensive submissions which have greatly assisted the Court in determining these issues. I fully appreciate the importance of the GST Tax to Government of Belize's revenue and the legislative power of Parliament to enact legislation on taxation. In ***British American Insurance***

Company Ltd v The Attorney General of Antigua and Barbuda Civil Appeal No 20 of 2002, the Court of Appeal of Antigua and Barbuda considered the constitutionality of section 39 of the Income Tax Act challenged by British American upon the assessment of \$1,067,166.00 as withholding tax for the period 1995 to 2001. Byron CJ (as he then was) described the powers of the Parliament in elegant language:

“The competence of parliament to make laws in the field of taxation ceased to pose any controversy during argument. Taxes are the lifeblood of any democratic society. They enable Government to meet its legal, social and economic obligations to all persons and citizens in the State, to honour its financial obligations to State employees and creditors, to discharge its liabilities to regional and international institutions, and to embark on social and development programs for the benefit of all. It is therefore not surprising that Section 9(4) of the Constitution specifically prescribes that nothing contained in or done under the authority of any law shall be held to be unconstitutional to the extent that the law in question makes provision for the taking of any property in satisfaction of any tax except so far as it is shown not to be reasonably justifiable in a democratic society.”

There is a similar provision in our Constitution of Belize at section 17 (2).

However, I must also bear in mind in deciding these issues that the Court is duty bound to jealously guard the rights of the taxpayer and to ensure that he is not deprived of his right to access to justice, especially when statutory provisions appear to be infringing the Constitution. I find that section 45 of the GST Act does offend against the Constitution of Belize in that it prohibits the taxpayer from accessing the Courts or any other authority for review or appeal until and unless a sum of 50% of the tax assessed is paid to the Commissioner. This mandatory section restricts the taxpayer’s right of access to the court in such a way that it impairs the nature of the right itself. It does so without regard for the individual circumstances of the taxpayer, and without regard for whether he can afford to pay or not. There is no discretion vested in the Commissioner of Sales Tax to suspend payment of the assessment under the Act. In the case at bar, Mr. Chawla was

found to be in arrears of GST to the value of \$1,127,072.24. Under the statute as it stands, he has to pay the sum of 50% of the assessment to the Commissioner of Sales Tax before he could access his right to appeal or review. I find that Section 45 of the GST Act is unconstitutional; I agree with Mr. Smith SC's submission that it is disproportionate to the legislative intent to impose an unwavering obligation on the taxpayer to pay 50% of the assessment, without any consideration of the merits of the taxpayer's case.

I have found that the section 45 of the Sales Tax Act is unconstitutional; however, in light of the vital importance of this particular Act to government's revenue base I will refrain from striking it down. Instead, I will adopt the course urged upon me by the Deputy Solicitor General and modify the section so as to bring it in line with the Constitution and preserve the taxpayers' right of access to justice, while maintaining the parliamentary intent in keeping with the presumption of constitutionality with which the courts approach legislation:

Section 45 is therefore modified as follows:

Section 45 of the GST Act:

*"An application for review by the Commissioner under section 42, or for an appeal to the Board or the Supreme Court under Sections 43 and 44 shall not be entertained or heard unless and until the appellant has paid to the Commissioner at least 50% of the tax which is the subject of the appeal or review; **provided that the Commissioner may order a stay of the collection and payment of the whole or part of the assessed tax until the determination is completed if it would be unjust not to do so.**" (emphasis mine)*

I urge Parliament to take the necessary steps to further amend the Sales Tax Act to ensure that the rights of the taxpayers to access justice are not violated. It is Parliament's responsibility as the legislative power to determine the criteria to be applied by the Commissioner of Sales Tax in deciding what would make an assessment unjust, and such decision must of necessity be informed by government policy. As the Court stated in **British American Insurance Company Ltd v The**

Attorney General of Antigua and Barbuda, determining the circumstances under which it would be unjust would require reasonableness and would also require that reasons for decision be given by the Commissioner.

Mr. Smith, SC, also asked that he be granted relief for the other grounds which have been challenged but have not been addressed by the Deputy Solicitor General. I now examine each of these in turn.

7. **Ground 2 Section 42(1) of the General Sales Tax Act breaches the taxpayer's right to be judged by an independent and impartial authority or tribunal, as guaranteed by section 6(7) of the Belize Constitution.**

While it is true that Mr. Hawke did not directly address this ground in his submissions, I must respectfully disagree with Mr. Smith, SC, on this point. A similar argument was raised in ***British American Insurance Company Ltd v The Attorney General of Antigua and Barbuda*** where it was argued that the Commissioner was not the proper authority to determine whether a stay should be granted as his office made it impossible to be objective. The Court of Appeal dismissed that argument stating that this was part of the administrative process of assessment. I would reiterate that position in relation to the case at bar in saying that "*general principles of administrative law protect against unreasonable decision making which would be subject to control by the court*". The Commissioner in his capacity as arbiter of appeals/ reviews under the legislative scheme of the Sales Tax Act is governed in the exercise of his discretion and powers by principles of administrative law; and the Court in its supervisory role over all administrative bodies ensures that the rights of the taxpayer are always protected.

8. **Ground 3 Section 42(6) of the General Sales Tax breaches the taxpayer's right to a fair trial by placing the onus of proving that the assessment of the Commissioner is excessive on the Applicant and is therefore unconstitutional in that it reverses the burden of proof guaranteed by section 6 of the Constitution.**

I have to once again respectfully disagree with Mr. Smith, SC, on this ground as well. In my view, the nature of the review that the Commissioner presides over under the scheme of the General Sales tax Act is similar to that of appeals in Court. A decision has been made by the Department of Sales Tax, the taxpayer has appealed against that decision, and now it is the Commissioner or Board as the appellate body who has to examine that decision/assessment to see if it is unreasonable, unjust and therefore cannot be upheld for any other valid reason. As in appeal cases in the courts, the onus is on the Appellant to substantiate his case to the satisfaction of the Court of Appeal and establish how the court below fell into error, or in the case of the taxpayer it is his duty to prove to the Commissioner how the assessment is excessive or unjust, and why it cannot stand. I therefore must confess, most respectfully, that I find nothing unconstitutional about this process set out in section 42(6) of the General Sales Tax Act.

9. **Ground 4 Section 42 (7) of the General Sales Tax Act which states that proceedings relating to a review be held in camera violates section 6(8) of the Constitution of Belize which requires that court proceedings be held in public.**

I am not convinced that the requirement to have proceedings relating to review under the Sales Tax Act in camera is unconstitutional. I see no reason for the legislature to insist that such hearings be held in private, but at the same time I can see any number of reasons why taxpayers would prefer that such hearings be conducted in private. The reputation of businesses is at stake, and I can hardly see the taxpayers who own businesses and corporations clamoring to have intimate details of their financial business aired publicly during these hearings. I will not strike down this section. I would only recommend that the legislature amend section 42(7) to give the taxpayer the option of having the review of his assessment in public if he so chooses.

As this judicial review is in the public interest, as in *British American Insurance Company Ltd v The Attorney General of Antigua and Barbuda*, I order that the state pay the costs of the Applicant Mr. Chawla to be assessed or agreed.

Dated this 5th day of May, 2015

Michelle Arana
Supreme Court Judge