

IN THE SUPREME COURT OF BELIZE, A.D. 2014

CLAIM NO. 425 of 2013

BETWEEN:

BELIZE INTERNATIONAL SERVICES LTD.

CLAIMANT

AND

THE ATTORNEY GENERAL OF BELIZE

THE COMMISSIONER OF INCOME TAX

DEFENDANTS

Before:

Hon. Madame Justice Shona Griffith

Date of Hearing:

29th July, 2014

Appearances:

Mr. Eamon Courtenay S.C. of Courtenay Coye LLP with Ms. Priscilla Banner, Counsels for the Claimant.

Mr. Nigel Hawke, Acting Solicitor General, Counsel for the Defendants.

DECISION

Dated 3rd October, 2014

1. This is a claim by Belize International Services Ltd ('BISL') against the Government of Belize ('GOB'), represented by the Attorney General ('AG') and Commissioner of Income Tax ('CIT'), for a number of declaratory and consequential orders challenging the validity of an assessment of income and business tax made in excess of \$30 million against the company by the CIT in May, 2013. The claim also challenges the constitutionality of certain provisions of the Income and Business Tax Act, Cap. 55 of the Laws of Belize ('the IBT Act'), relating to enforcement and appeals of assessments made under the said Act. The claim was instituted by Fixed Date Claim form filed on 8th August, 2013 which was subsequently amended by an amended claim filed on 23rd September, 2013. The claim was supported by several affidavits filed on behalf of the Claimant, in response to which a number of affidavits were filed on behalf of GOB.

2. In light of the circumstances surrounding and given the extent of the tax assessments levied by the CIT against the Claimant, the latter filed an urgent application for an injunction to restrain the CIT from taking any action to enforce the assessments until determination of the trial instituted in respect of the assessments. The determination of the application for an injunction was obviated by an undertaking given by the CIT, not to enforce the assessments pending the determination of the trial on the constitutionality of the challenged provisions of the IBT Act and the validity of the assessments against the Claimant. The substance of the claim is as follows:-

Factual Background.

3. BISL is and was at all material times, a registered international business company under the International Business Companies Act, Cap. 270 of the Laws of Belize ('the IBC Act'). In June, 1993 agreement was made between the Claimant BISL and GOB for the Claimant to develop and manage the International Business Companies Registry and International Merchant Marine Registry of Belize ("the Registries"). The agreement was to have life for 10 years and thereafter was capable of renewal for a further 10 years at the exercise of an option to renew granted to BISL.
4. The agreement contained certain key provisions, most notably:-
 - (i) Clause 8, which provided for a shared distribution of revenue arising from the operations of the Registries. The distribution of revenue was for 40% of the income in any given year to defray operational expenses of the Registries and the remaining 60%, itself be distributed at a 6:4 ratio in favor of GOB.
 - (ii) Clause 12, which conferred tax exempt status on income derived from the Company (BISL) and on the emoluments of personnel employed by the Company abroad.
 - (iii) Clause 15, which provided BISL with an option to renew the contract for a further 10 years upon the same terms and conditions of the agreement. No pre conditions were attached to the exercise of this option.

5. The agreement came to an end. There is a variance of the parties' positions as to whether that end was occasioned by expiration of the contract (GOB's position) or whether by repudiation on the part of GOB - the contract having been renewed consequent upon the exercise of the option to renew as provided under clause 15 and thereafter even further extended by agreement of the parties.
6. For the purposes of this factual background, that variance of positions need not be resolved but what can be said, is that the events giving rise to renewal began with a letter from the Claimant sent to GOB in May, 2003 advising of the Claimant's exercise of its option under clause 15 of the Agreement, thereby extending the life of the Agreement to June, 2013. This position was countered by GOB in the form of a short extension for 2 months during which period there was to be discussion on the way forward. No evidence is presented as to what if anything emerged as the way forward in the immediate aftermath at that time and the matter next arose in January, 2005. Within the early quarter of 2005 a payment of US\$1.5 million was made to GOB by the Claimant and the Claimant asserts that in consideration of that payment, the life of the Agreement was then extended to June, 2020.
7. In May, 2013 GOB wrote to the Claimant referring to the extension of the Agreement until June, 2013 and invited further discussion on the way forward. The Claimant responded by asserting the exchange which occurred in 2005 resulting in the extension of the life of the Agreement to June, 2020. This position was categorically rejected by GOB who at that time acknowledged the exercise of the option to renew in May, 2003 and correspondingly, the extension to and impending expiry of, the Agreement in June, 2013. This is an uncomplicated condensation of the relevant facts surrounding the varying positions between the parties as it pertained to the life of the Agreement.
8. GOB, then on 31st May, 2013 issued a series of assessments of income and business tax against the Claimant, effective from the date of commencement of the Agreement to 31st May, 2013. This assessment was made pursuant to the provisions of the IBT Act – in particular section 110 – in the total amount of \$30,036,382.36 inclusive of penalties on the taxes assessed. GOB's assessments were premised on the assertion that contrary to

the prohibition against carrying on business in Belize, as provided in **section 5(1) of the IBC Act**, the Claimant had in fact so engaged from its inception and had therefore taken itself outside the provisions of the IBC Act and as such attracted the assessment. In particular, GOB rested its contention of the Claimant carrying on business on the assertions that it regularly conducted business with registered agents (paragraph 7, third affidavit of Kent Clare) and that it employed persons and was registered under the PAYE system (paragraph 10, third affidavit of Kent Clare).

9. The Claimant responded by letter dated 7th June, 2013 disputing the validity of the assessments pursuant to section 42 of the IBT Act. The Claimants also re-asserted both the extension of the Agreement until June, 2020 and existence of the tax exemption provided by the Agreement. Thereafter, maintaining that the Agreement had come to an end, GOB assumed control of the management of the two Registries – the IBCR and IMMARBE with effect from 11th June, 2013. In August, 2013, as detailed in paragraph 1 above, the Claimant instituted the claim now before the Court. The respective positions of the parties are expressed below.

The Case for the Claimant:-

10. The Claimant's case resists the assessments on two fronts. Firstly, that the assessments were unlawful as the Claimant was entitled to tax exempt status not only under clause 12 of the Agreement but also pursuant to **section 130(1)(a) of the IBC Act** which conferred tax exempt status upon any company registered under the IBC Act. ('The tax exempt argument'). Secondly, that **sections 53(2), 53(3) and 110(5) of the IBT Act** violated the provisions of **sections 6 and 17 of the Constitution** and also were in contravention of the doctrine of separation of powers. For ease of reference, clause 12 of the Agreement and the mentioned sections of the respective legislation are extracted below.

(i) Agreement, Clause 12:-

“Fiscal Exemptions

Any income derived by the Company in accordance with this Agreement contract shall be exempt from Government taxes fees and other assessments. Likewise the emoluments of the personnel employed by the Company abroad shall be exempt from Government taxes and other charges.”

(ii) IBC Act, section 130(1)

“PART XII

Exemption from Tax

130 (1) Notwithstanding any provision of the Income and Business Tax Act, but subject to the provisions of this section:-

- (a) all income of a company incorporated under this Act;*
- (b) all dividends or other distributions paid by the company to persons who are not resident in Belize;*
- (c) all interest, rent, royalties, compensations and other amounts paid by the company to persons who are not persons resident in Belize; and*
- (d) capital gains realised with respect to any shares, debt obligations or other securities of a company incorporated under this Act by persons who are not persons resident in Belize, are exempt from all provisions of the Income and Business Tax Act”*

(iii) IBT Act, sections 53 and 110(5)

“Collection and Repayment of Tax

53 (1) The Commissioner shall from time to time deliver to the Chief Collector certified extracts from the assessment records containing the names and addresses of the persons assessed together with the amount of tax payable by each person.

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

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

(4) Where any review, objection or appeal as aforesaid results in less tax being payable by the taxpayer than that assessed by the Commissioner, the excess tax paid by the taxpayer shall, subject to any further appeal by the Commissioner or the taxpayer, be promptly refunded to the taxpayer with interest thereon from the date of payment of such excess tax until the date of such refund, at such rate of interest as may be determined by the person or body conducting or hearing the review, objection or appeal, as the case may be.”

“110(1) Where a return has been delivered under this Part, the Commissioner may:-

- (a) accept the return and make an assessment
- (b) refuse to accept the return and determine to the best of his judgment the amount of tax payable and assess accordingly.

(2) Where a return has not been delivered, the Commissioner shall use his best judgment to determine the proper amount of tax due and make an assessment accordingly.

(3) The Commissioner may by notice in writing require any person or entity to furnish, within a specified time, a return of receipts and such particulars as may be required for the purposes of this Part to enable him to ascertain the receipts of such person or entity and, in particular, may require any person to produce all books, bank accounts, statements or other documents in his custody or under his control relating to the business.

(4) Every person or entity, whether or not such person or entity is liable to pay tax shall, if required by the Commissioner by notice in writing to make and deliver a return of his or its receipts, make and deliver such return to the Commissioner within ten days of the service of such notice.

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

11. In the first instance learned senior counsel for the Claimant submits that clause 12 of the Agreement, which was a binding contract as between the parties, by itself validly conferred the tax exempt status upon the Claimant. The Agreement was lawfully extended, firstly to June, 2013 by the exercise of the option to renew by the Claimant and thereafter to June, 2020 upon the payment to and acceptance of US\$1.5m by GOB, as consideration for such further extension. At the time the tax assessment was levied upon the Claimant, there was therefore a valid and enforceable agreement as between the parties which provided for the Claimant to be exempt from all taxes.
12. Further to clause 12, learned senior counsel contends that the contractual exemption is in any event consistent with the statutory exemption bestowed upon the Claimant as an IBC. **Section 130(1)(a)** as set out at paragraph 9 above, exempts the income of any company registered under the IBC Act, from all provisions of the IBT Act.
13. As regards the status of the Claimant as an IBC it was firstly contended that contrary to the assertion of GOB that the Claimant was carrying on business in Belize in contravention of the IBC Act, (section 5), the operations of the Claimant fell well within the exceptions of what constitutes carrying on business in Belize as provided under section **5(2) of the IBC Act**. It is useful to also extract section 5 of this Act as follows:-

“5 (1) For purposes of this Act, an International Business Company is a company that does not-

- (a) carry on business with persons resident in Belize;*
- (b) own an interest in real property situate in Belize, other than a lease referred to in paragraph (e) of subsection (2);*
- (c) carry on a banking business unless it is licensed under an enactment authorising it to carry on such business;*
- (d) carry on business as an insurance or a reinsurance company, insurance agent or insurance broker, unless it is licensed under an enactment authorising it to carry on such business;*
- (e) carry on the business of providing the registered office for companies;*
- (f) carry on trust business, unless it is licensed under an enactment authorising it to carry on such business;*
- (g) carry on collective investment schemes, unless it is licensed under an enactment authorising it to carry on such business;*

(h) hold shares, stock, debt obligations or other securities in a company incorporated under the Companies Act or under any enactment amending or substituting the said Act;

(i) subject to subsection (4) below, issue its shares, stock, debt obligations or other securities to any person resident in Belize or to any company incorporated under the Companies Act or under any enactment amending or substituting the said Act.

(2) For purposes of paragraph (a) of subsection (1), an International Business Company shall not be treated as carrying on business with persons resident in Belize by reason only that-

(a) it makes or maintains deposits with a company incorporated in Belize and carrying on a banking business within Belize;

(b) it makes or maintains professional contact with solicitors, barristers, accountants, bookkeepers, trust companies, administration companies, investment advisers or other similar persons carrying on business within Belize;

(c) it prepares or maintains books and records within Belize:

(d) it holds, within Belize, meetings of its directors or members;

(e) it holds a lease of property for use as an office from which to communicate with members or where books and records of the company are prepared or maintained;

(f) it owns a vessel or vessels registered in Belize in accordance with the Registration of Merchant Ships Act.

(3) The provisions of the enactments authorising the carrying on of the businesses specified in paragraphs (c), (d), (f) and (g) of subsection (1) above shall override any contrary provisions contained in this Act but paragraphs (c), (d), (f), (g), (h) and (i) of subsection (1) and this subsection and subsection (4) do not apply to a public investment company existing on or prior to 1st November, 1995.

(4) A person or a company resident in Belize who is a registered agent pursuant to section 43 of this Act may hold shares in a nominee capacity but not beneficially in a company incorporated under this Act”

14. In particular, the Claimant’s case is that the operations of the Claimant fell within the exception provided in **section 5(2)(b)** which exempted a company maintaining professional contact with solicitors, accountants, book keepers, trust companies and other similar classes of persons carrying on business within Belize.

This view notwithstanding, were it to be the case that the Claimant was carrying on business in Belize (which is not admitted), its status as an IBC and thus tax exempt company was not automatically lost.

15. The IBC Act provides the consequence for failing to satisfy the requirements of a company registered under the Act in two ways. First, pursuant to **section 6**, the company is required to inform the Registrar of its failure to satisfy the requirements of the Act or suffer the penalty for willful failure so to do as set out in **section 6(2)**. Section 6 in its entirety is set out below:-

“6 (1) Without affecting the operation of section 107, if a company is incorporated under this Act without having satisfied the requirements prescribed for an International Business Company under section 5, or if having satisfied the requirements it subsequently ceases to satisfy the requirements for a continuous period of more than 30 days, the company shall upon the expiration of that period notify the Registrar of that fact.

(2) A company that wilfully contravenes subsection (1) is liable to a penalty of \$500 for each day or part thereof during which the contravention continues, and a director who knowingly permits the contravention is liable to a like penalty.”

16. The other consequence referred to by learned senior counsel is provided by **section 107(1) of the IBC Act** which empowers the Registrar to strike a company off the Register of IBC companies for no longer satisfying the requirements for qualification as an IBC. In the instant case, no such action was taken by the Registrar and as provided under section 6 (paragraph 15 above), no such failure was found or action taken to penalize the Claimant for failing to satisfy the requirements of an IBC company as stipulated under section 5(1) of the Act. Accordingly, the Claimant maintained its status as an IBC company and consequently its entitlement to tax exempt status as provided under **section 130(1)(a) of the IBC Act**.

Limitation on Assessments

17. In addition to the argument that the Claimant retained at all material times its tax exempt status learned senior counsel submitted that in the event that the assessments were properly imposed (which was not admitted) there was a six year limitation on recovery of taxes as provided by **section 111(1) of the IBT Act**.

The assessments if valid ought not to have been made prior to June, 2007 which would accord with the statutory limitation of six years

The Constitutional Arguments

18. For reasons which will be explained in the Court's consideration of the matter, the Constitutional arguments are set out only in brief:-

- (i) Contravention of Section 6 of the Constitution – the right to due process and protection of the law. The conjoined effect of sections 53(2), 53(3) and 110(5) of the IBT Act is to deny the Claimant its rights afforded under section 6 of the Constitution by reason of the requirement that the tax assessed must be paid as a precondition to the hearing of an appeal by the Commissioner (section 53(2)) and that stipulation is further cemented by the ensuing provision in section 53(3) which mandates the Chief Collector to enforce assessments regardless of whether any objection, review or appeal is filed. The effect of these provisions is that referred to as the requirement to 'pay first and argue later'.
- (ii) In illustrating the nature of the infringement caused by sections 53(2), 53(3) and 110(5), learned senior counsel referred to the judgment of Byron CJ in **British American Insurance Company Ltd v The Attorney General of Antigua and Barbuda Civ. App. No. 20 of 2002** (OECS) regarding the meaning of 'due process of law'. It was therein expressed as "*the right to have civil disputes determined by an independent and impartial body established by law within a reasonable time*". Further, as per Byron CJ, quoting ECHR authority **Janosevic v Sweden Application No. 34619/97**, to the effect that - *any limitation restricting or reducing a person's access must not be to such an extent that the very essence of the right is impaired. There must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.*
- (iii) Whilst the aim sought to be achieved (which is to ensure timely and effective collective of Government's revenue) is acknowledged – the means employed to achieve this aim – to deny the taxpayer the opportunity to challenge an

assessment unless the tax assessed is first paid – goes beyond and where as in this case large amounts of money are involved, brings about a result disproportionate to the aim.

- (iv) Aside from the alleged violation of section 6 of the Constitution, the Claimant's argument is that it was arbitrarily deprived of the benefit of the remainder of the term of the Agreement (7 years) and it was so deprived without compensation in violation of section 17 of the Constitution. Specifically, the benefit of the contract is a chose in action and a chose in action by definition under section 2 of the Interpretation Act Cap. 1, is property.
- (v) Additionally, says learned senior counsel, as a consequence of the effect of sections 53(2), 53(3) and 110(5) of the IBT Act which require the tax under appeal or review to be paid before the hearing of such review or appeal and require the Commissioner to enforce the assessments, the assessments will result in the arbitrary deprivation of the Claimant's property (in the form of the amount of the assessments), contrary to section 17 of the Constitution.

The Case for the Defendant:-

Lawfulness of the Assessment

19. The Defendant's answer to the claim was firstly that the Claimant was liable to pay taxes and thus properly assessed. Whilst acknowledging that the Claimant was registered as an IBC, the Defendant says that in violation of the IBC Act, the Claimant in fact did carry on business in Belize. The Claimant having contracted to manage the two Registries in Belize - by execution of the agreement itself, carried on business. Further, the Claimant registered for the PAYE system and employed a total of thirty (30) persons. But for the exemption granted by the IBC Act, any company carrying on business in Belize is liable to pay taxes and as such to be assessed therefor.
20. A company is excepted from this legal obligation to pay taxes by the legislative exemption afforded by section 130(1)(a) of the IBC Act.

As a consequence of carrying on business in Belize, the Claimant says the Defendant, loses the protection of the exemption provided by section 130(1)(a) and becomes liable to pay taxes. In other words, once an IBC goes into the realm of conducting business in Belize, the exemption no longer applies. In the circumstances, the assessment levied upon the Claimant by the 2nd Defendant was lawful.

The Contractual Exemption

21. As a natural progression to the assertion of the lawfulness of the tax assessment, the Defendant then considered the question of the contractual exemption – clause 12 of the Agreement. Clause 12 (extracted at paragraph 9) explicitly states that any income derived by the company in accordance with the Agreement shall be exempt from Government fees, taxes and other assessments. The Defendant submits in relation to clause 12 of the Agreement that it should be deemed illegal, null and void and contrary to public policy. The reason for this assertion is that the exemption ought to have been the subject of legislative approval and for the Executive to have afforded this exemption in the absence of such legislative approval such action amounted to a breach of public policy. Clause 12 created a ‘special tax regime’, unsanctioned by the Legislature.
22. This submission regarding the status of clause 12 of the Agreement was based upon CCJ decision **BCB Holdings & Belize Bank Ltd. v The Attorney General of Belize [2013] CCJ 5**. The CCJ’s treatment of what was found to be a special tax regime granted by the Government to the Claimants therein which neither sanctioned by written law or other form of legislative approval, is urged upon the Court. There having been no legislative basis in terms of written law or legislative approval granted by Parliament, and given the importance afforded to matters of taxation and revenue, the tax regime afforded to the Claimants therein was found contrary to public policy and therefore null and void. Based on this authority and in the circumstances of the instant case, clause 12 being contracted outside the law and without the sanction of the National Assembly, the Claimant was precluded from reliance upon the contractual exemption and accordingly became liable to pay the taxes assessed.

Limitation of Assessments and Alternative Remedy.

23. In answer to the submission on behalf of the Claimant that the assessments were statute barred based upon section 111 of the IBT Act, it was submitted on behalf of the Defendant that once it is accepted that the Claimant was carrying on business in Belize and thus not entitled to the exemption under section 130(1) of the IBC Act and that the contractual exemption was void for being illegal and contrary to public policy, the Commissioner of Income Tax was entitled to make the assessments which were made. The Claimant ought not to be able to benefit from the illegality created by clause 12 of the Agreement.
24. It was also submitted on behalf of the Defendant that the claim was prematurely brought before the Court (at least in one aspect), as an alternative remedy exists under the IBT Act in the form of the available challenge to the tax assessed before the Tax Appeal Board and that alternative remedy ought to have been first exhausted before the claim was brought. It is recognized however that the question of the constitutionality or otherwise of the provisions of the IBT Act would not be within the purview of the Board thus the claim should be bifurcated to allow the issue on constitutionality to proceed, but the remaining challenge to the tax assessed to be reserved for determination by the Board.

The Constitutional Arguments:-

Denial of Due Process and Deprivation of Property – Sections 6 and 17 of the Constitution. As already alluded to in this Judgment, for reasons to be discussed in the Court's consideration of this matter, the Constitutional arguments are referred to only in brief.

25. The Defendants' answer to the Constitutional arguments was similarly predicated on OECS Court of Appeal authority **British American Insurance Company Ltd v Commissioner of Inland Revenue, Civ. App No. 20 of 2002**. The approach of the Court of Appeal, led by then Byron CJ was urged upon the Court herein.

Byron CJ firstly recognized the importance of taxes to any society as was underscored by the Constitutional provisions legitimizing the deprivation of property taken in satisfaction of any tax to the extent shown to be reasonably justifiable in a democratic society. The provision that a taxpayer 'pays first and argues later', is therefore not of itself unconstitutional.

26. Learned Counsel for the Defendants additionally sought to apply the reasoning of Byron CJ regarding the Court's solution to the challenge to the tax law in question (emanating out of Antigua and Barbuda). The tax law in that case was an existing law and the Court applied the transitional Constitutional provision regarding reading and construing existing laws to bring them into conformity with the Constitution. The tax law in question was therefore not struck down but instead modified by the Court, to bring it into conformity with the Antigua and Barbuda Constitution.
27. Learned Counsel for the Defendants submits that a similar modification exercise could be successfully applied in the instant case as an alternative to rendering the offending provisions of the IBT Act unusable pending any intervention by Parliament. Adaptation of this approach was urged upon the Court based upon reliance on further authorities of **Permanent Secretary v De Freitas (1995) 49 WIR 70** and **Chief of Police and another v Nias**. Additionally, learned counsel for the Defendants urged upon the Court CCJ appeal emanating out of Belize – **Phillip Zuniga et al v BCB Holdings et al CV6 of 2012** as authority illustrative of the reluctance of Courts to strike legislation as unconstitutional.
28. On the whole, a reductionist summary of the case for the Defendants would be that in the first instance the assessments were lawful as the Claimants carried on business in Belize and were therefore not entitled to the statutory exemption provided under the IBC Act. Additionally, the Claimants were also not entitled to rely upon the contractual exemption granted under clause 12 of the Agreement as said provision was unlawful having not been sanctioned by any law or otherwise approved by Parliament.

Regarding the constitutionality of the challenged provisions the regime of 'pay first argue later' was not in and of itself unconstitutional but even if the Court were so to find, the offending provisions, being part of existing law, could be cured by the Court making such modifications deemed necessary and appropriate to bring the law into conformity with the Constitution.

29. There were no submissions put forward in relation to the argument of violation of section 17 of the Constitution and separation of powers. Learned Counsel for the Defendant appeared to concede that without modification the challenged provisions would be in violation of the Constitution and of the doctrine of separation of powers as alleged.

The Claimant in Reply

Learned senior counsel on behalf of the Claimant made several arguments in reply to the Defendant's submissions. To the extent that the matters raised in reply were additional to learned senior counsel's main submissions, they are expressed in brief as follows:-

30. With respect to the alleged invalidity of clause 12 of the Agreement, **BCB Holdings & Belize Bank v Attorney General of Belize** is to be distinguished from the instant case as therein there was no legislative sanction either by way of written law or other form of legislative approval for the tax regime granted to the Appellants in that case. In the instant case, the exemption granted under clause 12 is grounded in section 130(1) of the IBC Act so provision exists by law for the exemption to be granted.
31. As regards the proposed modification of the challenged provisions of the IBT Act, the case of **British American Insurance Company Ltd v The Attorney General of Antigua and Barbuda** is also to be distinguished from the instant case by reason of differences in the legislative framework under consideration. The basis of the constitutional challenge in that case - which was to due process of law and deprivation of property under the Antigua and Barbuda Constitution - arose from the similar legislative framework of 'pay first, argue later'.

The provisions of the Antigua and Barbuda Income Tax Act however contained a basis from which a modification could properly be made, namely the provision for a stay to be granted in the discretion of the Commissioner, but only at the lower level of the appeals process and not the further appeals board level, which was before the Court. The existence of the power to grant a stay at the lower level allowed the Court in effect to treat the absence of that discretion at the further level of the appeal process as an oversight which could properly be modified by including a similar provision. The Belize legislation contains no such basis and any attempt at modification would in effect be the Court legislating an amendment to the Act.

The Court's Consideration.

Against the backdrop of the legal arguments and brief factual background set out above the Court now considers the claim. It is to be noted that both parties agreed that their respective witnesses were not required for cross examination thus any questions of fact would have to be weighted on the extent of the written evidence filed in support of and in opposition to the claim.

32. The Court regards the primary issues in the case to be two-fold, but the primary issues are themselves dependent upon a number of sub-issues. Firstly:-

(a) Was the assessment lawful? The determination of this issue depends upon and is affected by a number of questions in the Court's view, as follows:

- (i) What was the legal status of the Claimant as pertains to its registration as an IBC?
- (ii) Assuming the Claimant's status as an IBC, if found to be carrying on business in Belize contrary to the provisions of the IBC Act, what are the legal consequences of such a finding?
- (iii) Is clause 12 of the Agreement lawful?
- (iv) Did clause 12 of the Agreement provide any right additional to or outside the IBC Act?

- (b)(i) Are sections 53(2), 53(3) and 110(5) in contravention of the fundamental rights afforded under sections 6 and 17 of the Constitution, to due process of law and protection against unlawful deprivation of property or further, in contravention of the doctrine of separation of powers?
- (ii) If so found, the additional question arises as to whether any and if so what action would be available to the Court consequent upon the Court's finding of unconstitutionality of the challenged sections. More particularly, are the sections to be struck down for being unconstitutional or is there some modification that the Court can apply in order to bring the said sections into conformity with the Constitution.
- (ii) Was there an unlawful acquisition of the Claimant's property rights (to the benefit of the Agreement) without compensation in violation of section 17 of the Constitution by virtue of GOB's assumption of management of the Registries managed by the Claimant under the Agreement?
- (iii) If so, what if any relief is to be granted to the Claimants bearing in mind the parameters of the claim?

33. The Court had indicated earlier that the arguments on constitutionality would be briefly dealt with. This was for reason that the constitutionality arguments, in the Court's view, hinge upon the question of the lawfulness or otherwise of the assessments. In other words, should the Court find the assessments unlawful, no further issue need be considered in respect of the constitutionality arguments, save for that of the subsistence or otherwise of the Agreement.

The legality of the Assessments

34. There was at no time any dispute as to the fact that the Claimant is a registered IBC. More particularly, the Claimant's existence as a registered IBC was never challenged by the Defendants. The Court regards this fact as important, as the registration of the Claimant as an IBC conferred upon it a legal status from which flowed certain rights and liabilities as prescribed by the law – the IBC Act.

One of those rights as provided by section 130(1), is to exemption from all the provisions of the IBT Act pursuant to which taxes are levied upon the income of a company incorporated and doing business in Belize.

35. Section 130(1) of the IBC Act, expressly begins in terms that “***notwithstanding any provision contained in the Income and Business Tax Act but subject to the provisions of this section...(a) all income of a company incorporated under this Act...are exempt from all provisions of the Income and Business Tax Act.***” On the express terms of the law therefore, an IBC is exempt from tax. There is and can be no dispute as to this fact in any regard.
36. The issue of the company carrying on business in Belize however is a different matter. The parties are at variance on this issue as evident from the arguments presented. The relevant provisions as referred to by both parties have already been extracted (paragraph 9 above). The Defendants assert that the Claimant was carrying on business in Belize in contravention of section 5(1)(a) of the IBC Act in so far as it concluded an agreement with the Government to manage the Registries in question, employed persons and registered for PAYE. The Claimant maintains that its operations fell within the exceptions provided by section 5(2) of the IBC Act.
37. In the particular circumstances of this case the Court finds that the question of whether or not the company was carrying on business in contravention of the IBC Act, is secondary to the more critical issue of the actual consequence of so doing. The Defendants’ position in relation to the effect of the Claimant carrying on business in contravention of the IBC Act is that the Claimant loses the benefit of the tax exemption conferred by section 130(1). In respect of this issue, the Court finds merit in the Claimant’s arguments (which were outlined at paragraphs 14-15 above) but sets forth its own consideration of the issue in the manner following.
38. The Court considers (emphasis added) section 6 of the IBC Act which again provides as follows:

6(1) Without affecting the operation of section 107, if a company is incorporated under this Act without having satisfied the requirements prescribed for an International Business Company under section 5, or if

having satisfied the requirements it subsequently ceases to satisfy the requirements for a continuous period of more than 30 days, the company shall upon the expiration of that period notify the Registrar of that fact.

(2) A company that willfully contravenes subsection (1) is liable to a penalty of \$500 for each day or part thereof during which the contravention continues, and a director who knowingly permits the contravention is liable to a like penalty.

Given the reference to section 107 in section 6 above, this section is also extracted for ease of reference (with emphasis added):

*107(1) **Notwithstanding section 6**, where the Registrar has reasonable cause to believe that a company incorporated under this Act no longer satisfies the requirements prescribed for an international business company under section 5 of this Act, the Registrar shall serve on the company a notice that the name of the company shall be struck off the register, unless the company or another person satisfies the Registrar within 30 days immediately following the date thereof that the name of the company should not be struck off.*

(2) If the Registrar:-

(a) receives from the company a notice stating that the company no longer satisfies the requirements prescribed for an international business company under section 5 of this Act; or

(b) does not receive a reply to the notice served on the company under subsection (1) above, or receives a reply which the Registrar finds unsatisfactory,

the Registrar shall strike the name of the company off the Register, and shall inform the registered agent of the company accordingly.

(3) The Registrar...

(4) If a company...

(5) If a company...

(6) A company that has been struck off the Register under this section remains liable for all claims, debts, liabilities and obligations of the company, and the striking off does not affect the liability of any of its members, directors, officers or agents.

39. Section 6(1) of the IBC Act begins by stating “*without affecting the operation of section 107*” – meaning that no action taken under section 6 can preclude the operation of section 107. That being said, it is additionally noted that the marginal note to section 6 states “*effect of failure to satisfy requirements of section 5*”. Thereafter, two situations are catered for – (a) *where a company is incorporated under the Act without satisfying the requirements of section 5; or (b) if having satisfied the requirements, subsequently ceases to satisfy the requirements of section 5*. In either of those situations, the company is required to notify the Registrar of its failure or subsequent failure to satisfy the requirements of section 5. The effect of failure to fulfill the obligation to notify the Registrar as directed under section 6(1), (such failure being willful), is that the company becomes liable under section 6(2), to a penalty of \$500 for each day or part thereof that the failure continues.
40. Nothing in this section provides any support for the Defendants’ argument that the effect of an IBC carrying on business in contravention of section 5 of the Act results in an automatic change in the status of the company as an IBC. The purpose of highlighting the fact that two situations are provided for under section 6(1), is to show that even where a company is incorporated under the Act without satisfying section 5 – in other words, such company ought not in the first place to have been incorporated as an IBC – the legal consequence created by the legislation is not that the incorporation fails, but that there is a penalty as provided under section 6(2), that is there to be enforced.
41. The only other consequence of an IBC contravening section 5 of the Act is provided under section 107 – which through no accident is cross referenced in section 6. Section 107 begins – “notwithstanding section 6...” – in other words, regardless of any action taken under section 6 – and thereafter is provided the power of the Registrar to strike an IBC off the Register. In the absence of such striking off the Register, an IBC remains incorporated and of the nature as such.

If an IBC remains as such, in the absence of any other legal provision which affects the rights afforded to it under the Act, the Court cannot agree with the proposition on behalf of the Defendants that by carrying on business in contravention of the Act, the legal consequence was that the Claimant automatically lost any right or status afforded to it under the Act. That is not what the legislation provides.

42. Section 130(1) provides that “***notwithstanding anything contained in the Income and Business Tax Act but subject to the provisions of this section...(a) all income of a company incorporated under this Act...shall be exempt from all provisions of the Income and Business Tax Act.***” The qualification implied as existing by use of the words - ‘*subject to the provisions of this section*’ appears later at subsection 4 where companies with certain defined connections to companies incorporated under the Companies Act, are excluded from the exemption from taxes created by section 130(1). None of those situations in section 130(4) have been alleged or shown to apply to the instant case. Once a company is incorporated under the IBC Act and remains registered as such, section 130(1)(a) exempts that IBC from the application of the IBT Act.
43. The Court wishes to make clear, in order to avoid a nonsensical interpretation of its reasoning, that it is not advocating its position from the standpoint that a company, once it exists as an IBC is entitled to flout the law and yet retain the benefit of tax exemption to which it would but for its incorporation as an IBC not be entitled. The Court’s position rather, is that the IBC is a statutory construct. Its creation is effected according to the provisions of the IBC Act, as are the rights afforded to it, its powers, its liabilities and its methods of dissolution. The Act itself provides sanctions for contravening the provisions of section 5 but these sanctions are not automatic; they require action to be taken under either, or both sections 6 or 107 and outside of those sanctions, no other provision elsewhere in the Act serves to reinstate the operation of the IBT Act, which is expressly removed by section 130(1).

44. The Court illustrates its reasoning in this regard by reference to two other IBC Acts within the Caricom Region. By way of introduction on this point, the Belize IBC Act, enacted in May, 1990 is an early form of such an Act which was more or less replicated throughout the Region. The identical Act can be seen in the now repealed BVI IBC Act, 1984 and versions of the same were repeated throughout other Regional countries, but for the most part those now subsisting have undergone numerous amendments or complete repeal. In any event, the Court refers for merely illustrative purposes firstly to the IBC Act. Cap. 12.14 of St. Lucia, particularly section 109. This section provides

“109(1) An international business company which complies with this Act and does no business in Saint Lucia may elect –

(a) To be exempted from income tax; or

(b) To be liable to income tax on the profits and gains of the international business company at a rate of 1%.

109(2)...”

45. Additionally, Cap. 221 of the Laws of Antigua and Barbuda is the International Business Companies (Exemption from Income Tax) Act. This is a somewhat different Act from that currently in the Belize format but the Belize format existed in Antigua as the International Business Companies Act, 1982.

“3(1) The profits or gains of an international business company which is not an investment company shall be exempt from income tax if, within the prescribed time after the expiration of an income year the company satisfies the Commissioner that during the whole of that income year, it was an exempted company within the meaning of this Act.” Exemption of Profits and gains from income tax

46. The point being made is that upon examination of these two provisions, it can be seen that the retention of the exemption is expressly made conditional upon the IBC complying with the terms of the Act. This the Court regards as a distinct difference from the Belize and other original IBC Acts, where the tax exempt status is conferred upon the company with no qualification other than being incorporated as an IBC. In these two examples, in order to claim the exemption the companies have to prove that they are complying with the prohibition not to carry on business within the jurisdiction in question.

47. Having said all of the above, the Court's position is that the assessments by the Commissioner of Income Tax were unlawful. In this respect, it is necessary to make clear that the Court has not made any positive finding that the Claimant company did or did not contravene section 5 of the IBC Act in the conduct of its business. Such a finding within the context of the claim would not have affected the Court's position in relation to the jurisdiction of the CIT to levy assessments and furthermore, the claim as presented and defended did not ideally lend itself to such a finding being made, from the standpoint that both parties presented no witnesses for cross examination. In the circumstances, a finding of fact on the question of whether or not the Claimant was carrying on business in Belize, is not part of the Court's disposition of the claim.
48. It is instead made clear, that the Court's determination as to the unlawfulness of the assessments, is made on the basis that in the absence of any argument to the contrary that the Claimant was incorporated and remains registered as an IBC, there was no jurisdiction under the IBC Act, for the Commissioner of Income Tax (whose jurisdiction is entirely removed under section 130(1) of the IBC Act), to levy any assessments of income and business tax against the Claimant. Further, even if it were to be the case that the Claimant was found to have been carrying on business in contravention of the Act, the redress in respect of so doing exists under sections 6 and 107 of the Act and it is a matter for the 1st Defendant to have availed itself of the appropriate action under those provisions.

The Remaining Issues

Notwithstanding the Court's position as stated above, it is necessary to address the other issues raised in the claim.

The legality of clause 12 of the Agreement

49. The Defendants contend that clause 12 of the Agreement ought to be declared void on the basis that it existed outside the law and without any form of legislative approval. The decision of the CCJ in **BCB Holdings** (supra) was relied upon as authority for the manner in which clause 12 was to be beholden.

The Court firstly recognizes the magnitude and importance of this decision to the jurisprudence not only of Belize, but to the entire Region, having emanated from the CCJ. The case will serve as authority for several public law issues, most importantly, the considerations and limits in the application of public policy and an affirmation of the continued relevance and applicability of the doctrine of Separation of Powers and also of the Court's supervisory role over the exercise of Executive power. That being said however, the Court nonetheless acknowledges that this decision must be understood and applied within the context of its peculiar facts and circumstances.

50. On the submission on behalf of the Claimants, the authority was to be distinguished from the instant case and the Court is in agreement with this submission. As learned senior counsel submitted, the difference arises by virtue on the one hand, of the combined effect of the absence of written law or other legislative sanction pursuant to which the contractual tax concession in the BCB Holdings Case was granted, along with the circumstances of concealment found to have been associated with the conferment of the tax privileges granted therein.
51. This is against on the other hand, of what in the instant case is a contractual exemption from taxes in favor of an international business company, which exemption in any event is a status expressly conferred by the written law of the land. Clause 12 of the Agreement therefore neither created nor conferred any right not existing, or greater than that already existing, within the applicable law. As an IBC, the tax exempt status sought to be conferred on the Claimant existed independently of the contract and would have been able to be invoked even in the absence of clause 12 from the Agreement.
52. If there is to be any indictment against the correctness or otherwise of the Claimant company having been allowed in the first place to be incorporated as and thereafter continue as an IBC, that question is one which ought to have been addressed either by those primarily responsible for the management of the Act; or, if as suggested by the Defendants, apparent self interest rendered that unlikely, the issue was nonetheless one at liberty to be addressed by those at a greater level of responsibility for the

country's financial affairs. On the Court's interpretation of the law however, the action by the Commissioner of Income Tax of levying assessments against the registered IBC, was not a consequence enabled by the legislation in response to any contravention by the Claimant of carrying on business in Belize. That there is a specified manner of addressing a contravention of the Act has already been identified above.

The Constitutionality Arguments

53. The arguments as to the constitutionality of sections 53(2), 53(3) and 110(5) of the IBT Act all derived from the existence of the assessments levied against the Claimants. The assessments are found to have been unlawful as a consequence of the absence of jurisdiction on the part of CIT by virtue of section 130(1) of the IBC Act. In the circumstances, as there are in effect now no lawful assessments in existence against the Claimant, the Court will go no further in considering the arguments as to constitutionality of the challenged sections, save for one question as dealt with below. Specifically therefore, the Court gives no further consideration to any question of contravention of sections 6 or 17 of the Constitution or in relation to the question of any infringement of the doctrine of separation of powers as may have arisen from the existence and application of sections 53(2), 53(3) or 110(5) of the Income and Business Tax Act, Cap. 55 of the Laws of Belize.

54. The one question referred to in paragraph 51 above, arose from submissions on behalf of the Claimant advancing the argument of a breach of section 17 of the Constitution arising from the Defendant's termination of the Agreement and assumption of control of the Registries. No such relief was claimed in relation to this alleged termination of the Agreement by GOB. The Court was not asked within the parameters of the claim to make any factual finding as to the termination of the Agreement nor orders consequent upon such a finding. In the circumstances, the Court makes no pronouncement in relation to whether the Agreement expired as argued by the Defendants or whether it was properly extended to June, 2020 as argued by the Claimant and thus repudiated by the Government upon the latter's assumption of management of the Registries.

In any event it is the Court's understanding that the Claimant's position in respect of the takeover of the Registries is the subject matter of a separate claim.

The Final Disposition

55. The Court's final disposition in relation to the claim put forward by the Claimants is hereinafter set out but first the relief claimed is itself set out in its entirety for ease of reference and avoidance of doubt. The Claimant claimed as follows:

- (a) A Declaration that the Notices of Estimated Assessments for income and business tax raised by the Second Defendant against the Claimant for the period 1993-2013 which, together with penalties and taxes, amount to \$30,036,382.36 ("the Assessments") are unlawful, null and void.
- (b) A Declaration that sections 53(2), 53(3) and 110(5) of the Income and Business Tax Act are in violation of, repugnant to and inconsistent with sections 3 and 6 of the Belize Constitution which guarantees that every citizen is entitled to equal protection under the law; and/or
- (c) A Declaration that sections 53(2), 53(3) and 110(5) of the Income and Business Tax Act are in violation of, repugnant to and inconsistent with sections 3 and 17 of the Belize Constitution which guarantee protection against the arbitrary deprivation of property; and/or
- (d) A Declaration that sections 53(2), 53(3) and 110(5) of the Income and Business Tax Act are in violation of, repugnant to and inconsistent with the Separation of Powers doctrine which is a fundamental tenet of the Belize Constitution.
- (e) An Order that the Court doth strike down sections 53(2), 53(3) and 110(5) of the Income and Business Tax Act.
- (f) An Order striking down/quashing each of the assessments raised by the Commissioner of Income and Business Tax dated the 31st day of May, 2013 against the Claimant as being unlawful, irrational and arbitrary.
- (g) Such further or other relief as may be just; and
- (h) Costs.

56. The Court's disposition and orders in relation to the relief sought as set out above are as follows:

- (a) It is declared that the Notices of Estimated Assessments for income and business tax levied by the Second Defendant against the Claimant for the period 1993-2013 which, together with penalties and taxes, amount to \$30,036,382.36 ("the Assessments") are unlawful and therefore void.
- (b) The Court declines to grant the declarations prayed at paragraphs (b), (c) and (d) of the relief sought by the Claimants which is set out in paragraph 55 above.
- (c) The Court hereby orders that the Notices of Estimated Assessment levied against the Claimant by the Commissioner of Income Tax on the 31st May, 2013 are quashed.
- (d) The Court declines to grant any order striking down the validity of sections 53(2), 53(3) and 110(5) of the Income and Business Tax Act, Cap. 55 of the Laws of Belize. The said sections remain valid and enforceable as part of the said Act.
- (e) The Claimant is hereby awarded costs.

Shona O. Griffith
Supreme Court Judge.