Privy Council Appeal No 65 of 2005

Bikeworld Limited

Appellant

v.

The Director-General of the Mauritius Revenue Authority

Respondent

FROM

THE COURT OF APPEAL OF MAURITIUS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 23rd January 2007

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Present at the hearing:-

Lord Bingham of Cornhill
Lord Hope of Craighead
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Mance

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[Delivered by ***Lord Bingham of Cornhill****]*

1. Bikeworld Limited ("the company") appeals against a decision of the Supreme Court of Mauritius (YKJ Yeung Sik Yuen ACJ and N Matadeen J) of 16 November 2004, dismissing the company's appeal by case stated against a decision of the Tax Appeal Tribunal. The issues for decision by the Board are whether the Tax Appeal Tribunal had jurisdiction to entertain the company's appeal to it and, if it did, whether the assessments of tax payable by the company made by the

Commissioner of Income Tax should be upheld. The Commissioner has since become the Director-General of the Mauritius Revenue Authority, but it is convenient to use the title by which he was known at the time.

2. The company was incorporated as a commercial company in Mauritius on 30 June 1994. By section 116 of the Income Tax Act 1995 it was required to submit to the Commissioner, not later than 30 September of each year, a return of all income derived by it during the preceding income year. Thus on 30 September 1995 the company's return was due for the assessment year 1995-1996, and on 30 September 1996 its return was due for the assessment year 1996-1997. The assessment year in Mauritius ran from 1 July to the following 30 June, and for a year of assessment tax was imposed on the income of the preceding year. In neither year did the company submit any return.

3. Where a company failed to submit a return as required by section 116, the Commissioner had power to raise an assessment based on his estimate of the company's chargeable income and the tax payable. This power was conferred by section 129 of the 1995 Act which, so far as relevant, provided:

> "*Commissioner may make assessments*
>
> 129.(1) Where, in respect of a year of assessment, the Commissioner - …
>
> (b) has reason to believe that a person who has not submitted a return of income is a taxpayer,
>
> he may, according to the best of his judgment, make an assessment of the amount of chargeable income of, and income tax payable by, including any penalty under sections 109, 110, 111, 121 and 122, that person for that year of assessment and give him written notice of the assessment.
>
> (2) Where the Commissioner has given written notice to any person of an assessment under subsection (1), that person shall pay the income tax within 28 days of the date of the notice of assessment."

4. In referring to "the best of his [the Commissioner's] judgment" the Act used language widely used elsewhere and interpreted by the Board in *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* (1990) 63 TC 515.

5. The Commissioner exercised his power under section 129. It so happened that between October 1995 and the end of that year officers of the Customs Department had visited and searched the premises of the company. Arrests had been made and documents seized. Arising from

this action, Mr Mukhtar Mauthoor, a director of the company acting on its behalf, had served on the Comptroller of Customs a *mise en demeure* or notice of demand, which (under section 4(2) of the Public Officers' Protection Act 1957) was a necessary step before civil proceedings could be instituted against a public officer. In its *mise en demeure* the company had claimed loss of profits on exports during the period 1995-1997 of Rs 54,100,000 and loss of profits on local sales of Rs 50,000,000, in addition to other smaller heads of loss. In the absence of returns submitted and accounts furnished by the company, the Commissioner based his assessments on the claim figures advanced by the company in its *mise en demeure*, although the company did not pursue its claim against the Comptroller. Thus the Commissioner raised two assessments, both dated and sent to the company on 11 September 1997: the first, for the assessment year 1995-1996, assessed the company's total chargeable income as Rs 50,000,000 and charged tax of Rs 21,875,000; the second, for the following assessment year, assessed the total chargeable income as Rs 54,000,000 and charged tax of Rs 22,032,000.

6. Under the 1995 Act, a company served with an estimated assessment under section 129 was entitled to challenge it, provided it complied with certain conditions in doing so. Thus section 131A of the Act provided:

> "131A.(1) Subject to subsection [6], where a person who has been assessed to income tax under section 129 or 131 is dissatisfied with the assessment, he may, within 28 days of the date of the notice of assessment, object to the assessment by letter sent to the Commissioner by registered post.
>
> (2) Where a person makes an objection under subsection (1), he shall specify fully in his letter of objection, in respect of each of the items in the notice of assessment, the grounds of the objection.
>
> (3) Where a person who has made an objection under subsection (1), has not, for the relevant income year, submitted his Statement of Income under section 106 or his return of income under section 112, 115, 116 or 117, he shall, within 28 days of the date of the notice of assessment, comply with the provisions of those sections as appropriate.

(4) Any objection under this section and section 131B shall be dealt with independently by an objection unit set up by the Commissioner for that purpose.

(5) Where -

(a) the Commissioner considers that the person has not complied with the provisions of subsection (2); or

(b) the person has not complied with the provisions of subsection (3),

the objection shall be deemed to have lapsed and the Commissioner shall give notice thereof.

(6) (a) Where it is proved to the satisfaction of the Commissioner that, owing to illness or other reasonable cause, a person has been prevented from making an objection within the time specified in subsection (1), the Commissioner may consider the objection on such terms and conditions as he thinks fit.

(b) Where the Commissioner refuses to consider a late objection under this subsection, he shall, within 28 days of the date of receipt of the letter of objection, give notice of the refusal to the person.

(7) Where a notice under subsection (5) or (6)(b) is given, the tax specified in the notice of assessment shall be paid within 28 days of the date of the notice under subsection (5) or (6)(b), as the case may be.

(8) Any person who is aggrieved by a decision under subsection (5) or (6)(b) may appeal to the Tribunal in accordance with the Tax Appeal Tribunal Act 1984."

It is noteworthy that the right to object is subject to (1) giving notice of objection by registered post within 28 days (or such longer period as the Commissioner may allow under subsection (6)(a)), (2) specifying the grounds of the objection fully in the letter of objection, and (3) submitting a return of income within 28 days if this has not already been done. Where the Commissioner considers that the taxpayer has not fully specified the grounds of its objection in its letter of objection, or the taxpayer has not submitted an outstanding return of income within 28 days, the objection is deemed to have lapsed and the Commissioner must notify that fact to the taxpayer. Notice of refusal must also be given to

the taxpayer if the Commissioner refuses to consider a late objection under subsection (6)(a). Where an objection is deemed to have lapsed under subsection (5) or the Commissioner refuses to consider a late objection under subsection (6)(a), the tax assessed must be paid within 28 days, but in either of these cases an aggrieved taxpayer may appeal to the Tax Appeal Tribunal. The section requires the taxpayer to act promptly, and enable the Commissioner to review the estimated assessment. It gives only a limited right of appeal.

7. Section 131A was supplemented by section 131B, which provided:

> "131B.(1) Subject to subsection (3), where the Commissioner does not refuse to consider an objection under section 131A, he shall -
>
> (a) review the assessment;
> (b) disallow or allow it in whole or in part; and
> (c) where appropriate, amend the assessment to conform with his determination.
>
> (2) The Commissioner shall give notice of the determination to the person.
>
> (3) For the purposes of considering an objection and reviewing an assessment, the Commissioner may by notice, require the person, within the time fixed by the Commissioner, to comply with any of the provisions of sections 124 and 125.
>
> (4) Where the person fails to comply with a notice under subsection (3) within the time specified in the notice, the Commissioner may determine that the objection has lapsed and he shall give notice thereof.
>
> (5) Where a notice of determination under subsection (2) or (4) is given, the tax specified in the notice of assessment shall be paid within 28 days of the date of the notice of determination.
>
> (6) A notice of determination under subsection (2) or (4) in respect of an assessment made on or after 1 July 1997, shall be given to the person within 6 months of the date on which the objection is lodged.

(7) Where the objection is not determined within the period specified in subsection (6), the objection shall be deemed to have been allowed by the Commissioner.

(8) Any person who is aggrieved by a determination under this section may appeal to the Tribunal in accordance with the Tax Appeal Tribunal Act 1984."

This section makes no express reference to the independent objection unit set up by the Commissioner under section 131A(4), but it must be inferred that the Commissioner acts through, or in accordance with the decisions of, that unit.

8. Section 134(1) provided that

> "Any person who is aggrieved by a decision, or determination, under sections 20, 59, 98, 114(2), 123(4), 127(2), 131A and 131B may appeal to the Tribunal in accordance with the Tax Appeal Tribunal Act 1984."

Section 129 was not one of the sections included. Thus sections 131A and 131B provided the only route for appealing. There was no right to appeal directly to the Tribunal against an assessment under section 129.

9. Section 135 addressed the conclusiveness of assessments. It provided:

> "135. Except in proceedings on objection to assessments under section 131A or on appeal under section 134 -
>
> (a) no assessment, decision or determination under this Act shall be disputed in any court or in any proceedings either on the ground that the person affected is not liable to income tax or the amount of tax due and payable is excessive or on any other ground; and
>
> (b) every assessment, decision or determination shall be final and conclusive and the liability of the person so affected shall be determined accordingly."

10. The company did not respond to the assessments posted to its registered office on 11 September 1997, and later insisted that they had not been received. The Tax Appeal Tribunal was, in due course, sceptical about this assertion, which it described in its Determination as "most surprising and alarming" and "unacceptable", and it twice noted that the assessments had not been returned to the postal authorities. But it is clear (despite the argument of Mr Said Toorbuth for the company to the contrary) that under the relevant legislation service was deemed to have been effected whether in fact the assessments had been received or not. Section 155(3) of the 1995 Act provided:

> "(3) Any notice of assessment, determination or other notice required to be served on or given to any person by the Commissioner may be served or given by - …
>
> (b) … sending it to his usual or last known business … address."

The assessments were sent to the company's business address. Section 40 of the Interpretation and General Clauses Act 1974 provided

> "40 *Service by post*
>
> Where an enactment authorises or requires a document to be served by post, whatever the expression used, the service shall be deemed to be effected by properly addressing, prepaying and posting a letter containing the document and be presumed to have been effected at the time when the letter would be delivered in the ordinary course of post."

11. Having received no response to his estimated assessments, and no payment of tax, it appears that the Commissioner wrote to the company requesting payment in a letter of 19 November 1997, sent by registered post. The company wrote to the Commissioner on 9 February 1998, and the Commissioner replied on 4 March 1998, referring to the 11 September assessments and the reminder of 19 November. The company replied on 5 March 1998, asserting that the letters of 11 September and 19 November had never been received by the company. The Commissioner responded to this letter on 25 March 1998 by sending copies of the assessments.

12. On 13 November 1998 the company wrote to the Commissioner and said:

> "During one of our visits to the Income Tax Department, we were informed that an assessment has been made on the

> above company although no documents relating to the above has been received by us. This company has stopped operation and has sustained huge loses (*sic*).
>
> We are hereby appealing against any assessments that may have been issued against the above company.
>
> We would be much obliged if you could arrange for a meeting with you personally as we want this matter to be settled amicably."

The Commissioner replied to this letter on 26 November 1998:

> "The above notices of assessment issued on 11 September 1997 are deemed to have been served as they have been forwarded to the company's last known business address as above.
>
> However, following letters received at this office in February 1998 and March 1998, copies of these assessments have again been sent on 25 March 1998 at the same address.
>
> In these circumstances, I regret to inform you that your request for a review cannot be entertained."

It appears that the Commissioner wrote again in similar terms on 26 January 1999, but neither side attached any significance to that letter.

13. By written notice dated 5 March 1999 the company gave notice of appeal to the Tax Appeal Tribunal. The notice was expressed to be under section 4 or 4A of the Tax Appeal Tribunal Act 1984. Section 4A is irrelevant. Section 4 of the Act as amended provided in subsection (1) that

> "Subject to subsections (2) and (4), any person who is aggrieved by any decision taken by a revenue Commissioner under the Revenue Acts may, within 28 days of the notification to him of the decision, appeal to the Tribunal in the prescribed manner."

This apparently broad right of appeal was, after amendment of the Act, qualified by subsection (5)(a):

> "The Tribunal shall not hear an appeal from a decision -

> (a) of the Commissioner of Income Tax which is a decision other than a decision or determination or an assessment under the sections referred to in section 134 of the Income Tax Act 1995 …"

Thus the right of appeal conferred by section 134 was not enlarged. In its notice of appeal the company stated that it had appealed against the estimated assessments on 13 November 1998, and that in the years under reference it had been incurring huge losses. It sought leave to appeal against the notices of assessment despite its delay in doing so.

14. On 5 February 1999, shortly before applying to the Tribunal, the company submitted returns of income for the two assessment years in question, and a set of unaudited accounts showing that it had suffered losses. Eighteen months later, on 21 November 2000, it submitted further returns and a further set of unaudited accounts for the same period. These showed different figures, but still showed losses.

15. The Commissioner resisted the company's application to the Tribunal to hear the appeal out of time, but the Tribunal allowed the application for reasons given in a ruling of 9 November 1999, and no issue arises on this ruling. More significantly, the Commissioner submitted that the company's objection to the assessments was deemed to have lapsed in view of the clear provisions of section 131A of the 1995 Act. This submission the Tribunal also rejected, ruling on 3 July 2001 that

> "although it is correct to say that the [company] has not complied strictly with the provisions of s.131A(1) and (2) of the Income Tax Act 1995, as amended, we shall proceed to hear the appeal on the merits, since the assessments for the years under reference are strongly objected to by the [company]."

So the Tribunal did proceed to hear the case on the merits. It was unable to accept that the two sets of accounts belatedly produced showed a true, fair and reliable picture of the company's affairs. It found Mr Mauthoor, the company's representative and witness, to be very evasive and vague. It ruled that the question of considering an objection and reviewing an assessment did not arise, since as a matter of fact no objection to the assessments had been raised. Having considered all the evidence placed before it in the light of the parties' submissions, the Tribunal was unable to find fault with the assessments as raised or with the basis of the assessments.

16. Under section 8(1) of the Tax Appeal Tribunal Act 1984 a party dissatisfied with a determination of the Tribunal as being erroneous in point of law was entitled to appeal to the Supreme Court. The company exercised this right, and the Tribunal duly stated a case, listing the nine issues which the company wished to argue.

17. In its judgment of 16 November 2004, the Supreme Court dealt briefly with these nine issues, which it found to raise issues of fact and not law, or to be founded on an incorrect legal premise, or to be misconceived. It continued:

> "Furthermore, we wish to express our utter surprise at the stand of the tribunal in allowing the objections to be directed to the tribunal by way of appeal since that was clearly in breach of section 134 of the Income Tax Act which limits the instances in which an appeal to the tribunal is permissible. Indeed there are only eight situations which are covered by sections 20, 59, 98, 114(2), 123(4), 127(2), 131A and 131B of the Act and none is akin to our case.
>
> It is clear to us that once the assessments in lite had been raised by the respondent, the appellant should have channelled its objections to the respondent if it felt aggrieved or dissatisfied with them. The delay for objecting is usually 28 days from the receipt of the notice of the assessment. In case there is a reasonable ground to justify non-compliance with the delay [where it is proved for example that it was never received or not received in time] it should be raised again with the respondent.
>
> True it is that objections or delays relating to objections which are raised by the tax payer with the respondent, and which are not determined to the satisfaction of the former, may be the subject of an appeal to the tribunal pursuant to section 131A of the Act. But the appellant cannot appeal to the tribunal without having first objected to the respondent against the assessments once they have been raised. The obvious reason is that the respondent may agree with any objection in part or in whole and may be prepared to make the necessary adjustment in the assessments. Another reason is that the respondent remains the appropriate revenue authority habilitated to determine objections in the first place and should not be by-passed.

> The tribunal therefore wrongly assumed appellate jurisdiction in the first place when the appellant had initially failed to lodge any objection to the assessments with the respondent. It follows that the present appeal is flawed 'ab initio' and should be set aside on the basis of a serious procedural departure."

Leave to appeal to the Board was granted by the Supreme Court on 6 July 2005.

18. It is clear, in the opinion of the Board, as the Supreme Court held, that the Tribunal lacked jurisdiction to entertain the company's appeal. Section 4(5)(a) of the 1984 Act (see para 13 above) made plain that no appeal lay to the Tribunal save under one of the sections referred to in section 134 of the 1995 Act. Section 134(1) of the 1995 Act (see para 8 above) provided a right of appeal under a number of sections of which only sections 131A and 131B were relevant. Thus to establish jurisdiction in the Tribunal the company had to appeal under one or other of those sections.

19. Section 131A (see para 6 above) gave a right of appeal to the Tribunal in two situations. The first (subsection (5)) was where the Commissioner considered that the taxpayer had not particularised the grounds of his objection as required by subsection (2) or where the taxpayer had not submitted a return of his income within the period specified in subsection (3) and the Commissioner gave notice that the objection was deemed to have lapsed. The second situation (subsection (6)(b)) was where the Commissioner gave notice of refusal to consider a late objection under subsection (6)(a). An appeal lay to the Tribunal against these decisions, and if the taxpayer was successful on appeal the Tribunal would rule that the Commissioner was wrong to consider that the taxpayer had not complied with subsection (2), or to rule that he had not complied with subsection (3), or to refuse to consider a late objection under subsection (6)(a). The consequence would then be an order that the Commissioner consider the taxpayer's objection on its merits. In the present case, the company was not complaining of a decision by the Commissioner under subsections (5) or (6)(b), a complaint which would on the facts have been impossible to sustain in any event. It was complaining of the estimated assessments. This was a complaint which it was not entitled to make to the Tribunal under this section, and which the Tribunal accordingly had no jurisdiction to entertain.

20. Section 131B (see para 7 above) was addressed, and addressed only, to cases in which the Commissioner had not refused to consider an objection. He was required by the section to review the assessment and

make a determination (through or in conjunction with the independent objection unit referred to above). The objection was deemed to have been allowed by the Commissioner if he did not make a determination within six months of the lodging of the objection: subsection (7). If he did make a determination within that period, such determination might be challenged on appeal. But the section had no application in the present case. Even if it be assumed in favour of the company that its letter of 13 November 1998 was an objection within the meaning of the Act (a very generous assumption, given its failure to comply with subsections (1), (2) and (3) of section 131A) or was an attempt to invoke subsection (6)(a) of section 131A, the Commissioner made it clear in his letter of 26 November 1998 that he would not consider it and did not in fact consider or accept it. There was never any appeal against any such decision of his under subsection (8) of section 131A. It has never been suggested that the company's objection must be deemed to have been allowed because no determination had been made by the Commissioner within six months. Thus section 131B offered the company no avenue of appeal, and it has not been argued that it did.

21. It follows that the Tribunal had no jurisdiction to entertain the company's appeal, and the Supreme Court was right so to rule. The Tribunal was wrong to think that it had a discretion to waive the terms of section 131A, which defined its jurisdiction. The object and effect of section 135 (see para 9 above) were to ensure that assessments were not challenged save on an objection under section 131A or an appeal under section 134.

22. This conclusion makes it inappropriate for the Board to rule on the merits of the company's complaints. But having heard argument on the facts the Board is not persuaded that the company has suffered any substantial injustice. Where a taxpayer has failed to make a return or supply accounts, the Commissioner must make the best estimate he can, and any estimate may be wrong. But under section 10 of the Tax Appeal Tribunal Act 1984 the burden lay on the taxpayer to show that an assessment was incorrect, and (as the Board pointed out in *Bi-Flex Caribbean* at p 523) the facts are peculiarly within the knowledge of the taxpayer. By producing discrepant, unaudited, unreliable accounts, and adducing unreliable evidence, the company was judged to have failed to discharge that burden. There is nothing to suggest that that judgment was erroneous in law, and the Board is not attracted by the company's submission that the Commissioner should have rejected the figures advanced in its *mise en demeure* as an obviously dishonest sham. The Commissioner might no doubt have taken that view, but he can scarcely be criticised for relying on the only figures the company had given,

bearing in mind (*Van Boeckel v Customs and Excise Commissioners* [1981] 2 All ER 505, 508, per Woolf J) that

> "the commissioners should not be required to do the work of the taxpayer in order to form a conclusion as to the amount of tax which, to the best of their judgment, is due."

23. The appeal must be dismissed with costs.