

Bhurtun Chambers

Monthly newsletter

Issue No 7: March 2022

Introduction

Statutory interpretation is quite a useful concept. It enables the Courts, members of the public, enforcement agencies and any person generally to determine what meaning the Legislator wanted to convey.

Statutory interpretation may be required to define a single word or, in other instances, it may be required to understand the scope of a whole section or subsection of the law. In case of controversy, the matter will be resolved based on the interpretation to be given by the judicial body.

Over time, a same provision may be given different meanings or scope of application by the Courts. For example, the concept of “time of supply” has been applied differently in cases of **Toolink Ltd v The Director General, Mauritius Revenue Authority 2012 SCJ 423** and **Shophold (Mauritius) Ltd v The Assessment Review Committee and another 2014 PRV 90**.

The decision given in the **Dilloo** case (please see summary below) is one example of statutory interpretation by the Assessment Review Committee wherein the Committee applied the provision in relation to the derivation of income by individual from abroad in a manner never applied by the Revenue Authority or taxpayers previously.

This newsletter provides a short summary of cases decided by the Assessment Review Committee and some interesting judgments of the Supreme Court. It also contains details about our trainings.

Table of Contents

Decision Delivered by the Assessment Review Committee.....	4
Selected Decisions delivered by the Supreme Court.....	8
Our Trainings.....	13

Decisions Delivered by the Assessment Review Committee

1. Hilmi Mohammad Ehsan Dilloo v The Director General, Mauritius Revenue Authority ARC/IT/106-20

The Applicant was employed by a company in Saudi Arabia. He transferred money from his bank account in Saudi Arabia to several bank accounts in Mauritius. He also acquired immovable property in Mauritius from which he received rental income.

An assessment was raised by the Respondent based on section 5(3) of the Income Tax Act. It was the contention of the Applicant that:

- a. The Applicant was not resident in Mauritius;
- b. The savings remitted to Mauritius did not amount to income.

It is convenient to set out section 5 of the Income Tax Act, which provides for the derivation of income:

5. Derivation of income

(1) Income shall be deemed to be derived by a person where-

(a) the income was derived from Mauritius, whether the person was resident in Mauritius or elsewhere; or

(b) the income was derived at a time when the person was resident in Mauritius, whether the income was derived from Mauritius or elsewhere.

(2) Subject to the other provisions of this Act, income shall be deemed to be derived by a person when -

(a) it has been earned or has accrued; or

(b) it has been dealt with in his interest or on his behalf, whether or not it has become due or receivable.

(3) Income derived by an individual from outside Mauritius shall be deemed to be derived by the individual when-

(a) it is received in Mauritius by him or on his behalf; or

(b) it is dealt with in Mauritius in his interest or on his behalf.

Both parties were of the view that section 5(3) applied to “a resident”. The Committee however analysed the deeming provision. It referred to foreign case law and articles written by authors.

The Committee concluded that section 5(3) was a stand-alone provision and was not dependent on the concept of residence. As such, even a non-resident individual is taxable in Mauritius on income derived abroad, subject to such income being remitted in Mauritius.

The Committee further effected a factual analysis to conclude that the Applicant was a resident of Mauritius given that his domicile remained in Mauritius.

Another argument put forward by the Applicant was that the money transferred to Mauritius was his savings and therefore not income. The Committee referred to the following extracts from relevant authorities:

UK decisions have ruled that mere investment of income before it is received will not convert the income into capital.

The investment of income abroad does not change its character as income and whether the investments or assets are realised abroad and the proceeds remitted here (Walsh v Randall (23TC55) and Patuck v Lloyd (26TC284)) or whether they are transferred here and then realised (Scottish Provident Institution v Farmer (6TC34)). Such transactions give rise to ‘sums received’ and the amounts are taxable.

The Committee concluded that the savings were “income”.

The representations were therefore set aside.

[Note: This decision departs from the principles being applied by the Revenue and taxpayers to the effect that, with regard to individuals, income is derived when:

1. The individual is resident in Mauritius, whether the income is derived from Mauritius or elsewhere. Income derived elsewhere is taxable only to the extent that it is remitted to Mauritius.
2. Income is derived in Mauritius, whether or not the individual is resident in Mauritius or not.

The effect of the decision is to create a third instance where income which is derived abroad by an individual and remitted to Mauritius is taxable irrespective of whether the individual is resident or not in Mauritius.]

2. Jean Paul Brelu Brelu v Director-General, Mauritius Revenue Authority ARC/IT/406-16

This is a matter which refers to an objection which was lapsed for non-payment of 10 percent. The Respondent had admitted that the assessment had to be revised based on documents provided by the Applicant.

The Committee concluded that, in the circumstances, it would be unfair to require the Applicant to pay the 10 percent given that the Respondent had admitted that the assessed amount was wrong.

The matter was therefore referred to the Respondent for the objection of the Applicant to be considered within 4 months as from the date of the Ruling of the Committee.

3. Trait D'Union Ltée v Director-General, Mauritius Revenue Authority ARC/IT/26-20

The matter concerned Advertising Structure Fee. On 21 January 2020, the Applicant received a claim from the Respondent. The Respondent raised a preliminary objection to the Representations to the effect that the Assessment Review Committee had no jurisdiction to hear the matter.

The Committee analysed the provisions of the Mauritius Revenue Authority Act which provides for the jurisdiction of the Committee in its Fifth Schedule. The sections of the law mentioned therein do not bear any relationship with the claim of the Respondent. The Committee therefore concluded that it did not have the jurisdiction to hear the present matter.

[Note: One of the essential matters to consider before lodging representations with the Clerk of the Committee is to ascertain whether the Committee does have jurisdiction to hear the matter. The relevant provisions of the law must be considered, especially, the Fifth Schedule to the Mauritius Revenue Authority Act.]

Selected Decisions delivered by the Supreme Court

a) AWL Trading & Contracting Co. Ltd v Yamagin Tsusho Company Limited 2022 SCJ 54

The Applicant has made an application to have a statutory demand served upon it by the Respondent set aside.

The main contention of the Applicant was that it was dealing with “Yamagin Corporation” and not the Respondent.

Under section 181(4) of the Insolvency Act, a statutory demand may be set aside where the Court is satisfied that-

- (1) there is a substantial dispute whether or not the debt is owing or is due;
- (2) the company appears to have a counterclaim, set-off or cross-demand and the amount specified in the demand less the amount of the counterclaim, set-off or cross-demand is less than the prescribed amount; or
- (3) the demand ought to be set aside on other grounds.

The evidence showed that “Yamagin Corporation” was the trade name of the Respondent and that the Applicant had been dealing with the representative of the Respondent, whilst it was using its trade name.

The Supreme Court considered that there was no issue in using a trade name whilst dealing with the Applicant. There was therefore no serious dispute about the claim made by the Respondent.

The Application made by the Applicant was therefore set aside.

**b) Mauritius Duty Free Paradise Co Ltd v The Mauritius Commercial Bank Ltd & Anor
2022 SCJ 42**

The Applicant obtained an interim injunction to restrain the Respondent from debiting its account and to credit the amount debited to any account held by Afrasia Bank Ltd. The present matter was for the interim injunction to be made interlocutory.

In order to decide on the issue, the Supreme Court set out the procedure of “*saisie-arrêt*”. The “*saisie-arrêt*” is a procedure by which money owned by a debtor in the hands of a third party may be seized.

Article 557 of the Code de Procedure Civile reads as follows –

557. Tout créancier peut, en vertu de titres authentiques ou privés, saisir-arrêter entre les mains d'un tiers les sommes et effets appartenant à son débiteur, ou s'opposer à leur remise.

The various stages of the procedure are as follows:

1. Take action to secure the debt in the hands of the third party (the “garnishee”);
2. Within 8 days of step 1, a notice of same is served on the debtor (“instance en validité”) and an *inter partes* application is made before the Judge in Chambers for an order, summoning the debtor within a delay of 8 days, to show cause why the “instance en validité” should not be held good and valid.
If the instance en validité is held to be good and valid, the third step may be taken.
3. The third step is the affirmative declaration. The third party will be summoned to make a declaration as to what sum is owed to the debtor.
4. The final step is to apply for an order for the sum attached to be paid to the creditor.

Now, the principles applicable for the granting of an injunction had been set out in the case of **American Cynamid Co v Ethicon [1975] AC 396** as follows:

1. Is there a serious question to be tried?;
2. Adequacy of damages; and

3. Does the balance of convenience tilt in favour of the applicant for an injunction to be granted?

The Supreme Court concluded that the Applicant had failed to meet the above conditions and declined to grant the interlocutory injunction. The interim injunction was discharged.

**c) Bhunjun V & Anor v His Excellency The President of the Republic of Mauritius & Ors
2022 SCJ 37**

Respondent No. 1 appointed a commission of enquiry in relation to the Betamax contract. The Applicants were seeking leave to apply for a judicial review of the decision to appoint the commission of enquiry.

A preliminary issue which had to be decided was whether the Respondent No. 1 had to be put out of cause given his immunity under the Constitution of Mauritius.

The relevant provisions of the Constitution are as follows:

30A Privileges and immunities

(1) Subject to section 64(5), no civil or criminal proceedings shall lie against the President or the Vice-President in respect of the performance by him of the functions of his office or in respect of any act done or purported to be done by him in the performance of those functions.

(2) Subject to section 64(5), no process, warrant or summons shall be issued or executed against the President or the Vice-President during his term of office.

(3) The President or the Vice-President shall be entitled –

(a) without payment of any rent or tax to the use of his official residence; and

(b) to such emoluments, allowances and privileges, exempt from any tax thereon, as may be prescribed.

(4) No alteration to any of the entitlements specified in subsection (3) which is to the disadvantage of the President or the Vice-President shall have effect without his consent.

64 Exercise of President's functions

(5) (a) Subject to paragraphs (b) and (c), where the President is required by this Constitution to act in accordance with the advice of or after consultation with any person or authority, the question whether in fact he has so acted shall not be called in question in any court of law.

(b) Where the President dissolves Parliament otherwise than under the proviso to section 57, the Prime Minister, may by motion, request the Supreme Court to enquire into the decision.

(c) Upon the hearing of a motion under paragraph (b), the Supreme Court shall determine whether or not the President has acted in accordance with the advice of the Prime Minister and where the Supreme Court declares that the President has not acted in accordance with such advice the dissolution of the Parliament shall, subject to section 57(2), have no effect.

The Applicant tried to distinguish between two categories of decisions taken by the President, namely:

- a) decisions of the President of the Republic taken in his own deliberate judgment; and
- b) decisions taken upon the advice of Cabinet or any other authority or person other than the Cabinet.

Applicant argued that the decision taken under paragraph b) above was reviewable.

The Court analysed its previous decisions, in particular the case of **Dayal v The President of the Republic of Mauritius [1997 MR 223]** to conclude that the President enjoys immunity

under the Constitution irrespective of whether the decision was one under category a) or b) above.

The Supreme Court ordered that the President be put out of cause.

Our Trainings

Bhurtun Tax Training Institution is currently delivering its training (courses) on Value Added Tax for Beginners to a group of professionals involved in the accounting sphere. The training started on Wednesday 09 March 2022 and will continue on 16 and 23 March 2022.

The following Training is also open for registration:

	07, 14, 21 and 28 May 2022
Basics of International Taxation	09h00 to 12h00
	Face to Face Training

Registration for the training is open. All relevant details may be obtained by sending an email to bhurtuntaxtraining@gmail.com or by visiting the Facebook page “Bhurtun Tax Training Institution”.

THE FOLLOWING SHORT TRAININGS WILL ALSO TAKE PLACE:

Some main differences between the OECD and the UN Model Tax Conventions	11 May 2022 10h00 to 12h00
How to deal with objections lapsed for non-payment of 10% or for other reasons provided by law.	06 April 2022 10h00 to 12h00

Registration for the trainings is open. All relevant details may be obtained by sending an email to bhurtuntaxtraining@gmail.com.

TAILOR-MADE TRAININGS FOR EMPLOYERS

Our training institution also provides trainings as per specific requirements of employers for the benefit of their employees. Such trainings are delivered within the premises of the employers. Some examples of such trainings are as set below, but of course, employers may request for specific trainings depending on the needs of their staff:

1. Mastering International Taxation
2. Mastering the Taxation of the Global Sector
3. The operation of the VAT system
4. Mastering the Income Tax System
5. The Taxation of Trusts and Foundations
6. The Conduct of Cases before the Assessment Review Committee
7. The Rules of Statutory Interpretation

Our Training Institution is approved by the MQA so that employers are eligible for appropriate refunds by the HRDC.

Ahmed Richard Bhurtun

Barrister and Founder of Bhurtun Chambers

Email: ahmedbhurtun@gmail.com

Phone: +230 59045181