

Bhurtun Chambers

Monthly newsletter

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Introduction

In the whole process of challenging an assessment of the Director General of the Mauritius Revenue Authority, some strict time frames are prescribed for specific stages only. I refer here to the mandatory period of 4 months for the Objection, Appeals and Dispute Resolution Department of the MRA to deal with an objection. I may also refer to the non-mandatory and indicative periods of 3 months for the Assessment Review Committee (ARC) to fix a case for Hearing and 4 weeks to give its decision once a Hearing is completed.

The time that may be taken for other stages is left open, for example, the time that the Supreme Court would take to deal with an appeal, or the actual time that the ARC would take to deliver Rulings and Decisions.

We can here take the example of the **Mohungoo** case (summary below). The taxpayer filed his return for the year of assessment 2014. The determination of the ARC was in 2017 and finally the decision of the Supreme Court on appeal was in 2023!

Such amount of delay is not to the advantage of taxpayers as it leaves them in a state of uncertainty for an unduly long period.

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Decisions Delivered by the Assessment Review Committee

1. Batismart Ltd v Director-General, Mauritius Revenue Authority ARC/CUS/019-22

The Applicant made representations before the ARC late by 88 days. The representative of the Applicant explained that, at the material time, the Applicant was moving from Port Louis to Trianon and that the notice of the Respondent was misplaced.

The Chairperson concluded that the Applicant had good reasons for having made the representations late and allowed it to proceed.

2. Dimitris PAPAKOSTADINOU v THE DIRECTOR GENERAL, MAURITIUS REVENUE AUTHORITY ARC/VAT/104-20

The Applicant voluntarily registered for VAT with effect as from 17 May 2020. In his return for the quarter ended June 2020, he claimed input tax credit in relation to invoices which were dated 07 March 2019 and 27 April 2018.

The Respondent rejected the claim for repayment of VAT.

The assessing officer relied on sections 21(9) and 910)(b) of the Value Added Tax Act (VATA), which read as follows:

(9) Notwithstanding subsection (5), but subject to subsection (10), where a person is registered for VAT under section 15, he may, subject to subsection (2), take credit in his first VAT return of the VAT paid or payable on his trading stocks and capital goods, being plant, machinery or equipment of a capital nature, held on the date immediately preceding the date of his registration.

(10) No credit shall be allowed under subsection (9) unless –

...

(b) the goods forming part of his trading stocks and the capital goods were

acquired within a period not exceeding 3 months immediately preceding the date of his registration.

The Committee observed that the above provision referred to section 15 VATA, that is, to compulsory registration. It was therefore not applicable to the Applicant who was voluntarily registered.

The notice of determination also referred to the above provisions. The Committee therefore concluded that the notice of determination was misconceived. Give that the role of the Committee was to review the notice of determination, it ended its analysis here. It did not make any pronouncement as to whether section 21(6) VATA would be applicable.

The notice of determination of the Respondent was set aside.

3. The Northsun Properties Ltd v Director-General, Mauritius Revenue Authority ARC/IT/176-22

The representations were made late by 43 days late. The representative of the Applicant explained that the notice of determination of the Respondent was misplaced.

The Chairperson concluded that there was good reasons to allow the representations to proceed.

4. Sun Limited v Registrar-General ARC/RG/1435-18

The Applicant made representations to the ARC and the Respondent took a preliminary objection to the effect that the additional duty claimed was not paid, as same was a prerequisite to the making of the representations.

Before the ARC, the representative of the Respondent agreed that the Applicant would be able to proceed on the merits of the matter once the said payment was effected. The said amount was in fact subsequently paid.

Thereafter, the Respondent took the point that the representations were made outside the statutory period. The Applicant responded that there was a waiver by the Respondent when

he earlier stated that matter could proceed on the merits if the additional duty claimed was paid.

The Respondent relied on section 19 of the Mauritius Revenue Authority Act (MRA Act) in support of his contention that the representations were late. The relevant parts read as follows:

(1) Subject to Subsection (2), any person who is aggrieved by a decision (...) specified in the fifth schedule may, within 28 days of the date of the decision (...) lodge with the Clerk to the Committee, written representations, (...) specifying the reasons for asking for review of the decision (...).

(2) Where a person has failed to make his representations within the time specified in Subsection (1) (...) the Chairperson may direct that the representations shall be accepted.

The time frame of 28 days applied to the types of cases mentioned in the fifth schedule. The representations were made under section 17 of the Registration Duty Act, as this section was not mentioned in the fifth schedule. The representations of the Applicant did not fall within the purview of section 19 and therefore the time frame of 28 days did not apply to it.

The objection of the Respondent was therefore wrongly taken.

The Committee further observed that the statement made by the representative of the Respondent to the effect that the matter could proceed if additional duty were paid could have led the Applicant's Counsel to believe that the case will be heard on the merits once the additional Registration Duty was paid. The representative, even though not a lawyer, may bind the Respondent as he did have the option to request for time to consult the State Law Office, which he did not do.

The Respondent therefore failed on the issue of late representations and the matter was allowed to proceed.

5. Travelmymy.com Ltd v Director-General, Mauritius Revenue Authority ARC/VAT/08-18

This is a case where the Applicant was not allowed to proceed with its representations given that same did not mention any reason for asking the review.

The Committee emphasized the fact that reasons have to be mentioned even if the person making the representations was not a lawyer or was not assisted.

6. Varcity Mauritius Ltd v Director-General, Mauritius Revenue Authority ARC/VAT/164-19

The reasons for the representations were as follows:

(i) Whether a property developer who develops and constructs villas for sale to residential customer should charge VAT; and

(ii) Whether the property developer is making exempt supplies in respect of sale of villas for residential purposes as per item 48(a) of VAT Act, First Schedule.

The Respondent argued that those two reasons were just vague assumptions.

The Committee observed that the reasons were indeed drafted in very general terms using the words “a property developer”. Although the Committee is not a Court of law, section 19(2) of the MRA applies and imposes a duty to mention reasons.

Although the Committee may request an Applicant to furnish particulars, such request would be made when the Committee is in presence of proper reasons for representation, unlike in the present matter.

The case was therefore set aside.

Selected Decisions delivered by the Supreme Court

1. The Director General, Mauritius Revenue Authority v Abdool Ibrahim Mohungoo 2023 SCJ 69

Facts of the case

The Respondent (Abdool Ibrahim Mohungoo) was civilly married. The spouses were in the process of a judicial separation and the provisional custody of their child was given to the wife.

Both, the Respondent and his wife, claimed Income Exemption Threshold applicable to persons having one dependent, that is, both claimed the child to be their dependent. An assessment was made on the Respondent, whereby the Appellant (the Director General, Mauritius Revenue Authority) was not allowed to take his child as a dependent. The Assessment Review Committee concluded that the Respondent could avail himself of his child as his dependent.

The main applicable law

Section 27(2) of the Income Tax Act:

Subject to the other provisions of this section, every person shall, in an income year, be entitled to deduct from his net income in that year, the appropriate amount of income exemption threshold in respect of Category A, Category B, Category C, Category D, Category E, Category F or Category G as specified in the Third Schedule.

The decision of the Supreme Court

The Supreme Court observed that the abovementioned provision would ideally work within a couple who discuss their tax affairs and that a couple who is not on speaking terms, as in the present situation, would find themselves in a very awkward situation.

At the outset, the Supreme Court agreed with the reasoning of the Assessment Review Committee to the effect that the dependent child could not be granted to the spouse that filed his or her tax return first. Other criteria have to be taken into consideration.

One such criteria was the issue of custody of the child, that is, to whom among the couple was the custody of the child granted by the Court or Judge in Chambers.

However, the custody could not be considered as a determinant factor. This is because it might be that the spouse who has no custody was contributing financially for the child.

The Supreme Court concluded that “[t]he onus would then squarely lay upon the parent making the tax exemption claim to satisfy the tax authorities that he/she meets the test of having primarily and substantially catered for the dependent/s during the taxable year, before being allowed the applicable tax credit.”

The Court quashed the decision of the Assessment Review Committee. The decision of the Appellant not to grant the child of the Respondent as his dependent was reversed. The Court remitted the matter back to the Appellant for a fresh assessment to be made in light of the observations made.

2. INNODIS LTD v THE DIRECTOR GENERAL, THE MAURITIUS REVENUE AUTHORITY (CUSTOMS DEPARTMENT) 2023 SCJ 73

Issues raised in the Case Stated

1. Whether the passage benefits due to the employees of the Appellant, but not actually paid, were deductible.
2. Whether section 75 of the Income Tax Act was applicable to the interest free loans granted by the Appellant to its wholly owned subsidiaries.

Preliminary issue raised by the Respondent

The Respondent claimed that “Director General, The Mauritius Revenue Authority (Customs Department)” is a non-existing entity.

The Supreme Court agreed that “Director General, The Mauritius Revenue Authority (Customs Department)” was a non-existent entity. However, the Court observed that the Case Stated mentions the name of the Respondent as “Director General, The Mauritius Revenue Authority”. We note that the Case Stated is a document issued by the Assessment Review Committee upon an application made by the Appellant.

Furthermore, the Supreme Court referred to previously decided cases which make a distinction between a mistake as to the name of a person and a mistake as to the identity of the person. Given that the present mistake was as to the name and not to the identity of the person, the Appellant was allowed to proceed with its appeal before the Supreme Court.

The main applicable law

Section 18(1)

(1) Any expenditure or loss shall be deductible from the gross income, other than gross income specified in section 10(1)(a), of a person in the income year in which it is incurred to the extent to which it is exclusively incurred in the production of his gross income, other than gross income specified in section 10(1)(a), for that income year.

Section 26(1)(c)

(1) Notwithstanding sections 18 and 19 but subject to the other provisions of this section, no deduction shall be made in respect of –

...

...

(c) any reserve or provision of any kind;

Section 75(1)

This section shall apply to any case where -

(a) any business or other income earning activity carried on in Mauritius or from Mauritius -

(i) is controlled by a non-resident; or

(ii) is carried on by a non-resident company or by a company in which more than one half of the shares are held by or on behalf of a non-resident; or

(b) in the carrying on of any business or other income earning activity in Mauritius or from Mauritius any person controlling that business or activity, by reason of his relationship or

otherwise with any other person, is not in the opinion of the Director-General at arm's length with that person with respect to any commercial or financial transaction; and

(c) it appears to the Director-General that the business or other income earning activity in Mauritius or from Mauritius produces no net income or less than the amount of net income which in the opinion of the Director-General might be expected to be derived from that business or activity.

The decision of the Supreme Court

On the First Issue

The Supreme Court agreed with the ARC that the disbursement of the passage benefits will depend on the employees exercising their rights to claim the payment and that the passage benefits were not deductible under section 18.

The Supreme Court went further to conclude that the passage benefits were “a provision” until actually disbursed. There was no certainty as to their payment.

The Appellant therefore failed on the first ground.

On the second issue

The Supreme Court analysed section 75 and agreed with the ARC that it applied both to non-residents and residents controlling a business or income earning activity in Mauritius. The Court further observed that it would be absurd to apply section 75 only to non-residents doing business in Mauritius.

The Supreme Court also concluded that the fact that the parties to the loan agreement were parent and subsidiaries was irrelevant. The economic or other food reasons behind the loan agreement were also irrelevant.

The Supreme Court went on to mention that the term “deemed interest” is an expression which is commonly used and refers to an amount of interest which would be claimed by one party to another if there were no relationship between them. The Respondent was therefore not wrong to use the term “deemed interest” to refer to the assessed amount in the present matter.

Lastly, the Supreme Court concluded that it was irrelevant whether section 90 (relating to tax avoidance) would also be applicable.

The Appellant failed on the second issue also and the appeal was dismissed with costs.

Our Trainings

Bhurtun Tax Training Institution delivers training on a wide range of topics related to taxation.

In addition, we regularly conduct free webinars on tax related matters. The last one on **Special Provisions Relating to Time of Supply for Value Added Tax Purposes** took place on 17 February 2023 and saw the participation of more than 60 attendees.

The trainings that will take place in 2023 are as follows:

Practical Aspects of Assessment Review Committee Cases	07, 14 & 21 March 2023 (3 whole days)
Mastering Income Tax	09, 16, 23 & 30 May 2023 (3 half-days)
Value Added Tax	To be scheduled
The Operation of the Pay As You Earn System (PAYE)	11 July 2023 (1 half-day)
Changes to be brought by the Finance Act 2023	To be scheduled
Trusts and Taxation of Trusts	12, 19 & 26 September 2023 (3 half-days)
Transfer Pricing	17, 24 & 31 October 2023 (3 half-days)
CRS and FATCA	14, 21 & 28 November 2023 (3 half-days)
Statutory Interpretation	5 December 2023 (1 half-day)

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

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