Bhurtun Chambers

Monthly newsletter

Issue No 21: March 2024

Introduction

Welcome to our newsletter for the month of March 2024!

In the world of taxation, even the brightest minds can find themselves scratching their heads. As the legendary physicist Albert Einstein once humorously remarked, "*The hardest thing in the world to understand is tax*." It's no wonder – with tax laws and regulations constantly evolving, keeping up can feel like an uphill battle. This perpetual state of flux often leaves taxpayers feeling overwhelmed, struggling to grasp the intricacies of taxes.

At Bhurtun Chambers & Bhurtun School of Taxation, we understand the frustration all too well. This is why we are dedicated to keeping our readers in the loop with the latest updates and insights from the tax world. In this edition, we're excited to bring you summaries of nine interesting decisions handed down by the ARC, offering valuable insights into key issues and trends.

In that same vein, we highlight for you the Proclamation of the Financial Crimes Commission Act 2023 (with exceptions) on 29 March 2024.

Finally, we invite you to take note of our lineup of dynamic tax training sessions for the Year 2024. Designed to simplify the complexities of taxation, our sessions are crafted for both seasoned professionals as well as for someone just starting out on his/her tax journey.

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Decisions Delivered by the Assessment Review Committee

1. E-VET LTD v/s DIRECTOR GENERAL-MRA ARC/CUS/005-23

The Applicant here lodged three grounds of Representations with the Committee. It then took the last two grounds as preliminary objections in law.

In its first preliminary objection, the Applicant submitted that the Notice of Determination was flawed because it referred to a meeting held on 5 December 2022 when there was no such meeting on that day, and also because the Notice of Determination referred to a previous Notice of Objection which was allowed by the Respondent at the time they took objection to a first Notice of Claim. The Applicant contended that, in matters of taxation, it was unacceptable to have such uncertainty which is misleading and confusing for the Applicant, and accordingly submitted that the Notice of Determination should be set aside.

In its second preliminary objection, the Applicant argued that the Notice of Claim dated 6 October 2022 arose for the first time in respect of a Customs Declaration of 5 August 2021, and was invalid and not according to law because it was issued under both sections 15 & 20 of the Customs Tariff Act. The Applicant argued that it was wrong to have referred to s.15 because the latter makes mention of 'payment under protest' when the case was about the classification of goods.

After considering the Respondent's submissions as well as the evidence on record, the ARC decided to set aside both preliminary objections. In reaching this decision, the Committee gave the following reasons.

For the first preliminary objection, the Committee agreed with the Applicant there is a need for precision in cases of taxation, and that mistakes as to the dates should not be accepted. However, the Committee explained that in the matter at hand no prejudice and confusion could have been triggered when the grounds of Objection had been annexed to the Notice of Determination. The Committee further explained that Grounds of Objection should be drafted such that it is easy and convenient for the Respondent to identify the issues raised,

and that in the matter at hand, the Applicant did not identify concisely and precisely the number of grounds that it intended to raise.

For the second preliminary objection, the Committee agreed with the Respondent that s.20 of the Customs Tariff Act refers to s.15 where it is mentioned that the classification of goods is subject to the application of the said section, and that therefore the two sections were applicable, even though the heading of s.15 mentions 'payment under protest'. The Committee further explained that the procedure for a Notice under s.20 is found in s.15 of the Customs Tariff Act.

2. SCOTT HEALTH LTD V/S DIRECTOR GENERAL-MRA ARC/VAT/030-22

This was a matter concerned with time bar for the MRA to raise assessments.

The Applicant here was issued with an assessment for VAT by the Respondent for the period June 2017 to September 2017. Then Applicant filed their Notice of Objection and Grounds of Objection against this decision of the Respondent. The Applicants subsequently conceded that the assessment for the month of August 2017 was not time barred since it was covered by **s. 21 R (1) (d) of the MRA Act** - in respect to extension of time during Covid-19 period. Thus, it made representations to the ARC, contending that the assessment for the period June, July, and September 2017 was time barred.

The issue before the ARC was therefore limited to whether the periods of assessment June and July 2017, and September 2017 were time barred.

The ARC concluded that the assessment for the period June and July 2017 were not time barred whilst the assessment for the month of September 2017 was time barred. In arriving at this conclusion, the Committee gave the following explanations.

Assessment for the period June and July 2017

The Committee started by noting that in respect of the above period, **s. 21 R (1) (c) of the MRA Act** applied. The said section reads:

(1) *Where, under this Act or any Revenue Law, a time is imposed to make an assessment, a decision, a determination, a notice or a claim and the time expires, or falls wholly or partly, during –*

…….

(c) the COVID-19 period for year 2021, the assessment, decision, determination, notice or claim may, notwithstanding this Act or any Revenue Law, be made or given not later than 2 months after the commencement of this paragraph; [Emphasis is ours]

The Committee further noted that this section came into force on 5 August 2021.

The contention between both parties for this period turned around the interpretation of "Calendar month".

The Applicant relied on the case of ***Y. Gujadhur v The State of Mauritius & Ors*** **[2022] SCJ 67** to submit that the dictionary meaning of calendar month should be applied. With regards to that, the Applicant relied on Stroud Vol. 18th Edition and highlighted that in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days. The Applicant also relied on Black's Law Dictionary 6th Edition 1990 which stated that a calendar month is defined as Period terminating with day succeeding month, numerically corresponding to day of its beginning, less one. Applying these, the Applicant posited that the 2 months the MRA had after this paragraph started from 5 August 2021 and ended 4 October 2021, and since the assessment was made on 5 October 2021, it was time barred.

The ARC however took the view that the 2 months started running from 5 August 2021 and ended on 5 October 2021. The Committee reasoned, like the Respondent, that the Supreme Court had already given an interpretation of "Calendar Month" in ***Golf Developments International (Pty) Ltd and Ors v The State of Mauritius & Anor*** **[2015] SCJ 37** as being the period between two identical dates in consecutive months. The Committee added that the definition of calendar month given in Stroud and on which the Applicant was relying was in the context of imprisonment rather than revenue law.

Based on these, the Committee upheld the views of the Respondent that the assessment for the period June and July 2017 was not time barred.

Assessment for the month of September 2017

For this month, the ARC noted that **s. 21 R (1) (d) of the MRA Act** applied. The said section reads:

(1) Where, under this Act or any Revenue Law, a time is imposed to make an assessment, a decision, a determination, a notice or a claim and the time expires, or falls wholly or partly, during –

…….

(d) a period of 30 days after the commencement of this paragraph, the assessment, decision, determination, notice or claim may notwithstanding this Act or any Revenue Law, be made or given not later than 2 months after the period of 30 days lapses.

The Committee took the view that assessment for the month of September 2017 concerns invoices issued for the period from 1st to 30th September 2017. The last day of the taxable period was 30 September 2017 and pursuant to **s.37(3) of the VAT Act**, the last day for the MRA to make an assessment would have been the 29 September 2021 which did not fall within the ambit of **s. 21 R (1) (d)**. Since the last day for the assessment to be issued was 29 September 2021 and the Respondent failed to raise the assessment within that period, the assessment was time barred.

3. ST FELIX BRANDS LTD V/S DIRECTOR GENERAL-MRA ARC/IT/058-22; IT/059-22; ARC/VAT/022-22

This was a matter concerned with the non-payment of 10% of the amount of tax claimed in the Notices of Assessment for an objection to be considered.

The Applicant in this case had been issued Notices of Assessment for Income Tax, VAT, and PAYE. The latter objected to the assessment but failed to pay the 10% of the amount claimed, amounting to Rs 509,151. The Respondent accordingly lapsed the objections.

The ARC allowed the Applicant a final opportunity to pay the 10% in relation to each of the three cases or give security by way of a bank guarantee for that amount by the of April 2024.

In reaching this decision, the Committee noted that the Applicant was not seeking a waiver but was merely canvassing for additional time to satisfy its statutory obligation. The Committee also noted that the total amount assessed was relatively significant.

As usual in matters concerning non-payment of 10%, the Committee underlined that the approach adopted in this matter was on its specific circumstances, and that this should not constitute a precedent.

4. MESSRS CLEMENT VALAYDON & S. HAWOLDAR V/S THE REGISTRAR-GENERAL ARC/RG/234-21, 235-21

This was a rather interesting matter concerned with an alleged breach of the MRA Act and the Constitution of Mauritius.

The Applicant here had a raised a *plea in limine litis*. He referred the ARC to s. 19(1C) of the MRA Act which provides a time-limit of 21 days to a party having been served with a copy of written representations, to forward its reply and comments thereon to the ARC with a copy to the party lodging the representations. s. 19(1C) read as follows:

"Any party served with a copy of the written representations, statement of case and any witness statement shall within 21 days of receipts thereof, forward his reply and comments thereon to the Committee, with copy to the person lodging the written representations".

[Emphasis is ours]

The Applicant accordingly contended that because it had made written representations to the ARC on 24 September 2021, a copy of which was received by the Respondent on the same date, the last day for the Respondent to forward its reply and comment to the ARC was 14 October 2021, with a copy of same to the Applicant. However, no copy of any reply was received by that date and up to the current date. The Applicant therefore submitted that there had been a breach of s. 19(1C) and a contravention of the principle of equality of arms enshrined under s.10(8) of the Mauritian Constitution, and which reads as follows:

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

The ARC took the view that there had not been any breach of s. 19(1C) of the MRA Act nor of s. 10(8) of the Constitution. In arriving at this decision, the Committee endorsed the views of the Respondent that s. 19(1C) cannot be read in isolation, but in conjunction with the other provisions under s.19 of the MRA Act. Indeed, subsection (1A) all the way down to (1C) relate to claims under Income Tax (IT) Act, or Value Added Tax (VAT) Act, or under the Gambling Regulatory Authority (GRA) Act and not for Registration Duty and Land Transfer as was the case in the matter at hand. s. 19(1C) was therefore not applicable to the present matter. Moreso, the Committee noted that, in the matter at hand, the Applicant had served the Respondent with only the written representations without any statement of case and any witness statement, which was more consonant with the practice before the ARC where Registration Duty is being claimed rather than with the procedure laid down under s. 19(1C) for IT, VAT, and GRA.

Note*:* s.19(1C) of the MRA Act has been repealed by the Finance Act 2022 since 2 August 2022.

5. ECURIE MAINGARD DE LA VILLE-ES-OFFRANS MAXIME HENRI V/S DIRECTOR GENERAL-MRA ARC/VAT/131-15

In this matter, the Applicant proposed to submit only three out of its four grounds of representations, since it considered that these grounds comprised of issues of law, and then to submit on the fourth ground once the Committee had issued a preliminary ruling. It also submitted that it reserved its right to file a further statement of case in the event that any grounds presented were decided against it.

The grounds read as follows:

1) *"Was the stable liable to pay VAT in relation to the Maingard Horses?"*
2) *"Could the Director-General of the MRA (the 'Director-General') exercise the power conferred upon him by an amendment made in December 2013 to section 12(2) of the VAT Act (the 'Amendment') to ignore monthly consideration agreed by the Stable and each owner and determine the value of the taxable supply made by the Stable to each owner?"*
3) *"Could the Director-General exercise the power conferred upon him by the Amendment to ignore the Monthly Consideration agreed by the Stable and each Owner and determine the value of a taxable supply made prior to December 2013 to each Owner?*

The ARC considered that it cannot treat the grounds as separate issues and that they will have to be looked together as any evidence adduced before the Committee on any one of the ground may also have an impact on the other grounds. The Committee also noted that the issues in law raised by the Applicant were intricately linked to the facts of the matter, and that the Respondent contended that they were not in agreement with the facts. Added to that, the Applicant had not already called its witness to depone. The Committee thus considered it proper for the Respondent to cross-examine the Applicant's witness before it could render any decision. Further, the Committee took the view that it would be practical to hear both parties and deliver a single ruling on all the issues raised in the grounds.

6. SEACOM LTD V/S DIRECTOR GENERAL-MRA ARC/IT/636-15, ARC/IT/383-16, ARC/IT/588-15, ARC/IT/674-17, ARC/IT/544-18

This was quite a noteworthy decision of over 100 pages delivered by the Chairperson of the ARC. It was concerned with whether interest expense in respect of amount advanced to related parties had been incurred in the production of gross income and therefore whether they were allowable deductions.

The Applicant holds a GBL 1 license in Mauritius and is involved in Internet and ICT services. An audit of the Respondent revealed that the Applicant had made advances to related companies free of interest. The Applicant itself had incurred interest on loan taken. The Respondent considered that the interest expense in respect of the amount advanced to

related parties had been incurred in the production of gross income and accordingly disallowed the interest expense. The Applicant objected on the grounds that it made advances to increase the group infrastructure to enable the group to expand into international markets and to generate income for both the local subsidiary and for itself. The Applicant added that it received service fees from its international customers due to the expansion of its infrastructure, and that interest on bank loan was thus the in the production of gross income. When the objections were determined, the Respondent considered that the interest expense claimed was not an allowable deduction. For the Year of Assessment 2010 the interest expense was disallowed based on **S.19** of the **Income Tax Act (ITA)**.

Aggrieved, the Applicant lodged Representations on the ground that without the local portions (owned by the subsidiaries) the service cannot be provided to Customers in those Countries, and that to set up the local portions, it has provided interest-free loans to its subsidiaries and as such the income that was produced by the interest-free loans was in the service fee income that it received due to expansion into different markets.

The ARC found that the MRA had rightly disallowed the interest expenditure claimed by the Applicant. In reaching this decision, the Committee fully agreed with the Respondent that the loans given by the Applicant to subsidiaries were used to produce customer fees by the subsidiaries for the subsidiaries only. The Applicant did not derive any income from the capital employed by the subsidiaries. While the Committee agreed that the Applicant could not have derived its gross income without the activities and services of the subsidiaries, the Applicant did not derive gross income from the local segment belonging to the subsidiaries for which capital was employed.

7. LEE CHOONG FO LEE SIN CHEONG & ANORS V/S THE REGISTRAR-GENERAL ARC/RG/233-19 & 234-19

The Applicant in this matter sold two pieces of immovable property to the same buyer on 6 December 2018. The two properties were adjoined on the same extent of land situated at Pointe aux Cannoniers in Morcellement Lapointe. They had the same road frontage and were of the same size - 696.44 m^2. We are going to call them Property A & Property B respectively.

Property A, which comprised only of a portion of land was purportedly sold at Rs 3,660,000, but the Respondent valued it at Rs 5,500,000 [696.44 m^2 @ Rs 7,897.31/m^2]. The Applicant objected, but the Respondent maintained their assessment and an additional land transfer tax amounting to Rs 105,800 was payable.

Property B, which comprised of a portion of land and a concrete residential building was purportedly sold at Rs 8M, but the Respondent valued it at Rs 9,840,000 [Land as above: Rs 5,500,000 + Building: Rs 4,340,000]. The Applicant objected, but the Respondent maintained their assessment and an additional land transfer tax amounting to Rs 92,000 was payable.

Considering the Respondent's assessments to be wrong, the Applicant made representations to the ARC.

The Committee took the view that the Market value of Property A was Rs 4M and the Market value of Property B was Rs 8,340,000 [Land: Rs 4M + Building: 4,340,000].

In arriving at these figures, the ARC made it clear that *marketing* and *valuation* are two different components and may not coincide when it comes to sales of properties. The Committee thus took the view that adverse effect of a nearby discotheque on the properties must be taken into consideration. The Committee further accounted for the difficulty in finding buyers for the properties. The Committee then balanced these factors with the fact that only one offer was taken into consideration by the seller, making it difficult to say that the selling price reflected the market value of the properties. Also, the properties were in an accessible area through roads and was in a residential area, contrary to the Applicant's averments that it was not in a good location.

8. DEREK LAM PO TANG V/S THE REGISTRAR-GENERAL ARC/RG/1281-18

This was a rather interesting matter concerned with valuation of immovable property by the Government Valuer.

To assess the duty payable by the Applicant, as a party to a deed of transfer of shares, the Respondent had assessed the value of the immovable property ascribed in the said deed at a

total rounded value of Rs 148,000,000. Now, since the assessed value of the land component was near to its declared value, the Applicant only contended the assessed value of the buildings and accordingly made representations before the ARC on the following grounds:

1) *No basis available on how the buildings have been valued.*
2) *We could not reconcile the building surface area to the report by Registrar General.*
3) *No indications of how the cost of the building per square meter has been arrived at.*

The ARC decided to set aside all three grounds of representations.

Ground 3 was the crux of the matter. In setting aside this ground, the Committee first noted that in such matters, the law under the Land (Duties and Taxes) Act (LDTA) requires the "*Open market value*" of the property to be determined. The latter is defined under the LDTA as "*the value which a property might reasonably be expected to realise if sold on the open market by a prudent vendor."*

The Committee then noted that the contention here was precisely about the appropriate valuation method to be used with respect to the "Open market value" of the buildings. The Committee took the view that the two valuations methods, i.e. Replacement Cost Method and Depreciated Replacement Cost Method, proposed by the Applicant were unreliable whilst the Direct Comparison Method used by the Government Valuer was appropriate. The following reasons were given.

Replacement Cost Method of the Applicant's Quantity Surveyor:

The Committee considered that the "the value which a property might reasonably be expected to realise" is not equivalent to cost of construction or the "Current Replacement Cost" as these may not encompass various aspects that influence "value", such as construction time, contractor default risk, deviation risk from initial plans, the finished building's positioning relative to other structures.

Depreciated Replacement Cost (DRC) Method of the Applicant's Chartered Valuation Surveyor:

With regards to the DRC method, the Committee first found it unsafe to rely on the Valuation Surveyor's report because the latter had relied on primary figures concerning construction costs from an unidentified source whose reliability could not be tested before the Committee. Moreover, the unidentified source was working for the Applicant or the company of which the shares have been transferred.

Further, the ARC referred to the Guidance Note issued by the Royal Institution of Chartered Surveyors (RICS) and concluded that "DRC is normally used in situations where there is no directly comparable alternative" and "where there is no useful or relevant evidence of recent

sales transactions due to the specialised nature of the asset." In this matter, same were available as will be discussed below.

Direct Comparison (DC) Method of the Government Valuer, for the Respondent

The ARC noted that the validity of the DC Method when determining the "open market value" is recognised by Case-law namely, the Privy Council case of ***MON TRESOR AND MON DESERT LIMITED v MINISTRY OF HOUSING AND LANDS*** **[2006] PRV 92*** where it was held that in assessing the Open market value, the best evidence is comparison with figures from other sales of comparable property.

After carefully considering the Report of the Government Valuer, the Committee found that one of the four comparables used by the latter satisfied the requirements for being a comparable laid down in ***SOCIETE A & I KATHRADA & CIE v THE ASSESSMENT REVIEW COMMITTEE & ANOR*** **[2010] SCJ 216** in that it was similar in location, characteristic, type of construction, and condition. The Government Valuer also satisfactorily explained her choice of the rates that she applied to the different components of the building in this matter based on the rate derived from this comparable.

The Committee accordingly set aside Ground 3 since it was satisfied that there are actual indications of how the cost of the building per square meter had been arrived contrary to what was averred in Ground 3.

*Of note, the case of ***MON TRESOR*** concerns the determination of the "open market value" in the context of Compulsory acquisition, however, as per the ARC, the same test applies in relation to valuation for the purpose of determining land transfer tax and registration duty.

9. NORMAN PATRICK GRANT V/S DIRECTOR GENERAL-MRA ARC/CUS/29-19

The application under review before the committee in this matter was whether the Applicant was entitled to Excise Duty concession on a vehicle as per Item 3(1) A of the First Schedule to the Excise Act 1994.

The Applicant was residing and working in Hong Kong from 27 August 2013 to October 2018. He returned to Mauritius on 20 November 2018 and requested for Excise Duty Concession as per Item 3 of Part 1A of the First Schedule to the Excise Act 1994 on a used car of capacity 1986CC. Among the conditions to obtain the concession, one was that the beneficiary had been residing outside Mauritius for a period of at least 5 years preceding the date of his return to Mauritius, and (i) He has been working outside Mauritius for the said period; or (ii) He has ceased to work on having reached retirement age. To satisfy these conditions, the Applicant submitted and signed undertaking to MRA Customs. However, the Respondent contended

that the Applicant did not satisfy the condition because records from Passport and Immigration Office showed that the Applicant had spent 166 days in Mauritius during the last 5 years. The Applicant's undertaking was accordingly not approved and Excise Duty and VAT concessions were denied to the Applicant. The latter made objections to the Objections Appeals and Dispute Resolutions Department of the MRA and same was disallowed. Aggrieved, the Applicant lodged representations with the ARC.

The issue before the Committee was whether the Applicant was residing and working in Hong Kong for a period of at least 5 years preceding his return to Mauritius, despite having been on holiday for a period of 166 days in Mauritius.

The Committee took the view that the contractual period, i.e. the actual period the Applicant was in Hong Kong for the purposes of his employment, was the relevant period for the purposes of the concession. In this matter, the Applicant's employment contract started on 25 August 2013 and ended in October 2018, which covered a bit more than five years by approximately 35 days.

Furthermore, the Committee stated that it had no doubt that the Applicant was still working when he was on holiday in Mauritius since he was still under contract of employment and in all probability receiving his salary.

Finally, having perused through the Applicant's contract of employment, the Committee noted that the Applicant was entitled to 17 public holidays each year and 30 annual leave. The Committee therefore noted that there would not be any break in the continuity of the Applicant's employment, nor his residency permit whilst he exercised his right to use his vacations.

In light of these, the ARC concluded that the Applicant had worked for a period of at least 5 years and his visits to Mauritius on vacation which he was entitled to under his contract of employment would not deny him of the concession. The Committee accordingly upheld the representations.

It is important to highlight that this matter was decided on its particular set of facts and should therefore not be used as a precedent.

Important Legislations and Legislative Amendments

1. THE FINANCIAL CRIMES COMMISSION ACT 2023 (FCCA 2023)

- **FCCA 2023**, except for **Section 166(9)(g)**, came into operation on **29 March 2024**.

  *Of note, **Section 166(9)(g)** reads:

  The Financial Intelligence and Anti-Money Laundering Act is amended in the First Schedule, in Part I –

  (i) in items 3, 4, 5 and 6, in the third column, by deleting the word "FIU" and replacing it by the words "Attorney-General's Office";

  (ii) in item 8, in the third column, by deleting the word "FIU" and replacing it by the words "Assay Office";

  (iii) in item 9, in the third column, by deleting the word "FIU" and replacing it by the words "Real Estate Agent Authority".

- The Proclamation was Gazetted on **29 March 2024**.

Our Trainings

The trainings that will take place in 2024 are as follows:

Month	Training
February	Payroll Taxes
	Mastering VAT
March	Trusts and Taxation of Trusts
April	Transfer Pricing
May	Directors' Duties and Rights of Shareholders
June	Business Plan Preparation
	AML/CFT
July	Practical Aspects of ARC Cases
	VAT for Beginners
August	Changes brought by the Finance Act 2024
September	Mastering Income Tax
October	International Taxation
November	Mastering VAT

December	Taxation of Real Estate Sector

All relevant details may be obtained by sending an email to bhurtuntaxtraining@gmail.com or by visiting the Facebook page "Bhurtun School of Taxation".

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. Drafting of Trust Deeds
7. The Conduct of Cases before the Assessment Review Committee
8. The Rules of Statutory Interpretation
9. The Operation of the Pay As You Earn System (PAYE)
10. Trainings on Corporate Law including Duties of Directors, Rights of Shareholders
11. Trainings pertaining to AML/CFT

Our Training Institution is approved by the MQA so that employers are eligible for appropriate refunds by the HRDC, subject to all conditions being satisfied.

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