Bhurtun Chambers

Monthly newsletter

Issue No 25: July 2024

Introduction

Welcome to our July 2024 newsletter!

In this issue, we offer our usual summaries of the latest ARC and Supreme Court decisions to keep you informed about recent developments. Notably, we highlight an interesting ARC ruling on VAT and a Supreme Court case concerning a Criminal Confiscation Order under the Financial Crimes Commission Act 2023.

We also spotlight two significant pieces of legislation: *The Finance (Miscellaneous Provisions) Act 2024* and *The Anti-Money Laundering and Combating the Financing of Terrorism and Proliferation (Miscellaneous Provisions) Act 2024*. We invite you to stay tuned for upcoming training sessions on these!

Additionally, we provide a brief update on international tax matters namely, *the Rio de Janeiro G20 Ministerial Declaration on International Tax Cooperation.*

Finally, don't miss our 2024 training sessions, designed to enhance your expertise in tax matters.

Happy reading!

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Decisions Delivered by the Assessment Review Committee

1. AVAGO TECHNOLOGIES TRADING LTD V/S DIRECTOR GENERAL-MRA ARC/IT/602/15, IT/145-16, IT/265-17

FACTS:

The Applicant Company (hereinafter referred to Applicant) is a GBL 1 company in Mauritius forming part of the Avago group – a multinational enterprise in the semiconductor industry. The Applicant is wholly owned by GEN IP (Singapore) which is also part of the Avago group.

By virtue of a License Agreement, the Applicant held a portfolio of IP from GEN IP which it made available to related and unrelated Contract Manufacturers for the manufacture of Avago Prodcucts. The Applicant sold the finished products to ATIS – another entity of the Avago group.

The License agreement stipulated that the Applicant would retain 7% of the Operating profits and although the Agreement was amended to provide that the Applicant would receive an arm's length return, in effect the Applicant continued to retain the 7% Operating profits as an arm's length profit. The remainder of the profits (before royalty) went to the GEN IP (IP holders) as royalty.

The Applicant sought to deduct the royalty amount under **s.18 Income Tax Act (ITA)** as allowable expenses for the years under consideration.

The Respondent did not deny that some royalty was payable and should be allowed under **s.18 ITA**. However, the Respondent did not agree that the royalty was wholly and exclusively incurred in the production of gross income. The latter was of the view that the payments of royalty were not in accordance with the arm's length principle under **s.75 ITA** and that there was a tax avoidance arrangement as envisaged under **s.90 ITA** under the license Agreement.

ISSUE:

The ARC found that the issues raised in the Applicant's Grounds of Representation turned around two main issues:

(1) Whether the royalty payment made by the Applicant for each year under consideration was an allowable deduction under **s.18 ITA**. If the whole amount of royalty paid was found to be an arm's length amount which any unrelated party would have agreed to pay, then the whole amount of royalty for each year would be allowable and the question of tax avoidance under **s.90 ITA** would not arise.

(2) If the amount of royalty payment claimed as deduction under **s.18 ITA** is found not to be at arm's length, whether the Applicant had embarked on a scheme the sole/main purpose of which was to avoid paying tax in Mauritius as envisaged in **s.90 ITA**.

HELD:

The ARC found all the Grounds of representations of the Applicant to be devoid of any merit and ruled in favour of the Respondent.

The Committee explained that it is for an Applicant to prove that under **s.18 ITA** the whole amount claimed as royalty expenses are allowable, and that if the Applicant fails to discharge this burden of proof, it is for the MRA (Respondent) to prove that the transaction gets caught under **s.90 ITA**. In the present case, the Committee found that the Transactional Net Margin Method (TNMN) method used to attribute all residual profits to IP was not properly done. The Committee found that the Respondent was right based on information available including the research work done by the MRA Officer, not to allow the whole amount of royalty claimed and to allow only 5% of sales as deductible royalty expense because this was the trend in the industry. The Applicant had failed to prove that the amount of royalty claimed was at arm's length and was fully deductible.

Having found that the Applicant had failed to prove that the royalty expense for each year was at arm's length, the Committee proceeded to decide whether the Applicant had embarked on a scheme to avoid paying taxes in Mauritius as envisaged under **S.90 ITA**.

The Committee stated that it had no doubt the Applicant entered into the License Agreement with GEN IP and IP Holders so that it would confer a tax benefit to the Applicant. The Committee considered that the Respondent had rightly considered that the transaction had created rights or obligations which would not normally be created between person dealing with each other at arm's length under a transaction of the kind in question; and that the Respondent rightly concluded that the person, or one of the persons, who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person, either alone or in conjunction with other persons, to obtain a tax benefit.

The Committee further considered that that the royalty was purposely inflated beyond an arm's length amount for the sole/dominant purpose of the Applicant (and GEN IP in Singapore) obtaining a tax benefit in Mauritius.

2. HEALTHY MEALS LTD V/S DIRECTOR GENERAL-MRA ARC/VAT/41-21

FACTS:

The Applicant is engaged in the sale of fast food under the trade name 'Subway' and has two food outlets at the SSR International Airport of Mauritius, one at the Arrival Hall and the other one at the Departure Hall. This matter only concerned the food outlet at the Departure Hall as the Respondent had observed that the while the outlet at the Arrival Hall was charging VAT on its sales, the one at the Departure Hall was not.

ISSUE:

Whether the Applicant should have charged VAT at its outlet in the Departure Hall.

HELD:

The ARC agreed with the Respondent that the Applicant should have charged VAT at its outlet in the Departure Hall.

In reaching this decision, the ARC noted it was not disputed that there was a field audit effected at the business premises of the Applicant and from the information gathered it was concluded that the goods sold were not zero-rated.

The Committee further explained that the **Fifth Schedule VAT ACT, item 2** refers to a list of goods which are regarded as zero-rated. The Committee then noted that it was clear from the list that there is no reference to cooked or prepared food or any reference to the type of food provided for by the Applicant at the Departure Hall. The Committee added that it was a frivolous defence for the Applicant to rely on the fact that the food at its outlet at the Departure Hall, which was principally fast food, falls under the list of zero-rated goods. The Committee further added that the food provided by the Applicant is processed and prepared in a manner to be consumed and cannot be categorized from the list of the **Fifth Schedule.** The Committee thus concluded that Applicant had failed to discharge its burden of proving that the goods are zero-rated.

The Committee also found that the Applicant did not have any leg to stand on under **item 4, Fifth Schedule VAT Act** which provides for the supply of goods made by an

operator of a duty-free shop situated at the airport as the Applicant admitted that it did not hold a 'duty-free' licence and thus not qualified to be a duty-free shop.

The Committee also noted that the Applicant was VAT registered and can only make a taxable supply and must charge VAT on the food sold. The Committee then explained that the term supply under **S.4 VAT Act** means a supply of goods and the transfer for a consideration of the right to dispose of the goods as the owner. The Committee then reasoned that the purpose of a purchase of fast food at the Departure Outlet could only be logically for a 'consideration of the right to dispose of the goods as the owner'. The Committee found that there is a supply of goods once an invoice is issued and the payment is received (**Vide S.5 VAT Act** and **Toolink Ltd v The Director-General, Mauritius Revenue Authority 2012 SCJ 423**).

Selected Decisions delivered by the Supreme Court

1. FINANCIAL CRIMES COMMISSION v BIMLA RAMLOLL & ANOR 2024 SCJ 326

FACTS:

The FCC had made a motion supported by affidavit for a Criminal Confiscation Order pursuant to **S.77 & 79** of the **Financial Crimes Commission Act 2023 [FCCA]** against both defendants ordering them to pay to the State an amount equal to the value of the benefits derived by them from the offences of which they had been found guilty. The FCC attached a statement setting out an assessment of the value of the benefit obtained by the defendants.

After having initially resisted the application, both defendants later indicated that they were not objecting to the application. They also did not file any counter affidavit and did not respond to the averments in the assessment attached. Further, they both deemed it opportune not to adduce any evidence at the hearing although **s.78(1)(b) FCCA** provides that every person who has been served may appear and adduce evidence at the hearing of the application.

HELD:

The Court granted the application in terms of the Motion paper and issued a Criminal Confiscation Order under **S.79 FCCA** ordering both defendants to pay amounts equal to the value of their benefits within 6 months from the date of the present judgment.

In reaching this decision, the court found it established that both defendants had benefitted from the commission of the offence of money laundering in view of the fact that the defendants had not adduced any evidence and the evidence adduced by the applicant in its affidavit in support of the application and the attached statement stood unchallenged and unrebutted.

2. SEAFARERS' WELFARE FUND v THE EMPLOYMENT RELATIONS TRIBUNAL 2024 SCJ 337

FACTS:

This was an application for leave to apply for a Judicial Review of the determination of the ERT on the grounds that the determination was *ultra vires*, irrational and Wednesbury unreasonable.

The Co-respondent in this case (in whose favour the ERT had decided) was objecting to leave being granted on the grounds that:

(i) The application had not been entered promptly; and

(ii) It did not disclose an arguable case.

HELD:

The Court overruled the objections of the co-respondent and granted leave to the applicant to apply for a judicial review.

In reaching this decision, the Court was satisfied that the applicant had brought its claim with the requisite promptness as on the very next day of being notified of the ERT's determination, the Applicant started to take action. The Court also considered the fact that the applicant was administered and managed by a Board consisting of 9 members coming from various organisations and that as such, in order to reach a decision with regard to the case at hand, the Applicant had to convene Board meetings, the holding of which depended on the availability of the members. The Court therefore reasoned that this was not a case where the Applicant could be taxed with procrastination in bringing a claim.

The Court was also satisfied that the Application disclosed an arguable case in that the issues raised in the application involved a point of importance and were fit for further investigation. Of note here, the issues raised were in effect, whether **section 64(11) Workers' Rights Act 2019** was of a mandatory nature providing for an absolute time limit which cannot be derogated from, as found by the ERT, or whether the ERT still retained a discretion, having regard to all the circumstances of the case, to decide whether there were good reasons to justify an extension of the time limit by the disciplinary committee, as contended by the applicant.

3. AIRPORTS OF MAURITIUS CO LTD v THE EMPLOYMENT RELATIONS TRIBUNAL 2024 SCJ 321

FACTS:

This was an application for leave to apply for a judicial review of the *decision* and decision-making process of the respondent on the grounds that the decision was *ultra vires*, in breach of the rules of natural justice, Wednesbury unreasonable, irrational and wrong in law.

HELD:

In declining to grant all the prayers sought for and refusing to grant leave, the Court explained that what was in effect being challenged here was the decision of the respondent rather than its decision-making process. The Court went on to quote a case on point namely, **Francis MCG & ORS v The Employment Relations Tribunal [2014 SCJ 266]** where it was stated that "…*It is well settled that the purpose of a judicial review is to look at the legality of a decision and at the decision making process and not to act as a court of appeal*". The Court added there were, in this case, being asked to "sit on appeal on the merits" of the respondent's Determination.

The Court also found no error of law or irrationality and also that the present application was a far cry from disclosing an arguable ground having a '*realistic prospect of success*' (*vide* **R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617**).

4. SOCIETE ALEX BHUJOHARRY v PRIVATE SECONDARY EDUCATION AUTHORITY & ANOR 2024 SCJ 341

FACTS:

The Applicant here was the owner of Bhujoharry College, a private secondary grant-aided school and the respondent was a statutory body established under the Private Secondary Education Authority Act ("the PSEA Act") operating under the aegis of the Ministry of Education (the Co-respondent in this case) responsible for the payment of grants to private secondary grant-aided schools.

The applicant was granted leave to apply for judicial review of the respondent's decision to implement the Revised Comprehensive Grant Formula ("the RCGF") under which grants are paid by the respondent to grant-aided schools.

The grounds for seeking judicial review were that the said decision was illegal, manifestly unreasonable, contrary to the principles of natural justice, contrary to the Wednesbury principle, against the applicant's legitimate expectation and unfair.

HELD:

In setting aside the application, the Court found that the applicant had failed to establish that the decision to implement the RCGF was illegal or unreasonable, let alone Wednesbury unreasonable in since the respondent had acted within the purview of its powers under the PSEA Act when it implemented the RCGF – **S.5 PSEA Act** confers a statutory mandate on the respondent to formulate appropriate policies, make rules, issue guidelines and directives, and set standards and conditions for ensuring efficiency and transparency in the manner in which grants are used by secondary schools. The Court added that as long as the respondent was acting within the confines of its powers, the Court will be reluctant to interfere with its decision regarding the amount of grant paid or the criteria used to determine the amount of the grant.

5. RAMDASS A. v. THE STATE OF MAURITIUS & ORS 2024 SCJ 322

FACTS:

This was a Constitutional case.

The Plaintiff was challenging the constitutionality of **S.12A(1A) Local Government Act**, as amended by Act No.7 of 2023 ("the impugned legislation") as being inconsistent with any of the provisions of **Sections 1,2,3,12,28, 47(3), 57(2) or 111 of the Constitution**.

In essence, the impugned legislation enables the President, acting in accordance with the advice of the Prime Minister, to extend, at any given time by Proclamation, the life of Municipal Councils for a further period of two years. The President did extend, on the advice of the Prime Minister, the life of the Municipal Council of Quatre Bornes for a further period of 2 years as from June 2023. As a result, the Municipal elections which were due to be held by 14 June 2023, were postponed for 2 years.

HELD:

In dismissing the plaint, the Court began by embarking on an analysis of the guiding principles established in landmark constitutional cases. The Court then fully agreed with the conclusive findings made by the Court in **Valayden v The State of Mauritius and Anor [2024 SCJ 277]** that:

"(1) Parliament was empowered to validly enact Section 12A(1A) of the Act and provide for an extension of the life of the Municipal Councils pursuant to the amending legislation.

(2) Section 12(1A) of the Local Government Act is not inconsistent with and does not contravene Sections 1 and 45 or any other provision of the Constitution for any of the reasons invoked by the plaintiff."

Important Legislations and Legislative Amendments

1. THE FINANCE (MISCELLANEOUS PROVISIONS) ACT 2024

- An Act to provide for the implementation of measures announced in the Budget Speech 2024-2025 and for matters connected, consequential and incidental thereto.

- Some 95 Acts of Parliament have been amended including:

  - Bank of Mauritius Act;
  - Banking Act;
  - Companies Act;
  - Construction Industry Authority Act 2023;
  - Customs Act;
  - Customs Tariff Act;
  - Economic Development Board Act;
  - Excise Act;
  - Finance and Audit Act;
  - Financial Crimes Commission Act 2023;
  - Financial Reporting Act;
  - Financial Services Act;
  - Gambling Regulatory Authority Act;
  - Income Tax Act;
  - Land (Duties and Taxes) Act;
  - Mauritius Revenue Authority Act;
  - Morcellement Act;
  - Registration Duty Act;
  - Social Contribution and Social Benefits Act;
  - Value Added Tax Act;
  - Worker's Rights Act.

- Please refer to **S.97 - Commencement** of THE FINANCE (MISCELLANEOUS PROVISIONS) ACT 2024 for the coming into operation of the various amendments.

- **Stay tuned for our upcoming training on the *Key Changes brought by The Finance (Miscellaneous Provisions) Act 2024***

2. THE ANTI-MONEY LAUNDERING AND COMBATTING THE FINANCING OF TERRORISM AND PROLIFERATION (MISCELLANEOUS PROVISIONS) ACT 2024

- An Act to amend various enactments with a view to meeting international standards on anti-money laundering and combatting the financing of terrorism and proliferation.

- These 16 Acts have been amended

  - Bank of Mauritius Act
  - Banking Act
  - Companies Act
  - Courts Act
  - Financial Crimes Commission Act 2023
  - Financial Intelligence and Anti-Money Laundering Act
  - Financial Services Act
  - Foundations Act
  - Gambling Regulatory Authority Act
  - Limited Liability Partnerships Act
  - Limited Partnerships Act
  - Mauritius Revenue Authority Act
  - Mutual Assistance in Criminal and Related Matters Act
  - National Payment Systems Act
  - Notaries Act
  - Virtual Asset and Initial Token Offering Services Act 2021

- **Stay tuned for our upcoming training on the *Amendments brought by The Anti-Money Laundering and Combatting the Financing of Terrorism and Proliferation (Miscellaneous Provisions) Act 2024***

3. THE WORKERS' RIGHTS (SOCIAL PLAN) (INCOME SUPPORT TO WORKERS) (AMENDMENT) REGULATIONS 2024.

- A new regulation has been added after Regulation 6:

  "Where a qualifying employer –

  (a) has paid wages to any eligible worker in any month during which the trade or business of the employer was not operational; and

  (b) has not generated any revenue or adequate revenue to pay wages of the eligible worker,

  the Director-General shall refund the employer the wages he has paid to the worker, which shall be equivalent to the basic wage or salary of the worker."

- These regulations shall be deemed to have come into operation on 01 April 2024.

International Tax updates – The Rio de Janeiro G20 Ministerial Declaration on International Tax Co-operation.

On 25-26 July 2024, G20 Finance Ministers and Central Bank Governors met in Rio de Janeiro, Brazil.

The meeting culminated with a communiqué that reaffirms the G20 Finance Ministers' commitment to:

- The October 2021 statement of the OECD/G20 Inclusive Framework on the Base Erosion and Profit Shifting (BEPS) 2.0 project;
- The swift implementation of the two-pillar solution; and
- Support ongoing works to ensure coordination among countries implementing the Global Anti-Base Erosion Rules as a common approach.

The G20 Finance Ministers also agreed on a stand-alone Tax Declaration, which:

- Spells out their commitments on a wide range of international tax cooperation matters;
- Expresses a commitment to finalizing all components of the Pillar One agreement in view of signing the Multilateral Convention as soon as possible;
- Indicates the intent to engage cooperatively on effective taxation of ultra-high-net-worth individuals in the G20; and
- Highlights the benefits of work on tax transparency and strengthening technical assistance.

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	VAT Decoded: Navigating the complexities of Value Added Tax
	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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