

# Bhurtun Chambers

## Monthly newsletter

Issue No 23: May 2024

### Introduction

Welcome to our newsletter for the month of May 2024!

In this issue, we bring you our customary roundup of crucial updates and insights to keep you informed and ahead in the ever-evolving tax landscape.

We have summarized for you three ARC decisions, including two interesting ones on property valuation, and two important landmark Supreme Court Judgments, one on the interpretation of **s.5 Income Tax Act** and the other on Corporate Criminal liability/Corporate mens rea.

Additionally, we recap our enlightening Free Seminar on Practical Tips to Minimize Tax Assessment Risk which was held on May 10th, 2024.

Lastly, don't miss out on our lineup training sessions for 2024, meticulously designed to hone your expertise and fortify your acumen in matters of taxation.

Happy reading!

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## Decisions Delivered by the Assessment Review Committee

### 1. SOCIETE CLEFOON v/s THE REGISTRAR-GENERAL ARC/RG/656-17

In this matter, a subject property comprising of three connected lands, Plot 1 (710.38m<sup>2</sup>), Plot 2 (529.93m<sup>2</sup>), and Plot 3 (726 m<sup>2</sup>), was acquired by the Applicant in 1983. As per the Government Valuer's report, the three plots were connected. Plots 2 & 3 were located along an untarred common road whereas Plot 1 was located at the rear of Plots 2 & 3 along an unopened common road. All three plots of land had a sloppy/low lying topography which made them prone to flooding.

In 2016, the subject property comprising of land and buildings was sold at a price of MUR 6M. The Respondent assessed it at a value of MUR 7,165,000 and claimed an additional land transfer tax amounting to MUR 64,075 from the Applicant.

The Applicant stated that, following a revision of the subject property, it had been re-assessed at a market value of MUR 6,400,000 by the Government Valuer. The Applicant thus contended that it was illogical and absurd for a property to have 2 market values at the same time – one for the seller and another one for the buyer.

In reaching a decision in this matter, the ARC noted that both Parties had equally highlighted the plus and minus factors in relation to the valuation of the subject property. The Committee then referred to **Neelavani (S.) (Smt) v CWT [1980] 125ITR 665** and **Ramachandran (V.C) v CWT [1980] 126 ITR 157** (where it was held that it was permissible to take an average of the values arrived at by different methods) and reasoned that an average value would be a reasonable indication of a fair market value. The Committee also noted that both Parties had reports which had been diligently prepared by the Valuers and submitted to the Committee and each Party had the opportunity to be examined and cross-examined on these reports.

Based on these, the Committee concluded that the average value would be:

$MUR\ 6M + MUR\ (7,169,331)/2 = MUR\ 6,584,655.50$  rounded to MUR 6,585,000

The Committee also highlighted that that this value was quite close to the figure proposed by the Government Valuer for settlement purposes and which the Applicant's Valuer had observed that it was an indication of the market value of the market value of the property.

## **2. PRAVIN AND DEVI SOOKHEE LTD v/s DIRECTOR GENERAL-MRA ARC/LTD/22-11**

This matter came for argument on a motion to amend the Representation form to add a new paragraph to raise an issue of "LPG Gas".

Interestingly the ARC had given a previous Ruling that the Applicant could not raise this issue as it did not form part of the grounds of Representations and also that the issue was not canvassed at the Objection level.

In refusing the proposition for amendment, the Committee explained that the amendment that the Applicant was trying to bring concerned averments which were not raised in the Notice of Objection to the Assessment and thus were not determined at the level of the Objection Directorate. The Committee, referring to **Jabil (Mauritius) Holdings Ltd v Director General, Mauritius Revenue Authority ARC/IT/38-21**, reminded that it has in fact no jurisdiction to entertain a ground of representation for which the objection directorate had not been called upon to make a Determination under **s.19(1) Mauritius Revenue Act**. The more so, as admitted by the Applicant in the proposed amendment, that the "LPG Gas" issue was omitted by the Applicant itself in its Corporate Tax Return.

In support of its argument, the Applicant also tried to rely on **Ramiah Ramsamy v Director General, MRA ARC/VAT/221-19** where two grounds were raised as part of the amendment. In distinguishing this matter from the present one, the Committee explained that the two grounds in **Ramiah Ramsamy** were more akin to points of law whilst the "LPG Gas" issue in the present matter cannot be assimilated to a point of law.

However, the Committee further noted that the Respondent had placed on record that the "Revised Computation" proposed to the Applicant was on a 'without prejudice' basis whereby the Applicant was requested to pay MUR 17,833/- as tax due. If the Applicant was not

agreeable to same, the Notice of Determination would be the main issue to be decided upon for at the Hearing of the case.

### **3. CONVENIENCE FOOD LTD V/S THE REGISTRAR-GENERAL ARC/RG/270-15**

In this matter, a subject property consisted of two connected plots of land - Plot A & Plot B located along Riche Terre Road in the proximity of Jumbo Hypermarket, McDonald, and IBL Business Park.

Plot A of 1056.20 m<sup>2</sup> (or 25.02 perches) with no buildings was declared at MUR 2M.

Plot B of 1037.4 m<sup>2</sup> (or 24.58 perches) with four buildings was declared at MUR 5.5 M (Land at MUR 2M + Buildings at MUR 3.5 M).

The Subject property was thus declared at MUR 7.5M (MUR 2M + MUR 5.5M).

The Subject property was however re-assessed by Government Valuer at MUR 10,215,000/-. In arriving at this value, the Government Valuer used the sales comparison method to estimate the value of the subject property based on comparables in the vicinity. However, the Applicant contended that the comparables identified by the Government Valuer did not reflect the market value of the subject property.

As such, the issue to be determined by the ARC was whether the declared value of the building was correctly determined by the Government Valuer and reflected the market value at the time of registration.

To do so, the Committee analysed the essential characteristics of the comparable evidence to see whether they reflected a comparative value or estimate of the subject matter.

Referring to to aerial pictures submitted by the Applicant and the plan submitted by the Government Valuer, the Committee found that the subject property was far from the Motorway as compared to the comparables adduced by the Respondent, which were nearer to the Motorway and in a much-industrialised zone.

The Committee further highlighted that comparable sales should be of such lands as are:

- a) Similar in character as far as may be;
- b) Reasonably proximus to the acquired lands;
- c) Should have similar amenities and advantages; and
- d) The transactions should be reasonably proximate in time to the date of acquisition.

In light of these, the Committee considered that a 30% allowance would be appropriate in the circumstances on the land based on location and size and a 25% allowance on the buildings for wear and tear.

The Committee thus calculated that the Total Market Value of the subject property amounted to 8,685,081/- at the date of Registration.

## Selected Decisions delivered by the Supreme Court

### 1. MAURITIUS REVENUE AUTHORITY v DILLOO H. M. E. & ANOR 2024 SCJ 191

In this case, the MRA in one case (*MRA v Hilmi Mohammad Ehsan Dilloo & ARC*) and Mr. Dilloo in another (*Hilmi Mohammad Ehsan Dilloo v ARC & MRA*) were both appealing by way of case stated against the decision of the Assessment Review Committee (ARC) which concerned the imposition of tax on income derived outside Mauritius by Mr. Dilloo and remitted to Mauritius. Both appeals turned on the interpretation of **s.5 Income Tax Act (ITA)** and Mr. Dilloo (hereinafter referred to as Mr. D) was additionally challenging some of the ARC's findings. The Court considered it wise to hear both appeals together and to deliver a single judgment.

#### **Background:**

Mr. D, a Mauritian National with a Mauritian passport was employed with a company based in Saudi Arabia. Since he had not submitted his returns of income for the years of assessment 2016/2017, 2017/2018, and 2018/2019, the MRA initiated an audit into his tax affairs and requested him to submit information and documents. When he did not comply, Mauritian Banks and deposit institutions were "circularized"<sup>1</sup>, and an analysis of Mr. D's bank statements and information available at the MRA was carried out. This revealed that, during the period under review, Mr. D:

- had transferred money from his Saudi bank account into his local MCB account 1;
- had transferred money from several fixed deposit accounts in Mauritius from the MCB account 1;
- had acquired an immoveable property valued at MUR 10 million by withdrawing from MCB account 1; and

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<sup>1</sup> Process of sending requests for confirmation directly to the bank's clients or counterparties, asking them to verify specific financial transactions or balances, often used in audit, fraud investigations, or other financial assessments.

- had received a monthly rental income by letting the immovable property and deposited the money into MCB account 2.

The MRA informed Mr. D of these findings, and also that the MRA was of the opinion that he is a resident of Mauritius and hence taxable on all his income, whether derived from Mauritius or elsewhere, when the income is received in Mauritius, as per **s. 5(3) ITA**. Mr. D explained that his income was not received in Mauritius and that he had paid Expatriate tax under Saudi law but did not submit supporting evidence. The MRA accordingly issued a contemplation letter to him, following which he submitted a letter from his employer confirming that he had paid tax for the period under review. However, the MRA took the view that the letter could not be taken into consideration pursuant to **s.4 ITA & Regulation 8 Income Tax (Foreign Tax Credit) Regulations 1996**, and reaffirmed its decision that Mr. D was taxable on all his income.

Mr. D was subsequently assessed on all the money transferred from his Saudi Bank account into MCB account 1 and the rental income received from letting the immovable property. Mr. D objected to the assessment but then conceded that the rental income was taxable. After he failed to submit a Tax Residence Certificate from Saudi Authority to prove that he was a Saudi resident for tax purposes, MRA had no choice but to maintain its assessment and issue a Notice of determination.

Aggrieved, Mr. lodged representations before the ARC to the effect that he was not taxable on his income. The ARC decided to set aside Mr. D's representations and maintain the determination of the MRA.

#### **Issues before the Supreme Court:**

- 1) The main issue before the court was whether the ARC was right in interpreting **s. 5(3) ITA** as a stand-alone provision.

In holding that the ARC was wrong, the SC began by looking at **s.5 ITA**. Same has been reproduced below for ease of reference:

“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 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.”*

The Court then explained that, under the **ITA**, a person is liable to tax either if he is a resident of Mauritius or if his income is sourced in Mauritius, and that thus only a resident of Mauritius is liable to tax on income derived from outside Mauritius. The Court further explained that **s.5(3) ITA** which identifies when income is deemed to be derived from outside Mauritius by an individual is therefore a provision which clearly has to be read along with **s.5(1)(b) ITA** which states that a resident is taxable on all his income whatever its source.

The Court then stated that the ARC failed to understand that pursuant to **s.5(1)(b) ITA**, only a resident of Mauritius is liable to tax on income derived from outside Mauritius and that **s.5(3) ITA** simply provides *when* that income becomes taxable. The further stated that the ARC erred in holding that **s.5(3) ITA** is not subject to any other provision of the law and does not provide for any requirement to establish that the individual was resident in Mauritius.

- 2) A second issue before the court was whether the ARC was right to hold that the residence requirement under **s.73 ITA** inapplicable when the deeming provision under **s.5(3)** applies.

The Court held that the ARC was wrong. In reaching this decision, the Court highlighted that the ITA does not define the word “resident” other than in **s.73 ITA**, and also that **s.73 ITA** makes it clear that it provides for the definition of residence “*for the purposes of this Act*”, i.e. the whole of the **ITA**. The Court therefore reasoned that in determining who is a resident under **s.5 ITA**, one has to turn to the definition of “resident” under the **ITA** which is provided for under **s.73 ITA**.

- 3) A third issue before the court was whether the ARC was right in finding that the money transferred from Saudi Arabia to the Mr. D’s local bank account was income.

The SC found no flaw in the ARC’s reasoning that whether an income is received directly in Mauritius or transits through a Saudi Bank account and only part is credited into a Mauritian Bank account, the amount that is receivable in Mauritius still qualifies as income.

- 4) The final issue before the court was whether the ARC was wrong to find that Mr. D was a resident of Mauritius for the years of assessment 2016/2017 to 2018/2019.

The Court was unable to conclude that the ARC was wrong in its finding. This was because, as the court explained, the onus was on Mr. D to establish that the MRA was wrong to determine that he was a resident of Mauritius. The MRA maintained the assessment on the grounds that Mr. D did not submit any conclusive evidence to prove that he was a Saudi resident, and by virtue of **s.73(1)(a) ITA**, he was a resident of Mauritius and the income receivable was taxable as per **s.5(3) ITA**. Furthermore, there were no contrary evidence before the ARC which showed that Mr. D was not a resident of Mauritius and which the ARC failed to consider.

## 2. CHANGE EXPRESS LTD v THE INDEPENDENT COMMISSION AGAINST CORRUPTION & ANOR 2024 SCJ 203

This was quite an interesting judgment in that it was the second time that the matter was heard on appeal before the Supreme Court. The first time was in 2022, where the Supreme Court had remitted the matter back to the learned Magistrate if the intermediate Court (IC) for him to address his mind to the *mens rea* of the Accused company.

### **Background:**

- The Appellant company (hereinafter referred to as AC), as represented by the Chairman of the Board of Directors, was charged with willfully, unlawfully and criminally accepting a payment of 16,925 Euros in cash from Mr. V in exchange for the sum of MUR 634,684.50.
- AC pleaded not guilty.
- The Chairman told ICAC investigators that the transaction was never effected at AC's branch of Quatre Bornes and that an email found in the Former CEO, Mr. M's file, and which mentioned the transaction under the heading of "INOX" was fabricated by the latter who was the subject of an internal investigation into malpractices at the time.
- The Prosecution's case was in essence that Mr. V went to the Quatre Bornes branch where he exchanged 16,925 Euros for Rs 634,684.50 and that the transaction was dealt with by Mr. P, the Manager of the branch.
- However, Mr. P was not called as a witness at the trial.
- The Company's Daily Transaction report also showed that the transaction was not reported.
- Mr. V gave evidence that, on 26.04.2006, he remitted an amount exceeding MUR 500,000 in Euros to Mr. P, whom he referred to as a "Cashier" he knew at AC and who exchanged the said sum without asking for his National ID card.
- Mr. M deposed and stated that he had never come across the term "INOX" and he had never received the said email (see above) two days after the transaction and that he did not leave the company on good terms.
- On 18.04.2023, the learned Magistrate concluded that the Prosecution had proved its case beyond reasonable doubt and found AC guilty as charged.

- AC appealed against its conviction on 12 grounds.

By grouping together related grounds, four issues could be identified in this case:

**Ground 1 – The Failure of the prosecution to call Mr. P as witness for the Prosecution:**

AC argued that the learned Magistrate of the IC was wrong to find AC guilty of the offence charged in the absence of testimony of Mr. P who carried out the transaction on the material day.

The Court found that this ground had been well taken and should succeed. In arriving at this decision, the Court explained that the discretion of the Prosecution to call witnesses of its choice is a restrained one, and that Prosecution has a duty to call all credible witnesses who can tell the court about the relevant events (**R v Nugent [1977] 3 ALL ER 662**). In this matter, Mr. P was a material witness, and had he been called, this would have shed light on the said transaction – Whether Mr. P, when carrying out the transaction, had acted within the scope of his duties or whether he had embarked on a frolic of his own or, more importantly, whether he had received instructions from AC.

The Court added that, Mr. P could also have told the court about the capacity in which he was acting at the material time, i.e. Cashier or Manager or cumulating different roles at the same time.

**Grounds 2 to 6, 10 and 12 – Corporate criminal liability:**

AC argued that the learned Magistrate was wrong to assume that Mr. P triggered the liability of AC since he was the manager of AC as per the words of Mr. M.

The Court found that these grounds should succeed. In reaching this decision, the Court explained that the **Criminal Code** and **S.44 Interpretation and General Clauses Act (IGCA)** are silent as to the circumstances on which the charge should be levelled against the body corporate. The Court added that as per **CEB v State [2010] SCJ 75**, the identification principle should be applied to establish corporate liability and a company will only be criminally liable if an individual's Criminal conduct can be attributed to that company. Referring to

**Tesco Supermarkets Ltd v Natrass [1971] 2 ALL ER 127**, the court explained that for an employee or officer of a company to engage the criminal liability, it must be established that the latter represents the directing mind and will of the company. The Court also stated that one must consider whether the employee or officer of a company acted outside the scope of his duties and on a frolic of his own, in which case the latter's personal liability will be engaged and not that of the company (**Rory Kenneth Dunoon Kirk v The Bay (Holding) Limited & Ors [2013] SCJ 108**). The Court also referred to **Tesco Supermarkets (Supra)** where it was explained that *"the accused company, as a personne morale rather than a personne physique, could be found to have the requisite mens rea upon proof of such a state of mind on the part of "a director or senior manager in actual control of the company's operations who could be identified as the controlling mind and will of the company"*.

Applying these principles to the matter at hand, the Court found that there was no evidence on record as to whether Mr. P had followed the established practice and procedure put in place by AC or whether he acted on a frolic of his own. The Court also found that the finding of the learned Magistrate that Mr. P had powers of decision and was actively involved in the management of AC was highly questionable. Nevertheless, the Court reasoned that even if it were to assume that it was Mr. P who was the manager of AC at the material time, this did not in itself make of him the controlling mind of AC as the extent of delegation of responsibilities to the officers of AC was unknown. Further, there was also no evidence to support the contention that the transaction had been duly authorized by AC as there was nothing on record to show that the authorisation of the operations manager or any other hierarchical officer had been sought and obtained.

The Court thus concluded that the prosecution had not been able to prove that Mr. P was the controlling mind and will of AC.

**Grounds 7, 8 and 11 – Challenging finding of facts by the learned Magistrate:**

In dealing with these grounds, the court began by reminding that Appellate courts interfere with findings of facts of the trial Courts only if clearly injustice were to be meted out to any party.

In the present matter, inter alia, the Court found that it was clear that the learned Magistrate relied on the email mentioning the transaction under the heading of “INOX” to find the charge proved against the appellant in spite of the fact that there was no evidence on record to shed light on its contents.

The Court also found that the guilty intent of AC could not be gathered from the email as there was no evidence as to the identity of the Operations Manager.

The Court thus concluded that these grounds should also succeed.

**Ground 9 – Fairness of trial:**

AC argued that it did not benefit from a fair trial inasmuch as the ICAC officers failed to inform AC in the course of the enquiry that the Physical act of Mr. P were those which triggered the liability of the company.

Agreeing with this contention, the Court explained that every person in a criminal trial has an inbuilt right as per **S.10 of the Constitution** to a fair trial which includes the right to know with precision what is the charge he has to answer, so as not be prejudiced in the conduct of its defence (**Automatic Systems Ltd v The State of Mauritius [2023] SCJ 107**). In the present matter, the court observed that AC was not informed with precision at the outset of the exact nature of the charge being brought against it.

The court thus concluded that ground 9 too should succeed.

**Conclusion:**

With all grounds of appeal succeeding, the Appeal was allowed and AC’s conviction and sentence quashed.

## **Important Legislations and Legislative Amendments**

### **1. LAND (DUTIES AND TAXES) (AMENDMENT OF SCHEDULE) REGULATIONS 2024**

- Please refer to **The Land (Duties and Taxes) Act**.
- The Eighth Schedule of the Act has been amended by inserting a new item (zla) reading “witnessing the, transfer of land by a subsidiary of the Bank of Mauritius” after item (zl).
- These amendments came into operation on 01 November 2023.

## Events recap

### Free Seminar: Practical tips to minimize the risk of a tax assessment:

On the 10<sup>th</sup> of May 2024, tax enthusiasts and professionals convened at the elegant Le Ruby D'Ebene in Ebene for an enriching and insightful event titled "Practical Tips to Minimize the Risk of a Tax Assessment." Hosted by our seasoned expert, Me. Ahmed Bhurtun, the seminar delved into the intricate world of taxation, providing attendees with the tools to navigate tax complexities with confidence and finesse.



The seminar covered a range of crucial topics, including the taxation of authorised companies, the role of the Financial Services Commission (FSC), and practical considerations regarding the "source" of income. Attendees gained valuable insights into the taxation of salaries and fees for directors, the importance of proper documentation, and the types of payments that constitute dividends.





With a special focus on global business sectors, participants explored essential contents of corporate agreements, underlying foreign tax credits, and the elusive 80% exemption. The discussion also delved into deductions, emphasising the criteria required to satisfy the Income Tax Act (ITA) and the application of the arm's length principle.





As with all of Me. Bhurtun's trainings, the event was far from a passive lecture. Instead, it was an engaging exchange of knowledge and experiences. Attendees had the opportunity to interact with Me. Ahmed Bhurtun and fellow participants, creating a dynamic environment of collaboration and shared learning.



After the seminar, attendees gathered for some healthy snacks, where conversations continued to flow, and appreciation for the valuable insights gained was palpable. Many expressed eagerness for our future events, eager to further refine their tax strategies and propel their businesses forward.



We invite you to experience this event through some more pictures below and to stay tuned for more of our enriching events and opportunities to elevate your tax strategy and excel in the dynamic world of business.

Join us on this journey of growth and success!







## 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

<b>December</b>	Taxation of Real Estate Sector
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All relevant details may be obtained by sending an email to [bhurtuntaxtraining@gmail.com](mailto: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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