

Bhurtun Chambers

Monthly newsletter

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Introduction

A good case preparation is crucial and such preparation must start as early as at the time of the audit initiated by the Director-General of the Mauritius Revenue Authority. This will increase the possibility of settling the matter without going through the objection and ARC stages.

In the event matters are not settled at the audit stage, taxpayers must be cautious and ensure that all issues are raised at the objection level. If certain issues are not made live at the objection stage, the taxpayer will be faced with an objection when these issues are brought for the first time before the Assessment Review Committee.

The cases mentioned below highlight the importance of always going through the relevant provisions of the law before embarking into any legal procedure.

This newsletter includes, as usual, a summary of selected ARC and Supreme Court cases, some updates and a copy of our article published in the last issue of the Mauritius Finance Magazine.

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Decisions Delivered by the Assessment Review Committee

1. DEOKUMAR BHEKHAREE v REGISTRAR GENERAL ARC/RG/80-20

The matter relates to the purchase of immovable property by the Applicant and the claim of additional registration duty by the Respondent following his valuation exercise.

Registration duty is calculated on the open-market value of the property purchased. The value declared by the Applicant was Rs1,562,000 and the assessed value of the Respondent was Rs3,348,000.

The Respondent applied a comparative method. The Committee concluded that the comparable sales used by the Respondent for the valuation were proper, as well as the allowances given.

In addition, given that the property originally belonged to the Applicant, that same was sold to a third-party by “sale by levy” before the Supreme Court and that the Applicant acquired the property from the third party, the Committee applied a further allowance of 20 percent of the assessed value.

2. FOOD PARADISE CO LTD v DIRECTOR-GENERAL, MAURITIUS REVENUE AUTHORITY ARC/CUS/58-20

The Respondent adjusted the values of goods imported by the Applicant. Not satisfied with such valuation exercise of the Respondent, the Applicant made an objection, and the ground of objection was:

Arbitrary Valuation

Goods imported several times before without being uplifted by the Customs.

The objection was determined, and the Applicant made representations before the Committee. One of the reasons for making the representations was:

The Notice of Assessment contravenes the custom law.

The Respondent raised a preliminary objection to the effect that the said reason did not form part of the objection of the Applicant.

The Committee concluded that the Applicant could not proceed on the abovementioned reason for representation given that same was not considered at objection level.

3. JOSEPH JEAN-MICHEL MARRIER D'UNIENVILLE v THE DIRECTOR GENERAL, MAURITIUS REVENUE AUTHORITY ARC/IT/152-20

The employer of the Applicant paid pension premiums in favour of the Applicant. The pension premiums were not treated as expenses in the Profit and Loss Account of the employer but as a loan.

The premiums were being added into a current account that the Applicant had with the employer.

The Committee concluded that such arrangement between the employer and the employee was not prohibited. The premiums paid, in the circumstances, did not constitute a benefit in kind to the Applicant. The notice of determination of the Respondent was therefore set aside.

4. PEAK TRADING OVERSEAS LTD v THE DIRECTOR GENERAL, MAURITIUS REVENUE AUTHORITY ARC/IT/337-19

During the hearing of the case, based on section 75 of the Income Tax Act, the Applicant sought to produce a Transfer Pricing Report. The Respondent objection to its production given that the said report was not communicated to the Respondent at audit stage or at objection level. The Ruling delivered by the Committee relates to this issue only.

After reviewing various authorities, the Committee came to the following conclusions:

1. As a general rule the Committee will consider only evidence which were considered at the level of the objection.

2. As an exception, the Committee may consider fresh evidence, but only in relation to issues that were live at the level of the objection. The parameters within which to allow such new evidence would be as follows:
 - a. the evidence could not have been obtained with reasonable diligence;
 - b. the evidence must be such as would probably have an important influence on the result of the case, although it need not be decisive;
 - c. the evidence must be such as is presumably to be believed, i.e. it must be apparently credible, although it need not be incontrovertible.
3. Given that the Committee should avoid technicalities, a strict application of the above might not be warranted and other parameters might also be considered, such as,
 - a. The technical nature of the fresh evidence
 - b. The stage at which the new evidence is being produced before the Committee
 - c. Whether or not the taxpayer was represented by a professional at the objection level

Bearing the above principles, the Committee observed that:

1. The issue in connection with the Transfer Pricing Report was a live one at the level of the objection
2. The said report is being produced at an early stage of the Hearing
3. The Respondent was already in possession of the said report; and
4. The amount of tax in issue was significant (USD1,660,964)

The objection of the Respondent was set aside and allowed the Applicant to rely on the Transfer Pricing Report.

Selected Decisions delivered by the Supreme Court

1. CHANGE EXPRESS LTD v INDEPENDENT COMMISSION AGAINST CORRUPTION & ANOR 2022 SCJ 301

The Appellant was convicted before the Intermediate Court for the offence of accepting payment in cash exceeding Rs500,000.

One of the elements that had to be proved by the Prosecution, was the criminal intent of the Appellant, also referred to as *mens rea*.

Given that the Appellant was a corporate body, the manner in which the *mens rea* is proved is based on certain legal principles, referred to as the “identification principle”. The Supreme Court observed that:

Under the “identification principle”, a company will, in a nutshell, only be criminally liable if an identified individual’s criminal conduct can be attributed to the company. However not every employee or officer of a company will engage the criminal liability of the company; it has to be established that he represents the “*directing mind and will of the company*”.

Secondly, the Court also need to consider whether the officer of the Company who dealt with the transaction acted within the scope of his functions.

The Supreme Court analysed the judgment of the Intermediate Court and concluded that the Magistrate did not address his mind to these principles. The Court quashed the conviction and sentence and remitted the matter back to the Intermediate Court for the above mentioned principles to be considered.

2. DARUTY DE GRANDPRE H. J. M. & ORS v COMPAGNIE DU MAPOU LIMITED & ORS 2022 SCJ 318

The case sheds light on the concept of “prejudiced shareholder”. The relevant provision of the Companies Act is as follows:

178. Prejudiced shareholders

(1) Any shareholder or former shareholder of a company, or any other entitled person, who considers that the affairs of a company have been, or are being, or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial to that person in that capacity or in any other capacity, may apply to the Court for an order under this section.

The Petitioners were seeking, among others, an order from the Court for respondents Nos. 5, 6, 7, 8, 9, 10 and 11 to purchase the petitioners' shares in the respondent No. 1 at a fair value to be determined by this Court in such manner as it shall think fit.

The Supreme Court analysed the definition of “oppressive, unfairly discriminatory and unfairly prejudicial” and concluded that the Petitioners had failed to establish their case on a balance of probabilities. The petition was therefore set aside.

3. LE SUEUR D. S. & ANOR v WALLER L. 2022 SCJ 303

The case was entered against the Respondent on the basis that it allowed the company, Sirocco Capital Partners Ltd, to trade and incur liabilities whilst being insolvent.

Section 162 of the Companies Act provides as follows:

162. Duty of directors on insolvency

(1) A director of a company who believes that the company is unable to pay its debts as they fall due shall forthwith call a meeting of the Board to consider whether the Board should appoint a liquidator or an administrator.

(2) Where a meeting is called under this section, the Board shall consider whether to appoint a liquidator or an administrator, or to carry on the business of the company.

(3) Where -

(a) a director fails to comply with subsection (1);

(b) at the time of that failure the company was unable to pay its debts as they fell due; and

(c) the company is subsequently placed in liquidation,

the Court may, on the application of the liquidator or of a creditor of the company, make an order that the director shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.

(4) Where -

(a) at a meeting called under this section the Board does not resolve to appoint a liquidator or an administrator;

(b) at the time of the meeting there were no reasonable grounds for believing that the company was able to pay its debts as they fell due; and

(c) the company is subsequently placed in liquidation,

the Court may, on the application of the liquidator or of a creditor of the company, make an order that the directors, other than those directors who attended the meeting and voted in favour of appointing a liquidator or an administrator, shall be liable for the whole or any part of any loss suffered by creditors of the company as a result of the company continuing to trade.

(5) This section shall not apply during the COVID-19 period and such further period, as the Registrar may determine, after the COVID-19 period lapses.

The Court analysed the facts of the case and concluded that the Respondent was not aware that the Company was unable to pay its debts at the time the transaction was entered into. The application was therefore set aside.

4. SOCIETE SQL v EXPIATION INTERNATIONAL LIMITED 2022 SCJ 300

The issue was whether the statutory demand was properly served upon the Respondent. The return of the usher showed that the statutory demand was served upon the siblings of the directors of the Respondent.

Section 323 of the Companies Act governs the service of documents in judicial proceedings and reads as follows:

323. Service of documents on company in legal proceedings

(1) A document in any legal proceedings may be served on a company -

(a) by delivery to a person named as a director of the company on the register of companies;

(b) by delivery to an employee of the company at the company's head office or principal place of business;

(c) by leaving it at the company's registered office or address for service;

(d) by serving it in accordance with any directions as to service given by the court having jurisdiction in the proceedings; or

(e) in accordance with an agreement made with the company.

(2) The methods of service specified in subsection (1) are, notwithstanding any other enactment, the only methods by which a document in legal proceedings may be served on a company in Mauritius.

The Supreme Court analysed the nature of a statutory demand and conclude that the service of a statutory demand did not amount to legal proceedings. The service of the statutory demand was therefore governed by section 324 of the Companies Act, which reads as follows:

“324. Service of other documents on company

A document, other than a document in any legal proceedings, may be served on a company-

(a) by any of the methods set out in section 323(1)(a), (b), (c) or (e);

(b) by posting it to the company’s registered office or address for service or delivering it to a post office box which the company is using at the time;

(c) by sending it by facsimile machine to a telephone number used for the transmission of documents by facsimile at the company’s registered office or address for service or its head office or principal place of business.”

In light of the above provisions, the Supreme Court concluded that the statutory demand was not properly served by the Petitioner and set aside the petition.

International Taxation Update

The Regulation under the Income Tax Act of Mauritius that gives effect to the Double Taxation Avoidance agreement between the Republic of Mauritius and the Republic of Angola was published in the Government Gazette of 10 September 2022.

The Regulation is not yet in force. It will come into operation on a future date to be specified by the Minister responsible for the subject of Finance in Mauritius.

The said agreement between the two countries follows more the UN Model Double Taxation Convention. On that aspect, I wish to highlight the following concerning the agreement:

1. The Construction PE under Article 5(3) requires a 6 month period;
2. PE under Article 5(3) includes furnishing of services;
3. Facilities for the delivery of goods not excluded as PE
4. The taxation of business in source jurisdiction not limited to income attributed to PE, under Article 7;
5. Withholding tax rates of 5 or 8 % for dividends and 8% for interests.

Our Trainings

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

The Training Institution delivered a four half-day training on **Global Business-Evolution and Taxation** on 08, 15, 22 and 29 September 2022.

We also conducted a free webinar on **The Offence of Money Laundering-An Analysis of the case of DPP v Ramgoolam 2022 SCJ 296** on 26 September 2022.

The following Trainings will be conducted next year as from the month of March:

1. Practical Aspects of Assessment Review Committee Cases
2. Value Added Tax for Beginners
3. Value Added Tax-Advanced Level
4. Statutory Interpretation
5. The Powers of the Director-General of the Mauritius Revenue Authority
6. Mastering Income Tax
7. The Pay As You Earn System
8. Trusts and Taxation of Trusts
9. Tax Deduction At Source and Advance Payment System
10. Tax Planning
11. Tax Avoidance and Tax Evasion
12. Transfer Pricing

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.

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To what extent is Tax Certainty important?

Given the risks attendant on an inaccurate assessment of tax obligations, Ahmed Bhurtun of Bhurtun Chambers gives us key insights into the requirements to ensure tax certainty, areas where the application of tax rules might operate with a certain level of uncertainty, and the consequences of such uncertainty.

Mauritius is a sovereign democratic state where the supreme law is the Constitution of Mauritius. Two fundamental concepts underlie the Constitution, namely, the rule of law and the separation of powers between the Parliament, the Executive, and the Judiciary.

The applicable revenue laws are set out in Acts of Parliament and subsidiary legislations. The rules contained therein should not be so uncertain that their application by the Judiciary may indirectly result in some form of judicial legislation.

The importance of tax certainty

Tax certainty provides a level platform for the Revenue Authority and taxpayers.

The main function of the Revenue Authority is to act as an agent of the State to assess tax liability and to collect and account for taxes. The provisions of the Revenue Laws that are drafted in a language that is too simple may have more than one interpretation and the provisions that are too complex might not be applied in an efficient and equitable manner.

The result of such uncertainty is loss of revenue. There may also be an increase in tax disputes which consume the precious time and labour of the officers of the Revenue Authority, of the judicial body involved, and of the taxpayer.

Some causes of tax uncertainty

Cases have demonstrated that some seemingly simple words or terms may be difficult to interpret in the sphere of tax law, such as "undergraduate studies" in relation to additional income exemption, or "goods" for the application of section 44B ITA, bearing in mind that we are living in a digital era.

Other cases have shown that concepts such as the

arm's length test and the general anti-avoidance provisions under Section 90 of the Income Tax Act (ITA) will require a substantial degree of knowledge in the field of law and business for their optimal application.

Moreover, specific legislation might pose issues in interpretation. For instance, the Value Added Tax (VAT) Act contains peculiar provisions which may lead to a VAT claim to a taxpayer who is not VAT registered and who did not collect VAT. For example, rules providing for supplies made by a particular person in a distribution chain to have been fictitiously taken place at another level in the same distribution chain may leave a taxpayer uncertain as to whether he should register for VAT or not.

The international aspect

Another crucial aspect that makes tax rules complex and uncertain is cross-border transactions.

Tax certainty provides a level platform for the Revenue Authority and taxpayers

The first thing that flashes to one's mind upon hearing 'cross-border transactions' is Double Taxation Agreements (DTAs). Mauritius has been a party to DTAs over the last decades, as well as other agreements relating to, among others, the exchange of information.

The setting up of the Base Erosion and Profit Shifting (BEPS) Project has led to the development of new rules and the enhancement of others. The Common



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Reporting Standards (CRS) for the Automatic Exchange of Information mention various technical terms which are defined specifically for this purpose. The complexity of the CRS may be more obvious when applied to persons such as trusts.

The international agreements are given effect in Mauritius through regulations made by the Minister responsible for the Finance portfolio. The integration of these agreements into domestic legislation may disrupt the coherence of local rules. Uncertainties may also arise because of interpretation issues.

Furthermore, given that States are sovereign, different jurisdictions may treat the same type of entity differently. For instance, a trust may be considered fiscally transparent by one jurisdiction but not by another.

How to enhance tax certainty in Mauritius?

The Revenue Laws are subject to some important amendments at the beginning of each financial year following the Budget Speech. For these amendments to bring efficiency and fairness, it is crucial to ensure the participation of major stakeholders. There must

also be a careful balancing of inputs by all parties concerned.

Professionals who represent the interests of taxpayers must be given ample time and opportunity to express their views on proposed laws, and, more importantly, to highlight any inequity and any uncertainty in their application.

Another important aspect to bear in mind to uphold tax certainty is to ensure coherence in the domestic legislation. Piecemeal amendments brought to cater for new issues and align with international standards may result in loopholes or conflicting provisions.

Taxation rules evolving to meet international standards

The evolution of the types of transactions taking place in a digital day and age has led to the development of more complex rules to ensure efficiency. It is inevitable that the revenue laws will tend to become less certain.

Having said that, it is incumbent upon the State to create the opportunity for all actors of the economy to participate in establishing the applicable rules that are efficient and fair without being uncertain.



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