

Bhurtun Chambers

Monthly newsletter

Issue No 13: January 2023

Introduction

Welcome to this first issue for the year 2023!

Our newsletter, as usual, highlights the main decisions taken by the Assessment Review Committee and the Supreme Court. We also highlight some major developments in the sphere of taxation. Further down, you will see the amendments brought to the Mauritius-Germany Double Taxation Agreement.

Our domestic tax legislations will constantly be subject to amendments to be in line with international standards or trends. The legislator has, however, to be very careful to keep the domestic legislation coherent and also easy to interpret and apply. One can take the example of the case of **Gamma Materials Ltd** (see page 7), where the Assessment Review Committee did not agree with the interpretations of both, Applicant and the Respondent. We remember also the amendments brought to the Revenue Laws pertaining to the Global Minimum Tax, following the last Finance Act, but which are still not proclaimed and therefore not yet applicable.

We also endeavour to equip professionals with knowledge and skills. Last year, the Bhurtun Tax Training Institution, which is an MQA Approved Training Institution, delivered various trainings and free webinars. We are continuing this trend and you can see the list of our training activities at page 12.

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Decisions Delivered by the Assessment Review Committee

1. SUDESH KUMAR CALCUTTEEA v DIRECTOR-GENERAL, MAURITIUS REVENUE AUTHORITY ARC/IT/139-22

The matter concerned the application of section 27D(1) of the Income Tax Act relating to deduction for household employees, which reads as follows:

Subject to subsection (2), where, in an income year, a person employs one or more household employees in respect of whom he has paid the contributions payable under the National Pensions Act and the National Savings Fund Act, he shall be entitled to deduct from his net income for that income year the wages paid to the household employees or 30,000 rupees, whichever is the lower.

The matter confirmed that, for the Applicant to avail himself of the deduction, the necessary contributions must have been paid. The Applicant did not make such contributions and therefore the deduction was not allowed.

The representations of the Applicant were therefore set aside.

2. FUTURAMA CO LTD v DIRECTOR-GENERAL, MAURITIUS REVENUE AUTHORITY ARC/IT/148-22

In this matter, the Applicant made an objection which was late by 261 days. The representations made mentioned the following reasons:

MRA has sent an Assessment Notice to Cassis which is actually closed and visited once a time (We apologize for the late objection). That is why the correspondence remained in our letter box together with other letters. We agree to pay the 10% to reopen the case.

During the case, the representative of the Applicant mentioned that she had no means to prove her averment.

The Committee reiterated the principle that the burden rests on the Applicant. In the circumstances, the Committee concluded that the Applicant failed to establish any reasonable cause to explain the delay and the representations were set aside.

3. Savesh Sharma Gaungoo v Director-General, Mauritius Revenue Authority ARC/IT/077-22

The matter relates to a case of late representations. The representations were made 490 days late.

The Applicant explained that the notice of determination issued in October 2020 to his accountant. He contacted the accountant again in February 2022 when he received a letter from the Debt Collection Department of the Mauritius Revenue Authority. The accountant had stopped taking his calls.

A new accountant was appointed by the Applicant.

The Chairperson observed that the Applicant did not explain the reasons for which he did not contact his accountant between October 2020 and February 2022. He however, took into consideration the fact that the determination of the Respondent was issued between two lockdowns, followed by restriction of movement.

In the circumstances, the Chairperson allowed the Applicant to proceed with the late representations.

4. THE MAURITIUS GYMKHANA CLUB v THE DIRECTOR GENERAL, MAURITIUS REVENUE AUTHORITY ARC/VAT/63-19

The Applicant charged a one-off entrance fee and a monthly subscription fee to its members. The issue was whether the one-off entrance fee was subject to VAT. It was the contention of the Applicant that same was exempt of VAT. The Respondent issued an assessment on the basis that the one-off entrance fee constituted a taxable supply.

After reviewing applicable case law, the Committee concluded that the entrance fee was subject to VAT given that it gave right of membership and access to facilities. The Committee also observed that the entrance fee was used by the Applicant for capital expenditure and did not appear as a liability in the accounts of the Applicant.

The Committee also took into consideration the considerable amount of the entrance fee, Rs250,000, to conclude that same could not be a simple processing fee.

The representations of the Applicant were set aside.

5. Daniel Laval Gilbert Jeannot v Director-General, Mauritius Revenue Authority ARC/IT/008-22; ARC/VAT/002-22

The Applicant made representations to the Committee but was 127 late. The issue of late representations is governed by Section 19(2) of the Mauritius Revenue Authority Act, which provides that:

...where a person has failed to make his Representations within the time specified in Subsection (1) and the Chairperson is satisfied that the failure was due to illness or other reasonable cause, the Chairperson may direct that the Representations shall be accepted.

The Applicant averred that he was suffering from the Covid-19 and also broke one leg.

In the circumstances, the Committee allowed the Applicant to proceed with his representations.

6. Deeneswarnath Tiwaree SEEBUNDHUN v Director-General, Mauritius Revenue Authority ARC/CUS/03-20

Applicant's father purchased a motor vehicle whilst being the holder of a PSV (Taxi) Licence. He therefore benefitted from duty exemption.

After the demise of the father of the Applicant, the Respondent issued a claim for excise duty and taxes given that the motor vehicle was not transferred to the succession. Section 5(2A)(aa) is relevant and reads as follows:

Notwithstanding subsections (1), (2) and (2A)(a), in the case of a motor vehicle or motorcycle purchased by an officer, or a beneficiary, in accordance with his entitlement, and transferred to his succession on his death, no duty, excise duty and taxes shall be claimed provided that the motor vehicle or motorcycle is not sold, transferred or disposed of within the time remaining due out of the 3-year period or 4-year period, as the case may be.

The Applicant was also making a personal use of the said vehicle.

The Committee concluded that, based on the evidence, the Applicant made personal use of the said vehicle. Also, he failed to notify the NTA of the demise of his father and to transfer the ownership to the succession. The claim of the Respondent was therefore maintained.

7. Noormohamed Dulmar v Director-General, Mauritius Revenue Authority ARC/IT/423-15

The assessment made in this case was based on bank lodgments. The Applicant averred that the bank lodgments were in relation to reimbursement of a loan provided to a company.

The Committee concluded that the Applicant failed to substantiate his case with relevant documentary evidence and that the assessment of the Respondent met the standards of a best of judgment assessment.

The Committee further laid emphasis on the principle that the Applicant cannot proceed with issues not raised at Objection Level or those not raised in the representations.

The representations were set aside.

8. Hemun Bissessur v Director-General, Mauritius Revenue Authority ARC/IT/157-22; ARC/VAT/060-22

The matter relates to an objection of the Applicant which was made late by 265 days. The Applicant stated before the Committee that his accountant stopped working for him and that he had to deal with the tax issues with the Respondent himself.

At the relevant time, there were also two lockdown periods and restriction of movement. The Applicant had cashflow problems and was very worried.

In the circumstances, the Committee considered that the Applicant had good reasons for making the objection late and referred the matter to the Respondent for the objection to be considered.

9. GAMMA MATERIALS LTD v DIRECTOR GENERAL, MAURITIUS REVENUE AUTHORITY ARC/EPF/03-19

The matter relates to the imposition of the Environment Protection Fee (EPF). The main provision, section 66(2)(a) of the Environment Protection Act, reads as follows:

The manager of every designated establishment specified in Column 1 of Part I of the Eighth Schedule shall, after the end of every month, pay to the Director-General on its monthly turnover in respect of that month, a fee at the corresponding rate specified in Column 2 of that Schedule within the period specified in Column 3 of that Schedule.

The Committee analysed the respective positions of each party and observed that:

- a. The Respondent claimed that the EPF was applicable on the total turnover of the Applicant; and
- b.** The Applicant claimed that EPF was applicable on specific activities irrespective of premises.

The Committee concluded that both claims were not proper. The Committee concluded that the EPF was applicable in respect of premises where the specified activities were carried out.

Since the assessment and determination of the Respondent were incorrect, the notice of determination of the Respondent was set aside.

Selected Decisions delivered by the Supreme Court

1. JYOTI'S CLINIC LTD v SIKA (MAURITIUS) LTD 2022 SCJ 338

In a previous decision of the Supreme Court involving the same parties, the Supreme Court concluded that the Director of Jyoti's Clinic Ltd lacked the proper authority to institute the proceedings. The Court referred to the following provisions of the Companies Act:

129. Management of company

(1) The business and affairs of a company shall be managed by, or under the direction or supervision of, the Board.

(2) The Board shall have all the powers necessary for managing, and for directing and supervising the management of, the business and affairs of the company.

(3) Subsections (1) and (2) shall be subject to any modifications, adaptations, exceptions, or limitations contained in this Act or in the company's constitution.

131. Delegation of powers

(1) Subject to any restriction in the constitution of the company, the Board of a company may delegate to a committee of directors, a director or employee of the company, or any other person, any one or more of its powers other than its powers under any section specified in the Seventh Schedule.

(2) A Board that delegates a power under subsection (1) shall be responsible for the exercise of the power by the delegate as if the power had been exercised by the Board, unless the Board –

(a) believed on reasonable grounds at all times before the exercise of the power that the delegate would exercise the power in conformity with the duties imposed on directors of the company by this Act and the company's constitution; and

(b) has monitored, by means of reasonable methods properly used, the exercise of the power by the delegate.

The Supreme Court concluded that:

...that a particular director of a company, especially when there are several directors, has no authority, per se, to institute legal proceedings on behalf of the company and to bind the company eventually in a Court matter unless the power to institute legal proceedings has been specifically conferred upon him by the Board of directors. Such power can only be given by passing a resolution to that effect.

Jyoti's Clinic limited appealed against the decision. The appeal was allowed and the matter was referred back to the Supreme Court to decide whether there was a proper ratification of the act of the director under section 180 of the Companies Act.

Section 180 of the Companies Act reads as follows:

180. Ratification of certain actions of directors

(1) The purported exercise by a director or the Board of a company of a power vested in the shareholders or any other person may be ratified or approved by those shareholders or that person in the same manner in which the power may be exercised.

(2) The purported exercise of a power that is ratified under subsection (1) shall be deemed to be, and always to have been, a proper and valid exercise of that power.

In light of the above, the Supreme Court observed that, for there to be a proper ratification, first, the Board of directors must be aware that an action was taken by a director without

proper authority and, second, the Board of directors must express its intention to ratify the action taken by the director.

In the present matter, those two elements were not present and therefore there was no proper ratification by the Board of Directors. The Application of Jyoti's Clinic Ltd was therefore set aside.

International Tax Update

Amendments have been brought to the Double Taxation Agreement between Mauritius and Germany in 2021 following the Double Taxation Avoidance Agreement (Federal Republic of Germany) (Amendment) Regulations 2021(GN No. 301 of 2021). These amendments came into effect on 16 December 2022, following General Notice No. 2 of 2023.

The Double Taxation Agreement between Mauritius and Germany was signed on 07 October 2011. It also contained a protocol which set out additional details in relation to certain specific articles.

The amendments brought on 2023 have included a protocol in the Agreement, which amends the original agreement and the original protocol, in order to reflect some of the requirements of the Multilateral Instrument relating to BEPS.

The amendments provide for:

1. An updated preamble;
2. The possibility for a taxpayer to request for arbitration if there is no agreement following the Mutual Agreement Procedure under Article 25 of the Agreement.

Our Trainings

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

The Training Institution delivered a half-day training on **Tax Deduction at Source (TDS)** on **19 January 2023**.

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

Special Provisions Relating to Time of Supply for Value Added Tax Purposes	10 February 2023 (Free Webinar)
Practical Aspects of Assessment Review Committee Cases	07, 14 & 21 March 2023 (3 whole days)
Mastering Income Tax	09, 16, 23 & 30 May 2023 (3 half-days)
Value Added Tax	To be scheduled
The Operation of the Pay As You Earn System (PAYE)	11 July 2023 (1 half-day)
Changes to be brought by the Finance Act 2023	To be scheduled
Trusts and Taxation of Trusts	12, 19 & 26 September 2023 (3 half-days)
Transfer Pricing	17, 24 & 31 October 2023 (3 half-days)
CRS and FATCA	14, 21 & 28 November 2023 (3 half-days)

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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