Bhurtun Chambers

Monthly newsletter

Issue No 20: February 2024

Introduction

Welcome to our second newsletter of the year 2024, dedicated to the important events that unfolded in the tax world throughout the month of February.

In this edition, we provide you with summaries of ten ARC cases, some of which shed light on interesting topics such as fair hearing within a reasonable time at the ARC, jurisdiction of the ARC, taxability of accrued interest, and the time-limit for the MRA to raise assessments.

Additionally, we provide you with summaries of noteworthy Supreme Court Judgements, two of which dealt with important issues such as the ARC's jurisdiction to review the rulings of the Director-General of the MRA and Appeals to the Supreme Court against ARC rulings.

Further, our tax landscape witnessed significant legislative amendments, notably in The Income Tax Regulations 1996, which we have highlighted for you. We have also kept a keen eye on global tax trends, highlighting updates to Article 26 of the OECD Model Tax Convention on Income and Capital.

As always, our goal is to provide you, our valued readers, with enriching content that helps you navigate the dynamic world of taxation. In line with that, we invite you to explore our engaging tax training sessions scheduled for the Year 2024, designed to empower you with the practical insights and expertise necessary to not only navigate but also excel in the ever-evolving world of taxation.

Table of Contents

Decisions Delivered by the Assessment Review Committee

1. ATTITUDE PROPERTY LTD V/S THE REGISTRAR-GENERAL-MRA ARC/RG/96-15

This was quite an interesting matter concerning fair hearing within a reasonable time at the ARC.

The Applicant's case was that the ARC, as an administrative Tribunal which must comply with the principles set in the constitutions, had breached s.10 (8) of the constitution by not affording the Applicant a hearing within a reasonable time. The Applicant submitted that the hearing had not been carried out within a reasonable time as 6 years had passed from the date of the transaction in 2014 to when the case started in 2020, which was way beyond the timeline provided for in the law. The Applicant then highlighted that the case had already started before another panel, but it was not possible to continue the hearing because of the departure of the Vice-Chairperson who was hearing the matter. The Applicant further added that its Chief Financial Officer had already deponed, but the matter could not proceed further because the Government Valuer who had made the report on which the assessment was based was not in service and no arrangement could be made to secure his attendance. The Applicant thus submitted that it was blameless for the inability to complete the hearing from the time it had started. The Applicant also remarked that staying the matter will be prejudicial to the Applicant in that the assessment will be maintained, and the Applicant will not have the opportunity to challenge it.

On the other side, the Respondent highlighted that there have been many instances where the matter has been postponed for reasons other than the absence of the Government valuer such as the parties trying to reach a settlement during informal meetings. The Respondent further added that it is only once the case of the Applicant is over that the Government Valuer could be called to testify and submitted that the case of the Applicant was not completed before the other panel. Finally, the Respondent referred the Committee to the case of ***Colomes v Colomes*** **2010 SCJ 131** which established that delay by itself will not result in a trial

being unfair and that the test was really to look at whether there was undue and unreasonable delay and whether that delay had led to the hearing being unfair.

In light of these submissions and the case of ***Colomes***, the Committee concluded that delay by itself will not cause prejudice and lead to an action being stayed or dismissed, unless the delay causes the hearing to be unfair. The Committee took note of the fact that some delays were caused because of the Government Valuer and some for other reasons, The Committee therefore deemed it wise, in the present matter, to proceed to hear the matter and also direct the parties to exchange all the relevant documents on which they will rely during the hearing. The Committee also stated that it will not allow any postponement which will cause unnecessary delays and placed an obligation on the Respondent to secure the presence of the Government valuer throughout the hearing.

2. TRUSTEES OF LATE MR ROGER KOENIG V/S THE REGISTRAR-GENERAL ARC/RG/776-18, 776A-18

The issue here was whether a Notice of Assessment was defective and could not stand in law because it did not mention the names of all transferors.

The Applicant, referring to s. 28 of the Land (Duties and Taxes) Act, explained that, while he admits the forwarding of the Notice of Assessment can be made to one of the transferors, the names of each of them should have been mentioned in it. He added that it was not enough in a transaction where there are some 20 parties to have the Notice issued to only one of them.

The ARC however concluded that as the law stood, in relation to a transaction which has several transferors, it simply stated that the Notice need to be forwarded to one of the transferor, although it poses practical problems as highlighted by the Applicant. The Committee also highlighted that the Notice of Assessment was at the same time addressed to the other transferors as well as it was clearly mentioned that the notice had been forwarded in the name of one Mr. Harel and others. The Committee added that, thus, in the

event that the assessment was maintained, all the transferors would be jointly and severally liable to pay Land Transfer Tax.

3. AVC VACATION CLUB LIMITED V/S DIRECTOR GENERAL-MRA ARC/IT/343-21

This matter was concerned with a decision by the Director-General of the MRA to disallow a claim for bad debts.

The Applicant was a company engaged in the selling of 'Club Points' to customers earning between 75,000 to 100,000 USD annually. The Customers had the option of purchasing the points outright by making a full payment or by paying monthly instalments under an 'Instalment Payment Contract'. The creditworthiness profiling exercise of customers were carried out by another company. According to the Applicant, in case of default by clients, the procedure for debt recovery consisted of making numerous phone-calls over a span of time and contacting the clients by email, giving them time to make payments. If there was still no payment or response after this, a 'Power of Sale' letter (which the Applicant considered to be a legal action) was issued to the defaulting customers as a final resort. The points were seized and put back for sale. The Applicant admitted that once the points were seized, the customers did not owe the Applicant.

The Applicant lodged seven grounds of representations before the ARC, all of which were set aside by the Committee as follows.

In its first ground, the Applicant contended that the Respondent was wrong to interpret s.60 of the Income Tax Act as requiring legal action to be taken against the defaulting customers. In setting aside this ground, the Committee explained that there is clearly no necessity for legal action for a debt to be declared "bad". However, in the matter at hand, the Respondent had rightly and clearly set out in his Determination that, according to s.60, the amount of debt or sum should be proved to have become bad, that is, even if no legal action was taken, the Respondent could be satisfied if there is proof that the debtors cannot be traced or have no assets. Yet, in this matter, no such proof such as credit records, profiling exercise, credit

worthiness of debtors, records of bankrupt debtors, or disclosure of current financial status of each debtor were available.

In its second ground, the Applicant contested the Respondent's findings that the Applicant did not act as a reasonable prudence commercial person and conclusion that there is no reasonable likelihood that debts will be paid. In setting aside this ground, the Committee explained that the Respondent could only rightly find and conclude so, given the circumstances. Indeed, the respondent had been able to demonstrate that not all debtors were untraceable by tracing and reaching *all* debtors out of a sample of 20 debtors. Moreso, there were no evidence that the debtors had no means to pay.

In its third ground, the Applicant stated that the Respondent failed to give any or due consideration to the Company's ground of objections for disallowing the amounts of bad debts. The Committee considered that the Respondent's compliance with s.7C of the MRA Act was sufficient to dispose of this ground.

In its ground 4, the Applicant contended that the Respondent failed to consider Statement of practice SP 9/11 in failing to find that certain debts owed to the Applicant were allowable as the Applicant was not required to take legal action against the debtors. In setting aside this ground, the Committee noted that it was clear from the record that SP 9/11 was considered, and also that the Applicant had not provided any evidence except an "Excel Sheet" to support its contention.

In ground 5, the Applicant contended that the Respondent failed to consider or give due consideration to the documentary evidence provided by the Applicant. In setting aside this ground, the Committee explained that Consideration was given to the documentary evidence made available but it was not to the satisfaction of the Respondent that the debt was irrecoverable.

In ground 6, the Applicant contended that the Respondent was unreasonable and in breach of natural justice by proceeding on a sample basis instead of assessing each debt on its individual merits. In setting aside this ground, the committee stated that the Respondent cannot be blamed in his assessment on a sample basis which showed that Applicant was wrong to say that all debtors were untraceable.

Finally, in its ground 7, the Applicant contended that the Respondent failed to guide it with respect to paragraph 3(iii) of the Statement of Practice SP 3/11. In setting aside this ground, the Committee began by highlighting that it should have been SP 3/09 instead of SP 3/11 (Applicant had made a mistake). The Committee then observed that the burden of proof was on the Applicant as per SP 3/09, and that sufficient guidance is provided for in SP 3/09 and 9/11.

4. L'AMICALE DE PORT LOUIS LTEE V/S DIRECTOR GENERAL-MRA ARC/VAT/126A-18

This was an interesting matter concerned with an unusual motion in relation to a Notice of Assessment (as opposed to a Notice of Determination of objection) made at a hearing before the ARC.

The Applicant in this matter was a private company operating a gaming house. The Respondent had raised an assessment on the Applicant. The latter objected to the assessment and was requested by the Respondent to produce information and documents in support of its objection. However, the Applicant submitted only explanations without documentary evidence. The Assessment was consequently maintained and the Respondent issued a Notice of Determination. Feeling aggrieved by the Notice of Determination, the Applicant made representations to the ARC. At the outset of the hearing before the ARC, the Applicant made a motion with regard to a particular paragraph of the Notice of Assessment as follows:

> *"please provide detailed particulars of the machine in respect of which the 455 jumps were detected as well as particulars of machines whereby 58 jumps were detected in March 2016"* [Emphasis is ours]

The Respondent objected to the motion stating that the particulars sought relate to the Notice of Assessment, when what it being challenged before the ARC, pursuant to s. 19(1) MRA Act, is the Notice of Determination.

This was the point of contention in this matter.

The ARC set aside the objection taken by the Respondent and allowed the motion made by the Applicant. The Committee explained that, in the particular circumstances of the matter at hand, the Assessment, the Objection and the Determination were inextricably linked in that the issue of "jumps" has been in contention between the parties throughout the process.

Indeed, the Notice of Determination itself read:

> *"With regards to the explanations received,….., kindly note that the 455 jumps in meter readings were found by comparing the meter …."* [Emphasis is ours]

Prior to the Notice of Determination, the Respondent had sent a letter to the Applicant requiring:

> *"Proper explanations in respect of the discrepancies found in the collector's reading and multiple jumps in meter readings ……"* [Emphasis is ours]

In reply to the letter, the Applicant provided the following information:

> *"….., L'Amicale is unaware of the alleged 455 jumps in meter readings between …….. L'Amicale contends that jumps in meter readings may be caused by machine breakdowns in a number of ways, including power failure,…….. However, L'Amicale is not aware as to the origin of the MRA's record of jumps and the causes of jumps."* [Emphasis is ours].

5. INDIA AGRI HOLDINGS LTD/MATIX FERTILISERS HOLDINGS LTD/FIRSTLAND HOLDINGS LIMITED V/S DIRECTOR GENERAL-MRA ARC/IT/268-19; ARC/IT/303-19 & ARC/IT/352-19

The issue here was whether the ARC had jurisdiction to hear the matter.

The Applicant's position was that s.124 Income Tax Act (ITA) gives the power to request for information, and that therefore request for information is always issued under s.124 and never under s.127. He added that s.127 ITA gives the timeline within which this information is to be provided and if it is beyond three years of assessment, the MRA must give reasons and if the taxpayer is not satisfied with the reasons, they have a right of recourse to the ARC.

Referring to correspondences between the parties where the MRA gave its reasons for requesting information beyond three years, the Applicant submitted that *if this was a notice*, then by virtue of s.127 (4) ITA, the aggrieved Applicant had the right to make representations before the ARC.

On the other hand, the Respondent argued that there was simply no evidence on record to show that a *notice* under s.127 (3) has been issued. The Respondent added that had he intended to issue a *notice*, it would have specifically stated so, and invited the Committee to refer to all the correspondences that have been addressed to the Applicant.

After considering the correspondences between the parties and the relevant law, the ARC concluded that it had jurisdiction to hear the present matter. The Committee explained that the Director-General of the MRA may request information under s.124 ITA and that in the matter at hand, even if the notice did not specifically mention s. 127 ITA as submitted by the Respondent, s.127 does take into consideration s.124. More importantly, the Committee stated, subsections 1 and 2 of s.127 read together gives the ARC the jurisdiction to hear the matter in relation to s.124 in respect of information beyond three years. The Committee stated that this is impliedly provided under s.127(3).

6. JES TRAVEL CONSULTANTS LTD V/S DIRECTOR GENERAL-MRA ARC/IT/536-16 & ARC/VAT/294-16

This was a matter concerning the non-payment of 10% for the OADR (Objections Appeal Dispute Resolutions Dept) of the MRA to consider the Applicant's objection.

The ARC found that the Applicant was in a position to pay the 10% but gave the latter a maximum of three months from the date of this decision to do so, so that the Respondent can consider its objection. In reaching this decision, the Committee had regards to the fact that the Applicant has been in the aviation sector for about 25 years. The Committee also noted from figures provided by the Respondent, which were confirmed by the Applicant, reveal that the Applicant was operating at a profit at the time the assessment was raised. Further, the Committee considered the fact that the aviation sector has picked up after the COVID pandemic. The Committee however balanced these with factors such as the difficulties

that the company had to face to operate and in order to maintain a proper cash flow so as to satisfy the requirement of the IATA (International Air Transport Association).

7. PATEL ENGINEERING LTD (PEL) V/S DIRECTOR GENERAL-MRA ARC/IT/134-19

The Respondent had raised an assessment on the Applicant, a company incorporated in India, claiming an amount of tax payable on accrued interest income arising to the latter in Mauritius on the loan facilities provided to its subsidiary, Waterfront Developers Ltd (WDL) – a Mauritian company. WDL, in turn, had claimed accrued interest amounts as expenses in its accounts during the period under review, and this was accepted by the Respondent.

The issue before the ARC was whether tax was payable on the accrued interest.

The Respondent contended that the accrued interest was taxable in light of s.5 of the Income Tax Act (ITA) and Article 11 of the Convention between Mauritius and India for the avoidance of Double Taxation and the prevention of Fiscal Evasion (DTAA) while the Applicant denied same.

The ARC upheld the argument of the Respondent. The Committee explained that, in light of Article 11 (2) of the DTAA, the present interest arises in Mauritius and need to be taxed according to the laws of Mauritius. The Committee also took the view that the fact that the interest due had been treated as an expense by WDL and accepted by the Respondent, that sum of money had therefore been dealt with in the interest of the Applicant as per s.5 (2) (b) ITA.

8. LOGENDRA APPAYA V/S DIRECTOR GENERAL-MRA ARC/CUS/85-18

The Applicant was offered an employment contract as 'Adviser on Legal issues' at the Ministry of Housing for one year, which made him eligible for 100% exemption on a car with engine capacity of up to 1601 cc or a car of higher engine capacity not exceeding 2250 cc. Three months after, the Applicant was granted Excise Duty concession on a motor vehicle of engine

capacity 1984 cc. Subsequently, Applicant was offered an employment contract as 'Senior Adviser' in the Ministry of Housing for one year which made him eligible for a 100% remission on a car with engine capacity of up to 1850 cc or a car of higher engine capacity not exceeding 2500 cc. Two years after, his contract of employment expired and was not renewed.

Some months after, the Respondent informed the Applicant through Notice that proportionate duty and taxes was payable on the car. Applicant objected to the said Notice, but same was disallowed, and a Notice of Determination issued by the Respondent. Feeling aggrieved by the Notice of Determination, the Applicant made representations before the ARC.

The issue to be determined by the ARC was whether the Respondent was right to have claimed proportionate Excise duty and taxes payable on expiry of the Applicant's contract of employment.

The ARC set aside the Applicant's representations. In reaching this decision, the Committee, relying on the case of ***J.M. Richard v/s The Comptroller of Customs (in the presence of the Tax Appeal Tribunal)*** **1999 SCJ 277**, took the view that the Applicant was granted the concession under the Customs Tariff Act (CTA) and exclusively due to the post held, not on the basis of a contract between him and the Ministry of Housing. The Committee also highlighted that the Applicant had signed an undertaking that he would refund proportionate duties in the even that his contract expired.

9. PREMCHAND PAUHALOO V/S DIRECTOR GENERAL-MRA ARC/IT/163-20

The Applicant was employed at a casino and was also a vegetable seller. After he had submitted his returns of income, an audit was initiated, and he was requested to submit information and documents. The Applicant did so but failed to submit a breakdown of cost of construction supported by documentary evidence. The cost of construction was then estimated based on information available at the MRA. Then, a capital computation was worked out based on this estimated cost of construction, documents submitted, and

information available, and this revealed undisclosed income. The Applicant was apprised of the basis of the assessment of the capital computation and a copy submitted to him. This was followed by a contemplation letter again informing him of the basis of the Assessment and requesting him to submit his views on the undisclosed income noted, which the Applicant did not respond to. Thereafter, the Respondent issued assessments based on the capital computation. The Applicant objected to the Assessments. The Assessment was revised after submission of requested documents and information, and a Notice of Determination issued. Feeling aggrieved by the decision of the Respondent, the Applicant filed representations with the ARC.

The ARC found no reason to interfere with the Respondent's Notice of Determination and set aside all the grounds of representations as follows.

The first ground contended that the Respondent's assessment was "arbitrary, unjustified and exaggerated". However, after considering the evidence on record, the Committee found the opposite, that the Respondent's assessment satisfied the "best of judgement" standard save for "Cost of labour" and "Cost of importation of Household Items" which the committee stated should be excluded from the capital computation. The Committee accordingly set aside ground 1.

The Second ground contended that the penalty was unwarranted. In setting aside this ground, the Committee explained that this could not be as the penalty was imposed by law and the relevant legislation was specifically mentioned in the Notice of Assessment.

The Third ground contended that the cost of the building as at 30.06.2019 was overstated and not as per cost valuation by the Engineer. The Committee took the view that this ground could not stand because the cost of the building as at 30.06.2019 was fair & reasonable while the valuation of the Civil Engineer was unreliable.

Ground 4 contended that a wall was built "well before the acquisition of land". In setting this aside, the committee explained that whilst the undated photograph produced by the Applicant could not substantiate the latter's claims, the title deed produced by the Respondent showed that it was part and parcel of the house construction.

Ground 4 *bis* (there were two grounds numbered '4' in Applicant's representations), contended that the Applicant did not spend huge sums on living expenses. In failing this ground, the committee explained that the Applicant himself had to revise his figures from Rs 8,000 to Rs 17,000, but even this revised figure was not reasonable for the committee – these were lower than the Income Exemption threshold for that category.

Ground 5 & 7 were both in relation to annual allowance on motor vehicle. Both failed as there was not even a claim in the Applicant's return initially.

Finally, Ground 6, which concerned the Applicant's foreign trip, was found to be unconvincing because the committee found it difficult to believe that the Applicant who claimed to be a "small planter", to have supposedly paid trips to Madagascar and India to find labour, seeds, fertilisers, and equipment.

10. PROVIDENCE LIFE LIMITED PCC V/S DIRECTOR GENERAL-MRA ARC/IT/490-19

This was quite an interesting decision concerning the time-limit for the MRA to raise an assessment.

The Respondent had raised assessments on the Applicant for the period January 2015 to June 2015 and for the period July 2015 to June 2016. The Notice of Assessment was issued by the MRA on 27 June 2019 (i.e. in Year of Assessment 2018/2019) and received by the Applicant on the 1 July 2019 (i.e. in Year of Assessment 2019/2020).

The Applicant contended that Assessments for both periods, i.e. January 2015 to June 2015 and July 2015 to June 2016, were time-barred.

The ARC took the view that only the period January 2015 to June 2015 was time-barred whilst the period July 2015 to June 2016 was not.

In reaching this decision, the Committee first noted that the Respondent ought to have withheld PAYE in relation to certain payments made to Directors of the Company and that

therefore, on the 27 June 2019, the Respondent had issued an assessment under s.129A of the Income Tax Act (ITA) for which the prescription period is provided under s.130 of the Act:

> ***130. Time limit to make assessments***
>
> *(1) Subject to subsection (2), the Director-General shall not, in a year of assessment, make an assessment under section 129 or 129A in respect of a period beyond 3 years of assessment preceding the year of assessment in which a return under section 112, 113, 116 or 119, as the case may be, is made.*
>
> *(2) The Director-General may, at any time, make an assessment under*
>
> *section 129 or 129A –*
>
> *(a) where a return of income under section 112,116 or 119, as the case may be, in respect of a year of assessment has not been made; or*
>
> *(b) in case of fraud.* [Emphasis is ours]

The Applicant contended that the prescriptive period started at the date of **receipt** (1 July 2019) rather that at the date of **posting** (28 June 2019) of the Notice of Assessment, and that the latter was therefore beyond 3 years. Drawing an analogy from the English case of ***Southwark London Borough Council v Runa Akhtar Stel LLC (Southwark)*** **[2017]**, the Committee took the opposing view that since there was no evidence that the Notice of Assessment was not properly addressed, prepaid, and posted, the Notice was deemed to have been properly served on the taxpayer. Accordingly, the Committee concluded that since the Assessment was raised in the year of assessment 2018/2019, the Assessment for the period July 2015 to June 2016 fell within the 3 years immediately preceding the year of assessment in which return is made. The Assessment for the period July 2015 to June 2016 was therefore not time barred.

As for the period January 2015 to June 2015, the Committee noted that in the case of companies, there is a period of 6 months to file return from the end of the month in which its accounting period ends as per s.116 of the ITA:

> ***116. Return of Income by companies***
>
> *(1) Subject to the other provisions of this Act, every company, non-resident société, cell of a protected cell company, Foundation, trust other than a trust to which section 46(3) applies or trustee of a unit trust scheme, whether or not it is a taxpayer, shall submit to the Director-General, not later than six months from the end of the month in which its accounting period ends, a*

return in such manner and in such form as may be approved by him specifying-… [Emphasis is ours]

The Committee also considered that as far as return date was concerned, s.118A ITA was applicable in the matter at hand as a company is given six months to file its return:

118A. Return of income in respect of approved return date

Subject to this Act, where a person has an approved return date ending on a date falling on or between –

(a) 1 January and 29 June, a return submitted or required to be submitted under section 116 shall be considered to be in relation to the income year ending on 30 June following that return date; and

(b) 1 July and 31 December, a return submitted or required to be submitted under section 116 shall be considered to be in relation to the income year ending on 30 June preceding that return date. [Emphasis is ours]

In the matter at hand, the returns with regards to PAYE, for the period January 2015 to June 2015 ought to have been made by 31 December 2015 at latest. Accordingly, that would have been in respect to the income year ending 30 June 2015(i.e. the year of Assessment 2014/2015). The Committee therefore concluded that the period of January 2015 to June 2015 was time-barred.

Selected Decisions delivered by the Supreme Court

1. SMIT SALVAGE PTE LTD V THE ASSESSMENT REVIEW COMMITTEE & ANOR [2024] SCJ 59

Following the infamous MV Wakashio disaster, the Appellant (who had a contract for the salvage of the vessel) entered into an agreement with the Police Helicopter Squadron (PHS) in respect of fully manned helicopters for the salvage operations. Subsequently, in order to ascertain the VAT implications of the leasing of helicopters by PHS, the Appellant applied to the Director-General of the MRA for a ruling under s.69A of the VAT Act.

The relevant part of s.69A reads as follows:

> *(1) A person, who in the course or furtherance of his business, makes taxable supplies, may apply to the Director-General for a ruling as to the application of this Act to any of the supplies made to him or made by him.*
>
> *(2) ……..* [Emphasis is ours]

Being dissatisfied with the ruling, the Appellant lodged representations before the ARC under s.40 (1) of the VAT Act to challenge it. The ARC decided to set aside the Appellant's representations because it considered that it had no jurisdiction to review the ruling issued by the Director-General of the MRA.

In this appeal by way of case stated, the Supreme Court quashed the decision of the ARC and remitted the matter back to the ARC to be heard on its merits.

In reaching this decision, the Court analysed the jurisdiction of the ARC which is set out in section 19(1) of the MRA Act. It reads as follows:

> *(1) …… any person who is aggrieved by a decision, determination, notice or claim under any of the enactments specified in the Fifth Schedule may, ……, lodge ….., written representations, ……..asking for a review of the decision, determination, notice or claim, ……..*" [Emphasis is ours]

The relevant part of the Fifth Schedule applicable to the present matter reads as follows:

"…the Value Added Tax Act in so far as it relates to section 40 and 66."

[Emphasis is ours]

The relevant part of section 40 of the VAT Act reads as follows:

> *1) Any person who is aggrieved by a decision of the Director-General —*
>
> *(a) as to whether or not a supply of goods or services is a taxable supply;*
>
> *(b) …… may lodge written representations with the Clerk to the Assessment Review Committee in accordance with section 19 of the Mauritius Revenue Authority Act 2004.* [Emphasis is ours]

The issue to be resolved by the Supreme Court, therefore, was whether a ruling given by the MRA under s.69A of the VAT Act on the issue of taxability of the supply of goods and services amounts to a "decision" within the meaning of s.40 of the VAT Act.

The Court concluded that the ruling given by the Director-General of the MRA necessarily amounted to a decision since it emanated from the Director-General, who, by law made a pronouncement in respect of a matter submitted to it "as to whether or not a supply of goods or services is a taxable supply", and it bore the stamp of the MRA (thus carrying weight). The Court also found no ambiguity in s. 40(1)(a) of the VAT Act which may lead to the conclusion that a ruling is not a decision.

Furthermore, the Court highlighted that there is nothing in s.40 VAT Act which suggests that an assessment is a condition precedent to challenge the decision of the MRA, and that such an interpretation would be limiting the full applicability of s.40 and render s.40(1)(a) inoperative.

For these reasons, the Court concluded that the ARC was wrong in law in its determination that a ruling issued by the Director-General of the MRA under s.69A of the VAT Act does not amount to a decision of the MRA and concluded that the ARC was wrong to reach the decision that it had no jurisdiction to review the ruling of the Director-General of the MRA.

2. MODE YELLOW HOLDINGS LIMITED V THE DIRECTOR-GENERAL, MAURITIUS REVENUE AUTHORITY & ANOR [2024] SCJ 70

The Appellant, a Global Business License Category 1 company, is in the business of providing products to customers of telecommunications companies and other utility service providers. The Mauritius Revenue Authority (MRA) had issued a notice of assessment against the Appellant based on audit in relation to three aspects, including "Foreign Tax Credit".

After receiving new documents from abroad, the Appellant moved to amend its ground of representations made to the ARC from *"we are agreeable to the 80% deemed tax credit"* to *"pursuant to section 77 of the Income Tax Act and the Income Tax (Foreign Tax Credit) Regulations 1996 (GN 80 of 1996), the company should be allowed foreign tax credit for an amount being the higher of the foreign tax suffered and the 80% deemed foreign tax credit"* – a totally different stand from its initial acceptance of 80% deemed credit.

The ARC, in its ruling, refused the Appellant's motion for an amendment of representations on foreign tax credit, and this led to this appeal by way of case stated. It is to be noted that the ruling pertained only to the motion for amendment and was therefore not a final decision taken on the merits of the case.

The issue was whether an appeal could lie against the ruling of the ARC in this case.

Right from the beginning, the MRA raised a preliminary objection to the hearing of this appeal on the grounds that the ruling is not a final decision against which an appeal lies to the Supreme Court.

The Supreme Court decided to uphold the MRA's preliminary objection and set aside the appeal. In reaching this decision, the Court explained that an appeal may only lie from the final decision of the ARC on a matter before it, and not otherwise, because the words "*the decisions of the Committee"* (and not *"a decision*…") in s.21 of the MRA Act (see below) can only refer to a final decision of the Committee, as opposed to any decision. Further, considering Rule 4(2) of the Assessment Review Committee (Appeal) Rules 2007, the Court took the view that a case can only be stated on a final decision. The Court reasoned that interpreting s.21 as also applying to non-final decisions will only give rise to a situation

where hearings before the ARC will be stalled by appeals to the Supreme Court *every* time a party is dissatisfied with a ruling during a hearing.

The relevant part of **s.21(1) of the MRA Act** reads as follows:

> a) *Any party who is dissatisfied with the decision of the Committee under section 20(7), as being erroneous in law, may lodge in the Registry of the Supreme Court an appeal against that decision.*
>
> b) .....
>
> [Emphasis is ours]

The Court also noted no statutory basis in the MRA Act for allowing appeals against non-final decisions.

The Court therefore concluded that no appeal lied against the ARC's Ruling in that case.

Interestingly, by the end of the judgement, the Court remarked "that it is not ideal for a Committee such as the ARC to function with more formalism than tribunals or courts", and that "a party who seeks to amend a representation following the receipt of documents from abroad should hardly have to deal with the level of black letter methodology that has been given in the ruling at hand".

We find it apposite to remind our readers of the case of ***Ayesha Hassam Rawat v Assessment Review Committee & Anor*** **[2020 SCJ 86]** which was also concerned with appeals to the Supreme Court against rulings of the ARC, but where the preliminary objection of the MRA, that the ruling was not a final decision against which an appeal lied to the Supreme Court, was set aside and the appeal was considered and allowed.

The Appellant in ***Ayesha Hassam Rawat*** had made representations to the ARC against a notice of the Director-General of the MRA directing her to furnish information in respect of a period beyond the statutory time limit. Then, while the case was still pending before the ARC, the Appellant filed an additional ground of representation which reads as follows:

> *"By virtue of the Finance Act 2016*(sic), *which amends the Mauritius Revenue Authority Act 2004, and creates an independent Tax Panel at PART IVA – INDEPENDENT TAX PANEL. The new s21A and s21B give the description and functions of the said Panel.*

By virtue of the said s21B(2)(a) of the all(sic) *enquiry, or request for information or return (the case of Mrs Ayesha Rawat is a request for information) initiated before the commencement of s21A, the enquiry or request shall lapse unless the Director-General applies ex parte for and obtains the authorization of the Independent Tax Panel.*

As per the Finance Act the new Part IVA came into operation on 1 June 2016 by Proclamation No. 10 of 2016 and the record will show that the request for information was initiated in November 2015.

Appellant further wishes to put on record that she objects to any such ex-parte application being instituted now in an attempt to cure the defect after the points have been raised by Appellant on appeal and in the present letter.

In the light of the above I move that the request for information be set aside."

[Emphasis is ours]

The ARC, however, delivered a Ruling setting aside the additional ground point and directed the case to continue. The Appellant then appealed to the Supreme Court against this Ruling.

In setting aside the preliminary objection of the MRA, the Court considered that the question as to whether the request for information had lapsed was a material one that had direct effect on the proceedings before the ARC.

3. HEERALALL N. v THE DIRECTOR-GENERAL, THE MAURITIUS REVENUE AUTHORITY [2024] SCJ 56

Best Flour & Co. Ltd ("the Company") was indebted to the Mauritius Commercial Bank Ltd ("the Bank"). The Bank subsequently caused, on 17 March 2016, fixed and floating charges to be inscribed on two immoveable properties ("the properties") forming part of the assets of the Company pursuant to Article 2202 of the Civil Code. Further, on 7 November 2017, the Bank appointed the Appellant as Receiver and Manager of the Company. Then, on 12 October 2017, the Respondent caused a "privilege" in the amount of Rs 1,771,906, in respect of tax due to and payable by the Company, to be inscribed on the same two properties pursuant to s.21L of the Mauritius Revenue Authority Act.

In order to proceed with the sale of the properties, the Appellant had made written request to the MRA for the erasure of the privilege, but the latter stated that its privilege on the Company's assets ranked in priority to the Bank's fixed and floating charges. However, after discussions, the MRA agreed to erase the privilege on condition that the Appellant retained the Rs 1,771,906 in an escrow until the determination of an application made by the Appellant to the Bankruptcy Division of the Supreme Court for an order giving directions as to which of the Charge registered and inscribed, the Bank's or the MRA's, ranked in priority. The Appellant did so. The Judge concluded that the MRA is entitled to be paid its debt in preference to the Bank since it had inscribed its privilege pursuant to section 21L of the Mauritius Revenue Authority Act, and the more so since that no sale could have taken place without the MRA consenting to the erasure of the privilege.

In this appeal, the Appellant challenged the decision of the Judge.

The sale of the Company's properties having taken place, the issue was one of distribution of the proceeds of sale between the Company's two creditors: the Bank and the MRA.

After analysing the relevant law, namely, s.81A of the Income Tax Act, s.21L & s.21M of the MRA Act, S.204 of the Insolvency Act, Articles 2143, 2148, 2149, 2152, and 2202-55 of the Civil Code, the Court noted that the current state of the law in relation to privilege is unsatisfactory and prone to create confusion and uncertainty among stakeholders. In particular, the court noted the lack of regulations prescribing the ranking of claims of preferential and secured creditors. It therefore took the opportunity to call the legislator to take the appropriate action remedy the situation.

The Court then took the view that the only possible and sensible interpretation and application of the law, despite its current state, to the facts at hand would be to allow the MRA to recover the amount of tax in accordance with s.21M and articles 2149 and 2152 of the Civil Code i.e. tax payable for a maximum of 12 months. Regarding the remaining amount of tax, if any, that will be due and payable after deduction of tax calculated under section 21M and articles 2149 and 2152, the MRA will rank after the Bank since it has inscribed its privilege after the charges of the Bank i.e. the MRA will rank after the Bank in whatever amount of tax will be due to it after deduction of the amount of tax payable for a period of 12 months.

Important Legislations and Legislative Amendments

1. THE INCOME TAX (AMENDMENT) REGULATIONS 2024

- Please refer to the principal regulations: **The Income Tax Regulations 1996 (ITA 1996)**.

- **Regulation 22 of the ITA 1996 has been amended** as follows:
  - In paragraph (3)(b):
    - The words “another Category of income exemption threshold or reliefs and allowances" have been deleted, and replaced by the words “a lower or higher amount of reliefs, deductions or allowances".
    - The words "new category of income exemption threshold or reliefs and allowances" have been deleted, and replaced by the words “amount of reliefs, deductions or allowances"

  - In paragraph (4):
    - In subparagraphs (a), (b), (c), (d), and (f), the words “income exemption threshold or reliefs” have been deleted, and replaced by the words “reliefs, deductions”.
    - In subparagraph (d), the words “entitled under section 27” have been deleted, and replaced by the words “entitled under Sub-part C, D or E of Part III”, and the words “under that section” have been deleted and replaced by the words "under those Sub-parts".
    - Subparagraphs (e) and (ea) have been revoked, and replaced by the following subparagraphs:

      (e) For the purpose of section 96(1) of the Act, the amount of income tax to be withheld from the emoluments of an employee in respect of a month shall, subject to paragraph (f), be the cumulative tax less the amount of tax already withheld from the emoluments of the employee for the previous months in that income year.

(ea) The cumulative tax for a month shall be calculated on the cumulative chargeable income of the employee for that month at the rates specified in the Fourteenth Schedule.

- A new subparagraph has been inserted after subparagraph (ea) and reads as follows:

  (eb) The cumulative chargeable income for a month shall be calculated by applying the following formula –

  EM—ET

  where –

  EM is the sum of the amount of emoluments for the month in respect of which tax is calculated and the amount of all emoluments taken into account for the previous months in the income year; and

  ET is the sum of the amount of reliefs, deductions and allowances allowable for the month in respect of which taxis calculated and the amount of reliefs, deductions and allowances allowed for the previous months in the income year.

- <u>In paragraph (4A):</u>
  - In subparagraph (c), the words "income exemption threshold or reliefs" have been deleted, and replaced by the words “reliefs, deductions”.

- <u>Paragraph (4C) has been revoked.</u>

- <u>In paragraph (7)(a):</u>
  - In sub subparagraph (iv), the words "income exempted in accordance with the Third Schedule to the Act" have been deleted, and replaced by the words "reliefs, deductions and allowances claimed in his Employee Declaration Form".
  - In sub subparagraph (v), the words "income exemption threshold or reliefs" have been deleted, and replaced by the words “reliefs, deductions”.

- By revoking sub subparagraph (vii); the words "; and" at the end of sub subparagraph (vi) have accordingly been deleted, and replaced with a full stop. The word "and" has accordingly been added at the end of sub subparagraph (v).

- **Regulation 23D of the ITA 1996 has been amended** as follows:
  - <u>In paragraph (2):</u>
    - In subparagraph (a), the words "for the purpose of" have been deleted, and replaced by the words "for the purpose of section 44D of the Act".
    - In subparagraph (b), a new sub subparagraph has been added and reads as follows:

      (x) section 44D of the Act, the manufacturing of –

      (A) a chemical product, preparation, biological product or other substance intended for use in the diagnosis, cure, mitigation, treatment or prevention of any ailment, infirmity or injury affecting a human being or an animal or for dental treatment;

      (B) any instrument, apparatus, implement, machine, appliance, implant, reagent for in vitro use, material or other similar or related article, intended by the manufacturer to be used, alone or in combination with any of the above articles, for a medical purpose;

      (C) products through the use of biological processes, namely living organisms.
    - By adding the above new sub subparagraph, the full stop at the end of sub subparagraph (ix) has accordingly been deleted and replaced by a semicolon.

- **The Seventh Schedule of the ITA 1996 has been amended** as follows:
  - <u>Under the Heading "**EMOLUMENTS NET OF EXEMPT INCOME**":</u>

- The words "Income exemption threshold" have been deleted, and replaced by the words “Reliefs, deductions and allowances”.

- **A Fourteenth Schedule has been added to the ITA 1996**.

- Regulations effective as from 1 July 2023.

2. THE SOCIAL CONTRIBUTION AND SOCIAL BENEFITS (INDEPENDENCE ALLOWANCE) REGULATIONS 2024

- For the purpose of s.30D(5) of the **Social Contribution and Social Benefits Act 2021**, where an eligible youth is a person with disabilities and is unable to open a bank account, the Director-General may pay the independence allowance into a bank account held by another person as the Director-General may approve. [Emphasis is ours].

- Of note, “Director-General” above means Director-General of the MRA.

- Regulations effective as from 23 November 2023.

International Tax update

Note: ***Italic Bold*** means added and ~~strikethrough~~ means deleted.

1. **OECD MODEL TAX CONVENTION ON INCOME AND ON CAPITAL 2017**
    - Paragraphs 11 & 12 of the Commentary on Article 26 of has been updated as follows.
    - Paragraph 11:

        Reciprocal assistance between tax administrations is feasible only if each administration is assured that the other administration will treat with proper confidence the information which it will receive in the course of their co-operation. The confidentiality rules of paragraph 2 apply to all types of information received under paragraph 1, including both information provided in a request and information transmitted in response to a request. Hence, the confidentiality rules cover, for instance, competent authority letters, including the letter requesting information. At the same time, it is understood that the requested State can disclose the minimum information contained in a competent authority letter (but not the letter itself) necessary for the requested State to be able to obtain or provide the requested information to the requesting State, without frustrating the efforts of the requesting State. If, however, court proceedings or the like under the domestic laws of the requested State necessitate the disclosure of the competent authority letter itself, the competent authority of the requested State may disclose such a letter unless the requesting State otherwise specifies. ***The confidentiality rules also apply to reflective non-taxpayer specific information (i.e. information about or generated on the basis of the information that was received by a Contracting State through the exchange of information such as, statistical data, as well as non-taxpayer specific notes, summaries, and memoranda incorporating exchanged information). However, such reflective non-taxpayer specific information may be disclosed to third parties if the information does not, directly or indirectly, reveal the identity of one or more taxpayers and the sending and receiving***

States have consulted with each other and it is concluded that the disclosure and use of such information would not impair tax administration in either the sending or the receiving State. It is understood that there should be a written record of this consultation and its outcome. Consistent with established practice, this consultation and conclusion (and the written record of such consultation and conclusion) can also be achieved in the multilateral context, where the disclosure and use are foreseen in a multilateral process, such as a peer review methodology. The maintenance of secrecy in the receiving Contracting State is a matter of domestic laws. It is therefore provided in paragraph 2 that information communicated under the provisions of the Convention shall be treated as secret in the receiving State in the same manner as information obtained under the domestic laws of that State. Sanctions for the violation of such secrecy in that State will be governed by the administrative and penal laws of that State. In situations in which the requested State determines that the requesting State does not comply with its duties regarding the confidentiality of the information exchanged under this Article, the requested State may suspend assistance under this Article until such time as proper assurance is given by the requesting State that those duties will indeed be respected. If necessary, the competent authorities may enter into specific arrangements or memoranda of understanding regarding the confidentiality of the information exchanged under this Article.

- Paragraph 12:

  Subject to paragraphs 12.3 and 12.4, the information obtained may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes with respect to which information may be exchanged according to the first sentence of paragraph 1, or the oversight of the above. This means that the information ***(whether obtained with respect to one or multiple taxpayers)*** may also be communicated to the taxpayer ***(***or his proxy***) to the extent that such***

information has a bearing on the outcome of a tax matter concerning such taxpayer, or to the witnesses. ***As an example, in the context of an exchange of information that contains information with respect to multiple taxpayers, the principle set out in the preceding sentence means that a taxpayer is a "person concerned" only to the extent that the information has a bearing on the outcome of a tax matter concerning that particular taxpayer.*** ~~This also means that~~ ~~i~~***I***nformation can ***also*** be disclosed to governmental or judicial authorities charged with deciding whether such information should be released to the taxpayer, his proxy or to the witnesses. The information received by a Contracting State may be used by such persons or authorities only for the purposes mentioned in paragraph 2. ***Such use is not limited to the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to the taxes referred to in paragraph 1 in respect of the person or persons for which the information was received, but also includes the use for such purposes in respect of any other person. The receiving Contracting State is not required to inform or to request authorisation from the sending Contracting State regarding such use. Except as provided in paragraph 11*** ~~Furthermore~~, information covered by paragraph 1, whether taxpayer-specific or not, should not be disclosed to persons or authorities not mentioned in paragraph 2, regardless of domestic information disclosure laws such as freedom of information or other legislation that allows greater access to governmental documents.

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 and 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.

Ahmed Richard Bhurtun

Barrister and Founder of Bhurtun Chambers

Email: info@bhurtunchambers.com

Phone: +230 260 6030

Website: bhurtunchambers.com