

IN THE SUPREME OF BELIZE A.D., 2008

CLAIM NO. 443 OF 2008

BETWEEN: 1. BELIZE TELEMEDIA LIMITED FIRST CLAIMANT
2. BUSINESS ENTERPRISE SYSTEMS LIMITED SECOND CLAIMANT
3. BTL DIGICELL LIMITED THIRD CLAIMANT

AND

THE ATTORNEY
GENERAL OF BELIZE FIRST DEFENDANT
(on behalf of the
Commissioner of Taxes)

Mr. Eamon Courtenay S.C., with Dr. Elston
Kaseke, for the applicant.
Ms. Lois Young Barrow S. C., for the respondent

AWICH J.

18.7.2008

J U D G M E N T

- Notes: Income and business tax law; when tax becomes payable and a debt – assessment by the Commissioner of Taxes, review by the Commissioner, and appeal to the Income Tax Appeal Board and to the Supreme Court;*

ss: 38, 40, 42, 53, 54, 55, 56, 57 and 111 of the Income and Business Tax Act; jurisdiction of the magistrate to issue summons requiring the taxpayer to show cause why the magistrate may not issue an order to pay in a particular manner and time – ss: 64 and 65; whether s: 112 of the Supreme Court of Judicature Act suspends the order made by the magistrate on appeal by the tax payer; whether ss: 112 is inconsistent with s: 56 of the Income and Business Tax Act and the intention and scheme of the Act.

2. The claimants, Belize Telemedia Limited, Business Enterprises Systems Limited and BTL Digicell Limited, by their joint fixed date claim dated 4.7.2008, filed on 7.7.2008, seek from this court, “[a] declaration that the effect of section 112 of the Supreme Court of Judicature Act, Cap 91, is to suspend the execution of the decision made by the revenue magistrate Ed Usher, dated 24 June 2008, against the claimant”. They seek no other relief apart from costs. The claimants cited as defendants, the Attorney General and “Magistrate Ed Usher”. There is no justification whatsoever for citing the magistrate; this is not a judicial review proceeding.

3. The decision and orders made by His Honour, the Magistrate, were the following:

“1. That the matter was heard pursuant to **s 64 (1)**

of the Income Tax Act Cap 55, and the order was made pursuant to s 65.

2. That once the judgement summons was issued and the defendant is brought before the court, the only issues, that are to be addressed are; whether the defendant has reason/cause as to why he should not be ordered to pay the amount as a judgment debt pursuant to s 64, and if the court finds that the defendant does not have cause then the court shall order the defendant to make payment as per s 65.
3. That the defendant shall pay the above mentioned sum in two equal parts one on the 1st July 2008, and one on the 8th July 2008.
4. That the Commissioner of Income Tax (CIT) shall not be ordered to attend as a witness”.

4. The total sum which the Commissioner of Income Tax (Commissioner of Taxes) presented as payable by the claimants was \$4,663,250.93.

5. The claimants appealed the decision of the magistrate immediately on 26.4.2008, to the Supreme Court. They believed that by their appeal, the order of the magistrate requiring them to make payments, on 1.7.2008 and on 8.7.2008, would automatically be suspended by s: 112 of the Supreme Court of Judicature Act, so they would not be required to make the two payments on the specified dates, while their appeal remained pending.

6. They were mistaken; the magistrate issued a warrant of arrest on 4.7.2008, after they had failed to make the first payment by 1.7.2008. As the result, the claimants made payment of the first one – half sum “under protest”, and the warrant was cancelled. The claimants since believed that the defendant intended to apply for another warrant of arrest if payment of the second one-half sum was not made by 8.7.2008, and so they applied to this court for a court declaration that; s: 112 of the Supreme Court of Judicature Act suspended the order

made by the magistrate on 24.6.2008. If the declaration is made by this court, the claimants would have no duty to make payment in the manner and time ordered by the magistrate; and the arrest warrant of 4.7.2008, would have been issued wrongly, and another would not issue after 8.7.2008.

7. The claimant requested an early hearing date of the claim for the reason that the magistrate would issue a warrant of arrest if payment of the second one-half sum was not made by 8.7.2008. I directed an early hearing, on notice to the defendant, on 10.7.2008, which was only three days later and directed further, that the usual preliminary first hearing was dispensed with.
8. However, on 8.7.2008, the day after the claim was filed, the claimants filed an urgent application without notice to the respondent/defendant, asking for an interim injunction order restraining the respondent from acting on that part of the order made by the magistrate, requiring that payment of the second instalment be made by 8.7.2008. The claimants also asked for an order that a warrant for arrest of their officers may not issue if the payment was not made by the close of

office hours. I heard the application the following day, 9.7.2008. The respondent attended by counsel and was heard, notwithstanding that the application was made without notice. That is the accepted practice of court.

9. I dismissed the urgent application without notice. It was my view, under the pressure of the short time, that the effect of an injunction restraining enforcement of payments as ordered by the magistrate would be to stop or suspend payment of the tax assessed altogether; and that would be in conflict with ss: 53, 56, 62 and 111(5) of the Income and Business Tax Act, and the intention of the specific Act on the subject matter, which was the governing Act. With the benefit of time and quiet, and less pressure over the week –end, that is no longer my view.
10. Suspension of the order of the magistrate has only a limited effect, that payment will not be collected in the manner and on the dates directed in the order. The underlying tax debt and the obligation of the tax-payer to pay it, and the duty and responsibility of the Chief Collector (the Commissioner) to collect the debt, are not suspended. The

Chief Collector could revert to collecting the debt in the other ways available under the Act. Many of those ways do not even require authorisation by court. Moreover, for sums over the jurisdiction of the magistrates' court, it is open to the Chief Collector to apply to the Supreme Court for any collection order deemed effective – see s: **57 of the Income and Business Tax Act**, and **s: 95 of the Constitution** for the general extent of the jurisdiction of the Supreme Court.

Determination.

11. Section 112 of the Supreme Court of Judicature Act provides:

“112. (1) Subject to subsection (2), (3) and (4), when the appellant has given notice and security for appeal as prescribed by rules of court, the execution of the decision under appeal shall be suspended until the appeal is determined by the Court or is abandoned, and if the appellant is in custody he shall be released on the order of the magistrate, unless he has elected to continue to undergo his sentence pending the appeal”.

12. There are exceptions to the above provision; they are set out in subsections (2), (3) and (4). The exceptions concern decisions of a magistrate in criminal cases, and how to deal with vehicles and aircrafts, which may have been the subjects of orders made by a magistrate and therefore the subjects of appeals. The exceptions are not relevant to this claim.

13. In this substantive claim learned counsel Mr. Aemon Courtenay SC, for the claimants, submitted that the words and meaning of s: 112 of the Supreme Court of Judicature Act were very clear that an order made by a magistrate is suspended when there has been an appeal. He pointed out that the exceptions to the suspension did not include orders made by a magistrate under s: 65 of the Income and Business Tax Act.

14. Ms. Lois Young Barrow S.C., learned counsel for the Attorney General, urged the Court to reject the interpretation of s: 112 of the Supreme Court of Judicature Act offered by Mr. Courtenay because, Ms. Young Barrow submitted, the interpretation was inconsistent with the intention and the scheme of the Income and Business Tax Act.

She said that the intention and the scheme of the Act was that a tax payer had to, “pay now and get a refund later”.

15. For a good understanding of the reasons for my determination, I need to state; and it was a common submission by both counsel that: tax under the Income and Business Tax Act becomes a debt on an assessment made by the Commissioner and notified to the tax-payer, which assessment the tax-payer has accepted; or if the tax-payer has not accepted the assessment, on an assessment made on a review by the Commissioner, pursuant to the objection; or if the assessment on review has not been accepted by the tax-payer, on an assessment by the Income Tax Appeal Board pursuant to an appeal by the tax-payer against the decision of the Commissioner on review. I may add that an assessment also becomes a debt after an appeal on a point of law to the Supreme Court, the result of which is that tax is due for an amount determinable in accordance with the decision on the point of law. The relevant sections are: *38, 39, 40, 42, 43, 44, 53, 54, 55, 56, and 57 of the Act. Section 111(5)* directs that the first cited sections apply to business income as well.

16. It was also a common submission by counsel that the proceeding at the magistrate's court under s: 64 of the Income and Business Tax Act, was only an enforcement procedure, a collection procedure. Section 64 and the related s: 65 state as follows:

“64 –(1) Notwithstanding that the name of the person who has made default in the payment of the tax is included in a list to any warrant authorising a levy as provided in section 63, the Chief Collector may at anytime that such tax remains unpaid cause the operation of the said warrant to be suspended as against such defaulter and in lieu thereof to apply to the magistrate of the district in which the person in default is for the time being staying or residing, for a summons directing the defaulter to attend before such magistrate, at a time to be named in the summons, to show cause why he should not be ordered to pay the amount aforesaid, as a judgment debt, and the magistrate may issue summons and cause it to be served, and

deal with the defaulter in such manner as is provided in section 65”.

(2) ...

Judgment Debtor Process

“65 If a summons for enabling the defaulter to show cause as mentioned in section 64 is issued, the magistrate may on the date named in the summons or at any other date to which the hearing may be adjourned, order the defaulter to pay into the court the amount of the unpaid tax and fines and such costs and expenses as are for this purpose from time to time fixed by the Minister, or order him to pay into court any part of such amount which the magistrate may think the defaulter able to pay or arrange for paying, within seven days of the order or within such extended time as may be determined by the magistrate, and either in a lump sum or by instalments. ”

17. From the above explanations, it follows that the jurisdiction of the magistrate under ss: 64 and 65 is limited to making orders for the collection of tax already determined, whether by the Commissioner, or by the Appeal Board or in accordance with the decision of the Supreme Court on appeal. The determination is regarded as “*a judgment debt*”, when it is presented to the magistrate. He does not have jurisdiction to make an order as to what sum the tax should be, or as to whether it is payable in the first place. He has jurisdiction limited to making an order as to whether the respondent tax-payer and a debtor, has shown cause or not as to why a collection order requiring him to make payment in certain manners should not be made against him. Moreover, the magistrate is limited to ordering payment within a mere “*seven days or such extended time*” as he may determine.
18. Some of the matters that I suppose the magistrate may regard as sufficient causes are that: the stage had not been reached for the Commissioner to apply to the magistrate for enforcement; the tax-payer is owed a tax refund sufficient to meet the tax debt claimed by the Commissioner; and the tax-payer has been making payments according to an arrangement agreed to with the Commissioner. If the

magistrate is not satisfied that the tax-payer has shown cause, the magistrate makes the order as to the manner of payment and manners of enforcement. Recourse to the magistrate under s: 64 is usually necessary in the case of “a hard payer”, a defaulter.

19. It is the above limited and restricted orders within the jurisdiction of the magistrate that are the subjects of suspension under s: 112 of the Supreme Court of Judicature Act, in the event of an appeal against the decision of the magistrate. The limited and restricted orders are not inconsistent with the intention of the Income and Business Tax, which is that tax is payable on assessment whether or not a review or an appeal is proceeded with.

20. I do therefore accept that the orders made by the magistrate, are automatically suspended pending determination of the appeal by the claimants. However, the orders are collection orders only; the effect of the suspension is limited to the fact that collection of the tax debt in the manner ordered by the magistrate cannot be proceeded with, while an appeal is pending, but the underlying obligation of the tax-payer to pay the tax assessed, is not suspended. There is therefore, no

inconsistency between s: 112 of the Supreme Court of Judicature Act, and s: 56 of the Income and Business Tax Act, and the general intention and the scheme of the Act.

21. For the reasons I have given, I accept that the words of section 112 is unambiguous about the suspension of an order or a decision made by a magistrate, when the order or decision is appealed to the Supreme Court. The joint claim dated 4.7.2008, of the three claimants succeeds. The Court makes the declaration sought as follows:

It is declared that the effect of s: 112 of the Supreme Court of Judicature Act, Cap 91, is to suspend the execution of the decision dated 24th June 2008, made by the Revenue Magistrate Ed Usher, against the claimants.

22. I must, however, make it clear that it does not follow from the declaration made, that the liability of the claimants to pay the tax assessed is suspended. The obligation subsists according to assessment made and notified.

23. The costs incurred in this claim are reserved to the hearing of the appeal of the claimants. To expedite the appeal, I direct that it will be heard on 23.9.2008. The Registrar is to send out notice of hearing accordingly.
24. I have been informed that the Supreme Court of Judicature Act at s: 112 has been amended. I have not seen the amending Act; if so, there will be need to peruse the amendment to see whether it repudiates this judgment.
25. Pronounced this Friday the 18th day of July 2008
At the Supreme Court
Of Belize

Sam L. Awich
Judge