IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2021/APP/sts/00020

BETWEEN:

THE COMPTROLLER OF VALUE ADDED TAX

Appellant

AND

CTK HOLDINGS

Respondent

Before The Hon Mr. Justice Neil Brathwaite

Appearances: Kayla Green-Smith, Deputy Director of Legal Affairs, and Rashied Edgecombe for the Appellant

Attorney Kevin Moree for the Respondent

DECISION

FACTUAL SUMMARY

[1.] This is an appeal against a decision of the Tax Appeal Commission made on the 25th May 2021. The brief facts are that on the 5th July, 2019, McKinney, Bancroft & Hughes, the legal advisor for the Respondents submitted to the Department of Inland Revenue a conveyance dated the 7th of February, 2019 between Information Specialist Limited and CTK Holdings Ltd. to be stamped exempt from stamp duty. The consideration of the conveyance was in the amount of $390,000.00. Upon submission of the conveyance for stamping, the Respondents received a receipt dated 5th July, 2019 from the Department of Inland Revenue. On the 27th August, 2019, the Department of Inland Revenue sent correspondence to the Respondents indicating that there had been a discrepancy with the conveyance. It was discovered that the back page of the conveyance contained a consideration amount that differed from the consideration amount contained within the conveyance. The price on the back sheet reflected an amount of $390,000,000.00 as opposed

to the figure of $390,000.00 which was contained in the body of the conveyance. The Department requested that the Respondent rectify the issue and submit the relevant documents indicating the correct amount. It was also indicated by the Department that the taxes payable for the transaction would be assessed upon submission of the conveyance.

[2.] The conveyance was resubmitted by the Respondent on the 10th September, 2019 for stamping. The Respondent expressed that the consideration amount was a typographical error that did not warrant the return of the conveyance without first being stamped exempt as the back page was not required by law for the conveyance to be stamped. It was the Respondent's contention that the amount of the consideration was irrelevant as the conveyance was exempt from Stamp duty and the VAT (Amendment Act) was not in force on the date the conveyance was first submitted which would be the proper date of assessment. It was further expressed that there was excessive delay by the Comptroller to bring this administrative oversight to the attention of the Respondent which they assert was unreasonable and potentially prejudicial.

[3.] On the 28th November, 2019, the Appellant issued a Notice of Assessment assessing the VAT to be paid on the conveyance in the amount of 39,000.00 calculated at a rate of 10 percent of the consideration amount. This was challenged by the Respondent as they lodged a Notice of Objection on the 20th December, 2019. In the Notice of Objection, the Respondent maintained that on the date that the conveyance was submitted for stamping, it was subject to the Stamp (Amendment) Act, 2019 which attracted an exemption, and not the VAT (Amendment) Act, which they contend did not come into effect until 2nd August, 2019 when it was published in the Extraordinary Gazette. This objection was dismissed by the Comptroller of VAT by Notice of Decision dated 19th March, 2020 and the assessment of $39,000.00 was confirmed. It was stated in the Notice that the explanation for the decision was attached to the Notice. However, the Respondent contends that no such explanation or reason was given.

[4.] The Respondent appealed the decision to the Tax Appeal Commission by way of a Notice of Appeal on the 15th April, 2020 on the grounds that:

1. "The Comptroller erred in law and/or misdirected himself in disallowing the appellant's objection and concluding that the Conveyance is subject to VAT:

a. In reaching such a decision the Comptroller failed to consider at all the fact that the Conveyance was submitted for stamping on 5th July, 2019, at which time conveyances were exempt from stamp duty pursuant to the Stamp (Amendment) Act, 2019 and were not subject to VAT as the Value Added Tax (Amendment) Act, 2019 was not in force because it had yet to be Gazetted.

b. The date of submission (i.e. 5 July, 2019) is the relevant date on which to consider whether VAT is payable on the Conveyance.

2. The Comptroller erred in law and in fact when concluding that there was "no unreasonable delay by the Comptroller in relation to this matter.

a. No reasons were provided in the Notice of Decision on Objection as to why the Comptroller held that there was no unreasonable delay.

b. No reasonable decision maker could conclude that approximately two (2) months is an appropriate amount of time to bring a complaint of an administrative oversight to a taxpayer."

[5.] The Tax Appeal Commission upon hearing the submissions of Counsel for both parties on the 25th May, 2021 decided that ***"the VAT (Amendment) Act came into force on 2nd August, 2019 when it was published in the Extraordinary Gazette."*** Further, it was decided that ***"when the Appellant's (now Respondent) conveyance was submitted on July 5th, 2019 the VAT Amendment Act was not completely enacted and the conveyance is not subject to VAT".*** The Commission allowed the appeal of the Appellant and ordered that the Notice of Assessment be set aside.

[6.] By Re- Amended Notice of Appeal filed on 21st October, 2021, the Appellant filed an appeal of the Commission's decisions pursuant to section 26 of the Tax Appeal Commission Act 2020 on the grounds that:

1. "The Tax Appeal Commission erred in law in deciding that the Value Added Tax (Amendment) Act, 2019 came into force on the 2nd August, 2019;

2. The Tax Appeal Commission erred in law in finding that the conveyance is not subject to VAT;

3. The Tax Appeal Commission misdirected itself in applying the Attorney General v Luckner and Levasser which concerns a criminal matter and in failing to apply the clear provisions of section 18(b) of the Interpretation and General Clauses Act and the various tax authorities cited by the Comptroller which indicate that once Gazetted, the VAT (Amendment) Act, 2019 retrospectively comes into operation on the 1st July, 2019."

[7.] Crucial questions for determination are therefore on which date did the Value Added Tax (Amendment) Act, 2019 come into force, and whether the Conveyance submitted to the Department of Inland Revenue on July 5th, 2019 is subject to the VAT (Amendment) Act.

THE APPELLANT'S SUBMISSIONS

[8.] The Appellant's contention is that the Stamp (Amendment) Act, 2019 and the VAT (Amendment) Act, 2019 were two creations of Parliament to transition the **taxes on the supply of realty** from stamp duty to attract VAT. The Appellants assert that this transition was intended to be seamless and not to create a loophole or tax break for Bahamians for a one month period. The Appellant claims that the VAT (Amendment) Act came into force on the 1st July, 2019 pursuant to section 1(2) of the Act and that VAT was chargeable on every supply of real property made to any person

since that time. It is further contended that although the Act was not published in the Extraordinary Gazette until 2nd August, 2019, the clear provisions of the Act together with interpretive legislative framework and the intention of Parliament, specifically provide for the VAT (Amendment) Act to retrospectively take effect from 1st July, 2019. The Appellant advanced the argument that retrospective legislation is common with tax legislation so that they take effect at the beginning of the new fiscal year.

[9.] In the Appellant's submissions, much emphasis was placed on the provisions of the Stamp (Amendment) Act, 2019 and the VAT (Amendment) Act, 2019. It was explained that section 4 of the Stamp (Amendment) Act, 2019 removed realty transactions from the imposition of stamp duty. The Appellant maintains that as of 1st July, 2019, realty taxes transitioned to VAT and were subjected to the VAT (Amendment) Act, 2019. The Appellant highlighted section 27(2) of the VAT (Amendment) Act, 2019 which made provision for the transition from stamp duty to VAT. Section 27(2) states:

> "(2) Any instrument executed before the commencement of this Act, which by virtue of the provisions of this Act, is an instrument for the supply of real property shall be subject to the provisions of this Act where the instrument has not been stamped under the provisions of the Stamp Act (Ch. 370)."

[10.] The Appellant further relies on section 14 of the VAT (Amendment) Act, 2021 to substantiate the point that the Act contains a validating provision for all acts performed in reliance of the VAT (Amendment) Act, 2019 from 1st July, 2019 until the commencement of the 2021 Act. Section 13 of the VAT (Amendment) Act, 2019 reads:

> "14. Any act performed by any person under and in reliance of the Value Added Tax (Amendment) Act 2019 between 1st July, 2019 and the date of the commencement of this Act shall be deemed validly performed."

[11.] The Appellant submits that sections 1(2) and 27(2) of the VAT Amendment Act, 2019 are retrospective in their effect despite there being a general presumption against the retrospective operation of legislation. It is posited that the presumption is rebutted where there are clear and unambiguous provisions that expressly provide that the legislation is to have a retrospective effect. As to the interpretation of the Act, the Appellant relies on section 18 of the Interpretation and General Clauses Act to make the point that the date of commencement of the Act is the date provided within the Act. The Appellant also relied on Budget Communications of the Minister of Finance to determine the intention of Parliament for the Stamp (Amendment) Act, 2019 and the VAT (Amendment) Act, 2019. It is the Appellant's conclusion that the purpose of the amendments was to strengthen tax compliance and administration. Hence, realty transactions since 1st July, 2019 were to attract VAT as opposed to stamp tax at the same 2.5 percent and 10 percent rates attracted under the Stamp Act.

[12.] Sometime after the conclusion of the hearing, the Respondent forwarded to the court the affidavit of Alexandria K. Russell filed 24th June 2022, to which was exhibited an article published in the

Tribune newspaper on 23rd June 2022. In that article, Senator Michael Halkitis, Minister of Economic Affairs, was asked, regarding real estate transactions, "whether deals in process now, but whose conveyances are completed and presented for stamping after July 1st, will attract the present 10 percent or the new regime's lower rates." In response, Senator Halkitis said "When the documents are presented for stamping after completion of the transaction is the determining factor."

[13.] Ms. Russell goes on to aver that in the same article Simon Wilson, Financial Secretary, is quoted as saying the following:

> "Once it comes into effect they pay the lower rate. It becomes due and payable once they present the document. It's not the sales agreement, it's the date on the conveyance. It's the date when that's presented; that's the most important date."

[14.] The Respondent therefore submits that the court should have regard to this evidence, and conclude that the intention was that no VAT should be applicable, as no VAT was applicable at the time the conveyance was initially presented.

THE RESPONDENT'S SUBMISSIONS

[15.] The Respondent submits that the VAT (Amendment) Act, 2019 came into force on 2nd August, 2019 when it was published in the Extraordinary Gazette. Their contention is founded on the decision of Malone Snr J in the case of **The Attorney General of The Bahamas v Luckner and Levasser No. 236 of 1987** in which the Court held that before a written law can become operative, it must first be published in the Gazette. Although this case is criminal in nature, the Respondent submits that the Court adjudicated on a public law issue that applies to all legislation and is directly relevant to the issues before this Court. The Respondent further relies on Article 52(2) of the Constitution which requires that the assent of the Governor General be obtained before a Bill can be held to be completely enacted. The VAT (Amendment) Act's date of assent is the 2nd August, 2019.

[16.] The Respondent contends that when the conveyance was presented on the 5th July, 2019 to be stamped exempt from stamp duty, the VAT (Amendment) Act, 2019 was not completely enacted. It is submitted that the conveyance was subject to the Stamp (Amendment) Act, 2019 which provided that conveyances with effect from the 1st July, 2019 were exempted from stamp duty. It was highlighted that the Appellant at paragraph 63 of their submissions admitted to this circumstance. As a result, they contend that whether or not the VAT (Amendment) Act had a retrospective effect once it was enacted on 2nd August, 2019, was of no consequence as the conveyance was already exempted from stamp duty. The Respondent posits that section 1(2) of the VAT (Amendment) Act which states the date of commencement only creates a rebuttable

presumption which was subsequently rebutted when the Amendment Act was published in the Gazette on the 2nd August, 2019.

[17.] It was concluded by the Respondent that when the conveyance was submitted on the 5th July, 2019, it was exempt under the provisions of the Stamp Act and was deemed to have been stamped exempt at that date. Hence, even if the VAT (Amendment) Act had retrospective effect when it was completely enacted on 2nd August, 2019, section 27 (2) of the VAT (Amendment) Act does not apply to the conveyance and that VAT is not payable on the conveyance.

[18.] With respect to the late submission of the affidavit of Alexandria Russell, and the comments of Senator Halkitis and Financial Secretary Wilson, the Respondent objects to that evidence on the basis that as this matter is an appeal, the Court has no discretion to permit fresh evidence as, pursuant to section 26(1) of the Tax Appeals Commission Act, a party may appeal on matters of law only. Furthermore, they say no leave was sought to adduce fresh evidence, and the evidence also should not be admitted at this late stage.

[19.] The Respondent further contends that the comments in the affidavit are hearsay and inadmissible, and could not be relied upon as they are being adduced for the truth of the statements contained therein, and not merely to show that the statements were made. The Respondent further suggests that the comments of the Minister and the Financial Secretary are not relevant to the instant proceedings.

LAW

[20.] The provisions of the Stamp Act, Ch. 370 and its amendments must first be assessed to appreciate the transition from stamp duty to VAT on realty transactions. Subject to its amendments, section 3(1) of the principal Stamp Act provides in part:

> "3. (1)Subject to the exemptions contained in the Second Schedule to this Act there shall be raised, levied, collected and paid unto Her Majesty the Queen for the use and support of The Bahamas upon and in respect of the several instruments or transactions specified in the First Schedule, the several duties in such Schedule specified."

[21.] Every Deed of conveyance was subjected to stamp duty as contained within the First Schedule of the Act unless it fell as an item contained in the Second Schedule, which was exempted. Prior to 2019, conveyances and realty transactions were not exempted from stamp duty, and attracted a stamp duty rate of 2.5 percent of the value of consideration for transactions up to $100,000.00 and 10 percent of the value of consideration for transactions over $100,000.00. There is no dispute as to the commencement of this Act as it is stated in section 1(2) of the Amendment Act to have taken effect 1st July, 2019 and received assent on the 28th June, 2019. Therefore, according to the Act, as of 1st July, 2019, conveyances and realty transactions were exempted from stamp duty.

[22.] The VAT Act, 2014 and its subsequent amendments up to 2019 provide at section 3(1)(c) that this Act applies in The Bahamas to every supply of real property. A supply of real property was defined in section 1 of the VAT (Amendment) Act, 2019 to include *"the sale, long-term lease, assignment, mortgage or other conveyance, or dealing with, or the transfer of a beneficial or legal interest in real property from one person to another, whether or not for money or money's worth."* Section 4(1)(c) of the Amendment Act, 2019 provides that subject to the Principal Act, *"there is imposed on and from the date this Act comes into force a tax, called value added tax, chargeable on every supply of real property made to any person."* Section 5 of the Amendment Act imposes a joint and several liability on the supplier and the recipient of the supply of real property to pay VAT. Section 6 provides that any supply of real property that is not zero-rated is, subject to such conditions prescribed, to pay VAT on the value of the supply.

[23.] The Amendment Act further provided for a Third Schedule to be added to the Principal VAT Act. The Third Schedule states that *"every deed of conveyance, long-term lease, assignment or transfer of real property"* among other items are not zero-rated and attract VAT at 2.5 percent where the value is $100,000 and under, or 10 percent where the value exceeds $100,000. The transitional provision in section 27(2) of the Amendment Act (ibid) is perhaps one of the most vital provisions in this Act with respect to the question this Court must determine. It sets out that any instrument for the supply of real property executed before the commencement of the VAT (Amendment) Act, 2019 which was not stamped under the Stamp Act (Ch. 370) was now subjected to the provisions of the VAT (Amendment) Act, 2019.

[24.] When the provisions of legislation are ambiguous or are interpreted in various ways, the Court may be guided by Acts and principles of statutory interpretation to garner its true meaning. Section 18 of the Interpretation and General Clauses Act (Ch.2) 1987 provides that:

> "Every written law shall –
> (a) Be published in the Gazette; and
> (b) Come into operation on the expiration of the day next preceeding the day of each publication or, if it is provided in the written law or in some other law that such written law shall come into operation on some other day, then it shall come into operation on the expiration of the day next preceeding such other day."

[25.] In the case of **LaFleur v LaFleur [1992] BHS J. No. 111**, the Court was faced with a similar question to determine the date on which an Act came into operation. Sawyer J being guided by section 18 of the Interpretation and General Clauses Act stated at paragraph 4 of the ruling "as I read the section, unless it is otherwise provided in the statute itself, an Act comes into force on the day it is published…". A copy of the gazetted Act dated 2nd August, 1991 was shown to the Court. The Court concluded that it was of the opinion that the Act came into operation on 2nd August, 1991, being published on that date. It can be inferred from the reasoning of the Court that the Act did not contain a specified commencement date in the statute itself. A similar conclusion was arrived at by Gonsalves-Sabola CJ *in* **Gomez v Klonaris [1994] BHS J. No. 19**. It was stated at paragraph 15 of the ruling "*the contrary was not so provided, and therefore, the Regulations came into operation on the date they were gazetted...*".

[26.] At section 73 of Bennion on Statutory Interpretation 5th edn., it is stated "*an Act may state that it is to come into force at a time after its passing [receiving royal assent], which may be a specified calendar date, or the end of a specified period, or the date of a specified happening, or a time otherwise denoted. An Act may, by any similar description, state that it is to be treated as having come into force at a time before its passing.*" The provisions of the VAT (Amendment) Act stated clearly that the Act shall come into force on the 1st July, 2019, although the date of assent was stated to be 2nd August, 2019.

[27.] There is a general rule at common law that no statute is to be construed to operate retrospectively unless the construction of the statute is clear in that regard, given the language used. In **Tynes v Barr [2001] BHS J. No. 53** Sawyer CJ noted at paragraph 15 that:

> "Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective, if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to events….. " - see e.g., Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 at p. 836 per Lord Brightman and Allen v Gold Reefs of W. Africa [1900] 1 Ch. 656,673, per Lindley LJ and Craies on Statute Law, Seventh Edition, p. 387 et seq."

This position has been taken in the Court of Appeal in **Geosurvey Holdings Limited v BSI (Overseas) Bahamas Limited [2005] 5 BHS J. No. 600**.

[28.] In **Yew Bon Tew v Kenderaan Bas Mara (ibid)** the Board stated per curiam:

> "Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute"

[29.] The court is bound to give retrospective effect to legislation where the construction clearly states the date of commencement. It is common practice for tax legislation to take effect at the beginning of the fiscal year. In **James v Inland Revenue Commissioners [1977] 2 All ER 897** the Appellant lodged an appeal against a surtax assessment made against him for the fiscal year 1972 to 1973. The Appellant claimed that the surtax was imposed retrospectively under the Finance Act 1974 and that this was invalid. The Finance Act received Royal Assent on 31st July, 1974 and increased the rate of the previous surtax charges. However, the Crown claimed that the surtax assessment for the Appellant in March 1974 was to be treated as increased from 1st July, 1974 in accordance with the 1974 Act. In that case the court said the following:

"The consequences of the operation of the 1974 Act in relation to the taxpayer are thus somewhat striking, as they must be in the case of thousands of other taxpayers. The 1973 Act had ordained a rate of surtax payable in respect of the year 1972–73. An assessment had been made on a taxpayer for the amount so payable; and he might well have actually paid the amount payable before the 1974 Act became law on 31 July 1974. The 1974 Act, however, then intervened and said, in effect, that the surtax liability for 1972–73 should not be that originally ordained, but that this should be varied and a higher amount substituted. Furthermore, it said, in effect, that the higher amount should be treated as substituted as from 1 July 1974, a date 30 days before the 1974 Act became law.

Though he has made certain subsidiary points, the most important submission made on behalf of the taxpayer is this. The state, he says, having through Parliament set a final rate of surtax for a past fiscal year, and having, in many instances, actually collected that tax through the executive, it is contrary to common law and natural justice for that tax subsequently to be varied and the transaction to be re-opened. For these reasons, he submits, the court should not give effect to the relevant provisions of the 1974 Act.

I am bound to say that I have a measure of sympathy with this submission, since s 8 of the 1974 Act does appear to me to represent retrospective legislation of a fairly extreme kind. As the taxpayer said, if Parliament was content in the 1974 Act retrospectively to increase surtax liabilities laid down by the 1973 Act for the fiscal year 1972–73, there seems in principle no reason why it should not hereafter increase surtax laid down by earlier Finance Acts, for even more distantly past fiscal years. It is obvious that retrospective legislation of this kind can operate harshly in individual cases, particularly, as the taxpayer pointed out, in a case where, at the time when the new legislation is introduced, the taxpayer has actually discharged the whole of his liability for the relevant fiscal year on the basis of the previously existing law; that being so, he may naturally have regarded his liability for that year as finally settled once and for all and may have arranged his affairs on that basis.

No doubt with considerations such as this in mind the court, in construing a taxing statute, will be very reluctant to construe it as having retrospective effect and will construe it as not having such effect if the words used allow such construction. As Lord Atkinson said in Ingle v Farrand ([1927] AC 417 at 428, 11 Tax Cas 446 at 468):

'Your Lordships were referred to several authorities laying down the principle upon which the question should be determined whether a statute acts retrospectively or not. Amongst those authorities the case of Smith v. Callander and Lindley L.J.'s judgment in Lauri v Renad were included. The rule which according to those authorities is to be applied is thus stated in Maxwell on Statutes. "It is a fundamental rule of English Law that no statute shall be construed so as to have a retrospective operation, unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication."

> This, however, marks the limit of the court's powers to refuse to give effect to retrospective legislation. As Lord Atkinson went on to say in Ingle v Farrand ([1927] AC 417 at 428, 11 Tax Cas 446 at 468): 'If a clause in a statute says in so many plain words that the statute shall have retrospective operation, then it must not be construed so as to defeat those express words.'
>
> Thus, in answer to submissions to the contrary made by the taxpayer, it is in my judgment clear that, as the constitutional law of England stands today, Parliament has the power to enact by statute any fiscal law, whether of a prospective or retrospective nature and whether or not it may be thought by some persons to cause injustice to individual citizens. If the wording of that legislation is clear, the court must give effect to it, even though it may have, or will have, a retrospective effect. It has no power, as the taxpayer submitted, to refuse to give effect to it on the ground that the protection of private citizens requires it."

[30.] Further, even in the event of an ambiguity with the date of commencement, the Court can then consider the transitional provision of the VAT (Amendment) Act, 2019 and the validating provision of the VAT (Amendment) Act, 2021. Bennion on Statutory Interpretation, 5th edn. at section 96 explains that a transitional provision spells out precisely when and how the operative parts of the instrument are to take effect. In that section's commentary, the authors made reference to **Britnell v Secretary of State for Social Security [1991] 2 All ER 726** in which Lord Keith cited Thornton Legislative Drafting, 4th edn. 1996, which states that *"the function of a transitional provision is to make special provision for the application of legislation to the circumstances which exist at the time when that legislation comes into force."*

[31.] The fundamental principle developed in Pepper (Her Majesty's Inspector of Taxes) v Hart (1992) WLR 1032 on statutory interpretation is also relevant in the instant matter. It allows for the Court to refer to statements made in Parliament to interpret the meaning of legislation where the legislation itself is ambiguous. The premise of the ambiguity lies in the date in which the Act took effect. Lord Browne – Wilkinson laid down the criteria to be met for the court to consider Parliamentary material. It is stated by his Lordship:

[32.] "In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria."

[33.] In construing this Amendment, it is necessary to discern the purpose of the Amendment. Lord Griffith at page 6 of the judgment said:

"The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament."

[34.] In the Budget Debate 2019/2020, K. Peter Turnquest Deputy Prime Minister at the time stated:

"Lastly, I now turn to a review of the Bills we have tabled with this Budget, that underpin the objectives we are intending to materialize, particularly with regard to tax relief and revenue enhancement initiatives.

....

3. Stamp (Amendment) Bill, 2019, seeks to effect changes in policy from the payment of stamp tax on real property to the payment of VAT on real property.

....

6. Value-Added Tax (Amendment) Bill, 2019 seeks to amend a myriad of definitional changes and typographical errors, to include for the registration of persons in e-commerce conducting vacation home rentals on marketplaces, to make the zero-rating on water utility and electricity bills permanent, and to make all realty transactions subject to VAT as opposed to stamp tax, among other administrative changes."

[35.] Bennion also highlights that the Court may rely on official statements made on the meaning of the Act. At section 232 of the text it states:

"Official statements by the government department administering an Act, or by any other authority concerned with the Act, may be taken into account as persuasive authority on the legal meaning of its provisions."

[36.] This does not mean that the department's insight or interpretation of the Act is automatically correct. The Court retains the power to quash incorrect departmental guidance as to the meaning of the legislation. The Department of Inland Revenue released a circular dated 1st July, 2019. It reads in part:

"Procedures For The VAT Stamping Of Documents Evidencing Real Property Transactions

The Public is being advised of the following in relation to the stamping of documents:

1. With effect from 1st July, 2019 conveyances, mortgages, long term leases and other real property transactions will attract VAT. Apart from a few exceptions, most of these transactions will no longer attract stamp duty and the rates of the transactions under the VAT Act will be identical to what obtained under the Stamp Act prior to 1st July, 2019. The details of the VAT rates applied to these transactions under the VAT Act are outlined in the table below.

Note, however, that this table does not include real property transactions which were exempt from stamp duty prior to July 1, 2019, for example, transfer of a home mortgage. These real property transactions are still exempt from stamp duty and will now be zero-rated under the VAT Act. There are no changes to the rate of First Home Owner's exemptions. Rates previously applied are still applicable. Submission of documents are to continue being sent to first home-exemptions@bahamas.gov.bs.

Note that there are no changes in the rates applied to stamping. The rates previously applied to stamp duty are the identical rates applied for VAT..."

[37.] Having regard to the comments by then Minister Turnquest, it is clear that the purpose of the legislation was simply to transition from a stamp tax regime on real estate transactions to applying Value Added Tax instead. What is also clear from the comments of Minister Turnquest during the budget debate is that the intention was to ensure a seamless transition. That did not happen, as the amendments to the Stamp Act and the VAT Act were not published at the same time, but what may have been a bureaucratic mishap does not change the intention of Parliament.

[38.] Having regard to the foregoing, it is clear to my mind that the intention of Parliament was that the impugned amendment is to operate from the date contained in the legislation, that is the 1st July 2019, so that, while the legislation was not in force when the conveyance in this case was initially submitted on 5th July 2019, once the legislation was properly enacted by being published in the Official Gazette, which I accept is necessary for the amendment to become law, it operated retroactively. I note the authorities of **Luckner v Levasser**, and **Colton v Sidney Collie** relied upon by the Respondent, but I am of the view that while those authorities support the position that legislation must be published in the Gazette to be fully enacted, they do not deal with the issue of the retrospectivity of legislation. Furthermore, in **Luckner** the legislation concerned a criminal statute, and not a fiscal provision, as in the instant case, to which different considerations apply.

[39.] The Respondent further relies on section 3(2) of the Stamp Act which reads *"Any instrument or transaction shall, notwithstanding the date of execution, be chargeable with the ad valorem duty as fixed by law at the time such instrument or transaction is presented for stamping by the Treasurer."* It is therefore submitted that the document in the instant case was presented prior to the publication of the amendment on 2nd August 2019, when that law was not in force, and the amendment could therefore not apply to this transaction. The Respondent has also sought to convince the court to have regard to the comments of Minister Halkitis and Financial Secretary Wilson, with a view to being satisfied that the relevant date to be considered for stamping and tax purposes is the date of presentation of the document.

[40.] This then brings me to the question of the effective date of submission, and the concerns with the failure to either stamp the document prior to the gazetting of the legislation, or to have the document returned for correction in a timely manner. The Respondent contends that it is unreasonable for the document to not have been stamped as initially submitted, and that an inordinate period of time passed before the error was pointed out. In my view, the incorrect figure on the back of the conveyance meant that the document was not correct, and ought not to have been stamped. It is not for the tax authorities to determine that the backing was not correct, and that the figures in the recitals were correct, as opposed to the other way around, and it would not be correct in my view to conclude that the backing sheet could be ignored because it was not necessary. The fact is that that sheet was included in the document and therefore formed a part of the document, and could not be ignored. It would not therefore be correct to consider the initial date of 5th July 2019 as the date of submission, as the document was not in a proper state to be stamped on that date.

[41.] A further concern is the length of time it took to reject the document. No evidence has been provided of the usual amount of time for the processing of such documents, or of the volume of work, or of any contrasting situation where the processing time was much shorter. I must also note that the conveyance was initially submitted on 5th July 2019, while the amendment was published in the Gazette on 2nd August 2019, so that the complaint really is that the document was not rejected prior to the gazetting of the legislation, so that any correction could have been done prior to the publication of the amendment. That amounts therefore to a period of less than one month. I am therefore constrained to say that, while the delay was regrettable, it was not necessarily inordinate. I am also loathe to ascribe blame only to the processing authorities, when the party submitting the document also bore a responsibility to ensure that the document was correct, which they failed to do. In all the circumstances of this case, I am therefore of the view that the document was properly submitted on 10th September 2019, by which time the amendment had been published in the Gazette. I also note the reasoning in the **James v Inland Revenue** case cited above, in which it was held to be permissible to increase a tax rate even where an assessment had already been conducted, which would be similar to the case here even if the document was considered to be properly submitted on 5th July 2019, once the law was gazetted on 2nd August 2019, and, according to that law, came into force as of 1st July 2019. (**See also the well-reasoned decision of Pienaar Brothers (Pty) Ltd v Commissioner for the South African Revenue Service and another [2018] 3 LRC 48**). By that reasoning, even if it were considered that the conveyance was

properly submitted on 5th July 2019, it would still be lawful for the amendment to operate retroactively so as to capture this conveyance.

[42.] Such an interpretation might seem harsh and unfair, but in the circumstances of this case, in my view no unfairness has occurred. The date on this conveyance is 7th February 2019. If the document had been submitted for stamping at any time between that date and the 30th June 2019, when the amendment to the Stamp Act removed conveyances from the provisions of that Act, the document would have been subject to a tax of 10 percent. The fact is that the amount due under the VAT amendment is the same amount that would have been due prior to the amendment to the Stamp Act. The Respondent is therefore no better off, and no worse off.

CONCLUSION

[43.] For the foregoing reasons, I am satisfied that the Tax Appeal Commission erred in finding that the conveyance is not subject to VAT, and in failing to apply the VAT (Amendment) Act 2019 retrospectively. The appeal is therefore allowed, and the decision of the Tax Appeal Commission is hereby set aside. While the usual rule is that the successful party is entitled to their costs, adherence to that rule is in the discretion of the court. In the circumstances of this case, I decline to follow the usual rule, and order that each side bear their own costs.

Dated this 2nd day of May A.D., 2024

Neil Brathwaite

Justice