

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT

Common Law & Equity Division  
2019/CLE/gen/01828

BETWEEN

CARIBBEAN TOBACCO ENTERPRISES LTD.

Plaintiff

AND

COMPTROLLER OF CUSTOMS

First Defendant

AND

ATTORNEY GENERAL

Second Defendant

Before: The Hon. Madam Justice G. Diane Stewart

Appearances: Mr. Damian Gomez Q.C. and Mr. J. Michael Saunders for the Plaintiff  
Mr. Shaka Serville for the Defendants

Judgment Date: 24<sup>th</sup> August 2022

JUDGMENT

1. By a Specially Endorsed Writ of Summons filed 24<sup>th</sup> December 2019, the Plaintiff, Caribbean Tobacco Enterprises (“**CTE**”), a company licensed with the Grand Bahama Port Authority (the “**GBPA**”) since 1<sup>st</sup> April 2013 (the “**Plaintiff**”), seeks damages and an injunction from the Comptroller of Customs (the “**Defendant**”), after claiming that it was deliberately and unlawfully compelled to pay excise taxes, which it claims is contrary to the Excise Tax Act 2013 (the “**Excise Tax Act**”) and the Excise Stamp (Tobacco Products Control) Act, 2013 (the “**Excise Stamp Tobacco Act**”). This action was commenced after the Petitioner had applied for judicial review and which they subsequently sought the Court’s order to convert that action to a Writ action which was granted.
2. The Plaintiff alternatively seeks constitutional relief based on its rights founded in the Hawksbill Creek Agreement 1955 and Article 27 of the Constitution of The Bahamas. In the further alternative, the Plaintiff seeks relief from the Defendant for a breach of its Invest Grand Bahama brochure (the “**Brochure**”), after causing the Plaintiff to act to its detriment and suffer loss and damage.
3. The Defendants denying that the Plaintiff had an absolute right to any exemption under the Excise Tax Act and the Excise Stamp Tobacco Act. They also deny that the Plaintiff is entitled to any constitutional relief and claim that certain claims against it are statute barred based on the 1<sup>st</sup> Defendant being a public body carrying out a public function.

4. By the Amended Statement of Facts and Issues filed 12<sup>th</sup> January 2021, the agreed facts and issues are: -

“FACTS

1. The following facts are established by the Affidavits:-
  - a. CTE was incorporated on 26<sup>th</sup> November 2012.
  - b. CTE received a licence from the GBPA on 1<sup>st</sup> April, 2013 to import and manufacture tobacco products. At all material times CTE operated its manufacturing and processing business in the Port Area of the GBPA under the provisions of the Hawksbill Creek Agreement.
  - c. CTE has at all material times been registered under the Excise Stamp Tobacco Act.
  - d. CTE produces on a monthly basis between 2 million and 3 million cigarettes.
  - e. No customs duty or excise taxes have been levied against CTE in respect of its imports used to manufacture its cigarettes nor on machinery and equipment used in the manufacturing process.
  - f. CTE has between April 2014 and 31<sup>st</sup> January 2019 been charged excise tax at the rate of 15 cents per cigarette for an aggregate of \$6,076,226.21.
  - g. At the commencement of its business, CTE through a promotional effort, gave away 500,000 cigarettes in order to promote sales. Subsequently, the Inland Revenue Department accused CTE of failure to comply with the relevant statutory position, and stationed one of its employees at the premises of CTE for the purpose of verifying the number of cigarettes manufactured, in order for the excise tax imposed to be accurately monitored and enforced better. CTE was forced to bear the cost of the Inland Revenue Department's posting of its employee at the premises of CTE. The Inland Revenue Department thereby threatened to use its statutory authority to prevent CTE from operating its business as a manufacturer of tobacco products.
  - h. The Excise Tax Act, Cap. 293A was repealed by the Excise Tax Act, 2013. (See s.18 Excise Tax Act, 2013.) Section 9(2)(j) of the Excise Tax Act, 2013 and chapter 98 of the schedule thereto gave a general exemption from excise tax liability for goods manufactured or processed in the Port Area. (See heading 98.82 and 9882.0000). It is apposite to note that there was a change in the law on this point having regard to section 9 of the Excise Act, Cap. 293A and the schedule thereto paragraph 6 which mirrors 9882.0000. The 2013 Act's schedule is wider in its scope by its inclusion of heading 98.82 "goods manufactured or processed in the Port Area."
  - i. The Excise Act, 2013 was amended by the Excise Amendment Act, 2014, the Excise (Amendment) (No.2) Act, 2014, the Excise (Amendment) (No.3) Act, 2014, the Excise (Amendment) Act, 2016, and the Excise (Amendment) Act, 2017. The chapter 98 of the schedule was not altered so as to delete the excise tax exemption for goods manufactured or processed in the Port Area. Heading 98.82 remains.

- j. CTE objected from as early as 2013 to the imposition of excise tax by communicating with the Minister of Grand Bahama, Dr. Michael Darville (“**Min. Darville**”) and with the Prime Minister and Minister of Finance, Mr. Perry G. Christie. In spite of these protestations and objections the Inland Revenue Department through the Comptroller of Customs continued to levy excise tax on CTE’s non export manufactured products in the said Port Area. On the 26<sup>th</sup> of October, 2018, Counsel for the Plaintiff, wrote a letter before action to the Comptroller of Customs seeking clarification of the justification for the imposition of the excise tax levied on CTE’s non-export manufactured products, which was never responded to.
- k. The application for Judicial Review was lodged on 23<sup>rd</sup> of January 2019.

## ISSUES

5. The issues to be determined are:
  - a. Whether upon a true construction of the Excise Tax Act, 2013 the Comptroller of Customs is entitled to levy Excise Tax upon the tobacco products of CTE manufactured in the Port Area?
  - b. Whether upon the true construction of the Excise Tax Act, CTE was entitled to a general exemption from excise tax liability for its tobacco products manufactured or processed in the Port Area?
  - c. Whether the imposition of excise tax is a breach of the Plaintiff’s constitutional rights and those under the Hawksbill Creek Agreement?
  - d. If the answers to paragraphs b and c are in the affirmative, what, if any remedies are available to CTE?
6. The Defendant raised a preliminary issue of whether a portion of the Plaintiff’s claim is statute barred?

## EVIDENCE

### PLAINTIFF’S EVIDENCE

7. Mr. Stunce Williams, the President and Director of the Plaintiff (“**Mr. Williams**”), avers that CTE obtained its licence from the GBPA (**the “GBPA”**) on 1<sup>st</sup> April 2013, to import, manufacture, process, assemble, export and locally sell tobacco products and related products.
8. It was also registered and licensed as a manufacturer of tobacco products with the Ministry of Finance under the Excise Stamp Tobacco Act to carry on the business of importing and manufacturing tobacco products in or from the plant in Grand Bahama. In further compliance of the Excise Stamp Tobacco Products Act, the Plaintiff provided the Financial Secretary a bond of \$5,000.00.
9. The Plaintiff produced two to three million cigarettes on a monthly basis. It paid no import duty or excise tax on the raw material imported to use in the manufacture of the cigarettes. Nor did it pay any import duty or excise tax on any of the machinery or plant

equipment used in the manufacturing process. The Plaintiff was subjected to the payment of an excise tax of fifteen cents per cigarette from April 2016 to January 2019.

10. Prior to the Company's incorporation in 2012, he had inquired about the tax exemptions available to manufacturers of cigarettes and tobacco products in New Providence and the wider Bahamas. He spoke with members of the Bahamian government, specifically the Prime Minister and the Minister of Tourism, Mr. Obediah Wilchcombe ("**Min. Wilchcombe**") at the time.
11. Min. Wilchcombe led him to Grand Bahama where he met with employees of the GBPA. Those employees represented to him that their licensees enjoyed immunity from excise taxes on their manufactured products. He was also given the Brochure which they had compiled in collaboration with the Bahamian government.
12. Based on the information in the Brochure, the Plaintiff was incorporated and licensed as a licensee of the Port Authority. At all material times, the Plaintiff operated its business in and from the Port Area which was created pursuant to the terms of the Hawksbill Creek Agreement and its amendments.
13. On or about June 2014, he had complained to Min. Darville about the unlawful imposition of excise taxes on the Plaintiff's manufactured tobacco products. The only response he received from Min. Darville, was that he would speak to the Prime Minister and Minister of Finance and revert to him.
14. The Plaintiff's objection and complaint was about the imposition of excise taxes on its cigarettes produced in the Port Area in Grand Bahama. From April 2014 to 2019, the Plaintiff paid the following amounts annually in excise taxes:

"2014 - \$127, 592.16.  
2015 - \$230, 611.89.  
2016 - \$171, 072.26.  
2017 - \$1,671, 520.00.  
2018 - \$2,673, 570.00.  
2019 - \$6,076,226.31."

15. On 26<sup>th</sup> October 2018, he caused the Plaintiff's attorney of record to write to the Comptroller of Customs to challenge the levy of excise taxes on its manufactured products. The Plaintiff never received a response to the said letter. Based on the provisions of the Excise Tax Act and its amendments, the repealed Excise Act Cap 293A and the Excise Stamp Tobacco Act, there was no statutory basis for the imposition of the excise tax.
16. Mr. Williams verily believed that the Plaintiff was entitled to a refund of their payments to the Comptroller of Customs together with interest pursuant to the Civil Procedure (Award of Interest) Act, Cap 80 which were made from April 2014 to the date of judgment.
17. During cross-examination, Mr. Williams agreed that CTE did submit themselves to the Hawksbill Creek Agreement and the provisions of the Excise Tobacco Act. The Plaintiff was a wholesale manufacturer but also a local retailer, selling its products in food stores, gas stations and convenience stores throughout various islands of The Bahamas.

18. CTE felt as if it was being oppressed. On every pack of cigarettes sold, it earned two dollars which he would not call a profit. CTE paid for the stamps which are held in the custody of customs until they were in production. Cigarettes cannot be sold without the stamp affixed to the packaging. Initially there was a debate on the amount of excise tax to be paid. Once the amount of fifteen cents was decided, they were informed that if they could not pay they could not manufacture the products.
19. During re-examination, Mr. Williams averred that they did not make a profit from the sale of cigarettes. The Plaintiff was impacted by two hurricanes and had to contract with a company in Canada to produce its product. There were only two shipments that were impacted by the pandemic and up until Dorian they were meeting all of their investor's requests.
20. By further cross-examination, Mr. Williams explained that they started manufacturing outside of The Bahamas in 2019 due to the passage of Hurricane Dorian. They could not turn on the electricity at their manufacturing plant because it was under four feet of water. They did not enjoy the same concessions as previously as they were operating outside of The Bahamas.

#### **DEFENDANTS' EVIDENCE**

21. Customs Superintendent, Mr. Larry Bodie ("**Spt. Bodie**") avers that while he was attached to the Customs Department in Grand Bahama he had oversight and responsibilities over the GBPA's licensees. In that capacity, he was loosely familiar with the Plaintiff. With respect to the Plaintiff's claims, it was the position of the Defendant that it had not acted unlawfully nor unconstitutionally in its transactions with the Plaintiff but in accordance with the relevant law.
22. The Plaintiff had no absolute right to excise tax exemption. Even after the negotiation of concessions, the Plaintiff always appeared to accept that the position taken by the First Defendant was in fact the law.
23. During cross examination, Spt. Bodie averred that he had some knowledge of the matters raised. He did not exactly work like line staff but he had some supervisory responsibilities for the area concerned which gave him some knowledge.
24. Spt. Bodie confirmed that he had seen the bankers draft in the amount of \$54,365.67 and the form which was evidence of customs being paid. Before he prepared his evidence in chief, he was shown two of Mr. Williams' affidavits but not the third. He was shown various payments of excise tax by the Plaintiff and had no reason to disbelieve that there was no receipt of payment. The particular form he referred to demarcated the difference between value added tax and excise duty.
25. In relation to the letter dated 5<sup>th</sup> July 2017, a back tax payment plan meant that the Plaintiff may have fallen behind in their payments and was essentially on a payment plan and may have even fallen behind on their payment plans. The reflected amounts were due much earlier as opposed to being current. He knew that to date, the Plaintiff still had an outstanding amount of excise tax to pay.
26. Spt. Bodie accepted that there was evidence which showed that the Plaintiff had some difficulty with meeting its commitments to the Defendant, assuming that the excise tax

was payable. He was shown a customs receipt form for the Plaintiff dated 26<sup>th</sup> July 2017 and explained that it was prepared after CTE submitted a report. The customs officer would then break down the various charges after satisfying themselves of the payments and upon being satisfied they would execute the voucher which would be stamped by the excise officer at the bottom. After the amount was paid, the cashier would stamp it at the top. The excise officer verified the amount relating to excise tax payment.

27. Spt. Bodie stated that he had never seen the Brochure but he knew the GBPA would from time to time, publish various brochures which outlined various incentives where licensees are concerned. Primarily the goods were goods which were imported for the purpose of being used in the business listed in the Hawksbill Creek Agreement which speaks very clearly to goods classified as consumable as to duty.
28. In the Brochure was a section entitled 'Manufacturing and Light Industry' which provided for the construction of new structures in ideal locations accompanied by import and export tax concessions, inter alia. Spt. Bodie disagreed that the business being referred to in the brochure as an aid industry was a reference to a tax exempted business although there are some concessions which relate to the industries under the "aid" industry section.

#### **PRELIMINARY ISSUE - Whether a portion of the Plaintiff's claim is statute barred?**

##### **DEFENDANTS' SUBMISSIONS**

29. The Defendants raised the preliminary issue that because the First Defendant is a public body carrying out the public function of levying lawful excise taxes, it carried out a public function. In the circumstances, Section 12 of the Limitation Act bars the Plaintiff from advancing any claimed item arising and accruing prior to December 24<sup>th</sup>, 2018. Any such claim should be deemed barred by statute and struck out/dismissed on such grounds.
30. Section 12 of the Limitation Act states: -
- "12. (1) Where any action, prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the provisions of subsection (2) shall have effect.**
- (2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within twelve months next after the ceasing thereof."**
31. Furthermore, and/or alternatively, Section 12 of the Excise Act, 2013 limited any complaints or claims regarding over payment of excise tax to be made by formal application to the Comptroller of Customs in the prescribed form within six months. Section 12 states: -

**"12. Refunds.**

- (1) Where a person pays an amount as or on account of excise tax on goods imported or sold by him that exceeds the amount payable by him under**

this Act, the Comptroller shall, subject to this section, pay a refund to that person equal to the amount of the excess if that person applies therefor within six months after the amount was paid.

(2) Where a person who has imported taxable goods subsequently exports those goods or puts them on board a ship or aircraft for use as stores and the goods are in compliance with the conditions specified in the Customs Management Act for the payment of a drawback of duties, the Comptroller shall, subject to this section, pay an amount to the person equal to the excise tax paid on the goods if the person applies therefor within six months after he exported the goods or put them on board the ship or aircraft.

(3) An application under this section shall-

(a) be made in the prescribed form;

(b) contain the prescribed information;

(c) be filed with the Comptroller in the prescribed manner.

(4) Notwithstanding subsections (1) and (2), where a refund or other payment is payable to a person under this section, the Comptroller may apply it against any outstanding tax, penalty or interest payable by the person under this Act.”

## PLAINTIFF’S SUBMISSIONS

32. The Plaintiff contends that there is no limitation on its claim for a monetary award, notwithstanding section 12 of the Excise Act, 2013 which they interpret as being applicable to a person who has been overcharged for excise taxes to claim a refund within six months of payment to the Comptroller of Customs.
33. They contend that the section is confined to instances in which the Comptroller of Customs was entitled to quantify and collect excise taxes from a manufacturer and merely made an error in the calculation of the amount of the excise tax liability. In the instant case, there was no lawful basis for the Comptroller of Customs to make any claim for excise taxes under the provision of the Excise Act and hence no limitation arises which restricts the Plaintiff.

## DECISION

34. The First Defendant contends that because it is a public body carrying out the public function of levying lawful excise taxes, it carried out a public function and in the circumstances, Section 12 of the Limitation Act bars the Plaintiff from advancing any claimed item arising and accruing to December 24<sup>th</sup> 2018 as it would be statute barred and should be struck out/dismissed on such grounds.
35. There are two requirements derived from Section 12 of the Limitation Act as acknowledged by Barnett CJ in **Miriam Lightbourne v Department of Public Health and Minister of Health 2010/CLE/gen/00023**:
  - (1) “The defendant must be a person acting in pursuance, execution or intended execution of any written law or under public duty or authority; and,
  - (2) The action must begin after twelve months to be statute barred.”

36. In **Callenders & Co. (a firm) v. The Comptroller of H.M. Customs [2013] 2 BHS J. No. 33**, Adderley JA highlighted that the Comptroller of H.M. Customs was the person appointed under the Customs Management Act 1976 to be responsible for the administration of that Act. Under Section 8 of the Customs Management Act 2011 the Comptroller is confirmed to be responsible for the general management and administration of the Customs authority.
37. The Excise Act of 2013 is the Act which governs the excise tax to be paid on taxable goods manufactured or produced in The Bahamas and sold in The Bahamas. The following sections are relevant:-
16. This Act binds the Crown.
17. (1) The Comptroller shall administer and enforce, subject to the control and direction of the Minister, this Act and collect the tax imposed by this Act.
- (2) Where tax is imposed by this Act on the importation of goods into The Bahamas for the purposes of collecting and enforcing the payment of the tax and, generally, for the purposes of administering and enforcing this Act, the Customs Management Act relating to the importation of goods apply as if the tax were a duty.
38. It is a correct interpretation that the First Defendant is a public body, carrying out a public function, and subsection 2 of Section 12 confirms that an action shall not be commenced against such public body carrying out a public function unless it is commenced twelve months after the act, neglect or default complained of or in the case of continuance injury or damage within twelve months after the damage or injury has ceased.
39. The Plaintiff, in its statement of claim alleges that the First Defendant has deliberately and unlawfully extracted \$6,076,226.31 as of October 2019 and in spite of those proceedings continuously demands excise taxes from the Plaintiff.
40. The Defendants also rely on Section 12 of the Excise Act, 2013 regarding the limitation period for which the Plaintiff should have made its claim.
41. This section would only apply where a person was overcharged or exceeded the payment amount for excise taxes, and needed to claim a refund of the payments. Such a person, according to statute would have six months to make an application. This section was confined to instances in which the First Defendant was entitled to quantify and collect excise taxes from a manufacturer but would have made an error in the calculation of the amount of the excise tax liability. The claim in this action is not for a refund from overpayment, but for relief on the ground that no taxes should have been charged at all. Therefore this section does not assist the Defendants.
42. In **Longcliffe Golf Club v Commissioners for Her Majesty's Revenue and Customs [2018] UKFTT 383 (TC)** Jones J sitting as a judge in the first-tier tribunal tax chamber, heard an appeal against a review decision of Her Majesty's Revenue and Customs. The appeal concerned the refusal of a claim for repayment of value added tax which the appellant claimed was overpaid between 1 January 2009 and 30 September 2009.
43. The appellant wrote to the HMRC by letters dated 31 March 2009 and 8 April 2009 with respect to accounting periods 07/73 to 12/89 and later with respect to accounting



periods 06/06 to 12/08 and its claims were rejected. The decision was appealed which was stayed pending HMRC's investigation into a defence of unjust enrichment. The appellants later sought payment for amounts overpaid during the accounting periods 12/07 to 09/13. The amount claimed was later reduced.

44. For the periods 03/09, 06/09 and 09/09 the HMRC rejected the appellant's claim but accepted the claim for the periods 12/07 to 12/08. They treated the claim with respect to all subsequent periods as a new claim as the claim for the periods 03/09, 06/09 and 09/09 was made more than four years after their end which was considered to be outside the period provided by Section 80(4) of the Value Added Tax Act 1994 which provides that HMRC was not liable to meet a claim made more than four years after the end of the prescribed accounting period to which it relates.
45. The appellants appeal was on the basis that they were not new claims but were amendments or adjustments of the existing claim made in 2009. The Tribunal held that the claim in respect of periods 03/09, 06/09 and 09/09 was to be regarded as an individual, discrete claim, separate from any other. Jones J held,

**“58. In dismissing the appeal the Tribunal relies on the following arguments of HMRC and is satisfied that it previously erred in law in allowing the appeal.**

**59. The Tribunal is satisfied that in accordance with the Tribunal decision in Reed Employment, the Appellant's November/December 2013 claim in respect of periods 03/09, 06/09 & 09/09 must be regarded as an individual, discrete claim, separate from any other, and has not been shown to be in essence as one with the earlier claim of April 2009. The Appellant's claim of November 2013 was therefore made outside of the four-year time limit for making claims in respect of the 03/09 to 09/09 periods provided by section 80(4) VATA. The later claim did not arise out of the same subject matter as the original claim in April 2009. Further, it extended to facts and circumstances that fell outside the contemplation of the earlier claim.**

**60. In summary, the Tribunal finds that a request for repayment arising from new VAT periods, different supplies and different sums claimed to be overpaid must necessarily concern different subject matter in comparison with the original claim. Unspecified and future VAT periods fell outside the contemplation of the taxpayer when making the original claim in April 2009, and that is sufficient to find that the original claim included request for repayment relating to the additional periods.**

**61. Further, the Tribunal accepts it may not apply an overly broad and subjective test but must apply an objective test of what was contemplated consistent with the statutory requirements of binding authority. The fact that the Appellant did not file further repayment claims between 2009 and 2013 because it was apparent that it would take considerable time for the legal issues between the parties to be resolved is an immaterial consideration.”**

46. In **Leicester City Council v Revenue and Customs [2021] UKFTT 0075 (TC)** Brannan J followed the decision in Longcliffe even though he acknowledged that he was not mandated to do so. Brannan J considered a plethora of authorities on the issue including the leading decision in **Reed Employment Ltd v HMRC (Roth J) [2013] STC 1286 (“Reed Employment”)** in which Roth J considered the issue of the Limitation Act being silent with respect to the interpretation of the limitation of a claim.

47. While the Limitation Act states that an action cannot be brought against a public body a year after any act or omission of the act complained of, the period is extended when the act is continuous. The cases of **Longcliffe** and **Leicester City Council** both consider claims for the repayment of taxes after it was alleged that the United Kingdom's equivalent to the Defendant were unjustly enriched by the over payment of value added tax.
48. They both made findings that if claims for over payment were made outside the limitation period they could not be considered as amendments to initial claims when they were for separate periods of time. In **Leicester City Council** Brannan J held,

**“56. The leading authority, which was relied on by both parties, is Reed Employment Ltd v HMRC (Roth J) [2013] STC 1286 (“Reed Employment”). The taxpayer, Reed, made a claim in 2003 to recover output tax for the period 1 April 1973 to 31 December 1990 (the 2003 claim) on the supplies of temporary workers to the “irrecoverable sector” i.e. to clients who were fully or partially exempt or who were not registered for VAT and who could not recover their own input tax in full. HMRC refused that claim and Reed appealed. In March 2009, Reed claimed the repayment of two further amounts of overpaid output tax in respect of supplies made to clients in the “recoverable sector”. Reed claimed that the first of those demands (the 2009 Demand) which related to the period 1 April 1973 to 31 December 1990 was an amendment to the 2003 claim and that therefore HMRC could not raise a defence of unjust enrichment. HMRC, however, argued that the 2009 Demand was a new claim made outside the applicable time limit and that therefore HMRC had a statutory defence of ‘unjust enrichment’. 10**

**57. The FTT ([2011] UKFTT 200 (TC) (Judge Bernerr and Dr Small)) considered whether the 2009 Demand was to be treated as a new claim or an amendment to an existing claim. The FTT held, dismissing Reed’s appeal, that this was a new claim and not an amendment to the 2003 claim. Reed appealed to the Upper Tribunal which upheld the decision of the FTT but in somewhat narrower terms. Roth J said:**

**“[32] The FTT approached the question of whether a further demand is an amendment an existing claim by adopting the test of whether it was shown to be ‘in essence as one with an earlier claim’: para [110]. In my judgement, there is nothing wrong with this test, but I am not sure it advances the matter significantly, and I do not think it is appropriate to add gloss to the statutory wording. The FTT proceeded to hold as follows: ‘[111]. That test, in our view, will be satisfied only if the latter claim arises out of the same subject matter as the original claim, without extension to facts and circumstances that fall outside the contemplation of the earlier claim. Without deciding matters outside of this appeal, we consider, for example, that this would generally include cases where a particular computation was not made at the time of the original claim, but the subject matter of the claim was sufficiently identified for such a calculation made subsequently to be related back to the original claim. Simple calculation errors would similarly be included. It should**

also cover, we think, cases where particular items within the category of the subject matter of the original claim are unknown or not fully identified at the time of the original claim, and would but for that fact have been included in the original claim, but only subsequently come to light.’

[33] If subsequent to the submission of a claim, the taxpayer sends in the correction of a mistake, whether that be an arithmetical error or through the omission of some supplies that were clearly intended to be included, then I consider that would clearly not be a new claim but an amendment. Further, if the taxpayer making a claim says that he is not yet able to calculate the full figures and gather all the documentation as required by reg 37, but is in the course of doing so and will provide such further details as soon as possible, such further submission would not constitute a new claim but fall within the scope of the existing claim. Thus I consider that what is an amendment is very much a question of fact and degree, judged by the particular circumstances. I therefore respectfully agree with the test set out by the FTT in the first sentence of para [111]. However, of the examples given in that paragraph, I would not wish to approve in the abstract the final example: that would be for consideration on the particular facts of the case should it arise.

[34] It follows that I reject the submission of [Counsel for Reed] that the crucial issue for determining this question is the relationship between Reed and HMRC and thus whether the later application relates to the same accounting period or periods; and that if the later application arises out of the same underlying error (i.e. here accounting for the whole sum received by Reed rather than just its commission) and the difference is one of quantum the latter cannot be a new claim. I consider that there is no warrant for such a prescriptive requirement given the statutory language to which I have referred.

[35] I should add that the fact that the 2009 demand is drafted in the form of an amendment to the third repayment claim cannot serve to constitute it as such an amendment if substance it is not.”

58. After indicating that authorities in relation to the Limitation Act were of no assistance, Roth J continued: 11 “[38] [Counsel for Reed] gave the example of a claim for a particular accounting period in respect of supplies in London, where the taxpayer subsequently wrote to ask for repayment in respect of supplies made for the same accounting period in the rest of England. However, in my judgement, unless there was some express reservation in the initial claim of the kind that I have indicated, the later request would clearly constitute a separate claim. So also if Reed initially sought to claim reimbursement of allegedly overpaid VAT only for its placement services in the healthcare sector, and subsequently made a demand for payment as regards another part of its business, notwithstanding that this was for the same accounting period and arising out of the same error.”

49. I am satisfied and having considered the findings made by the tax authorities above, albeit speaking specifically to overpayments, the same principles apply to charges made over a period of time, which the licensee claims should not have been charged at all, that the separate claims for overpayment of the excise tax by the Plaintiff to the Defendant for successive years cannot be considered as amendments to claims made within the limitation period of one year as they were for payments made during various accounting periods. I therefore am satisfied that the alleged damage is not continuous and that the Plaintiff is statute barred from pursuing or seeking repayment for any amount paid before January 22<sup>nd</sup>, 2018 pursuant to Section 12 of the Limitation Act. The Court considers and accepts that the claim was made when the action for judicial review was initially filed and which was subsequently converted to this action.

**ISSUE ONE - Whether upon the true construction of the Excise Tax Act 2013, the Comptroller of Customs is entitled to levy Excise Tax upon the tobacco products of CTE manufactured in the Port Area?**

50. The overall role of the First Defendant, the Comptroller of Customs has been considered by several Bahamian jurists. In **Callenders & Co. (a firm) v. The Comptroller of H.M. Customs [2013] 2 BHS J. No. 33** Adderley JA noted that the Comptroller is the person responsible for the acts or defaults of any customs officer or any other person performing a duty under the Act.

51. In **Freeport Concrete Company Limited v. The Crown and others [2007] 3 BHS J. No. 22**, Isaacs J set out the various functions of the Comptroller as set out by not only the CMA but the Tariff Act.

“6 The functions of the Comptroller can be gleaned from a reading of the various provisions of the CMA, e.g., he exercises a discretion to return an item seized to a claimant: section 130; he can take out proceedings for condemnation of items seized: section 131; and he can compound offences: section 141. Further, under the Tariff Act 1996 (Ch. 295), the Comptroller is statutorily enjoined to collect customs duties. Section 3 states:

“3. Subject to this Act and any other law relating to customs, duty shall be charged, levied and collected upon all goods imported.”

7 The chief duty placed on the Comptroller however, is to ensure that the Government’s revenue is collected, protected, accounted for and deposited to the Consolidated Fund.

8 Additionally, as mentioned by Ganpatsingh, J. in **Sandra Hepburn, et. al. v. The Comptroller of H.M. Customs, et. al. [1999] BHS J. No. 207**, there is “a duty of care and management on the part of the Comptroller which is the basis for the jurisdiction he exercises to give guidance to importers. (See **R. v. Inland Revenue Commissioners Ex. p Matrix Securities [1994] 1 WLR 334**). A Comptroller who departs from the guidelines without reasonable notice of a change of policy can be held to be acting unreasonably. (See **Associated Provincial Picture Houses Ltd. v. Wednesbury Corp. [1948] 1 K.B. 223**).

52. In **Lockhart v. Comptroller of Customs [1993] BHS J. No. 95**, Hall J, when considering the Comptroller’s requirement to satisfy himself that a person committed an

offence under the Act, stated that such a discretion given to an administrator must be exercised reasonably.

53. As stated above, pursuant to **section 17 of the Excise Act**, the Comptroller is given the power to administer and enforce the Act subject to the control and direction of the Minister.
54. There appears to be two different positions submitted against the First Defendant. Firstly that there was excise tax paid on cigarettes manufactured in the Port Area which were sold within the area, and secondly a different tax position existed for cigarettes manufactured in the Port Area and exported.
55. The amount of taxes paid and the years paid are not in dispute. The issue here is whether taxes should have been levied on any cigarettes manufactured in the Port Area whether sold within or without the Bahamas.
56. As Ganpatsingh, J stated in **Hepburn v Comptroller of H.M. Customs [1995] FP No. 249**:

**“This is a common law constitutional principle and accepted by the Courts at the highest level. (See Oladehinde v. Secretary of State for Home Department (1991) 1 AC 254). The concept is to be distinguished from that of delegated authority. The exerciser of the power is considered the alter ego of the minister: power is devolved rather than delegated. In the same way the courts would give recognition to the exercise of prerogative power by the minister, as in government the sovereign acts through its ministers. (See Att. Gen. V. Brent (1956) 2 DLR 503 and De Smith’s Judicial Review of Administrative Law 5<sup>th</sup> Ed para 6-117).**

**In the Bahamas the Customs Management Act makes the Comptroller of Customs responsible for the administration of the Act. The Act itself does not contain any express provisions regarding the power of waiver or exemption from duty for imported goods, but there is implicit in sections 82 and 152 a recognition of the prerogative power of the minister to permit the entry of goods for temporary purposes free of duties, or in such form and manner, and for goods to be unloaded and removed from any aircraft or vessel under such conditions, as he, may direct.”**

57. I also adopt the explanation of Ganpatsingh, J when he said;-

**“46. There appears to be no statutory definition of customs duties but historically, duties of customs or customs duties in the strict sense, are pecuniary charges or tolls imposed by the State and payable upon goods exported from or imported into the country. (See Halsbury’s Laws of England 4<sup>th</sup> Ed. para. 1) In A.G. for British Columbia v Kingcome Navigation Co. Ltd. (1934) A.C. 45 at p.59 Lord Thankerton pointed out that customs and excise duties are in their essence trading taxes. He was there referring to the transaction between the importer and the overseas supplier of the goods. Therefore any tax imposed on the importation of goods is a duty of customs within the ordinary meaning of that expression. (See Carmody v [...])**

47. The Customs Management Act Ch. 267 provides for the management and administration of customs, and the liability to, determination, recovery, and remission of customs duties. The Comptroller of Customs is responsible for the administration of the Act, and is subject to the control and direction of the Minister. All imported goods are subject to customs control (See Section 8); and when unloaded from a vessel or aircraft must be entered with full particulars. The Act makes provision for the warehousing of unloaded dutiable goods in bonded warehouses. Import duty is paid at the rate in force when the goods liable to duty, are entered for home consumption.

48. ....In the Bahamas, section 87 of the Customs Management Act gives, in my opinion, conclusive guidance on the point. It is the liability and recovery provision: it reads;-

(1) Without prejudice to any other provision of the Act, any amount due by the way of duty may be sued for and recovered in the name of the Comptroller.

(2) Where an obligation has been incurred, whether by bond or otherwise for the payment of any duty, it shall be deemed to be an obligation to pay all duties which are or may become payable or recoverable under the customs laws.”

58. Any importation of goods into the Bahamas is subject to customs control unless specifically exempted. By virtue of the Hawksbill Creek Agreement the import of the product required for the manufacturing of the cigarette within the Port Area was exempted from import duties.

59. Sections 3(1) and (2) of the Excise Stamp (Tobacco Products) Control Act, provide:-

“(1) Subject to this Act, no person other than an excise registrant in possession of a valid excise registration certificate issued in accordance with this Act shall import into or manufacture tobacco products within the Customs territory unless –

(a) such products are imported for personal use in quantities not in excess of the limits for duty-free entry prescribed by the regulations;

(b) such products are manufactured by an individual in quantities within the limits prescribed by the regulations for personal use;

(c) being a visitor to The Bahamas, such person has made an oral declaration to an Excise officer of accompanying tobacco products and, where such products are in excess of the duty free allowance, completed an ‘Accompanied Baggage Declaration’ in the form prescribed by the regulations;

- (d) being a returning resident to The Bahamas, such person has made a written declaration and completed an 'Accompanied Baggage Declaration' in the form prescribed by the regulations;
- (e) the imports fall within the privileges and immunities accorded to a diplomatic agent, embassy or consulate under the Diplomatic Privileges and Immunities Act (Ch.19);
- (f) such person is a small importer and the imported products are within the limits prescribed in the definition of "small importer" set out in section 2.

**(2) A separate excise registration certificate shall be required in respect of each premises in or from which a person imports or manufactures tobacco products."**

The Plaintiff was therefore required to be a registrant within this statute as it did not qualify for any of the statutory exceptions.

60. Sections 12 (1) and (2) of the Excise Stamp (Tobacco Products) Control Act provide:-

- (1) An excise registrant in possession of a valid excise registration certificate may apply to the Secretary in the prescribed form for the purchase and issuance of excise stamps for affixing to imported or domestically manufactured tobacco products.**
- (2) A registrant who domestically manufactures tobacco products shall not be eligible to apply for excise stamps under subsection (1) unless and until he has paid the applicable excise taxes on such products"**

By virtue of this section the Plaintiff could not apply for excise stamps until the applicable excise taxes were paid. Taxes must be paid in order to domestically manufacture tobacco products such as cigarettes which did not fall within the statutory exceptions.

61. I am satisfied that although there was an exemption from import duties for the raw materials, there was the requirement for the payment of an excise tax in order to manufacture cigarettes in a manner outside of the ambit of the statutory exceptions.

**ISSUE TWO - Whether upon the true construction of the Excise Tax Act 2013, CTE was entitled to a general exemption from Excise Tax liability for its tobacco products manufactured or processed in the Port Area?**

#### **PLAINTIFF'S SUBMISSIONS**

62. The Plaintiff submits that by section 9 (2) (j) of the Excise Tax Act and chapter 98 of the schedule thereto, it enjoyed a general exemption from excise tax liability for goods

manufactured or processed in the Port Area. The same was set out in heading 98.82 and 9882.0000 of the Schedule attached to the Excise Tax Act.

63. Contrary to those provisions, the First Defendant charged excise taxes of fifteen cents per cigarette for an aggregate of \$6,076,226.31 between April 2014 and 21<sup>st</sup> January 2019, It was therefore entitled to an order prohibiting the First Defendant from making any further demands for the payment of excise tax and to a monetary award in respect of the expropriation of the sum of \$6,076,226.31 in addition to any sums paid.

64. Section 9 (2) (j) of the Excise Tax Act, 2013 states,

**“(2) The following categories of goods may be eligible for general exemptions from excise tax, as specified in the relevant sections of Chapter 98 in the Schedule-**

- (a) .....**
- (j) goods manufactured or processed in the Port Area;.”**

65. Number 98.82 of the Schedule to the Excise Tax Act, Tariff Code, provides:

<b>TARIFF CODE Heading/Subheading</b>	<b>ARTICLE DESCRIPTION</b>	<b>RATES OF DUTY General Rate</b>
<b>98.82</b>	<b>Goods manufactured or processed in the Port Area</b>	
<b>9882.0000</b>	<b>Goods manufactured or processed in the Port Area by manufacturers registered with and approved by the Ministry responsible for Trade and Industry</b>	<b>Free</b>

66. While there were numerous amendments to the schedule of the Excise Tax Act, number 98.82 was not altered. For promotional purposes, the Plaintiff had given away five hundred thousand cigarettes to promote sales. Subsequently, the Inland Revenue Department accused the Plaintiff of failing to comply with the Excise Tax Act and stationed an employee at its premises to verify the number of cigarettes being manufactured.

67. The Plaintiff was forced to bear the cost associated with the employee of the Inland Revenue Department’s (IRD) posting at its premises. The IRD used its statutory authority to prevent the Plaintiff from operating its business as a manufacturer of tobacco products.

68. The Plaintiff contends that the use of the word ‘may’ in section 9 (2) (j) of the Excise Tax Act should be interpreted as mandatory and not directory as it is supported by heading 9882.0000 of the schedule. If ‘may’ was directory it would create the unfairness and anomaly of a cabinet approved exemption recipient being deprived of the very exemption the Excise Tax Act contemplated as being its entitlement.

69. The Plaintiff contends that when construing an act, the plain meaning of the words used should be applied unless that meaning produces some absurdity. The object of the construction exercise is to discern the purpose of the statutory instrument and to give effect to the will of Parliament. The Excise Stamp Tobacco Act should be read in



conjunction with the Excise Tax Act as the former required companies involved in the sale of cigarettes to be registered and for registrants to be tax compliant.

70. They further submit that the Excise Stamp Tobacco Act does not affect any amendments to the Excise Tax Act nor does it impose any tax liability upon the producers of tobacco products. The Plaintiff asserts that pursuant to the Excise Stamp Tobacco Products Act, its registration thereunder ought to have triggered its zero rating under the Excise Tax Act however, it did not.
71. The Plaintiff submits that there is a presumption against taxation which was not rebutted by the Defendants. Clear words were required to establish an intention to interfere with common law rights. The presumption of taxation is discussed in **Craies on Legislation, A Practitioners' Guide to The Nature, Process, Effect and Interpretation Of Legislation, Eighth Edition** which states,

**“Presumption against taxation**

**1.6.12 The presumption against taxation can be formulated succinctly in the words of the Judicial Committee of the Privy Council in *Oriental Bank v Wright* –**

**“The rule is that the intention to impose a charge upon a subject must be shown by clear and unambiguous language.”**

**The width of this formulation shows that it matters not whether the charge ought strictly to be described as a tax or as a payment for services or in some other way. Hence, for example, Lord Tenterden CJ. On the subject of rates in *Dock Co. at Kingston-upon-Hull v Browne* –**

**“These rates are a tax upon the subject and it is a sound general rule that a tax shall not be considered to be imposed (or, at least, nor for the benefit of a subject) without a plain declaration of the legislature to impose it.”**

**The presumption against taxation is relevant to the discussion elsewhere in this work about the difference between evasion and avoidance in the context of statutory duties. In the case of a statutory duty to pay a tax or other charge, the words of Rowlatt J express the position-**

**“In a taxing Act once has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”**

72. The Defendants surprised the Plaintiff with their reliance on the first ninety seven schedules to the Excise Tax Act contrary to Order 18 Rule 11 of the Rules of the Supreme Court. Pursuant to Order 18 Rule 11, the Defendants were required to raise any point of law in their pleadings. At trial, the Defendants also failed to identify any provision within the ninety seven schedules on which it relied or the rationale of how it would benefit from it. The Plaintiff submits that none of the ninety seven schedules affect its claim.

## **DEFENDANTS' SUBMISSIONS**

73. The Defendants contend that the Plaintiff's claim is misconceived as their products are lawfully subject to the excise tax levied upon them. Pursuant to the Excise Tax Act a tax could be imposed on taxable goods that are manufactured, and/or sold in the Bahamas. Any exemption of some categories of goods and goods manufactured in the port area, was discretionary by virtue of Section 9 (2) (j) of the Act which states: -

**“(2) The following categories of goods may be eligible for general exemptions from excise tax, as specified in the relevant sections of Chapter 98 in the Schedule-**

- (a) agricultural, floricultural, horticultural, agricultural co-operative societies, fisheries and forest industry goods;**
- (b) aircraft parts and accessories;**
- (c) baggage of passengers;**
- (d) educational, scientific and cultural goods;**
- (e) religious goods;**
- (f) production materials for cottage and light industries;**
- (g) printing equipment and raw materials;**
- (h) relief goods;**
- (i) vessel or vessel parts;**
- (j) goods manufactured or processed in the Port Area;**
- (k) any other goods which receive duty concessions under incentive legislation.”**

74. The **Tariff Act, 2013** at section 5(2)(w) similarly provided that some categories of goods may be eligible for general exemption. The Defendants contend that some goods manufactured and processed within the Port area may fall to be exempted. Section 5 (2) (w) states: -

**(2) The following categories of goods may be eligible for general duty exemptions, as specified in the relevant sections of Chapter 98 in the First Schedule –  
(w) goods manufactured or processed in the Port Area.”**

75. The Plaintiff manufactured products and by its own submission accepted that it and its products were subject to the provisions of the **Excise Stamp Tobacco Products Act**, which made specific provision for the processing, control, taxation and stamping of tobacco products, inclusive of those tobacco products that were manufactured within the Bahamas (inclusive of the Port Area).

76. The **Excise Stamp Tobacco Products Act** gave policing and taxing authority of tobacco products to the **Excise Act**, the **Tariff Act** and the **Customs Management Act**. It mandated a requirement of stamps to be affixed to each packet of tobacco product produced by entities (like the Plaintiff) from its Port Area enterprise. Such stamps were not to be issued until the excise tax was paid and provided evidence of the payment of such excise tax. The Plaintiff acknowledged that it was a registrant under the **Excise Stamp Tobacco Products Act**, and as such properly surrendered itself to its machinery.

77. The Schedule to the **Excise Act, 2013** at tariff code number 2402.1030 provides that 15 cents was payable by the Plaintiff on each unit of its product, that is, per cigarette. The Plaintiff was a lawful licensee of the Port Area, and therefore subject to the **Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) Act, Chapter 261**, and most notably the terms of the **Hawksbill Agreement**.

78. The **Hawksbill Creek Agreement** provided that Consumable Stores, were not eligible for exemption from the kind of taxation which the Plaintiff attempted to persuade was unlawful. Consumable stores are defined as “any article or thing assembled processed or manufactured within the Port Area and subsequently exported from the Port area to

any other part of the Colony, except pine timber or products made from pine timber or pine lumber”.

79. The nature of the Plaintiff’s product and their movement by the Plaintiff, disqualified the same from tax exemption in its final state of production, notwithstanding that the materials and machinery imported and utilized in the manufacturing process may avoid such tax liability. In all the circumstances, it was clear that based on the relevant legislative instruments and provisions concerned with the levying against and payment of excise tax, the Plaintiff did not have an absolute, nor any plausible basis upon which to conceive its asserted right to be entitled to excise tax exemption of its cigarettes.
80. While the Defendants accepted that the provisions of **Chapter 98** and the schedule thereto as a part of the Excise Act, 2013, suggested (on its own) that goods manufactured in the Port area were exempt from excise tax liability, the same must be read in conjunction with other relevant provisions, which was the intention of Parliament. This much was expressly stated in Chapter 98.
81. In the present circumstances, the Plaintiff was a registered company under the **Excise Stamp Tobacco Products Act** and licensed to manufacture tobacco products. It follows that the Plaintiff has subjected itself to the combined regulations, provisions and general tax regime provided under the aforementioned Acts. The Plaintiff did in fact manufacture tobacco products within the Port area, however in light of other relevant legislative and regulatory provisions, tobacco products do not fall within the category of goods that may be exempted as contemplated by section 9(2)(j) of the Excise Act, 2013 above.
82. The excise tax of 15 cents per cigarette was lawfully and correctly imposed on the Plaintiff in accordance with the applicable legislative regime. The Plaintiff’s claims regarding its entitlement to the claimed exemption ought to be dismissed and the Constitutional claims raised by the Plaintiff could not be maintained and should also fall away.

## DECISION

83. The Plaintiff’s claim is based on its reliance on Section 9(2)(i) of the Excise Tax Act and Chapter 98 of the schedule, and submits that it is authorized by legislation to enjoy a general exemption from excise tax liability for goods manufactured or processed in the Port Area.
84. The Plaintiff contends that its exemption from the payment of excise tax was granted to it by the Minister pursuant to the exemption provisions and the Invest in Grand Bahama handbook.
85. Section 9 (2) (i) of the Act states:-  
“(2) The following categories of goods may be eligible for general exemptions from excise tax, as specified in the relevant sections of Chapter 98 in the Schedule-
  - (a) agricultural, floricultural, horticultural, agricultural co-operative societies, fisheries and forest industry goods;
  - (b) aircraft parts and accessories;

- (c) baggage of passengers;
- (d) educational, scientific and cultural goods;
- (e) religious goods;
- (f) production materials for cottage and light industries;
- (g) printing equipment and raw materials;
- (h) relief goods;
- (i) vessel or vessel parts;
- (j) goods manufactured or processed in the Port Area;
- (k) any other goods which receive duty concessions under incentive legislation.”

86. The Plaintiff contends that that section is a mandatory imposition of the excise tax exemption as it is supported by heading 9882.000 of the schedule, and to do otherwise would create unfairness and an anomaly of a cabinet approved exemption recipient being deprived of the very exemption entitled. While there were numerous amendments to the schedule of the Excise Tax Act, number 98.82 of the Schedule was not altered nor was the use of the word “may”.

87. Chapter 98, notes 1 and 2 state:

- (1) **The Provisions of this chapter are not subject to the rule of relative specificity in General Rule of Interpretation 3(a). Any article which is described in any provision in this chapter is classifiable in that provision if the conditions and requirements thereof and of any applicable regulations are met.**
- (2) **The classification codes in Heading 98.70 through 98.88 are to be used in conjunction with the applicable classification code from Chapters 1 through 97, where the article meets the specified conditions for an exemption from duty.**

88. Note 2 specifically requires that in order for a classification code to apply, the article must meet the requirements and conditions for an exemption from duty. No evidence was led by the Plaintiff of the existence of any conditions or requirements for the exemption or of any conditions having been met.

89. Turning to 9882.0000 of the Schedule, the general rate of the tax to be levied states “Free”. A determination of this issue will require the interpretation of the word “may”. I am satisfied that the wording of Section 9 (2) (i) gives a discretionary power to the First Defendant.

90. Section 3(3) of the **Interpretation and General Clauses (Amendment) Act, 2011** is supportive of the discretion granted. It provides:-

“(3). In every written law, the word “may” is to be construed as being directory or empowering and the word “shall” or “must” is to be construed as being mandatory or imperative.”

91. It is the duty of the Court to interpret Parliament's intention having regard to the particulars of each case. Per Lord Campbell L.C., articulated in **Liverpool Borough Bank v Turner (1861) 20 LJ Ch. 379 and 380,**

“No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments, shall be considered directory only or obligatory with an implied nullification for disobedience, it is the duty of Courts of Justice to try to get

**at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed.”**

92. Therefore, by the wording of section 9 (2)(i), one would not automatically assume that the excise tax exemption is mandatory but rather discretionary at the hands of the Comptroller of Customs. Consequently, the First Defendant has rightfully acted within its powers and function as mandated by the legislation to impose and collect excise tax from the Plaintiff. Even though the Schedule further implies that the Plaintiff may be given such exemption, the right to such an exemption is not an absolute right to be enjoyed by the Plaintiff but at the discretion of the Minister. No evidence was led of any exemption granted at the discretion of the Minister.
93. The use of the word "shall", in my opinion, would have granted the Plaintiff the exemption claimed. There is no "shall".
94. In my judgment I do not consider the Invest in Grand Bahama handbook as evidence of the law in these proceedings for obvious reasons. It is not the law but simply a layman's interpretation of what they consider to be the law. At best it would create a reliance upon a statement made by the Grand Bahama Port Authority or other entity who is not before this Court.
95. I am satisfied that upon a true construction of the Excise Act, 2013, the Plaintiff has been lawfully taxed pursuant to the Act. I find that the Comptroller of Customs was entitled by the Act to levy the Excise Tax upon the goods, namely tobacco products and cigarettes manufactured in the Port Area as a general function of its duties as mandated by the Act. I further find that the Plaintiff was not entitled to a general exemption from the Excise Tax for its tobacco products manufactured and processed in the Port Area upon a general interpretation of the relevant section. The schedule is subject to the section of Customs Management Act which gives a discretion to the taxing authority.

### **ISSUE THREE – Whether the imposition of excise tax is a breach of the Plaintiff's constitutional rights and those under the Hawksbill Creek Agreement?**

#### **PLAINTIFF'S SUBMISSIONS**

96. The Plaintiff submits that it is entitled to rely on the Hawksbill Creek Agreement which exempts licensees from the payment of taxes on products produced in the Port Area save and except for consumable store products. While tobacco products are consumable store products, clause twenty-seven of the Hawksbill Creek Agreement provides an exemption as it provides protection against violation of property; such violation in the instant case being the imposition of excise tax.
97. In the further alternative, the Plaintiff submits that it is entitled to constitutional relief pursuant to Article 28 of the Constitution pursuant to its rights under Articles 26 and 27 of the Constitution. Articles 26 and 27 state:-

**“26. (1) Subject to the provision of paragraph (4), (5) and (9) of this Article no law shall make any provision which is discriminatory either of itself or in its effect.**

(2) Subject to the provisions of paragraphs (6), (9) and (10) of this Article, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the function of any public office or any public authority.

(3) In this Article, the expression "discriminatory" means affording different treatment to different person attributable wholly or mainly to their respective descriptions by race, place of origin political opinions colour or creed whereby person of one such description are subjected to disabilities or restrictions to which person of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Paragraph (1) of this Article shall not apply to any law so far as that law makes provision-

(a) for the appropriation of revenues or other funds of The Bahamas or for the imposition of taxation (including the levying of fees for the grant of licences; or

(b) with respect to the entry into or exclusion from, or the employment, engaging in any business or profession, movement of residence within, The Bahamas of persons who are not citizens of The Bahamas; or

(c) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law; or

(d) whereby persons of any such description as is mentioned in paragraph (3) for this Article may be subjected to any disability or restriction or may be accorded any privilege or advantage which having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society; or

(e) for authorizing the granting of licenses or certificates permitting the conduct of a lottery, the keeping of a gaming house or the carrying on of gambling in any of its forms subject to conditions which impose upon persons who are citizens of The Bahamas disabilities or restriction to which other persons are not made subject.

(5) Nothing contained in any law shall be held to be inconsistent with or in contravention of paragraph (1) of this Article to the extent that it makes provision with respect to standards or qualifications (not being a standard or qualification specifically relating to race, place of origin, political opinions, colour or creed) in order to be eligible for service as a public officer or as a member of a disciplined force of for the service of a local government authority or a body corporate established by law for public purposes.

(6) Paragraph (2) of this Article shall not apply to anything which is expressly or by necessary implication authorized to be done by any such provision of law as is referred to in paragraphs (4) or (5) of this Article.

(7) Subject to the provisions of subparagraph (4)(e) and of paragraph (9) of this Article no person shall be treated in a discriminatory manner in respect of access to any of the following places to which the general public have access, namely, shops, hotels, restaurants, eating-houses, licensed premises, places of entertainment or places of resort.

(8) Subject to the provisions of this Article no person shall be treated in a discriminatory manner-

(a) in respect of any conveyance or lease or agreement for, or in consideration of, or collateral to, a conveyance or lease of any freehold or leasehold hereditament which have been offered for sale or lease to the general public;

(b) in respect of any covenant or provision in any conveyance or lease or agreement for , or in consideration of, or collateral to, a conveyance or lease restricting by discriminatory provision the transfer,

ownership, use or occupation of any freehold or leasehold hereditament which have been offered for sale or lease to the general public.

(9) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision whereby persons of any such description as is mentioned in paragraph (3) of this Article may be subjected to any restriction on the rights and freedoms guaranteed by Articles 21,22,23,24 and 25 of this Constitution, being such a restriction as is authorized by Article 21(2)(a), 22(5), 23(2), 24(2) or 25(2)(a) or (e), as the case may be.

(10) Nothing in paragraph (2) of this Article shall affect any discretion relating to the institution, conduct or discontinuance of civil or criminal proceedings in any court that is vested in any person by or under this Constitution or any other law.

27. (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say-

(a) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit or the economic well-being of the community; and

(b) the necessity thereof is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

(c) provision is made by a law applicable to that taking of possession or acquisition-

(i) for the making of prompt and adequate compensation in the circumstances; and

(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation; and

(d) any party to proceedings in the Supreme Court relating to such a claim is given by law the same rights of appeal as are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.

(2) Nothing in this Article shall be construed as affecting the making or operation of any law so far as it provides for the taking of possession or acquisition of property-

(a) in satisfaction of any tax, rate or due;

(b) by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of The Bahamas;

(c) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;

(d) upon the attempted removal of the property in question out of or into The Bahamas in contravention of any law;

(e) by way of the taking of a sample for the purposes of any law;

(f) where the property consist of an animal upon its being found trespassing

(g) in the execution of judgments or orders of courts;

- (h) by reason of its being in a dilapidated or dangerous state of injurious to the health of human beings, animals or plants;
- (i) in consequence of any law making provision for the validation of titles to words) the confirmation of such titles, or for the extinguishment of adverse claims, or actions,
- (j) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, the carrying out thereon-
  - (i) of work or reclamation, drainage, soil conservation or the conservation of other natural resources; or
  - (ii) of agricultural development or improvement that the owner or occupier of the land has been required, and has without reasonable and lawful excuse, refused or failed to carry out; or
- (k) to the extent that the law in question makes provision for the vesting or taking of possession or acquisition of administration of-
  - (i) enemy property;
  - (ii) property of a deceased person, a person of unsound mind or of a person who has not attained the age of twenty-one years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;
  - (iii) property of a person adjudged insolvent or a defunct company that has been struck off the Register of Companies, of a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of that insolvent person or body corporate and, subject thereto, for the benefit of other person entitled to the beneficial interest in the property; or
  - (iv) property subject to a trust, for the purpose of vesting the property creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision for the orderly marketing or production or growth or extraction of any agricultural or fish product or mineral or water or any article or thing prepared for market or manufactured therefor or for the reasonable restriction of the use of any property in the interest of safeguarding the interests of others or the protection of tenants, licensees or others having rights in or over such property.

(4) Nothing contained in or done under that authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision for the compulsory taking possession in the public interest of any property, or the compulsory acquisition in the public interest or right is held by a body corporate established directly by law for public purpose in which no monies have been invested other than monies provided by Parliament or by any Legislature established for the former Colony of the Bahamas Islands.”

## **DEFENDANTS' SUBMISSIONS**

98. The Defendants contend that the Plaintiff sought constitutional relief from the Court prematurely having not exercised an avenue available for adequate redress given the proviso of Article 28 of The Constitution of The Bahamas. The Plaintiff had a duty to exhaust available remedies and to mitigate its loss before seeking constitutional relief.

99. Article 28 of the Constitution states: -



**“(1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.**

**(2) The Supreme Court shall have original jurisdiction-**

**(a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and**

**(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled.**

**Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.”**

100. Further, the Plaintiff’s constitutional claims were not specifically pleaded in its statement of claim. There was only a reference to redress under Article 28 in the prayer for relief as an alternate claim.

## **DECISION**

101. While the Plaintiff contends that its constitutional rights have been breached, it has not provided the Court with any particulars of the breach and what damages may have resulted from such a breach. It is trite that a party seeking relief must specifically plead the same. An omission to do so would leave the Court disadvantaged with respect to the consideration of the extent of the breach and the damages sustained as a result.

102. In **Higgs Construction Company v Patrick Devon Roberts and another [2020] 1 BHS J No.9**, Charles J also considered this issue and held,

**“the starting point must always be the pleadings. Submissions, however powerful they may be, do not rise to the level of pleadings: *Bahamas Ferries Limited v Charlene Rahming SCCivApp & CAIS No. 122 of 2018* relied upon.**

103. Accordingly, in the absence of any pleading on the constitutional claim I am unable to consider the Plaintiff’s claim for constitutional relief. In any event, I am satisfied that Article 28 would require the Plaintiff to first seek relief by virtue of the laws of contract and or torts before seeking constitutional relief. I have found that there were no contractual or tortious breaches on the part of the Defendants in the levying of taxes and the failure to give the exemption claimed. Further, Article 27 specifically provides for the acquisition of property in satisfaction of any tax.

104. Any claim for any breaches of the Hawksbill Creek Agreement for failing to grant the concessions from taxes on the importation of certain goods in the Port Area even if it were properly brought before the court, which is debatable here, would in my opinion also fail. Consumable stores of which the cigarettes are an example are specifically excluded. The claim of the Plaintiff relates not to taxing by import duties but the levying

of an excise tax on the manufacturing of cigarettes after importation of duty free materials.

105. I am satisfied that there has been no breach of any right arising under the Hawksbill Creek Agreement based the facts of this case.

### **CONCLUSION**

106. I apologize for the delay in the delivery of this judgment.

107. The Plaintiff's claim for damages prior to January 22<sup>nd</sup> 2018 is barred as the law specifically limits claims to one year prior to the commencement of the action.

108. The Plaintiff was not entitled to a general exemption from the excise tax for its tobacco products manufactured and processed in the Port Area.

109. The First Defendant was lawfully entitled to levy excise tax against the Plaintiff at its own discretion on the manufacturing of cigarettes within the Port Area.

110. The Plaintiff's claim for constitutional relief pursuant to its rights under Articles 26 and 27 of the Constitution is hereby dismissed. The Plaintiff's claim for damages for breach of its rights under the Hawksbill Creek Agreement is also dismissed.

111. The Defendants are entitled to costs to be taxed if not agreed.



**The Hon. Madam Justice G. Diane Stewart**

Dated this 24<sup>th</sup> day of August 2022