

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**Civil Appeal No. P0 41/2015**

**Tax App No. 16-128 of 2014**

**BETWEEN**

**UNILEVER CARIBBEAN LIMITED**

**Appellant**

**AND**

**BOARD OF INLAND REVENUE**

**Respondent**

**PANEL: Allan Mendonca J.A.  
Peter Rajkumar J.A.  
Charmaine Pemberton J.A.**

**APPEARANCES**

**Mr. Barry Attzs for the Claimant instructed by Mr. Bryan McCutcheon**

**Ms. Indra Rampersad-Suite for the Respondent**

**Date delivered: December 14th 2016**

**I have read the judgement of Rajkumar J.A and I agree with it.**

**Allan Mendonca**  
**Justice of Appeal**

**I also agree.**

**Charmaine Pemberton**  
**Justice of Appeal**

**Delivered by P. Rajkumar J.A.**

### **Background**

1. This appeal comes before this court by way of case stated by the Tax Appeal Board (the Board) in relation to a preliminary issue, namely, *whether under the Income Tax Act [the Act] there exists a statutory pre-condition which must be satisfied before the Respondent is allowed to make a determination against an employer for PAYE on additional emolument income.*
2. The issue arises in the following context: - For the income years 2004 and 2005 Unilever Caribbean Ltd. [*the employer*] provided for some of its employees [the employees or the emolument earners] a motor vehicle *which was made available for their private use.*
3. The Appellant calculated the gross chargeable income of those emolument earners for Income Tax purposes on the sum of their salary and the value of the motor vehicle perquisite at 33 1/3 percent of the monthly rental of the motor vehicle incurred by the Appellant. It remitted PAYE to the Respondent on this basis.

4. Under the motor vehicle leases a payment was also required of \$1600.00 per month in respect of maintenance. The Appellant did not deduct PAYE on the motor vehicle benefit in kind for income tax purposes on that maintenance cost incurred by the Appellant in respect thereof.

5. The Board of Inland Revenue (BIR) subsequently determined that the monthly payment in respect of maintenance was also a taxable emolument.

6. The emolument earners were never assessed by the Respondent for the additional tax taking into account the maintenance cost.

7. The Respondent has sought to recover that additional tax from the Appellant, (not the employees), through PAYE determination.

8. The notices of determination were issued on November 14<sup>th</sup> 2011 and Unilever, the employer/appellant, was advised of its right to contest the determination before the Tax Appeal Board- (the Board).

9. The employer objected before the Board that it could not be liable for unpaid tax on emoluments if the employee, who was the actual emolument earner, had not been first assessed. The Appellant contends that the employees must be duly assessed as liable to tax and served with a Notice of Assessment in respect of the quantum of emolument income in dispute before it can raise a determination against an employer.

10. The Board rejected this contention and concluded that “there is no statutory precondition which must be satisfied before the Respondent can raise a PAYE determination against an employer of an individual who is in receipt of emolument income”.

11. It summarised its decision as follows(all emphasis added):-

*a. There is no statutory pre-condition which must be satisfied before the Respondent can raise a PAYE determination against an employer of an individual who is in receipt of emolument income.*

b. *The issuance of a notice of determination by the Respondent on the employer as the provider of particular emoluments to an employee is the means to facilitate the **due process** in the mechanism to determine whether the **employer** is in compliance with its **statutory obligation** to deduct from the emolument earner and remit to the Respondent the appropriate amounts of PAYE.*

c. *The **statutory obligations an employer has under s.99 (1) of the Income Tax Act, Chap. 75:01** are **separate and apart** from the ability the Respondent has for raising an **assessment or an additional assessment on any particular individual within** the ambit of sections **83 and 89** of the Income Tax Act, Chap. 75:01.*

### **Issue**

12. As stated by the Board – *“The issue in this application is one of law as to whether there exists a statutory pre-condition which must be satisfied before the Respondent is allowed to make a determination against an employer for PAYE on additional emolument income. The Appellant has contended that the statutory pre-condition is that the Respondent has to initially raise an assessment against the individual in receipt of the emolument income whilst the Respondent has contended that no such condition exists.”* (Paragraph 11 of the judgment & paragraph 6 of the Case Stated)

13. Whether there exists such a statutory precondition involves consideration as to whether an employer can be directly liable for the deductions that it is obligated to make under s. 99(1) of the Act in the absence of a prior assessment of the employee’s liability.

### **Findings and conclusion**

14. We agree with the decision of the Board that:-

- a. There is no statutory pre-condition which must be satisfied before the Respondent can raise a PAYE determination against an employer (in respect) of an individual who is in receipt of emolument income.
- b. The issuance of a **notice of determination** by the Respondent **on the employer** as the provider of particular emoluments to an employee is the means to facilitate the **due process in the mechanism** to determine whether **the employer** is in compliance with its **statutory obligation** to deduct from the emolument earner and remit to the Respondent the appropriate amounts of PAYE.

- c. The **statutory obligations** an **employer** has under s.99 (1) of the Income Tax Act, Chap. 75:01 are **separate and apart** from the powers that the Respondent has for **raising an assessment** or an additional **assessment** on any particular **individual** within the ambit of sections 83 and 89 of the Income Tax Act, Chap. 75:01.

15. The service of a notice of determination under section 99 is upon the employer. This triggers the right of the employer to contest the determination. The fact that a right is given to the employer to contest the determination, (and not the employee), is clearly indicative of the fact that the employer has a separate liability to deduct the correct amount of tax under the PAYE regime.

16. The section recognizes that statutory liability, (for tax not correctly deducted and therefore unpaid on emolument income), by providing within that regime the following statutory mechanisms:-

- a. the requirement that notice of determination be served on the **employer, demanding the amount of tax** to be deducted;
- b. conferring on the **employer the right to object**;
- c. the imposition of criminal liability, by the stipulation that the **employer** can be guilty of an offence if the correct amount is not deducted;
- d. the express stipulation that the **employer** is liable in that case for the unpaid tax as if it were the taxpayer.

This emphasises that there is a **separate** ability to recover undeducted or unremitted tax under the PAYE regime from the employer.

17. Neither the sequence in which the provisions of the Act are set out nor, (given s. 11(2) of the Interpretation Act), the heading preceding section 98, is of sufficient weight to suggest otherwise or to suggest a construction of the section inconsistent with its actual wording and content.

18. There is no statutory precondition which must be satisfied, whether express or implied, that an assessment must be made of the emolument earner before the Respondent can raise a PAYE determination against an employer in respect of undeducted or unremitted tax on emoluments or additional emoluments of that emolument earner.

19. The PAYE regime of the Income Tax Act imposes statutory obligations on an employer / emolument provider **independent** of those imposed on an employee/ emolument earner. Therefore under the pay as you earn provisions of the Income Tax Act an employer can be directly liable for tax unpaid on its employee's emoluments, on the basis of its own separate statutory liability, and in the absence of a prior assessment of the employee's liability.

20. Further there is no demonstrated statutory basis for restricting this statutory obligation in respect of past years of income. S. 99(1)(B) (a) of the Act simply does not support such a construction, and a reading of the Act in context does not support the employer's contention that there must first be an assessment of the employee's liability before there can be recovery from the employer of unpaid tax on emoluments in respect of years prior to the current year of income.

21. The pay as you earn provisions of the Income Tax Act constitute a separate code of taxation, notwithstanding any provision in the Act to the contrary, and under section 99 an employer has a separate statutory liability for tax unpaid on its employee's emoluments, including in respect of past years of income, even without a prior assessment of the employee's liability.

## **Order**

22. The appeal is dismissed.

## **Analysis and Reasoning**

### **The PAYE system**

23. The system of PAYE in this jurisdiction was succinctly described by the Board at paragraphs 17 – 20 of its Case Stated as follows:-

*17. The system of PAYE has its legislative underpinning in section 99 of the Income Tax Act, Chap. 75:01. Under section 99(1), notwithstanding any provision in the Income Tax Act to the contrary, PAYE is to be withheld by the employer on the emolument income it has provided to the employee. The term "emoluments" is defined widely under section 100 to include not only cash payments to the employee such as salaries, wages and bonuses but*

*also benefits in kind such as the value of board and lodging and usage of company owned or leased motor vehicles. The onus therefore is placed upon the employer to deduct and remit to the Respondent the PAYE. The time prescribed for such being on or before the fifteenth day of the month next succeeding the month in which the employer paid the emoluments.*

*18. The PAYE deducted and withheld by the employer from the emoluments of the employee shall be deemed to have been made to the account of the employee who shall thereupon be liable for the income tax to the extent of the amount so deducted.*

*19. Inherent in that process would be the inevitable dispute which would arise between the Respondent and the employer as to whether a particular item is in fact an emolument or the quantum of the emolument or whether in fact, particular individuals are its employees by way of examples. Where the Respondent is of such an opinion, it shall cause to be served on the person providing the emolument, a notice of its determination under section 99(1A)) of the Income Tax Act and demand the amount of tax to be deducted or withheld. It also has to inform such person of the due process in the dispute procedure being the right to object to such determination. The issuance of a notice of determination is therefore a means to facilitate the due process in the mechanism to determine whether the employer is in compliance with its statutory obligations to deduct and remit the appropriate amounts of PAYE.*

*20. Under s.99 (1D) of the Income Tax Act, the procedure which relates to the determination of objections for assessments of income tax and corporation tax applies mutatis mutandis to the procedure for the determination of objections to PAYE determinations save that the time period for the determination is twelve months in the case of PAYE as opposed to the twenty four month period prescribed under s.86 (8) of the Income Tax Act.*

24. The Board's summary cannot be improved upon.

### **The Statutory context**

25. The relevant provision in this jurisdiction is s. 99 of the Income Tax Act which is set out below:  
- (all emphasis added )

**99. (1) Notwithstanding any provision of this Act to the contrary, where emoluments arise or accrue in or are derived from or received in Trinidad and Tobago in a year of income for the benefit of an employee or the holder of an office, tax shall, subject to and in accordance with any Regulations made under section 125, be deducted or withheld by the person providing the emolument.**

**(1A) If any question arises as to whether—**

**(a) an amount is an emolument in respect of which tax shall be deducted or withheld pursuant to this section;**

**(b) an allowance claimed pursuant to section 98 should be admitted;**

**(c) the quantum of the emolument is in dispute; or**

**(d) the tax deducted or withheld from the emoluments of an employee is in accordance with the provisions of this Act or any regulations made under section 125, such question shall be determined by the Board in writing subject to the provisions of this section relating to objections and appeals against the determination of the Board.**

**(1B) Where the Board is of the opinion that an amount is an emolument and that the correct taxes have not been deducted or withheld, it shall—**

**(a) cause to be served on the person providing the emolument, notice of its determination under subsection (1A), demanding the amount of tax to be deducted or withheld by that person; and**

**(b) inform the person of his right to object.**

**(1C) Where a person providing an emolument under this section disputes the determination of the Board, he may apply to the Board by notice of objection in writing delivered to the Board, to review its determination and such application shall—**

**(a) state precisely the grounds of his objection; and**

**(b) be made within fifteen days from the date of service of the notice of determination.**

**(1D) The provisions of section 86(3), (4), (5), (5A), (6), (7), (8) and (11) and section 87 of this Act relating to objections and appeals shall apply mutatis mutandis to this section, except in relation to the period of twenty-four months stated in section 86(8), which shall for the purposes of this section be read as twelve months.**



(2) *The tax deducted or withheld as required by subsection (1) shall, subject to and in accordance with any Regulations made under section 125, be paid to the Board by the person deducting or withholding the same at such time or times and by such date or dates as may be prescribed by such Regulations, and on the payment thereof the Board shall send to such person a receipt which shall to the extent of the amount referred to therein be a good and sufficient discharge of the liability of such person for any amount deducted or withheld as required by this section.*

(3) *Subject to subsection (10), where an amount has been deducted or withheld under subsection (1) from the emoluments of any person, it shall for the purposes of this Act be deemed to have been received by such person at the time of the deduction or withholding thereof.*

(4) ***If any person fails—***

***(a) to deduct or withhold any amount required to be deducted or withheld by him by subsection (1); or***

***(b) to remit or pay to the Board any amount which he is required by subsection (2) to pay to the Board by such date or dates as may be prescribed by Regulations made under section 125, he is guilty of an offence; and, in addition to such amount, there shall become payable by such person to the Board, unless the Board otherwise directs, a sum of twenty-five per cent of such amount, or forty dollars, whichever is the greater, and he shall pay interest at the rate of twenty per cent a year on such amount and on such additional sum, unless the Board otherwise directs, from the day on or before which he was required to make the payment to the day of payment, as if the same was tax payable by such person on the date when such amount was required to be deducted, withheld, remitted or paid, as the case may be, and the provisions of this Act relating to the collection and recovery of tax shall apply to the collection and the recovery of any such sum or amount.***

(5) *All amounts deducted or withheld by any person pursuant to the provisions of subsection (1) shall be deemed to be held in trust by such person for Trinidad and Tobago, whether or not they have in fact been kept separate and apart from such person's own monies, and shall not be subject to attachment in respect of any debt or liability of the said person and in the event of any liquidation, assignment or bankruptcy the said amounts shall form no part of*

*the estate in liquidation, assignment or bankruptcy but shall be paid in full to the Board before any distribution of the property is made.*

26. The statutory regime prescribed by section 99 can be summarized as follows:-

- a. Section 99 contemplates that there may be disputes as to, inter alia, whether ***an amount is an emolument in respect of which tax shall be deducted or withheld.***
- b. It provides that in that context a notice of determination is to be **served on the person providing the emolument** – in this case the employer.
- c. It specifically provides that by its notice of determination it can **demand** the tax to be deducted or withheld by the person providing the emolument. (This cannot as a matter of language or logic be construed to mean that such tax can only be recovered prospectively. The notice clearly refers to liability to pay tax that should have been deducted. The demand clearly must refer to the tax uncollected in past periods.
- d. It further provides that the notification of the right to object to the determination is to be served on the person providing the emolument – in this case the employer.
- e. It further imposes liability on the person providing the emolument in the event that the correct amount of tax is not deducted. In fact it makes this a summary offence prosecutable in the magistrate's court and prescribes the penalty.
- f. It further provides that the tax unpaid is recoverable against the employer **as if the same was tax payable by such person.**

27. It is clear therefrom that:-

- a. It is the employer who is informed of the determination,
- b. It is to the employer that a demand for the amount of tax to be deducted or withheld by him is made.
- c. It is the employer who is informed of the right to object,
- d. It is the employer who is subject to criminal liability ,
- e. It is the employer who is liable to repay tax incorrectly under deducted **as if the same was tax payable by such person** (that is - the employer.)

28. A direct **liability to deduct** tax on the emolument is imposed upon the person providing the emolument – the employer- as that liability is expressly made **enforceable against the employer / emolument provider**.

29. Therefore the statutory provisions referred to clearly recognize, and in fact impose, a statutory obligation upon the employer to deduct and remit the correct amount of PAYE tax. That obligation is separately enforceable against it, and therefore separate from that of the employee/emolument earner's liability to pay that tax.

30. Section 99, providing for deduction of tax on emoluments by the employer providing such emoluments, does contemplate that there may be provisions in the Income Tax Act to the contrary. It provides that it is to take effect "***Notwithstanding any provision of this Act to the contrary***". The meaning of those words must therefore also be considered.

### **Principles of statutory construction in relation to Taxing statutes**

31. General principles of statutory construction which are applicable to taxing statutes were identified in the case of *Reynolds v Income Tax Commissioner (1964) 7 WIR 154*, where then Chief Justice Wooding stated in relation to the construction of the then Income Tax Ordinance:

*"It must be read as a whole so as to correlate its several parts. Its language when plain must be given its full significance. Resort may be had to special rules of construction if its terms should prove ambiguous, but there should be no recourse simply to provide a means of entry for the fisc or a hatch of escape for the taxpayer. The imposition of tax being the prerogative of the legislature, the courts must enforce what the legislature decrees. No exaction can be maintained which is not specifically levied, and no avoidance permitted which finds such support from sophistry alone. Interpretation must be strict because it is a taxing statute ...."*

32. A literal construction of s. 99, read within the context of the Act, would also lead to the conclusion that there is not to be read into it a precondition, (that the emolument earner must first be assessed before there can be notice of a determination and a demand for tax from the emolument provider on emoluments alleged to be unpaid), as:-

a. Such a precondition does not appear in s. 99 itself, and

b. To the extent that there is provision for assessment of the emolument earner before demand is made upon **him**, (and not the emolument provider), for unpaid tax, s.99 expressly provides that it is to take effect “**Notwithstanding any provision of this Act to the contrary**”.

33. A literal construction of those words leads to the conclusion that s. 99 (1B), which permits service upon the emolument provider / employer of a notice of determination demanding the amount of tax to be deducted or withheld, **does not require** that there be read into them any other precondition that the emolument earner first be assessed. There is simply no language to that effect in the section and any suggestion of implication of such language is expressly disavowed by the words “*Notwithstanding any provision of this Act to the contrary*”.

34. Assistance can be also be gleaned from judicial interpretation of similar language in the local taxing statute, as well as case law in relation to PAYE systems in other jurisdictions.

#### **Case law – *Notwithstanding any provision of this Act to the contrary***

35. Language similar to the words “***Notwithstanding any provision of this Act to the Contrary***” has been the subject of judicial interpretation in related contexts. See for example the case of **Motor and General Insurance Co. Ltd-V. B.I.R. Tax Appeal Board 1967 1TTTC 161**, cited by the Respondent, where the court considered the words in S19 (1) of the Income Tax Ordinance Chapter 33 No.1 “***Notwithstanding anything to the contrary contained in this Ordinance***”.

36. That case concerned the assessment of insurance companies. His Honour Kelsick QC Chairman of the Tax Appeal Board, as he then was, stated at page 168 paragraph 1:

*“The effect of these words at the beginning of section 19 “Notwithstanding anything to the contrary contained in this Ordinance” is in our judgment that the **special and express provisions contained in the section** override and exclude the provisions of the Ordinance for the ascertainment of trading profits of **other businesses** on ordinary commercial principles. Sections 19 and 20 which appear under the heading “Insurance and Shipping Companies” contain a special set of provisions or a code for the income taxation of these companies.”*

37. The Board there found support for its conclusion from equivalent language interpreted by the High Court of Madras in *United India Life Assurance Co. Ltd.* (1963) 49 ITR 965.

38. In **G.H Ltd and the Board of Inland Revenue** No. I 146 of 1967, also cited by the Respondent, the Board had to consider s12A (1) of the Income Tax Ordinance and the same words, ***“Notwithstanding anything to the contrary contained in this Ordinance ...”*** contained in that section. At page 12 of the judgment His Honour Kelsick QC Chairman of the Tax Appeal Board, as he then was stated:-

*“Furthermore the choice of the opening phrase of the section **“Notwithstanding anything to the contrary contained in the Ordinance”** is significant. If section 13 were intended to be operative, one would have expected the draftsman to use the expression **“Subject to the provisions of this Ordinance”**. This language when coupled with the exclusion of Section 12A (2), was indicative that the provisions of section 12 A were to constitute a separate code for capital allowances including their carry forward. In this connection see the judgment of the Appeal Board in **Motor and General Insurance Company Ltd** (No 1 136 of 1967) and the authorities there cited in support of the ruling that sections 19 and 20 of the Ordinance contained a special and exclusive code for taxation of insurance and shipping companies”.*

39. The decision in **G.H. Ltd** was upheld and approved as authoritative by the Court of Appeal in **Josephine De Lima and the Board of Inland Revenue. Civ. App. 97 of 1982 Delivered October 11, 1985.**

**Whether the change in wording of s.99 of the Act from its predecessor provision is of significance**

40. The respondent pointed out that section **53 B(1) of the Income Tax Ordinance**, which preceded **Section 99(1) of the Income Tax Act**, originally stated (“notwithstanding any provision of this Ordinance to the contrary”) that tax shall *be deducted or withheld...* ***“notwithstanding that when the payment is made no assessment has been made in respect of the emoluments or that the tax on the emoluments is for a year of assessment other than the year during which the payment is made”***.

41. It submitted that at that time in 1957 the inclusion of those words was necessary as it was the BIR which made the assessment on the taxpayer. However since 1963, when the **self-assessment** system was introduced there was no need for those words.

42. The words “**notwithstanding that when the payment is made no assessment has been made in respect of the emolument**” are also similar to the language used in the UK 1970 Income Tax Act s. 204 which is as follows:

*On the making of any payment of, or on account of, any income assessable to income tax under Schedule E, income tax shall, subject to and in accordance with regulations made by the Board under this section, be deducted or repaid by the person making the payment, **notwithstanding that when the payment is made no assessment has been made in respect of the income and notwithstanding that the income is in whole or in part income for some year of assessment other than the year during which the payment is made.*** (Halsbury’s Statutes 3<sup>rd</sup> ed. pg. 285)

43. The instant language of s. 99 is more general. It does **not** specify that tax shall be deducted or withheld “**notwithstanding that when the payment is made no assessment has been made** in respect of the emolument”, or **notwithstanding that the income is in whole or in part income for some year of assessment other than the year during which the payment is made.**

44. However the language now contained in s. 99 “**Notwithstanding any provision of this Act to the contrary**” is sufficiently wide to encompass the exclusion of other provisions in the Income Tax Act, including those which refer to the assessment of the individual emolument earner.

45. As indicated previously, in **G.H Ltd and the Board of Inland Revenue** similarly wide language has been construed to create a separate special and exclusive code, (in that case for taxation of insurance and shipping companies).

46. Therefore, apart from the fact that this is the natural meaning of the language used in s. 99 it would also be consistent with authority to construe the instant language in s. 99 in relation to PAYE as intended to create its own special and exclusive code for taxation.

47. In so far as provision is made for assessment by inter alia section 83 of the Act, the respondent contends that section 99 takes effect **notwithstanding any provision of this Act to the contrary**. This would encompass and exclude any requirement for assessment of liability of the emolument earner prior to making demand from the emolument provider for tax allegedly not deducted or remitted.

48. The relevant portions of section 83 are set out hereunder.

**ASSESSMENTS**

**83.** (1) *The Board shall proceed to assess every person chargeable with the tax as soon as may be after the day prescribed for delivering the returns.*

(2) *Where a person has delivered a return, the Board may—*

(a) *accept the return and make an assessment accordingly; or*

(b) *refuse to accept the return and, to the best of its judgment, determine the amount of the chargeable income of the person and assess him accordingly.*

(3) *Where a person has not delivered a return and the Board is of the opinion that such person is liable to pay tax, it may, according to the best of its judgment, determine the amount of the chargeable income of such person and assess him accordingly, but such assessment shall not affect any liabilities otherwise incurred by such person by reason of his refusal, failure or neglect to deliver a return.*

(4) *Subject to section 89(2) and (3), if at any time within the year of income or within six years after the expiration of the year of income or three years from the date the tax return is filed, whichever is later, the Board makes an assessment which results in a person being charged to tax for the year of income in respect of a total chargeable income in excess of the chargeable income disclosed in the return of income rendered by such person, the Board may (unless the person assessed proves to the Board's satisfaction that the omission or incorrectness of the return did not amount to fraud, covin, art or contrivance, or gross or willful neglect) charge such person, in addition to the total tax otherwise charged in the assessment, further tax not exceeding the amount of tax charged in respect of the excess.*

(5).....

(6) *Nothing in subsections (1) to (5) shall be construed as derogating from any other provisions of this Act.*

49. In fact s. 79 (6) and (7) of the Act recognize that persons paying tax under the separate regime of taxation prescribed in s. 99 would not be subject to the requirement under that section to pay tax quarterly. This is one example of the recognition within the Act that s. 99 takes effect ***notwithstanding any provision of this Act to the contrary.***

*79. (1) Subject to this section, every person shall pay to the Board on or before 31st March, 30th, 30th September and 31st December, respectively, in each year of income, an amount equal to one-quarter of the tax as estimated by him at the rates set out in Part I of the Third Schedule on his estimated chargeable income for the year and, on or before 30th April in the next year, the remainder of the tax, as estimated by him.*

*(2) For the purposes of subsection (1), the estimated chargeable income of any person for a year of income shall be taken to be the chargeable income as disclosed in his return, if any, of total income for the preceding year of income.*

*(3) Where the estimated chargeable income of any person for the year of income as provided for by subsection (2) is, in the opinion of such person, likely to be less than the chargeable income of the preceding year, on an application by such person for the purpose, the Board may revise the estimated chargeable income of that person and the amount of tax chargeable thereon, and the provisions of subsection (1) shall apply accordingly.*

*(3A) Where the estimated chargeable income of any person for a year of income is likely to exceed or exceeds the chargeable income of the preceding year of income, **the quarterly instalments by that person** shall be paid on the basis of the estimated chargeable income of the year of income.*

*(3B) Where a person to whom subsection (3A) applies had paid quarterly instalments which amount to less than the tax liability disclosed in the return of the year of income, such person*

*shall, with effect from 1st January 1992, pay interest under section 103 on the difference between—*

*(a) the tax liability on the chargeable income of the previous year of income plus 80 per cent of the increase in the tax liability of the current year on the previous year of income; and*

*(b) the total amount paid by the end of the fourth quarter.*



- (4) The Board may estimate the amount of tax payable by any person where—*
- (a) that person fails to make the return required by section 76(1);*
  - (b) no tax was payable in the immediately preceding year of income, and, upon making demand therefor in writing of such person, subsection (1) shall apply accordingly, as if the Board's estimate was the estimate of such person.*
- (5) Where an individual is in receipt of emoluments within the meaning of section 100 in a year of income, the provisions of subsection (1) shall not apply to that individual in respect of that part of his income arising or accruing to him from emoluments received by him in the year of income, but the instalment of tax payable under subsection (1) shall be at the highest rates as if that part of his income arising or accruing to him from emoluments as aforesaid was included in his estimated chargeable income for the year.*
- (6) Where amounts have been deducted or withheld under section 99(1) from the emoluments received by an individual in a year of income, if the emoluments from which such amounts have been deducted or withheld and which he had received in the year, are equal to or greater than three-quarters of his total income for the year, he shall, on or before 30th April in the next year, pay to the Board the remainder of his tax for the year as estimated by him.*
- (7) Where the income of an individual for a year of income consists solely of income from emoluments within the meaning of section 100 that individual shall, on or before 30th April in the next year, pay to the Board the remainder of his tax, if any, as estimated by him.*

### **Case law**

50. The Board accepted that the case of **Ramlakhan** (1974) 21 WIR 305 at 309 established that at common law there are three stages in the imposition of a tax – the declaration of liability, the assessment of quantum, and the collection and recovery of tax. It recognized those principles “*in the context of an imposition of tax on individuals and corporations*” (paragraph 22). It held however that “*the obligation an employer has under s. 99(1) of the Income Tax Act Chap.75:01 is only concerned with the deduction of the relevant PAYE from the emoluments provided by the employer. This is separate and apart from the Respondent raising an assessment on any particular individual*”.

51. In **Ramlakhan** (1974) 21 WIR 305 at 309 it was stated (all emphasis added):-

*“I am of the view, that the service of the notice of assessment is a separate step apart from the assessment itself which is complete as soon as the mathematical calculations are complete, and the Commissioner has fixed the quantum of the tax payer’s liability. If perchance, the Commissioner decides for some reason not to inform the tax payer of such liability under Section 78 (1) of the statute, he may not take any further step to collect the tax. For one thing it is upon the notice of assessment the tax payer’s right to appeal to the Board of Review depends. And the Board may or may not affirm the Commissioner’s assessment. So that the service of the notice is an important step in the whole process of tax collection, and is no part of the actual assessment, notwithstanding the expression ‘duly assessed’ in the statement of claim. That expression means assessed in a manner allowed by the statute, that is, in due process of law, but does not include any step after assessment. I must therefore find against the Commissioner on this point.”*

52. It is significant that the reasoning of the court in **Ramlakhan** turned upon the issue of due process, and a finding that if the Commissioner decided not to inform the tax payer of his assessed liability then he may not take any further step to collect the tax. The reason for that was that the due process contemplated by the statute was the tax payer’s right of appeal, which depended upon receipt of the notice of assessment.

53. That is dealt with under Section 78 (1) of the statute in the Income Tax Act of Guyana, which is in most respects similar to section 86 of the Income Tax Act Trinidad and Tobago, (save for the additional words *the amount of tax withheld or deducted from his emoluments*. These words are included in the Guyana statute and are to be included in the notice of assessment in Guyana, but which are not included in the Trinidad statutory equivalent).

54. However **Ramlakhan** did not deal with the equivalent of Section 99 of the Income Tax Act with which this appeal is concerned. As indicated by the Board, Section 99 (1B) contains safeguards with respect to due process. We are of the view that the Board was correct in so concluding.

55. Section 99 requires the service on the person providing the emolument of notice of the determination (99 (1B) (a).

56. It requires that person to be informed of his right to object 99 (1B) (b).

57. It recognizes that there may be a review of that determination (99(1C).

58. What is significant is that Section 99 does not expressly state, as it could have easily done, that such notice of determination was to be served upon the employee in addition to being served upon the employer.

59. Neither does it indicate that the person to be informed of the right to object is the employee.

60. It could have easily have done so in sub section (1 B), by specifying that the Board shall inform **both** the party who provided the emolument **and** the emolument earner of the right to object. Yet nowhere in Section 99 is it stated or even implied that before issue of a notice of determination by the Board that there must first be an assessment of the tax payer before recovery.

61. Section 99 makes it clear that:-

- a. notice of demand for payment of such tax ,
  - b. the right to object, and
  - c. criminal liability for nonpayment/ non deduction/ non remittance of such tax,
- are all in respect of the emolument provider, that is, the employer.

62. The separate statutory liability of the emolument provider is illustrated in case law from the UK where the respective obligations of employer and employee have had to be considered. For example, in **Bernard v Shaw** [1951] 2 All E.R 267 the employer sought to recover from the employee sums that it was liable to pay to the Revenue on the employee's emolument income, although it had not yet paid these sums. At page 268 H Lynskey J found that under the Income Tax Employments Act 1943 Section 2, the Finance Act 1946 and regulations made in 1950 "*an obligation was imposed on employers to ascertain the total emoluments which each of their*

*employees is earning or is likely to earn or has earned in any particular year and then to deduct from the remuneration or emolument payable to the employee the appropriate tax, notwithstanding that when the payment is made no assessment has been made in respect of the emoluments.”*

63. (The 1943 Income Tax Act (Employments) UK s.2 specifically provided for regulations to be made, to have effect **notwithstanding** anything in the Income Tax Acts).

64. Lynskey J went on to state at paragraph 268 (g)

*“where there has been an assessment a certificate or card is issued which bears a code number which directs the employer as to the proper amount to be deducted weekly, monthly or quarterly as the case may be from the employee’s remuneration. In respect of the collection of tax a **statutory duty** is therefore imposed on the employer and, if he fails to deduct tax, **he is in breach of that duty and is liable to pay that tax to the revenue authorities whether he has deducted it or not.**”*

65. It was expressly held that in respect of the collection of tax, a **statutory duty was therefore imposed upon the employer** to make deductions and if he failed to deduct tax he was liable for breach of that duty and **liable (himself) to pay the tax** to the revenue authorities, **whether he had deducted it or not**. In that case the plaintiffs did not carry out their statutory obligations by deducting tax. They paid all the remuneration without any deduction. ( page 268 G-H)

66. In **Bernard v. Shaw** the Court held at page 270 A:-

*“I am satisfied that the basis on which the present case was put forward primarily was as for money had and received to the defendant for the use of the plaintiffs, and that is the form of action which must fail. It is next suggested that because there is a legal liability to pay the tax to the Inland Revenue Authorities the plaintiffs are entitled to recover it from the defendant. I know of no such form of action. If the money had in fact been paid by the plaintiffs in discharge of the tax liability, it might well be that there would be a cause of action for money paid by the plaintiffs to the use of defendant on the basis that they were compelled by process of law to pay money which was due in respect of his remuneration as to which he would ultimately be responsible for taxation. In those circumstances the money*

*might be recovered, but in the present case the money has not been paid, and until the money is paid, it seems to me that there can be no action for money paid to the use of the defendant.”*

67. Although that case primarily concerned recovery by the company from the emolument earner of the tax liability incurred in respect of emoluments paid to him, it was decided on the basis that, even in the absence of a right to recover that unpaid tax from the emolument earner, there existed a statutory obligation on the employer to itself pay tax which should have been deducted. It treated the obligation of the employer to deduct tax as a statutory obligation, an obligation imposed directly upon the employer regardless of whether there could also have been recovery against the emolument earner.

68. The case of **Demibourne Limited v UK Revenue and Customs** [2005] UKSPC (delivered June 23<sup>rd</sup> 2005 SPC00486), was cited by attorney at law for the Respondent as support for the contention that the employer’s statutory obligation to deduct PAYE tax from the employee is a **separate** statutory obligation, and can arise **even where the emolument earner has already mistakenly paid tax on his emoluments.**

69. In that case the Revenue were held entitled to recover tax on emolument income which the employer had not paid, notwithstanding that the emolument earner, in the belief, which his employer shared, that after retirement he had become self employed, had himself deducted and remitted the appropriate tax on his emoluments.

70. This case under the UK PAYE statutory regime therefore recognized the **independent liability of the employer** to deduct and remit tax on emolument income, which existed even where the employee and the employer both mistakenly believed that the obligation to deduct and remit the appropriate tax was on the employee, after his status was believed (mistakenly as it turned out), to have changed after his retirement, and **even where the appropriate tax had been paid by the emolument earner.**

71. Even though the Revenue accepted that it could not recover tax twice, it sought recovery from the employer/ emolument provider on the basis that if the employee/ emolument earner had sought to recover from the Revenue the sums that he had paid as tax on his emoluments, in the mistaken basis that he had been self employed, he would probably be entitled to a return of those sums, leaving the Revenue without the ability to recover against anyone.

72. The theme common to *Shaw* and *Demibourne* is that a separate statutory liability is recognized as capable of being imposed upon the employer under a PAYE system. The statutory language must of course be considered. Where the statutory language so provides, a statutory obligation is placed upon the employer to satisfy the demand by the Revenue in respect of that separate and independent statutory obligation on the part of the employer.

73. In the instant case s. 99 does provide statutory language to support such a separate statutory liability of the emolument provider to deduct and remit the correct amount of tax, independent of any obligation to first assess the emolument earner. No authority has been provided to suggest the contrary.

74. On the material it submitted to the Board, and now to this Court, the employer has not been able to establish that there exists any basis for its contention that there must first be an assessment of the employee before there can be a notice of determination issued to the employee in respect of tax which the employer allegedly failed to deduct from the employee's emoluments under Section 99 of the Act.

75. In particular ,no argument that has been raised displaces the effect of section 99 (4)(b) which stipulates that in default of the direct statutory obligation on the employer to deduct the correct amount of tax the employer is liable to pay the amount required to be deducted as if it were tax **payable by the employee.**

#### **Does section 99 apply in respect of determinations relating to past years of income**

76. Another issue which arises is whether the specific PAYE regime established by s. 99 applies when the Board, as here, revisits a prior income year.

77. It was contended that there is a distinction between tax deducted in the current year of income and tax deductible in respect of prior years. Even if deduction of PAYE is permitted under s. 99, without the need for prior assessment of the employee's income and tax liability, it was contended that a demand with respect to a notice of determination for past years of income, as in this case, would be outside of the PAYE system, and in fact would constitute a recovery. Such recovery would be subject to the principles recognized in *Ramlakhan* - and in respect of which there must first be an assessment of the employee's liability.

78. However, in so far as it is contended that recovery of such tax against the employer only applies in respect of the employer's prospective obligation to deduct tax, the clear words of section 99 do not support such construction.

### **Headings**

79. Further, to the extent that such an argument can be constructed based upon the heading "Collection and Recovery" which precedes section 98 of the Act, headings in a statute form no part of the written law. The Board's findings and conclusions on the weight to be accorded to that heading are consistent with the **Interpretation Act Chapter 3:01 section 11(2)** which provides:-  
*"Marginal notes and headings in a written law and references to other written laws in the margin of or at the end of a written law form no part of the written law but shall be deemed to have been inserted for convenience of reference only."*

80. Neither is there any absurdity which requires the introduction of additional words in support of a purposive construction to the contrary. In any event attorney for the appellant was not able and did not suggest any such language that could have been introduced in support of any purposive construction which he contended applied.

81. Attractive as this contention might appear at first sight there is nothing in the Act as a whole, or in s. 99 in particular, to support it. In fact as discussed above, the language of s. 99 makes no such distinction. In those circumstances no such distinction can be implied.

## **Limitation**

82. No limitation period is provided under s. 99 in respect of a demand under a notice of determination against the employer.

83. It was contended that a construction of s. 99 which imposes liability on an employer to pay tax which the Board subsequently claims should have been deducted on an employee's emoluments, without such an express limitation period, could not be fair, as it could permit a re-visitation of the PAYE payable in respect of income years long past.

84. It was contended by the appellant that there would be no need to infer a limitation period if an assessment were first required of the employee's liability as the employee would have the benefit of the limitation period provided for in the Act by s. 83(4).

85. The dichotomy occasioned by lack of an express limitation period in respect of recovery against employers, as opposed to the emolument earners, is a valid concern. The difficulty with this contention however that is this also finds no support from any language in any provision of the Act. In particular the construction of S. 99(1B) (a), as referring to tax to be deducted in future , as suggested by the employer, cannot be supported by the plain meaning of its language.

86. The Board considered that it could infer a practical limitation period in relation to civil liability based on the 6 year period beyond which the employer was not required to keep records. While this may be a logical and practical construction of the Act this point was not fully argued before this Court. In any event as its determination is not necessary in deciding this appeal we express no view thereon.

## **Practical issues**

### **What if as here the notice of determination takes place years later?**

87. Here, the issue revisited by the Board was whether, in respect of several employees, the sums payable in respect of maintenance under the leases for the motor vehicles made available to them for personal use, were a taxable emolument. Where, as here the single issue is one which affects several employees, it would be understandable if, for practical reasons, the Legislature



considered that the onus should be placed on the employer to deduct the correct amount of tax, and in default, that the employer be accountable to pay it, regardless of whether the individual employee had first been assessed.

88. The most obvious such practical reasons which come to mind would be administrative workability and ease of recovery. Requiring that each employee first be assessed before recovery in respect of his unpaid tax was a statutory choice that could have been made, and which could have been reflected in the Act. The fact that it cannot be discerned in the Act strongly suggests that it was a choice which was not made.

### **Findings and conclusion**

89. We agree with the decision of the Board that:-

a. There is no statutory pre-condition which must be satisfied before the Respondent can raise a PAYE determination against an employer (in respect) of an individual who is in receipt of emolument income.

b. The issuance of a notice of determination by the Respondent on the employer as the provider of particular emoluments to an employee is the means to facilitate the due process in the mechanism to determine whether **the employer** is in compliance with **its** statutory **obligation** to deduct from the emolument earner and remit to the Respondent the appropriate amounts of PAYE.

c. The **statutory obligations** an **employer** has under s.99 (1) of the Income Tax Act, Chap. 75:01 are **separate and apart** from the powers that the Respondent has for raising an assessment or an additional **assessment** on any particular **individual** within the ambit of sections 83 and 89 of the Income Tax Act, Chap. 75:01.

90. The service of a notice of determination under section 99 is upon the employer. This triggers the right of the employer to contest the determination. The fact that a right is given to the employer to contest the determination is clearly indicative of the fact that the employer has a separate liability to deduct the correct amount of tax under the PAYE regime.

91. The section recognizes that statutory liability for tax not correctly deducted, and therefore unpaid on emolument income, by providing within that regime the following statutory mechanisms:-

- a. the requirement that notice of determination be served on the employer, **demanding** the amount of tax to be deducted;
- b. conferring on the employer the right to object ;
- c. the imposition of criminal liability by the stipulation that the employer can be guilty of an offence if the correct amount is not deducted;
- d. the express stipulation that the employer is liable in that case for the unpaid tax as if it were the taxpayer. This emphasises that there is a **separate** ability to recover un-deducted or unremitted tax under the PAYE regime from the employer.

92. Neither the sequence in which the provisions of the Act are set out nor the heading preceding section 98, (which *forms no part of the written law but is for convenience of reference only*, see s. 11 of the Interpretation Act), is of sufficient weight to suggest otherwise, or to suggest a construction of the section inconsistent with its actual wording and content.

93. **There is no statutory precondition which must be satisfied, whether express or implied,** that an assessment must be made of the emolument earner before the Respondent can raise a PAYE determination against an employer in respect of undeducted or unremitted tax on emoluments or additional emoluments of that emolument earner.

94. The PAYE regime of the Income Tax Act imposes statutory obligations on an employer / emolument provider independent of those imposed on an employee/emolument earner. Therefore under the pay as you earn provisions of the Income Tax Act an employer can be directly liable for tax unpaid on its employee's emoluments in the absence of a prior assessment of the employee's liability.

95. Further there is no demonstrated statutory basis for restricting this statutory obligation in respect of past years of income. S. 99(1B) (a) simply cannot bear such a construction. A reading of the Act in context does not support the employer's contention that there must first be an assessment

of the employee's liability before there can be recovery from the employer of unpaid tax on emoluments in respect of years prior to the current year of income.

96. Under the pay as you earn provisions of the Income Tax Act, in particular section 99, an employer has a separate statutory liability for tax unpaid on its employee's emoluments, including in respect of past years of income, even without a prior assessment of the employee's liability.

**Order**

97. The appeal is dismissed.

**Peter A. Rajkumar**  
**Justice of Appeal**