IN THE PRIVY COUNCIL **JCPC/2025/0015**

ON APPEAL FROM THE COURT OF APPEAL OF THE EASTERN CARIBBEAN SUPREME COURT

(ST VINCENT AND THE GRENADINES)

BETWEEN: -

UNICOMER (ST VINCENT) LIMITED

Appellant

and

(1) APPEAL COMMISSIONERS

(2) THE COMPTROLLER OF INLAND REVENUE

Respondents

CASE FOR THE SECOND RESPONDENT

Introduction

1. The Appellant appeals against the dismissal by the courts below of its challenges to three elements in the Second Respondent's assessment **[89-93]**: (i) the disallowance of certain payments as a deductible expense, pursuant to section 23 ITA **[AB 2/EB1144]**; (ii) the assessment of these payments as subject to withholding tax under section 66 ITA **[AB 5/EB1149]**; and (iii) the treatment of the Appellant's income, pursuant to section 9 ITA **[AB 1/EB1142-43]**, as having accrued for tax purposes when credited in the Appellant's books of account rather than later.

Elements (i) and (ii) – sections 23 and 66

2. Although he does not concede every point in the Appellant's lengthy and detailed Case, the Second Respondent does not resist the appeal as it relates to elements (i) and (ii). It is submitted, however, that the appropriate remedy is neither the mere quashing of the

assessment simpliciter nor the remission of any part thereof to the High Court (these being what the Appellant proposes at para 118 of its Case as the possible remedies). Rather, for the following reasons the Board is invited to advise that, if the Second Respondent's assessment is quashed as it relates to these elements, the matter be remitted to the Appeal Commissioners.

3. The basis for the Second Respondent's disallowance, pursuant to section 23 **[AB 2/EB1144]**, of the Appellant's claimed deductions was that there was 'no foundation in the facts to support th[e] contention' that the Appellant had contracted with United to provide credit protection insurance (see the decision letter at para 1 **[90]**). As the Second Respondent confirmed in his oral evidence **[826-827]**, his assessment was made on the basis that this was a sham, a scheme involving falsely characterising the Appellant as having made payments of insurance premiums to United. This was also a material element in the Second Respondent's assessment under section 66 **[AB 5/EB1149]** (see the decision letter at **[92]**: 'Please see our statements under item 1 of this letter […]').

4. The judge disagreed, at para 64 **[24]**:

> '[T]he court accepts that the role that was played by United was as a provider for and of insurance coverage for the [Appellant] in the form of CPI. Without that policy in effect as between United and the [Appellant], the [Appellant] would not have in turn been able to offer the service to its customers. That in this court's mind is integral and belies the contention of the [Second Respondent] that the [Appellant] was engaged in self-insurance.'

The judge also found (at para 61 **[24]**) that United had effected a contract of reinsurance with Canterbury.

5. It is for this reason that the Second Respondent does not resist the appeal against his assessments under sections 23 and 66.

6. It does not follow, however, that the Board should simply quash the assessment as it relates to these elements without more, in substance deciding (as the Appellant appears to contend it should) that the amounts sought to be deducted were all properly deductible for tax purposes (and did not attract withholding tax under section 66). This would be to fail to take account of other unchallenged findings of fact by the judge and of the material

underlying those findings.

7. As is common ground (see Appellant's Case at para 56), during the whole of the relevant period the Appellant's financial statements, which were audited by KPMG, did not show funds moving from the Appellant to United but instead showed them moving from the Appellant to Canterbury. The Appellant's evidence before the judge was that this was simply an error:

> '[…] the CPI premium payments were incorrectly classified in the Financial Statements of the Appellant as monies payable to Canterbury.'
>
> (Affidavit of Jn Charl Miller, Regional Tax Manager of the group of companies of which the Appellant is a member, 6 December 2017, at para 7 **[439]**.)

This explanation was roundly rejected by the judge: the Second Respondent had submitted that the contention that the financial statements were merely erroneous was 'wholly incred[ible]' (judgment at para 69 **[26]**), a submission that the judge 'accept[ed]' as 'wholly reasonable when one considers the entirety of the evidence […]' (para 70). The judge also found that in 2015 the Appellant's then finance director 'admitted to the [Second Respondent] that United was in fact the agent for Canterbury locally' (para 71). In her discussion of the *Courts (Barbados)* case, which had been cited by the Appellant as an example of similar deductions having been allowed, the judge observed at para 80 **[28]**:

> 'Courts (Barbados) [unlike the Appellant in the present case] had not produced financial statements showing that the said Canterbury was classified as a party to whom sums were paid directly. There was therefore no information that showed that the transaction with Phoenix [the equivalent in that case of United in the present case] and ultimately Canterbury had any other interpretation than that of independent parties.'

8. None of these findings of fact was challenged by the Appellant in the Court of Appeal. It is therefore not open to the Appellant to submit, as it does at para 58 of its Case, that 'it is eminently conceivable that someone in an accounting function with the corporate group, misunderstood the precise legal nature of the retail/insurance chain.' Nor is it accurate for the Appellant (at para 59) now to seek to re-characterise its audited financial statements as 'simply internal reporting, which could be right or wrong'. The Second Respondent respectfully submits that the factual position should accordingly be taken to be that the

Appellant itself classified its payments as payments to Canterbury, and that it did so deliberately.[1]

9. Section 23(1) **[AB 2/EB1144]** provides (with lettering and emphasis added):

> '(1) Where **[A] any transaction**, operation or scheme (hereinafter in this subsection referred to as "a transaction") […] **has the effect of** avoiding, **reducing** or postponing **the liability to tax of any person** for any year of assessment and **[B]** the Comptroller is of the opinion that **the transaction**—
>
> > (a) **was** entered into or **carried out by means or in a manner which would not normally be employed in the** entering into or **carrying out of a transaction of the nature of the transaction in question**; or
> >
> > (b) has created rights or obligations which would not normally be created between independent persons dealing at arm's length under a transaction of the nature of the transaction in question,
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> **the Comptroller shall determine the liability to tax as if the transaction had not been entered into**, or in such other manner as he deems appropriate to counteract such avoidance, reduction or postponement of liability as would otherwise be effected by the transaction.'

10. Treating the relevant payments as an allowable deduction plainly had the effect of reducing the Appellant's liability to tax: criterion [A] was accordingly satisfied. The question is whether criterion [B] was satisfied. As the emphasised words show, it would be satisfied if the transaction was carried out by means or in a manner which would not normally be employed in the entering into or carrying out of a transaction of the nature of the transaction in question.

11. A transaction under which a company purchasing insurance from an insurer, whether for itself or on behalf of its customers as in the present case, pays the premium not to the insurer but directly to a reinsurer, or at any rate classifies itself as doing so in its financial reporting, thereby indicating that such is the substance of the matter, is a transaction that is being carried out in a manner that would not normally be employed in the carrying out of a transaction of that nature. The normal manner of carrying out a transaction involving buying insurance is to pay one's insurer; whether, and with whom, the insurer reinsures is

[1] There was no direct evidence below as to the actual movement of funds.

a matter for the insurer, such that the insured does not usually even know who the reinsurer is.

12. Moreover, the Appellant's financial reporting was not the only curious aspect of this transaction. As the judge noted at para 53 of the judgment **[20]**, the Second Respondent had pointed out that the total paid out in claims to customers was a mere 12.2% of the total premiums net of commission, the remaining 87.8% going to United and/or Canterbury. This was excellent business for Canterbury, but one might reasonably question whether a party in the position of the Appellant would normally (e.g. in the absence of the connection with Canterbury) have been content to purchase, and to keep on purchasing without ever seeking to renegotiate, such a remarkably expensive insurance product.

13. Criterion [B] in section 23(1) does appear accordingly to be satisfied even on the footing that this was not a sham.

14. Where does this leave matters? The Appellant's Case addresses remedy only briefly, asking the Board at para 118(ii) and (iii) either simply to quash the Second Respondent's assessment entirely or (if it considers that any part of the assessment was lawfully made) to remit the matter to the High Court for redetermination of the quantum of lawfully assessable tax.

15. It is respectfully submitted that neither course would be satisfactory. As to the former, what the Appellant presumably intends is that in substance the Board should itself rule that the claimed deductions should be allowed (and should not be subjected to withholding tax). For merely quashing the Second Respondent's assessment (as regards elements (i) and (ii)) would not answer the question as to what the correct tax treatment *should* have been.

16. This, however, would involve the Board in determining for itself, in effect as the tribunal of first instance, whether the Appellant's payments are properly deductible (and do not attract withholding tax) in spite of the factors and findings mentioned above. The Board would of course formally have jurisdiction to do this, but this is hardly its normal role, especially in a tax case. The appropriate course, it is submitted, is to remit.

17. As to the suggestion that the Board should remit the matter to the High Court for it to determine the tax lawfully assessable, the Second Respondent respectfully submits that the High Court is not the appropriate body. Its powers are limited to review for error of law (section 106 ITA **[AB 6/EB1150]**) and it has no specialist expertise. The determination of the tax lawfully assessable, in circumstances where an assessment by the Second Respondent has been quashed, is in principle a matter for the Appeal Commissioners as the specialist body with general appellate powers (see sections 104-105 ITA **[SAB 2/EB2555-56]**).

18. In these circumstances the Board is respectfully invited, in the event that the Appellant's appeal succeeds in relation to elements (i) and (ii), to remit the matter to the Appeal Commissioners for reconsideration in the light of the factual findings of the judge and of the material underlying those findings.

<u>Element (iii) – section 9</u>

19. In relation to element (iii), the Second Respondent respectfully asks the Board to dismiss the appeal. This is for the following reasons.

20. The relevant statutory provisions are repeated here for ease of reference, again with emphasis:

> '34. Business income
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> (1) Subject to this Act, the **assessable income** of any person for any year of assessment, insofar as it is derived from a business, **shall be the** gains or **profits accrued therefrom during the basis period** for that year of assessment. […].' **[SAB 1/EB2554]**
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> '9. Income accruing
>
> (1) Subject to this section, **income shall accrue to a person for the purposes of this Act—**
>
> > (a) in the case of income from employment, when it is earned;
> >
> > (b) **in the case of a business, in relation to which the Comptroller is satisfied that a commercially recognised system of accounting other than a cash received basis is regularly followed, when it is credited, or should be credited, in the books of account of such person**;

(c) in the case of a business where, pursuant to subsection (2), the Comptroller has accepted the preparation by that person of his accounts on a cash received basis, when it is received by him;

(d) in the case of interest, when it is paid; and

(e) **in any other case, when it becomes due and payable to him**.

(2) Where any person regularly prepares the accounts of his business on a cash received basis the Comptroller may, on application and in his discretion, accept such method of accounting or may direct that accounts shall be prepared on an accruals basis and the income accrued to such person shall be ascertained accordingly.

[...].' **[AB 1/EB1142]**

21. It will be recalled that the Appellant's business was the hiring out and eventual selling of household items on hire purchase terms. This had the consequence that, although the Appellant's prospective entitlement to an amount equivalent to the sum of the instalments arose as soon as the customer signed the contract, its entitlement to payment (and its receipt of the money) came later, over time. In his evidence on behalf of the Appellant (affidavit of 29 September 2017 at para 17 **[357]**), Jn Charl Miller explained how this was dealt with in the Appellant's accounts:

> 'In terms of commercial accounting practice, the Appellant treats the full purchase price of the particular product as income in the year in which the Hire Purchase agreement is entered into. However, for purposes of income tax reporting, the instalments are only treated as income in the year in which they are received.'

22. Mr Miller also explained (affidavit of 6 December 2017 at para 4 **[438]**) that the Appellant's accounts were 'prepared in accordance with International Accounting Standards.'

23. The Second Respondent's decision on this issue **[90-91]** was as follows:

> 'KPMG [the Appellant's auditor] has confirmed that the income from the sale of goods related to hire purchase contracts is recognized in the financial statements when earned:
>
> > "Unicomer (St. Vincent) Limited is a retailer of domestic furnishings, appliances and other consumer durables and operates primarily on hire purchase contracts. As a result of the hire purchase transaction, the Company recognizes revenue in accordance with the revenue recognition principle by recognizing revenue at the point it is earned or realized".

However, in computing the assessable income for the period under review, the Company has deferred a portion of the profits associated with the hire purchase contracts as 'Deferred Hire Purchase Profits'. Effectively, this practice allows the company to report its profits on a cash basis.

This is a direct contradiction of Section 9 (1) (b) of the Income Tax Act **[AB 1/EB1142]** which states

> "in the case of [a] business, in relation to which the Comptroller is satisfied that a commercially recognized system of accounting other than a cash received basis is regularly followed, when it is credited, or should be credited in the books of accounts of such person".

Based on the above, the Comptroller reaffirms the Department's position therefore the accumulated deferred hire purchase profits as of March 31, 2011 were adjusted and have been reassessed as shown in the attached schedule.'

24. The Second Respondent did not state in terms that he was, in the words of para (b) of section 9(1) **[AB 1/EB1142]**, 'satisfied that a commercially recognised system of accounting other than a cash received basis [was] regularly followed' by the Appellant. But he plainly *was* so satisfied, given that:

   a. by quoting verbatim from the statute he was in effect directing himself as to what he needed to be satisfied of;

   b. the accounts stated on their face that they had been prepared in accordance with International Financial Reporting Standards **[457]**, and indeed they had been reviewed by KPMG who had stated that 'nothing has come to our attention that causes us to believe that these financial statements are not presented fairly, in all material respects, in accordance with International Financial Standards' **[451]**; and

   c. KPMG themselves had stated to the Second Respondent, as he observed, that the accounts were based on 'the revenue recognition principle', i.e. a basis other than the cash received basis.

25. Moreover, the Second Respondent was *right* to be so satisfied: as noted above, the Appellant's own evidence was that its accounts were 'prepared in accordance with International Accounting Standards'.

26. This being so, section 9 **[AB 1/EB1142-43]** required that the Appellant's income be treated for tax purposes as having accrued 'when it [was] credited, or should be credited, in the books of account'. The Second Respondent therefore acted correctly in treating the Appellant's income as having accrued for tax purposes when credited in the Appellant's books of account, not at any later date.

27. The Appellant contends at para 99(iv) of its Case:

> 'Section 9(1)(b) stipulates that, when a commercially recognised accounting system is employed, prevailing commercial accounting standards for revenue recognition applicable to the specific income shall be employed to determine the profits or losses of the taxpayer.'

On this foundation, the Appellant builds (at paras 100ff) an argument, with much citation of case law, which appears to be to the effect that it was entitled to have its income treated as not accruing until some time after it had been recorded in its books, *unless* the Second Respondent himself established to the court, by leading expert evidence about accounting standards, that recognised accounting standards applicable to this particular line of business (1) had been followed by the Appellant and (2) *required* income to be credited on the dates when it was recorded in the Appellant's books.

28. This foundation is, however, unsound. Section 9(1)(b) **[AB 1/EB1142]** does *not* say, in the words of the Appellant's inaccurate precis, that 'prevailing commercial accounting standards […] shall be employed to determine the profits or losses of the taxpayer.' It simply says that if the Comptroller is satisfied that a taxpayer is regularly using a commercially recognised accounting method other than the cash received basis, the taxpayer's income is treated as earned when it is entered in (or should be entered in) the books.

29. Of course, it would in theory have been open to the Appellant to allege, in the face of all the evidence, that its accounts had been prepared using a commercially *un*recognised accounting method, such that para (b) of section 9(1) **[AB 1/EB1142]** did not apply and therefore, in accordance with para (e), income should only be treated as accruing when it became due and payable. But the suggestion that, against the background described above,

it was for the Second Respondent to prove that the accounts had been prepared using a commercially recognised accounting method is quite unrealistic.

30. In any event, however, and quite apart from the burden of proof, the evidence before the judge was unequivocally to the effect that a commercially recognised system of accounting other than a cash received basis *had* been regularly followed by the Appellant, from which it followed that income fell to be treated as accruing when it was entered in the Appellant's books.

31. It is accordingly submitted that the courts below were right to uphold the Second Respondent's decision on this issue.

<u>Conclusion</u>

32. The Board is respectfully invited to advise that the appeal be dismissed as it relates to element (iii), and that, in so far as the appeal is allowed as it relates to elements (i) and (ii), the matter be remitted to the Appeal Commissioners, because:

(1) As regards element (iii), the applicable provision for determining when the Appellant's income accrued for tax purposes was section 9(1)(b) **[AB 1/EB1142]**, as the Second Respondent rightly concluded.

(2) As regards elements (i) and (ii), in the light of the findings by the judge and the material on which they were based, the appropriate course if the appeal is allowed is to remit the matter for reconsideration by the Appeal Commissioners.

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