In The Supreme Court of Bermuda

APPELLATE JURISDICTION

2014: No. 434

BERMUDA GAS AND UTILITY COMPANY LIMITED

Appellant

-AND-

THE TAX COMMISSIONER

Respondent

JUDGMENT

(in Court)[1]

Date of hearing: April 24, 2015
Date of Ruling: May 5, 2015

Mr. Saul Froomkin QC, Isis Law Limited[2], for the Appellant
Mr. Norman MacDonald and Mr. Michael Taylor, Attorney-General's Chambers, for the Respondent

[1] To save costs, the present Judgment was circulated without a formal hearing.
[2] Between the date of the hearing and Judgment, the Appellant's attorneys announced that they were rebranding as BeesMont Law Limited.

Background

1. By letter dated October 10, 2012, the Appellant appealed against the decision of the Tax Commissioner contained in an undated letter communicated by email on September 12, 2012 that the Appellant was ineligible for Retail Payroll Tax Concession announced by the Minister of Finance on September 30, 2011 ('the Concession").

2. The Tax Appeal Tribunal (Peter A.S. Pearman (Chair), Jeffrey Conyers and Kenneth Robinson) dismissed the appeal on November 28, 2014. By Notice of Originating Motion dated December 17, 2014, the Appellant appealed to this Court against that decision..

3. Having heard argument in relation to the four grounds of appeal, it seemed clear that only two (Grounds 2 and 3) were seriously arguable, both relating to the scope of the issues the Appeal Tribunal had jurisdiction to decide:

    (a) "*The Tribunal erred in law when, having found that the Respondent was wrong in holding that the Appellant was a 'public utility' and therefore ineligible for the 'retail concession', in failing to remit the matter back to the Respondent to determine said eligibility*";

    (b) "*The Tribunal erred in law by exceeding its jurisdiction in purporting to determine whether or not the Appellant was entitled to the 'retail concession', when in fact the only issue properly before it was whether or not the Appellant was a 'public utility' that issue having been decided in favour of the Appellant.*"

4. Mr. Froomkin QC very properly conceded that due to the way in which the Appellant's case was argued before the Appeal Tribunal, it would not have been clear at the first tier appeal that only a limited ground of appeal was being pursued. This was because the Appellant not only adduced evidence relating to the public utility point, but also adduced (or sought to adduce) before the Appeal Tribunal fresh evidence on the merits of whether the Appellant was eligible in financial terms for the Concession.

5. The central question to be determined on the present appeal is accordingly whether it was properly open to the Appeal Tribunal to determine the merits of the eligibility for the Concession dispute or whether the only issue properly before it was the question of whether eligibility could be validly refused on "public utility" grounds. Resolving this question turns on an analysis of the statutory appeal structure and an elucidation of the governing procedural principles and rules.

The Scope of the Appeal against the Tax Commissioner's Decision

6. Despite Mr. MacDonald's valiant efforts to persuade the Court to reach a contrary conclusion, I find that the scope of the Appellant's grounds of appeal was clearly limited to challenging the decision that it did not qualify for the Concession on the sole ground that the Appellant was a public utility. The Appellant's appeal letter dated October 10, 2012 to the Tax Commissioner stated in salient part as follows:

> "*Further to your…letter…where you advised that you support the classification of the Company as a public utility as defined in section 9 of the Statistics Act 2002, we hereby give notice of our intention to lodge an appeal in connection with this matter…*
>
> *The matters which we object to are as follows:*
>
> *1) The Commissioner has determined that since that the Company meets the criteria set out in the definition of "public utility" in Section 9 of the Statistics Act 2002 that it should be classified as such and therefore the Company would not be eligible for the Retail Payroll Tax Concession. However, the Commissioner has not taken account of the fact that the primary purpose of the business is the sale of goods to customers and that therefore the Company does in fact meet the criteria set out in the definition of a "retail store" in Section 2 of the Payroll Tax Act 1995 and should be classified as that accordingly.*
>
> *2)The Commissioner has failed to give due consideration to the fact that for the purposes of filing statistical information for the compilation of data for the Retail Sales Index, the Company has been categorized as a retail store by the Department of Statistics who have accepted the Company as such for a number of years, which is clearly contrary to the classification being assessed by the Commissioner of the company as a public utility under the definition contained in the Statistics Act 2002.*
>
> *3)The Commissioner has applied the said definition of public utility to the Company arbitrarily as there are other businesses engaged in the activities set out in Section 9(2)(b) of the Statistics Act 2002 such as gas stations which are not classified as a public utility although they meet the same criteria. This therefore represents an inequitable application of the criteria which acts to the detriment of the Company since this classification purports to exclude the company from eligibility for a retail tax concession enjoyed by such other entities.*
>
> *We would be grateful for an acknowledgement of our objection in due course and the opportunity to present our objections before the Tribunal for deliberation.*"

The Tax Appeal Tribunal's Decision

7. It appears that on the first occasion that the appeal was listed for hearing, the Appeal Tribunal proceeded to hear the appeal. The Respondent had filed affidavit evidence in support of its case from Mr. Anthony Manders, Financial Secretary, and Ms. Joelene Lindsay, Acting Assistant Tax Commissioner. The Appellant filed no written evidence, but at the hearing adduced oral evidence from its General Manager, Ms Judith Uddin.

8. Mr. Manders' Affidavit deposed that the Concession was not intended to apply to companies such as the Appellant and placed the Ministerial policy statement before the Appeal Tribunal. Ms. Lindsay's Affidavit purported to be "*the Collector's Case*" on the appeal (paragraph 25). The Affidavit gives the overall impression that the Collector understood that her decision and the appeal each concerned whether or not the Appellant was properly characterised as a "*utility*". For example, it was deposed that:

   (a) "*In an email dated April 5, 2012 the Office disallowed the Objector's claim…The Office informed the Objector that its primary purpose was the sale of propane gas as a utility business and that it is not eligible for the concession. The company is registered in the Office as a utility business. In an email to the Office on April 12 2012 the Objector once again noted the objection to the position of the Office. The basis of this objection was that the…Department of Statistics….treats the Objector as a Retail Establishment and thus the Office should view the Company in the same vein….The Objector was informed that… it was the job of the Tax Commissioner to ensure that taxes are collected in accordance with the Tax legislation….In a letter emailed to the Objector on September 12, 2012, the Collector reiterated the position of the Office and disallowed the Objection…*" (paragraphs 16-18, 22);

   (b) "*23. The Objector's letter to the Office on October 10th, 2012 was based on the following three points…*"; and

   (c) the Affidavit then proceeds to deal with the Appellant's three grounds of appeal against the Commissioner's decision, all of which relate to its classification by the Respondent as a utility. In dealing with the classification complaint, the deponent justified the classification by reference to both the fact that the Appellant had not previously objected to it and by reference to a general definition of a "utility" business set out in paragraph 9.

9. Both the grounds of appeal and the response to them clearly referenced a dispute as to whether the very nature of the Appellant's business as a utility disqualified it from benefitting from the Concession rather than a dispute as to whether, even if the utility classification was ignored as irrelevant, the Appellant was either eligible or ineligible based on a commercial and/or financial analysis of its business activities, analysed by reference to the terms of the Concession itself.

10. The hearing took place over three days: September 15-16 and October 2. Ms Lehman and Mr. MacDonald appeared for the Appellant and Respondent respectively. The following preliminary rulings were made:

    (1) the Appeal Tribunal rejected the Respondent's argument that the appeal should be struck-out because the Appellant was bound by the previous determination that it did not qualify for a 2001 payroll tax concession; and

    (2) the Appeal Tribunal acceded to the Respondent's application for certain portions of the Appellant's submissions to be struck out because they went beyond the scope of its grounds of appeal in breach of section 25(2)(a) of the Act.

11. Somewhat surprisingly, in light of the preliminary ruling that the Appellant was limited to arguing its formally pleaded grounds of appeal, the Appeal Tribunal proceeded to make the comparatively broad jurisdictional finding that "*the key issue to be determined in this appeal is the whether the Appellant's operations were such that they fall within or outside the terms of the Concession.*" This was an accurate formulation of the dispute between the parties broadly defined and assuming that the Respondent's reliance on the utility classification as a sufficient basis for rejecting the Appellant's claim was rejected. However, this was not an accurate reflection of the three grounds of appeal read in a straightforward way together with the Respondent's impugned decision.

12. However, in fairness to the Appeal Tribunal, the record compiled by the parties for the purposes of the appeal to this Court did not include the written submissions which were apparently tendered to the Tribunal which may well have invited consideration of the underlying merits of the Appellant's Concession claim. It was not complained before this Court that the Tribunal had rejected an invitation to limit its deliberations to the narrow question of whether or not, as a matter of construction of the Concession, the Respondent's classification of the Appellant as a 'public utility' constituted sufficient grounds for disqualification.

13. The Appeal Tribunal, having heard evidence proceeded to make findings on each of three limbs of the Concession "[i]*n order to determine whether the Appellant would*

be entitled to the benefits of the Concession". These three criteria were taken from the Office of the Tax Commissioner's '*Notice: Payroll Tax Retail Concession Defined*", which stated:

> (1) "*…the Office of the Tax Commissioner has defined 'Retail' as:* ***Any business, the primary purpose of which is the sale of good***[s] ***by 'retail' to consumers***…";
> (2) "*Goods are defined as, items held for sale where there is a physical transfer of ownership to the purchaser*";
>
> (3) "*The primary purpose of your business is dedicated to the sale of goods. That is sales greater than 50% to individual persons not to other businesses.*"

14. The Appeal Tribunal correctly viewed the classification of the Appellant as a 'public utility' as engaging the first of these three criteria, namely whether or not the Appellant was "*any business*" which would qualify if it meet the primary purpose test, as elaborated upon in the second and third elements of the definition. The Tribunal held:

> "*Within this element of the Notification, it is clear that the Appellant falls within the concept of 'any business…', and it is arguable, and entirely possible, that the primary purpose of the Appellant's business is the sale of goods by 'retail' to consumers.*
>
> *Given this rather vague language and qualification, on balance the Tribunal accepted the argument or possibility that the Appellant complied with this element of the Notification*…"

15. This resolved the single broad point upon which the Appellant had formally appealed, the contention that the Respondent had wrongly found that the Appellant was ineligible based on its classification as a public utility, in favour of the Appellant. The Appeal Tribunal proceeded to further decide that:

> (a) the Appellant was involved in selling goods; and
>
> *(b)* "*For the purposes of this element of the Notification, the Appellant had the burden of proving that greater than 50% of their sales are to individual persons, and not to other business.*
>
> *It is clear from the evidence submitted by the Appellant, both in their initial discussions with the Respondent and during the hearing, that their internal accounting and financial controls were not sufficient to*

accurately capture the necessary breakdown in sales of propane into retail sales and non-retail sales…

…In conclusion…the Appellant was unable to convince the Tribunal that more than 50% of their sales fall within this element of the Notification…"

16. The following supplementary and very practical issues are raised as a result of the Appellant's complaint that the Appeal Tribunal had no jurisdiction to determine the merits of the Concession claim at all, in light of the Respondent's submissions on this appeal:

    (1) did the Respondent decide the merits of the Appellant's claim at all, or did the Appeal Tribunal decide the merits for the first time as the language of the Decision implies? It is noteworthy that the Appeal Tribunal states that the Appellant had not discharged the burden of convincing the Appeal Tribunal of the merits of the claim, not that the Appellant has failed to discharge the burden for setting aside a decision by the Commissioner; and

    (2) has the Appellant been given so substantially fair an opportunity to prove its case on the merits, both before the Commissioner and the Appeal Tribunal, that its appeal should in any event be dismissed, despite its merit in abstract or technical legal terms?

17. Before addressing these narrow issues, it is helpful to consider the nature of the statutory appeal framework in general terms.

The statutory framework for tax appeals

18. Section 23 of the Taxes Management Act ("the Act") provides as follows:

"(1) *A person who is dissatisfied with any decision, determination or assessment made by the Collector under the Taxes Acts, by which his liability to pay tax is affected may, within thirty days after service of notice of the decision, determination or assessment as the case may be, lodge with the Collector an objection in writing stating the grounds on which he relies.*

(2)The Collector shall consider the objection and may either disallow it, or allow it, either wholly or in part.

(3)If on the consideration of an objection the amount of tax charged on a person is reduced the Collector shall refund to the person the excess amount which has been paid.

The Collector shall serve on the objector written notice of, and the reason for, his decision on the objection."

19. The Act defines the Collector as "*the person responsible under the Taxes Acts for the collection of tax*" (section 1), and that person has traditionally held the office of 'Tax Commissioner'. This section, read in isolation, seems to envisage that the Collector will make an initial decision or assessment, the taxpayer will then object and the Collector will then determine the objection. As will be seen, the taxpayer may elect to ask the Collector to treat the objection as an appeal. It is against this primary determination by the Collector that an appeal lies to the Tax Appeal Tribunal, created by section 24:

> "*24(1) For the purposes of the Taxes Acts there shall be a Tribunal to be called the Tax Appeal Tribunal which shall consist of a Chairman and two other members selected by the Chairman from a panel of members.*
>
> *(2)The Chairman of the Tribunal shall be a person appointed for the purpose by the Minister and shall hold office during the Minister's pleasure.*
>
> *(3)The panel of members of the Tribunal shall be not less than five or more than nine persons appointed by the Minister and shall hold office during the Minister's pleasure.*
>
> *(4)Fees shall be paid to the Chairman and members of the panel in accordance with the Government Authorities (Fees) Act 1971.*"

20. The primary statutory jurisdiction of the Appeal Tribunal is found in the following provisions of the Act:

> "25(1)*A person who is dissatisfied with a decision of the Collector on an objection made by that person may, within thirty days after service on him of notice of that decision or within such further time as the Tribunal may allow, by notice in writing accompanied by such fee as may be prescribed under the Government Fees Act 1965, require the Collector to treat his objection as an appeal and to forward it to the Tribunal and the Collector shall, as soon as practicable, forward it accordingly.*
>
> *(2)On appeal—*
>
> *(a) the objector shall be limited to the grounds stated in the objection; and*

(b) the burden of proving that any decision, determination or assessment objected to is unreasonable or excessive lies on the objector.

(3)The Tribunal, subject to this Part, may allow or dismiss the appeal, or may reverse or vary any part of the decision, determination or assessment of the Collector, whether the appeal relates to that part or not, and may, additionally or alternatively, set aside the decision, determination or assessment appealed against and remit the matter to the Collector for further consideration."

21. Section 25(2) (a) firstly appears to be to require the taxpayer to articulate grounds of objection with sufficient particularity to enable the Appeal Tribunal to determine the appeal within the parameters of the 'pleaded' objections. Section 27 (2) (b), secondly, seems to impose a high burden on the taxpayer of challenging factual or 'merits' findings made by the Collector. Thirdly, section 27(3) confers a broad jurisdiction on the Appeal Tribunal, empowering it to either confirm, reverse or vary the Collector's impugned decision, as well as empowering the Tribunal to remit a matter for further consideration to the Collector. At first blush, this appears to be a fairly standard appellate jurisdiction consistent with a high level of deference to the Collector's primary fact finding and policy-making powers.

22. Section 26 prescribes appeal procedure in the following terms:

"26(1) *The Tribunal shall hear an appeal in accordance with the regulations and, subject to such regulations and this Act, may regulate its own procedure.*

(2)The Tribunal may consider more than one appeal at one and the same time where, in the opinion of the Tribunal, such appeals raise substantially similar points for determination by the Tribunal or may for any other good and sufficient reason be conveniently considered together.

(3)On the hearing of an appeal by the Tribunal the Collector, and the appellant and any other person who, in the heard, shall be entitled to appear before the Tribunal in person or by his duly authorized representative and to produce any lawful evidence and to make representations relating to the appeal.

(4)Notwithstanding the foregoing provisions of this section, where in the course of determining any appeal one of the members of the Tribunal is unable to continue to act as a member for any reason, then, if all parties concerned agree, the Tribunal may proceed with the determination of that appeal in the absence of that member and shall be deemed to be duly constituted in so doing.

(5)The Tribunal shall at the request of the appellant exclude the public or any representative of the press from its sittings."

23. Section 26, somewhat vaguely, empowers the Appeal Tribunal to admit "*lawful evidence*". And section 27(1) empowers the Tribunal to "*summon any person (other*

than the appellant) to produce any document or to appear before it and give evidence". Despite these provisions, the Act itself does not contemplate a full rehearing before the Appeal Tribunal. Section 26(1) does expressly provide that, subject to regulations made under the Act, the Tribunal may regulate its own procedure.

24. Neither counsel, despite being asked by the Bench whether such regulations had been made, referred the Court to the Tax Appeal Tribunal Procedure Regulations 1981, made under section 50 of the Act ("the Regulations"). Neither party sought to rely on them or (understandably) considered them to be directly relevant to the present appeal. The Regulations, in outline, deal with the following matters:

    (a) a form of notice of appeal is prescribed (regulation 4, Schedule Form 1), which was not used by the Appellant or insisted upon by the Appeal Tribunal;

    (b) the practice and procedure, subject to the power to give directions for matters not provided for, "*shall, except where the Act or these Regulations otherwise specifically provide, be that of a court of summary jurisdiction mutatis mutandis, as far as that is applicable*" (regulation 3(1));

    (c) regulation 5 provides as follows:

> "*(1) A notice of appeal shall be accompanied by a supplementary statement setting out —*
>
> *(a) the grounds of appeal;*
>
> *(b) all the facts which the appellant considers material and relevant to the determination of the appeal; and*
>
> *(c) the appellant's contentions in law based upon such facts,*
>
> *and that statement is in these Regulations called 'the appellant's case'*";

    (d) regulations 6 and 7 make similar provisions in relation to an "*agreed case*" and the "*Collector's case*", provisions all designed to identify clearly before the appeal hearing what issues of fact and law are in dispute;

    (e) regulation 13 provides that facts may be proved by affidavit, although deponents may be cross-examined and the Tribunal is conferred with the same powers of a court of summary jurisdiction to compel the attendance of witnesses;

    (f) regulation 14 provides:

"*In the determination of an appeal the decision of a majority of the members of the Tribunal shall prevail, except that it shall be for the Chairman alone —*

(a) to determine any question of law arising in the appeal; and

(b) to decide whether a question is or is not a question of law."

25. These provisions in the Regulations, consistent with the statutory scheme they are designed to supplement, confirm what ought perhaps to be ultimately obvious. Firstly, and most generally, that the Tribunal's jurisdiction is intended to be an appellate one reviewing decisions which the Collector has made and not simply affording the parties a full rehearing. Secondly, and more narrowly, that the starting assumption is that appeals will be dealt with on the basis of documentary evidence with oral evidence being the exception rather than the rule. Thirdly, and most pertinently (in a general sense) to the central complaint raised by the Appellant before this Court, the rules provide for the parties to formulate their cases in a way which will make hearings shorter and more focussed than they might otherwise be. Because the Tribunal will be greatly assisted by knowing in advance of the initial hearing precisely which issues of fact and/or law arising from the grounds of appeal are truly in dispute. I was left with the distinct impression that both the Appellant and Respondent, if not the Tribunal as well, had possibly ignored these valuable case management tools embedded in the Regulations.

Findings: did the Appeal Tribunal have jurisdiction to decide the merits of the Concession claim or was it strictly confined by the pleaded grounds of appeal?

Effect of section 25(2)(a)of the Act

26. In my judgment, section 25(2)(b) of the Act is merely a mandatory procedural provision, which cannot be sensibly construed as operating in a way which would deprive the Appeal Tribunal of jurisdiction to entertain an application to amend the grounds of appeal initially formulated in the grounds of objection communicated to the Collector[3]. Parliament cannot have intended that failure to strictly comply with this procedural requirement should invalidate an appeal before the Tribunal altogether, without regard to the circumstances in which non-compliance occurred. Accordingly, absent a successful application to the Tribunal for leave to amend the grounds of appeal, or an amendment by consent, section 25(2)(a) would prevent an appellant from pursuing issues not contemplated by its notice of appeal.

27. This was in substance the interpretation of the statute which was advanced by Mr. MacDonald as a preliminary point before the Appeal Tribunal, which accepted the argument and struck out offending portions of the Appellant's written submissions. Senior Crown Counsel's attempt to resile from this entirely rational construction of the statute before this Court was, inevitably, unconvincing. Section 25(3) delineates the powers of the Tribunal to dispose of appeals, and does not define or even deal

[3] See e.g. *Re an Application to Enforce an Arbitration Award* [2013] Bda LR 51 at paragraphs 7-16, and the authorities referred to therein.

with the range of issues which can be considered in the course of an appeal. Accordingly I accept Mr. Froomkin QC's submission that, as a matter of law, the Appeal Tribunal had no jurisdiction to adjudicate matters not raised by the objections set out in the Appellant's 'notice of appeal'. The only issue raised, whether the Appellant was disqualified because it had been classified as a 'public utility, was indeed resolved in the Appellant's favour. However, it does not follow automatically that the Appeal Tribunal's decision to dismiss the Appellant's appeal should be quashed and the matter remitted to the Minister.

Did the merits of the Concession application form part of the Collector's decision so that in substance the merits were properly before the Appeal Tribunal?

28. It is necessary to consider whether any substantial injustice occurred, because Mr. MacDonald rightly argued that this Court was not bound to allow the appeal on purely technical grounds. He referred the Court to the following provisions of Order 55 rule 7 of the Rules of the Supreme Court, which define the scope of this Court's jurisdiction to dispose of appeals from statutory tribunals:

> "(7) *The Court shall not be bound to allow the appeal on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned.*"

29. The Respondent's counsel fundamentally submitted that the original decision was far broader than the issues identified in the Appellant's grounds of appeal and involved the merits as well. The Appellant's counsel insisted that only the public utility issue was originally decided. The picture is clouded somewhat by the fact that the Appellant undoubtedly submitted accounting figures in support of its case before the Collector that it was entitled to benefit from the Concession. On the one hand, in my judgment, it is reasonably clear that those figures were in at least one material respect misunderstood by both the Collector's Office and by the Appeal Tribunal, as Mr. Froomkin fairly complained. On the other hand, the presentational fluidity of the various tables produced by the Appellant at various stages of their claim process and appeal (before the Appeal Tribunal) did little to create an impression of reliable underlying data. Mr. MacDonald wryly asserted that it appeared that whatever test the Appellant was told it had to meet, it would produce purportedly conforming data in support. It is difficult to ignore the intuitive feeling that any case which a claimant is unable to advance very simply and clearly is often an unmeritorious one.

30. The present enquiry, however, is directed towards ascertaining whether the Appeal Tribunal had the jurisdiction to dismiss the appeal by way of affirmation of an underlying decision which the Collector either in fact made or might have made on the material before her. I am bound to conclude that the Collector did not make any or any sufficient decision that the Appellant was not eligible for the Concession, with reference to the terms of the Concession as defined and ignoring the public utility classification issue. This conclusion is based not just on a straightforward reading of the Collector's Decision, in light of the preceding correspondence between the parties. It is also based on how the Appeal Tribunal itself articulated its decision. The following finding to my mind reflects a misunderstanding of the Appeal Tribunal's

jurisdiction; a finding which is relevant to the question of whether the merits issues ought to have been remitted back to the Collector as the Appellant complained:

> "*15. Notwithstanding the arguments in relation to the Wednesbury Principles and whether these were, or were not, matters that ought to be properly considered by the Respondent, at the end of the day, the Appellant's case falls to be determined on whether they fall within the Concession and Notification. It is up to the Appellant to prove to the satisfaction of* [sic] *Tribunal that they are entitled to the benefits of the Concession.*" [emphasis added]

31. The correct position is, as Mr. MacDonald submitted on the present appeal, that the *Wednesbury* test applies under section 25(2) (b) of the Act in the sense that it limits the grounds on which an appellant can challenge the factual and/or policy determinations of the Collector. Those determinations must be shown to be either unreasonable or excessive. The Appeal Tribunal had no jurisdiction to decide for itself whether it was satisfied of the merits of the Appellant's claim, as if it were the primary or first instance decision-maker. Its duty was to decide whether the Collector's decision was so unreasonable or excessive that it was liable to be set aside. Section 25(2)(b), it bears remembering, provides as follows:

> "(b) *the burden of proving that any decision, determination or assessment objected to is unreasonable or excessive lies on the objector."*

32. In my judgment it is impossible to believe that the Appeal Tribunal would have misdirected itself in such a fundamental way if the Collector had made a clear and reasoned decision on the merits and if argument had been focussed on analysing the soundness of the Collector's decision, as opposed to deciding what the Collector might have decided if she had accepted that the public utility classification had no legal bearing on whether or not the Appellant was eligible for the Concession. While it is far from clear precisely what happened before the Appeal Tribunal, it seems self-evident that neither side assisted the Tribunal by pointing out the limited nature of the Collector's decision and the limited nature of the Tribunal's appellate jurisdiction. Instead, each side seemingly attempted to deliver a knock-out blow and win the 'fight' outright without proceeding on to another round.

33. I accept the submission of Mr. Froomkin QC that the Appeal Tribunal erred in law in deciding that it had jurisdictional competence to resolve issues which the Collector had never determined.

Has the Appellant had a fair opportunity to address the merits of its Concession claim?

34. The above findings in principle form a sufficient basis for allowing the present appeal. It remains to consider whether there remains some residual discretion to dismiss the appeal on the grounds that no substantial injustice has occurred. Mr. MacDonald was

unable to positively affirm that the same factual analysis that the Appellant relied upon in support of discrediting the public utility argument would necessarily apply when considering the Concession claim on its merits, properly construed. This Court would have to be satisfied that the taxpayer's case was obviously hopeless to justify taking away the opportunity to have a claim correctly assessed on its merits in light of a legally sound view of what the relevant considerations are. It is insufficient for the Court to be able to form a merely preliminary view that the Appellant's case is not obviously strong.

35. It must be doubted in any event whether the Appeal Tribunal, even with the parties' informed consent, has the jurisdictional competence to make primary findings of fact on the merits of a tax assessment which the Collector has not first determined. Or, to put it another way, it is doubtful whether this Court could properly conclude that no "*substantial wrong or miscarriage*" has occurred in the present circumstances. Where an appellate body empowered to review decisions made by the statutory authority charged with making the primary factual and policy determinations has itself made those primary determinations, the statutory scheme has arguably been distorted beyond waiver and consent's curative reach.

Provisional views on costs

36. My provisional view is, however, that although the Appellant has succeeded in the present appeal, costs should not follow the event because of the manner in which it prosecuted its appeal before the Appeal Tribunal, which itself seemingly has no power to award costs. It could have pursued the arguments advanced to this Court in less than a half-day's hearing. Instead, the Appellant apparently pursued what amounted to an impermissible 'trial' of the merits which failed to achieve its commercially legitimate objectives, in large part because of its own inability to formulate a convincing case.

37. In these circumstances, it is difficult to see why the Respondent should pay the costs of the present appeal. It is entirely possible, of course, that if the issue of costs is argued, there are factors of which I am presently unaware which will undermine this provisional perspective on the history of this matter.

Disposition of appeal

38. This Court is empowered under Order 55 rule 7 to grant the following relief:

> "*(5) The Court may give any judgment or decision or make any order which ought to have been given or made by the court, tribunal or person and make such further or other order as the case may require or may remit the matter with the opinion of the Court for rehearing and determination by it or him.*"

39. I allow the Appellant's appeal against the Decision of the Appeal Tribunal dismissing its appeal against the decision of the Respondent, set aside the Respondent's Decision that the Appellant was ineligible for the Concession because it was a public utility, and remit the matter to the Respondent for reconsideration according to law.

40. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, I would make no order as to costs.

Dated this 5th day of May, 2015 _____

IAN R.C. KAWALEY CJ