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# THE J.D.
# JURIST DICIT

## J.D. NEWS

**NEW PROFESSIONALS**

**J.D. is pleased to announce the addition of Ms. Anja Dass to the Corporate and Commercial practice group as an Associate.**

**EVENTS**

**J.D.'s OSH Committee, as part of its efforts to encourage and foster a safe and healthy work life is hosting a walk/jog/run around the QPS every Tuesday and Thursday.**

**Clients Welcome!!!!**

## Recent Tax Cases: Implications for Tax law and Appeal Practice

In February 2014, in a team lead by our Barrie Attzs, J.D. Sellier + Co. successfully represented three of our clients in cases that have very significant implications for tax law and tax appeal practice, in Trinidad & Tobago ("T&T").

In the interests of client confidentiality, particularly given the sensitivity of tax matters, we use abbreviations instead of the clients' full legal names throughout this newsletter.

**Cases:** **S.J.B. v The Board of Inland Revenue**
**J.D.C. v The Board of Inland Revenue**

**Issues:** **Disposition of a Tax Appeal without Trial**

*Background*

Frankly, there are too many cases going to the Tax Appeal Board ("Appeal Board") that should have been settled beforehand. Indeed, before a case gets to the Appeal Board there are ample opportunities for the Board of Inland Revenue ("BIR") to review, reconsider and reevaluate tax assessments that may be devoid of genuine merit. Specifically, the BIR must first conduct an audit and then issue a Notice of Assessment (the "Assessment"). After this, the taxpayer will

lodge a letter of objection providing reasons for their disagreement with the Assessment (the "Objection"). Following this, the matter goes to a different department within the BIR, the Objection Department, which has between six months (Value Added Tax matters) and two years (Corporation and Income Tax matters) to reconsider the Assessment.

Sadly, the view amongst taxpayers and their advisors is that insufficient consideration is being given by the Objection Department as to the merits of the taxpayer's position at this stage. In the weeks and days prior to the expiration of the statutory deadline to determine the Objection, the BIR asks taxpayers to attend meetings and provide additional documents (many of which were already made available to the BIR during the audit stage). The general sense is that irrespective of the documents provided, or explanations given by the taxpayer and their advisors, the Objection is generally denied, and the taxpayer is left with little alternative other than to launch an Appeal to the Appeal Board.

*Legal Issue*

In two recent cases, *S.J.B. v The Board of Inland Revenue* and *J.D.C. v The Board of Inland Revenue* (Notices of Appeal filed October 2, 2013 and December 19, 2013 respectively), the taxpayer filed applications before the Appeal Board to allow their appeals, and to vacate the BIR's Assessment against them - without the delay and expense inherent in a full blown trial - on the respective bases that:

- The BIR failed to serve its (i) Statement of Case; and (ii) Bundle of Documents upon the taxpayer within the statutorily prescribed time frame set out in the Tax Appeal Board Act and Rules;

  and

## TAX MATTERS

J.D.'s Tax practice is an integral part of our Banking + Finance and Corporate + Commercial practices. We render tax advice on a range of commercial transactions including corporate finance, mergers and acquisitions, new business ventures, private equity transactions and project finance.

We work closely with several of the country's leading accounting firms to develop tax strategies for our clients.

We represent clients in appeals of the Board of Inland Revenue decisions on matters of corporation tax, value added tax, withholding tax, double taxation relief, business levy and stamp duty.

J The Statement of Case filed by the BIR revealed, on its face, that it stood no reasonable chance of success on the Appeal.

In the language of the 1998 Civil Procedure Rules ("CPR"), these are referred to as an Application for "Default Judgment" and "Summary Judgment" respectively, which are mechanisms contained in the CPR to determine a proceeding without a trial.

*Facts & Argument*

The material facts in the *S.J.B.* case are as follows: On 2 October 2013, the Appellant filed and served a Notice of Appeal (the Tax Appeal version of a Statement of Case and Claim form). Rules 25 and 26 of the Tax Appeal Board Rules ("the Tax Rules") provide that the Respondent "shall" file and serve (i) all documents relevant to the appeal; and (ii) its statement of case, 21 days from the service of the notice of appeal. On 5 December 2013, the Appeal Board extended the time for the Respondent to comply until 6 February 2014.

> *There are too many cases going to the Tax Appeal Board that should have been settled beforehand*

On February 4, 2014, the Appellant served and filed an application for default judgment ("the Application") returnable on 6 February 2014 referencing, amongst others, rule 12 of the CPR. Specifically, pursuant to Rule 12.4 of the CPR, at the request of the claimant it is mandatory that the Court Office enter judgment in favour of the claimant, on the basis of the defendant's failure to defend, if the following conditions are met—

1. The court office is satisfied that the claim form and statement of case have been served;
2. The period for filing a defence has expired;
3. The defendant—
   (i) has not served a defence to the claim or any part of it; and
4. (Where necessary) the claimant has the permission of the court to enter judgment.

In the *J.D.C.* case, the Appellant's position was that the BIR filed the determination of Objection after the statutory deadline for doing so. Pursuant to section 40(3) of the Value Added Tax Act, where the BIR fails to determine the objection within six months, the objection *shall* be deemed to have been determined in favour of the person disputing his assessment and the assessment shall be amended accordingly. On the facts, the Appellant served and filed its letter of Objection on December 13, 2012. The BIR's letter of determination, however, was dated October 30, 2013 (i.e. over four months past the statutory deadline). It was in these circumstances that the Appellant filed and served its application for Summary judgment pursuant to Rule 15 of the CPR.

*The position of the Appellant was that the BIR stood no realistic chance of success on any of the substantive matters referred to in its Objection*

Rule 15.2 of the CPR provides that the court may give summary judgment on the whole or part of a claim or on a particular issue if it considers on an application by the claimant that the defendant has no realistic prospect of success in his defence to the claim, part of claim or issue. The Appellant contended that the BIR stood no realistic chance of success on any of the substantive matters referred to in its Objection, if the Appeal had already been deemed to have been determined in the taxpayer's favour by virtue of the BIR's failure to resolve the Objection within 6 months as it is statutorily obliged to do.

*Analysis*

The Appellants raised a previously untested point before the Appeal Board, i.e. whether an Appellant can obtain an order for default/summary

## LITIGATION AND DISPUTE RESOLUTION

The firm's litigation and dispute resolution practice group manages a substantial civil litigation portfolio which includes public law, admiralty, banking, mortgagee and foreclosure actions, wrongful dismissal, workmen's compensation and medical negligence. Its non-commercial litigation portfolio comprises contentious probate matters, personal injuries claims, defamation and a family practice that includes divorce and custody proceedings, property settlement and maintenance applications.

The firm's litigation attorneys-at-law have also undergone extensive training in arbitration and mediation to further develop their skills to enable them to resolve their clients' differences and disputes without recourse to the Court.

The practice group is headed by Marcelle Ferdinand, an attorney-at-law with more than 30 years of experience in litigation. She is ably supported by a team of highly qualified and dedicated associates and a complement of well-trained, committed support staff who work assiduously to ensure the efficient delivery of services to the firm's clients in a timely manner.

judgment and bring the appeal proceedings to an end prematurely without having to incur the costs and time associated with the trial process.

Section 6(12) of the Tax Appeal Board Act ("TABA") gives the Appeal Board the power to make rules which govern the carrying on of the business of the Appeal Board and the practice and procedure in connection with appeals before the Appeal Board. These rules are the Tax Rules.

The Tax Rules do not make provision for default or summary judgment applications; however rule 21 of the Tax Rules provides:

> "Except as otherwise provided in the Act or in these Rules or in any written law, the Rules of the Supreme Court relating to applications to a Judge in Chambers and as to taxation of costs shall, with the necessary modifications, if any, apply to appeals and applications to the Court".

Moreover, section 6(7) TABA provides that:

> "The Board, as respects the… enforcement of its orders… and other matters necessary or proper for the due exercise of its jurisdiction, has all such powers, rights and privileges as are vested in the High Court of Justice...".

The wording of this section is sufficiently wide to give the Appeal Board the power to order default and summary judgments.

In *S.J.B.,* the Appellant sought to argue that her Application could apply to proceedings before the Appeal Board because her appeal to the Appeal Board was akin to a claim at first instance, and the

## ABOUT OUR AUTHORS

Bryan McCutcheon, Barrister-at-Law, is currently doing 6 months in-service training in J.D. Sellier's litigation and dispute resolution department. He has assisted the department in a variety of legal matters and has appeared before the Industrial Court.

Prior to joining the firm, Bryan worked as an adjudicator for the Financial Ombudsman Service in London. Within this role, Bryan mediated and adjudicated disputes in insurance matters between large multi-national financial institutions and members of the public.

Bryan has also worked for law firms in London, gaining knowledge in various areas of law including: contractual disputes; tortious actions; property disputes; employment disputes; insolvency; and shipping and maritime law.

Bryan is a graduate of King's College London University, wherein he obtained his LL.B. with First Class Honours. He subsequently attended law school in London and was called to the Bar of England and Wales in 2011 by the Honourable Society of the Inner Temple.

BIR having not filed its "Defence" in the time provided by the procedural rules meant the Appellant was entitled to have "judgment" in her favour.

Under rule 12.2(2)(a) of the CPR, in proceedings against the State, a Claimant must have permission from the Court to obtain default judgment.

The Appellant argued further that the Appeal Board not only has the power to grant default judgment but that it also has the jurisdiction to give permission to Appellants to obtain default judgment against the BIR. The Appeal Board is a Superior Court of Record and consists of a Chairman who enjoys the status, terms and conditions of a Puisne Judge of the Supreme Court of Judicature (section 6(7) referenced above).

*Implications*

By having the jurisdiction to give permission and the power to grant default and summary judgments, this not only enables the Appeal Board to deal with its cases expeditiously and cost effectively, but it also gives it teeth to regulate its procedure and seek compliance with its orders. Were it not able to do so, it is easy to see how the procedure of the Appeal Board may be open to abuse. The BIR would effectively be able to breach the law with impunity.

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The relevant Tax Rules are clear and permitting default and summary judgments - where there is little merit to the BIR's case - is a sensible and cost effective method of allowing the Appeal Board to regulate its procedure and manage its caseload effectively.

Fortunately for the Appellants in both *S.J.B.* and *J.D.C.,* the BIR conceded both points and requested that the Appeal Board to allow the Appellant's appeal on the day of the Application, thereby preventing a lengthy and expensive trial process. It is however regrettable that the Appeal Board was denied the opportunity to hear

submissions and rule on the applications thereby establishing an authoritative precedent for the guidance of future Appellants against the BIR. Nonetheless, it can be argued that the Appeal Board in *S.J.B.*[1] tacitly acknowledged its jurisdiction on this regard in light of the language of its Order:

> "This Appeal having come up for Hearing on the 06th day of February, 2014;
>
> AND UPON HEARING the Attorney-at-Law for the Appellant;
>
> AND UPON HEARING the Attorney-at-Law for the Respondent;
>
> IT IS HEREBY ORDERED that Appeal No. I XX of 2013 be allowed consequent upon the application of Attorney-at-Law for the Appellant."

[1]As of the date of this Newsletter, the Order in *J.D.C. v the BIR*, which was concluded on February 27, 2014, has not been issued to the parties. We anticipate, however, that the language of the Order will be similar to that in *S.J.B.*

**Case Note: C. Limited v The Board of Inland Revenue (Judgment, February 11, 2014)**

**Issue: Deductibility of Doubtful Debts**

*Significance*

For the first time in T&T (and in the Commonwealth Caribbean), the Appeal Board permitted a taxpayer to claim a tax deduction for a provision made in respect of "doubtful" debts. In lay terms, a provision for doubtful debts is a taxpayer's estimate as to the quantum of debts (receivables) it is unlikely to receive in any given year. This is distinguishable from a bad debt, which is a debt that has been written off by the taxpayer as uncollectible (usually following the taxpayer's unsuccessful attempts to collect the same from the debtor).

*Facts & Argument*

The subject matter of the appeal was the taxpayer's corporation tax return in which a claim was made for both bad and doubtful debts pursuant to section 11(1)(c) of the Income Tax Act. The BIR allowed the claim for bad debts, but disallowed the claim for doubtful debts on the basis that:

i. The calculation is a general provision and is not specific to any particular debtor;

ii. The debts that became bad during the year of audit were specifically written off as bad in the Profit and Loss Account.

## ABOUT OUR AUTHORS

Matthew Gayle, Barrister-at-Law, is currently doing 6 months in-service training in J.D. Sellier's Corporate-Commercial Department.

Matthew previously managed an international public law project based in Oxford, UK after a stint at the UK Constitution Unit based at University College London, and has worked as a legal and compliance consultant to a Caribbean based financial securities firm.

Matthew holds a DipHE in Mathematics and Electronic Engineering from the University of Nottingham. On completion of studies at Nottingham Matthew served as the Sabbatical Education Officer (formerly VP) of the Students' Union and was awarded the Ordo Caligulae, the highest student award for his work which included founding the Nottingham Springboard project for disadvantaged youths.

Matthew read for an LLB (Hons) at the University of Birmingham, during which time he won the Allen and Overy Moot.

Matthew, who was called to the Bar of the England and Wales by the Honourable Society of the Middle Temple, is a PhD candidate at the University of Birmingham.

*Legal Issues*

i. Does the Income Tax Act have a regime for doubtful debts deductions as distinct from bad debts?

ii. What is the meaning of "general" and "specific" provision?

iii. What does 'respectively estimated' mean?

*Analysis*

The Appeal Board confirmed that (i) Section 11(1)(c) of the Income Tax Act creates a regime for the deductibility of *doubtful* debts separate and distinct from the deductibility of *bad* debts and (ii) that it is a trite principle of tax law that a *general* provision for doubtful debts is not deductible for taxation purposes. The Appeal Board found that for a claim for deduction for a provision of doubtful debts to succeed it must relate to *specific* debtors.

> *For the first time in T&T (and in the Commonwealth Caribbean), the Appeal Board permitted a taxpayer to claim a tax deduction for a provision made in respect of doubtful debts.*

Concerning the meaning of "doubtful", the Appeal Board adopted the partially subjective and partially objective test referred to in *J.K. Limited v The Board of Inland Revenue* (1967-77), 1 T.T.T.C. 399 at p. 402 to the effect that:

> "It… must be based on the *bona fide* opinion [held by the taxpayer][2] as to the … doubtfulness of the debt made on an objective view of the facts as they appear at the relevant time . . ."

Once certain accounts have been specifically identified as "doubtful", the Appeal Board adopted the following guidance from Canada Customs and Revenue Agency ("CCRA") Interpretation Bulletin I442R as being instructive in ascertaining whether the 'provision' had been 'respectively estimated':

[2]Text in parenthesis added for clarity by author.

> Once having identified which debts are doubtful, the maximum amount of the reserve [i.e. provision] should be calculated based on an estimate as to what percentage of the doubtful debts will probably not be collected. This calculation should preferably be based on the taxpayer's past history of bad debts, the experience in the industry if that information is available, general and local economic conditions, costs of collection, etc. This procedure may result in a reserve [i.e. provision] being calculated as a percentage of the total amount of the doubtful debts or a series of percentages relating to an age-analysis of those debts.
>
> Note: text in parenthesis added by authors herein for clarity only.

Although the Appeal Board did not expressly equate a "respective estimate" with a test of "reasonable estimate", this is implicit in its reasoning.

The Appeal Board also looked at the ratio of the provision as compared to the entire Accounts Receivable in order to analyze its reasonableness.

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*This case has significant implications for any company, which in the course of business, extends credit terms to its customers (e.g. financial institutions or companies that sell products on hire purchase terms).*

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*Summary*

In order to be deductible, the following characteristics ought to be present:

- The provision must generate from individual debtor accounts that have been specifically identified by the taxpayer as exhibiting characteristics of questionable collectability. This is both a subjective and objective process. It is subjective in that the taxpayer must hold a *bona fide* belief that the accounts are "questionable", but objective in that the taxpayer must support their belief with rationale grounds (e.g. such as the debtor's late payments).
- "Respectively estimated" requires that the provision be "reasonable". The Appeal Board will take into account the commercial experience of the taxpayer, but will also consider the overall ratio of doubtful debts provided for in relation to the total of accounts receivable, to ascertain whether it is in "reasonable

limits”. On the facts of this case the Appeal Board considered that a doubtful debt provision that represented a percentage of 2% of accounts receivable to be within reasonable limits.

- The Appeal Board confirmed that where a doubtful account has been identified, it is not the entire doubtful account that needs to hit the provision, it is only the portion that is considered (respectively estimated) to be uncollectible. For example, if Claude Debtor owes $100, the taxpayer may treat $10 as uncollectible and $90 as collectible.
- There must be no double accounting between the bad and doubtful debt claimed by the taxpayer.

*Implications*

This case has significant implications for any company, which in the course of business, extends credit terms to its customers (e.g. financial institutions or companies that sell products on hire purchase terms). It demonstrates that in the appropriate circumstances a company may make a provision for questionable accounts, which is deductible for tax computation purposes, without having to wait until the debt is written off as bad or uncollectible.

**[The views expressed in this article are the views of the authors only and are for the benefit of the clients and associates of J.D. Sellier + Co. generally; they are not intended to be legal advice and clients are encouraged to consult with their professional advisors for advice concerning specific matters.]**

### ABOUT J.D. Sellier + Co.

J.D.Sellier+Co. was founded by Jean-Baptiste Denis Sellier who was admitted to practice as a Solicitor and Conveyancer in Trinidad and Tobago in 1882. He practiced on his own until 1916 when he invited his colleague and friend George Cecil Pantin to join him in a partnership.

Today, J.D.Sellier+Co. has expanded to approximately 20 attorneys-at-law and 77 employees and offers its clients quality legal services. Our clients include industrial, commercial and financial enterprises, domestic and foreign, public and private, ranging in size and complexity from small single location business enterprises to large diverse, multinational corporations.

Our firm is a general practice law firm divided into four areas of civil practice, namely: Corporate + Commercial (including banking + finance; energy + regulated industries; probate; estate planning + administration; mergers + acquisitions; tax), Real Estate, Intellectual Property, and Litigation + Dispute Resolution (including admiralty + shipping).

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