IN THE SUPREME COURT
TURKS AND CAICOS ISLANDS

MAGISTRATE'S COURT
REFERENCE NO. 1/22

In the matter of the Hotel, Restaurant and Tourism (Taxation) Ordinance (Cap. 19.09)

BETWEEN:

SOMERSET RESORT MANAGEMENT LTD **Plaintiff**

AND

THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS **Defendant**

RULING

Before: **The Hon. Mr. Justice Anthony S. Gruchot**

Appearances: **Mr. Ariel Misick KC and with him Mr. Gordon Kerr of Misick and Stanbrook for the Plaintiff**

Ms Clemar Hippolyte of the Attorney General's Chambers for the Defendant.

Hearing Date: **24 October 2022**

Venue: **Court 5, Graceway Plaza, Providenciales.**

Introduction

1. On 16th September 2021, the Permanent Secretary, Finance served on the Plaintiff, a

notice ('the Notice') asserting that the Applicant had failed to correctly calculate accommodation tax due under the Hotel, Restaurant and Tourism (Taxation) Ordinance (Cap. 19.09)[1] ('the Ordinance').

2. The Notice stated that there had been an underpayment over a 6-year period[2] and demanded payment of the sum of US$1,741,561.49[3] made up of alleged unpaid tax of US$580,496.28 together with penalties of US$923,371.62 and interest of US$237,693.59 ('the Assessment').

3. The underpayment was stated as having been calculated in accordance with section 27(1)(a) of the 2019 Ordinance which provides:

> "*Where an amount is due from a proprietor on account of tax and the Permanent Secretary, Finance is unable to ascertain the amount of tax properly due from the proprietor by reason of—*
>
> *(a) a failure of the proprietor to furnish the Permanent Secretary, Finance with any return under section 24 or to furnish the Permanent Secretary, Finance with a complete and correct return under that section;*
>
> *…*
>
> *the Permanent Secretary, Finance may,* ***to the best of his [her] judgment****, make an assessment of the amount due on account of tax by the proprietor and shall, on making such an assessment, serve on the proprietor a notice specifying that amount and the reason for the making of the assessment.*" (My emphasis)

4. A document showing how the Assessment had been calculated accompanied the Notice.

5. Pursuant to section 38 (1) and (3) of the Ordinance, any question arising as to the

[1] Referred to throughout the hearing of the matter as the Hotel, Restaurant and Tourism (Taxation) Ordinance 2019 as it was prior to the 2021 revision of the Laws of the Turks and Caicos Islands.
[2] Asserted to be the maximum period of back recovery.
[3] This followed a letter dated 19th July 2021 which cited an amount due of $1,724,146.60.

liability of any person to pay tax [under the Ordinance] may be referred to the Magistrate within 7 days of the service of the Notice.

6. On 21st September 2021 the Applicant issued Plaint Note 340/21 in the Magistrate's Court asking the court to determine:

> Whether on the true construction of sections 2, 6, 9 and 24 of the Ordinance the Plaintiff is liable to pay tax in the aggregate sum of US$1,724,146.00[4] in respect of sleeping accommodation at the Somerset Resort ("Resort"):
>
> a) For owners and guests of owners of condominium units at the Resort where owners and guests were not charged for such sleeping accommodation.
>
> b) Other guests who stayed at the Resort and were not charged for sleeping accommodation.

7. The matter came before the Chief Magistrate on 12th January 2022 at which time there was no appearance by the Defendant. The matter was adjourned to 26th January 2022 when the Chief Magistrate determined that the matter should be referred to the Supreme Court on the following points of law:

   A. Whether on a true construction of the Ordinance, an owner of a condominium or their family and friends occupying the owner's condominium free of any charge is a "guest" to whom the Ordinance applies.

   B. Whether on a true construction of the Ordinance tax arises and is payable by the Plaintiff as a result of a stay at the Resort by a guest who is accommodated free of charge.

   C. Whether on a true construction of the Ordinance, the Permanent Secretary, Finance has the power under section 27 to assess the alleged arrears of tax in the manner she did.

[4] This figure is not correct. See paragraph 2 above.

Background

8. The Somerset on Grace Bay is one of many 'condominium hotels/resorts' in the Turks and Caicos Islands. Under the Strata Titles Ordinance, units or condominiums may be sold to independent third parties and when this happens, they constitute separate freehold property, which can be sold or otherwise dealt with as any other freehold land or house[5].

9. Owners of condominiums often place their units in a rental pool managed by a rental management company such as the Plaintiff. In essence, the rental management company runs the resorts and the individual owners receive a percentage of the revenue generated by the renting of their unit. In these circumstances, the management company is the agent of the owner for the purpose of letting the units, generally, on short term. In order for the Resort to operate it is obviously essential that the majority of owners participate in the rental management program.

10. Under most rental management agreements, an owner is able to stay in his unit or may allow his family or friends to stay in the unit without being charged for occupation, alternatively, the accommodation.

11. The resorts also provide complimentary accommodation to travel agents and travel writers as part of the promotion of the individual resorts and the Turks and Caicos Islands generally. This may include travel agents or travel writers who come to the Islands at the request of the Tourist Board[6], for example. The owners of the condominium unit do not receive any payment from the rental managers for such stays, such use of the unit generally being permitted under the terms of the rental management agreements.

12. Under the provisions of the Ordinance a tax of 12% is levied on the total amount of the charges paid or payable by or in respect of the guest for the provision of certain

[5] Subject to any restrictive agreement or strata by-laws that may be applicable.
[6] The Tourist Board is now defunct and its role has been absorbed into the Destination Management Organisation.

services including *inter alia*, sleeping accommodation[7].

13. The tax is accounted for by the rental manager. Section 9 (1) provides:

> *"Tax payable by a guest accommodated in premises to which this Ordinance applies shall be accounted for and paid by the proprietor in accordance with section 24".*

14. A 'proprietor' is defined as "*the person who carries on, or intends to carry on, at those premises any business of providing for reward or not board and lodging or lodging only, whether on his own behalf or on behalf of another as manager, agent or otherwise*."[8] It can be seen from this definition how the obligation to pay over the tax is vested in the Plaintiff rather than the legal owners of each condominium.

15. Historically no tax has ever been paid or demanded with respect to the occupation of a condominium by the category of persons described in paragraphs 10 and 11 above. In 2021 the Revenue Department started to implement a policy of imposing a charge to tax on the stays of those persons and carried out a retrospective assessment over the previous 6 years, this being said to be the maximum recoverable period allowed. The Court also understands that the Revenue Department is also applying this policy to private villas that are also offered for rental.

<u>Development of the Legislation.</u>

16. Ms Hippolyte submits that the 1st imposition of an accommodation tax was introduced by The Hotel Accommodation (Taxation) Ordinance 1985 ('the 1985 Ordinance')[9]. Section 6 of the 1985 Ordinance provided:

> "*6.- (1) Subject to the provisions of this Ordinance, there shall be paid by each*

[7] Section 6 of the Ordinance

[8] 'Proprietor' in this sense is a misnomer and is not synonymous with the 'legal owner'. It is usually a different entity than the 'registered proprietor' under the Registered Land Ordinance (Cap. 9.01), as in this case.

[9] The 1985 Ordinance in fact repealed and re-enacted with amendments The Accommodation (Taxation) Ordinance No. 5 of 1976. That ordinance provided that "… *there shall be levied and payable by every guest a tax in respect of each night, or part of a night, when such guest is in occupation of accommodation in premises to which the ordinance applies*." That tax was set at $1.00 and was not referable to the amount of charges levied on those occupying the premises.

guest accommodated *in any* ***premises to which this Ordinance applies*** *a tax at the rate of five* per centum *of the* ***total amount of the charges paid or payable by or in respect of the guest*** *in respect of all or any of the following services that is to say-*

(a) sleeping accommodation;

(b) meals, including any intoxicating liquor or other beverage supplied with or as an ancillary to a meal;

(c) the provision of lighting, fuel, water, furniture, domestic appliances or equipment;

d) laundering;

(e) any other service as may be prescribed,

being services[10] provided in the Islands for the guest, whether within or outside the premises, ***in the course of the business of providing for reward board and lodging or lodging only****, carried on at the premises.*

(2) Tax shall be payable in respect of the ***actual amount of the charges*** *referred to in subsection (1), or where those charges have been assessed by the Treasurer under and in accordance with this Ordinance, in respect of those charges as so assessed*." (Emphasis added)

17. The tax is payable in respect of each 'guest accommodated'. In the 1985 Ordinance 'guest' is defined as "… *any person of or over the age of twelve years who is* ***accommodated for reward*** *in premises to which this Ordinance applies*". (My emphasis)

18. Under the above provision, no charge to tax would arise on the provision of the prescribed services if there was no charge for the 'accommodation', irrespective of whether a separate charge was made for other services, such as the provision of meals, as the person being accommodated would not fall under the definition of a

[10] Note that many of these services may not be being provided by the owner of a unit.

'guest' because the accommodation would not be for reward. Also, tax would not be chargeable on intoxicating liquor or other beverages unless supplied with or as an ancillary to a meal, even if supplied to a 'guest' as defined.

19. The premises to which the 1985 Ordinance applied were defined (with some exceptions) under section 3(1) as:

> *"… premises comprising one or more buildings containing, or containing in the aggregate, four or more bedrooms used, or intended to be used, for the purposes of habitually providing for reward board and lodging or lodging only."*

20. The 1985 Ordinance was amended several times, also changing its title. By the time of the publication of the Revised Laws in 1998, it was known as the Hotel and Restaurant (Taxation) Ordinance (Cap. 19.09). The rate of tax had increased to nine percent and section 6(1)(b) had been revised to provide a charge to tax on intoxicating liquor or other beverage regardless of whether it was supplied with or as an ancillary to a meal[11], this amendment remedying the anomaly noted in the latter sentence of paragraph 18 above.

21. In 2004 the Hotel and Restaurant (Taxation) (Amendment) Ordinance[12] amended section 3(1) to broaden the definition of 'premises' by removing the below 4-bedroom exemption. The amendment read:

> *"… premises used, or intended to be used, for the purposes of habitually providing for reward board and lodging or lodging only."*

22. In 2013 a further (and significantly in respect of this referral) [amendment] ordinance came into force[13]. This amended, *inter alia*, the definition of 'guest' to mean "*… any person of or over the age of twelve years who is accommodated for* ***reward or***

[11] Section 6(1)(b) having been amended to read "… meals, including any intoxicating liquor or other beverage whether supplied with, as an ancillary to, separately from or accompanied by, a meal."
[12] Ordinance 10 of 2004
[13] Hotel and Restaurant (Taxation) (Amendment) Ordinance 2013

not *in premises to which this Ordinance applies*." (Emphasis added)

23. It also added the words '*or not'* after the word '*reward*' wherever the words '*for reward*' appeared[14] in relation to the provision of accommodation and introduced a new definition of 'reward' as meaning "… *The consideration for the provision of accommodation in premises to which this Ordinance applies to any person, whether to be received in money or otherwise*." This was presumably to put a charge to tax where accommodation was being provided for consideration other than money, but as Mr Misick KC points out, no methodology is provided in the Ordinance for valuing such other consideration.

24. On 15th March 2019 the 1985 Ordinance (as amended) was repealed and the Ordinance came into force, the provisions of which relevant to this referral, largely mirror the 1985 Ordinance as amended.

Discussion

25. Ms Hippolyte posits that "*the deliberate inclusion of the words 'or not' after the word 'reward'* into *the legislation where it previously did not exist is indicative of the Government's intention to capture stays which were not for reward or complimentary*."

26. Mr Misick KC posits that "'*For reward or not' in this context does not qualify the description of the services. Nor does it qualify the charges by reference to which tax is to be imposed. Grammatically, the phrase qualifies, and only qualifies, the description of the* business *in which the services are provided: it is a 'business of providing board and lodging, whether or not for reward. It cannot, therefore, properly be concluded that taxes are imposed by reference to that part of the business in which board and lodging may be provided otherwise than for reward*."

27. The terms 'accommodated', 'board' and 'lodging' were not defined under the iterations of the 1985 Ordinance but, as noted above, a guest was defined as someone who is 'accommodated'. From its inception section 2(3) of the 1985 Ordinance

[14] Save for in section 9(3) with respect to a proprietor who is not resident in the Islands.

provided:

> *"For the purposes of this Ordinance a person shall be treated as being accommodated for reward in any premises to which this Ordinance applies, …, if–*
>
> *(a) he is provided with that accommodation* ***in the course of the business*** *of providing for reward board and lodging, or lodging only, at those premises; …".*
> (My emphasis)

28. It therefore follows that 'accommodated' meant being provided with board and lodging or lodging only in the course of a business albeit, such definition in the context of the above provision, was to bring within the Ordinance, separate buildings outside of, but connected with, the 'premises' such as an annex. It also follows that 'accommodation' means the provision of board and lodging or lodging only in the course of a business.

29. The above provision is maintained in the Ordinance; however, the Ordinance goes on to define 'lodging' as meaning "*accommodation only*" and 'board' as meaning "*meals only*".

30. The Ordinance defines *a* 'guest' as being "*any person of or over the age of ten*[15] *years who is accommodated for reward or not in premises to which this Ordinance applies*."

The Reference

31. The questions of law which have been referred to this Court are set out at paragraph 7 above. Ms Hippolyte, on behalf of the Defendant, has put the questions differently and addressed a somewhat different question. She puts the issues as being:

    a. Whether upon a proper interpretation of **section 6 of the Hotel, Restaurant and Tourism (Taxation) Ordinance 2019** ("**the 2019 Ordinance**") the

[15] Albeit that the reduction in age from twelve years [in the1985 Ordinance] has not been carried through to the requirements for keeping a register of guests, under section 5 of the Ordinance where the age remains as twelve years – see section 5(4)(b)(iv).

Turks and Caicos Islands Government (**TCIG**) (sic) is empowered to impose a tax on non-paying guests who enjoy complimentary accommodation on the relevant premises on the Islands[16].

b. Whether in the case where no taxes have been paid in respect of a complimentary guest at a hotel accommodation, the Permanent Secretary, Finance is entitled to exercise his power under **section 27 of the 2019 Ordinance** to make an assessment to the **best of his judgment**.

c. Whether the imposition of penalties after the conduct audits of various entities can be regarded as unconstitutional because the scope and extent of the penalties are considered burdensome or harsh.

(Emphasis in original).

32. The Statement of Claim laid before the Magistrate, concludes with something akin to a prayer for relief:

"11. The Plaintiff contends that:

1. *On the true construction of the Ordinance, the Plaintiff is not liable to pay the assessment.*
2. *If on the true construction of the Ordinance, the Plaintiff would be liable to pay the assessment in the circumstances set out in paragraph 10 above, it raises the question as to its constitutionality which should be referred to the Supreme Court for determination.*
3. *Costs"*

Paragraph 10 reads:

"The assessment is based on the premise that the owner of a condominium unit who stays in his unit and a guest of that owner staying in that unit is the guest of the Resort and tax is payable by the plaintiff, even though the owner and his

[16] This question encompasses the questions at 'A' & 'B' of the Reference as a result of the position adopted by the Defendant in that there is no distinction between occupation by an owner or his/her/its invited guests on the one hand and complimentary stays offered by the Plaintiff to 3rd parties on the other, to which see paragraphs 34 & 35 below.

guest are not charged for sleeping accommodation. It is also based on the premise that the plaintiff is liable to pay tax for sleeping accommodation in respect of travel agents and travel writers staying complimentary at the Resort."

33. As can be seen from paragraph 7 above, there is no reference to this Court in respect of any constitutional challenge. Ms Hippolyte has devoted significant time in her written submissions to constitutionality, not limited to penalties (as suggested at 31.c above) but to the imposition of an accommodation tax at all. Mr Misick KC however, only addresses briefly as a constitutional issue, the re-interpretation of the Ordinance and if that interpretation is correct, the retroactive assessment i.e., the fact that tax has previously not been charged since 2013 but has now been assessed for the previous 6 years to the date of assessment. Given that a reference to constitutional matters has not been included in the Reference I do not propose to deal with the same in this ruling.

34. Mr. Misick KC submits that the imposition of accommodation tax, in the present context, gives rise to 2 categories of persons who may occupy any relevant premises. They are:

    i). The legal/beneficial owner of a condominium and non-paying persons staying at the invitation of the owner (including his/her family) ('Owner Occupiers'); and

    ii). Other persons allowed to occupy a condominium without charge (at the invitation of the Plaintiff or some other entity).

    (together 'Occupiers Not For Reward')

35. Ms Hippolyte submits that the Defendant does not make any such distinction and it adopts a position that a charge to tax arises in respect of any stay, whether or not a charge is made and irrespective of the character or circumstances of the occupation.

36. To support this argument, Ms Hippolyte refers to section 6(1) of the Ordinance which

now reads:

> *"6. (1) Subject to this Ordinance, there shall be paid by each guest accommodated in any premises to which this Ordinance applies a tax at the rate of 12% of the total amount of the charges paid or payable by or in respect of the guest in respect of all or any of the following services, that is to say–*
>
> *(a) sleeping accommodation;*
>
> *(b) meals, including any intoxicating liquor or other beverage whether supplied with, as an ancillary to, separately from or accompanied by, a meal;*
>
> *(c) the provision of lighting, fuel, water, furniture, domestic appliances or equipment;*
>
> *(d) laundering;*
>
> *(e) any privilege, amenity, facility or service for the employment of any cultural or recreational activity or pursuit;*
>
> *(f) any other privilege, amenity, facility or service in connection with the accommodation of the guest in those premises;*
>
> *(g) any other service as may be prescribed, being services provided in the Islands for the guest, whether within or outside the premises, in the course of the business of providing for reward or not board and lodging, or lodging only, carried on at the premises.*"

37. Ms Hippolyte avers the above must be read in conjunction with the definition of 'guest' in section 2 of the Ordinance (set out at paragraph 30 above). She submits that section 6 provides that the tax "… *shall be paid by each guest accommodated* …". Focus is then put on the words "… *for reward or not* …" in the definition of 'guest'.

38. The corollary of that submission is that it has to be argued that everyone who stays in a unit at the Resort must be a 'guest' as defined.

39. Ms Hippolyte also refers me to the definition of 'premises' to which the Ordinance

applies. Section 3(1) of the Ordinance provides:

> *"Subject to subsections (2) and (3), this Ordinance applies to any premises used, or intended to be used, for the purpose of providing for reward or not board and lodging or lodging only.*"

40. Ms Hippolyte submits that "*When all of those provisions are read together it is clear that the Legislatures intended that the accommodation tax is to be imposed on both paying guests and on non-paying guests or* persons *who enjoy complimentary stays. Such a conclusion follows from the words in relation to guests who are accommodated* ***for reward or not****. That expression appears not only in* ***section 6(1)*** *but also in* ***section 2*** *and in* ***section 3(1) of the 2019 Ordinance***." (Emphasis in the original). Here she appears to make a distinction between non-paying guests and persons who enjoy complimentary stays, something that was expressly rejected in her oral submissions.

41. The conclusion of Ms Hippolyte's submission is that anyone who stays in a unit, whether:

    a. as an owner;

    b. with the permission of the owner;

    c. is given a complimentary stay by the Plaintiff or other entity; or

    d. is ordinarily paying to stay at the Resort

    is, for the purposes of the Ordinance a 'guest' and as such liable to pay accommodation tax, the tax arising as a result of the inclusion of the words "*for reward or not*".

42. Mr. Misick KC submits a different approach. In addressing the question referred by the learned Magistrate at 'A' above, he submits that those persons who fall within the definition of Owner Occupation cannot fall under the definition of 'guest' at all.

43. He argues that an owner is the registered proprietor with absolute title to the unit, registered under the Registered Land Ordinance (Cap.9.01) and has an absolute right

to occupy it whenever they desire[17]. They do not need the Plaintiff's permission to occupy the unit. In this way, he says that they are not being 'accommodated' by the Plaintiff, who is the proprietor of the unit for the purposes of the Ordinance. He submits that "*They are occupying and enjoying their own property which they have an absolute right to do whenever paying or other complimentary guests arranged by the Plaintiff are not staying in the unit*."

44. With respect to other persons who enjoy complimentary stays in a unit, whom Mr Misick KC submits, fall into a different category of occupier, he suggests that Ms Hippolyte falls into error in considering that these persons come under the definition of 'guest' as she focuses on the words 'for reward or not'. He submits that in doing so the interpretation is that accommodation tax is payable even if no consideration is paid for the accommodation, the Defendant's position, which he says "… *is entirely wrong*".

45. Mr Misick KC submits that the reason the definition of 'guest' has been extended to persons occupying whether for 'reward or not' is to bring those persons who give no consideration for their stay, within the provisions of section 5 of the Ordinance, the requirement for registration of guests, such that it allows the Government to check the returns filed in the course of an audit.

Statutory Interpretation

46. Ms Hippolyte addressed me on the approach I should take to statutory interpretation and urges me to take a purposive construction approach as she submits, that the words in the statute (reward or not) are "*very clear and unambiguous*" and that the words should therefore be "*looked at against the scheme and purpose of the Act (sic) as a whole and section 6 in particular to determine the nature of the taxable activities to which the provisions are intended to apply*".

[17] I comment that such absolute right may be modified by any contractual agreement the owner may have entered into with any rental manager, which agreement may limit the amount of time they can use their unit in any given year, for the duration of such agreement, for *inter alia*, the Resort's commercial efficacy purposes.

47. Ms Hippolyte refers me to the dicta of Lord Steyn in **Inland Revenue Commissioners v McGuckian**[18]:

> *"During the last 30 years there has been a shift away from the literalist to purposive methods of construction. Where there is no obvious meaning of a statutory provision the modern emphasis is on a contextual approach designed to identify the purpose of a statute to give effect to it."*

And to Lord Nicholls in **Barclays Mercantile Business Finance Ltd v Mawson (Inspector of Taxes)**[19]:

> *"The essence of the new approach was to give the statutory provision a purposive construction in order to determine the nature of the transaction to which it was intended to apply and then to decide whether the actual transaction (which might involve considering the overall effect of a number of elements intended to operate together) answered the statutory description."*

48. Ms Hippolyte submits "… *that the clear intent and purpose of* ***the 2019 Ordinance*** *and its predecessor was to bring within the charge to tax monies which would have been charged to or become payable by guests who have benefited from complimentary accommodation. It is quite clear that the purpose of the intent of the legislation is to impose the tax not only on charges paid by guests but also to extend it to charges that would have been incurred by guests but for the fact they were given complimentary stays*". (Emphasis in original)

49. Mr Misck KC refers me to extracts from **Bennion on Statutory Interpretation**[20] and submits "*The canons of statutory interpretation tell us that we must assume that the legal draftsman is competent and has chosen his words carefully*[21]*. If the draftsman of the Ordinance truly intended that non paying guests and owners occupying their own unit were to be subject to tax on notional charges that might have been imposed for the*

[18] [1997] 3 All ER 817 at 824
[19] [2005] 1 ALL ER 97 at para. 32
[20] 5th Ed. Lexis Nexis 2008
[21] Bennion on Statutory Interpretation, 5th Ed. Lexis Nexis 2008 page 413

unit they are occupying then he or she could and should have said so clearly. He or she did not. There is a complete lack of any such direction in the Ordinance and so the Defendant must persuade the court that the draftsman of the Ordinance was horrifically imprecise or massively incompetent or both."

50. He goes on to cite Lord Hewart CJ in **Spillers Ltd. v Cardiff Assessment Committee**[22]

> *"It ought to be the rule and we are glad to say it is the rule that words are used in an Act of Parliament correctly and exactly and not loosely and inexactly. Upon those who assert that the rule has been broken, the burden of establishing their proposition lies heavily".*

51. Mr Misick cites the 3 traditional rules of statutory interpretation as follows:

> *"i. The "Literal Rule". The Court applies the natural and ordinary meaning to the words contained in the statute. If this is applied and no ambiguity arises there is no need to go further.*
>
> *ii. If a genuine ambiguity exists the Court may then apply the "Mischief Rule". Using this approach the Court asks itself "what was the intention of the legislators?"*
>
> *iii. The third Rule that the court looks to is the "Golden Rule". This is available to the Court when the literal interpretation even if unambiguous leads to a "manifest absurdity"."*

52. He goes on to submit that "[*T]he Court does not take one of these many guides and apply it to the exclusion of all others. What it does is take an overall view, weigh all of the interpretive factors that are relevant and arrive at a balanced conclusion. This is now referred to as the "Global method" of statutory interpretation*." And again, citing from **Bennion**:

> *"An Act or other legislative instrument is to be read as a whole, so that an*

[22] [1931] All ER 524 – 531 at 528 - 529

enactment within it is not treated as standing alone but is interpreted in its context as part of the instrument"[23]

Analysis

53. In considering the above submissions I am mindful that the 1985 Ordinance was amended to include the words 'or not' after 'reward' in the 2013 amendment. No explanation has been proffered as to why, if as Ms Hippolyte submits, it was the clear intention of the Legislature that including the words 'or not' was to put a charge to tax on stays for which no consideration is paid, assessments were not commenced in 2013. It cannot have been the clear intention to implement new legislation to catch what was perceived as a weakness or loophole in the legislation and then not apply it.

54. However, if I do not accept Ms Hippolyte's context to the amendment i.e. if I were to take the view that the intention was not to give rise to a charge to tax on stays for which no consideration is charged, then what was the intention behind the amendment?

55. Ms Hippolyte, perhaps unsurprisingly, does not address that question. Mr Misick KC suggests that the amendment was to bring into the definition of 'guest' those persons who are not required to make payment for their occupation, for the purposes of registration. As he puts it, "*Information regarding the provision of free accommodation is also relevant to Section 5, which enables the Government to maintain a full record of the location of persons who are accommodated at the premises. This is achieved by the* ***guests (whether or not provided with accommodation for reward)*** *being required to sign the Guests' Register including the relevant information. This allows the Government to check the returns filed by the proprietors of the premises in the course of an audit of their remittance of tax at any stage*." (My emphasis)

56. This may have been part of the reasoning but that could easily have been achieved by

[23] Bennion on Statutory Interpretation, 5th Ed. Lexis Nexis 2008 page 1155 et seq

simply requiring everyone who stays at the hotel sign the register, and the problem with this submission is that whilst saying that those who fall within Occupiers Not For Reward (or perhaps those enjoying Owner Occupation) are not 'guests', he says they are for the purposes of registration. Looking at the development of the legislation as a whole, I am of the view that the purpose of the amendment must have been to bring into the charge to tax, something that was not so previously.

57. To repeat, under the Ordinance a 'guest' is defined as:

> *"… any person of or over the age of ten years who is accommodated for reward or not in premises to which this Ordinance applies."*

58. In order to fall under the definition of 'guest' you must be 'accommodated'. Section 2(3) of the 1985 Ordinance[24] survived with the addition of the words 'or not' after 'reward' and provides the only (limited) definition of being 'accommodated' but with the caveat that this definition is in connection with an annex or overflow occupation.

59. The Ordinance included additional definitions of 'lodging', being 'accommodation' only, and 'board', being meals only, the tax in question being an imposition in respect of board and lodging[25].

60. I do not accept that Owner Occupiers can be considered to be either being provided with 'lodging' or being 'accommodated' in the normal sense of the words. The definitions in the Ordinance are not helpful or are perhaps ambiguous and I am not of the view that if a purposive approach or as Mr Misick KC submits a 'Global method' is taken to the interpretation of these provisions of the Ordinance this means that someone who occupies a unit, with no charge being made for that accommodation, is not necessarily a 'guest', to which I will return below. It seems to me that the words 'occupation' and 'accommodation' for the purposes of interpretation of the Ordinance, can be taken as synonyms.

[24] Set out in para. 27 above.
[25] See the heading to Section 6 of the Ordinance *infra*.

61. The charge to tax on board and lodging arises from the provision of section 6 of the Ordinance. Section 6(1) provides:

> "*6. (1) Subject to this Ordinance, there shall be paid by each guest accommodated in any premises to which this Ordinance applies a tax at the rate of 12% of the* ***total amount of the charges paid or payable by or in respect*** *of the guest in respect of all or any of the following services, that is to say– …"* (My emphasis)

62. As Mr Misick KC put it in his oral submissions, it is a tax on charges for services. The words 'charges paid' are obvious; 'charges payable' means charges that are to be or have been billed but have not yet been paid.

63. In **The Attorney General of the Turks and Caicos Islands (Respondent) v Misick and others (Appellants)**[26] the Privy Council's approach to the interpretation of Regulation 4(6) of the Emergency Powers (Covid-19) (Court Proceedings) Regulations 2020 was:

> *"In interpreting Regulation 4(6) the first question is what is the natural or ordinary meaning of the particular words or phrases in their context in the Regulations. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the Governor when making or of the House of Assembly when approving the Regulations that it is proper to look for some other possible meaning of the word or phrase, see Pinner v Everett [1969] 1 WLR 1266 at 1273. In performing that exercise the text of Regulation 4(6) has to be read in context in its widest sense, to include the context of the Regulations as a whole, and the legal, social and historical context, see R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Limited [2001] 2 AC 349 at 396; R (Westminster City Council) v National Asylum Support Service [2002] 4 All ER 654 at [5]; Attorney General v Prince of Hanover [1957] 1 WLR 436 at 460-461. As stated*

[26] [2020] UKPC 30 at para. 38.

in Bennion on Statutory Interpretation (7th edition) at para 9.2 context "is relevant not simply for resolving ambiguities and other uncertainties, but for ascertaining meaning (whether or not there is an ambiguity or other uncertainty) and indeed for identifying whether something is (or is not) ambiguous or uncertain in the first place."

64. I have considered the authorities referred to me by Ms Hippolyte, which concern a charge to income tax arising where an annual value of a property is assessed for the purposes of calculating the amount of tax payable where the payer is in occupation of his property, albeit that no profit or gain is made. They are in my view distinguishable from the matter at bar, given the clear wording of section 6(1) and the statutory tax regimes under which those cases were decided.

65. In my deliberations, I have considered that if I were to accept Ms Hippolyte's approach, what the practical consequences would be. It would lead to what would be in my view, a manifest absurdity. Two identical Owner Occupiers could be treated entirely differently. For example, if one unit is rented out for reward for 6 months of the year and is used for occupation by Owner Occupiers for the remainder 6 months, the occupation by the Owner Occupiers would, on the Defendant's case, give rise to a charge to tax. But if the unit has been acquired for Owner Occupiers for 6 months of the year and simply stood empty for the remaining 6 months, i.e. the unit is never offered for accommodation as part of the Resort (or otherwise for reward), there would be no charge to tax as the accommodation would not fall within a service to which section 6(1) of the Ordinance applies, the accommodation not being in the course of a business (for reward or not). The same equally applies to villa rentals.

66. The words used in section 6(1) are in my view clear and unambiguous. The tax is levied on the total amount of the charges paid or payable by or in respect of the specified services in the context of an Ordinance, the purpose of which is to provide for a tax on hotels, restaurants and tourism services. It must follow, and in my view, it does follow, that if no charge is made for the provision of the specified services then no charge to tax arises. It is, as Mr Misick KC puts it a tax on a charge for (or what is

payable for) services, not on the value of those services. That interpretation does not give rise to any absurdity.

67. What then was the purpose of adding the words 'or not'? I have purposely gone to some lengths to set out the development of the legislation.

68. I agree with Mr Misick KC that the addition of the word 'or not' after the word 'reward' in section 6(1) of the Ordinance is a qualification of the description of the business being undertaken and not referable to the services provided. The effect of the amendment to section 3(1) is to bring those who are Occupiers Not For Reward in premises to which the Ordinance applies into the definition of 'guest' in its wider sense.

69. The progressive amendments to the 1985 Ordinance have enlarged the application of the imposition of the tax and resolved various anomalies in the drafting (see paragraph 18 above).

70. The purpose of the Ordinance is to impose a tax on certain prescribed services offered by certain businesses. The heading of the Ordinance states that it is:

> *"AN ORDINANCE TO CONSOLIDATE AND TO PROVIDE FOR A TAX ON HOTELS, RESTAURANTS AND TOURISM SERVICES AND FOR RELATED PURPOSES."*

71. I have made comment concerning the provision of intoxicating liquor and other beverages (other than with a meal) not falling within the prescribed services to which the original iteration of the 1985 Ordinance applied, which provision was then brought under the charge to tax in respect to a guest by amendment.

72. As I observed in paragraph 18 above, if Occupiers Not For Reward are not to be considered to be 'guests' then it is not just the 'accommodation' that will not attract a charge to tax, but also, the provision of any of the other prescribed services for which payment is being made (in a similar way that intoxicating liquor and other beverages originally fell outside of the charge to tax if they were served without a meal).

73. I refer to Ms Hippolyte's submission set out at paragraph 48 above. Whilst I disagree with the 2nd part of that submission, there is merit in the former. She submits: "… *that the clear intent and purpose of* ***the 2019 Ordinance*** *and its predecessor was to bring within the charge to tax monies which would have been charged to or become payable by guests who have benefited from complimentary accommodation.*" i.e. in respect of other chargeable prescribed services

74. I am of the view that 'guest' is imperfectly defined in the Ordinance and is ambiguous. As can be seen from Mr Misick KC's submission set out in paragraph 55 above, it is most difficult to narrow the definition to that set out in the Ordinance[27]. It cannot be said that if I invite someone to stay at my home, they are not a guest. They clearly are in the normal definition of the word. In my view, the definition in the Ordinance cannot be applied literally.

75. The addition of the words 'or not' brings within the definition of 'guest' those categories of people which I have defined as Occupiers Not For Reward and gives purpose to the addition. It gives rise to a charge to tax to those persons on the provision of the prescribed services for which they are required to pay and fixes the anomaly identified in paragraph 18 above.

76. Given the above, it is unnecessary for me to consider whether the Permanent Secretary, Finance had the power to assess the tax liability in the manner that she did if a charge to tax had arisen. I would comment, however, that assessing the notional cost of a room by taking an average of all the accommodation costs across the Resort for any given period and then simply dividing the total by the number of units cannot be a proper approach to achieving a result that would satisfy the test of applying 'best judgment' and would likely give rise to a 'manifest absurdity' of such an assessment methodology. I take Mr Misick KC's example, that it would result in a 4-bedroom oceanfront penthouse having the same charge to tax as a garden studio unit.

[27] See also the reference to the Plaint Note in para. 6 above and question 'B' of the reference at para. 7 above for further non-exhaustive examples of where the word 'guest' is used in its non-statutory definition.

Conclusion

77. In answer to question A of the Reference, the answer is yes.

78. In answer to question B of the Reference, the answer is no.

79. In light of the 2 foregoing paragraphs, it is unnecessary to address question C.

80. In conclusion I would thank counsel for their assistance in this matter which has been an interesting subject with which to grapple.

81. I will hear counsel as to the form of order and as to costs on this referral.

21st December 2023

The Hon. Justice Anthony S. Gruchot
Judge of the Supreme Court