CIVIL – Statutory Interpretation – Value Added Tax Chap. 75:06

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REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2018-02605

IN THE MATTER OF THE VALUE ADDED TAX ACT CHAP. 75:06

IN THE MATTER OF THE LEGAL PROFESSION ACT CHAP. 90:03

IN THE MATTER OF THE INTERPRETATION OF THE VALUE ADDED TAX ACT CHAP. 75:06

BETWEEN

THE LAW ASSOCIATION OF TRINIDAD AND TOBAGO

Claimant

AND

THE BOARD OF INLAND REVENUE

Defendant

CLAIMANT'S SUBMISSIONS

INTRODUCTION

1. By Fixed Date Claim Form filed on July 19, 2018 supported by the affidavits of Theresa Hadad filed on July 19, 2018 and October 19, 2018, the Claimant, the Law Association of Trinidad and Tobago, seeks the Honourable Court's determination and interpretation, by way of Declaration or otherwise, of the following matters:

    (1) Whether the Value Added Tax Act Chap 75:06 makes chargeable to Value Added Tax annual subscriptions paid by members to the LATT?

    (2) Whether the said annual subscriptions are a commercial supply and thus chargeable to Value Added Tax?

    (3) Whether the said subscription fees are paid by members for the supply of services in the course of, or furtherance of, a business within the meaning of the Value Added Tax Act?

2. By its said Fixed Date Claim Form, the Claimant also seeks an order that the Board of Inland Revenue ("the Defendant") do repay to the Claimant all monies remitted purportedly paid in respect of VAT on subscription fees paid by members and such necessary and consequential orders, directions and further and/or other reliefs as may be necessary or expedient or as the Court deems fit.

3. The facts giving rise to the filing by the Claimant of its Fixed Date Claim Form are contained in the said affidavits of Theresa Hadad filed on July 19, 2018 and October 19, 2018 and are, in summary, as follows:

    a. On October 15, 1998 the administrative staff and then Treasurer of the Claimant made to the Defendant an application for a certificate of registration pursuant to the Value Added Tax Act ("the VAT Act"), without first receiving advice;

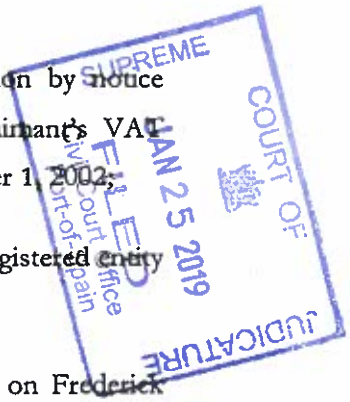
b. The Claimant was registered and a certificate of registration containing an error in the Claimant's description was issued bearing the date April 29, 1999;

c. The Council of the Claimant met on July 29, 1999 and considered the advice of Counsel on the issue of registration, that the Claimant should cancel its registration for VAT;

d. By letter dated August 10, 1999, the Claimant wrote to the Defendant seeking cancellation of its VAT registration. The application was acknowledged by the Defendant in a letter dated August 30, 1999;

e. The Claimant submitted a formal application for de-registration on September 14, 1999 on the basis that the application for registration was made in error, as under the provisions of the Legal Profession Act ("the LPA"), the Claimant's activities were not taxable;

f. The Defendant cancelled the Claimant's registration by notice dated November 26, 2002, advising that the Claimant's VAT registration was cancelled with effect from December 1, 2002;



g. From that date until 2015, the Claimant was not a registered entity for VAT purposes;

h. In 2014, the Claimant moved to its own building on Frederick Street and proposed to rent its first floor. It considered that the proposed rental income would exceed the VAT threshold and as such there would be a need to re-apply for VAT registration;

i. By letter dated January 15, 2015, the Claimant applied to the Defendant for re-registration "in respect of rental income only" as the rental income was to exceed $360,000.00 annually. In this letter, the Claimant also advised the Defendant that an application for de-registration was made and was accepted by the Defendant;

j. The Claimant was then re-registered by the Defendant with effect from February 25, 2015;

k. Following its re-registration, VAT was paid on the rental income and on membership services such as ID Cards and events held by the Claimant. The annual membership subscriptions continued to be treated as exempt from VAT;

l. In 2016, after obtaining legal advice in respect of the then tax Amnesty, the Claimant approached the Defendant to settle any VAT liability in respect of the annual membership subscriptions paid by its members;

m. The Claimant met with Mr. Nayak Ramdahin, Tax Commissioner, on September 12, 2016 who confirmed that the Claimant would be liable to pay VAT on the annual membership subscriptions. On September 15, 2016, the President and Treasurer of the Claimant met with Mr. Ramdahin to determine the position. Mr. Ramdahin confirmed that he had discussed the matter with the Chairman of the Defendant and they were both of the view that the Claimant's annual membership subscriptions were liable to VAT. Mr. Ramdahin reported that the VAT records had no record of the Claimant's deregistration;

n. The Claimant provided two cheques amounting to TT$1,132,430.00 and TT$110,009.00 in purported settlement of the outstanding VAT and tax liability and Mr. Ramdahin signified receipt of the cheques within the Amnesty period;

o. After paying VAT on annual membership subscriptions, the Claimant continued to receive conflicting advice in respect of the applicability of VAT to the subscriptions;

p. By letter dated March 15, 2017, the Defendant confirmed its opinion that the activities of the Claimant were regarded as a business and that the annual membership subscriptions were subject to VAT. The Defendant also indicated that it was not able

to find any legal notice, correspondence or other documents to support the claim that any advice or dispensation has been granted for the treatment of subscriptions paid by members of the Claimant to be not subjected to VAT;

q. By letter dated January 12, 2018, the Claimant set out its position to the Defendant asking for a reconsideration of its latest position or an indication as to whether they would join in an interpretation summons. The Defendant has not to date responded.

4. The Claimant's submissions on each of the three matters that the Court is asked to determine, are set out below. As appears from these submissions, the Claimant's contention is that the annual membership subscriptions are and/or ought not to be subject to VAT under the VAT Act.

SUBMISSIONS

Issues:

(1) Whether the annual membership subscriptions paid by members of the LATT are subject to Value Added Tax under the VAT Act.

(2) Whether the said annual subscriptions are a commercial supply and thus chargeable to Value Added Tax?

Submission: The annual membership subscriptions paid by the Claimant's members are not subject to VAT under the VAT Act as they cannot be deemed as part of "a commercial supply of prescribed services" under the VAT Act.

5. For convenience, the Claimant deals with the first two matters that the Court is asked to determine, together.

6. **Section 6 of the VAT Act** provides:

> ***"Subject to this Act, a tax, to be known as value added tax, shall be charged in accordance with this Act—***
>
> *(a) on the entry of goods imported into Trinidad and Tobago; and*

(b) on the commercial supply within Trinidad and Tobago of goods or prescribed services by a registered person,

where that entry or commercial supply takes place on or after the day appointed for the purposes of this section by Order made by the President, being a day that is the first day of a calendar month and is not less than three months after publication of the Order."[emphasis supplied]

7. In order for VAT to be chargeable on the exercise of a particular function of the Claimant, that function must therefore be "a commercial supply of prescribed services."

8. **Section 3(1) of the VAT Act** defines "commercial supply" to mean "a supply that is a commercial supply in accordance with section 14." **Section 14** provides:

> *"(1) A supply of goods or prescribed services that is made in the course of, or furtherance of, any business is a "commercial supply" for the purposes of this Act.*
>
> ...."

9. A "commercial supply" is therefore a "supply" of "prescribed services" that is made "in the course of, or furtherance of any business."

10. In order to determine the first two matters, the Court must therefore determine whether the Claimant's activity of receiving the annual membership subscriptions can be classified as "a commercial supply of prescribed services, in the course of, or furtherance of business" for the purposes of the VAT Act. The Claimant submits that it cannot be so classified.

11. **Section 15 of the VAT Act** provides:

> *"(1) Schedule 3 applies for determining what is, for the purposes of this Act, to be included as a supply of goods or services."*

12. **Schedule 3 of the VAT Act** provides:

> *"1. The term "supply" includes all forms of supply and, in relation to services, includes the provision of any service.*
>
> *2. ...*
>
> *3. ...*
>
> *4. ...*
>
> *5. Subject to items 7 and 8, **where the supply of anything for consideration** is not a supply of goods, it shall be regarded as a supply of services."*
> [emphasis supplied]

13. It follows from the above that, where the supply is a supply of services that is not made for consideration, this is not "a supply" within the meaning of **section 14 the VAT Act.**

14. The Claimant submits that VAT is not chargeable on the annual subscriptions paid by its membership because those subscriptions are not made for any consideration provided by the Claimant. **The LPA**, by virtue of **Sections 12, 20 (2) and 23,** imposes upon the Claimant the obligation to accept, and upon its members the obligation to pay, annual membership subscriptions in order for its members, inter alia, to be able to practise law in Trinidad and Tobago. There is no consideration in relation to those payments.

15. **Halsbury's Laws of England (2012) Vol. 22, paragraph 309,** defines "consideration" in the following terms:

> *"Valuable consideration has been defined as some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other at his request. It is not necessary that the promisor should benefit by the consideration. It is sufficient if the promisee does some act from which a third person benefits, and which he would not have done but for the promise.*

Thus, consideration for a promise may consist in either some benefit conferred on the promisor, or detriment suffered by the promisee, or both. On the other hand, that benefit or detriment can only amount to consideration sufficient to support a binding promise where it is causally linked to that promise. Furthermore, consideration must be distinguished from both a motive and a condition.

Consideration may be executed or executory, but it may not be past; it need not be adequate, but it must be of some value; and it must move from the promisee."

16. It follows that for consideration to exist for the purposes of **Item 5, Schedule 3 of the VAT Act**, there has to be a direct link between the services provided and the consideration received. Some element of reciprocity or mutuality between the Claimant and its members must exist. We submit that it is clear that none does.

17. In **Apple and Pear Development Council v C & E Comrs (Case 102/86) [1988] 2 C.M.L.R. 394,** a council was established under statute to promote and improve the quality of apples and pears. The Apple and Pear Development Council Order defined the Council's powers and functions which included promoting the production and marketing of apples and pears, the definition of trade descriptions, and research into aspects of growing and marketing of apples and pears. These functions were to be exercised 'in such a manner as it appeared to the Council to be likely to increase efficiency and productivity in the industry, and to improve and develop the service that it renders or could render to the community and to enable to render that service more economically.' The Council's members were representatives of growers, persons employed in the industry, and persons with special knowledge of marketing of the produce. Under the Order, the Council was mandated to impose an annual charge at a rate based on each grower's holding in order to meet administrative and other expenses incurred or to be incurred in the exercise of the Council's functions.

18. In the Court of Appeal, it was held that the Council carried out its general activities, not in return for consideration from the growers, but because it was

obliged to do so by the Order. Further, the compulsory payment of the charge was not related to the Council's discharge of its functions. In determining whether the general activities of the council are conducted for "a consideration", the Court looked at section 6(2)(a), of the VAT Act, where "supply" included "all forms of supply, but not anything done otherwise than for a consideration." According to Fox LJ at page 390:

> ***"The question is whether the council's general activities constitute the provision of supplies in return for consideration. In my view they do not. It seems to me that the position does not involve any reciprocity or mutuality between the parties. The council carries out its activities, not because it chooses to do so in return for something provided by the growers, but because it is obliged to do so by statutory instrument (i.e. the 1980 Order). By art 3 functions are assigned to the council and it is provided that 'The Council shall exercise their functions in such manner as appears to them to be likely to increase efficiency and productivity in the industry...' That is mandatory.***
>
> ***Equally, the grower has no choice in the matter. If he has specified acreage, he must register and must pay the levy. There seems to me to be no mutuality in any of this. The council is bound to perform its functions, whether it succeeds in recovering the levy or not. The growers are bound to pay irrespective of the manner in which the council discharges its functions. The statutory obligation to pay in fact bears no direct relations to the services of the payer.*** *It is a matter for the council how it discharges its functions; the grower of pears may have little interest in the council's activities in relation to apples.*
>
> ***In the circumstances, my conclusion is that the general activities of the council are not conducted for a consideration...."*** [emphasis supplied]

19. In our case, the Claimant was incorporated by Act of Parliament on January 1, 1987 by the LPA. Among other things, the LPA effected a merging of the profession; and sets out how the profession is to be regulated, the composition of the Claimant, and its duties and powers.

20. **Section 5 of the LPA** delimits the scope of the Claimant's duties and responsibilities and provides:

> *"The purposes of the Association are—*
>
> *(a) to maintain and improve the standards of conduct and proficiency of the legal profession in Trinidad and Tobago;*
>
> *(b) to represent and protect the interests of the legal profession in Trinidad and Tobago;*
>
> *(c) to protect and assist the public in Trinidad and Tobago in all matters relating to the law;*
>
> *(d) to promote good relations within the profession, between the profession and persons concerned in the administration of justice in Trinidad and Tobago and between the profession and the public generally;*
>
> *(e) to promote good relations between the profession and professional bodies of the legal profession in other countries and to participatein the activities of any international association of lawyers and to become a member thereof;*
>
> *(f) to promote, maintain and support the administration of justice and the rule of law;*
>
> *(g) to do such other things as are incidental or conducive to the achievement of the purposes set out at (a) to (f)."*

21. Members are required to pay annual membership subscriptions in order to obtain a practising certificate which is required to practise law in Trinidad and Tobago and in order to obtain notice and vote at general meetings. **Section 9(2) of the LPA** states:

"(2) Only practitioner members who pay their annual subscription to the Law Association are eligible—

(a) to attend and vote at a general meeting or at an election of members of the Council; or

(b) to be elected to the Council."

22. All members, other than honorary members and law officers, are required to pay annual membership subscriptions yearly (in respect of the period of twelve months commencing on the 1st October) and must do so by making the payment to the Claimant, through the Registrar of the Supreme Court: see **Section 12 & 27 of the LPA.** Failure to pay the annual membership subscription results in that member not being issued a valid practising certificate and, by virtue of **sections 20(2) and 23 of the LPA,** he may not practise law.

23. Applying the Court of Appeal's reasoning in **Apple and Pear Development Council (supra)** to the instant case, the Claimant is obliged to charge and receive the payment of the annual membership subscriptions by the LPA. These compulsory subscriptions are not related to the Claimant's discharge of its functions under **section 5 of the LPA.** The payment of the subscriptions involves no reciprocity or mutuality between the Claimant and its members. As a statutory body, the Claimant carries out its activities not because it chooses to do so in return for something provided by the members, but because it is obliged to do so by the LPA. Equally, the Claimant's members have no choice in the matter: they must pay the subscriptions as required by **sections 12 and 27 of the LPA.**

24. In **Apple and Pear Development Council (supra),** the House of Lords agreed with the Court of Appeal's decision but referred, to the European Court of Justice, the question whether the exercise of the council's functions and the imposition on growers, pursuant to the Order, of an annual charge, for the purpose of enabling the council to meet administrative and other expenses incurred or to be incurred in exercise of such functions, is 'the supply of….services effected for consideration' within the meaning of Article

2(1) of the EC Council Directive 77/388 of 17 May 1977 on the harmonisation of the laws of the member states relating to turnover taxes—Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p 1) (Sixth Directive).

25. Article 2 of the Sixth Directive defined the scope of value added tax and provided:

> *"The following shall be subject to value added tax:*
>
> *1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;"*

26. The European Court of Justice held that the exercise by the Apple and Pear Development Council of its functions and its imposition on growers of an annual charge for the purpose of enabling the Development Council to meet administrative and other expenses, did not constitute 'the supply of ... services effected for consideration' within the meaning of Article 2 of the Sixth Directive. The Court held:

> *"[11] It should be noted that, in Case 154/80, Staats secretaris Van Financiën v. Coöperatieve Aardappelenbewaarplaats, the Court ruled that, **for the provision of services to be taxable within the meaning of the Second Directive, there must be a direct link between the service provided and the consideration received.***
>
> *[12] It must therefore be stated that **the concept of the supply of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive presupposes the existence of a direct link between the service provided and the consideration received.***
>
> ***[13] The question then arises whether there is a direct link between the exercise of its functions by the Development Council and the mandatory charges which it imposes on growers.***

[14] It is apparent from the order for reference that the Development Council's functions relate to the common interests of the growers. In so far as the Development Council is a provider of services, the benefits deriving from those services accrue to the whole industry. If individual apple and pear growers receive benefits, they derive them indirectly from those accruing generally to the industry as a whole. *In that connection, it must be stated that the possibility cannot be ruled out that, in certain circumstances, only apple growers or else only pear growers can derive benefit from the exercise of specific activities by the Development Council.*

[15] Moreover, no relationship exists between the level of the benefits which individual growers obtain from the services provided by the Development Council and the amount of the mandatory charges which they are obliged to pay under the 1980 Order. The charges, which are imposed by virtue not of a contractual but of a statutory obligation, are always recoverable from each individual grower as a debt due to the Development Council, whether or not a given service of the Development Council confers a benefit upon him.

[16] It follows that mandatory charges of the kind imposed on the growers in this case do not constitute consideration having a direct link with the benefits accruing to individual growers as a result of the exercise of the Development Council's functions. In those circumstances, the exercise of those functions does not therefore constitute a supply of services effected for consideration within the meaning of Article 2(1) of the Sixth Directive." [emphasis supplied]

27. We submit that this reasoning is applicable to the instant case, and that when the Court considers whether there exists "consideration" for the purposes of **Item 5, Schedule 3 of the VAT Act,** it must consider whether there is a direct link between the exercise of the functions by the Claimant and the annual membership subscriptions which the LPA imposes on members.

28. The functions of the Claimant as set out in **section 5 of the LPA,** are in relation to the common interest of the attorneys in the profession. In so far as the Claimant is a provider of services, the benefits deriving from those services accrue to the whole profession. Further, no relationship exists between the level of the benefits which the individual member obtains from the services provided by the Claimant, and the amount of the subscriptions they are statutorily obliged to pay under the LPA. The subscriptions have to be paid by each member due to the Claimant, whether or not a given service of the Claimant confers a benefit upon him.

29. No services are provided to the Claimant's members in exchange for their annual membership subscriptions. The subscriptions are paid by the members in order to secure their practising certificates. All services afforded to members including, inter alia, the provision of ID cards, attendance at seminars and social functions, Certificates of Fitness and the rental of facilities are charged separately: see **Paragraph 4 of the Affidavit of Theresa Hadad.**

30. Members are bound to pay the subscriptions, irrespective of the manner in which the Claimant discharges its functions under the LPA. Their obligation to pay is directed by statute and it bears no relation to the services provided by the Claimant to the members.

31. In **Apple and Pear Development Council (supra),** Lord Slynn stated:

> *"Secondly, it is to be noted that by Article 9 of the 1980 Order the purpose of the charge is to enable the Council 'to meet administrative and other expenses incurred or to be incurred in the exercise of' the functions referred to in Article 3 which the Council is obliged to exercise. The charge is only made if the Council decides to impose it and if the Minister approves. It seems likely that the charge will be imposed annually, though not necessarily certain that the proportion used for publicity, advertising and promotion should continue to constitute approximately two-thirds of total expenditure as apparently it does at present.* ***The fact that the levy is obligatory may not be conclusive against it being consideration, but the absence of any consensual element in the payment and the lack of***

control by individual growers over what the Council does for them are pointers to the levy not being in any real sense a payment for particular services." [emphasis supplied]

32. We submit that the same observation applies, here. Members have no choice in paying these annual subscriptions. They also have no control over what the Claimant does for them. The Claimant's members are required to pay these subscriptions and the Claimant mandated to receive them under the LPA. The Claimant's members have no say in the matter: if they wish to practice law, be entered onto the Register and avoid sanctions, they must pay these subscriptions yearly. If a member does not pay a subscription, the effects of failing to do so include not being entitled to practise law, ineligibility to attend and vote at general meetings or at election of members of the Council of the Claimant; and ineligibility to be elected to the Council. Where these subscriptions have not been paid for three successive years, the member's practising certificate ceases to have effect. The effect of not paying these subscriptions is not decided by the Claimant: they are set out in statute.

33. We therefore submit that payment of the annual membership subscriptions imposed by the LPA does not constitute consideration having a direct link with the benefits accruing to members as a result of the exercise of the Claimant's functions, and therefore cannot be considered a supply of services for consideration.

34. Although the language in Article 2 of the Sixth Directive and **Item 5 of the Third Schedule to the VAT Act** is different, both provisions contain a requirement of consideration. It is submitted that the European Court of Justice's reasoning should be adopted in support of a finding that the annual membership subscriptions do not represent a consideration for which the Claimant in turn carries out its statutory functions.

35. In relation to the first two matters that the Court is asked to determine, we therefore submit that the VAT Act does not make chargeable to Value Added Tax annual subscriptions paid by members to the LATT; and that the said annual subscriptions are not a commercial supply and thus are not chargeable to Value Added Tax.

Issue 3:Whether the said subscription fees are paid by members for the supply of services in the course of, or furtherance of, a business within the meaning of the Value Added Tax Act.

Submission: The Claimant's activities are not done "in the course of, or furtherance of any business."

36. We submit that the Claimant's activities cannot be considered "a business" under the VAT Act.

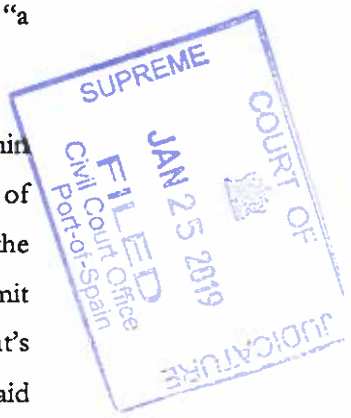
37. According to **section 4 of the VAT Act**, a business is defined as:

> *"...includes any trade, profession or vocation.*
>
> *(2) For the purposes of this Act—*
>
> *(a) an activity that is carried on, whether or not for pecuniary profit, and involves or is intended to involve, in whole or in part, the supply of goods or services for consideration;*
>
> ***(b) the activities of a club, association or organisation, other than a trade union registered under the Trade Unions Act, in providing, for a subscription or other consideration, facilities or advantages to its members; or***
>
> *(c) an activity involving the admission, for a consideration, of persons to any premises,*
>
> *(d) **(Deleted by Act No. 9 of 1990)***
>
> *shall be regarded as a business.*
>
> *(3) A body having objects in the public domain that are of a political, religious, philanthropic, philosophical or patriotic nature shall not be regarded as carrying on a business by reason only that it provides to its members, for a subscription, the right to participate in its management or receive reports on its activities but no other facility or advantage.*

(4) A person shall not be regarded as carrying on a business by reason only of any engagement, occupation or employment under a contract of service or as a director of a company except where, in carrying on any business, the person accepts an office and supplies services as the holder of that office in which case those services shall be regarded as being supplied in the course of, or furtherance of, the business.

(5) Anything done in connection with the commencement or termination of a business shall, for the purposes of this Act, be regarded as done in the course of, or furtherance of, the business." [emphasis supplied]

38. As seen from **section 4(2)(b) of the VAT Act,** for the activities of an Association to be considered a "business", consideration is relevant. As we have already submitted above, there exists no consideration in respect of the Claimant's activities, by reason of which same cannot be considered "a commercial supply".



39. We submit that, applying *the ejusdem generis rule*, for a subscription to fall within the definition in section **4(2)(b) of the VAT Act,** it must be in the nature of a consideration for the function that is being performed. Applying the reasoning in **Apple and Pear Development Council (supra),** we submit that the subscriptions paid under the LPA are not related to the Claimant's discharge of its statutory functions, and do not amount to consideration paid for services rendered in furtherance of a business and therefore should not be considered part of a commercial supply for VAT purposes.

40. In the alternative, we submit that the charging of subscriptions does not amount to a business, since that activity is not economic in nature. In **Institute of Chartered Accountants in England and Wales v Customs and Excise Commissioners [1999] STC 398,** the Institute's functions comprised the regulation of investment business, including the issuance of certificates of authorization to carry on investment business under the Financial Services Act 1986; the recognition and authorization of its members as company auditors under the Companies Act 1989 and the regulation of insolvency practitioners by the grant, refusal, review of termination of insolvency practitioners and the power to investigate their activities under the

Insolvency Act 1986. The Institute's regulatory functions were essentially for the protection of members of the public.

41. The question was whether, in carrying on its functions under the three Acts, the Institute was a "taxable person" for the purposes of section 4 of the UK Value Added Tax Act 1994 and the Sixth Directive. The House of Lords, looking at the language of the charging section of the English VAT Act and various authorities held:

> *'On the basis of cases like Eurocontrol [1994] ECR I-43 and* ***as a matter of ordinary language I do not consider that what is done here by the institute is such an economic activity. The institute is carrying out on behalf of the state a regulatory function in each of these three financial areas*** *to ensure that only fit and proper persons are licences or authorized to carry out the various activities and to monitor what they do.* ***This is essentially a function of the state for the protection of the actual or potential investor, trade or shareholder. It is not in any real sense a trading or commercial activity which might justify it being described as 'economic' and the fact that fees are charged for the granting of licences (to be assessed overall on a break-even basis) does not convert it into one."*** [emphasis supplied]

42. Lord Slynn concluded that, having regard European Court of Justice case law and the six indicia of business set out in **Customs and Excise Commissioner's v Lord Fisher [1981] STC 238,**[1] it was not possible to regard the Institute's regulatory activities as possessing the necessary

1. ———————————

[1] The list of six indicia were set out by Gibson J. in Customs and Excise Commissioners v Lord Fisher [1981] STC 238 at 245 as the test to whether an activity was a business – was it:

a) a 'a serious undertaking earnestly pursued';
b) pursued with reasonable continuity;
c) substantial in amount;
d) conducted regularly on sound and recognized business principles;
e) predominantly concerned with the making of taxable supplies to consumers for a consideration; and
f) such as consisted of taxable supplies of a kind commonly made by those who seek to make profit from them.

economic content. Performing the licensing function was not the carrying on of a business.

43. Similarly, here. In our case, the Claimant is carrying out a regulatory function, which is for the protection of the public and which is not done for the economic benefit of the Claimant or its members **(see paragraph 4 of the Primary Affidavit of Theresa Hadad).** It does so consistent with its purposes under **section 5 of the LPA.** By the issuance of practising certificates to its members, the Claimant is ensuring that only fit and proper persons are authorized to practise law, thereby ensuring the protection of the public.

44. We submit that, as was made clear in the **Institute case (supra)**, the Claimant's functions must be of an economic nature to be considered "a business"; we submit that, as a matter of ordinary language, those functions cannot be classified as "economic activity; "of an economic nature" or having "economic content". Rather, we submit that the Claimant's discharge of its statutory function is a public and regulatory one and does not represent a supply in the furtherance of any business.

45. In the premises, we submit that, in relation to the third matter that the Court is asked to determine, the subscription fees are not paid by members for the supply of services in the course of, or furtherance of, a business within the meaning of the Value Added Tax Act.

POSTSCRIPT

46. Finally, we draw the Court's attention to the changing position of the Defendant over the course of time.

47. After the Claimant was registered for VAT on April 29, 1999, it applied for cancellation of same, by letter dated August 10, 199 pursuant to Senior Counsel advice **(See T.H.3. of Theresa Hadad's Affidavit).** This cancellation was acknowledged by the Defendant in a letter dated August 30, 1999 and the Claimant submitted its VAT 14 form, applying for cancellation based on error. The Claimant's VAT registration was then cancelled by the

Defendant with effect December 1, 2002 by notice on November 26, 2002 **(See T.H.4. of Theresa Hadad's Affidavit).**

48. It was clearly stated on the VAT 14 form that **under the LPA, the Claimant's activities were not taxable**. We say that this indicated, in the clearest possible terms, the Defendant's agreement that the Claimant's activities were not taxable.

49. We submit that for the Defendant now to take the position that the Claimant's annual membership subscriptions are subject to VAT, is inconsistent with its past de-registration of the Claimant.

50. It makes for a confusing state of affairs leading the Claimant to this interpretation summons. We submit that the nature of the Claimant's activities has not changed from 2002 to present, save and except the Claimant's rental income which is subject to VAT, and for the Defendant to claim now that it sees no basis for the de-registration in 2002 is wrong.

DISPOSITION

51. For all of the above reasons, we respectfully ask this Honourable Court to:

i. Declare that the annual member subscription fees paid by members of the Claimant are not subject to Value Added Tax under the **Value Added Tax Act Chap. 75:06;**

ii. Grant an order that the Defendant do repay the Claimant all monies remitted purportedly paid in respect of Value Added Tax on the subscription fees paid by members; and

iii. Make such necessary and consequential orders, directions and further and/or other reliefs as may be necessary or expedient or as the Court deems fit.

Dated this 25th day of January, 2019

Nicole de Verteuil-Milne
Instructing Attorney-at-Law
For the Claimant
DE VERTEUIL-MILNE & ASSOCIATES

Alvin Fitzpatrick

of Senior Counsel

Kerwyn Garcia

of Counsel

Anil Maraj

of Counsel

TO: THE REGISTRAR OF THE SUPREME COURT OF JUDICATURE
Supreme Court
Hall of Justice, Knox Street
Port of Spain

AND TO: ANN-MERISSE DUNCAN & LISA SINGH-DAN
Inland Revenue Division
IRD Tower
Government Campus
2-4 Ajax Street
PORT OF SPAIN.
Attorneys-at-Law for the Defendant