

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No. 1135 of 2013**

**BETWEEN:**

**CANADIAN SOLAR INC.**

**CLAIMANT**

**AND**

**HSBC HAV 2 (III) LIMITED**

**DEFENDANT**

*Before the Honourable Mr. Justice William Chandler, Judge of the High Court*

*Dates of Hearing 2013: November 25<sup>th</sup>*

*2014: March 17<sup>th</sup>, 21<sup>st</sup>, June 30<sup>th</sup>, December 12<sup>th</sup>,*

*Date of Decision 2016: June 15<sup>th</sup>*

*Mr. Francis G. De Peiza of Messrs Carrington & Sealy, Attorneys-at-Law for the Plaintiff in association with Mr. Frank Walwyn, Attorney-at-Law  
Mr. Garth Patterson, Q.C. and Ms. Tammi Pilgrim of Lex Caribbean, Attorneys-at-Law for the Defendant*

**DECISION**

**THE PARTIES**

- [1] The Claimant is a company incorporated under the laws of the Province of Ontario in the Dominion of Canada.
- [2] The Defendant is a company incorporated in Barbados as Company 27380 pursuant to the provisions of the Companies Act, Chapter 308 of the Laws of Barbados.

## **BACKGROUND**

**The Background to this Application is set out in the Claimant's Skeletal Arguments.**

[3] On 16 November 2005, HSBC, JAFCO Asia Technology Fund II ("JAFCO") (collectively called the "Investors") entered into a subscription agreement ("the Agreement") with the Claimant. Pursuant to the Agreement, the Investors subscribed for convertible notes ("Convertible Notes") in Canadian Solar Inc. (CSI) and executed an Acknowledgment and Agreement dated 1 July 2006 ("the Indemnity") which included a confirmation by the Investors that CSI was not to bear any tax liabilities arising under certain withholding tax provisions of Canada's **Income Tax Act, R.S.C. 1985 c. 1 (5<sup>th</sup> Supp.)** ("ITA") in connection with the conversion by the Investors of the Convertible Notes.

[4] The Convertible Notes were converted into CSI common shares on 1 July 2006. In intended compliance with **s. 116** of the **ITA**, the Investors each submitted an application for a clearance certificate following the conversion of Convertible Notes into CSI common shares ("the clearance certificate applications").

[5] In December 2006, the Canada Revenue Agency ("CRA") began an audit of the clearance certificate applications. In 2011, the CRA advised that

withholding taxes under **section 116** of the **ITA** were owing in connection with the Convertible Notes. Thereupon JAFCO (one of the Investors) paid the tax resulting from the CRA audit in accordance and in compliance with the indemnity and CSI's statutory right of recovery. HSBC did not pay its portion of tax owing.

- [6] In 2012, CSI was formally assessed an amount of CAD\$1,888,824 under **section 116 (5)** of the **ITA** in connection with HSBC's conversion of the Convertible Notes. CSI paid the amount assessed in respect of HSBC's conversion of the Convertible Notes. The Claimant alleges that as a result there is no tax owing to the CRA or any government tax or revenue authority as a result of HSBC's conversion of the convertible notes.
- [7] On 22 August 2008, HSBC filed an application for its own dissolution with the Corporate Affairs and Intellectual Property Office ("CAIPO"). In April 2011, CSI was informed by JAFCO that HSBC had been dissolved and would not participate in further dealings with the CRA. In October 2011, CSI filed an application for the revival of HSBC pursuant to **s. 362** of the **Companies Act of Barbados**. The Certificate of Revival was issued by the CAIPO in June 2012 with the revival of HSBC effective as of 10 November 2011.

## The Claim Form

[8] By a Claim Form and Statement of Claim filed on 26 June 2013, the Claimant claimed against the Defendant, inter alia:

(a) Payment in the amount of CAD\$1,888,824 for breach of contract of indemnity;

(b) In the alternative, payment in the amount of CAD\$1,888,824 pursuant to **s.116 (5)** of Canada's **Income Tax Act, R.S.C. 1985 c. 1(5<sup>th</sup> Supp.)**

## THE APPLICATION

[9] This is an application by the Defendant filed on 23 September 2013 (and an amended application filed on 23 April 2014) for the following relief:

- a. A declaration that this Honourable Court has no jurisdiction to hear and determine the Claimant's claim for payment in the amount of CAD\$1,888,824 pursuant to **s.116(5)** of the **Income Tax Act, R.S.C. 1985 c. 1 (5<sup>th</sup> Supp.) of Canada (the "ITA")** and/or the Acknowledgement and Agreement dated the 1<sup>st</sup> day of July 2006 (the "indemnity") set out and contained in the Claimant's statement of case (the "Canadian revenue law claim");
- b. An order that the Claim Form and Statement of Claim be struck out in their entirety and that judgment be entered for the Defendant accordingly; and
- c. An order that the Claimant do pay the Defendant's costs of and incidental to this application and of this action.

[10] **The grounds of the application are as follows:-**

(1) The applicable private international law principle is that the Barbados courts have no jurisdiction to entertain an action (a) for the enforcement, either directly or indirectly of a penal, revenue or other public law of a foreign State; or (b) founded upon an act of state.

(2) The Canadian revenue law claim concerns the construction and enforcement of a Canadian taxing statute, namely the ITA, and the Barbados High Court does not have subject matter jurisdiction to entertain or enforce a claim arising under or pursuant to subsection 116(5) of the Income Tax Act, which is clearly a revenue law.

(3) The Claimant is relying on the provisions of the revenue laws of Canada and/or the Indemnity as the basis for asserting the Canadian revenue law claim. At paragraph 24 of its Statement of Claim, the Claimant asserts that it has "an absolute statutory right of recovery from [the Defendant] for any liability imposed pursuant to subsection 116(5) of the ITA". That subsection states as follows:

"Where in a taxation year a purchaser has acquired from a non-resident person any taxable Canadian property (other than depreciable property or excluded property) of the non-resident person, the purchaser, unless

(a) after reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada,

(b) subsection (5.01) applies to the acquisition, or

(c) a certificate under subsection 116(4) has been issued to the purchaser by the Minister in respect of the property, is liable to pay, and shall remit to the Receiver General within 30 days after the end of the month in which the purchaser acquired the property, as tax under this Part for the year on behalf of the non-resident person, 25 of the amount, if any, by which,

(d) the cost to the purchaser of the property so acquired exceeds,

(e) the certificate limit fixed by the certificate, if any, issued under subsection 116(2) in respect of the disposition of the property by the non-resident person to the purchaser, and is entitled to deduct or withhold from any amount paid or credited by the purchaser to the non-resident person *or otherwise recover from the non-resident person any amount paid by the purchaser as such a tax.*"

(4) The Claimant is asserting a right to recover from the Defendant, pursuant to that section, an amount the Claimant allegedly paid as tax in accordance with the same section. The claim is in respect of taxes paid, and the right to recover such a payment is conferred by the subsection. On the basis of the applicable private international law principles, this Court has no jurisdiction to hear or determine that claim.

(5) The Claimant's claim under the indemnity is similarly founded on the provisions of section 116(5) of the ITA since the Claimant is asserting an alleged contractual right to recover taxes paid by it under that section. For the same reasons, the Court has no jurisdiction to hear or determine the claim.

## **THE ISSUE**

[11] The main issue for determination is:

Whether the Court has jurisdiction to hear and determine the Claimant's claim for payment pursuant to **s.116 (5)** of the **Income Tax Act, R.S.C. 1985 c. 1 (5<sup>th</sup> Supp.) of Canada (the "ITA")**.

## **SUBMISSIONS OF THE DEFENDANT**

[12] Mr. Garth Patterson, Q.C., Counsel for the Defendant, submitted that the Claimant was relying on the provisions of the revenue laws of Canada as the sole basis for asserting the Canadian revenue law claim. Counsel relied upon paragraph 24 of the Claimant's statement of claim in which he alleged that the Claimant asserted that it had an absolute statutory right of recovery from the Defendant for any liability imposed pursuant to s116(5) of the ITA. He referred to **section 116 (5) of the Income Tax Act of Canada** which the Claimant relied on in paragraph 24 of its Statement of Claim.

[13] He further submitted that the Canadian revenue law claim, arising under the provisions of the **ITA**, should be struck out based on the long established rule of private international law that the Barbados courts have no jurisdiction to entertain an action “(a) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or (b) founded upon an act of state.”

[14] Counsel referred to **Part 26.3 (1) (a) – (c) of the Supreme Court (Civil Procedure) Rules, 2008 (“CPR”)** of Barbados as authority for the Court's power to strike out the whole or part of a statement of case under certain circumstances.

[15] He pointed out that striking out is the appropriate sanction where the statement of case raises an unwinnable case, where continuance of the proceedings is without any possible benefit to the Claimant, and would waste resources on both sides. He posited that, in granting an application to strike out, the Court must be certain that the claim is bound to fail and that a claim seeking a remedy designed to give extra-territorial effect to foreign revenue law is bound to fail. He relied on the following cases:

(a) **Harris v Bolt Burdon [2000] EWCA Civ 3037;**

(b) **Hughes v. Colin Richards & Co. [2004] EWCA Civ 266;**

(c) **QRS 1 Aps and others v Frandsen [1999] 3 All ER 289.**

[16] Counsel submitted that a request for the indirect enforcement of a foreign state's revenue laws, clothed in an action brought by a non-State party, is as offensive as direct enforcement, with the result that any claim which will have this effect will not be entertained by the Court.

[17] Mr. Patterson, Q.C. submitted also that, in considering whether or not a claim brought by a non-State party amounts to indirect enforcement of a foreign State's revenue laws, it is the duty of the Court to go behind form and examine the substance of the claim, in order to determine its nature for the purposes of application of the rule. He relied on the case of **United States of America v. Harden [1963] S.C.R. 366.**

[18] Further, he submitted that entitlement to reimbursement will not be entertained if the effect would be indirect enforcement. He referred to the following cases in support:

(a) **Stringam v. Dubois [1992] A.J. No. 1075;**

(b) **Prestwich v. RBC Trust Co (Jersey) (1998) 1 ITLR 565 (Prestwich).**

[19] Counsel submitted that it was inescapable from the case law that a statutory provision that creates an entitlement to collect or recover taxes or creates an indemnity will not be enforced by a foreign court, as it would amount to an indirect enforcement of another country's revenue law. Instead, such law should be enforced by the court of the country which enacted the statute. This principle will apply, in his submission, whether or not, under the provision in question, the taxes have been paid or not.

[20] Furthermore, counsel referred to strong public policy justifications which support the Court's comprehensive practice of declining to engage in an evaluation of the revenue laws of a foreign state or acting as a collection mechanism for foreign revenue agencies. He listed these justifications as:

- a. Comity precludes sitting in judgment of foreign states' public laws;
- b. Enforcement of taxes of another state is an extension of that state's sovereignty; and

c. Courts should avoid the administrative difficulties of interpreting another state's revenue laws: **Government of India v. Taylor [1955] A.C. 491,511,514-515.**

[21] Counsel for the Defendant submitted that **section 116 (5)** of the **ITA** is a revenue collection provision. The nature of which was recognized by the Federal Court of Appeal for Toronto in **Morris v. Canada (Minister of National Revenue – M.N.R.) [2009] F.C.J. No. 1653.**

[22] Counsel submitted that the only indication before the Court of the nature of section 116 (5) is the affidavit evidence of Edmund Gill which only confirmed that the section is a recovery mechanism for revenue. In addition, he opined that the section should not be taken at face value and serious consideration, ought to be given as to whether it gave a purchaser an enforceable right to collect tax, as well as its extra-territorial effect. He pointed out that doubt has been expressed over the section's purported effect in relation to the purchaser's right to collect. He referred to paragraph HTC-170 of Halsbury's Laws of Canada.

[23] Mr. Patterson, Q.C. pointed out that other questions of interpretation arise, namely, whether the section applies automatically or whether there is any right of recourse by the non-resident. For example, section 116 is one to which the Agreement between Canada and Barbados for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and on Capital ("Barbados-Canada Double Taxation

Treaty”) applies. He referred to **Morris v. Canada (Minister of National Revenue – M.N.R.) [2009] F.C.J. No. 1653**.

[24] Counsel submitted that a critical question which must be considered is can this Honourable Court rely solely on the statements made in the Statement of Claim and in the submissions that the section confers a statutory right to recovery without more? He contended that it is clearly not a private right created between parties because it cannot be divorced from its statutory context. It is not in the nature of the contract and, but for the tax statute, the recovery would not exist.

[25] He further contended that the **ITA** clearly has implications on the Barbados-Canada relationship and treatment of residents for the purpose of tax and that Canada is the proper jurisdiction to deal with those issues. Moreover, if the Court was to make a determination in this matter, it would in effect be purporting to sit in judgment of one of Canada’s fundamental revenue laws and embroiling itself in the interpretation of a section that is not without some controversy in Canada. Counsel submitted that the claim is bound to fail and is ripe to be struck out.

[26] Mr. Patterson Q.C. submitted that there would be no prejudice to the Claimant if the Court proceeded to strike out the Claimant’s claim because the Claimant would not be left without an avenue to seek a

remedy under **section 116 (5)** of the **ITA**. He pointed out that it remained open to the Claimant “to litigate this portion of the Claim in Canada.”

[27] Counsel concluded that, in view of the settled, long-established rules, the portion of the Claimant’s claim that would seek to indirectly enforce **section 116 (5)** of the **ITA** is a claim that is bound to fail and that the Court should not entertain it. He requested the Court to grant the relief in terms of the orders being sought in the application.

### **SUBMISSIONS OF THE CLAIMANT**

[28] Written submissions were filed on behalf of the Claimant by Mr. Francis De Pieza of Messrs. Carrington & Sealy, Attorneys-at-Law. Mr. Frank Walwyn presented oral arguments on the Claimant’s behalf. Counsel contended that the Claimant’s claim is not an attempt by or on behalf of the state to enforce a foreign revenue law. The Claimant was seeking to enforce a contractual and statutory right of recovery of a debt *simpliciter* between private parties and the principle that the courts of one country will not enforce the revenue laws of another country did not apply.

[29] Counsel also contended that the Defendant failed to meet the test for striking out portions of a statement of case and the Application should be refused.

[30] Mr. De Peiza acknowledged the Courts power to strike out a statement of case pursuant to the **CPR Part 26.3 (1) (a)-(b)** and that, in an application to strike out a statement of claim, it is assumed that the facts alleged in the statement of claim are true. He relied on **Citco Global Custody NV v. Y2K Finance Inc., HCVAP 2008/022 (Territory of the Virgin Islands, 19 October 2009 per Edwards J.A.) (“Citco”)** at para. 13.

[31] Furthermore, he submitted that in determining whether to exercise the draconian power of striking out a statement of claim, the court should consider the principles stated by **Edward J.A** in **Citco** at para. 14:

“Among the governing principles stated in Blackstone’s Civil Practice 2009, the following circumstances are identified as providing reasons for not striking out a statement of case: where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross-examination of witnesses often change the complexion of a case. [Emphasis added]”

[32] Counsel accepted that it is a well-established principle of private international law that the courts of one country will not enforce, either directly or indirectly, the revenue laws of another country (the “revenue rule”). Moreover, the principle prohibits the enforcement of foreign revenue laws on the ground that the enforcement of such claims is an extension of the sovereign power which imposed the taxes and the court

must determine whether the law at issue falls within the category of laws captured by the principle. He relied on:

(a) **Lord Collins of Mapesbury, ed, Dicey, Morris and Collins on The Conflict of Laws, 15<sup>th</sup> ed, Vol 1 (London, UK: Sweet & Maxwell, 2012) at 107-108 and 109;**

(b) **Halsbury's Laws of England, Vol 19, 5<sup>th</sup> ed (London, UK: Butterworths, 2011) at para 334 (QL).**

[33] Counsel contended that the revenue rule does not prevent recognition of a foreign revenue law for other purposes and he referred to the decision of the Supreme Court of Ontario in **Prince v. ACE Aviation Holdings Inc., 2013 ONSC 2906 at paras. 15-18**. He also referred to the case of **Attorney General of New Zealand v. Ortiz [1984] AC 1 (UKHL) at 20 (Ortiz)** where **Lord Denning** acknowledged that there are instances in which the court of one country will recognize the penal or revenue laws of another country.

[34] He admitted that while **Ortiz** may be distinguished on its facts, as it concerned a state's attempt to enforce its forfeiture provisions in a foreign state, Lord Denning's opinion lends support to the Ontario Court's reasoning in **Prince**. He averred that in **Prince**, the English courts have recognized that the revenue rule does not automatically oust the court's jurisdiction to hear a claim which arises in connection with a foreign revenue law.

- [35] Mr. De Peiza submitted that the Claimant's claim is founded both on a contractual right (the Indemnity), and on a statutory right of recovery of a debt simpliciter between private parties. This is not an attempt by or on behalf of the "foreign state", "Her Majesty in the Right of Canada," to enforce the collection of taxes. He pointed out that Her Majesty in the Right of Canada is not a party to this action, the state obtains no monetary benefit or detriment whatsoever from this action and that the outstanding liability to the CRA has already been satisfied by CSI.
- [36] Counsel further submitted that while the amount owed may have been calculated by reference to an amount paid by CSI as a tax, it is not in fact an action to collect tax, which CSI has no authority to do as a private party. It is, *inter alia*, an action to enforce a statutory right of recovery.
- [37] He averred that, while that right of recovery is contained in a Canadian statute that did not change the nature of the claim from one that is a recovery of debt. He further averred that a right of recovery, whether conferred by contract, at common law or by statute, remains a right to recover a debt regardless of the subject matter of the statute.
- [38] Mr. De Peiza submitted that the Court is not barred from determining the Claim for the recovery of a debt simply on the basis that the right of recovery arises out of the Canadian Income Tax Act. He stated that the Claimant's statutory right of recovery has already crystallized, and it now

seeks to recover the debt, one that is owed between two private parties and which does not involve the enforcement of a foreign revenue law.

[39] Counsel for the Claimant submitted finally that the Defendant failed to meet the test for striking out part of a statement of case. He stated that the court's discretion to strike a statement of case must be exercised sparingly, particularly where the claim, as in this case, raises a serious live issue of fact which requires full ventilation at trial.

[40] He submitted that if the misdescribed "Canadian revenue law claim" were struck out, it would deprive CSI of its right to a fair trial on all issues before the court and that in all the circumstances, it is just and fair to dismiss the Defendant's application with costs payable by the Defendant.

### **The power to strike out the Claim Form and Statement of Claim.**

### **THE LAW**

[41] **The Supreme Court (Civil Procedure Rules) 2009 (the CPR) Part 26.3** provides:

"(3) The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court

- (a) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
- (b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim; or
- (c) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

[42] None of these grounds has been alleged by the Defendant. Instead, the Defendant's application is premised upon the submission that, in as much as the Claim seeks to enforce an alleged agreement to pay the taxes of a foreign state, it is a claim that is bound to fail.

[43] Mr. Patterson submitted that striking out is appropriate where the statement of case raises an unwinnable case, where continuance of the proceedings is without any possible benefit to the Claimant and would waste resources on both sides. In granting an order upon such an application, the court must be certain that the claim is bound to fail.

[44] The general rule at common law is that the direct and indirect enforcement of foreign revenue laws by local courts is prohibited. In **Government of India v Taylor [1955] AC 491, Viscount Simonds** said at p. 508:

“We proceed upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries...And since it is a rule which operates equally in regard to natural and artificial persons, the company, with which we are concerned, could not on the day before its resolution to wind up became effective have been sued by the Indian Government for the recovery of tax in the courts of this country.”

[45] In **Dicey, Morris and Collins on The Conflict of Laws, 14<sup>th</sup> ed., Vol. 1,** at p. 102, the learned authors opined that:

“Direct enforcement occurs where a foreign State or its nominee seeks to obtain money or property, or other relief, in reliance on the foreign rule in question.”

[46] In **Cheshire and North’s Private International Law, 12<sup>th</sup> ed.**, at p. 115,

the learned authors state, concerning indirect enforcement of foreign revenue laws:

“The rule that no action lies to recover foreign taxes is not affected by the identity of the plaintiff or by the form in which the action is brought.”

[47] **Section 116(5)** of the **ITA** states:

“Where in a taxation year a purchaser has acquired from a non-resident person any taxable Canadian property (other than depreciable property or excluded property) of the non-resident person, the purchaser, unless

- (a) After reasonable inquiry the purchaser had no reason to believe that the non-resident person was not resident in Canada,
- (a.1) subsection (5.01) applies to the acquisition, or
- (b) a certificate under subsection 116 (4) has been issued to the purchaser by the Minister in respect of the property,

is liable to pay, and shall remit to the Receiver General within 30 days after the end of the month in which the purchaser acquired the property, as tax under this Part for the year on behalf of the non-resident person, 25% of the amount, if any, by which

- (c) the cost to the purchaser of the property so acquired exceeds
- (d) the certificate limit fixed by the certificate, if any, issued under subsection 116 (2) in respect of the disposition of the property by the non-resident person to the purchaser,

and is entitled to deduct or withhold from any amount paid or credited by the purchaser to the non-resident person or otherwise recover from the non-resident person any amount paid by the purchaser as such a tax.”

## **DISCUSSION**

[48] The application to strike out was made by the Defendant who bears the burden of proof on a balance of probabilities. Both counsel acknowledge the existence of the revenue rule but dispute the applicability to the facts

of this case. Thus, it is necessary to examine the revenue rule to determine whether that rule would apply in the circumstances of this matter.

[49] An examination of the wealth of case law on the issue of the enforcement of foreign revenue laws reveals that the revenue rule applies to circumstances where sovereign states try to collect revenue by seeking to enforce their revenue laws in foreign courts. Thus, in Dicey, **Morris and Collins on The Conflict of Laws, 14<sup>th</sup> ed., Volume 1**, at p. 102 it states:

“In the eleventh edition of this book it was suggested that it is the foreign State which has no international jurisdiction to enforce its law abroad, and the English court will not exercise its own jurisdiction in aid of excess of jurisdiction by the foreign State.”

[50] Counsel for the Defendant referred to the case of **Government of India v Taylor** where the Government of India sought to recover taxes due under the laws of India. **Lord Keith of Avonholm** in reference to the revenue rule, said at p. 511:

“One explanation of the rule thus illustrated may be thought to be that enforcement of a claim for taxes is but an extension of the sovereign power which imposed the taxes, and that an assertion of sovereign authority by one State within the territory of another, as distinct from a patrimonial claim by a foreign sovereign, is (treaty or convention apart) contrary to all concepts of independent sovereignties.”

[51] In **United States of America v. Harden [1963] S.C.R. 366** also cited by Counsel for the Defendant, the plaintiff sued upon a judgment in respect of a claim for taxes issued by the United States District Court for the Southern District of California against the defendant in the Supreme Court of British Columbia. The Supreme Court of Canada held that the claim

asserted remained a claim for taxes even if the Defendant had made an agreement to pay it was an agreement to pay taxes. This is the common thread throughout the cases cited in support of the Defendant's contention that hearing the Claimant on **s.116 (5)** of the **ITA** would result in a direct or indirect enforcement of a foreign revenue law.

[52] Another feature found in case law applying the revenue rule is the claim to recover taxes. Counsel for the Claimant contended that the action is not "an action to collect tax". In **Government of India v Taylor, Lord Somervell of Harrow** pointed out that the first issue was whether a foreign State could use the courts of England for the collection of its taxes. He said at p. 514:

"Tax gathering is an administrative act, though in settling the quantum as well as in the final act of collection judicial process may be involved. Our courts will apply foreign law if it is the proper law of a contract, the subject of a suit. Tax gathering is not a matter of contract but of authority and administration as between the State and those within its jurisdiction. If one considers the initial stages of the process...it would be remarkable comity if State B allowed the time of its courts to be expended in assisting in this regard the tax gatherers of State A. Once a judgment has been obtained and it is a question only of its enforcement the factor of time and expense will normally have disappeared. The principle remains. The claim is one for tax."

[53] The Claimant claims a statutory right under **s.116 (5)** of the **ITA** which enables a purchaser who has paid tax on behalf of a non-resident person to recover the money paid. Although **s. 116 (5)** is a revenue law, it has two components to it. Firstly, it provides that the purchaser is liable to

pay, and shall remit to the Receiver General within 30 days after the end of the month in which the purchaser acquired the property, as tax for the year on behalf of the non- resident person, 25% of the amount, if any, by which the cost to the purchaser of the property so acquired exceeds the certificate limit fixed by the certificate and secondly the purchaser is entitled to deduct or withhold from any amount paid or credited by the purchaser to the non-resident person *or otherwise recover from the non-resident person any amount paid by the purchaser as such a tax.*'  
(*Emphasis added*).

[53] On the facts as accepted by all sides the relevant taxes have already been paid to the CRA. That body is not seeking to recover any further revenues from any of the parties to this suit.

[54] It is important to look at the pleadings to ascertain what it is that the Claimant is seeking to enforce. Those pleadings are set out in paragraph 8 of this decision and it is unnecessary to repeat them here. What then is the proper interpretation to be placed on section 116(5) of the ITA? It seems to me that the revenue collection aspect of the statute is the statutory obligation of the purchaser to pay the taxes on behalf of the non-resident person only. The ITA then provides a right of recovery of the amount paid by the purchaser against the non-resident person.

[55] It is not an unreasonable submission that the monies sought to be

recovered are not taxes. Taxes are paid to the relevant state authority not to individuals. This matter involves two private entities. The Claimant is not acting on behalf of a sovereign State to collect taxes owed under a revenue law. The Claimant seeks to recover from the Defendant a debt, arising out of the agreement with the Defendant and calculable by reference to the taxes it paid to the Canada Revenue Agency (**CRA**).

[56] The Claimant referred to the Canadian case of **Prince v ACE Aviation Holdings Inc., 2013 ONSC 2906** where American taxes were charged on tickets purchased in Canada and the Court found that it had jurisdiction to determine the dispute. The argument was made that an adjudication of the matter by the Court would offend the rule that a Court will not directly or indirectly enforce the tax laws of a foreign country (“**the revenue rule**”).

[57] The Supreme Court of Canada in **Prince** stated at paras. 16-18:

“In my view, Air Canada is misapplying the revenue rule. That rule prevents a foreign state from suing in this country for taxes due under the law of the foreign state...The revenue rule does not, as Air Canada suggests, broadly restrict the court from adjudicating any matter that may concern or involve foreign tax laws. In this case, the court is not being asked to enforce a claim by the U.S. government for the recovery of taxes...The issues are whether Air Canada is entitled to and has properly collected amounts from its customers on ticket purchases. There is nothing in the revenue rule that prevents this court from determining those issues.”

[58] Moreover, the case of **Prince** was appealed and adjudicated before the Ontario Court of Appeal (**Prince v. ACE Aviation Holdings Inc., 2014 ONCA 285**). The appellants argued that Air Canada’s administrative

practices gave extra-territorial reach to U.S revenue laws and that Air Canada misapplied those laws by collecting taxes. **Strathy JA**, in giving the judgment of the Court, said:

“In my view, just as an Ontario Court will not assist the direct or indirect enforcement of foreign revenue laws in Canada, so it has jurisdiction to restrain the application of foreign laws in its territory by a foreign state or its agent. I am therefore prepared to assume that an Ontario Court has jurisdiction to determine whether a foreign law is being enforced extra-territorially and to grant appropriate relief. This is consistent with **Harden**. I am also prepared to assume that an Ontario court can interpret a foreign law and grant relief against its misapplication.” (Emphasis added)

[59] The Claimant also relies on the **Attorney General of New Zealand v Ortiz [1984] AC 1 (UKHL)** where **Lord Denning** expressed at p. 20:

“This suit by a foreign state to enforce its laws is to be distinguished altogether from a suit between private firms or individuals which raises a question as to whether a contract has been broken by one or the other or whether a wrong has been done by one or the other. In such a suit our courts will often recognize the existence of the laws of a foreign state. We will recognize the foreign law so much that we will refuse to enforce a contract which is in breach of the laws of a foreign state...”

[60] Counsel for the Claimant acknowledged that the judgment in **Ortiz** may be distinguished on its facts but contended that it confirms the view in **Prince** that the revenue rule does not automatically oust the jurisdiction of the court to hear a claim which arises in connection with a foreign revenue law.

[61] This matter is indeed a suit between private individual companies. However, the circumstances in **Prince** are different from the present matter. The plaintiffs in **Prince** did not seek to enforce a US law but they disputed the actions of Air Canada under a US law.

[62] Counsel for the Defendant cited the case of **Stringam v. Dubois [1992] A.J. No. 1075** in support of his contention that entitlement to reimbursement will not be entertained if the effect is indirect enforcement.

The main issue in **Stringam** was stated by Stratton J. A.:

“The issue raised by this appeal is whether, on the facts of this case, the rule against our courts enforcing a tax claim of a foreign jurisdiction applies so as to allow the transfer of Canadian realty to the devisee of that realty, rather than requiring that the property be sold and the proceeds used firstly to pay United States estate taxes.”

The case of **Stringam** can be distinguished because, in that case, if the revenue rule was not applied, the United States Government would have benefitted from the claim of the Claimant, by obtaining estate taxes. That would have resulted in indirect enforcement of a foreign revenue law. In this matter, there is no issue of the Canadian Government obtaining taxes under the **ITA** if the Claimant is allowed to continue his claim.

## **Conclusion**

[63] I, therefore find that the Claimant’s submission that it is not indirectly seeking to enforce the tax laws of Canada by bringing this suit but that it is simply seeking to recover monies owed by virtue of a indemnity/statutory right contained in a revenue statute is arguable.

[64] In **Prestwich** the Claimant, (Mr. Prestwich) a resident of the UK paid tax to the Inland Revenue under s.86 and Schedule 5 of the Taxation of Capital Gains Act, 1992 of the UK. Paragraph 6 (2) of Schedule 5 of the 1992 Act provided that the person who had paid this liability was entitled

to recover the amount of tax from any person who was a trustee of the settlement. Mr. Prestwich sought to recover the amount paid from the Defendant, who was a trustee and a resident of a foreign jurisdiction. The Court examined the revenue rule and held that the right to recover could only be enforced in the UK. It also held that the revenue rule also extended to recovery of taxes paid by private persons as an indirect enforcement of the revenue rule.

[65] Mr. Patterson also submitted that it was inescapable from the case law that a statutory provision that creates an entitlement to collect or recover taxes or creates an indemnity will not be enforced by a foreign court as it would amount to an indirect enforcement of another country's revenue law. Such a law ought, he averred, to be enforced by the country which enacted the statute. The principle was applicable whether or not the taxes had been paid under the provision in question. He relied on **Prestwich**.

[66] Counsel cited the following as strong public policy justifications for the practice of declining to engage in an evaluation of the revenue laws of a foreign state or acting as a collection mechanism for foreign revenue agencies:

- a. Comity precluded sitting in judgment of foreign state's public laws.
- b. Enforcement of taxes of another state is an extension of that state's sovereignty, and
- c. Courts should avoid the administrative difficulties of

interpreting another state's revenue laws: **Government of India v Taylor [1955] A.C. 491, 511,514-515.**

[67] In **Prestwich, Howarth J.** referred to cases regarding the revenue rule and said at p. 577:

“...would it be right to infer that Parliament, when conferring the entitlement to recover, has given that right of recovery which may be appropriate, as I say, if there is a minority trustee within the jurisdiction, that is minority in number, or trustees happen to come within the jurisdiction or the trust comes back into the jurisdiction? Is that really what Parliament is contemplating? My own view, whether it be right or wrong, is that Parliament was probably not contemplating that at all. What Parliament, I would have thought, was inevitably contemplating was that that right could be enforced in some way or another, and once one comes to that conclusion it seems to me to lead inevitable one way or the other to an answer that the right can be enforced only within this country.”

[68] One of the questions to be answered in this matter, is whether the Parliament of Canada contemplated that the right under **s. 116 (5)** of the **ITA** could be enforced in a foreign jurisdiction. The decision in **Prestwich** is of persuasive authority only. The resolution of the issue of the intention of the Canadian Parliament in **Section 116 (5)** of the **ITA** is a matter for the determination of this court. Affidavits were filed by Mr. Edmund Alaric Gill, a practicing tax Attorney-at-Law in Canada as to his interpretation of this section. The Defendant filed an affidavit of Mr. James Murdoch also a practicing tax Attorney in Canada in which he deposed that pursuant to the section of the **ITA** CSI has a statutory right to recover the amount of Can \$1,900,000.00 paid from the defendant. None of these witnesses have been examined *viva voce* or cross-examined with

respect to the legislative intent of the Canadian Parliament when passing the ITA. No expert opinion has yet been received on this issue.

[69] In this regard it should be noted that the court cannot simply apply the English jurisprudence in **Prestwich** to the interpretation of Canadian statute law without first trying to ascertain the jurisprudential basis of section 116(5) which has not yet been advanced before me. This is not to deny the persuasive authority of **Prestwich** relied on by Mr. Patterson.

[70] In **Ortiz Lord Denning M.R.** looked at the question of what is meant by the “exercise of sovereign authority” (albeit in a slightly different context) and said:

“I suggest that the first thing in such a case as the present is to determine which is the relevant act. Then to determine whether it is of a sovereign character or non-sovereign character. Finally to ask whether it was exercised within the territory of the sovereign state –which is legitimate or beyond it-which is illegitimate.”

[71] The gathering or collection of taxes as an exercise of State authority by Lord Somervell of Harrow has already been described in this decision.

## **Analysis**

[72] The power to strike out a Claimant’s statement of case is a draconian power as described by **Edwards J.A.** in **Citco Global Custody NV v. Y2K Finance Inc., HCVAP 2008/022 (Territory of the Virgin Islands, 19 October 2009)** where the learned judge opined **para. 14** that:

“It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures...”

This power must always be viewed in the light of the overriding objective which requires courts to deal with cases justly.

[73] Every case must be decided upon its own peculiar facts. The Claimant pleaded in paragraph 16 that, in the indemnity, HSBC fund agreed to indemnify CSI for any and all tax liabilities imposed as a consequence of s.116 of the ITA.

[74] In paragraph 24, it is pleaded that CSI has an absolute statutory right of recovery from HSBC fund for any liability imposed pursuant to subsection 116(5) of the ITA.

[75] The Claimant claims the statutory right under **s. 116 (5)** in the alternative. If this Court strikes out the Claimant's claim under **s. 116 (5)** the Claimant will not be totally shut out from obtaining a remedy if the alternative claim is not struck out. If the entire claim is struck out, the Claimant is without remedy.

[76] The Claimant is also claiming, *inter alia*, damages for loss resulting from the improper dissolution of HSBC Fund, including but not limited to the cost of revival, an accounting for and disgorgement of all assets distributed by HSBC Fund to its shareholder, or any other person or entity upon dissolution and an order permitting the tracing of all funds distributed by HSBC Fund to its shareholder or to any other person or entity, upon dissolution. These claims remain live before the Court.

[77] No defence has been filed in this matter to date, so that the position of the Defendant with regard to the substantive issues is yet unknown save and except its position with respect to the application of foreign revenue laws to this matter. Mr. Patterson quite rightly conceded that he has not advanced any arguments based upon forum non conveniens.

[78] I am of the view and hold that a fair trial is predicated upon a full ventilation of claims which are not totally devoid of merit and the defences filed in opposition to such claims.

[79] I am also of the opinion that the cases cited do not put beyond doubt the issue of the ability in law of a Claimant, which is not a sovereign state or the agent of such a state, to rely upon a provision contained in a foreign revenue statute or an agreement between private individuals which makes reference to or incorporates a private right to recover monies as in this case. See eg. **Ortiz** where **Lord Denning M.R.** opined as follows:

“This suit by a foreign state to enforce its laws is to be distinguished altogether from a suit between private firms or individuals which raises a question as to whether a contract has been broken by one or the other. In such a suit our courts will often recognize the existence of the laws of a foreign state so much that we will refuse to enforce a contract which is in breach of the laws of a foreign state.”

[80] See also **Stringham** in which **Stratton J. A.** in commenting on **Harden** made the point that the Supreme Court in **Harden** stressed two points, namely that an indirect attempt at enforcement is as offensive as a direct attempt and that **one must look at the substance of the claim to**

**determine its nature for the purposes of application of the rule (emphasis added).**

[81] The Defendant argued that the Claimant can have its claim heard in the courts of Canada. That may be so. However, it is no basis for this court to decline jurisdiction, if it exists, to say there is an alternative as distinct from a more convenient forum, for the hearing of this matter.

[82] With respect to Mr. Patterson's submission that striking out is appropriate where the statement of case raises an unwinnable case, where continuance of the proceedings is without any possible benefit to the Claimant and would waste resources on both sides and that, in granting an order upon such an application, the court must be certain that the claim is bound to fail, I cannot find that this case is unwinnable and bound to fail.

[83] I do not think it appropriate to make a final ruling on such important points of law upon preliminary submissions without reference to a full ventilation of the factual issues which fall for determination.

[84] I am of the opinion and hold that it would not be just and equitable to exercise the draconian power of striking out the statement of claim at such a preliminary stage of the proceedings.

[85] In conclusion, I am of the view and hold that the court at this preliminary stage of proceedings ought not to decline jurisdiction but should proceed to hear the substantive matter.

## **Disposal**

[86] In the circumstances, the Court makes the following order:

1. The application for the declaration sought by the Defendant is dismissed.
2. The application to strike out the Claimant's claim form and statement of claim in its entirety and that judgment be entered for the Defendant is dismissed.
3. The costs of this application shall be the costs in the cause.

**William J. Chandler**

**Judge of the High Court**