

MONROVIA BREWERIES INC., by and thru its Manager, KURT CALLENSON, Petitioner, v. **HONOURABLE FRANCIS KARPEH**, Minister of Finance, R. L., Respondent.

PETITION FOR A WRIT OF PROHIBITION AGAINST THE MINISTER OF FINANCE.

Heard: May 31, 1993. Decided: July 23, 1993.

1. The Minister of Finance shall, upon receipt of the notice from a taxpayer requesting for administrative hearing in accordance with the Administrative Procedure Act, appoint one or more review officers to hear and determine the matter. Appeal therefrom shall be conducted in accordance with the Administrative Procedure Act, except that appeal from the final administrative determination shall be instituted in the tax court.
2. The doctrine of *res judicata* is applicable in a proceeding only when the same subject matter involving the same parties has been judicially determined.
3. The doctrine of *res judicata* cannot be invoked when the subject matter involving the identical parties was never judicially determined.
4. Although the writ of prohibition will not ordinarily lie to control administrative or ministerial acts, when an administrative or executive board or tribunal is acting in a judicial or quasi-judicial capacity, prohibition will lie where it is acting without jurisdiction or in excess of its jurisdiction.
5. Every taxpayer, upon request, must be granted a hearing regarding the status and payment of his taxes.
6. Where a petition merely states that an act is unconstitutional and prays for it to be declared so, said petition, because it is so vague, does not put the constitutional question in issue.
7. The Supreme Court will declare an act unconstitutional only with the greatest possible caution and reluctance.

Respondent wrote petitioner, Monrovia Breweries Inc., informing it that it was liable to the Liberian Government for failure to pay its business levy taxes in keeping with

the Revenue and Finance Laws of Liberia. The petitioner disclaimed such liability and invoked the doctrine of *res judicata* averring that respondent, through its Assistant Minister for Revenues, had previously exempted it from payment of such tax. Petitioner also asserted that for it to be liable under the aforementioned tax liability, it must first be determined by a formal administrative body whether or not it is a taxable person for the purpose of the herein above mentioned tax since, indeed, it is not involved in retailing of its products. The attempt to enforce the payment of the aforementioned tax without an administrative hearing in the matter necessitated the filing of this writ of prohibition. The alternative writ was ordered issue. After hearing argument *pro et con*, the Court granted the writ, holding that the Ministry of Finance acted in excess of its jurisdiction when it attempted to enforce its decision against the petitioner without an administrative hearing. The Court also held that the doctrine of *res judicata* will not lie because the issue of tax exemption has never before been adjudicated between the parties.

H. Varney G. Sherman and David D. Kpomakpor appeared for petitioner. *John L. Greaves* of the Ministry of Justice, in association with *Thompson N Jabbah* of the Ministry of Finance, appeared for the respondents.

MR. JUSTICE MORRIS delivered the opinion of the Court.

The petitioner, Monrovia Breweries, Inc., is a foreign corporation doing business in Liberia under a concession agreement since May 27, 1957. The petitioner contended that paragraph 3(d) of the Concession Agreement exempted it from the payment of all taxes for six (6) years commencing from date of actual production. The petitioner also contended that this same matter was decided by the Ministry of Finance in 1973/74 and it was decided that the petitioner was not subjected to the payment of business trade levy, as evidenced from the letter of April 9, 1974 under the signature of Byron Tarr, Assistant Minister of Finance for Revenues. The petitioner therefore invoked the doctrine of *res judicata* and strongly maintains that the respondent cannot resurrect this issue anymore.

On August 10, 1973, the Acting Commissioner of Internal Revenue, R. L., in person of Eden C. Reeves, wrote the following letter to the Monrovia Breweries, Inc:

"REPUBLIC OF LIBERIA
MINISTRY OF FINANCE
MONROVIA, LIBERIA

August 10, 1973

MONROVIA BREWERIES, INC.

Bushrod Island Monrovia, Liberia

Gentlemen:

I wish to advise that we have carefully reviewed your Concession Agreement and it is our opinion that your Company is liable to pay the business trade levy.

The exemption indicated in the agreement is for manufacturing beer but does not exempt you from payment of business trade levy for doing business in Liberia and the sale of beer. I would therefore appreciate you making payment on the basis of gross sales for 1972.

Very truly yours,

(Sgd)Eden C. Reeves ACTING COMMISSIONER OF INTERNAL REVENUES,
R. L.

It would appear that the above quoted letter resulted into several meetings between petitioner and the Ministry of Finance which culminated in the letter of April 9, 1974, which we quote hereunder:

"MINISTRY OF FINANCE

MONROVIA, LIBERIA

104/17/3 April 9, 1974

Counsellor Philip J. L. Brumskine

Counsellor-at-Law

Garber Law Firm

Monrovia, Liberia

Dear Counsellor Brumskine:

This is in reply to your letter of March 11, 1974, concerning Monrovia Breweries, Ltd.

1. The Ministry of Commerce Industry and Transportation and I have never discussed Monrovia Breweries' business trade levy issue;
2. We are in agreement that the Breweries is not subject to business trade levy if all of their sales are to wholesalers/distributors. In the event of sales by the Breweries to an ultimate consumer, its total gross sales shall be liable to business trade levy;

3. Our prior approval must be obtained in writing for any departure from count (2) above.

Very truly yours, (sgd.) Byron Tarr

ASSISTANT MINISTER FOR REVENUES

The respondent, on the other hand, maintained that the doctrine of *res judicata* cannot apply to respondent who decides to change an administrative decision of his predecessor. Secondly, petitioner contended that prohibition will not lie to restrain an administrative agency or a branch of government from performing a duty which by law is part of its function to perform. Thirdly, that Chapter 6.1 of the Revenue and Finance Law provides that any protested tax must be paid within 30 days after the receipt of the copy of the notice and demand, and the taxpayer may request an administrative review or determination regarding the payment of the tax by filing a notice with the Minister requesting such review.

The petitioner's contention that prohibition will lie is contained in counts 10 and 11 of the petition which we quote hereunder:

"10. Petitioner submits that SECTION 6.1 of the REVENUE AND FINANCE LAW, VI LCL REVISED PAGE 1 provides that within thirty 30 days after receipt of a copy of a notice and demand or of a notice of rejection of a claim pursuant to Chapter 5, a taxpayer may request an administrative review of the determination by filing a notice with the Minister of Finance requesting such review.

Petitioner also submits that its Exhibit "P/6", hereto, constitutes a notice to the Minister requesting an administrative review to determine whether petitioner is taxable person for purposes of business trade levy, and the respondent has acknowledged said letter to be a notice/request for an administrative review. Yet, respondent has refused to grant such administrative review, which conduct of respondent is in violation of the statute; and as such the writ of prohibition will lie and petitioner so prays.

11. That SECTION 6.1 of the REVENUE AND FINANCE LAW, VI LCL REVISED, PAGE 71, also provides that in accordance with the need therefor, the Minister shall appoint one or more review officers, after receipt of the notice from the taxpayer requesting for an administrative hearing, in accordance with the ADMINI-STRATIVE PROCEDURE ACT. Regrettably, respondent not only

ignored or simply disregarded this mandatory requirement of SECTION 6.1 of the REVENUE AND FINANCE LAW VI REVISED, PAGE 71 but, instead, respondent arbitrarily fabricated an assessment of business trade levy and imposed same on petitioner in keeping with a bill dated April 6, 1993, and the covering letter from the respondent to the petitioner dated April 13, 1993. Both the covering letter and the bill are attached, hereto, in bulk as Exhibit "PIT."

The respondent wrote the petitioner on August 25, 1992 the following letter:

OFFICE OF THE MINISTER

MF/2-2/JNB/FW156/8-25/'92

August 25, 1992

The General Manager

Monrovia Breweries Inc.

P.O. Box 437 Monrovia, Liberia

Mr. General Managers

Further to our discussion of the issue regarding the payment of the business trade levy (BTL) by your Corporation, our position is as follows:

1. That Monrovia Breweries, Inc. (MBI) is liable to pay business trade levy following the six (6) years granted it for tax-free operation;
2. That business trade levy is payable not only by retailers, but also by wholesalers (See 12.31 of the Revenue and Finance Law and in particular, schedule C (3) of that section);
3. That business trade levy is not a license to do business which Monrovia Breweries, Inc. is not required to pay under its contract with the Government, but a tax on gross sales;
4. That Monrovia Breweries, Inc. did not pay Business Trade Levy over the years, not because Monrovia Breweries, Inc. did not want to, but because Monrovia Breweries, Inc. was informed by this Ministry that Monrovia, Breweries, Inc. did not have to pay. It would therefore be unjust to request Monrovia Breweries, Inc. to pay arrears on Business Trade Levy.
5. In view of all of the above, we require Monrovia Breweries Inc. to pay the business trade levy effective 1992.

If our position is acceptable to you, please see the Miscellaneous Tax Division for your 1992 business trade levy tax bill. If you have question, please see us for further discussion.

Kind regards, Sincerely yours, (Sgd.) Francis T, Karpeh,
Jr. MINISTER FTK/JNB/mws File"

On February 4, 1993, the respondent addressed the below letter to petitioner and the petitioner than replied on the 18th February, 1993.

REPUBLIC OF LIBERIA
MINISTRY OF FINANCE
MONROVIA, LIBERIA
OFFICE OF THE MINISTER
F/2-2/FTK/JNB/016/2-4/193
February 4, 1993
The General Manager
Monrovia Breweries Inc.
Bushrod Island
P. O. Box 437 Monrovia, Liberia

Mr. General Manager:

With reference to my letter MF/2-2,/JNB/FTK-/156/18-25/92 dated August 25, 1992, you will please be informed that a team of Auditors from the Inspection (Enforcement) & Internal Audit Division were duly assigned to audit all financial records of your establishment for business trade levy purposes.

They have officially informed us that according to Chapter 3, Sec. 3.6(1) and Sec. 3.8(1) of the Revenue and Finance Law of Liberia, Monrovia Breweries should be liable to pay her business trade levy for (5) years back instead of making payment for the taxable year 1992 as stated in my communication aforesaid.

In view of the foregoing, I hereby request that you kindly make available all relevant financial documents to the team of auditors for the periods under review, 1987 thru 1991, so that they will determine the full amount due under the law.

We regret any inconvenience this exercise may cause you.
Kindest regards, Sincerely yours,

(Sgd.) Francis T. Karpeh, Jr. MINISTER FTK/JNB/mws

The below quoted letter is the petitioner's reply, through Counsellor H. Varney G. Sherman, to respondent's letter of February 4, 1993.

18 February, 1993

The Honourable

The Minister of Finance

Ministry of Finance

Monrovia, Liberia

Mr. Minister:

We are legal counsel to Monrovia Breweries, Inc. (MBI) and we have the honour most respectfully to refer to your letter of February 4, 1993 in which you informed them that upon the advice of your auditors business trade levy will be assessed against MBI for a period of five (5) years (1987-1992).

We attach hereto a memorandum on this matter and request that you yourself will review this memorandum and also have your lawyers and your tax administrators review it; we are certain that you will agree with the conclusions of this memorandum.

Based upon the attached memorandum, we request that you reconsider your letter of February 4, 1993 and let us handle the business trade levy matter in keeping with the terms of the memorandum and our letter of December 6, 1992 to Deputy Minister Josiah N. Browne.

MBI has always been a good and diligent taxpayer; there is a very good relationship between the Ministry of Finance and MBI. We are very, very reluctant to even anticipate a formal protest and a subsequent hearing as was done in 1973 and 1974.

We trust therefore that you will review this memorandum and give us the opportunity of another meeting with you on the matter. We are certain that this matter can be settled to the mutual satisfaction of both MBI and the Ministry of Finance and, of course, based on the law.

Kind regards.

Very truly yours, (Sgd.) H. Varney G. Sherman

COUNSELLOR-AT-LAW & MANAGING DIRECTOR,
CC: MONROVIA BREWERIES, INC.

The respondent letter of March 3, 1993 requesting the petitioner to make available all financial documents to the team of auditors from the Ministry of Finance to inspect and audit for the period 1987-1991 led the petitioner to write another letter on March 18, 1993. We shall quote the three last paragraphs of that letter:

"Mr. Minister, with all due deference, we submit that there are two separate and distinct issues involved here; and we suggest that these two issues be considered in the order of priority. The first issue is whether Monrovia Breweries, Inc. is a taxable person for purposes of business trade levy. If you decide that Monrovia Breweries Inc. is a taxable person for purposes of business trade levy, and Monrovia Breweries Inc. concedes to that decision, or the Supreme Court of Liberia confirms your decision, then the second issue ought to be addressed.

The second issue is how much tax is Monrovia Breweries Inc, obligated to pay as a taxable person for purposes of business trade levy. It is at this stage of determining the second issue that we suggest that your auditors may audit Monrovia Breweries Inc.'s records; and even for this second issue, Monrovia Breweries Inc. may maintain that the Monrovia Breweries Inc. is not a taxable person for purposes of business trade levy or if the Supreme Court of Liberia reviews your decision to the contrary and reverses it, then, of course, the second issue becomes moot.

To submit Monrovia Breweries Inc. to an audit for business trade levy assessment, without first determining that Monrovia Breweries Inc. is a taxable person for purposes of business trade levy is to subject Monrovia Breweries Inc. and your Ministry to a possible unnecessary exercise, which has its cost both in terms of man hours and expenses. In short, we will be "putting the cart before the horse". So please let us first determine whether Monrovia Breweries Inc. is a taxable person for purposes of business trade levy. We have gathered from the exchanges of communication, and the various discussions that this is not a matter that will be solved amicably. Therefore, for and on behalf of Monrovia Breweries Inc. we invoke the rights contained in Chapter 6 of the Revenue and Finance Law and request for a formal administrative review to determine whether Monrovia Breweries Inc. is a taxable person for purposes of business trade levy. We also request that you appoint the review officers, pass all the exchanges of communication to them and instruct them to conduct the hearings in accordance with the Administrative Procedure Act."

Instead of the request for a formal administrative review to determine whether Monrovia Breweries Inc. is a taxable person for the purpose of business trade levy, the respondent, on April 13, 1993 wrote the petitioner this letter and we quote:

"REPUBLIC OF LIBERIA

MINISTRY OF FINANCE

MONROVIA, LIBERIA

April 13, 1993

OFFICE OF THE MINISTER

MF/2-2/FTK/JNB/079/13-4/93

The Managing Director:

Monrovia Breweries Inc.

Bushrod Island P. O. Box 437

Monrovia, Liberia

Mr. Managing Director:

Reference is made to our letter of February 4, 1993 indicating that we were sending in auditors to look into your records for the purpose of establishing the extent of the Monrovia Breweries Inc.'s commitment to Government in respect of business trade levy for the period 1987 to 1991. That letter was not answered, instead we received a letter dated February 18, 1993 from Counsellor H. Varney G. Sherman claiming to be your legal counsel and attaching a fifteen-page memorandum to show why Monrovia Breweries Inc. should not pay business trade levy. We replied Mr. Sherman on March 3, 1993 taking note of the memorandum and requesting that you kindly respond to our letter of February 4th and make available Monrovia Breweries Inc.'s records from 1987 to 1991 for review by our auditors. Again you did not reply directly but we received another letter from your lawyer requesting a review board to look into the matter and decide the following issues:

(a) Whether or not Monrovia Breweries Inc. should pay business trade levy; and

(b) if it has to pay, how much ?

Since we have not heard from you directly, and sincerely you have refused for our auditors to undertake their assignment, apparently based on the advice of your lawyer, we are enclosing herewith Monrovia Breweries Inc. Statement of A/C on business trade levy in the amount of L\$1,358,588.66 to be settled within thirty (30) days from the receipt of this letter. Under Section 6.1 of the Revenue and Finance Law you may

choose to pay under protest and call for a review of the matter, but after the bill is paid. Failure to pay the bill within the given time, we will have no alternative but to have Monrovia Breweries Inc. closed down for non-payment of legitimate taxes due Government.

Kind regards, Sincerely yours, (Sgd.) Francis T. Karpeh
MINISTER

From the various communications between the respondent and petitioner, it would appear that the petitioner did not refuse to comply with the law as it relates to the payment of business trade levy, but maintained that it wants a formal administrative review to determine whether or not the Monrovia Breweries Inc, is liable to pay business trade levy tax, since it was the same Ministry of Finance, through the Assistant Minister for Revenue, in person of Byron Tarr, that decided that it was not liable for the payment of business trade levy if all its sales are to wholesaler/distributors as stated in the letter of April 9, 1974.

We also quote for the benefit of this opinion section 6.1 of the Revenue and Finance Law under Administrative Review:

"Except when a specific provision of law provides otherwise within 30 days after receipt of a copy of a notice and demand, or of a notice of rejection of a claim made pursuant to chapter 5, a taxpayer may request an administrative review of the determination by filing a notice with the Minister requesting such review; provided that if the determination involves the imposition of a tax, the taxpayer within the said 30-day period, shall first pay the full amount of the disputed tax. In accordance with the need therefor, the Minister shall appoint one or more review officers who shall conduct hearings in accordance with the Administrative Procedure Act. The Minister may also act as review officer where he considers it appropriate." Revenue and Finance Law, Rev. Code 36: 6.1., *Administrative Review*.

In the instant case, the respondent told the petitioner that it was not liable to pay business trade levy tax as long as all its sales are to wholesalers/distributors. If by some means or the other, the respondent has learned or been informed that petitioner sales are no longer to wholesalers/distributor, then it is but fair, proper, and just for the respondent to grant the request of petitioner by appointing a formal administrative review board so that the petitioner will be given its day in court.

The petitioner has the right to appeal from the final administrative determinations,

for the law provides that:

"Except as may otherwise be inconsistent with the provisions of this title or with rules and regulations prescribed by the Minister, an "administrative review and any appeal therefrom shall be conducted in accordance with the Administrative Procedure Act, except that an appeal from the final administrative determination shall be instituted in the Tax Court." Revenue and Finance Law, Rev. Code 36: 6.4. The Administrative Procedure Act provides under Enforcement of administrative order for payment of money as follows:

"In a proceeding under this section to enforce a final order for a payment of money, the judge of the Circuit Court, if enforcement is granted, shall direct the clerk of his court to enter judgment for the amount of money to be paid. Such judgment shall have the same effect, and be enforceable through the same proceedings as though rendered in a civil action before the Circuit Court, except that no appeal may be taken therefrom." Executive Law, Rev. Code 12: 82.9(3), *The Administrative Procedure-Act, ch. 82*.

With regards to the petitioner's contention that the matter is *res judicata* because the hearing held in 1973 by respondent was a quasi judicial hearing in keeping with statute, this court has repeatedly held that:

"*Res judicata* is a principle of law which bars litigation of issues in a case involving the same parties and the same subject matter where the case has once been judicially determined; that is to say, where the merits of the issues involved have previously been tried and judgment rendered thereon.." *Kiazolu-Wahab v. Sonii et al.*, 16 LLR 73 (1964). "The doctrine of *res judicata* is applicable in a proceeding only when the same subject matter involving the same parties has already been judicially determined." *Shannon v. Liberia Trading Corporation*, 23 LLR 66 (1974).

In this case, we have no record to indicate that this case was judicially determined on its merits except the letter of April 9, 1974. Therefore, we are very reluctant to go along with the petitioner on this argument. Since there is no evidence in the records, the argument therefore is not conceded. This Court has also held that: "The doctrine of *res judicata* cannot be invoked when the subject matter involving the identical parties was never judicially determined. *Liberia Trading Corporation v. Hall and Shannon*, 21 LLR 543 (1972).

The respondent contended that prohibition will not lie to restrain an Administrative

Agency or Executive Branch of Government from performing a duty which by law is a part of its functions to perform.

The petitioner maintained that prohibition will lie because this was a quasi judicial proceeding. The law relied on by the respondent is 6.1 of the Revenue and Finance Law found in VI of Revised Code which provides, *inter alia*, that if a taxpayer is not satisfied with the determination regarding the tax, he may request for an administrative review of the determination and the review will be in accordance with the Administrative Procedure Act. Section 6.4 of the same law also provides that the dissatisfied party may appeal from the final administrative determination to the Tax Court. We also note as a matter of procedure, even though not provided under Section 6.4, that a party still dissatisfied with the decision of the Tax Court may appeal to the Supreme Court. Hence, this is a quasi judicial function and therefore prohibition will lie if the allegations in the petition substantiate the grounds for the issuance of the writ of prohibition. "While, as has been noted, a writ of prohibition will not ordinarily lie to control administrative or ministerial acts, nevertheless, when an administrative or executive board or tribunal is acting in a judicial or quasijudicial capacity, prohibition will lie where it is acting without jurisdiction or in excess of its jurisdiction " 50 C. J., *Prohibition*, § 41, under *Quasi-Judicial Proceedings of Boards, Commissions, and Executive or Administrative Officer*.

The first part of Section 6.1 of the Revenue and Finance Law volume VI Revised Code provides that:

"Except when a specific provision of law provides otherwise, within 30 days after receipt of a copy of a notice and demand, or of a notice of rejection of a claim made pursuant to chapter 5, a taxpayer may request an administrative review of the determination by filing a notice with the Minister requesting such review".

We strongly feel that there cannot be a determination without a hearing, because the determination should be predicated upon the issues presented at the hearing. Therefore every taxpayer should and must be granted a hearing, especially so when she or he requests for such hearing. The taxpayer is bound by the final determination of such hearing whether it ends at the administrative hearing level, or in the Tax Court, or in the Supreme Court. To do otherwise will amount to denying the taxpayer his/her day in court.

Regarding the request of petitioner to declare a portion of Section 6.1 of the Revenue and Finance Law unconstitutional, this Court has held that "where a petition merely

states that an act is unconstitutional and prays for it to be declared so, said petition, because it is vague, does not put the constitutional question in issue." *Fazzah v. National Economic Committee*, 8 LLR 85 (1943).

The Court held in 1978 that "the Supreme Court will declare an act of the Legislature unconstitutional only with the greatest possible caution and reluctance." *Morris v. Reeves and Morris*, 27 LLR 334 (1978) .

We are therefore reluctant to declare that portion of section 6.1 of the Revenue and Finance Law unconstitutional upon this request. In view of the foregoing circumstances, the law controlling, and especially so the respondent having declared the petitioner not liable for the payment of business trade levy as long as petitioner conducts its business through wholesalers, the petitioner is hereby granted the peremptory writ and it is ordered issued prohibiting the enforcement of the respondent's present decision to close petitioner's business down until a hearing is had and a final determination made as to whether or not petitioner is a taxable person for business trade levy. Costs disallowed. And it is hereby so ordered.

Petition granted