REPUBLIC OF TRINIDAD AND TOBAGO
Tax Appeal Nos. I 43 and I 44 of 2014

BEFORE THE TAX APPEAL BOARD

(Superior Court of Record – Tax Appeal Board Act, Chap: 4:50)
In Re: Tax Appeal Board Act, Chap. 4:50
And in Re: Miscellaneous Taxes Act Chap. 77:01
And in Re: Corporation Tax Act, Chap. 75: 02
And in Re: Income Tax Act, Chap 75:01

BETWEEN

ABR (No.2) Unlimited

Appellant

AND

THE BOARD OF INLAND REVENUE

Respondent

Coram: His Honour Anthony D.J. Gafoor (Chairman)

His Honour Roland N. Hosein (Member)

Appearances: Mr. Russell Martineau SC, Mr. Jonathan Walker instructed by Mr. Gregory Pantin for the Appellant

Dr. Claude Denbow SC, Mr. Dharmendra Punwasee instructed by Ms. Allison Scott for the Respondent

DATE DELIVERED: 18th November 2024

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JUDGMENT

A. BACKGROUND

1. The phrase "*the price is right"* in popular culture is associated with a somewhat legendary and enduring American television game show of similar name where contestants compete in guessing the correct market value of a number of everyday household commodities and appliances. Whilst one may be wondering if the Court has now embarked on an unnecessary diatribe related to an entertainment programme, our comparison thereto to the instant matter is indeed deliberate as the essence of the dispute in these consolidated appeals is rooted in a similar subject, being, the fundamental question of pricing of the Appellant's commodities. Specifically, that in relation to approximately 50% of the Appellant's Chemical output, which was agreed upon in certain Fixed Price Contracts (hereinafter referred to as "FPCs") and whether these were a true reflection of the prevailing market rates at the time of the transactions or, as the Respondent has steadfastly advocated, were artificially low and thereby not reflective of the fair market value of such commodities.
2. In considering the dispute presented, the Court must therefore confront the interplay between two important tenets of taxation: the authority of the Respondent to disregard transactions under the anti-avoidance provisions of Section 67 of the *Income Tax Act, Chap. 75:01* and the sanctity of commercial transactions especially those entered in on good faith and for valid business purposes. Accordingly, the matter before us will turn on whether the FPCs employed by the Appellant to sell approximately 50% of its Chemical output to a related party was properly characterized by the Respondent as being within the realm of *'artificial or fictitious'* transactions in the context of the provisions of Section 67 of the *Income Tax Act, Chap. 75:01*.
3. In that regard, the Respondent asserts that the prices set under the FPCs did not reflect fair market value, and, by reason of the relationship between the contracting parties should be substituted with the prevailing market rates at the time of the transactions. This approach invokes the established principle in the seminal decision of the House of Lords in *Sharkey (Inspector of Taxes) v Wernher*[1], which compels the inclusion of fair market value where transactions between related parties are conducted at undervalued prices. In

[1] [1956] AC 58

the current context, the Respondent has contended that the FPCs were designed not for legitimate commercial purposes but as a mechanism to artificially reduce the measure of the Appellant's taxable income and on that basis, the Respondent has argued that its application of Section 67 of the *Income Tax Act, Chap. 75:01* in the current context is justified as a matter of law and fact.

4. On the other hand, the Appellant maintains that the FPCs were far from being devices of artificiality and were necessary commercial instruments, integral to securing non-recourse financing for the AbR Project. It further submitted that these contracts, negotiated with independent affiliates of MMX and PDB, were the product of meticulous planning, reflective of the Chemical market at the time of execution and future price projections for such a commodity.
5. The Court therefore is tasked with the responsibility of determining whether the FPCs, formed in the context of a volatile global Chemical market, were genuinely required for the project involving the construction of the Appellant's plant's viability or whether these were instruments drafted in terms in which the manifest intention was to avoid taxation and thereby fell within the scope of Section 67's anti-avoidance provisions. In resolving the issue, the Court must thereby give due regard not only to the statutory framework but to the commercial realities in which the impugned agreements were made. It is axiomatic that tax law must not operate to frustrate legitimate commercial transactions, and the Tax Appeal Board, should as a general principle, neither apply nor construe the wide powers accorded to the Respondent under Section 67 to disregard a transaction that is grounded on a sound commercial basis. Nevertheless, if the facts reveal that the purpose of the FPCs were primarily to realize a tax avoidance strategy conceived and executed as instruments for price manipulation between related parties, such circumstance may verily lead to a finding that the Respondent's recalibration of the pricing under the FPCs would be well within its statutory powers conferred upon it by virtue of Section 67 of the *Income Tax Act, Chap. 75:01.*
6. Against that backdrop of the issues which lie ahead for the Court's determination in the instant matter, we shall proceed to provide further context by outlining the history of the proceedings before the Court.

7. These consolidated appeals[2] were initiated by the Appellant with the filing of its Notices of Appeal dated and filed on the 11th March 2014 in which its Statement of reasons advanced in support of its appeal were stated as follows: -

    a. *There is no legislative provision or legal basis to support the Respondent's substitution of the Basket Price for the actual price agreed and paid under the FPCs.*

    b. *There is no provision in the Miscellaneous Taxes Act which authorizes the Respondent to impose Green Fund Levy on any imputed income and by section 62(1) of the Miscellaneous Taxes Act, a company is only liable to Green Fund Levy on actual sales and receipts*[3].

    c. *There is no factual basis to support the Respondent's substitution of the Basket Price for the FPC price. By that substitution, the Respondent has entirely disregarded the market conditions and the business environment and the commercial considerations at the time the FPCs were negotiated and entered into.*

    d. *The Respondent has acted reasonably and arbitrarily in assessing the Appellant as it did, in particular by failing to provide any legal and /or factual basis and/or commercial accounting principle for making the assessment.*

    e. *The assessment is not justified in law and in fact.*

8. In response thereto, in its Consolidated Statement of Case filed on the 3rd October 2024, the Respondent contended as follows: -

    a. *The Appellant failed to submit to the Respondent a true and correct return of income for 2005. The Appellant understated its sales revenue by the sum of $439,183,501.00 and its liability to Green Fund Levy by $439,183.40.*

    b. *The prices fixed by fixed price offtake agreements were not in line with and were significantly lower than forecasted and actual contract market prices reported by industrial experts such as CMAZ (CMAZ).*

    c. *As a result of the said fixed price arrangements the purchase proceeds received under contract with MMC Co. (MMC) for the Fixed Price Chemical Volumes was half the amount of the proceeds received for the Basket Chemical Volumes.*

[2] Appeals I 43 and I 44 of 2014 were upon the application of the Respondent consolidated at the hearing of the matters on the 24th June 2014.
[3] This reason was unique to the I 43 of 2014 in which the disputed assessment related to Green Fund Levy

d. *The effect of such arrangements was to reduce the Appellant's chargeable income resulting in increased carried forward losses to be set off against the Appellant's chargeable profits in future years.*

e. *By selling its output to related and/or affiliated companies at fixed prices significantly lower than both the basket price and prevailing market prices, the Appellant had in effect, set out from the outset to incur losses.*

f. *By selling its output and/or affiliated companies at a fixed price significantly lower than the cost of natural gas used in Chemical production, the Appellant had in effect, set out from the outset to incur losses.*

g. *Whilst such method of operation may have made good commercial sense to the Shareholders/Sponsors, it did not make commercial sense from the standpoint of the Appellant's business.*

h. *Accordingly, the method of operation utilized by the Appellant was not a genuine trading that could have resulted from dealing between parties at arm's length.*

i. *Further since the fixed price offtake arrangements were part of a preordained series of transactions directed and controlled by the Shareholder/Sponsors, MMX and PDB, the offtake arrangements were not conducted at arm's length and the fixed prices used did not represent the arm's length price that could have resulted if the transactions were conducted among unrelated parties.*

j. *In the circumstances surrounding the transactions in question, the Respondent was correct to infer that the fixed price arrangements were part of a wider transaction devised to reduce or avoid the Appellant's future liability to tax. Accordingly, the Respondent was correct to adjust the Appellant's sales revenue as it did and the adjustment was justifiable pursuant to the provisions of section 67(1) of the Income Tax Act Chapter 75:01.*

FURTHER AND/OR IN THE ALTERNATIVE

k. *The Respondent's assessment of the Appellant was consistent with the tax treatment prescribed by the Petroleum Taxes Act Chap. 75:04, Second Schedule under the heading: "Prices of Crude Oil, Natural Gas, Petroleum Products and Petrochemicals".*

l. *Pursuant to Section 5*

(1) Subject to subparagraph (3) for the purposes of this Act the prices of crude oil, natural gas, petroleum products and petrochemical is the actual realized price in a sale transaction at arms-length.

(2) Where a sale takes place between affiliated or related parties, it will be presumed not to have been an arms-length sale.

(3) Where the actual realized price is, in the opinion of the Board, not a realistic price, the sale will be presumed not to be an arms-length sale, unless it is proved to be otherwise by the person liable to tax.

(4) Where a sale transaction is not at arms-length the Board shall substitute for the price reported the fair market value as determined by the Minister.

m. *Accordingly, notwithstanding the terms of any of the fixed price offtake agreement, for tax purposes the price of Chemical must be the price that could be obtained by parties to an arms-length transaction.*

n. *Consequently, where the offtake agreements did not reflect the arms-length price, the Respondent's substitution of fixed prices for basket prices, being prices closer to the prevailing market prices in 2005, was not arbitrary or unreasonable.*

FURTHER

o. *In light of the adjustments to the Appellant's sales revenue, the Respondent acted correctly when it increased the Appellant's liability to Green Fund Levy and was entitled to raise an assessment for Green Fund Levy in accordance with the provisions of Section 62 of the Miscellaneous Taxes Act Chap 77:01.*

p. *As a result of the facts set out above, the Respondent is of the opinion that the Appellant's corporate tax return for the year of income 2005 did not accurately reflect its true liability to tax. The Respondent has on the facts and circumstances of the case raised an assessment on the Appellant with respect to the said income year under the provisions of the Income Tax Act Chapter 75:01, the Corporation Tax Act Chapter 75:02 and the Miscellaneous Taxes Act Chapter 77:01.*

q. *The Respondent maintains that the assessment was justifiable both in fact and in law.*

9. On the 1st December 2015, the Appellant filed its Consolidated Answer in which, *inter alia*, it responded to the contentions advanced by the Respondent as submitted in its Statement of Case as have been summarized by the Court in the following terms: -

    a. The Appellant's return of income for 2005 was true and correct, and did not understate the Appellant's sales revenue or its liability to Green Fund Levy for that year;

    b. The fixed price offtake agreements were agreed in 2001, and the terms and prices of the fixed price offtake agreements must be judged by reference to the facts and circumstances prevailing in 2001. The prices agreed in the fixed price offtake agreements are in line with forecasted and actual contract market prices reported in 2001 by independent industry experts, such as CMAZ. Changes in the forecasted and actual market prices pre and post 2001 are the result of the dramatic changes to the Chemical market and prices between when the fixed price offtake agreements were signed (in 2001) and the sale of the Appellant's Chemical output in 2005;

    c. The prices at which the Basket Chemical Volumes were sold during income year 2005 were greater that the prices in the fixed price offtake agreements, but this is irrelevant to judging the commerciality of the fixed price offtake agreements, which were agreed to by parties in 2001;

    d. Although, in 2005, the Appellant realized less revenue than it would have done if all of its output had been sold at the market price prevailing in 2005, this is the result of the dramatic changes to the Chemical market and prices between when the fixed price offtake agreements were signed (in 2001) and the sale of the Appellant's Chemical output in 2005. There is no reason why the commercially agreed price in the fixed price offtake agreements should be judged in light of, or substituted for, the market price prevailing in 2005 or the basket prices;

    e. The fixed price offtake agreements were agreed in 2001, and the terms and prices of the fixed price offtake agreements must be judged by reference to the facts and circumstances prevailing in 2001. That the Chemical market went through an entirely unforeseen and dramatic period of change after 2001 which resulted in an increase in Chemical prices is irrelevant to judging the commerciality of the fixed

price offtake agreements. The Appellant did not set out from the outset to, and did not in 2005, incur losses, but in fact to ensure that its operations were commercially viable;

f. At no time during income year 2005 did the Appellant sell its output to related and/or affiliated companies at fixed prices lower than the cost of natural gas. The Appellant did not set out from the start to, incur losses;

g. The fixed price offtake agreements were agreed in 2001, and the terms and prices of the fixed price offtake agreements must be judged by reference to the facts and circumstances prevailing in 2001. Taking into account forecasted and actual contract market prices in 2001, the need to secure a steady and reliable source of income in a time when the Chemical market was undergoing a period of price volatility and market uncertainty and the need to persuade lenders to finance the AbR Project, the fixed price offtake agreements made good commercial sense from the standpoint of the Appellant's business;

h. Fixed price offtake agreements are and were a common commercial arrangement that gives price certainty to both the buyer and to the seller in the arrangement. The fixed priced offtake agreements were agreements that were made by parties operating at arm's length and the fixed prices agreed represented the arm's length price which were consistent with the forecasts of independent industry experts by reference to the prevailing and projected market conditions as well as the prevailing and projected market values at the time the FPCs were agreed, there was no tax avoidance scheme. Considering that, in the late 1990s and early 2000s, during which time the fixed price offtake agreements were negotiated and signed, the Chemical market was undergoing a period of price volatility and market uncertainty, the fixed price offtake agreements provided the seller of Chemical under those agreements with a steady and reliable source of income, and the purchaser of Chemical under those agreements with a steady and reliable source of Chemical, both of which were key commercial objectives in such uncertain times. The fixed price offtake agreements are legally binding and the Appellant was genuinely trading by selling some of its Chemical under these agreements;

i. The fixed price offtake agreements were not part of a preordained series of transactions. Although the agreements were made, in the case of the fixed price offtake agreements between ABR and each of MMX and PDB, between related parties, the terms and prices are commercially sound and reflect the position that could have been agreed between independent parties negotiating at arm's length in 2001; and

j. The fixed price offtake agreements were not part of a wider transaction devised to avoid the Appellant's future liability to tax, nor negotiated with the Appellant's tax affairs in mind, and the Respondent was not correct to adjust the Appellant's sales revenue as it did so. Without prejudice to paragraph 19(i) above, to the extent the fixed price offtake contracts formed part of a wider transaction, the purpose of that wider transaction was the development of a commercially viable Chemical producing facility. The fixed price contracts are a genuine transaction, neither artificial nor fictitious, and were not a device to reduce or avoid the Appellant's future liability to tax.

10. In its Consolidated Answer filed on the 1st December 2015, the Appellant further averred in the alternative, that: -

a. The Respondent has not, until its Consolidated Statement of Case dated 3rd October 2014, contended that section 67(1) of the Income Tax Act is applicable, despite repeatedly, over the course of a number of years, being invited to provide the reasoning behind its Proposed Adjustments and the Assessment of the Appellant for the income year 2005. As a result of this, to the extent that the Respondent is permitted to pursue this contention, the Appellant reserves the right to supply and provide further evidence to challenge this contention which has now been raised for the first time;

b. The Appellant is not governed by the *Petroleum Taxes Act.* Consequently, the Respondent has, appropriately, not raised the Assessment pursuant thereto, and has never treated the Appellant as falling within the scope of that Act. To the extent that the Respondent pursues this contention now or in the future, the Appellant reserves the right to supply and provide further evidence to challenge this contention which has now been raised for the first time by the Respondent. In

any event, the Appellant contends that the *Petroleum Taxes Act* is irrelevant to these proceedings, and if, contrary to this contention, the *Petroleum Taxes Act*, Second Schedule section 5 is relevant, the Minister has made no determination as to the fair market value pursuant to that section; and

c. for the reasons given above, there is no additional income on which to increase the Appellant's liability to the Green Fund Levy. In the event that the Tax Appeal Board concludes otherwise, it is averred that:

    (i) By section 62(1) of the *Miscellaneous Taxes Act*, a company is only liable to Green Fund Levy on its actual sales or receipts;

    (ii) there is no provision in the *Miscellaneous Taxes Act* which authorizes the Respondent to impose Green Fund Levy on any imputed income;

    (iii) any additional income made attributable to the Appellant by the Respondent's Proposed Adjustment and Assessment would be imputed income, such that there is no legal basis to charge additional Green Fund Levy on the Appellant; and

d. The Appellant asks the Tax Appeal Board to allow the appeal and confirm the Appellant's self-assessment tax return for income year 2005.

11. In addition to the Statutory Bundle of Documents which was filed by the Respondent on the 3rd October 2014, affidavit evidence was filed by the respective parties on the 19th February 2016 with that of Mr. SD[4], Mr. RN[5], Mr. WE[6], Mr. MP[7], Mr. MB[8], Mr. SC[9] and Ms. AB[10] being filed on behalf of the Appellant and that of Deann Surujbally-Gomez[11] and Ravi Taklalsingh[12] being filed on behalf of the Respondent.

[4] Deposed to on the 11th February 2016
[5] Deposed to on the 17th February 2016
[6] Deposed to on the 5th February 2016, in addition, the Court in its ruling delivered on the 5th June 2017, struck out the last sentence of paragraph 59 and the first sentence of paragraph 95 of the affidavit evidence of Mr. WE.
[7] Deposed to on the 11th February 2016
[8] Deposed to on the 17th February 2016
[9] Deposed to on the 10th February 2016
[10] Deposed to on the 19th February 2016, in addition, the Court in its ruling delivered on the 5th June 2017 struck out paragraphs 4 and 6 of the affidavit evidences of Ms. AB.
[11] Deposed to on the 19th February 2016
[12] Deposed to on the 19th February 2016

12. Further evidence in the matter was also adduced through the Answer to Interrogatories[13] which were contained in the affidavit evidence of Mr. CP on behalf of the Appellant which was sworn to and filed on the 4th August 2017.
13. By letter dated the 6th June 2019, the Appellant wrote to the Registrar of the Tax Appeal Board to the effect that it did not intend to place any reliance upon the affidavits of Mr. MB and Mr. SC both filed on the 19th February 2016 as it did not intend to call either of these two individuals as witnesses[14].
14. The trial of these consolidated appeals took place from the 8th to 18th July 2019.
15. At the conclusion of the matter, directions were given to the parties for the filing of written submissions in the following sequence: -
    - Appellant on or before the 23rd September 2019[15]
    - Respondent on or before the 11th November 2019[16]
    - Reply of the Appellant on or before the 2nd December 2019[17]
16. At the hearing on the 10th December 2019, leave was granted by the Court, upon the joint application by the parties, for a variation of the previous direction for the filing dates of the respective submissions with the particular times being extended as follows: -
    - Appellant on or before the 30th September 2019
    - Respondent on or before the 25th November 2019
    - Reply of the Appellant on or before the 16th December 2019
17. The respective submissions were all filed in accordance with the prescribed times as specified in the Court's Order made on the 10th December 2019.
18. The Respondent also filed a Reply to the Reply of the Appellant on the 31st January 2020. At the review of submissions hearing on the 4th February 2020, Counsel for the Respondent had sought leave of the Court for the filing of this document. In response thereto, Counsel for the Appellant expressly indicated that the Appellant would not be opposing the Respondent's application to have this document filed and, as the Court was satisfied that the ambit of the Reply of the Respondent was limited to matters which

[13] As ordered by the Court in its ruling delivered on the 5th June 2017 in which the application of the Respondent to administer interrogatories to Mr. CP was granted save and except interrogatory 1c.
[14] This was also confirmed at the commencement of the trial by the Attorneys-at-Law for the Appellant at the hearing on the 8th July 2019.
[15] These were actually filed on the 30th September 2019
[16] These were actually filed on the 25th November 2019
[17] These were actually filed on the 16th December 2019

required clarification by the Respondent on matters raised in the Reply of the Appellant, leave was granted to the Respondent for the filing of its submissions in Reply.

B. SUBMISSIONS OF THE APPELLANT

19. The submissions of the Appellant as filed on the 30th September 2019 were in the following terms: -

[A] Introduction:

1. *This is a consolidated appeal from the Respondent's decision to increase the Appellant's sales revenue for the year of income 2005 by $439,183,501. As the Appellant was the beneficiary of certain fiscal incentives which granted relief from tax, this decision did not result in the payment of any additional corporation tax. However, it did have the effect of (a) increasing Green Fund Levy by $439,183.40; and (b) reducing the Appellant's tax losses carried forward (from $73,754,282.00 to nil), so that the resolution of this issue is important for later years of income. In addition, given that the assessment concerned the treatment to be given to certain fixed price contracts, which had a 10-year tenor, then the issues in this appeal also impact a number of other assessments in later years.*

2. *The grounds of appeal are set out in two Notices of Appeal each dated and filed 11th March 2014 one of which concerns an assessment of Green Fund Levy (the appeal in I-43 of 2014) while the other concerns the assessment with respect to Corporation Tax (the appeal in I-44 of 2014). These appeals were consolidated and the Respondent filed a Consolidated Statement of Case on 3rd October 2014, to which the Appellant responded by its Consolidated Answer dated and filed 1 December 2014.*

[B] Key Factual Background

3. *The key factual background to the issues in dispute on this appeal is as follows:*

The Appellant, its business and shareholding

4. *ABR ("the Appellant" or "ABR") is the owner of a Chemical plant located in Pt Town ("the ZQ Plant"). The ZQ Plant is one of the world's largest Chemical plants and is capable of producing 1.7 million metric tonnes of Chemical per year. Chemical production at the ZQ Plant started in July 2004.*

5. *ABR was incorporated on 6 July 1999. The company was originally intended to be owned by SMT LLC ("SMT"), XYT LLC ("XYT") and PDB Plc ("PDB"), with SMT being the majority shareholder, although no substantive investment was made in ABR at this stage.*

6. *During the course of 2000, members of the MMX corporate group ("MMC") acquired the entire interest in SMT (and consequently its direct interest in ABR as well as its interest in XYT), and in the event the project proceeded with two shareholders/sponsors as follows:*

   (i) *MCBR Limited, a subsidiary of MMX Corporation ("MMX") who held a 63.1% stake in ABR; and*
   (ii) *ESC LTD Limited, an English incorporated affiliate of PDB who held the remaining 36.9% stake in ABR.*

7. *In 2002 the Appellant was granted a tax holiday under the Fiscal Incentives Act 1979 ("FIA"). The FIA was an Act to provide for fiscal incentives to industry and granting of benefits such as total or partial relief from corporation tax to an approved enterprise in respect of an approved product. In the case of the Appellant, the benefits that were granted were as follows:*
   (i) *from 24/07/2004 to 23/07/2006, total relief from corporation tax;*
   (ii) *from 24/07/2006 to 23/07/2011, corporation tax at the rate of 15%;*
   (iii) *from 24/07/2011 to 23/07/2014, corporation tax at the rate of 20%; and*
   (iv) *between 24/07/2004 and 23/07/2014, total relief from income tax on dividends or other distributions (other than interest) out of profits or gains derived from the manufacture of Chemical.*

This tax holiday was granted, following an application from ABR dated 28 February 2001, by the Tourism and Industrial Development Company of Trinidad and Tobago ("TIDCO") by a letter dated 27 August 2001 and a subsequent (Variation of Production) order of 26 January 2005 (the later order was a response to a letter from ABR dated 15 August 2003 reporting a delay in the ZQ Plant's production start date).

Development of the AbR Project

8. *The development of the ZQ Plant in Pt Town ("the AbR Project") was initially contemplated in or around 1998, by the SMT and XYT. At that time, SMT and XYT were in the process of building another Chemical production facility in Pt Town ("the XY Plant"). The ZQ Plant was anticipated to have twice the production capacity of the XY Plant and be one of the largest Chemical plants in the world.*

9. *The XY Plant was structured in a manner whereby 100% of the Chemical to be produced by the plant was sold to an offtaker who was responsible for the marketing and sale of same to third parties. A portion of the volumes that were sold by the offtaker were sold under fixed price contracts, one of which was with ACX Corporation ("the ACX FPC") while the other was with RAC CO. (subsequently RCA).*

10. *In developing the AbR Project, SMT proposed that a similar structure to that deployed in respect of the XY Plant be used, that is to say that a portion of the volumes produced by the ZQ Plant should be sold under long term fixed price contracts, and to this end proposed that 80% of the volumes produced by the ZQ Plant be sold in this manner in order to support the financing that would be required for the project (see Statutory Bundle A63, A64 and A71)*

11. *After MMX acquired its interest in ABR the percentage of the Chemical production that was to be sold under fixed price contracts was actually reduced from 80% to about 50%.*

Chemical Sales and Marketing Agreement

12. *On 29th August 2001, the Appellant entered into a sales and marketing agreement (the "Chemical Sales & Marketing Agreement") with a member of the MMX group and, prior to*

the commencement of production at the ZQ Plant in 2004, this Agreement was assigned to QR Trinidad("QR"), which was also a member of the MMX Group of companies.

13. *Under the Chemical Sales & Marketing Agreement, the entire Chemical produced by the Appellant is sold to QR for marketing and resale. QR receives 4% of the net resale proceeds and the Appellant receives 96% of the net resale proceeds.*

The FPCs

14. *Consistent with the way in which the AbR Project was initially conceived by SMT, by the terms of the Chemical Sales & Marketing Agreement QR was required to sell 880,000 metric tonnes of the Chemical that it purchased from the Appellant (approximately 50% of the ZQ Plant's total production) to a MMX affiliate, a PDB affiliate and to APS Products under three long-term off-take fixed price contracts (together the "FPCs" and individually as "the MMX FPC", "the PDB FPC" and the APS FPC" respectively). The MMX FPC and the PDB FPC were each for volumes of 350,000 MT per year while the APS FPC was for 180,000 MT per year. The remainder of the Chemical that QR purchased from the Appellant was sold to other purchasers at a price reflecting the prevailing Chemical prices in various regions (the "Basket Price"). In all cases, QR remitted to ABR the full revenue that it received (whether under the FPCs or the Basket Price sales) less its commission of 4%.*

15. *It is the sale of Chemical under the FPCs that lies at the heart of this appeal.*

The Respondent's Assessment

16. *Following an audit of the Appellant's 2005 corporation tax return, by letter dated 15th December 2011, the Respondent notified the Appellant that it proposed to increase the Appellant's sales revenue for the income year 2005 by TT$439,183,501 thereby resulting in the additional Green Fund Levy and a reduction of tax losses carried forward. The proposed increase of the Appellant's sales revenue was on the basis of substituting the price of Chemical sold by the Appellant pursuant to the FPCs, with the Basket Price used when selling the remaining Chemical. No legal basis for the proposed substitution in price was provided by the Respondent.*

17. *By letter dated 22nd December 2011, the Appellant disagreed with the Respondent's proposed adjustment and provided documentary evidence in support.*

18. *By letter dated 30th December 2011 and received by the Appellant on that date, the Respondent provided its formal Notice of Assessment (the "Assessment"), dated 29th December 2011. The Assessment confirmed the previously proposed adjustments, stating that the Respondent had increased the Appellant's sales revenue for the income year 2005 by TT$439,183,501, thereby resulting in the additional Green Fund Levy of $439,183.40 for that year of income and in the tax, losses carried forward being reduced to nil.*

19. *The explanation that was provided by the Respondent for this Assessment was set out in its covering letter as follows:*

> *"The company's entire output of Chemical was sold to QR Trinidad, a related party. Fifty percent (50%) was invoiced at a price that is termed and referred to hereunder as 'the fixed contract price and the balance (50%) was sold at a price referred to by the company and referred to hereunder as the 'basket price'.*
>
> *"The sales based on the fixed contract price did not reflect the fair market value.*
>
> *"…In addition the company entered into a Gas Supply Agreement with the GNL Co. for the supply of natural gas, its main input for the production of Chemical. The price of natural gas is determined by reference to the market prices of Chemical.*
>
> *"With respect to that portion of output reported at fixed contract it was found that, the price was below the cost of the natural gas used in production.*
>
> *"This arrangement had the effect of reducing total sales reported by your company and further the net result was a reduction of income reported for tax purposes in Trinidad and Tobago.*
>
> *Based on the circumstances outlined above the Board has adjusted sales by substituting the fixed price for the basket price with respect to the relevant portion of output. This results in an increase in sales of $439,183,501 and Green Fund Levy liability of $439,183.00…"*

20. *By letter dated 27th January 2012, the Appellant objected to the Assessment and asserted, inter alia, that:*

    (a) the Assessment was excessive and not justified;

    (b) the adjustments made were incorrect and not supported in law and in fact; and

(c) *the Respondent's explanation of the adjustments did not provide any legal basis for the Respondent imputing additional income to the Appellant.*

21. *The Appellant and Respondent met on 28th June 2013 to discuss the Appellant's objection to the Assessment. At this meeting, the Respondent, although requested to do so, stated that it was not, at this stage, willing to express an opinion about the legal basis of the assessment.*

22. *Notwithstanding the Respondent's refusal to indicate the legal basis for the assessment, the Appellant provided significant documentation in support of its objection to the Assessment. This information was provided by or under cover of the Appellant's letters dated:*
    (a) *29th July 2013;*
    (b) *25th September 2013;*
    (c) *26th September 2013;*
    (d) *21st October 2013 in response to the Respondent's request;*
    (e) *26th November 2013; and*
    (f) *9th December 2013.*

23. *The Appellant and the Respondent again met on 17th December 2013. At this meeting, the Appellant once again asked the Respondent to provide the legal basis on which the Assessment was made, but the Respondent continued to refuse to identify any legal basis for its position and indicated that it did not want to commit itself to a legal basis.*

24. *By letter dated 8th January 2014, the Appellant noted that the Assessment increased the Appellant's gross income, for the purposes of the Green Fund Levy, by substituting the Basket Price for the prices reported and actually received under the FPCs. The Appellant made further representations that:*

    (a) *There is no legal or factual basis for the Respondent to impute any additional sales or receipts to the Appellant for the year ended December 2005 and therefore no basis for the Respondent to make any adjustment to the Appellant's Corporation Tax or Green Fund Levy liability; and*

(b) In relation to the Green Fund Levy there is no provision in the Miscellaneous Taxes Act ("MTA") which authorises the Respondent to impose Green Fund Levy on any imputed income and, by section 62(1) of the MTA, a company is only liable to Green Fund Levy on its actual sales or receipts.

25. *By letter dated 27th January 2014, the Appellant once again asked the Respondent to confirm the legal basis on which it had made the Assessment.*

26. *By Notice dated 24th January 2014, the Respondent notified the Appellant that it refused to amend the Assessment on the basis that:*

(a) The Appellant had not provided satisfactory evidence to support its objection; and
(b) The Respondent was therefore satisfied that the Assessment was justifiable in law and in fact.

[C] The Evidence

27. *The evidence in this Appeal is contained in:*

(i) The Statutory Bundle of Documents filed on 3rd October 2014;
(ii) The affidavits filed by the Appellant namely:

(a) The affidavit of Mr. SD sworn on 11th February 2016 and filed on 19th February 2016
(b) The affidavit of Mr. RN sworn on 17th February 2016 and filed on 19th February 2016;
(c) The affidavit of Mr. WE sworn on 5th February 2016 and filed on 19th February 2016; and
(d) The affidavit of Mr. MP sworn on 11th February 2016 and filed on 19th February 2016.

(iii) The affidavits filed by the Respondent, namely the affidavits of Deann Surajbally-Gomez and Ravi Taklalsingh both of which were sworn and filed on 19th February 2016.

(iv) The answer to the interrogatories contained in the affidavit of Mr. CP sworn and filed on 4th August 2017; and

(v) The viva voce evidence of the witnesses who were cross examined on the 8th – 19th July 2019.

Evidence of Mr. SD

28. *Mr. SD was one of the Appellant's first directors and he was intimately involved in the development of both the AbR Project and its precursor, the XyT Project. In his affidavit Mr. SD provided some insights into the Chemical market and in particular the factors that affected or influenced the Chemical price and which contributed to its uncertainty and volatility. He also provided a brief history of the XyT Project and explained the rationale that underpinned that project as well as the way in which that project was structured, which included the use of fixed price contracts, to manage the risks associated with the project and to make the project more attractive to financiers.*

29. *Against the backdrop of the XyT Project, Mr. SD explained:*

- *the rationale for the AbR Project and the potential as well as the potential impact that this project was expected to have on the Chemical market and in particular the Chemical price given that it would have been the largest Chemical plant in the world at that time;*
- *the risk associated with that project due to its size, technology as well as economic and financing environment at that time; and*
- *how the investors/project sponsors proposed to manage those risks by replicating the XyT structure, including the use of long-term fixed price contracts.*

30. *In terms of process, Mr. SD testified to the several analyses that were conducted to determine whether the project made good commercial sense from the point of view of the operating company (that is to say, ABR) as well as the various diligence and reviews connected with the approval process that examined all of the elements of the project including into the price for the fixed price contracts. In so far as the project's economics were concerned, he noted that one of the factors or criteria that the AbR Project had to satisfy was the ability to generate sufficient return, as a standalone project, to meet PDB's hurdle rate for investments.*

31. *With regard to the FPCs, Mr. SD explained how the pricing of the FPCs was approached. In this regard he explained how the price was built up from a "cost plus" basis and compared against price forecasts that an independent industry expert, CMAZ Inc. ("CMAZ") had been commissioned to provide, as well as being analysed by each stakeholder and compared against their internal forecasts. He also explained the concerns that business units within PDB had with respect to the Chemical price given the uncertainty that existed within the industry at that time, and in particular the view that the market price of Chemical was likely to remain at or below approximately $100/MT for the long-term future. He also testified to the approaches that SMT (prior to being acquired by MMX) made to other entities to gauge their interest in signing up to fixed price contracts, and their unwillingness to do so save for APS.*

32. *Mr. SD also testified to the fact that as part of its negotiations over fiscal incentives ABR shared with the Government its full commercial structure which (as the documents in the Statutory Bundle confirmed) included details such as the volumes that were to be sold under the FPCs, the parties to whom these volumes would be sold, the price at which it was being sold as well as how these compared to the price forecasts.*

33. *He also gave evidence in relation to the financing for the project. In particular, he:*

- *explained the need to have financing for the AbR Project;*
- *noted that the financing that was being proposed was non-recourse financing, and explained the implications of this type of financing;*

- *set out the requirements that had to be met in order to attract such financing, which included the key project contracts (which included the FPCs) being signed off; and*
- *noted the role played by the financiers in reviewing the project and the key project contracts.*

34. *Finally, Mr. SD explained some of the factors that led to the unexpected increase in the price of Chemical after the contracts had been signed, most significantly the unexpected increase in demand from China.*

35. *Mr. SD was the first witness to be cross-examined. This cross-examination, like that of the witnesses that followed, did not challenge the majority of the witness' evidence, but instead focused on certain limited areas. Nothing in the cross examination detracted from the quality, veracity and reliability of his testimony.*

36. *One area where undue focus was placed was whether APS was a "project partner". Here Senior Counsel for the Respondent sought to equate APS with a related party. In so doing his questions often misquoted statements in the contemporaneous documents and from other affidavits. Nevertheless, any "interest" that APS had in the AbR Project by way of being the supplier of oxygen to the ZQ Plant (let alone as part of a joint venture with another third party) cannot, in law or in fact, be conflated with their being a related party.*

37. *Another area where Mr. SD was probed was whether the FPCs were not natural or commonplace. Here too, nothing in the cross examination detracted from the logical rationale that dictated the use of fixed price contracts on the AbR Project. Indeed, we note that despite the suggestions that Senior Counsel made to the witness, the Respondent had no difficulty accepting the XYT FPCs or the long term contract between CEL Ltd and SCC Corporation ("the CEL Contract"), which limited the price of Chemical to a very narrow range with a base price of $110/MT CIF (which equated to no higher than $80/MT FOB Pt Town) and a ceiling of $160/MT (which equated to no more than $140/MT FOB Pt Town). Accordingly, this line of attack of the witness was also without merit and was stillborn.*

38. *Senior Counsel also questioned the role that ABR played in the negotiations, suggested that the price for the FPCs was "a done deal" and doubted that it was required by the lenders. With respect to learned Senior Counsel, this line of cross examination demonstrated a complete misunderstanding of the AbR Project and of project finance on the whole. It is scarcely surprising to see project sponsors playing an active or even significant role in the negotiations of the key project contracts. They were the entities with the requisite knowledge, skill and expertise and were best placed to carry out these negotiations, especially since, until a final investment decision was made, the project company was not likely to have the full wherewithal to conduct such negotiations.*

39. *Senior Counsel inferred that there was a question over those contracts, as employees of ABR did not conduct these negotiations directly and instead the negotiations featured persons associated with MMX and PDB. We note that no similar concern or question was raised over the negotiations with regard to any of the other key contracts, such as the EPC Contract and the Gas Supply Contract, which – given the limited resources of ABR at that time – would also have involved representatives of the sponsors/shareholders. In any event, Mr. SD was resolute that not only did PDB and MMX have different interests due to their different shareholding, but that the contracts were considered and approved by the ABR Board who considered what was in the best interest of ABR as required by the fiduciary duty that they owed to ABR.*

40. *As to the role played by the financiers, counsel for the Respondent sought to create doubt through what he termed to be the absence of a clear statement in the notes of the kick off meeting to the effect that the FPCs were required for the financing- going so far as to suggest that this was a fiction. In so doing, counsel failed to appreciate the significance of the statements in the said notes that "[p]payments for Chemical <u>on fixed price contracts</u> will likely need to flow directly to a Collateral Account rather than to MMX" – which demonstrated the close tie between the FPCs and the mechanisms for servicing the debt; as well as "[t]tenor of debt cannot be longer than term of offtake agreements" – which again corroborates the direct link between the FPCs and the loan (which had a tenor that matched the term of the FPCs). Furthermore, counsel conveniently ignored the provisions of the financing documents which made it clear that the execution of the*

major project documents (which included the FPCs – see Statutory Bundle H184) was a condition precedent to the first drawdown of the financing (see Statutory Bundle H164); and also the contemporaneous documents which corroborated that the locking in of a significant volume of the Chemical production (at that time 80%) was a requirement of the lenders (see Statutory Bundle A63).

41. *Mr. SD was also challenged on his evidence as to the concerns that were expressed, and the opinions that the parties held, with respect to the Chemical market and in particular the Chemical price. Throughout this cross-examination Mr. SD remained firm. More importantly, his evidence as to the grave concerns that were held as to the future of the Chemical price, is corroborated by the contemporaneous documents.*

42. *The Respondent also attempted to cast doubt on Mr. SD's testimony, by using the Chemical price as at the date when the FPCs were being negotiated, to suggest that the price that was being agreed was too low. This only served to demonstrate the Respondent's complete misunderstanding of the situation and that it either ignored or failed to appreciate the fact that the Chemical price was not only volatile but there were concerns that it was destined to fall due to the impact of certain other factors that were either in process or about to take place. As such, the price that was current at the time when the FPCs were executed was not a proper indicator of the price that was likely to be obtained in the future by the time the ZQ Plant had started production. This entire line of questioning was therefore based on false logic and assumptions.*

43. *Another topic where the witness clashed with counsel was the suggestion that the Appellant made a loss because of the FPCs, which had been used to extract value up front. As dismissive as counsel was of the witness' attempt to explain that the loss in question was not an operational loss but an accounting loss, it is most telling that the Respondent later conceded that its contention that the Appellant sustained a loss on the sale of Chemical was incorrect.*

Evidence of Mr. RN

44. *Mr. RN provided his perspective as the representative of PDB Chemicals, the business unit within PDB who was intended to be the purchaser and/or user of the Chemical that was sold under the PDB FPC. Given his involvement in the Chemical industry he was also able to provide industry background as well as to the approval process that PDB employed in assessing the project and the risks that his business unit considered were involved in its accepting the FPC, and in particular the expectation that he held that the price of Chemical could go as low as $85/MT FOB Trinidad and that from a cost perspective it was not in PDB Chemical's interests to enter into the FPC. He corroborated the evidence of Mr. SD that the objective was to ensure that ABR made an appropriate commercial return, and that it was envisaged that the price that was agreed would help it to achieve that. He confirmed the role that was played by PDB Chemicals in negotiating the FPC, and how these negotiations were conducted.*

45. *In his cross examination he was confronted with several of the same topics as Mr. SD, and answered with confidence while maintaining a calm, impressive demeanour. His answers to the questions posed were clear, logical and supported by the contemporaneous documents. There is no basis for questioning his credibility or the veracity and reliability of his evidence.*

Evidence Mr. WE

46. *Mr. WE was the Appellant's first Chairman and provided MMX's perspective of the AbR Project. In his evidence he provided some insights into the economics of the Chemical industry and the various factors that affected its price. He also set out how MMX came to be involved in the project and the considerations that went into its decision to make that investment including how the viability of the project was assessed and the need for financing. He also provided a summary of the negotiations and key elements of the principal project contracts.*

47. *As was the case with the other witnesses, he was confronted with many of the same issues. Like Mr. RN before him, Mr. WE delivered his evidence with a calm demeanour and was not shaken. Aside from his demeanour, his evidence was logical and supported*

by the contemporaneous documents. He was also able to add additional details that undermined the case with which he was being confronted, for example, in response to the suggestion that APS was a related party by reason of the oxygen supply contract, Mr. WE politely noted that he oxygen supply contract was being performed by a joint venture featuring entities other than APS – which undermined the Respondent's suggestion that this supply agreement somehow turned APS into a related party – and also suggested that on the Respondent's logic the GNL Co. would also be a related party.

48. *A large portion of the cross-examination was spent on the corporate governance of the Appellant in 2001 and which, for the reasons already set out above and dealt with in more detail below, is simply not relevant.*

Evidence of Mr. MP

49. *Each of the previous witnesses were once employed by either MMX or PDB – though, by the time that Messrs. SD and WE had sworn their affidavits they had long since moved on to other companies, while in the case of Mr. RN by the time he came to be cross-examined he had ceased to be associated with PDB. However, Mr. MP was never associated with ABR or its Shareholders/Sponsors but instead was completely independent. He was an investment banker whose company had won the mandate to provide the financing for the AbR Project. His concerns and interests were markedly different from those of the Sponsors/Shareholders.*

50. *Mr. MP brought quite an objective perspective to the AbR Project. He was charged with assessing the project on behalf of the financiers and ensuring that it was economically viable. In his affidavit testified to the financier's perspective on the risks that the project faced and spoke in particular on how he felt the FPCs assisted in mitigating some of those risks.*

51. *The cross examination of Mr. MP lasted approximately 15 minutes and was innocuous. It ended without any challenge to his substantive evidence, and in particular his testimony as to:*

(i) *the importance of the FPCs to the project financing structure; and*

(ii) *the positive way in which the FPCs were viewed by the financiers (who were not only independent of MMX and PDB – but who had a clear interest in ensuring that the project agreements, including the FPCs, were fair, reasonable and produced an economic benefit for ABR).*

Evidence of Mrs. Surajbally-Gomez

52. *In her affidavit Mrs. Surajbally-Gomez provided a thin background to the issue and proceeded to indicate what documents she considered and the main factors and reasons behind her conclusion that the sales reported by the Appellant were understated. From the matters set out in her affidavit these factors or reasons were:*

(i) *The difference in price between the prices under the fixed price contracts and the basket prices;*

(ii) *The absence from the fixed price contracts of a provision for escalation of the fixed price;*

(iii) *That the fixed price Chemical volumes were resold to parties to the AbR Project and yielded less than the revenue received from parties purchasing the basket price Chemical volumes;*

(iv) *Her deduction that the Appellant ran the risk of incurring a substantial loss by contracting to sell approximately 50% of its total production at a fixed price.*

53. *The cross-examination of Mrs. Surajbally-Gomez revealed that she understood very little about the AbR Project and that her conclusions and deductions were wholly misplaced.*

54. *First, it was apparent from both her affidavit and her cross examination, that Mrs. Surajbally-Gomez had absolutely no idea as to significant difference between the key delivery terms and their impact on the net realized price. She failed to appreciate the difference between a price quoted as FOB Pt Town and one that was quoted as FOB UEFC (US Gulf Coast). Indeed, Mrs. Surajbally-Gomez confessed in her cross examination that she was did not know what UEFC meant (notwithstanding that this featured prominently in the forecasts that were before the Respondent and were a central*

part of the material) and thought that it was a reference to US Gas Contract. She demonstrated no, or very little, understanding of the FPCs.

55. *The pricing basis that was used was important in order to equate and compare prices that were quoted on different bases. For a plant that is based in Pt Town, Trinidad, the FOB UEFC price will include all of the costs involved in shipping the Chemical to a port in the US Gulf Coast region (that is to say, freight, together with handling and storage). These costs will not be included in an FOB Pt Town price. As confirmed by Mr. RN these costs were approximately $20/MT. Mrs. Surujbally-Gomez's failure to understand this led her into grave error and prevented her from appreciating how the prices under the FPCs compared with other forecasted, quoted or agreed prices.*

56. *Second, in her affidavit she made no mention of the fiscal incentives that had been granted to ABR by the Government of the Republic of Trinidad and Tobago, notwithstanding that, on cross-examination, she claimed that it was a matter to which she had regard. This omission was startling given her admission on cross-examination that the granting of such incentives was part of a programme instituted by the Government to monetize the nation's gas reserves as well as her acceptance that the effect of these fiscal incentives was that ABR was not chargeable to corporation tax in the year in question.*

57. *Third. her commentary and views over the lack of an escalator also highlighted her complete misunderstanding of the nature of a fixed price contract. According to Mrs. Surajbally-Gomez, she would have expected to see a provision for escalation to take into consideration changing economic and industrial factors such as fluctuations in the price of natural gas, the cost of labour and the market demand for labour. She did not refer to a single precedent of a fixed price contract and there was neither material before the Respondent, nor evidence before this Court, of any fixed price contract containing these or similar provisions. To the contrary, they are factors that Mrs. Surajbally-Gomez devised based on her own "logic".*

58. *However, the inclusion of an escalator, especially for these factors, would be incongruous to and inconsistent with a fixed price contract. That Mrs. Surajbally-Gomez considered an important factor to be the absence of an escalator for increases in the price of Chemical, demonstrates that she had failed to comprehend the purpose for having a fixed price contract in the first place – which was to provide a hedge against changes in the Chemical price. It is worth noting that the other fixed price contracts that were before the Respondent did not contain any such escalation clause, while the CEL Contract did not contain an escalation clause per se but had a floor and ceiling price that capped how high (or how low) the price could range, with the floor being $30 per MT lower than the fixed price under the FPCs.*

59. *Fourth, Mrs. Surajbally admitted that the decisions that she made were based primarily on the documents that she exhibited to her affidavit. It is therefore clear that Mrs. Surujbally-Gomez arrived at her decision without considering, or without the benefit of, the vast array of documents that were submitted to the Respondent and which, had they been considered and understood, should have resulted in the auditor accepting the Appellant's return. That could be her only explanation for the Respondent saying that the Appellant did not provide satisfactory evidence to support the objection. The Respondent just did not consider the evidence provided.*

60. *Fifth, Mrs. Surajbally-Gomez admitted that while she had heard of the CMAZ projection she had not seen it, notwithstanding the fact that it was one of the critical documents provided to the Respondent during the assessment process. Given the significance of this document, it is remarkable that Mrs. Surajbally-Gomez could have proceeded with the audit, and made her deductions and arrived at her conclusions, without examining such a key document, so too the Respondent's assessment. Not only did this key document provide an objective measure of the reasonableness of the price of the FPCs, but it confirmed that the draft FPCs had been reviewed by CMAZ who was of the opinion that they were commercially sound and within industry norms (see Statutory Bundle H557).*

61. *Sixth, while Mrs. Surajbally-Gomez confidently stated in her affidavit that she deduced that there was the potential for the Appellant to incur a substantial loss by contracting to*

sell approximately 50% of its total production due to the terms of the gas supply contract, she was not able to indicate at what Chemical price the Appellant would incur a loss. Indeed, even after having had the benefit of a break in proceedings, she remained unable to provide any type of indication as to a Chemical price at which this so-called loss would be incurred. The inescapable inference is that Mrs. Surajbally-Gomez's so called "deduction" was a simplistic and un-informed guess that she made and which she made no attempt to, and could not, verify. It is demonstrative of the approach that the Respondent took to this entire assessment.

62. *It is also telling that it was only when this point was being raised with Mrs. Surajbally-Gomez on her cross-examination that Counsel for the Respondent rose to indicate that the Respondent was conceding its contention that the Appellant would incur such a loss. Given the prominence that this contention had in the explanation of adjustments, the Consolidated Statement of Case, the affidavit of Mrs. Surajbally-Gomez and her explanation for the reasons for arriving at the decision made on the assessment and even counsel's cross-examination of the Appellant's witnesses, the fact of this concession was fatal to the Respondent's case. It was a confession that the Respondent had no case.*

63. *Seventh, according to Mrs. Surajbally-Gomez the FPCs* ***were not artificial****, rather the basis for her decision was that she considered that they were fictious. Just how she arrived at this conclusion – more so in the face of evidence that CMAZ had reviewed them and considered that they were commercially sound and within industry norms – is perplexing. It is the type of conclusion that one can only arrive at if they completely misconstrue the information that was before the Respondent and ignore, not just the internal, contemporaneous documents that show what was being considered in coming up with this structure, but the representations by independent experts among others.*

64. *Mrs. Surajbally-Gomez's conclusion that the FPCs were fictitious, is so fundamentally flawed that not only is it fatal to the Respondent's case, but it demonstrates that Mrs. Surajbally-Gomez had no proper appreciation for the criteria that had to be satisfied before she could arrive at that conclusion and that in arriving at this conclusion she*

ignored reams of relevant evidence which, had she considered it, would have disabused any notion that she may have had (as unreasonable as that notion already was) that the FPCs were fictitious.

65. *By the end of her cross-examination it was evident that Mrs. Surajbally-Gomez had no proper appreciation for the issues and had not considered most of the relevant material. Her decision was based on simplistic matters and mis-guided assumptions. She assumed that because the FPCs generated less revenue than the basket prices then they could not have been genuine. Like her failure to calculate if a loss would have been made due to the pricing, she failed to make any attempt to understand the commercial rationale for the FPCs and the role they played in structuring the AbR Project. Her entire assessment is based on this type of misplaced assumption and is so lacking in any foundation that there ought to be no hesitation in rejecting the assessment that she purported to make.*

Evidence of Ravi Taklalsingh

66. *Mr. Taklalsingh is the Commissioner in charge of Objections, and was held out as a person who could give evidence as to what transpired at the objection process, including the documents and factors that were considered by the Respondent in deciding to uphold the assessment and reject the objection.*

67. *It was therefore to the Appellant's great surprise that Mr. Taklalsingh essentially disowned that this was his affidavit by stating that he had no knowledge of any of the matters that were set out therein and admitting that the affidavit was prepared for him and he was just asked to sign it. In the circumstances, it is difficult to see how this affidavit can be used to support the Respondent's decision to uphold the objection.*

68. *In addition, while the affidavit purported to indicate the documents that were considered by the Respondent in determining the objection, it referenced only an extremely small subset of what the Court described as the "avalanche of documents" that were before the Respondent. There has been no evidence from the Respondent as to whether they considered these documents, far less an explanation why it did not consider these*

documents to be satisfactory evidence in support of the objection. Up to now the Respondent has not given evidence of what was missing from the evidence provided by the Appellant.

69. *Finally, the documents referenced in the Taklalsingh affidavit – and especially the XYT FPCs, the CEL Contract and the 2001 CMAZ Forecast, supported the Appellant's objection. That the Respondent could arrive at its conclusion in the face of even this limited subset of the documents that were provided is bewildering and calls for an explanation from the Respondent, an explanation that Mr. Taklalsingh was not able to provide.*

[D] APPELLANT'S SUBMISSIONS IN RESPECT OF CORPORATION TAX

70. *In so far as corporation tax is concerned, the assessment is not justifiable for the following 4 reasons:*

(i) *The FPCs were not artificial or fictitious – nor were they a device for the purpose of avoiding or reducing tax;*

(ii) *In any event, section 67 of the Income Tax Act ("ITA") did not give the Respondent the power to impute or attribute to the Appellant income that was neither due to nor received by the Appellant.*

(iii) *The provisions of the Petroleum Taxes Act do not apply to the Appellant, nor to the assessment that the Respondent purported to carry out.*

(iv) *In view of the grant of fiscal incentives to the Appellant, there was no legal basis for purporting to carry out an assessment of the Appellant's income for the year in question.*

FPCs Not Artificial or Fictitious

71. *In its Consolidated Statement of Case, the Respondent relied upon the provisions of section 67(1) of the ITA. However, as noted above, it is clear from the evidence of Mrs. Surajbally-Gomez and Mr. Taklalsingh that both in making the assessment and in*

determining the objection, the Respondent failed to take into account all of the material that was placed before it. By so doing the Respondent failed to give any consideration to the "avalanche" of evidence that was before it and which supported the Appellant's objection.

72. *Equally, the Respondent has conceded the primary basis that it had held out as the reason for the assessment. Having removed this limb, there was nothing else in its explanation of adjustments that could support its assessment and the adjustment that it made to the Appellant's revenue.*

73. *For either of these reasons the Respondent's assessment is fundamentally flawed and should be set aside. It failed to consider most of the relevant evidence and instead considered, and based its assessment on, erroneous reasoning.*

74. *In any event, even if one looks past these fundamental flaws, there remains no basis for the application of section 67 since no reasonable person would conclude that the FPCs were either artificial or fictitious so as to entitle the Respondent to disregard them.*

75. *Section 67(1) of the ITA is in the following terms:*

"where the Board is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious … the Board may disregard any such transaction … and the persons concerned shall be assessable accordingly."

76. *According to the evidence of Mrs. Surajbally-Gomez, she concluded that the FPCs were fictitious* ***but that they were not artificial****. As the person who was conducting the assessment, her evidence as to the reason for the assessment must be taken as the basis upon which the assessment stands or falls, and it is not open to the Respondent, after the determination of the objection, to seek to advance some other basis or reason.*

77. *A fictitious transaction is one in which those who are ostensibly the parties to it never intended should be carried out – see* ***Seramco Limited Superannuation Fund Trustees v The Income Tax Commission [1977] AC 287****. There can no doubt that in the case under appeal the Appellant in fact sold Chemical to QR at fixed prices and that QR in fact on-sold those same volumes, also at fixed prices, to MMX, PDB and AP. The physical volumes were actually shipped and delivered to the purchasers, who in turn paid the price that was agreed in the FPCs. Accordingly, not only was this a transaction that the parties intended to carry out, but it was in fact carried out. In the circumstances, the Respondent's conclusion that the FPCs were fictitious is not a finding that can be supported on the evidence, nor is it one that any reasonable person who had a proper appreciation of the circumstances could have come to. Given that this was the basis for the Respondent's assessment, then the direct consequence is that the assessment is flawed and the appeal should be allowed.*

78. *However, even if the Court were to permit the Respondent to argue – contrary to the evidence of the officer who did the assessment – that the FPCs were instead artificial, the result will be the same.*

79. *The essential characteristics of a transaction that is within the realm of artificiality are:*

(i) *The transaction is not one which is at arm's length in that one party has control over the other;*

(ii) *The transaction is one that does not make commercial sense in that it is unnatural and not one which would be expected of persons acting freely and independently of each other;*

(iii) *There is substantial disparity between the price at which the transaction is carried out and the fair market value;*

(iv) *The circumstances surrounding the transaction are such that one can fairly infer that it was a device or arrangement to reduce or avoid tax by the taxpayer.*

80. *In* ***Commissioner of Taxpayer Audit and Assessment v GUIarette Company of Jamaica Ltd [2012] UKPC 9*** *the Privy Council provided very helpful guidance as to the type of*

transaction that would be considered as artificial. In their Lordships' opinion, a transaction would be artificial if it had, as compared with normal transactions of an ostensibly similar type, features that are abnormal and appear to be part of a plan and not merely because it is not commercial, or not fully commercial. They are the sort of features that a well-informed bystander might say, "this simply would not happen in the real world." Recognising a transaction as artificial in this sense is an evaluative exercise calling for legal experience and judgment.

81. *When the circumstances in which the FPCs came to be executed are considered and properly understood, we submit that none of the essential characteristics of an artificial transaction has been, nor can be, made out from the available material.*

FPCs Were Arm's Length

82. *This was not an issue that was raised in either the explanation of adjustment nor the notice of determination of objection. Nevertheless, in the Consolidated Statement of Case the Respondent contended that the fixed price offtake arrangements were part of a pre-ordained series of transactions directed and controlled by shareholder/sponsors, MMX and PDB, so that the offtake arrangements were not concluded at arm's length and the fixed prices used did not represent the arm's length price that could have resulted if the transaction were conducted among related parties.*

83. *We do not dispute that the fixed price offtake arrangements were part of a pre-ordained series of transactions. Again this is not surprising given the integral role that they played for the structuring of the project so as to make it attractive for financiers and which necessitated that the key project contracts (which included the offtake contracts) be agreed and executed before the first drawdown.*

84. *We also do not dispute that the shareholders/sponsors played a significant role in the structuring of those contracts as well as their negotiation. Again this is scarcely surprising as unless the project was able to attract financing then there was not likely to*

be a project so as to warrant the engagement of full-time staff (far less staff with the sophisticated expertise required for negotiating these types of contracts). Since the contracts had to be executed before the financing, it only follows that they would invariably have to be done before ABR was fully functioning and had engaged the appropriate staff to conduct these negotiations.

85. *However, we do not accept the Respondent's contention that the offtake arrangements were not concluded at arm's length. This is not a case where the person or entity who controlled ABR was purporting to negotiate with ABR and had the ability to dictate the terms of their contract with ABR. To the contrary, the FPCs were negotiated on behalf of ABR by representatives of MMX and PDB, with the PDB FPC being negotiated first, before being reviewed by the ABR Board. In conducting those negotiations with PDB, the MMX representatives were not only free from the control of the other shareholder/sponsor, but each of the parties had very different interests. In particular, PDB was a user of Chemical while MMX was a supplier. Furthermore, while the MMX FPC and PDB FPC were for the same volume, these entities were not equal shareholders in ABR. Accordingly, if there was any benefit to be had under the FPCs, then it would not have been in MMX's interest to allow PDB to take a disproportionate share of that benefit through the fixed price contracts as opposed to allowing the value to flow through the shareholding. Viewed in that context, the parties (MMX and PDB) had competing and different interests which rendered the negotiations as to the price of the FPCs arm's length negotiations.*

86. *Moreover, it is not the case that the prices under the FPCs did not represent the arm's length price that could have resulted if the transaction were conducted among related parties. Such a contention holds no merit when one considers that:*

(i) The ABR fixed price contract prices were higher than the prices agreed between XYT and ACX in respect of the ACX fixed price contract (see exhibit "RT3"). The ACX fixed price contract, which was undoubtedly an arm's length agreement, contained two pricing points (see clause 8). The first was for deliveries to NE State France which was US$134 per MT. This would have included, inter alia, the cost of

shipping the Chemical from Pt Town to France. The second was for deliveries to any location other than NE State. For these deliveries, the price was US$98 per MT FOB Pt Town, plus actual freight. Accordingly, when the appropriate adjustments are made to remove the cost of shipping and other costs in order to bring the price to the same basis as the ABR Fixed Price Contracts, it is clear that the price under the ABR Fixed Contracts was $12 per MT higher than the price under a contract that the Respondent has accepted was done between third parties and at an arm's length. Accordingly, had QR entered into a similar arm's length arrangement with ACX (though we note that ACX had expressed dissatisfaction with those terms, and was therefore not likely to agree to that price) it would have generated approximately US$9,000,000.00 less revenue for ABR than the revenue received under the PDB and MMX FPCs.

(ii) *The ABR fixed contract prices were better than the indicative prices discussed between SMT and other potentially interested parties. Those prices and discussions were recorded in the ZQ Plant Disclosure (see Statutory Bundle A58 and A62 to 63) and the Summary of ABR Marketing/Off-take status as of April 17 2000 (see Statutory Bundle A64) and confirmed that:*

- *The price that SMT was discussing with PDB-AM, for deliveries to the United Kingdom, was in the range of US$105-110 c.i.f with a possible freight adjustment for the United States. Accordingly, even using the lower cost of shipping to the United States Gulf Coast (which is closer in distance than the United Kingdom), this price is $20 to $25 per MT lower than the price of the ABR Fixed Price Contracts. This is consistent with the evidence of the Appellant's witnesses, that the negotiations between the parties resulted in PDB-AM agreeing to a higher price that it would have preferred to have for the fixed price contracts.*

- *The price that SMT had offered to FAB was 34 cents a gallon (or approximately $113 per MT) FOB SU State, and FAB had reverted with a*

request that this price be refined. This price was therefore no less than $17 per MT lower than the price under the ABR Fixed Price Contracts.

- *Both ACX and RCA (formerly RAC) were dissatisfied with the fixed price contracts that they had with XYT, and seeking contracts based on improved economics. As noted above, the prices with which they were not satisfied were already significantly lower than the prices under the ABR fixed price contracts.*

In the circumstances, the evidence demonstrates that the involvement of MMX had a positive impact for ABR and increased the price to be paid under the FPCs.

(iii) When adjusted for the cost of shipping, the initial price (for the first 10-year term) in the APS FPC was the same as the price under the PDB FPC and the MMX FPC. While we accept that APS had an interest in seeing the AbR Project succeed (so that it would have a customer for the oxygen that, together with its local joint venture partner, it was building a plant to produce) this did not, and could not reasonably, render that contract anything other than a contract made at arm's length. As confirmed by the material that was before the Respondent, the commercial terms of the oxygen supply contract were consistent with those of oxygen supply contract for the XY Plant (see Statutory Bundle A60) which was undoubtedly an arm's length agreement. Nor was it either PDB's or MMX's interest to allow APS to extract value from ABR by way of the APS FPC – there has not even been the faintest suggestion as to what either of them stood to gain by doing that. Accordingly, the APS FPC was a contract entered into between two unrelated parties who were at an arm's length to one another and was entered into for their own individual commercial reasons. That the MMX and PDB FPC prices were on par with those in the APS FPC, further illustrates that the prices in those FPCs were equivalent to what could have been obtained on an arm's length negotiation.

(iv) The draft FPCs were reviewed by CMAZ who expressed their independent and objective opinion they were both commercially sound and within industry norms.

(v) *The financiers had reviewed the contracts, including the FPCs, and were not only comfortable with them but considered them so important to the project structure that their execution was a condition precedent to the first drawdown under the loan. The financiers had a vested interest in ensuring not only that the project was viable, but that the key project contracts were fair and appropriate. This is because the financing was being provided on a non-recourse basis, meaning that the financiers could not turn to the shareholder/sponsors in the event that the project went into default. In such an instance the primary remedy of the financiers would be to step in and take control of the project. They therefore had a vested interested in ensuring that the project was not saddled with any unfavourable contracts, but that all of the key contracts were fair and reasonable*

(vi) *The prices under the FPCs were consistent with the prices that had been forecasted by CMAZ.*

87. *Further, in arriving at its conclusion that the FPCs were not arm's length, the Respondent failed to give any consideration to the fact that ABR was completely transparent with the project structure and these contract details in particular. So much so that in addition to having the project documents scrutinized and examined by CMAZ, its financial advisors and the lenders, ABR, and the AbR Project Sponsors, shared all of the relevant information concerning the fixed price contracts (including the fixed price at which the Chemical was proposed to be sold, the volume that was to be sold, the term or tenor of the fixed price contract and the ultimate identity of each of the entities who would be purchasing the Chemical at these fixed prices) with the Government of the Republic of Trinidad and Tobago as part of ABR' application for fiscal incentives. The Government considered all of this information before granting the fiscal incentives. The only inference that can be drawn from this is that the Government was satisfied with the project structure and the contractual arrangements to give effect thereto and that it considered these arrangements to have been beneficial to the people of Trinidad and Tobago. It is simply inconceivable for the Government, having been provided with this*

information, to have granted fiscal incentives if it were even remotely of the view that those arrangements were artificial or fictitious or some device to cheat the Revenue.

88. *Further, while QR ultimately became the offtaker/marketer of the Chemical produced by ABR, the Respondent failed to give any or any proper consideration to the fact that the AbR Project structure (including the use of fixed price contracts) was modelled off of the pre-existing XyT Project, and had been conceived by SMT prior to MMX getting involved in or obtaining any interest in the project.*

89. *Under this structure, SMT would be the offtaker/marketer for all of the Chemical that was to be produced, 80% of which would be sold under long term fixed price contracts (see Statutory Bundle A63, A64 and A71), and in respect of which SMT originally expected to receive a marketing fee of 4% (see Statutory Bundle E58).*

90. *Following MMX's involvement in the project, it suggested that the investors put more equity into the project in order to reduce the volume that was to be sold at fixed prices from 80% of the total volume produced by ABR to 50% (see Statutory Bundle A77). This is not consistent with a party who considered that it was deriving significant benefit from the fixed price contracts.*

91. *Further, following MMX's involvement the price at which the fixed price volumes were to be sold was increased as compared to the price that SMT was discussing with/offering to other offtakers.*

92. *When the above facts are considered, we submit that the only conclusion that can be drawn is that the prices in the FPCs represented an arm's length price that could have resulted if the transaction were not conducted among related parties. Indeed, the price that was ultimately negotiated for the fixed price contracts were higher than those that SMT was able to negotiate in its arm's length negotiations with unrelated parties.*

93. *However, even if one were to leave aside all of the factors that demonstrate, and overwhelmingly so, that the prices under the FPCs were arm's length prices, and assume*

that the prices were not arm's length, it still would not have been open to the Respondent to apply the basket prices in substitution for the fixed prices. This is because it simply cannot be doubted that there was a genuine commercial need to have some of the volumes sold at a fixed price. Accordingly, assuming the Respondent had the power to substitute a price, and that there were grounds for the exercise of that power (both of which are denied), the most the Respondent could have done was to consider the price that two unrelated parties, placed in the same circumstances, would have agreed to fix for a future 10-year period. In this regard, we note that there was not a single forecast (not even among those referred to by the Respondent's witnesses) that projected a price that even remotely came close to the Chemical basket prices in 2005.

94. *Accordingly, even if the Respondent had the jurisdiction to substitute a different price, and the circumstances warranted such a substitution (neither of which is accepted), then the price that the Respondent purported to substitute for the prices under the FPCs were determined on the wrong basis and as a result were grossly overstated.*

FPC's Made Commercial Sense

95. *In its Consolidated Statement of Case the Respondent contended that the FPCs may have made commercial sense for the Appellant's sponsors/shareholders, but that they did not make good commercial sense for the Appellant. There is no basis for this contention.*

96. *The FPCs played an integral part in financing the project. Without the FPCs there would not have been a project. In that regard alone, having a fixed price contract made as much commercial sense for the Appellant as the XYT fixed price contracts made for the XyT Project and the CEL Ltd offtake contract made for SCC Corporation and its local affiliate ADZ Ltd.*

97. *Moreover, the ABR fixed price contracts were designed to guarantee that the Appellant would (a) have a ready market for its product (through the commitment to buy); (b) be able to generate sufficient cash flow to meet its debt service obligations, and thus avoid*

going into default should Chemical prices drop; and (c) receive a return of 15%. It therefore is not the case that the fixed price arrangement as conceived by SMT, and based on the information that was available at the time of contracting, did not make good commercial sense for the Appellant.

98. *Save for its false assumption that the Appellant set out to incur losses, the Respondent has not set out any basis in support for this contention that the FPCs were not in ABR' interest. This assertion was based upon two contentions. The first was that the sale of the Appellant's output to related and/or affiliated companies at fixed prices was significantly lower than both the basket price and prevailing market conditions; and the second was that the sale of the Appellant's output to related and/or affiliated companies at fixed prices was significantly lower than the cost of natural gas used in Chemical production.*

99. *As noted above, the Respondent has conceded that this second contention is not correct, thus leaving only the contention that the fixed prices were significantly lower than the basket price and the prevailing market conditions. This contention is misplaced and based on a complete lack of understanding of the project and the commercial reasons why it was structured so as to sell part of the Chemical that was produced by the plant under FPCs and the other part at basket prices.*

100. *In particular, in advancing this point the Respondent has failed to appreciate that the FPCs were intended to provide a hedge against a potential drop in Chemical prices (which based on the information then available was a very likely prospect) as well as to guarantee that, whatever the prevailing price might be at a given time, the project would generate sufficient revenue (from having a guaranteed sale for these volumes at a fixed price) so as to be able to satisfy its debt service obligations. In addition to the testimony of Mr. MP, this is borne out by the contemporaneous documents – see for example the ABR Disclosure (Statutory Bundle – A58) that was drawn up in March 2000 and which refers to the "minimum requirement of 80% pre-sold as required by its lender" (see Statutory Bundle - A63).*

101. *It is therefore scarcely surprising that the fixed price would be different from the basket prices though, at that time of contracting, it would not have been known whether the fixed price would have been higher than the basket price or vice-versa, nor was it possible to anticipate the extent of the difference that actually obtained between these prices. Accordingly, that the basket prices turned out to be higher than the fixed price cannot reasonably be taken to be evidence of any deliberate intent to incur losses.*

102. *It is also not appropriate to compare the fixed prices (which were to take effect several years after the date of the contract) with the market prices that existed at the time of the contract. Past performance was and is no guarantee of future performance, particularly in the Chemical market given the volatility that existed in the pricing as well as the radical, transformative changes that were expected to affect the Chemical market with the construction of new low-cost supply as well as the falling demand from the regulatory changes concerning MTBE.*

103. *Similarly, for the reasons set out above, it would not be appropriate to compare prices or conditions that actually prevailed subsequent to the date of the contract since these would not have been available to the parties at the time of the contract and hindsight cannot be used to support a contention that there was some deliberate attempt to incur a loss. The only information that it would be appropriate to compare the fixed price to, is the independent price forecasts that were carried out closest to the date of the contract. The prices under the fixed price contracts were in line with these forecasts.*

104. *Furthermore, regardless of which set of prevailing conditions were applied, or which market prices were used for comparison purposes, there simply is no evidence that in setting the prices of the fixed price contract the Appellant set out to incur a loss. In this regard it is noteworthy that the Respondent's witnesses were not able to indicate the price point at which there would be a loss far less whether a loss was incurred by reason of the pricing. To the contrary, the position of the Appellant is that given the manner in which the offtake contracts are structured, there is no price at which it would incur a loss on the sale of Chemical - although there may be other reasons, such as depreciation and capital allowances, that may result in a tax loss in a given year.*

105. *As to the pricing making good commercial sense to the persons who were buying Chemical under the FPCs, it is of course easy for the Respondent to make this submission with the benefit of hindsight. However, it was far from evident at the time when the contracts were being negotiated in view of the circumstances that existed and were projected to exist at that time. Indeed, at that time there was significant doubt as to whether these fixed price contracts would have been in the best interest of the shareholder/sponsors. As reflected in the contemporaneous documents, the shareholders/sponsors had flagged concerns over the pricing and/or considered that they were undertaking risk in committing to buy volumes at that fixed price given the risk that the price could fall much lower. In particular, we note that:*

(i) *As reflected in the MMX Corporation's Annual Information Form for 1998 (Statutory Bundle C20):*

(a) Over a 3-month period in 1998 Chemical prices plunged by almost 40% (see Statutory Bundle C28);

(b) The expectation was that the "bottom of the cycle" pricing for Chemical would be prolonged as there was "simply too much Chemical capacity for the anticipated demand" (see Statutory Bundle C42).

(c) the Group purchased a large volume of Chemical at fixed prices, which it then sold at a loss when Chemical prices declined.

(ii) *In a July 2001 note on the AbR Project to the MMX Board of Directors, the fixed price contract was seen as exposing MMX to potential price risk on 350KT/year during periods when the UEFC net transaction price falls below US$125 per MT (see Statutory Bundle at A194)*

(iii) *As reflected in a note on the purchase of Chemical under these fixed price contracts, the PDB business unit who was to be the purchaser indicate that it had no desire to enter into the fixed price contract and indeed considered that it was against its trading policies to take this exposure (see Statutory Bundle at A157).*

106. *Despite these concerns, the ABR FPCs were priced at a level which were intended to provide a 15% return to the project (see Affidavit of Mr. SD para 114). Far from being motivated to transfer value away from ABR, the project sponsors were resolute to ensure that the project obtained this return even though within their (the sponsors) respective groups there were concerns that the price of the fixed price contracts was too high.*

No Substantial Disparity Between FPC Price and Fair Market Value

107. *The unchallenged evidence of the Appellant explained how the price for the FPCs was derived and further confirmed that before these contracts were finalized the Appellant specifically commissioned a report from an independent industry expert, CMAZ so as to ensure that the prices were fair and reasonable. This report was prepared in July 2001 (at the time when the parties were entering into the FPCs) and set out the historical prices from 1986 to 2000 and the forecasted prices for the period 2001 to 2022. According to this forecast, Chemical prices for deliveries to the US Gulf Coast were expected to peak in 2001 and then decline steadily before levelling off at around $130/MT. The CMAZ Forecast prices for the expected tenor of the FPCs (ie. 2004 to 2013), together with the equivalent price FOB Pt Town are set out in the table below:*

108. *Year*	*Price FOB US Gulf Coast*	*Price FOB Pt Town*
	$/Ton	*$/Ton*
2004	*137*	*117*
2005	*134*	*114*
2006	*128*	*108*
2007	*128*	*108*
2008	*129*	*109*
2009	*129*	*109*
2010	*130*	*110*
2011	*130*	*110*
2012	*131*	*111*
2013	*132*	*112*

These prices were in line with the price that was ultimately agreed for the fixed price contracts, especially when the adjustment is made for shipping etc in order to bring those forecasted prices to a pricing basis that is comparable with FOB Pt Town.

109. *The Respondent's Consolidated Statement of Case set out no particulars of the forecasts that the Respondent contended were not in line with the prices under the fixed price contract. Further, the witness for the Respondent who was involved in the audit, Ms. Surajbally-Gomez, made no mention of these forecasts in her witness statement nor did she suggest that they played any part in the Respondent's decision to adjust the Appellant's gross sales. Indeed, as appeared from her cross-examination she was not in any position to understand or speak intelligently on the meaning and effect of the forecasts and the data set out therein as demonstrated by her "ill-informed guess" that the reference to "UEFC" in the price forecasts meant "US Gas Contract" as opposed to a reference to the geographic price connector "US Gulf Coast", and which had a significant impact particularly when comparing the prices in the forecast with the prices under the fixed price contracts given the adjustment that would have been required for shipping and storage.*

110. *The only witness who sought to treat with this issue was Mr. Taklalsingh – though as noted above, not only did he have no knowledge of the matters set out in his witness statement, but rather he simply signed what was placed before him by the Respondent's attorneys. Be that as it may, the only forecasts to which reference was made in his affidavit were:*

(i) *A CMAZ forecast for the 6-year period 1997 to 2002 – which forecast was prepared in 1997 ("the CMAZ 1997 Forecast'); and*

(ii) *A CMAZ forecast for the 6-year period 2001 to 2006 ("the CMAZ General Forecast") though it is not apparent from the face of the document when it was prepared – see RT5.*

It is significant that in listing the documents that were examined and considered during the determination of the Appellant's objection, Mr. Taklalsingh omitted to make any reference to the CMAZ ABR Forecast, thereby confirming that this critical document was not considered.

111. *With regard to the CMAZ 1997 Forecast, given the volatility associated with Chemical prices, as well as the changes that had taken place within the industry between 1997 and 2001, it was not appropriate for the Respondent to rely on such a dated forecast to assess the prices under the fixed price contracts, which were projected to take effect from 2004. Basing its decision on this forecast, even in part, resulted in the Respondent taking into account irrelevant considerations which affected its decision.*

112. *As to the CMAZ General Forecast, this is a forecast that CMAZ prepared for a general audience. As such it was more limited than the bespoke forecast that it had prepared for the AbR Project, and in particular only provided a look ahead to 2006. Given the volatility in the Chemical price, it is not surprising that there would be differences even in forecasts prepared by the same entity but at different times in the same calendar year. These expected fluctuations notwithstanding, the figures set out in this forecast were consistent with those in the forecast that CMAZ prepared for the AbR Project*

113. *In the circumstances, we submit that no reasonable person would:*

(i) rely on the outdated CMAZ 1997 forecast in considering whether the prices agreed for the fixed price contract were reasonable;

(ii) rely on the more limited CMAZ General Forecast in preference to the forecast that was specifically commissioned and prepared by CMAZ for the Appellant; and in any event

(iii) conclude that the prices under the fixed price contracts were not in line with either the CMAZ General Forecast or the CMAZ forecast that was prepared specifically for the AbR Project.

114. *As to the suggestion that the prices fixed by the fixed price offtake arrangements were not in line with, and were significantly lower than, actual contract market prices, the Respondent is here seeking to fix the Appellant with hindsight of events that only transpired years after the prices of the fixed price contracts had been agreed. This is not permissible. Hindsight is infallible. It is not a forecast. The fixed price contracts have to be judged based on the information that was available to the parties at that time. As all of the key contracts (including the offtake agreements) had to be signed off in order to obtain the financing to enable the construction of the plant, it was invariably the case that the parties would have to rely on the forecasts of future prices. In order to assist it with that task, the Appellant obtained the best information that was available to it, including advice from a neutral, independent, industry expert. The Appellant should not be criticized, far less penalized, if the future unfolded differently from what was predicted by those forecasts. It is not appropriate to use hindsight to criticise the decisions that were made by this Appellant, just as it would not have been appropriate to use hindsight to criticize the XYT FPCs or the CEL Contract.*

FPCs Not Device or Arrangement to Reduce or Avoid Tax

115. *The purport and objective of section 67(1) is to prevent tax avoidance through artificial or fictitious devices. Accordingly, the Court looks at the acts of the taxpayer to see if they necessarily were implemented in this particular way so as to avoid tax, or whether they were capable of explanation by way of ordinary business dealing. If the taxpayer's acts are capable of explanation by way of ordinary business dealing, then they will not fall within the type of transactions covered by section 67(1).*

116. *The Respondent's position, as gleaned from the matters set out in the Consolidated Statement of Case, is that the reduction or avoidance of taxes was to be achieved by the deliberate incurring of losses. However, as already emphasized above, and conceded by the Respondent, this is not a case where the FPCs caused the Appellant to make or incur a loss.*

117. *Moreover, this is not a case where there was any tax savings or tax efficiencies to be gained by the structuring of the contracts in this manner. To the contrary, in view of the fiscal incentives that had been granted, there would have been no need to engage in such structuring. Further, the fact that the Chemical that was sold under the fixed price contracts was either utilized or sold by entities that were located in jurisdictions whose tax rates were higher than those to which ABR was subject in Trinidad and Tobago confirms that there was no tax benefit to be gained by structuring the FPCs in the manner in which they were structured, and the FPCs were not some device or arrangement to reduce or avoid tax.*

118. *Further, as we have already set out above (and extensively so), there is an "avalanche" of material that confirms that the FPCs were part of ordinary business dealings. The same structure had been used on the XyT Project, which was accepted by the Respondent as being an arm's length commercial dealing. Moreover, the independent industry expert, CMAZ had confirmed that the FPCs were commercially sound and within the industry norms. Accordingly, there is no basis for suggesting that the FPCs were implemented to avoid tax.*

119. *For all of the above reasons we submit that none of the essentially characteristics required to establish artificiality have been, or can be, made out. In the circumstances, there was no basis upon which the Respondent could have reasonably concluded that the FPCs were artificial or fictitious.*

No Power to Impute or Attribute Income

120. *Even if there was a basis for concluding that the FPCs were artificial or fictitious, the Respondent did not have the power to act as it did in adjusting the Appellant's income by deeming it to have received the basket price for Chemical sold under the FPCs.*

121. *As noted above, where the Respondent is of the opinion that a transaction is artificial or fictitious, then section 67(1) gives the Respondent the power to "disregard any such transaction" and to assess the persons concerned accordingly.*

122. *The meaning and effect of "disregarding a transaction" was considered by the Privy Council in* ***Seramco Limited Superannuation Fund Trustees v The Income Tax Commissioner [1977] AC 287****. In delivering the advice of the Privy Council in that case, Lord Diplock explained that to disregard a transaction means to treat the transaction as if it never had been entered into. This is the full extent of the power that Parliament has bestowed upon the Respondent. It is an anti-avoidance provision that allows the Respondent to "look behind the transaction" in order to give effect to the true transaction that had taken place. It is a matter that is distinct from, and quite different from, a power to deem something to have occurred, especially where it has not in fact occurred. It is an annihilating provision essentially and not one which empowers the Revenue to impute income to the taxpayer – see Denbow, Income Tax in the Commonwealth Caribbean, 2nd Ed at para 8.12 pg. 121 – 122.*

123. *Accordingly, even if we were to assume that the sale of Chemical by the Appellant at fixed prices was artificial (which of course we do not accept), this would only allow the Respondent to look behind that transaction to see what was the true price that was being paid for the Chemical that was sold under the FPCs. In this regard, the actual price that was paid, was the price that was declared by the Appellant in its tax return and not the price as assessed by the Respondent. Indeed, we note that the Chemical that was sold by QR to PDB and APS under the PDB FPC and the APS FPC was used by those entities in their businesses. It is therefore not the case that these volumes were on sold at greater prices (whether in the sums assessed or at all) and there certainly is no evidence that could remotely support such a conclusion.*

124. *In the circumstances, even if there was a basis for the Respondent treating the fixed price contracts as being artificial or fictitious (which, for the reasons set out above, we say was not the case) the Respondent had no jurisdiction to substitute the market prices for the fixed prices and/or deem the Appellant to have received, or to attribute to the Appellant, this additional income which was never received by or due to the Appellant.*

125. *Furthermore, even if the Respondent has the jurisdiction to substitute prices (which we do not accept) then, in light of the legitimate purpose that the fixed price contracts served, then the appropriate price to have been substituted in place of the price under the FPCs, would have been the price that two entities, negotiating at arm's length, were likely to have agreed as a long-term fixed price. Here the Respondent should have been guided by, and only by, the material that was in existence at that time (such as the CMAZ forecasts). Such an exercise was not likely to produce a fixed price that was very different from that which was agreed in respect of the FPCs – but it certainly would have been far removed from the basket prices that eventually were obtained several years later and which the Respondent purported to substitute for the fixed price and attribute to the Appellant.*

Provisions of Petroleum Taxes Act Are Not Applicable

126. *As an alternative to its contention that the assessment was supported by section 67(1) of the ITA, the Respondent has contended that it was entitled to adjust the income of the Appellant by virtue of section 5 of the Second Schedule to the PTA.*

127. *The Second Schedule of the PTA sets out the mechanisms that are to be applied or available for calculation of taxable profits on realized prices or fair market value as the case may be (see section 19A of the PTA). As confirmed by section 18 of the PTA, the provisions of the Schedule have effect for the purpose of ascertaining the taxable profits and the tax chargeable thereon, of a person who is engaged in either production business, refining business and marketing business. These provisions have no application to the Appellant, and to the Respondent's assessment of the Appellant, for the following 4 reasons.*

128. *First, the assessment that was carried out by the Respondent was in respect of corporation tax, and not petroleum tax. While the PTA, in section 18A, incorporates certain sections of the Corporation Tax Act ("CTA") – there is no equivalent provision which incorporates provisions from the PTA (and in particular the Second Schedule)*

into the CTA. As such there is no basis for the Respondent seeking to exercise powers that may exist in respect of petroleum tax in an assessment to corporation tax.

129. *Second, the business of the Appellant does not fall within the activities that are subject to Petroleum Tax. As set out in section 18 of the PTA, the provisions contained in the Second Schedule (which include the provisions upon which the Respondent relies as giving it the authority to adjust the prices under the fixed price contracts) "shall have effect for the purpose of ascertaining the taxable profits and the tax chargeable thereon of a person* ***in respect of production business, refining business and marketing business****." [emphasis added]. Accordingly, for the provisions of the Second Schedule to apply, the taxpayer's activities must fall within at least one of these three discrete activities, that is to say production business, refining business and marketing business.*

130. *Each of these three activities is defined by the PTA. In so far as "production business" concerned, this is defined as meaning "the business of exploration for, and the winning of, petroleum in its natural state from the underground reservoir, and includes— (a) the physical separation of liquids from a natural gas stream; and (b) natural gas processing from a natural gas stream, produced by the production business of a person engaged in the separation or processing, but does not include the liquefaction of natural gas." It is clear that the production and sale of Chemical does not fall within this definition.*

131. *As to "refining business" this is defined as meaning "the business of the manufacture from petroleum or petroleum products of partly finished or finished petroleum products and petrochemicals by a refining process" but* ***expressly excludes*** *"petrochemicals manufactured by a petrochemical plant operated separately from any such business". The production of Chemical is not associated with the refining of petroleum but rather from the processing of methane (which is itself a gas that may be derived from a number of sources but which, for the production of Chemical, is commonly processed from either natural gas or coal).*

132. *In any event, even if the Chemical production process could be seen as being a refining process, the production of Chemical by the Appellant would nevertheless be expressly*

excluded from the definition of refining business by virtue of the exclusion for petrochemicals manufactured by a petrochemical plant operated separately from any such refining business.

133. *Marketing business is defined as meaning "subject to section 3(5), the business of dealing in petroleum and petroleum products by way of an acquisition and a disposal to a marketing licensee or to a consumer in Trinidad and Tobago or to a person in any other prescribed country, and includes bunkering of ships and aircraft by a marketing licensee, but does not include certain other activities, none of which are relevant for these purposes." Accordingly, for the fixed price contracts to be caught by this provision then Chemical would have to be either petroleum or a petroleum product. Petroleum is defined as a "any mixture of naturally occurring hydrocarbons and hydrocarbon compounds" while petroleum products is defined as meaning "any partly finished or finished product derived from petroleum by any refining process." Chemical is not a naturally occurring hydrocarbon, nor is it a product that is derived from petroleum by virtue of a refining process as noted above.*

134. *Accordingly, the production of Chemical is not an activity that falls within any of the three activities that are subject to, the imposition of Petroleum Tax, so that the provisions of the PTA (including the Second Schedule) do not apply to the Appellant and cannot be invoked to support this assessment.*

135. *Third, even if the provisions of Second Schedule of the PTA were not limited to Petroleum Tax that was to be assessed in respect of a taxpayer engaged in production business, refining business or marketing business as defined by the PTA, they still would not be applicable in respect of income from the manufacture and sale of Chemical.*

136. *The provisions of the Second Schedule upon which the Respondent relies is section 5. As expressly set out in section 5(1), the products whose prices are the subject of those provisions are crude oil, natural gas, petroleum products and petrochemicals. It is clear that Chemical is not crude oil, natural gas nor a petroleum product. As to whether Chemical could be said to be a petrochemical for the purposes of the pricing provisions*

of the Second Schedule, section 2 of the PTA defines "petrochemical" as carrying the same meaning as under the Petroleum Act where it is defined as meaning "a chemical compound or a mixture of such compounds manufactured from petroleum or petroleum products ***as is prescribed by Order made by the Minister****." [emphasis added].*

137. *At the time when the matters which gave rise to this assessment occurred, there was no Order made by the Minister prescribing or deeming Chemical to be a petrochemical for the purposes of the Petroleum Act (or the PTA).*

138. *For these reasons, we submit that the provisions of the PTA, and in particular section 5 of the Second Schedule to that Act, cannot be invoked by the Respondent in respect of its assessment of the Appellant for purpose of Corporation Tax*

139. *Fourth, even if the provisions of the PTA were applicable (which we do not accept), nothing in those provisions gives* ***the Respondent*** *the power to replace the actual price for some other deemed price. The person with the authority to replace the actual realized price with a different price is* ***the Minister****. There is no evidence before this Court that the price that the Respondent purported to substitute for the actual realized price was fixed by the Minister. To the contrary, as testified by Mrs. Surajbally-Gomez, the price that was substituted for the price under the fixed price contracts was determined by the Respondent.*

140. *For each of the above reasons, we submit that the Appellant cannot rely on the provisions of the PTA to justify its actions in purporting to adjust the income that was actually received by the Appellant and to deem the Appellant to have received, or to attribute to the Appellant, income that was never received by the Appellant.*

No legal basis for the assessment – Fiscal Incentives Act

141. *The Fiscal Incentives Act ("FIA") provides for the grant of tax benefits for certain approved products and approved enterprises. According to section 5(1) of the FIA these*

benefits take the form of either total or partial relief from corporation tax/customs duty or a loss-off set pursuant to section 24. An enterprise which is desirous of accessing these tax benefits must make a written application to the Minister detailing, inter alia, the proposed product, the estimated date for the commencement of production and the local value added in the manufacturing process – see section 8. The Minister then considers, having regard to the public interest, the appropriate categorisation for the applicant company, which in turn determines the length of the tax holiday, and whether to make a recommendation to the President for approval of the application- see section 9. Under section 10 of the Act, once the President is satisfied that the public interest so requires, the applicant company is declared an approved enterprise and an order is issued to that effect detailing the nature of the tax benefit being granted under section 5(1). The contents of the order, as specified in section 11 of the Act, include the construction/production day, the approved product, any continuing obligations and a provision for revocation in any case of breach or non-compliance. Section 11 also empowers the President to vary the production day, the approved product and the address of the factory site, if such changes become necessary.

142. *It is evident that the FIA and the Incentives Order made thereunder must be interpreted in a meaningful and purposeful way giving effect to the basic objectives of the legislation – see Attorney General's Reference (No. 5 of 2002).*

143. *It is apparent that the purpose of the FIA, and Order made thereunder in respect of the Appellant, was to encourage investment in the production of Chemical through the grant of tax benefits or incentives by refraining from charging or collecting corporation tax entirely for the first two (2) of the ten (10) years of a tax holiday period.*

144. *By issuance of the Incentives Order, the President declared ABR an approved enterprise and its product an approved product. Further by paragraph 4 of the Incentives Order, ABR was granted "total relief from corporation tax for the first two years in respect of the approved product." By paragraph 4 of the Incentives Order 6 conditions were attached to the grant of the fiscal incentives; the most important of which was to submit*

an annual return, notwithstanding "the relief from corporation tax". This annual return would simulate a normal corporation tax return in the first 2 years of the tax holiday since in these years, by Presidential order there could be no charge to corporation tax for ABR. As a result, ABR was granted the tax benefits arising naturally out of the corporation tax regime as well as the express tax benefit under section 5(1) of the FIA and paragraph 4(1)(a) of the Incentives Order.

145. *Although the Incentives Order required ABR to submit an annual return, this does not mean that an assessment to corporation tax naturally flows therefrom. The Respondent simply receives the annual return and may compute the chargeable profits as permitted by the special provisions of sections 23(1) and (2) and section 24 of the FIA and the provisions of the CTA, other than those which seek to counteract any tax benefit or advantage which the "total relief" of ABR from corporation tax might have secured. There could be no reduction in the taxpayer's liability if it was already zero. The intention of the Incentives Order was that the State should forego all corporation tax for a two (2) year period.*

146. *The basis upon which an assessment to corporation tax is to be conducted is set out in section 5 of the CTA which provides that "[c]orporation tax shall be charged for each year of income upon the chargeable profits of the company arising in that year …" By virtue of the exemption that was granted to the Appellant for income year 2005, which was for total relief from corporation tax, there were no chargeable profits so as to form the basis for an assessment under section 5 of the CTA.*

147. *Since, in accordance with the Incentives Order there could be no charge to corporation tax on the first two (2) annual returns filed by ABR, the corporation tax returns filed by ABR in both 2005 and 2006 were nothing more than pro forma returns to which the assessment procedure in section 83(1) of the ITA did not apply. There being no charge to corporation tax, there was no need for an assessment by the Respondent nor for the Respondent to refuse to accept the return under section 83(2)(b) and a determination of the relevant chargeable profits.*

148. *The Respondent's role in the first 2 years was not to massage fixed price sales numbers, not only because it is not involved in an assessment of the return but also because taxation was the very antithesis of the process of fiscal incentivisation of the ZQ Plant from application, to negotiation, to laying out the basket price/fixed price/sale price for the approval of the Minister and the government, to the representation by the Incentives Order that it was in the public interest that no corporation tax be charged ABR as long as ABR remained faithful to the project approved and appraised by the Minister from time to time - see section 13 of FIA.*

149. *It is clear that for the purpose of the pro forma computation which is carried out on returns submitted by an approved enterprise, some sections of the CTA and by extension the ITA apply. For example, section 23 of the FIA modifies the calculation of the wear and tear allowance normally applied by section 11(1)(b) of the ITA. In a similar vein, the loss off-set provisions at section 24 of the FIA modify the allowance for trade losses contained in section 16 of the ITA. However, based on the wording of the Order there is no scope for the application of section 24 in relation to ABR' 2005 corporation tax returns. In the usual course, section 16 of the ITA could be applied to set-off an excess of losses over notionally chargeable profits or gains in Year 1 and those losses could be carried forward against notionally chargeable profits in Year 2.*

150. *In the premises, by purporting to conduct this assessment the Respondent acted outside of its jurisdiction, and contrary to what was provided and/or intended by the FIA and the Incentives Order.*

[E] SUBMISIONS IN RESPECT OF GREEN FUND LEVY

151. *In so far as Green Fund Levy is concerned, the assessment is not justifiable for the following 4 reasons:*

(i) *Green Fund Levy is charged on gross sales and receipts, and not some imputed or notional income;*

(ii) *Neither 67(1) of the ITA nor section 5 of the PTA were incorporated into the Miscellaneous Taxes Act ("MTA");*

(iii) *In any event section 67 is an annihilating section and only gives the Respondent the power to disregard but not to adjust the Appellant's income;*

(iv) *The FPCs were not in any event artificial and fictitious.*

152. *The power or jurisdiction that is given to the Respondent by the MTA to levy Green Fund Levy is to raise a levy on actual income. There is no provision that allows the Respondent to impute or attribute to the taxpayer income that in fact was not due to the taxpayer.*

153. *Sections 61 to 69 of the MTA provide for the levying and collection of Green Fund Levy. In particular, section 62 provides:*

"(1) … there shall be levied and paid to the Board a tax at the rate of 0.1 per cent to be known as a Green Fund Levy, ***on the gross sales or receipts of a company*** *carrying on business in Trinidad and Tobago, whether or not such company is exempt from business levy.*

(2) The levy shall be payable by a company in each quarter ending 31st March, 30th June, 30th September and 31st December in each year of income and the provisions of section 79 of the Income Tax Act shall apply mutatis mutandis to this subsection.

(3) The provisions of section 3A (6), (7), (8), (9) and (10) of the Corporation Tax Act shall apply mutatis mutandis in relation to the levy but with the necessary modifications and adaptations.

(4) The Board shall, in respect of the collection and recovery of the levy, have all the powers as it has in relation to income tax under the Income Tax Act." [emphasis added]

154. *Gross sales, as defined by Black's Law Dictionary, are "the un-adjusted total sales invoice value". The un-adjusted total sales invoice value was the amount that was reported by the Appellant on its Green Fund Levy return. The MTA contains no provision (whether in its express provisions, or in any of the specific sections of the ITA*

and the CTA which were incorporated into the MTA) that gave the Respondent the power to alter the Green Fund Levy returns submitted by a taxpayer in order to take account of sales and receipts that were deemed to be, but which were not in fact, made or received.

155. *The Respondent did not allude to any provision of the MTA that allegedly gave it this power. Instead, the only statutory provisions to which the Respondent referred as allowing it to adjust the income of the Appellant were section 67(1) of the ITA and the PTA. However, as may be seen from section 62 of the MTA, only certain specific sections of the ITA and the CTA were said to apply mutatis mutandis to the Green Fund Levy charging sections so as to be incorporated into the MTA. Outside of those certain specific provisions, there is no basis for applying any of the other provisions of the ITA, CTA or PTA to the power to assess Green Fund Levy under the MTA.*

156. *Neither section 67(1) of the ITA nor section 5 of the PTA were incorporated into the Green Fund Levy charging provisions. Accordingly, there is no statutory basis that would enable the Respondent to rely on either of these provisions in assessing Green Fund Levy.*

157. *These were the only two provisions advanced by the Respondent as providing it with the power to disregard the price that was due, paid and received under the fixed price contracts and to substitute some other price in its place. As such, it follows that the assessment that the Respondent purported to make with respect to Green Fund Levy was flawed and made without jurisdiction.*

158. *Even if the provisions of the ITA were incorporated into the MTA, it did not give the Respondent the power to ignore what had transpired, both in fact and substance, and to impute to the Appellant, income that was never due to or received by the Appellant. In this regard we rely on the submissions set out above as to the meaning, effect and import of the power to "disregard a transaction" under section 67(1) of the ITA and the inability to use that section to adjust the sales of the Appellant by deeming the Appellant to have received or to be entitled to income that was never due to or received by it.*

159. *Finally, even if the Respondent had the jurisdiction under section 67 of the ITA to deem the Appellant's gross income to include income that was neither due to nor received by the Appellant, then for the reasons submitted above there was no basis for finding that the FPCs were artificial and fictitious so as to bring section 67 into play and to exercise that power.*

160. *For all of the above reasons we submit that the appeal should be allowed.*

C. SUBMISSIONS OF THE RESPONDENT

20. The submissions of the Respondent as filed on the 25th November 2019 were in the *following terms: -*

PRELIMINARIES

1. *These submissions are filed pursuant to the directions of the Tax Appeal Board given at the close of the Trial on 18th July, 2019 in response to the Appellant's written submissions filed on 30th September, 2019.*

THE NATURE OF THE APPEAL

2. *The Appeal herein is in respect of a decision of the Respondent to vary the assessable income of the Appellant for income year 2005 by adjusting the income earned by the Appellant on the sale of approximately 50% of the volume of Chemical sold by the Appellant in that year to reflect the income that would have been earned if that volume of Chemical had been sold at prevailing market prices.*

3. *The central legal issue in this appeal is whether certain fixed price contracts* ***("FPCs")*** *under which approximately 50% of the Chemical produced by the Appellant was disposed of can be disregarded on the grounds of* ***artificiality*** *under section* ***67 of the Income Tax Act ("ITA")*** *and the principle established in* ***Sharkey v Wernher.***

The Undisputed Background

4. *In the 1990s Trinidad and Tobago was enjoying the benefit of a flourishing oil and gas economy and substantial investments in that economy from various multinationals. One area in which there was substantial investment was in the construction and operation of Chemical production plants.*

5. *In or about 1990-91 SMT LLC **("SMT")** and the ZYX Group, a US based investment group, conceptualized and promoted the construction of a Chemical plant in Trinidad. Subsequently, these 2 entities offered AM Ltd **("AM")** the opportunity to acquire an interest in the proposed project; an offer which resulted in AM acquiring a 10% interest in that project. This Chemical plant became known as the XY Plant and its construction was completed sometime in or about 1998.*

6. *In 1998 AM merged with PD resulting in a new entity PDB-AM which subsequently became PDB Plc **("PDB")**. Prior to the completion of the XY Plant and the merger of AM and PD, SMT approached AM to find out if it would be interested in constructing a new Chemical production plant in Trinidad. The new plant would have twice the production capacity of the XY Plant and would, through the utilization of new technology, produce Chemical cheaper than the XY Plant. At the time SMT and XYT LLC were promoting the construction of the new plant. By 1999 PDB (the amalgamated AM and PD) had acquired an interest in the project for the construction of the new plant.*

7. *On 6th July 1999 SMT incorporated the Appellant as an unlimited liability company under the provisions of the **Companies Act Chap. 81:01** for the purpose of inter alia:*

   a. *developing, owing and operating a Chemical production plant **("the ZQ Plant" or "the Plant")** at the LIP Estate capable of producing 5,000 metric tonnes of Chemical a day[18]; and*

   b. *selling the Chemical produced by the plant [19] **(**collectively **"the AbR Project" or "the Project").***

[18] See Statutory Bundle **Folio A46**
[19] See Statutory Bundle **Folio A38**

The Appellant is therefore the corporate entity through which SMT intended to develop the AbR Project along with PDB and any other Project sponsor.

8. *The ZQ Plant, once operational, would be able to produce 1.7 million metric tonnes of Chemical per annum using a new technology that also reduced the cost of production. The technology was supplied by CLI Co. and required the utilization of two major feedstocks in equal volumes namely natural gas and oxygen. The source of the respective feedstock will be addressed later in this submission.*

9. *MMX Corporation of Canada **("MMXC")** is a global Chemical production and marketing company. In the 1990s MMX sought to strengthen its already strong global position as a leading supplier and marketer of Chemical by building and operating Chemical plants in locations with plentiful supply of cheap natural gas and access to ocean shipping. At the same time MMX was shutting in less cost-efficient plants. MMX therefore considered Trinidad a desirable location to build and operate a Chemical plant*[20].

10. *In or about September or October 1999 MMX approached SMT with an offer to purchase SMT's equity interest in both the XY Plant and the AbR Project*[21]*. Ultimately SMT accepted the offer and the parties entered into an agreement dated 31st March 2000*[22] *as a result of which by September 2000 MMX had acquired SMT interests (which at that time included the interests of XYT LLC) in the AbR Project.*

11. *Ultimately, the Appellant is owned by 2 shareholders. MMX owns 63.1% of the issued share capital in the Appellant through a wholly owned subsidiary MXRR of Barbados **("MXRR").** PDB owns the remaining 36.9% of the issued share capital in the Appellant through a wholly owned subsidiary ESC LTD **("ESC")** of the United Kingdom.*

12. *When MMX acquired an interest in the AbR Project in September 2000 SMT and PDB had already discussed and agreed on many key elements of the AbR Project relating to funding, sale and distribution of the Plant's production and the use of FPCs.*

[20] See **paragraphs 20 and 21** of the affidavit of Mr. WE.
[21] See **paragraph 91** of the affidavit of Mr. SD.
[22] See agreement dated 31st March, 2000 between HOR Holdings, a MMX controlled entity, and the members of SMT at **Folio D206**.

Notwithstanding the advance stage of the project development, the MMX Board of Directors did not immediately approve the continued pursuit of the Project. Instead MMX undertook an extensive review of the Project and entered into new discussions and negotiations with PDB. Those discussions and negotiations resulted in the approval of the use of FPCs with a fixed price which was agreed by MMX and PDB in 2000[23]*. Discussions and negotiation between MMX and PDB in relation to other terms of their arrangement continued from January 2001.*

13. *While those discussions and negotiations were ongoing, by an agreement dated 18th April 2001 made inter alia between the Appellant and* ***EF Group("EF"),*** *EF was engaged as the exclusive financial adviser to the Appellant for general financing strategy and planning in connection with the financing and development of the AbR Project.*

14. *Subsequent to MMX acquiring its interest in the Appellant, at a meeting of the Appellant's Board of Directors held on 27th April 2001, a resolution was passed ratifying and adopting the agreement dated 18th April 2001 appointing EF as the Appellant's exclusive financial adviser in relation to the AbR Project financing*[24]*.*

15. *On 28th August 2001 the MMX Board of Directors gave its approval for the Appellant to pursue the AbR Project.*

16. *The very next day, 29th August 2001, the Appellant presold the ZQ Plant's future Chemical production pursuant to an arrangement reflected in 4 separate agreements each dated 29th August, 2001, namely:*

    a. *An agreement between the Appellant and MMC* ***("MMC")****, another wholly owned subsidiary of MMX whereby MMC become the exclusive purchaser and marketer of all Chemical produced by the Appellant* ***("the MMC Agreement")***[25]*. Under that agreement the amount payable by MMC to the Appellant for any quantity of Chemical delivered to MMC would be the equivalent of 94% of the Net Resale*

[23] See **paragraph 46** of Mr. RN Affidavit. Mr. WE said in cross examination that he believed that the prices of the FPCs was agreed in September 2000 whereas Mr. SD said that the prices were agreed in mid 2000.
[24] See Resolution at Statutory Bundle **Folio A158 - A160**.
[25] **Folio 356**

Proceeds as defined in the agreement (essentially 94% of the revenue from sale of the Chemical by MMC less the deductions provided for under the MMC Agreement).

b. *An agreement between MMC and MMX Inc, another wholly owned subsidiary of MMX whereby MMX Inc would purchase annually 350,000 metric tonnes of Chemical purchased by MMX from the Appellant at a fixed price of $110.00 per metric tonne plus the cost of shipping for a period of 10 years from the effective date of the agreement* ***("MMX FPC")***[26]***;***

c. *An agreement between MMC and PDB International Limited, another wholly owned subsidiary of PDB whereby PDB International Limited would purchase annually 350,000 metric tonnes of Chemical purchased by MMC from the Appellant at a fixed price of $110.00 per metric tonne plus the cost of shipping* ***("PDB FPC")***[27]*; and*

d. *An agreement between MMX and APS* ***("APS")****, whereby in essence APS would purchase annually 180,000 metric tonnes of Chemical purchased by MMC from the Appellant at a fixed price of $125.00 per metric tonne including the cost of shipping for 5 years and then at $130.20 per metric tonne including the cost of shipping for 10 years* ***("APS FPC")***[28]*.*

[The MMX FPC, the PDB FPC and the APS FPC are collectively referred to as the ***"FPCs"*** *and the scheme for the sale of the Appellant's Chemical through the foregoing contracts is referred to as the* ***"FPC Scheme".****]*

17. *The terms of the MMC Agreement resulted in 880,000 metric tonnes of Chemical being sold annually ("the Fixed Price Volume") at the prices fixed in the FPCs. The remaining volume of Chemical purchased by MMC from the Appellant ("the Basket Volume") was sold at prices to be computed using a complex formula, the particulars of which are not necessary for the disposition of this Appeal as the Parties agree that this price is a market reflective price*[29] ***("the Basket Price")****.*

[26] **Folio 396**
[27] **Folio 411**
[28] **Folio 434**
[29] See **paragraph 2(e)(ii)** of the Notices of Appeal filed by the Appellant herein on 11th March, 2014**.**

18. *In relation to the primary feedstock consumed at the ZQ Plant:*

*a. The oxygen gas used by the ZQ Plant is supplied from an independent cryogenic air separation plant build on lands adjacent to the ZQ Plant which was leased to the Appellant by the TIL Development on 10th April 2002 and subsequently sub-leased to GUI Limited **("GUI")** on 10th April 2002. During the conceptualization of the AbR Project, the Project Sponsors selected APS to design, build and operate a cryogenic air separation facility to supply oxygen to the ZQ Plant in an across the fence arrangement. APS was an American company with specialist expertise in air separation on the scale required for the AbR Project. GUI, which is owned by APS and another entity, supplies oxygen to the ZQ Plant. The Respondent has not been provided with a copy of the Oxygen Sale Agreement dated 29th August, 2001 (as amended and restated effective on 22nd July, 2002) between the Appellant and GUI[30] and is therefore unaware of the precise nature of the arrangements between APS, GUI and the Appellant regarding the supply of oxygen.*

*b. The Appellant contracted with the GNL Co. **("GNL")** for the supply of natural gas to the ZQ Plant under a Gas Supply Contract executed on 20th September, 2001[31].*

On 19th September, 2001, the Appellant held both a Special Meeting of Shareholders and Special Meeting of Directors. At the Special Meeting of Directors, a new Board of Directors was appointed[32] . At the meeting of those directors which immediately followed, the Board considered a number of agreements which had been executed or which were to be executed in order to give effect to the AbR Project as has been agreed by the Appellant's parent companies[33]. The Board decided as follows:

a. EPC (Engineering, Procurement and Construction contracts) which had been signed on behalf of the Appellant on 1st June, 2001 were ratified;

[30] **Referred to in clause 2.6 of the Master Loan Agreement at Folio F9.**
[31] Statutory Bundle **Folio 300**
[32] **See Folio A 237**
[33] **See Folio A 240**

b. A shareholders Agreement entered into amongst the Appellant, ESC and MCBR which had been executed with the FPCs on 29th August, 2001 was ratified.

c. Four agreements with APS which had been approved and executed since 25th and 29th August, 2001 were ratified.

d. The Gas Supply Contract with NGC which was eventually executed on 20th September, 2001 was approved by the Board.

e. The Board approved the site lease for the Project between PLIPDECO and the Appellant and the sublease of a parcel to GUI. These documents were eventually executed on 10th April, 2002.

f. The Board approved an operating guarantee between the Appellant, GUI and APS.

19. *On 21st November 2001 PDB, MMX and EF distributed a Confidential Information Memorandum to potential lead arrangers for the Senior Debt Financing[34] for the AbR Project. That Confidential Information Memorandum set out the details of the AbR Project as had been agreed by MMX and PDB and subsequently approved by the Appellant.*

20. *DEUT Bank **("DEUT")** was selected as the Lead Arranger for the financing. On or around 1st July, 2002 a second Confidential Information Memorandum was distributed to potential lenders.*

21. *The Appellant secured financing for the Project and on 13th December, 2002, all necessary financing contracts and documents were executed by the respective parties. There were several amendments to the FPC Scheme leading up to the closure of the financing, namely:*

a. An Amendment to the Chemical Sales Agreement on 9th October, 2002;

[34] **Folio H1**

b. *An amendment to the APS FPC on 9th October, 2002;*

c. *An assignment of the PDB FPC from one PDB subsidiary to another PDBO International on 11th December, 2002[35]; and*

d. *An assignment of MMX's rights and obligation under the Chemical Sales Agreement to QR Limited* ***("QR")***[36]**.**

22. *Construction of the ZQ Plant was completed in July 2004. The ZQ Plant commenced production at or about the time construction was completed.*

The Appellant's Fiscal Incentives

23. *By virtue of* ***The Fiscal Incentives (ABR) Order 2002***[37] ***("the Order")****, the Appellant was granted a 'tax holiday' under the* ***Fiscal Incentives Act Chap 85:01*** *from the Production Day being 1st October, 2003. The reliefs which are relevant to this Appeal are as follows:*

a. *Total relief from corporation tax for the first 2 years;*
b. *A reduction in the rate of corporation tax to 15% for the next 5 years; and*
c. *A reduction in the rate of corporation tax to 20% for the next 3 years.*

24. *The Appellant was required to file returns of income in the same manner as if the income had not been exempted. In other words, there was no exemption from corporation tax but rather a reduction in the rate payable over a ten-year period.*

25. *Due to delays in the completion of the Plant, by virtue of the* ***Fiscal Incentives (ABR) (Variation of Production Day) Order 2005***[38]*, the Production Day was varied to 24th July, 2004. Accordingly, from 24th July, 2004 and during income year 2005, the Appellant was granted total relief from taxation.*

26. *The following timeline is provided for the Honourable Court's assistance:*

[35] **Folio D425**
[36] **Folio 392**
[37] **Folios E146-147**
[38] **Folio E320**

1998	*AbR Project conceptualized by SMT, PDB and AM*
2 January, 1999	*Project negotiations restart after approval of PDB/AM merger*
6 July, 1999	*Incorporation of ABR by SMT*
September, 1999	*MMX approaches Mr.VW to purchase SMT's shares in ABR. FPC structure agreed with price to be negotiated.*
30 March, 2000	*MMX's HOR Holdings purchases SMT*
2000	*MMX and PDB agreed to use FPCs and agreed the price of Chemical under those FPCs*
18 April, 2001	*Agreement amongst EF **("EF")** and ABR for EF to be appointed exclusive financial adviser to ABR*
27 April, 2001	*ABR issues 369 Shares to ESC LTD (PDB subsidiary) and 631 shares to MCBR Limited.* *Ratification of EF Agreement.* *Removal of SMT Directors and appointment of Mr.SD of PDB and Mr. D of MMX as Directors.*
28 August, 2001	*MMX Board resolves to proceed with project*
29 August, 2001	*Agreement between MMX **("MMX")** of XA State and ABR for MMX to be exclusive marketer of ABR' Chemical for a 4% commission* *10 year fixed price offtake agreement between MMC and MMX for 350,000 MT per year at $110/MT plus distribution and transportation costs* *10 year fixed price offtake agreement between MMC and PDB for 350,000 MT per year at $110/MT plus distribution and transportation costs* *15 year fixed price offtake agreement between MMX and APS for 180,000 MT per year at $125/MT including transportation costs for 10 years and then at $130.20/ MT including transportation costs for 5 years.*

	Oxygen Sale Agreement between ABR and GUI
19 September 2001	*Special Meeting of Shareholders* *Special Meeting of newly appointed Board of Directors*
21 November, 2001	*Project's Confidential Information Memorandum compiled MMX/PDB/EF submitted to Lenders*
10 April, 2002	*Plipdeco Lease to ABR*
10 April, 2002	*ABR Sublease to GUI*
July, 2002	*Project's Confidential Information Memorandum compiled by DEUT as Lead Arranger to Lenders*
13 December, 2002	*Finance Documents executed*
July, 2004	*Construction Completed and production commenced*

Income Year 2005

27. *The Appellant filed a Corporation Tax Return for income year 2005 in which it declared gross receipts of $1,414,499,109.00 and a taxable loss of $73,754,282.00 under the heading exempt income. That taxable loss was used to set off taxable income of $7,794,972.00 resulting in an adjusted loss of $65,959,310.00. Notwithstanding the foregoing, Schedule V of the Return purported to carry forward the full loss of $73,754,282.00.*

28. *The Respondent's auditors conducted an audit of income year 2005 during which the Appellant disclosed the MMX Agreement and the FPCs. The auditors observed as follows:*

    a. *The Appellant sold all the Chemical produced at the ZQ Plant to MMX and issued invoiced to MMX in relation to the sales which demonstrated that:*
        i. *50% of the Chemical was invoiced at a fixed price; and*
        ii. *50% of the Chemical was invoiced at a price referred to by the Appellant as the "basket price";*

b. *The revenue from the Chemical sold at a fixed price was approximately half of the revenue from the sale of Chemical at the basket price; and*

c. *The Appellant invoiced MMC $1,155,142,413.46 for Chemical sold at the basket price and $487,657,804.16 for Chemical sold at the fixed price.*

29. *The auditor further observed that the loss declared would not have existed if the fixed price volume of Chemical had been sold at market price.*

30. *In reviewing the Appellant's Corporation Tax Returns for Income Years 2006 and 2007 (both being taxable years), the auditor noted that the Appellant had attempted to carry forward the declared losses from 2005.*

31. *The auditor concluded that the Appellant's sales were understated, disregarded the pricing scheme created by the MMX Agreement and the FPCs and adjusted the Appellant's sales revenue by substituting the price paid for the fixed price volume with the corresponding basket price. In the Explanation of Adjustments annexed to the Notice of Assessment dated 29th December 2011*[39] *the Respondent advised the Appellant of the reasons for the adjustments to its 2005 Return in the following terms:*

> ***An examination of your books and records revealed the following-***
>
> ***The company's entire output of Chemical was sold to QR Trinidad, a related party. Fifty percent (50%) was invoiced at a price that is termed and referred to hereunder as "the fixed contract price" and the balance (50%) was sold at a price referred to by the company and referred to hereunder as the "basket price".***
>
> ***The sales based on the fixed contract price did not reflect the fair market price.***
>
> ***In the company's audited financial statements note 14 on disclosure of related party transactions, it was stated that all sales and purchases with related parties were carried out on commercial terms and conditions and at market prices. In fact, on examination of the records the Board of Inland Revenue (the Board) found that the arrangement entered into was such that***

[39] See Exhibit "D.S-G.12" to the affidavit of Deann Surajbally-Gomez

the price of the output based on the fixed contract price did not reflect a fair market price.

In addition, the company entered into a Gas Supply Agreement with the GNL for the supply of natural gas, its main input for the production of Chemical. The price of natural gas was determined by reference to the market price of Chemical.

With respect to that portion of output reported at fixed contract price, it was found that, the price was below the cost of the natural gas used in production.

This arrangement has the effect of reducing total sales reported by your company and further the net result was reduction of income reported for tax purposes in Trinidad and Tobago.

32. *It is plainly evident from the language of the explanations that the Respondent was relying on the provisions of* ***section 67 of the ITA*** *and was inter alia alleging that the Appellant had failed to bring the full market value of its stock into account for tax purposes.*

33. *The Appellant objected to the assessment by letter dated 27th January 2012*[40] *and set out the reasons why it believed that the FPCs are "****an arm's length, commercial arrangement"*** *and the Respondent's Assessment to be wrong. These included the following:*

a. The Appellant took every reasonable step at the time the FPCs were executed to ensure that they were reflective of a commercially sound transaction such that it cannot be fairly inferred that the FPCs are devices to reduce or avoid tax.

b. The FPCs and the Gas Supply Contract were necessary to secure the AbR Project including secure financing;

c. The FPCs were a natural and common commercial contract in the Chemical industry;

[40] See Statutory Bundle **Folio 468**.

d. The price of natural gas did not exceed the price of Chemical in 2005;

e. The price fixed for Chemical in the FPCs was reasonable and reflective of what a third party would have paid at that time;

f. It would be unreasonable and unjust to disregard the business environment and the commercial nature of the PFCs; and

g. In rejecting the MMX Agreement and the FPCs, the Respondent ignored market conditions and the business environment that truly existed at the time and sought to impose an unfair tax in hindsight, failing to take into account the independent opinion of ***CMAZ ("CMAZ")****.*

34. *By letter dated 24th January 2014 the Respondent informed the Appellant that its objection had been determined and the Assessment had been confirmed. The Appellant now appeals this decision to the Appeal Board.*

Natural inferences and conclusions to be drawn from correspondence passing between Appellant and Respondent

35. *It is clear from the Respondent's letter (set out in* ***paragraph 31 above****) and the objections raised by the Appellant (itemized in* ***paragraph 33),*** *that the parties were dealing with the question of* ***artificiality*** *and the* ***Sharkey v Wernher*** *principle. These are the central issues that arise in this Appeal.*

36. *What is also clear from the foregoing correspondence is that the Respondent has satisfied the evidential burden as required by this Court's enunciation of the principles governing the burden of proof in Tax Appeals. In that regard, Kelsick CJ in* ***The Board of Inland Revenue v Boland Maharaj (1978-85) 2 TTTC 504*** *stated as follows:*

> ***"On the Revenue rests only, the evidential onus that it rightly "appears" to the Revenue to act; which it discharges by adducing evidence of the information or material which caused it to appear to the Revenue that the taxpayer was under-assessed. On the other hand, the statutory burden of the whole case is on the taxpayer."***

37. *As a consequence of the foregoing, the legal burden hereafter rests on the Appellant. In that regard, the Respondent will contend that for the reasons set out hereunder that the Appellant has wholly failed to discharge that burden.*

THE LAW

38. *The Respondent's core submissions on the law is that this case is governed by* ***Section 67 of the Income Tax Act*** *and the* ***Sharkey v Wernher*** *principle.*

39. ***Section 67 (1) of the Income Tax Act*** *states:*

> ***Where the Board is of the opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious, or that full effect has not in fact been given to any disposition or settlement within the meaning of section 72 the Board may disregard any such transaction or disposition or settlement within the meaning of section 72 and the persons concerned shall be assessable accordingly.***

40. *The rule in* ***Sharkey v Wernher [1956] AC 58*** *[see Bundle of Authorities at TAB1] as stated in the headnote is as follows:*

> ***"That where a person carrying on a trade disposes of part of his stock in trade not by way of sale in the course of trade but for his own use, enjoyment, or recreation, he must bring into his trading account for income tax purposes the market value of that stock in trade at the time of such disposition…"***

41. *The relevant legal principles which govern this case can be extracted from decisions of this Court going back over 50 years as well as those from the Privy Council. Those principles can be summarized as follows:*

    a. *that where a taxpayer disposes of its products or stock-in-trade to a related party or a controlling entity or a party with a special interest at a price which is significantly below the fair market value of the product then that transaction can be disregarded on the ground of* ***artificiality*** *pursuant to* ***Section 67 of the ITA****. The power is to disregard the transaction and to substitute the market value in place of the reduced value at which the transaction was completed.* ***(X Ltd v Board of Inland Revenue***

(1967-77) 1 TTTC 82 and Z Estates Ltd v Board of Inland Revenue (1967-77) 1 TTTC 479.) *[See Bundle of Authorities at TABs 2 and 3.]*

b. *That in the circumstances where the Respondent exercises the power under* ***Section 67 of the ITA*** *there is also the likelihood of invoking the* ***Sharkey v Wernher*** *principle which basically establishes that where a tax payer disposes of his stock-in-trade at a value which is less than market value then as a matter of law for the purposes of income tax he must credit his trading account with the market value of that stock at the time of disposition. (See* ***BAO Limited v The BIR Appeal I105 of 1982.)*** *[See Bundle of Authorities at TAB 4.]*

c. *That in order for a Court to arrive at the view that the transaction is* ***artificial*** *it is not necessary that it should be established that there was an intention to avoid taxes. But in order to determine whether the transaction is artificial the court must identify in the transaction the circumstances and context in which it was entered into. This is an exercise calling for legal evaluation and judgment. (See* ***Commissioner of Tax Audit and Assessment v GUIarette Company of Jamaica Limited [2012] STC 1045.****)*

d. *That in considering whether a transaction is artificial it must be judged from the perspective of the Appellant taxpayer and not its parent company. This point arises particularly in the context where the Appellant sells its products to its parent company at a price which is significantly below market price. Such a transaction is to be regarded as artificial or exposed to challenge on the basis of the* ***Sharkey v Wernher*** *principle because it is disadvantageous to and results in a loss to the appellant. (See the case of* ***BAO Ltd v BIR*** *where one indicia of artificiality were the fact that the Appellant suffered a loss as in the present case****.)***

42. *The fact that a transaction may have been commercial or may have been concluded in the context of commerciality does not make it immune from being disregarded under an anti-avoidance provision such as* ***Section 67 of the ITA.*** *It is always a question of looking closely at the transaction and examining the circumstances in which it was made* ***(See the***

case of Commissioner of Taxpayer Audit and Assessment v Company of Jamaica Ltd at paragraph 23 of the judgement of the Privy Council).

43. *While upon its natural interpretation* ***Section 67 of the ITA*** *it is to be regarded as an annihilating section, that is only partially so. This issue is dealt with in greater detail hereunder.*

44. *The foregoing principles have been clearly restated by this Honourable Court in the most recent decision in* ***ACL v Board of Inland Revenue Appeal 102 of 2015*** *[see Bundle of Authorities at TAB 5] as follows:*

> ***90. The term "artificial" in the context of the legislation has a broader scope than the term "fictitious". Leading local authorities such as Z Estates Ltd v Board of Inland Revenue and Myerson Co. Ltd vs Board of Inland Revenue have established the essential characteristics of a transaction that is within the realm of artificiality. These features are:***
>
> - ***The transaction is not one which is at arm's length in that one party has control over the other.***
> - ***The transaction is one that does not make commercial sense in that it is unnatural and not one which would be expected of persons acting freely and independently of each other***
> - ***There is a substantial disparity between the price at which the transaction is carried out and the fair market value.***
> - ***The circumstances surrounding the transaction are such that one can fairly infer that it was a device or arrangement to reduce or avoid tax by the taxpayer.***
>
> ***91. In more contemporaneous times, the approach of the Privy Council as to the construction of the term "artificial", as demonstrated in the matter of Commissioner of Taxpayer Audit and Assessment v GUIarette Company of Jamaica Ltd has been to qualify the considerations as to whether the impugned transaction was commercial or fully commercial due to the inherent nature of income tax which affects transactions by way of bounty as well as commercial transactions. What was also emphasized is that the recognition of a transaction as being within the realm of artificiality is an evaluative exercise dependent on the facts and circumstances of the particular scenario and which may require legal experience and judgment in the overall determination.***

Consequences of Respondent invoking Section 67 of the ITA: annihilating provision

45. *At paragraph 122 of the Appellant's submissions under the heading* ***"No power to impute or attribute income"*** *it is contended that the Respondent is somehow debarred from substituting the market value of the Chemical sold by the Appellant for the substantially lower price under the FPC's. In support of that contention the Appellants referred to a passage from writing to Senior Counsel for the Respondent and in particular a sentence at the end of* ***page 122*** *which is read as follows:*

> ***It is an annihilating provision essentially not one which empowers the Revenue to impute income to the taxpayer.***

46. *That quotation is distorted, taken out of context and conveniently omits and ignores the following sentence which appears at the bottom of page 122 of the book*[41]*. The omitted sentence is dealing with imputing notional income arising in the context of the special facts of the case of* ***Trinidad Cement Limited v Board of Inland Revenue*** *(1978-85) 2 T.T.T.C. The omitted sentence reads as follows:*

> ***It would appear that the decision in the Trinidad Cement Case has to be regarded at best as one very much on its own facts and cannot provide a precedent for empowering the Inland Revenue to impute notional income to a taxpayer in any scenario where income tax may have been avoided or reduced.***

47. *Accordingly, the Appellant's submission on this point does not faithfully represent the passage upon which it purports to rely. Moreover, it is very clear from the judgment of this Court in the* ***Trinidad Cement Case*** *as supported by the passage referred to in Lord Diplock's judgment in the* ***Seramco Case*** *that when the Respondent has invoked and relied upon* ***Section 67*** *the consequence of so doing is that it is empowered not only to disregard the transaction which is effected at a reduced or depressed price but also to substitute the market price.*

48. *The Respondent is empowered to do the foregoing because it is clear that the reliance upon* ***Section 67*** *to disregard the transaction does not thereafter extinguish the power of*

[41] See Income Tax Law in the Commonwealth Caribbean, Dr. Claude Denbow SC, 2nd Edition

the Respondent to raise an additional assessment. In that regard ***Section 67*** *is not a purely annihilating provision but consequential on its utilization the Respondents power to raise an additional assessment under* ***Section 83 (2)*** *remains alive.*

49. *In support of the foregoing the Respondent relies on the statement of this Court in the* ***Trinidad Cement Case at pages 79 to 80*** *of the report [see Bundle of Authorities at TAB 6] where the Court said as follows:*

> ***(21) The transaction is artificial in that it is not such an agreement as would be entered into by independent persons acting of arm's length… It is unrealistic from business point of view is between independent persons…. Though it may have an effect is a valid contract between the parties, or was, until revoked, binding and then because it had been acted upon practice, it may be disregarded for income tax purposes…***
>
> ***(22) The Respondent need not prove motive or intention of the Appellant to avoid tax, though either would be relevant.***
>
> ***(23) It suffices to show that the effect or likely was to reduce the tax liability of the appellant…***
>
> ***(25) Section 54 of the ordinance is not purely annihilating section. The Respondent is authorized to take positive steps as a consequence of disregarding the artificial transaction…"***

50. *In referring to Respondent's power to take positive steps after disregarding an artificial transaction the Court relied upon and cited in support of that approach a lengthy passage in the judgment of Lord Diplock in the* ***Seramco case*** *where in interpreting* ***Section 67*** *Counsel recognized that as a consequence of invoking* ***Section 67*** *the Respondent still had available to it its statutory power to make an additional assessment which is embodied in* ***Section 83 (2) of the ITA****. The statement from Lord Diplock judgment appears at* ***pages 301 to 302*** *of the report in the* ***Seramco case.***

51. *In view of the foregoing it is quite clear that in invoking* ***Section 67 of the ITA*** *to disregard the FPCs on the ground of artificiality the Respondent can thereafter exercise the statutory power by way of an additional assessment to substitute the market value of Chemical in place of the reduced price embodied in the FPCs. The Respondent's power so to do is derived not only from* ***Section 83 (2) of the ITA*** *but also the* ***Sharkey v***

Wernher *principle. This is what has happened in this case and this Honourable Court is respectfully requested to uphold the assessment.*

Additional judicial support for the approach being advocated

52. *There is one decision of this Court which it is submitted provides guidance as to how the particular facts of this case should be approached. It is the case of* ***BAO v Board of Inland Revenue****. In that case Appellant which was in the business of manufacturing teeth in Trinidad and Tobago was a wholly owned subsidiary of BA Corporation of the United States (the US parent company). Whereas the taxpayer sold his finished products to non-associate companies in Europe at a markup at about 146 % over its standard cost of production, those same products were sold to his US parent at standard cost only.*

53. *As a consequence of the foregoing the Respondent claimed that in relation to the sales to the US parent, it was entitled to make an adjustment of the sales figure by substituting market price for the sale price to the US parent pursuant to the predecessor of* ***Section 67 of the ITA*** *and on the basis of the principle established in* ***Sharkey v Wernher.***

54. *The Court in delivering the judgment stated at* ***page 11*** *as follows:*

> ***In our view, it did not make commercial sense of the appellant to set out to incur losses in regard to the major portion of its production. Undoubtedly the transaction would have made good sense to the Parent but from the viewpoint of the appellant we can safely infer that it was only justified by the tax advantage resulting from the transaction. As already concluded, there was a disparity of $507,166 between the actual sale price and the fair market value.***

55. *As a consequence of the foregoing the Court went on to determine as follows at* ***page 13****:*

> ***Our determination is therefore, that the parent sales figure of $1,997,821.00 is to be disregarded for tax purposes and replaced by $2,504,987.00 both pursuant to Section 34 of the Ordinance and by reference to the Sharkey principle***

56. *In view of the foregoing it is respectfully submitted that this Honourable Court should adopt a similar approach on the facts of this case where all the related parties in this*

matter i.e. MMX, PDB and APS have been given a reduced price as compared to the market price. The market price ought to be substituted for the reduced price as has been contended throughout by the Respondent.

Market Price almost double the FPC price in the relevant year of assessment 2005

57. *The evidence in this case makes it very clear that the market price for the Chemical produced by the Appellant in the income year 2005 which is under consideration in this case was almost double the price under the FPC's. It will be recalled that the market price under the FPCs was US$110.00 per metric tonne. In 2005 the evidence of Mr. CP the retired President of the Appellant at paragraph 6 of his affidavit states that the average monthly basket price of Chemical during income year 2005 was US$208.13 per metric tonne.*

58. *In view of the foregoing it is respectfully submitted that this is a clear case where this Court should apply both* ***Sharkey v Wernher*** *and* ***Section 67 of the ITA*** *to uphold the Respondent's substitution of the market price for the reduced price under the FPCs.*

THE RESPONDENT'S WITNESSES

59. *The Respondent called two witnesses, auditor Deann Surujbally-Gomez who was part of the audit team which made the relevant assessment and Ravi Taklalsingh, the Respondent's Commissioner of Objections. Mr. Taklalsingh was not involved in either the audit or the objection stage. He gave evidence because the auditor who had dealt with the Appellant's Objection had died. He therefore confirmed that the objection had been rejected by the Respondent.*

Dean Surujbally-Gomez

60. *The evidence of Ms. Deann Surujbally-Gomez clearly established that approximately 50% of the Appellant's Chemical was being sold below the market price. Ms. Surujbally-Gomez's evidence was that:*

a. *All of the Appellant's Chemical was sold to MMC, an indirect wholly owned subsidiary of MMX, pursuant to the MMX Agreement;*
b. *Under that agreement, MMC marketed and resold the Chemical and paid the Appellant 96% of the proceeds of resale, less certain identified deductions;*

c. *MMX approved the terms and conditions of the FPCs;*

d. *Because of the FPCs, a wholly owned subsidiary of MMX, a wholly owned subsidiary of MMX PDB and APS (a company with a substantial investment and involvement in the AbR Project) were required to take a total of 880,000 metric tonnes of Chemical at fixed prices for a period of 10 years;*

e. *The FPCs made no provision for escalation to the fixed price to take into account changing economic and industry conditions or factors such as changes in the price of natural gas, the cost of labour, the market demand for Chemical, etc.;*

f. *Although the gas supply contract tied the price of gas to the market price of Chemical, effectively resulting in the cost of gas to the AbR Project increasing when the market price of Chemical increased, the price of Chemical was fixed in the FPCs not allowing for any adjustment to reflect an increase in the price of supplied gas. Effectively, the FPCs exposed the Appellant to the risk of loss if the market Chemical price increased;*

g. *The remaining 850,000 metric tonnes of Chemical, the Basket Volume, was to be resold by MMX by reference to the market price of Chemical;*

h. *The Appellant issued 2 different types of invoices to QR (successor to MMC) with 2 different prices (i.e. the fixed price and the market price) being charged for Chemical often on the same date;*

i. The revenue derived from the Fixed Price Volume was less than half the revenue derived from the Basket Volume so that revenue from Basket sales was $1,155,142,413.46 whereas revenue from Fixed Price Sales was $487,657,804.16, a difference of $667,484,609.30;

j. The Appellant was declaring a loss which would not have been incurred had the Appellant sold all of its Chemical at market prices; and

k. The FPCs had the effect of reducing the tax that would be payable by the Appellant.

61. *Based on the foregoing, the witness gave the following evidence*[42]*:*

> ***"since the Fixed Price Chemical Volumes (amounting to approximately 50% of the Company's entire Chemical output) were resold to parties to the AbR Project under Fixed Contract Sales and yielded significantly less revenue than the revenue received from parties purchasing Basket Price Chemical Volumes. The income reported from the sale of the Fixed Price Chemical Volumes did not reflect the amount that would have been received from parties transacting business under an arm's length transaction. Accordingly, I concluded that the income recorded in the Appellant's 'MMX Pricing/ Receivables Drill – ACTLOCAL' for Fix Contract Sales was understated."***

62. *Consistent with Deann Surujbally-Gomez's evidence, Mr. SD, one of the Appellant's key witnesses, confirmed that due to the fixing of prices under the FPCs it was possible for the Appellant's profits to be squeezed to the point of losses. This is demonstrated from the following exchange between Senior Counsel for the Respondent and Mr. SD:*

> ***Q: Would you agree that there is a major disadvantage and downside to the FPC where you don't take into account fluctuations in the price of natural gas.***
>
> ***A: It could be***
>
> ***Q: So, if the price of natural gas is pegged to the price of Chemical...***
>
> ***A: and it was…***

[42] See **paragraph 16** of the Surujbally-Gomez affidavit.

Q: And the price of Chemical goes up the person with a fixed price contract is going to suffer

A: His margins would be squeezed.

Q: He would have a solvency issue… the problem of solvency could arise, could it not?

A: Theoretically it could.

Q: So, ABR, by entering into these FPCs was exposed to a solvency issue… If the price of natural gas went up because the price of Chemical went up, would ABR not be exposed? Because it was stuck with a fixed price for its Chemical

A: It would make less money.

Q. It would be put into the zone of a loss, would it not?

A: We never thought it would go into a loss. Theoretically

Q: But it did, it went into a loss in 2005, did it not?

A: It resulted in that, yes… Theoretically it could and actually it did, but that was not the expectation is what I am trying to say…

63. *Mr. SD was also specifically asked to read* ***paragraph 21 and 22*** *of the Surujbally-Gomez's affidavits and he readily agreed with the reasoning therein. The relevant evidence is set out below:*

> ***"After examining the carried forward losses set off against the Appellant's chargeable profits for the income years 2005 and 2007, I concluded that arrangements under the Fixed Price Contracts had the effect of reducing the total sales revenue reported by the Appellant and further, the net result of reducing the income reported for tax purposes in Trinidad and Tobago.***
>
> ***Natural gas was one of the key components to the production processes for Chemical. Accordingly, the cost of natural gas was an important consideration for production and the determination of profits. The contents of the Gas Supply Contract made between GNL and the Appellant and executed on 20th September 2001 were therefore examined. It was noted that the Base Gas Price was tied to the referenced price for Chemical and the contractual formula used in the determination of the price of Chemical was based on various published market prices for Chemical. It was deduced that if the price of gas increased due to escalating market price of Chemical,***

then the Appellant ran the risk of incurring a substantial loss by contracting to sell approximately 50% of its total production at a fixed price that did not reflect an increase in the market price …"

64. *It is respectfully submitted that the evidence of Ms. Deann Surujbally-Gomez is more than sufficient to meet the evidential burden on the Respondent to demonstrate that the Appellant was selling Chemical below the market price. The undisputed evidence, both at the audit stage and at the appeal, is that the revenue for income year 2005 from the sale of the fixed priced volumes was $667,484,609.30 less than the revenue from the basket volumes[43]. The Respondent is therefore entitled to rely* ***on Section 67*** *and the principle in* ***Sharkey v Wernher*** *to justify its Assessment.*

What was before the witness at the time of the Audit

65. *The Appellants submissions are replete with the assertion that Dean Surujbally-Gomez failed to consider documentation which was available to her at the audit stage. It is however important emphasize to this Honourable Court that the documents contained in Bundles A-K were only provided to the Respondent* ***after*** *the audit stage which culminated in the Notice of Assessment dated 29th December, 2011. The barrage of documents provided by the Appellant, which constituted 15 bundles of documents, was provided after the aforementioned date. This is clear from a perusal of:*

a. The Objection correspondence commencing 27th January, 2012 at ***folio 468*** *and bearing date 9th July, 2013 at* ***folio 487*** *in which the Appellant began providing documentation;*

b. The Appellant's index at ***folios A1-A6*** *which lists documents contained in* ***Bundles A – D*** *which included documents up to November 2013 demonstrating that these bundles were only submitted after November, 2013 long after the Notice of Assessment; and*

[43] See **paragraph 15** of the Deann Surujbally-Gomez affidavit.

c. *The cover letters for* ***Bundles E, F, J and G*** *at* ***folios E1, F1, J1 and G1*** *all dated long after the Notice of Assessment.*

66. *Accordingly, the Appellants repeated assertions about failure to consider the documentation relevant to this matter are wholly unfounded. Moreover, the so called barrage of documents submitted do not assist the Appellant's case but mainly serve to contradict the assertions in the Appellant's affidavits as shall be demonstrated hereunder.*

Witness error

67. *During cross examination Ms. Deann Surujbally-Gomez said that her assessment was based not on the artificiality but on the fictitiousness of the FPC Scheme. This is clearly a departure from the witness's written evidence and also from the documentary evidence in the appeal. Critically, both the witness's written evidence and the documentary evidence clearly identify indicia of artificiality on which the witness based her decision*[44]*. At best therefore under the rigor of cross examination the witness made an error in her response to Senior Counsel or was not au courant with the legal distinction between the concepts of artificiality and fictitiousness.*

68. *That error aside, it is also important to emphasize that* ***section 67(8) of the ITA*** *which states as follows:*

> ***A discretion conferred on the Board by this section may be exercised, on appeal under section 87, by the Appeal Board.***

69. *Accordingly, the Respondent respectfully submits that irrespective of the quality of the evidence as to the decision-making process, the foregoing provision empowers this Honourable Court to act on its own once the evidence is on the record. In other words, the Court must itself consider the particulars of the FPC Scheme and the circumstances in which it was entered into in order to determine whether it is artificial. The opinions of*

[44] The clearest example of this is the explanation of the Assessment quoted at **paragraph 31 above** (see also exhibit **"D.S-G.12"** to the Affidavit of Deann Surujbally Gomez)

the witness and whether she expressed herself properly in cross examination would not vitiate the evidence both documentary and oral which is already on record.

THE APPELLANT'S CASE

70. *The Appellant's case is that the FPCs in issue should not be disregarded under the provisions of* ***section 67 of the ITA*** *on the ground of artificiality. According to the Appellant, this is because the FPCs were entered into for bona fide commercial reasons. In that regard, the Appellant has assumed the legal burden of proving to this Honourable Court what it is contending. This principle is well established from the decided cases in this case and is embodied in the passage cited from the judgment in* ***BIR v Boland Maharaj*** *set out at* ***paragraph 36*** *above.*

The Witnesses

71. *To meet this legal burden, the Appellant relies on the evidence of 4 witnesses:*

a. *MR.SD, a former employee of PDB who, as part of his work for PDB, was a member of the team established to review, develop and implement the XyT and AbR Projects*[45] *and sat on the Board of the Appellant;*

b. *Mr. RN, who in his role as the Global Chemical Business Manager for the ETY business within PDB was involved in the AbR Project from 1999, and also was involved (on behalf of PDB Chemicals in its capacity as a potential purchaser of Chemical from the Appellant) in determining the fixed price payable under the FPCs*[46]*;*

c. *Mr. WE, as part of his work for MMX, particularly in his capacity as a member of MMX's Executive Management Team (ELT), participated in the process by which MMX decided whether to invest in or proceed with the AbR Project*[47] *and he became the first Chairman of the Appellant; and*

[45] See **paragraphs 7, 8 and 11** of the Mr.SD affidavit.
[46] See **paragraph 6** of the Mr. RN affidavit.
[47] See **paragraph 10** of the Mr. WE affidavit

d. *Mr.MP a former employee of DEUT, the lead arranger for the financing of the AbR Project.*

72. *It is noteworthy that none of the four witnesses worked for the Appellant. Further, Messrs. WE, SD and RN all made clear that they were representing the interests of their respective employer; either MMX or PDB. Furthermore, even at the hearing of this Appeal, none of the Appellant's officers gave evidence on its behalf.*

73. *The Appellant also relies on an affidavit of Mr. CP, its former President, filed on 4th August 2017 pursuant to this Honourable Court's order of 5th June, 2017 requiring the Appellant to answer certain interrogatories.*

Weighing the Evidence

74. *In addition to the foregoing, there is a substantial amount of contemporaneous documentary evidence in the Appeal the vast majority of which was produced to the Respondent at the audit and objections stage. It is important to note that those documents were hardly referred to by the Appellant's witnesses in their affidavits.*

75. *As will be demonstrated later, the documentary evidence in this Appeal is very relevant and enlightening on the issues. In addition, it frequently conflicts to a significant degree with the oral evidence of the Appellant's witnesses. Their Lordships in the JCPC in* ***Grace Shipping Inc. & Anor. v C.F. Sharp & Co. (Malaya) PTE Ltd. [1987] 1 Lloyd's Rep 207*** *[See Bundle of Authorities at TAB 7] provided guidance as to the importance of contemporary document in assessing the credibility of witnesses. in that regard Lord Goff stated at 215-216 as follows:*

> ***In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in Armagas Ltd v Mundogas SA [1985] 1 Lloyd's Rep 1 , 207 at 215 to 216:***
>
> > ***'Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference***

> ***to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.'***
>
> ***That observation is, in their Lordships' opinion, equally apposite in a case where the evidence of the witnesses is likely to be unreliable; and it is to be remembered that in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence."*** *[Emphasis added.]*

76. *This principle was reaffirmed by the Privy Council in the local case of* ***Attorney General and Anor v Kalicklal Bhooplal Samlal (1987) 36 WIR 382 at 387 paragraphs e-g of judgement.*** *[See Bundle of Authorities at TAB 8] in these words:*

> ***"But a judge must check his impression on the subject of demeanour by a critical examination of the whole of the evidence (see Yuill v Yuill [1945] P. 15 at page 20) … It is essential when weighing the credibility of a witness to put correctly into the scales the important contemporaneous documents … and the inherent improbability, ... Thus the balancing operation, which is of the very essence of the judicial function, was not properly carried out."*** *[Emphasis added.]*

77. *It is clear from the foregoing statements that in a case such as the instant (which is of a commercial nature) great assistance is to be derived from the documentary evidence. We therefore commend the foregoing to the Honourable Court and submit that in weighing the witness' evidence the Court ought to-*

a. *attach greater weight and importance to the objective facts and documents,*

b. *consider the witness' motive for giving the evidence; and*

c. *weigh the inherent improbabilities of the evidence, particularly against the objective facts,* ***the documentary evidence*** *and the witness' motives.*

78. *This Court is asked to pay particular attention to the following contemporaneous documents all of which to a significant extent contradict or are inconsistent with the evidence given on behalf of the Appellant:*

*a. ABR Plant Disclosure dated 29th March 2000 (**Folio A58-A63**);*

*b. Summary of ABR Marketing / Off-take Status – As of April 17/ 00 (**Folio A64**);*

*c. Executive Leadership Team presentation dated Tuesday April 25 (F**olio A65-A76**)*

*d. MMX Internal Memorandum dated 10th May 2000 from Mr.MW, Executive Vice President and President, Chemical (**Folio A77-A79**);*

*e. Note headed June 19/00 ABR Marketing and attachments (**Folio A83-A85**);*

*f. Email dated 24th August 2000 from Mr. GD to Mr. SD and others (**Folio A86-A90**);*

*g. Email dated 11th April 2001 from Ms.KL to Mr. RN and others (**Folio A156-A157**);*

*h. AbR Project Report, May 22 2001 (**Folio A165-A180**[48])*

*i. AbR Project – Financial Advisor Kick-off Meeting, WI State, May 23/01 Meeting Notes & Follow-up Actions (**Folio A166-A169**)*

*j. AbR Project, MMX Board of Directors, July 20/01 (**Folio A185-A198**)*

*k. Draft News Release, 28th August 2001 (**Folio A232**)*

*l. ABR – Preliminary Financing Guidelines (**Folio A328-A331**)*

*m. MMC Annual Information Form March 3, 2001 (**Folio D71-D90**)*

*n. AbR Project Economic Model used in TIDCO Application February 28th 2001 (**Folio A114- A132 at A115**).*

ANALYSIS OF THE EVIDENCE

Appellant's Answer to Artificiality

[48] Note that this document stars at folio A165 and continues at folios A170 to A180

79. *Although the Appellant's witnesses adduced a barrage of evidence in their affidavits only a small percentage of that evidence was relevant to the issues in this Appeal. In the interest of saving time the following is a summary of the commercial reasons advanced by the witnesses for the use of the FPCs:*

a. *As the ZQ Plant was to be the largest plant in the world when completed and as other large plants were coming onstream, the Appellant feared a glut in the market and falling Chemical prices. If the price of Chemical fell too low for a prolonged period, the Appellant would have difficulty repaying its debt;*

b. *The FPCs were common in the industry, they were also used in the XyT Project and allowed for the guaranteed purchase of the Appellant's Chemical at a particular price;*

c. *This was critical to demonstrating to the Appellant's lenders that it would be able to service its debt and the lenders would not have given financing without the FPCs;*

d. *The Appellant was therefore constrained to give up on the prospect of increased profits in order to obtain the financing for the plant;*

e. *The prices in the FPCs were commercial as they reflected market prices at the time they were being executed; and*

f. *As APS is not a related party and its FPC was negotiated at arm's length, the PDB and MMX FPC must be regarded as commercial as the prices were basically the same.*

80. *The burden of proving the foregoing assertions rests solely on the Appellant. The Appellant has inundated the Respondent with lengthy statements in the affidavits and a barrage of documents* ***(supplied after the audit was completed)*** *in an attempt to do so. However, as demonstrated from the affidavits and the cross examination during the trial, the vast majority of the documents placed before the Court have not been referred to by*

the Appellant. In an effort to assist the Honourable Court to sift through the vast irrelevance, the Respondent has reproduced extracts from the relevant documents in order to demonstrate the fallacy of the Appellant's assertions.

The myth that the FPCs were natural common commercial contracts

81. *At the Objections stage the Appellant contended that fixed price contracts were both natural and common commercial contracts in the Chemical industry. The Appellant repeated this contention at* ***paragraph 13*** *of its Answer filed on 1st December 2014:*

> ***Fixed price offtake agreements are and were a common commercial arrangement that gives price certainty both to the buyer and to the seller in the arrangement.***

82. *It is of great importance to emphasize that although the Appellant maintained from the Objections stage that fixed price contracts were natural and common place, the Appellant was unable to produce examples of such contracts which mirrored the FPCs in this case, both in duration and the lack of a contractual mechanism for the variation of the price. The Appellant did seek to rely on 3 contracts which it contended were fixed price contracts. The Respondent submits that these 3 contracts do not advance the Appellant's case for the reasons set out later in these submissions.*

83. *The Appellant's contention was not supported by the evidence of Mr. SD who at* ***paragraphs 109 and 110*** *of his affidavit said:*

> ***109. Fixed price contracts were not particularly popular within the Chemical industry given that one party will always lose out if the market moves…***
>
> ***110. Contract price of commodities is usually not fixed but is a variable based on a market index such as Henry Hub for natural gas for Nymex for crude oil. These market index prices change hourly or daily in much the same way as share price of a listed public company changes in the stock exchange. The index commonly used in the Chemical industry at the time was that run by CMAZ who calculate the price by taking the average of various spot market prices quoted to them by buyers and sellers. The price varies in a weekly basis, based***

on reported supply and demand, and is reported in CMAZ's published newsletter.

84. *Mr. SD's evidence clearly implies that the norm in the Chemical industry was for Chemical to be sold at market prices calculated at regular intervals in an industry approved or accepted manner. Further, his evidence was more firmly that fixed priced contracts were unusual. During cross examination the witness was shown his evidence and attempted to put a less damaging interpretation on it by saying that he meant that fixed price contracts* ***"were not popular not that they weren't common…".***

85. *Mr. RN also attempted to suggest that the FPCs were common but he was challenged in cross examination. Senior Counsel for the Respondent showed Mr. RN a copy of an email dated 11th April 2011 (together with an attachment) from MS. KL of PDB ETY, a PDB Business Unit* ***(BU)****, entitled* ***ETY purchase of ABR*** *at* ***Folio A157****. In that email and attachment, Ms. Lovett, attempting to capture the key points of concern with the AbR Project from a PDB perspective, wrote:*

> ***1. No desire to enter into a fixed price contract***
> - ***Against PDB trading polices for BU to take this exposure.***
> - ***… price relative to the market is far more important than absolute price***
>
> - ***Most US contracts are priced at 'costs +' based on the prevailing market price for Chemical: to lock in a margin we need our Chemical costs to move with (and remain below) the market.***

86. *Mr. RN, one of the recipients of the email, and Mr. SD were therefore trying to convince this Honourable Court that fixed price contracts were natural and common place when the very company they worked for had no desire to use such contracts and expressed the view that sale at a price based on the market price is the norm. In the circumstances, it is reasonable to conclude that both men deliberately tried to mislead this Honourable Court on this issue.*

87. *Mr. WE was the most forthcoming of the 3 witnesses on this issue of fact. His evidence was consistent with the explanation in his affidavit which no doubt explains why business*

entities in the Chemical industry would not enter into fixed price contract for a long term. He said[49]*:*

> ***Fixing a price for any period into the future, let alone 10 years, was always going to be a challenge. The factors that impact the price of Chemical are numerous, extremely variable and volatile, so that price forecasts are essentially best 'guestimates'.***

88. *In cross examination Mr. WE response to questions from Senior Counsel was as follows:*

> ***Q I see, alright. Now would you say that the business of MMX didn't really involve the use of FPCs to any extent, ten-year FPCs? Would you accept that?***
>
> ***A If you are limiting it to ten-year FPCs that was not normally the …***
>
> ***Q Usually market driven for most of the business?***
>
> ***A Market driven and some price fixed contracts that were for shorter periods of time. 6 months, 12 months, 18 months' tops.***
>
> ***Q Normally for one year.***
>
> ***A Yes for that range of time.***
>
> ***Q So the normal FPC would be one year, normally in the business of MMX***
>
> ***A well it might be one year, it might be six months. It depends on the circumstances that the parties negotiated with respect to their specific requirements.***

89. *Any doubt that the use of fixed price contracts, especially long-term fixed price contracts, was not common in the Chemical industry is dispelled by MMX's own documentation which plainly conveys that the vast majority of MMX's sales are not concluded under fixed price contracts. The MMX Annual Information Form dated 3rd March, 2001 at* ***Folio D81*** *states as follows:*

> ***Currently, about 90% of our sales are covered by long-term or rolling one-year sales contracts. Pricing formulas under these contracts are generally determined on the basis of posted contract or other market prices at the time***

[49] See paragraph 92 of Mr. WE's affidavit

of shipment. Sales contracts generally specify a minimum and maximum volume and may include a "meet or release" clause that enables the customer to temporarily suspend the contract if another supplier of Chemical offers a supply of Chemical at a more favourable price. None of our customers accounted for more than 10% of total revenue in 2000."

90. *Mr. WE clarified the foregoing in cross examination and confirmed that FPCs were not usual in MMX's business in the following manner:*

A … My point is these two sentences are not talking about fixed price contracts. They are talking about contracts for a period of time where the price is not fixed.

Q Yes exactly, so I am saying that the MMX business was being primarily in contracts which are not FPCs?

A That is correct

Q And it is unusual to have an FPC? That was the exception, was it not?

A It was unusual, yes.

Conclusion

91. *In view of the foregoing, the Respondent will contend that:*

a. *fixed price contracts were not a natural common commercial arrangement in the Chemical industry as the Appellant has specifically pleaded at* ***paragraph 13*** *of its Answer filed on 1st December, 2014;*

b. *the norm was for the fixing of the price of Chemical using a formula incorporating the market price at the date of shipment;*

c. *although a fixed price contact was not a common commercial arrangement, MMX did conduct a very small percentage of its business in the basis of fixed price contract which did not exceed 1 year in duration; and*

d. *90% of MMX's own Chemical sales were through long term or rolling one year contracts which incorporated a contract formula for the calculation of price base on the prevailing market price for Chemical at the time of shipment.*

The Real Purpose of the FPCs

92. *Based on the documents provided by the Appellants, the FPCs were created and utilized as an integral part of a market restructuring exercise. That exercise ensured the production of low cost Chemical for PDB and APS' own business and to provide MMX with the opportunity to resell at a profit.*

Market Restructuring

93. *The Appellant's case is that the FPCs were needed because:*

a. *the state of the market supported the view of future surplus supply, coinciding with the coming onstream of the ZQ Plant, with the potential to drive Chemical prices low for a prolonged period; and*

b. *they were essential to demonstrate to the potential lenders that the Appellant would be able to service its debt.*

The Appellant filed lengthy evidence from Messrs. WE, SD, MP and RN in support of these assertions. However, none of these witnesses adduced any contemporaneous documents to support their evidence in chief. Furthermore, although the Appellant produced 15 volumes of documents to the Respondent in support of its Objection the Respondent was unable to find a single document that supports the witnesses' evidence in chief. On the contrary, the contemporaneous documentary evidence provides an altogether different explanation for the use of the FPCs by the Appellant which is consistent with the Respondent's findings. The missing element in all of this is that the issue of market restructuring is never mentioned at all. However, there is extensive documentary evidence on the subject.

94. *By 2000, MMX was the world's largest producer and marketer of Chemical, see* ***folio D73****. PDB Chemicals Ltd, a PDB Business Unit was one of the top 3 global consumers of Chemical, see* ***paragraph 52 of the SD Affidavit****. The two project sponsors were*

therefore 2 of the largest players in the Chemical industry with the capacity to influence the Chemical market and the market price of Chemical if they so desired.

95. *In fact, the evidence is that in 2000 MMX had already been engaged in an industry restructuring drive. This restructuring involved the acquisition and shutting down of high cost North American Chemical plants whilst acquiring new sources of cheap Chemical. The use of FPCs was an integral part of that exercise as will be demonstrated hereunder.*

96. *The particulars of this industry restructuring are detailed in the* ***MMX Annual Information Form*** *dated 3rd March, 2001 as follows:*

> ***We have played as significant role in the restructuring of the Chemical industry. In July 2000, we obtained exclusive rights to the open from RLG Chemicals 450,000 ton per year Chemical plant in XA State until the end of 2003. This plant was shut down in July remain shut-in. In 2000 we also acquired SMT LLC (SMT) and the Chemical assets of ICIP Limited ("ICIP"). Through the SMT acquisition we acquired the marketing rights to the new 850,000 tonne per year MXY CO plant located in Trinidad, a 10% interest in the XY facility and SMT's involvement in potential future Chemical development initiatives. Through the ICIP acquisition, we acquired ICIP's Chemical assets (which are located primarily in the United Kingdom) and include marketing rights and a well-developed logistics infrastructure but exclude ICIP's 500,000 tonne per year Chemical plant which is scheduled to be shut down at the end of April 2001. These acquisitions increased our global market share and provided us with increased flexibility in supplying the US and European markets.***[50]
>
> **…**
>
> ***Supply from the two capacity additions planned for 2001-2002 is expected to be more than offset by demand growth and announced shutdowns. Over the past several years significant industry restructuring has taken place with approximately 1.9 million tonnes of North American Chemical capacity shut down in 1999 and a further rationalization of 450,000 tonnes in 2000. CB&P Limited Partnership's 990,000 tonne per year facility located in the US was closed in January 2001 and ICIPs' 500,000 tonne per year plant located in England will shut down in April, 2001.***[51]

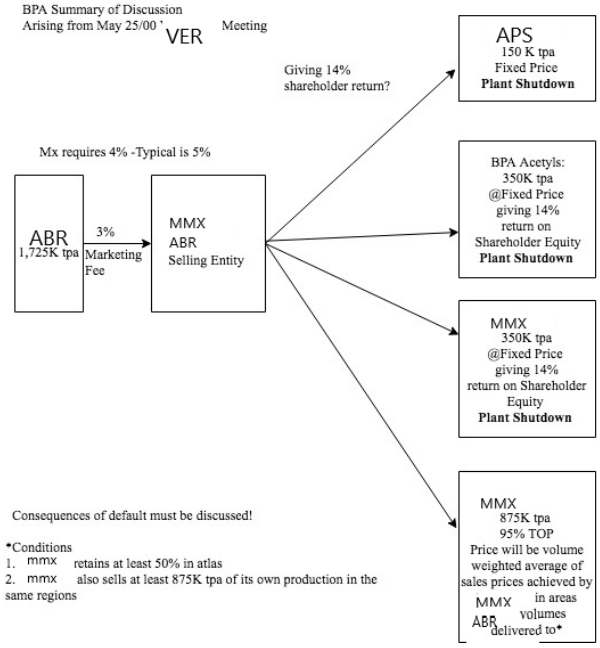
97. *The MMX* ***Internal Memorandum*** *dated 10th May, 2000 at* ***folio A77-A79*** *demonstrates that MMX entry into the AbR Project was in furtherance of this industry restructuring. That document showed that the objective was to close high cost Chemical facilities and to*

[50] **Folio D74**
[51] **Folio D77**

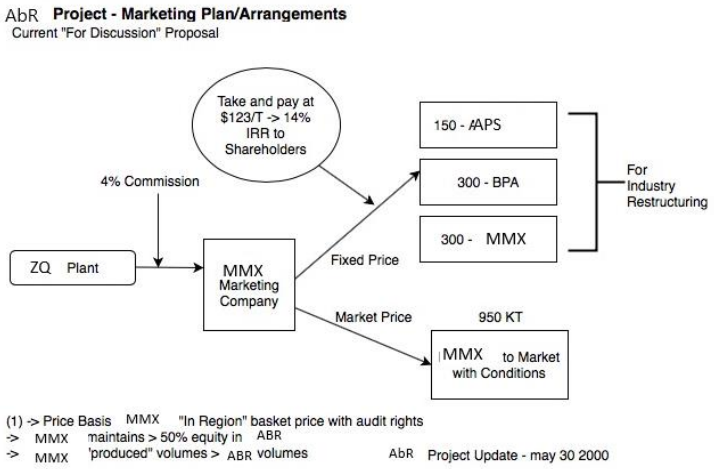
take low cost Chemical from the ZQ Plant thus also preventing the sale of ABR' cheaper Chemical on the market. The documents proposed inter alia:

> ***PDB AM and MMX put together a $50 m fund to restructure the Chem [Chemical] industry at the next down cycle. Funding would be 40:60 (i.e. $20M from PDB AM). Plan would be to buy up 1-1.5MMT of high cost capacity and shut it in.***

98. *This industry restructuring plan was put to Mr. SD in cross examination but he denied any knowledge of such a plan. This denial was however contradicted by the documents in the Statutory Bundle. One such document can be found at* ***folio A84****, a document which contains handwriting stating that it was a PDB-AM (PDB-AM) Summary of Discussion arising from a 25th May, 2000 meeting in Vancouver. On that document is a diagrammatic representation which reflects the particulars of the industry restructuring plan outlined in the MMX Internal Memorandum dated 10th May 2000. The plan was for the purchase of all of the ZQ Plant Chemical by a MMX entity with volumes of Chemical being resold to PDB-AM, MMX and APS at fixed prices with those three purchasers shutting down existing plants. The diagram which included specific references to the FPCs showed as follows:*



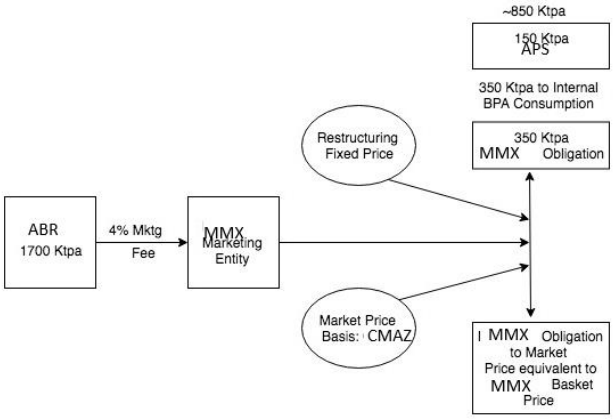
99. *The foregoing is also confirmed by another document at **folio A85** on a page entitled **AbR Project – Marketing Plan/Arrangements – "For Discussion'' proposal**. The diagram on this page proposes new volumes to be taken by PDB-AM, MMX and APS under fixed price contracts which are expressed as being **For Industry Restructuring**. The diagram suggests that the remaining volume resold from MMC is to be sold by MMC with Conditions. The diagram shows as follows:*



100. *The documents at **folios A86-A87** further undermined Mr. SD's feigned ignorance of the industry restructuring scheme. At **folio A86** there is an email dated 24th August, 2000 from Mr.GD of MMX to Mr.CA and Mr. SD both of PDB. Copied on that email are Mr. DG, the witness Mr. WE, Mr. JH and Mr.RM of MMX. In that email, Mr. GD indicates that he had reworked the ABR Marketing/Shipping Principles building on a discussion at a meeting in Houston on 10th August, 2000. Attached to that document is document entitled **ABR Marketing.** That document contained the following information:*

1. ***PDB-AM and MMX each have an obligation to ensure 350 KTPA (thousand tonnes per annum is sold at a "fixed price" for say 10 years.***
2. ***MMX to "manage" restructuring process with PDB-AM fully engaged.***
3. ***Restructuring must target "current operating" capacity.***
4. ***Restructuring costs recouped by MMX from ABR. Target for recovery of any up-front costs within 3 years of startup; annual payments to be self-funding.***
5. ***"Fixed price" set such that "AbR Project":***

- ***Is financeable, e.g. DSCR >1.5***
- ***On 100% equity basis, delivers > $25 M NPV/100M Capex (at 11% cost of capital).***



101. *The structure shown in the above diagram is precisely what was adopted in the AbR Project. It is to be noted once again that the FPCs occupied a prominent position in the diagram. In view of the foregoing, it is submitted that the contemporaneous documentation show that the FPCs were part of an industry restructuring plan amongst the 3 offtakers whereby they would shut down high cost North American plants and take low-cost Chemical from the Appellant. The documents therefore show that the Appellant's parent companies set about on a deliberate scheme to keep the Appellant's price of Chemical low for their own consumption in the case of PDB and APS and for resale at a massive profit in the case of MMX. This is clearly recognized as a consequence of the restructuring and part of MMX's business objections in the Board Paper of July 2001* ***at folio A190*** *by the following note:*

There are three areas where the AbR Project creates value for MMX

- ***Project cash flow;***
- ***MMX marketing commission; and***
- ***Sale of product purchased from ABR, under MMX' fixed price agreement, at market prices***

The Low Cost Strategy

102. *This is the second factor which influenced the use of the FPCs. The intention of both PDB and MMX in utilizing the AbR Project as a low cost strategy is demonstrated by MMX documentation from 2001 immediately preceding the execution of the FPCs. In a slideshow to the MMX Board of Directors on 20th July, 2001 at* ***folio A200****, the MMX Board is specifically told that the AbR Project was pursuing a* ***Low Cost Strategy.*** *The relevant slide stated as follows:*

> **Low Cost Strategy**
>
> - NA Capacity (Including MMX) will continue to Shut down
> - AbR project delivers low cost Atlantic Basin asset
> - Region supply/demand ~0.5 MT long in 2004 and 0.8MT short in 2008, per updated Strategic Mktg Plan

103. *Further, in the* ***Draft News Release***[52] *annexed to the Minutes of the meeting in which the MMX Board of Directors on 28th August, 2001 approved the AbR Project, Mr.PC, President and CEO of MMC is quoted as stating:*

> ***"Our investment in ABR is a significant step in fulfilling our ongoing strategic objective underpinning on increasing sales volumes with low-cost production… We expect that ABR will provide us with another low-cost production hub in a strategic location with abundant natural gas reserves and duty-free access to both the United States and Europe"***

104. *In cross examination Mr. RN of PDB also confirmed that the low cost strategy adopted for this project would provide a cheaper source of supply on Chemical to be used by PDB in its Acetic acid production. He therefore acknowledged the benefit that would accrue to PDB from market restructuring process.*

105. *In view of the foregoing, the Respondent submits that the foregoing documents completely undermine the credibility of the Appellant's witnesses all of whom failed to address the referenced documents in their evidence in chief. Effectively, all of the Appellant's witnesses deliberately attempted to mislead this Honourable Court by failing to direct the Court's attention to these very important pieces of evidence (particularly as*

[52] See Folio A232

it was supportive of the Respondent's case). Instead they deliberately tailored their evidence to support the contentions in the Appellant's Notice of Appeal. Accordingly, the witnesses gave expansive statements in an effort to establish that the FPCs were implemented because they were necessary to secure financing from lenders and to protect against the real risk of a market glut. In fact, none of the Appellant's witnesses were able to produce a single document to support these contentions. Instead the documentary evidence which will be referred to hereunder establish to the contrary.

Myths created by the Appellant to portray the FPCs as commercial agreements

106. *The affidavit evidence proffered by the Appellant purported to create 3 reasons in support of the contention that the FPCs were commercial agreements. First that the FPCs were necessary to guard against the risk of Chemical prices falling significantly by reason of the AbR Project coming on stream. The second is that APS is an independent party. Thirdly, that FPCs were a condition precedent to the approval of the bank finance.*

Exploding the myth of the soft market

107. *One important limb of the Appellant's case is that the FPCs were devised to ensure a stable, predictable and guaranteed source of revenue to service bank loans because at the time it was predicted that there would be a future prolonged drop in the price of Chemical. The Appellant's evidence is that it believed that there would be a future prolonged drop in the price of Chemical because it was anticipated that there would be:*

   a. *a surplus supply of Chemical due inter alia to the coming on stream of production of new plants including M4 and the ZQ Plant; and*

   b. *a decreased demand for Chemical due to the expected phasing out of MTBE in the United States.*

108. *The affidavit evidence put forward by the Appellant on this issue is to be found at* ***paragraphs 116-124*** *of the SD Affidavit,* ***paragraphs 19-28*** *of the RN Affidavit and* ***paragraphs 87 and 88*** *of the WE Affidavit. As already noted, the market restructuring proposed by PDB, MMX and APS involved the closure of several North American plant and the replacement of their Chemical production using newer more efficient low cost Chemical plants. This therefore does not suggest that there would be a surplus of Chemical on the market. In fact, the contemporaneous documentary evidence produced by the Appellant at the Objections stage, but not referred to by the Appellant in this Appeal, plainly demonstrates that neither scenario was anticipated nor likely to occur.*

109. *The Appellant very helpfully provided the Respondent with copies of MMX Annual Reports for the years 1998, 1999, 2000 and 2001. These documents provided sufficient material to track the growth of MMX over that 4-year period. That relevant data extracted from the 4 Annual Reports is set out in the table below:*

	2001 '000 MT	***2000 '000 MT***	***1999 '000 MT***	***1998 '000 MT***
Total Sale Volumes[53]	*7,390*	*6,771*	*6,593*	*6,011*
Internal Production[54]	*5,390*	*5,815*	*5,338*	*4,479*
Purchase/Commission Volume[55]	*2,000*	*956*	*1,255*	*1,532*
Average Realized Price[56]	*172*	*160*	*105*	*120*
Estimated Global Demand[57]	*30,093*	*29,340*	*27,985*	*26,411*
MMX Market share of Global Demand[58]	*26%*	*24%*	*24%*	*23%*

110. *This evidence shows that:*

a. Contrary to the evidence given by the Appellant's witnesses, the Estimate Global Demand for Chemical was quite stable, in fact improving over the 4-year period. There is no hint of volatility;

[53] See folio C368
[54] See folio C368
[55] See folio C368
[56] See folio C371
[57] See Folio H656
[58] See Folio C368

b. By 2001 MMX was supplying 25% of the global demand for Chemical;

c. By the same year MMX was purchasing 2 million metric tonnes of Chemical from third party suppliers to supplement its own production. Effectively, as at 2001 MMX already had sufficient demand to consume all of the ZQ Plant production; and

d. In 2001 when the parties signed the FPCs at a fixed price of US$110/MT MMX was selling its Chemical for US$172/MT.

111. *In fact, the MMX Board Paper dated 20th July 2000 indicates that the purpose of the AbR Project was to fill a 'sourcing gap' for MMX, see* ***folio A185****. This is a reference to the 2 million metric tonnes of Chemical purchase by MMX from third parties. The relevant part of that Board Paper (which was also stated in a document dated headed AbR Project, May 22, 2001[59]) is stated below:*

> ***The strategic plan presented to the Board in September of 2000 identified several options to filling the Chemical sourcing gap starting in 2004, and referred to the AbR Project as one of the routes to meeting this gap. As described in the strategic plan, two of the company's key strategic actions are to … "develop a supply position in Trinidad consistent with projected market needs and, to continue to lead the industry restructuring process'.***

112. *MMX's demand aside, at the material time PDB had the capacity to take 1,000,000 metric tonnes of Chemical per year for its own consumption, see* ***ZQ Plant Disclosure - Item 5*** *on* ***Folio A62****. When APS's demand for Chemical is added[60], the 3 interested parties had a requirement for 3.18 million metric tonnes of Chemical per year in 2000/1. This is substantially greater that the maximum output of the ZQ Plant when operating at full capacity. Having regard to this evidence, the Appellant cannot honestly contend that it anticipated a surplus supply of Chemical due inter alia the coming on stream of production from new plants including M4 and the ZQ Plant. It is for this very reason that*

[59] See **Folio A165**

[60] See **Folio A194-195** – The demand was for 180,000 metric tonnes per year as a consequence of the closure of its Pace Plant the close of which was a condition of its participation in the AbR Project.

the Appellant's witnesses omitted to make any reference to the documents referenced above.

113. *The Appellant's witnesses also sought to rely on the MTBE ban in Lo State and potentially the rest of the United States as a major indicator of the potential for a simultaneous drop in demand for Chemical. That assertion is again false in light of the following statement in the MMX Annual Information Form dated 3rd March, 2001 (at* ***folios D71 to D90 at D77).***

> ***The largest potential for MTBE demand growth is outside the US where there is momentum to phase out lead, benzene and other aromatics from gasoline. Industry consultants expect strong growth in demand for MTBE in both Europe and Asia despite any decrease in demand that may occur in the US.***

114. *Further, at page 4 (**folio D77)** of that document MMX went on to state that following consequence of the industry restructuring:*

> ***As a result, there is little excess supply over demand and it is not expected that this situation is likely to change over the next two years.***

115. *That positive outlook on the Chemical market continued into August 2001 when the MMX Board approved the AbR Project. In a Board Paper dated 20th July, 2001, the Board was presented with the following Chemical Supply/ Demand summary found at* ***folio A 186****:*

Description	***2001 MMT***	***2004 MMT***	***2008 MMT***
Atlantic Basin Supply (Inc. CIS export)	*17.5*	*18.5*	*17.5*
Rest of World Supply	*13.7*	*14.8*	*19.0*
Global Supply	***31.2***	***33.3***	***36.5***
Atlantic Basin Demand	*17.5*	*18.0*	*18.3*

Rest of World Demand	*12.7*	*15.0*	*18.2*
Global Demand	***30.2***	***33.0***	***36.5***
Atlantic Basin Supply/Demand Balance	*0.0*	*0.5*	*(0.8)*
Rest of World Supply/Demand Balance	*1.0*	*(0.2)*	*0.8*
Global Supply/Demand Balance	***1.0***	***0.3***	***0.0***

116. *The foregoing table demonstrates a balancing of the global supply/demand between 2001to 2008 due to greater growth in demand. Importantly, the table takes into account the increase in supply from 2004 resulting from the ZQ Plant productions (i.e. an additional 2 MT per year).*

117. *Remarkably, not a single document provided by the Appellant supports the contention that there was a real threat of a prolonged drop in Chemical prices to a level that threatened the Appellant's ability to either secure financing for the AbR Project or to continue meeting its obligations to the lenders after financing was secured*[61]*. One of expected that such an important issue would be the subject of extensive comment in some Board Paper or memorandum circulating amongst the executives. This must be contrasted with the multitude of documents which show that the purpose of the FPCs was simply to provide PDB, MMX and APS with cheap Chemical in furtherance of their business objectives in the context of the market restructuring exercise.*

118. *In view of the foregoing, particularly with reference to the Board Paper of July 2001, it is clear that the soft market theory is wholly unsustainable. MMX's confident conclusion of deriving a future profit from the resale of low cost Chemical originally purchase under the FPCs is evidence that it knew in July 2001 that the FPC's had been underpriced and that the Chemical market would remain buoyant at least until 2008.*

[61] Not even the CMAZ Report relied on by the Appellant in its written submissions suggests a prolonged drop in methanol prices below $110.00 per metric tonne.

Appellant's reliance on CMAZ Project Report of July, 2001

119. *The Appellant contends that the Chemical prices fixed in the FPCs are not artificial because they are in line with the market prices contained in the CMAZ Project Report of July, 2001. This is highlighted at* ***paragraph 19(b) of the Consolidated Answer*** *in the following terms.*

> ***…The prices agreed in the Offtake agreements are in line with forecasted and actual contract prices reported in 2001 by independent industry experts such as CMAZ…***

120. *Messrs. SD and WE also rely on CMAZ as providing independent confirmation that the fixed price agreed in the FPCs was commercial as it was in line with existing and forecasted prices as at July, 2001. This has also been highlighted in an entire section of the Appellant's written submissions at* ***paragraphs 110-114****.*

121. *The Appellant's reliance on CMAZ's report is misconceived. CMAZ's report of July 2001 was not in existence when the prices of the FPCs were agreed in 2000*[62]*. It is therefore unarguable that CMAZ's report was not the basis on which the parties fixed the FPCs prices. The CMAZ report was not even mentioned in the MMX Board Paper of July 2001*[63] *which was presented to the Board and formed the basis for the Board's decision to approve the AbR Project. Even a cursory examination of that Board Paper will disclose that the emphasis was not on pricing but rather on demand and supply.*

122. *The Court ought to be mindful of the fact that both MMX and PDB are key players in the Chemical industry having influence as producers, marketers and consumers of Chemical. In fact, the evidence in this Appeal clearly established that both companies recognized the extent of their influence because they, together with APS, were confident that they could influence the global supply and ultimately the global price of Chemical. It is therefore submitted, particularly as there is no evidence that CMAZ was aware of their plan to restructure the Chemical market, that MMX and PDB were in a better position*

[62] See **paragraph 46** of the RN Affidavit. Mr. WE said in cross examination that he believed that the prices of the FPCs was agreed in September 2000 whereas Mr. SD said that the prices were agreed in mid 2000.
[63] **Folio A185**

than CMAZ to determine a price for the FPC. This is supported by the evidence in the Board Paper of July 2001 which very clearly shows that MMX was of the opinion that both global demand for and supply of Chemical would increase over the period 2001-2008 (see the table at ***paragraph 115*** *above) with no shortfall in demand or glut in supply. The Court is reminded that in 2001 MMC realized a price of US$172 per metric tonne of Chemical and MMX's intention to resell Chemical at a higher market price. Thus, an average of US$172 is the minimum it ought to have expected to earn per metric tonne over the period 2001-2008.*

123. *Moreover, even if the prices in the FPC matched market prices in July 2001, the fixing of a price for 10 years in an industry such as the Chemical industry is in itself artificial. The Court need only recall the evidence of Mr. WE that predicting prices in the industry was nothing more than a 'guesstimate'.*

124. *At* ***paragraph 86(iv)*** *of its submissions, the Appellant seeks to rely on comments in the CMAZ Report to the effect that the draft FPCs were commercially sound and within industry norms. Those statements are however statements of opinion and are inadmissible unless they satisfy the test for the admission of expert evidence (which they do not). In* ***Kennedy v Cordia (Services) LLP [2016] 1 WLR 597*** *[See Bundle of Authorities at TAB 9], the Supreme Court stated as follows at* ***paragraph 44****:*

> ***There are in our view four considerations which govern the admissibility of skilled evidence:***
>
> ***(i) whether the proposed skilled evidence will assist the court in its task;***
>
> ***(ii) whether the witness has the necessary knowledge and experience;***
>
> ***(iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and***
>
> ***(iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence.***
>
> ***All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of***

others rather than or in addition to personal observation or its equivalent.

125. *The Respondent submits that the opinion evidence in the CMAZ Report must be disregarded by this Honourable Court as it does not satisfy the foregoing test for the following reasons:*

a. The question of whether the FPCs may have been commercial or not is a finding which this Court must make and therefore CMAZ's opinion is irrelevant.

b. It is unclear how those conclusions assist the Court in its task;

c. The Appellant has not condescended to identify the individual maker of the report or the maker's qualifications and to bring that person to be cross examined. Instead the Appellant seeks to rely on a report that is not even signed;

d. It is unclear whether the maker of the statement came to the opinion of commercial soundness whilst viewing the FPCs from the perspective of the Appellant or its parent or from potential lenders who only cared about the Appellant making sufficient income to repay the financing. This Court is concerned with commerciality from the perspective of the Appellant and the Appellant alone;

e. This Honourable Court is not aware of the test for or indicia of commerciality relied on by the maker of the statement in coming to the conclusion that the FPCs appeared to be commercially sound; and

f. This Honourable Court is not aware of the underlying facts known to and relied upon by the unnamed expert however the report notes that it is based on unverified facts[64].

The myth of APS as an independent and unrelated party dealing with ABR at arms' length

[64] See **Folio H554** (4th paragraph from the top)

126. *In his evidence Mr. SD[65] attempts to convey the impression that the MMX and PDB FPCs are not artificial because the Chemical price in those FPCs is the same as the price in the APS FPC; which he says was negotiated at arm's length with an independent unrelated entity.*

127. *The Respondent submits that this attempt to justify the pricing of the MMX and PDB FPCs is at best misleading if not disingenuous. Whilst APS was not a shareholder in the Appellant, it nonetheless was an integral part of the AbR Project to the extent that it should be regarded as party with a vested interest in the AbR Project. This is demonstrated from Appellant's own documentation and confirmed by its own witnesses as set out hereunder.*

128. *APS' involvement in the AbR Project predated that of MMX. In a document entitled* ***ZQ Plant Disclosure*** *dated 29th March, 2000 at* ***Folio A58****, the following information is given about APS:*

> ***g. Oxygen Supply in the XY Plant, ESE is the supplier of oxygen. After consultation with PDB-AM, the management of SMT determined to change its oxygen supplier. For ESE, the XY oxygen plant was its largest project. For Chemical Plant, SMT requires a plant with oxygen capacity of 2,800 tonnes/day compared to 1,500 tonnes/day for XY. APS has three plants of a similar capacity in operation worldwide versus ESE with none. The price of ESE's supply and APS' supply for oxygen was very similar. APS would also become an off-taker for Chemical in the United States for about 180,000 tonnes/year on a 15-year term, and a possible other contract for 50,000 tonnes per year in the U.K. No final contract has been reached although detailed discussions have been conducted. A draft contract is being drafted by APS.[66]***
>
> ***…***
>
> ***b. APS. With APS, SMT has substantially negotiated the supply of oxygen to the AbR Project and the tolling/sale of Chemical to their facilities in RI State (Pace through a to-be configured terminal in MoA State). The Chemical price negotiated including the tolling arrangement, boils down to approximately 36.2 cents per gallon F.O.B. mobile for ten years with a gas inflator thereafter. Price calculations were extremely tough based on the location (landlocked and local consumption). An additional 50,000 could be sold to APS in the U.K.[67]***

[65] See **paragraphs 126-128** of the SD affidavit and **paragraph 95** at the WE affidavit.
[66] **Folio A60**
[67] **Folio A62**

129. *In a MMX slideshow entitled* ***Trinidad – AbR Project – Executive Leadership Team*** *–* ***Tuesday April 25*** *which is dated 25th April, 2000 the APS price is stated to be:*

> ***$109/Tonne FOB MoA State. Includes tolling arrangement on oxygen, shutdown of PcE, plant.***[68]

130. *The FPC offered to APS, with all its attendant benefits, was therefore not influenced solely by market factors but included a tolling arrangement on the oxygen supplied and an agreement that APS would shut down its own Chemical production facility in Ma State. The detailed terms of this tolling arrangement were never disclosed to this Honourable Court or the Respondent.*

131. *Subsequent to the MMX takeover of SMT, the MMX Executive Leadership Team's* ***("ELT")*** *paper entitled* ***AbR Project – May 22, 2001***[69] *provides further details of the extent of APS' involvement in the Project. According to that paper:*

> ***8.3 Oxygen Contract***
>
> ***When MMX became involved in the AbR Project, significant discussion and negotiation between SMT/PDB and APS had already been completed, including an arrangement where the supply of oxygen was linked to a Chemical off-take agreement to replace APS' MA State Chemical plant. Initial MMC reaction to this arrangement was quite negative, and we pressed PDB to abandon this approach. However, PDB was not prepared to abandon APS at this advanced stage but did agree to work with MMX to obtain improvements in several critical areas.***[70]
>
> ***…***

132. *That document went on to describe the arrangement which would be made for the supply of oxygen by APS to the AbR Project. It stated:*

> ***The Air Separation Unit will be located immediately adjacent to the ABR Chemical plant and will use utilities (including high-pressure steam to drive the air compressor) from ABR…***[71]

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[68] **Folio A71**
[69] **Page 1 of that document is at Folio A165 and the remainder of the document continues from Folio A170**
[70] **A177**
[71] **Folio A178**

APS was responsible for meeting the cost of construction of the Air Separation Unit. There is no evidence of the cost of this plant but in cross examination Mr. RN said that he thought that it was in the range of US$100 million (although US$100 million was a little high). APS was therefore making a massive investment in Air Separation Unit primarily for the benefit of the AbR Project.

133. *In the MMC Board Paper entitled* ***AbR Project – MMx Board of Directors, July 20/01*** *which followed, the ELT provided the MMX Board of Directors with the following key features of the arrangements with APS*[72]*:*

> ***5.3 Oxygen Agreement***
>
> ***The Oxygen Agreement with APS calls for an "across the fence" arrangement with ABR. In this arrangement, APS (or an Affiliate) will design, build and operate the Air Separation Unit for a 20-year term in exchange for specified monthly fee. Negotiations with APS on an "across the fence" oxygen supply Agreement are essentially complete, as are the details of a Letter of Intent (LOI) between APS, ABR, and the ABR Sponsors PDB and MMX. The major outstanding issue is the finalization wording on a Parent Guarantee from APS Inc. to cover its obligations under the Oxygen Agreement.***
>
> ***Regarding the LOI, the purpose of this document is to commit APS to proceed with the construction of the Air Separation Unit as required by the main Oxygen Agreement. The LOI also obligates MMX and PDB to reimburse APS' cost if the project is cancelled… In addition, the LOI specifies that the execution of the Oxygen Agreement is contingent on completion and execution of the APS Chemical Sales Agreement. This agreement is further described in Section 5.4.***
>
> ***5.4 Marketing & Shipping Agreements***
>
> ***There is a total of five agreements in this category. The primary Chemical Sales Agreement is between MMC (MMC) and ABR where MMC has the rights and obligations to market all of the ABR Chemical production over a 15-year term in exchange for 4% marketing fee…***
>
> ***The remaining three marketing agreements are summarized as follows:***
>
> - ***MMC / PDB fixed price Agreement…***

[72] **Folios A194-195**

- ***MMC / MMX fixed price Agreement…***

- ***MMC / APS fixed price Agreement (15-year term) for the long 100% of APS' captive consumption in the Atlantic basin and 180KT/year at US$125/T Delivered Ex-ship (DES) UEFC for the first 10-years, then UST 130/T for the last 5-years. This is a "Requirements" contract to meet APS' internal Chemical consumption needs due to the shutdown of their Florida Chemical plant…***

The fifth agreement in this section is the Shipping Agreement between MMC and waterfront.

134. *APS' involvement in the Project was also detailed in the Confidential Information Memoranda issued to potential lead arrangers for the financing in November, 2001*[73] *and to investors in July, 2002*[74]*. Those documents demonstrate quite clearly that although the Appellant sought to obtain financing for the plant, what was being advertised to potential lenders was the AbR Project in which APS played a critical role, see* ***folios H207 and H226-228****. That document also revealed the particulars of the APS subsidiary which would be used to supply oxygen to the plant:*

> ***"GUI ("GUI"), a company formed by APS (APS"), will supply the Project with oxygen, nitrogen and instrument air under a 20- year supply agreement. APS will guarantee GUI's material obligations under such supply agreement. The contractual obligations of GUI under the oxygen supply agreement are backed by US$20 million in liquidated damages, and an obligation to spend US$20 million over and above the original amount spent during the design, construction and installation of the Oxygen Plant, to modify the Oxygen Plant to meet certain minimum test requirements."***

135. *APS was so intimately connected to the AbR Project that the prospective lenders (GE Capital and Hancock) for the financing of the air separation facility requested and were granted the opportunity to conduct a due diligence exercise on the AbR Project, see item 7 on* ***Folio A167.*** *In fact, in recognition of its key role in the AbR Project, both APS and GUI are described as a Major Project Parties in the Master Loan Agreement which was executed for the financing of the Project on 13th December, 2002, see* ***Folio F95.***

[73] **Folio H1**
[74] **Folio H192**

Conclusion

136. *In view of the all of the foregoing, it is submitted that the Appellant's witnesses' description of the APS FPC as an arm's length agreement was intended to mislead this Honourable Court. That evidence conveniently ignores APS involvement in the proposed industry restructuring, its massive investment in the AbR Project and the quid pro quo pricing arrangements. Quite startlingly, even though there were multiple references in the disclosed documents to the antecedent agreements, the Appellant made absolutely no effort to disclose the terms of those agreements. This only makes sense if, as the Respondent submits, those agreements are consistent with the Respondent's case that APS was not an independent or unrelated party vis-à-vis the AbR Project. The APS FPC cannot therefore be described as a commercial agreement, influenced purely by market forces, between persons acting independently. Accordingly, it is submitted that the APS FPC is no yardstick by which the other FPCs should be measured for their commerciality.*

Myth that FPCs were necessary in order to obtain financing

137. *One of the main themes of the Appellant's case is that the FPCs were necessary in order to obtain project financing. Mr. SD deposed as follows:*

> ***95. EF Group, advised that in light of prevailing Chemical conditions at the time, fixed price offtake contracts would greatly increase ABR' chances of obtaining project financing…At a minimum, they thought that their use would ensure that ABR obtained better terms.***
>
> ***118. ABR gave up the potential upside (for that portion of its sales) in exchange for the security of guaranteed revenue – itself a pre-requisite of getting the plant built at all as advised by EF in paragraph 95 above.***
>
> ***125. …In particular, many within PDB thought that the price was too high but that it was needed to get the project done.***

138. *On the other hand, Mr. WE while lukewarm at first, evinced increasing fervor for the narrative as his affidavit progressed. He deposed as follows:*

79. The FPCs were <u>helpful</u> to allow ABR to demonstrate to potential lenders that it would be able to service its debt…

81. …Moreover, MMC recognized that signing up to the FPC as a purchaser of ABR' was <u>necessary</u> in order that the AbR Project could attract financing, without which it would not go forward…

97. … Since having these long term FPCs were <u>crucial</u> to the AbR Project obtaining project financing…

139. *The Appellant's contentions that the FPCs were necessary, that EF advised that they would increase the prospect of obtaining financing or that they would at least result in obtaining better financing terms are not borne out by the documentary evidence and conflict with other statements made by the Appellant's witnesses as demonstrated hereunder:*

a. *Both Mr. SD and Mr. MP said that the risk associated with falling Chemical, specifically that it could jeopardize the Appellant's ability to liquidate the debt, would have been addressed by having a* ***floor price*** *for Chemical, (see* ***paragraph 67(iii) of the SD Affidavit*** *and* ***paragraph 17(i) of the MP Affidavit****).*

b. *The FPCs did not contain provisions for a floor price but fixed the price of Chemical. In the case of a floor price contract, the contractual price of Chemical is allowed to move with the market down to a floor and is not fixed. Such a contract may also have a ceiling price providing the buyer with a discount when the market price of Chemical is high. Such a contract would provide the seller with a minimum Chemical price when the market price of Chemical is low and the buyer with a discounted price when the market is high.*

An example of such a contract is the SCC Corporation and CEL Ltd at ***Folio D430*** *which is considered hereunder. In cross examination, Mr. MP confirmed that the issue of market volatility would have been addressed by a contract with a floor price. He then went on to state that there were alternative arrangements which could have been adopted by Appellant to satisfy the lenders. Accordingly, the assertion that the*

FPCs were necessary to demonstrate to potential lenders that ABR would earn the minimum amount to service the debt is unfounded.

c. *Mr. SD, Mr. WE and Mr. RN deposed and then confirmed in cross examination that the FPCs had been confirmed for use in the AbR Project since 2000[75]. Accordingly, when EF was retained on 18th April, 2001[76], it was presented with an existing structure and was asked to advise on the financing for that structure. Prospective lead arrangers and financiers who received packages in November, 2001[77] and July, 2002[78] respectively were asked to finance the particular structure which had been decided upon by the Appellant's shareholders.*

d. *In fact, that structure could not have been altered by the lenders as admitted by Mr. SD at* ***paragraph 81 of his Affidavit****. In that paragraph the witness deposes that the AbR Project could not go forward unless it complied with the Project sanctioning framework referred to at* ***paragraph 75*** *of his Affidavit. That project sanctioning framework included the use of the FPCs, see* ***paragraph 74*** *of his Affidavit.*

e. *With regard to* ***paragraph 40*** *of the Appellant's submissions on this issue, the Respondent submits as follows:*

i. *Contrary to what is suggested at paragraph 40 of the Appellant's submissions that minutes of kickoff meeting[79] that the pricing of the FPCs and the tenor were matters advised by EF, this is not the case. In this regard, this Court is asked to ignore that disingenuous and misleading submission and focus on the fact that prior to EF coming on Board in April, 2001, the Appellant had already submitted an economic model[80] to TIDCO some 2 months before in February, 2001, its application for the grant of fiscal incentives which showed that both price and tenor of the FPCs. The Appellant's contemporaneous*

[75] The use of FPC had been confirmed even before SMT sold its interest in the AbR Project to MMX
[76] See **Folio A160**
[77] See **Folio H2**
[78] See **folio H192**
[79] See **A167**
[80] AbR Project Economic Model used in TIDCO Application, February 28th 2001, see **folio A114 at folio 115**.

documentary evidence therefore demonstrates that price and tenor of the FPCs had been agreed and settled prior to EFs involvement in the Project.

ii. *With regard to the superior Project Financing knowledge of the Appellant's Attorneys (as reflected in paragraph 38 of the Appellant's submissions), they ought to be aware that where lenders agree to finance a particular project structure, the loan documentation which will follow will invariably require that the particular project structure which it has agreed to finance will remain unchanged. In this regard, this Court should recall that the project structure had been decided upon and settled well in advance of approach to the lenders in November, 2001 and even before financial advisers EF were brought on board in April, 2001. Accordingly, the submission that because the financing documents made the FPCs a condition precedent to the completion does not in any way assist the Appellant.*

f. *As the FPCs were conditions precedent to the Project proceeding, Mr. SD's suggestion that EF advised that the FPCs would greatly increase the Appellant's chance of obtaining financing at* ***paragraph 95 of his Affidavit*** *is false. Despite the suggestion to the contrary at paragraphs 94-95 of the Mr. SD Affidavit, the AbR Project- Financial Advisor Kick Off- Meeting Notes at* ***folios A166 – A169*** *do not contain any advice that the FPCs would increase the Appellant's chance of obtaining financing or would ensure that it would receive better terms as suggested at* ***paragraph 95 of SD's Affidavit****. In fact, not a single document in the Statutory Bundle contains such advice. Indeed, quite to the contrary the* ***ABR Chemical – Preliminary Financing Guidelines*** *at* ***folios A328-331*** *show that the FPCs were regarded as inimical to the term of the financing. The fact that this feature was inimical to the Appellant is demonstrated by the following statement by the EF, in the* ***ABR Chemical – Preliminary Financing Guidelines*** *at* ***folios A328****:*

> ***EF currently expects the tenor of the senior debt financing to be construction plus 10-12 years. The primary limiting factor for achieving a substantially longer tenor will likely be the absence of correlation between the price of the price of the project's main feedstock, natural gas, and the price of Chemical. Although ABR' gas***

price formula has a Chemical price factor embedded in it, the sliding floor price limits such relationship to the upside. Typical commodity driven projects in which the price of the feedstock and product are highly correlated can usually achieve the longest tenors.

Conclusion

140. *In view of the foregoing, it is submitted that another main plank of the Appellant's case for justifying fixing the Chemical price for 10 years (i.e. that it was necessary in order to obtain bank financing as advised by EF) is wholly unsupported by any documentary evidence. It is a contrived attempt to infuse an element of commerciality into the FPC Scheme which are agreements created in furtherance of the business interests and objectives of both MMX and PDB without regard to the interests of the Appellant.*

FPCs imposed on ABR by its two shareholder Companies

141. *The Appellant's own case is that the use of FPCs had been decided on while SMT was a party to the Project and the fixed price of the Chemical had been decided since 2000. Up to that point, the Appellant was nothing more than a shelf company. Its directors were still nominees of SMT. It was not until 27th April, 2001 that the Appellant changed its directors to employees of MMX and PDB[81] (Messrs. GD and SD) and issued shares to MMX and PDB[82]. This state of affairs continued throughout the negotiation of the remaining terms of the FPCs and even after the FPCs had been executed on 29th August, 2001. Indeed, the Appellant seemingly only became fully alive at the meeting of the Board and Special General Meeting which were both held on 19th September, 2001.*

142. *The Respondent relies on* ***paragraph 38*** *of the Appellant's written submissions as an admission that the Parent Companies imposed the FPCs on the Appellant. The Respondent however takes issue with* ***paragraph 85 of the Appellant's*** *submissions which attempt to confuse the realities of the AbR Project. The Appellant submits as follows:*

[81] See **folio A158**
[82] See **folio A161**

a. *The Appellant* ***is not a party to any of the FPCs****. The parties to the FPCs were MMXx, a wholly owned subsidiary of MMX, and the various offtakers. It is misleading to suggest, as the Appellant seeks to do, that someone negotiated the FPCs on behalf of the Appellant. The reality is that the FPCs were negotiated without reference to or input from the Appellant. In this regard the Court is reminded that Mr. SD, Mr. WE and Mr. RN participated in the AbR Project as officers of either MMX or PDB but not as officers of the Appellant. Accordingly, it was MMX and PDB that decided on the structure of the AbR Project, the pricing of the FPCs, etc. This was confirmed by Mr. SD in the following exchange with Senior Counsel for the Respondent:*

> ***Q. If you were in business for profit would you be comfortable having locked yourself into a fixed price for 10 years to have your production cost escalate with your major feed stock?***
>
> ***A. Well we had half at market.***
>
> ***Q. I'm not concerned with half at market. Would you be comfortable with that?***
>
> ***A. I would be comfortable, I recommended that. In this case I recommended that.***
>
> ***Q: Recommended it on behalf of whom.***
>
> ***A. PDB.***
>
> ***Q. ABR was not represented at all in this process?***
>
> ***A. ABR was by its members.***
>
> ***Q. By its members?***
>
> ***A. Its shareholders.***

The fact that the Appellant was a captive company and that the FPC were imposed upon it by its shareholders is admitted at paragraph 83 and 84 of the Appellant's submissions.

b. *The Appellant was only a party to the Chemical Sales Agreement between itself and MMX. The Appellant's argument of independence and arm's length dealing rings hollow when one considers who executed the FPCs and the Chemical Sales Agreement for an on behalf of the contracting parties. The PDB Offtake was executed by Mr. SD and Mr. GD on behalf of PDBO. The MMC Offtake was executed by Messrs. DG and RM on behalf MMX and MMC. The Chemical Sales Agreement was executed by Messrs. SD and GD on behalf of the Appellant and by Messrs. RM and DG on behalf of MMX. In these circumstances, how could it seriously be contended that anyone acted independently in the interests of the Appellant in relation to the Chemical Sales Agreement and by extension the FPCs?*

c. *This Honourable Court ought to reject the Appellant's continued reliance on the unequal shareholding of PDB and MMX as demonstrating arms' length dealings. The fact is that MMX had identified 3 source of value creation in the AbR Project* ***for itself****. These were identified in the MMX Board Paper July 2001 in the following terms:*

> ***There are three areas where the AbR Project creates value for MMX***
> - ***Project cash flow;***
> - ***MMX marketing commission; and***
> - ***Sale of product purchased from ABR, under MMX' fixed price agreement, at market prices***

The Respondent respectfully submits that there was a fourth source of value creation for MMC, as MMX was providing exclusive shipping services for the AbR Project[83]*. These additional avenues of value creation meant that MMX was deriving a higher earning than PDB from the AbR Project.*

143. *In view of all of the foregoing, the Respondent submits that the evidence quite clearly demonstrates that the Appellant was a mere captive and that the FPC Scheme was imposed on it by MMC and PDB in circumstances where the parties could not have been operating at arm's length.*

[83] **Paragraph 138** of the SD Affidavit

Other Chemical Sales Agreements do not assist the Appellant

144. *The Appellant further sought to rely on 3 Chemical sales agreements in the Statutory Bundle for the purpose of suggesting that the FPCs were normal or common place. Those agreements are as follows:*

a. An agreement between SCC Corporation and CEL Ltd at ***Folio D430-D446****;*

b. An agreement between RAC CO. and SMT LLC at ***Folio C1- C18****;*

c. An agreement between ACX Corporation and SMT LLC at ***Folios E18-E38****;*

145. *An examination of the agreement between SCC Corporation and CEL Ltd however demonstrates that it is not in fact a fixed price contract but a contract containing a floor and ceiling price with a fluctuating Chemical price, see* ***Folios 434-435****. In the case of a contract containing a floor price, the price of Chemical is not fixed but is allowed to move with the market down to a particular minimum or floor price. Such contracts will often contain a ceiling price so that the price of Chemical can move up to the maximum or ceiling. The price of Chemical is therefore tied with a market price between a particular range. In such contracts there is a distribution of risk as the seller is protected by the floor price whilst the buyer is protected by a ceiling price. Such a fair balancing of the risk did not occur in relation to the FPC Scheme. Instead the Appellants ultimate shareholders committed it to sell low price Chemical for their own benefit (and the benefit of APS).*

146. *The other 2 Chemical sales agreements appear to be contracts used for the sale of Chemical produced by the XY Plant. The Appellant's reliance on these contracts is however misconceived for the following reasons*

a. *The RAC FPC was for 5 years[84];*

b. *The evidence as to the 2 purchasers of Chemical in these contracts is to be found at* ***paragraph 39*** *of the* ***SD Affidavit****. The witness does not depose whether or not the buyers under these contracts were in fact independent of XY and its investors. Having regard to Mr. SD's evidence that the APS FPC was an arm's length agreement, the Court must be cautious not to accept any invitation by this witness to infer that these entities were independent.*

c. *The circumstance surrounding the XyT Project were markedly different and therefore what may have been commercial necessity for that project did not exist with the AbR Project. The differences between the ABR and XyT Project are as follows:*

i. *Mr. SD's evidence is that the initial sponsors of the XyT Project, SMT with 10% and Investment entity AoN Group with 85% [85] were startups in the Chemical industry[86] with no established track record. AM purchased a mere 10% stake in XY from AoN[87]. This was AM's introduction to Chemical production[88]. In the case of ABR, the Project was being undertaken by leaders in the industry who brought greater financial credibility[89]. MMX was the world's largest producer and marketer of Chemical. The PDB Group is one of the largest petroleum and petrochemical companies in the world. PDB Chemicals was one of the top 3 consumers of Chemical in the world. APS was one of the world's largest producers of methylamine, which is produced from Chemical. In view of the foregoing, while lenders may have required XY to pre-sell a portion of its Chemical in order to ensure that its debt could be repaid, the position would not have been the same with ABR.*

[84] **Clause 3 at folio C3**
[85] **Paragraph 21** of the SD Affidavit
[86] **See also paragraph 33** of the SD Affidavit
[87] **Paragraph 30** of the SD Affidavit
[88] **Paragraph 23** of the SD Affidavit
[89] **Paragraph 150** of the Charpentier Affidavit

ii. *XY sponsors were not producing Chemical for their own consumption whereas MMX, PDB and APS undertook the AbR Project in order to shut down their high cost sources and to supply low cost Chemical to themselves. The Appellant's Chemical would therefore always have a market.*

iii. *The ZQ Plant was significantly larger XY. The former produced 5,000 metric tonnes of Chemical per day whereas the latter produced half that amount, see* ***paragraph 47(i) of the SD Affidavit.*** *Fifty-two percent of the Appellant's Chemical (i.e. 2,600 metric tonnes per day) was committed to fixed price contracts whereas only 25% of the XY's Chemical (625 metric tonnes per day) was committed to long term fixed price contracts, see* ***paragraph 37 of the SD Affidavit.***

In view of the foregoing, it is submitted that the commercial realities of the 2 projects are so different that this Honourable Court must reject the attempt to use XY as justification for the FPC Scheme in the AbR Project.

147. *Finally, on this issue, the Respondent submits that* ***paragraph 86(i) of the Appellants*** *submissions ought to be disregarded. The Appellant is not only speculating as to the FOB Pt Town price of US$98 but it is relying on the price fixed in the contract in 1997. How could the Appellant make such an argument when its entire case is based on the argument that the commerciality of the fixed price must be tested in the year of execution of the agreement?*

Findings of Fact

148. *Having regard to the foregoing, it is respectfully submitted that this Honourable Court ought to make the following finds of fact:*

a. Time of submission of barrage of documents by the Appellant

i. *The multiplicity of documents which have been referred to hereinabove and which the Appellant has submitted as not considered by Deann Surujbally*

Gomez were only provided by the Appellant long after the Explanation of Adjustments were provided and the Notice of Assessment raised on 29th December, 2011.

b. Nature of FPCs

ii. *Chemical is normally sold at a price determined using a formula incorporating the market price at the time of shipping.*

iii. *A small percentage of the global supply of Chemical is sold using FPC's not exceeding 12 months in duration.*

iv. *FPCs exceeding 12 months' duration are not common commercial arrangements in the Chemical industry they are therefore unusual and abnormal.*

v. *The FPCs in this case, having a duration of a minimum of 10 years, are not common commercial arrangements.*

c. FPCs and the market restructuring exercise

i. *In the 1990s and early 2000's* ***("the material time")*** *MMX was engaged in an industry restructuring drive; closing down high cost Chemical plants in North America and replacing them with low cost plants.*

ii. *At the material time, MMX was the world's largest producer and marketer of Chemical and PDB was one of the top 3 consumers of Chemical in the world.*

iii. *MMX's purpose entering the AbR Project was to further its industry restructuring drive.*

iv. *MMX, PDB (the Appellant's 2 ultimate shareholders) and APS implemented the use of the FPC Scheme to inter alia facilitate the said industry restructuring and to allow:*

1. *PDB and APS to purchase Chemical for consumption in their own manufacturing plants at a price below the market price; and*

2. *MMX to purchase Chemical below market and to resell on the global market at a profit.*

d. Price of Chemical at material times

i. *MMX, PDB and APS agreed the selling price of the FPCs in 2000.*

ii. *When the FPC prices were agreed by PDB, MMX and APS in 2000, MMX was already receiving an average price of US$160 per metric tonnes.*

iii. *When the FPCs were signed on 29th August 2001, MMX was receiving an average price of US$172 per metric tonnes.*

iv. *In income year 2005 the average basket price of Chemical was US$208.00 per metric tonne.*

e. Exploding Myths created by the Appellant

i. *As at August 2001 MMX knew and accordingly, PDB and/or APS ought to have known that both demand and supply of global Chemical would increase during the period 2001-2008 so that there would not be a glut of supply in that period.*

ii. *Furthermore, as at August 2001 PDB, MMX and APS had the capacity to utilize all the Chemical to be produced annually by the ZQ Plant once it commenced production.*

iii. *PDB, MMX and APS did not determine the selling price in the FPCs by reference to the CMAZ Report as is suggested because this report is dated July 2001.*

iv. *MMX was always aware that it would make a profit from the resale of Chemical purchased under the FPCs.*

v. *MMX was therefore aware that the price of Chemical fixed under the FPCs was below the market price so that Chemical purchased thereunder could be resold for a profit.*

vi. *The prices in the FPCs were therefore knowingly fixed below market price.*

vii. *The FPC were not required by any lender as a condition precedent to financing.*

viii. *The use of FPC's had been agreed upon prior to EF coming on board as financial adviser to the AbR Project.*

f. Appellant as a captive entity for its shareholders and interested party

i. *At all times during the negotiations to set the selling price in the FPCs, the Appellant was unrepresented.*

ii. *The Appellant was not a party to the FPCs.*

iii. *That the price of Chemical taken under the FPCs was imposed on the Appellant by its ultimate shareholders.*

g. APS

i. *APS invested a substantial sum of money in the construction of the Air Separation Facility and in doing so incurred a substantial debt.*

ii. *That the financiers of the Air Separation Facility were allowed to conduct a due diligence on the AbR Project.*

iii. *APS ability to finance the debt was contingent upon its relationship with the AbR Project.*

iv. *Neither the Air Separation Facility nor the ZQ Plant could survive without the other.*

v. *APS was involved in the market restructuring exercise and its FPC was tied to the closing of its Chemical production facility in PcE, MA State as well as a tolling arrangement.*

vi. *Contrary what was suggested by the Appellant's witnesses, APS was not an independent and unrelated party in relation to the AbR Project.*

Consequences as a matter of law

149. *In light of the evidence, both oral and documentary, it is respectfully submitted that:*

a) The APS FPC was not an arm's length transaction and does not provide a basis for contending that the other FPCs were commercial agreements at arms' length.

b) The 3 FPCs at issue in this case when combined with the MMx Agreement are to be disregard as artificial transactions within the meaning of ***section 67 of the ITA****.*

c) The Respondent was entitled as a matter of law by way of an additional assessment under ***section 83(2) of the ITA*** *to increase the Appellant's sales revenue for the income year 2005 by TT$439,183,000.00 both on the basis of* ***section 67*** *and the* ***Sharkey v Wernher Principle****.*

The Fiscal Incentives Act Chapter 85:01 ("FIA")

150. *At* ***paragraphs 141 to 150*** *of the Appellant's written submissions it is being contended that the Respondent had no power to raise an additional assessment as it has done under* ***Section 83 (2) of the ITA*** *because of the* ***Fiscal Incentive Order ("FIO")*** *made in favour*

of the Appellant granting it total and partial relief from corporation tax. The core of that submission is to be found at ***paragraph 147*** *where it is stated as follows:*

> ***Since in accordance with the incentives order there could be no charge to corporation tax on the first two annual returns filed by ABR, the corporation tax returns filed by ABR in both 2005 and 2006 were nothing more than pro forma returns to which the assessment procedure in Section 83 (1) of the ITA did not apply. There being no charge to corporation tax, there was no need for an assessment by the Respondent nor for the Respondent to refuse to accept the return under Section 83 (2) (b) and a determination of the relevant chargeable profits.***

Respondent's Response

151. *In response to the Appellant's submissions the Respondent says that they are wholly misconceived. This is because the FIO does not relieve the Appellant from the charge to corporation tax. Instead what the FIO does is to deal with a reduction in the rate payable in relation to corporation tax. It reduces the rate in the first two years to zero.*

152. *The Respondent now sets out hereunder the detailed reasons why the Appellant's submissions on this issue are without legal merit. They are as follows:*

a) *That upon a true construction of the FIO and the relevant provisions of the* ***FIA*** *(in particular* ***Sections 23 to 27****), it is clear that there has been no abrogation of the statutory obligations of the Appellant from compliance with the provisions of the* ***Corporation Tax Act*** *to pay corporation tax on its chargeable profits pursuant to* ***Section 3*** *thereof.*

b) *That the FIO does not confer upon the Appellant an exemption from corporation tax. Instead what the order taken as a whole does is to provide total relief for the first two years and then partial relief for the following eight years on a sliding scale. The essence of that relief is that the rate chargeable is only for first two years and then in the subsequent years it increases. This is very clear from* ***paragraph 4*** *of the* ***FIO****. Further the fasciculus of sections (i.e.* ***23 to 27 of the FIA****) which are headed "****Corporation Tax Provisions"*** *headed as* ***Part IV***

proceed on the basis that the liability of a taxpayer who is being granted relief as an approved enterprise under the FIA remains alive and the statutory obligation to file corporation tax returns is undiminished and is not truncated in any way. In that regard it is to be noted as follows:

i. ***Section 23 (1) of the FIA*** *begins with the words* ***"In computing the profit of an approved enterprise for the purpose of relief from corporation tax under Section 5 (1) (a) (i)…***

ii. *Similarly,* ***Section 26 of the FIA*** *the side note of which reads* ***"Profits for accounting period to be apportioned"*** *clearly proceeds on the basis that during the tax holiday period or a period of total and partial relief the taxpayer entitled to those benefits is still obliged and required to compute the profits of the business.*

iii. *Similarly,* ***Section 27,*** *the side note which reads* ***"Allocation of outgoings and expenses"*** *is in the same vein. This is because one cannot arrive at the computation of outgoings and expenses unless the taxpayer has computed his profits within the context of filing a full-fledged tax return.*

iv. *Finally,* ***Section 24 of the FIA,*** *the side note of which reads "****Losses may be carried forward for the purposes of set off****" makes it very clear that the taxpayer who enjoys benefits of an approved enterprise is permitted within limits to carry forward losses incurred in his business and to set off same against the income in the subsequent year. Such an exercise can only be undertaken where the taxpayer has filed a return showing the income against which the losses are to be set off.*

153. *In view of the foregoing the Respondent submits that a zero rate of corporation tax has been conferred on the Appellant for the years of assessment 2005-2006 does not result in the diminution of the statutory obligation to file a full tax return or entitle it to file some form of proforma which is unknown to law under the* ***Income Tax Act*** *or the* ***Corporation Tax Act****. The Appellant's business remains within the provisions of the* ***Corporation Tax***

Act *and the only effect of the total relief given in the first two years is that the rate is zero.*

154. *Further the Appellant is entitled during those two years if it has losses incurred (as the Appellant claims in this case) to carry forward those losses and set them off against future chargeable profits. This is certainly a step which this particular Appellant would have been entitled to take. The difficulty for this Appellant in this case is that the losses which it is claiming are being treated by the Respondent as grossly inflated and to be disregarded under* ***Section 67 of the ITA*** *and the* ***Sharkey v Wernher*** *principle. This case demonstrates that the foregoing weapons can be used to curb and counteract a potential abuse of the carrying forward of losses. That potential abuse arises under* ***section 24 of the FIA*** *which provides as follows:*

> ***24. (1) Notwithstanding section 16 of the Income Tax Act but subject to subsection (2) of this section, on the expiration of the tax holiday period of an approved enterprise which enjoyed a benefit under section 5(1)(b), the net losses incurred by the enterprise during that period in respect of its approved product shall—***
>
> > ***(a) be carried forward; and***
> >
> > ***(b) without any limitation as to the amount of the set-off, be set-off in computing the chargeable profits of the approved enterprise for the five-year period immediately following the tax holiday period.***

155. *This case illustrates the opportunity for substantial abuse by utilizing the carrying forward of losses which can be set off under chargeable profits as is provided for under* ***section 16 of the ITA****. Those losses can be unjustified and inflated as a Respondent is contending in this case and result in the taxpayer not having to pay any corporation tax for an extended period of time into the future. It is that mischief which the Respondent is seeking to extinguish in these proceedings.*

Respondent's Concessions

156. *During the course of the trial, the Respondent indicated to this Honourable Court that it was not going to pursue the assertion at **paragraph 20** of the Consolidated Statement of Case filed on 3rd October, 2014 that:*

> ***"It was also observed that the fixed prices were seen at times to be lower than the cost of natural gas used in the production of Chemical."***

157. *That assertion was one of the several grounds on which the Appellant was contending that the FPC Scheme was artificial within the meaning of **section 67 of the ITA**. Even a cursory reading of the Explanation of Adjustments set out in **paragraph 31** above will disclose that the Respondent was relying on multiple indicia of artificiality in support of its assessment. Accordingly, the Appellant's suggestion at **paragraphs 61 and 62** of its submissions that by abandoning the assertion at **paragraph 20 of the Consolidated Statement of Case** the Respondent has conceded the Appeal is wholly without merit and should be rejected.*

158. *The Respondent concedes that the provisions of the **Petroleum Taxes Act** are not applicable to the Appellant.*

159. *Finally, the Respondent agrees the Appellant's appeal against its decision on the Green Fund Levy Liability should be allowed.*

Conclusion

160. *In the premises for the reasons herein set out above the Respondent respectfully submits that this appeal ought to be dismissed.*

D. REPLY OF THE APPELLANT

21. The Reply of the Appellant as filed on the 16th December 2019 was in the following terms: -

1. The Appellant makes these submissions in reply to the submissions filed by the Respondent on 25th November 2019.

2. *The Respondent submits that the central issue in this case is whether the ABR fixed price contracts can be disregarded on the ground of artificiality under section 67 of the ITA and the principle established in the case of* ***Sharkey v. Wernher****. We note that notwithstanding the centrality of this issue, neither artificiality under section 67 nor the principle in* ***Sharkey*** *were ever put forward in the explanation of adjustments or the notice of determination of the objection, notwithstanding the request by the Appellant for the Respondent to identify the legal basis for its decision. In any event, we note that the auditor who dealt with the assessment never indicated that she was relying on these bases but instead was resolute in her testimony to this Court, that she was not of the view that the ABR fixed price contracts were artificial but that they were fictitious.*

3. *For the reasons set out in more detail below, the Appellant respectfully submits that the Respondent's submissions are flawed and should not be accepted for the following reasons:*

   (i) The Respondent's submissions with respect to the fixed price contracts being artificial:

   (a) Are based on a misapplication of the principles in the case law, and in particular conflate the concepts of "unusual" with "unnatural";

   (b) Contradict the evidence from the Respondent's own witnesses, and in particular the auditor who assessed the Appellant to additional corporation tax and who confirmed that the fixed price contracts were not artificial but were sensible commercial arrangements;

   (c) Misconstrue and distort the evidence that is before the Court;

   (d) Seek to support the Respondent's position by relying on irrelevant considerations;

   (e) Omit key facts and fail to consider or to give any or any sufficient weight to a number of relevant considerations.

   (ii) The Respondent's submissions in relation to whether the Respondent can impute income to the Appellant are based on a misapplication of the case law and result

in the Respondent purporting to exercise a power that was not vested in it under the Income Tax Act ("ITA").

4. *The Respondent's submissions are set out in the following sections:*
   - *(i) Undisputed Background*
   - *(ii) Natural Inferences to be drawn from the correspondence passing between the Appellant and the Respondent;*
   - *(iii) The Law;*
   - *(iv) A review of the Respondent's witnesses;*
   - *(v) A review of the Appellant's case and evidence;*
   - *(vi) What the Respondent describes are myths that have been created by the Appellant to portray the fixed price contracts as commercial agreements; and*
   - *(vii) The findings of fact that the Respondent submits that the Court should make.*

   and we respond to the various points raised by the Respondent using the same headings.

THE UNDISPUTED BACKGROUND

5. *In this section the Respondent purports to set out the background to the Appeal to provide the context to the matters in dispute. In so doing the Respondent correctly notes that the structure of the AbR Project was conceived by SMT and that by the time that the MMX Group got involved in the project, PDB and SMT had already discussed and agreed on many key elements of the AbR Project including those relating to the funding for the Project; the sale and distribution of the Plant's production; and the use of fixed price contracts. Despite acknowledging these facts as not only being undisputed but as part of the factual background to the dispute, the Respondent fails to take them into account in the arguments that it advances in support of its assessment. As illustrated later in these submissions, many of the arguments advanced by the Respondent do not line up with these undisputed facts.*

6. *Further, the Respondent's submission omits four key facts, namely that:*

(i) *Prior to any involvement on the part of MMX, SMT had approached not only PDB, but no less than six other parties, and offered them fixed price contracts (see folio A62 to A63 and A64);*

(ii) *Several of these third parties (and in particular RAC, ACX and FAB) had expressed dissatisfaction with the prices, and considered that they were too high (see folio A63);*

(iii) *The prices that were agreed for the fixed price contracts with MMX, PDB and ABR were higher than the prices that SMT was discussing and/or were being offered by or to these third parties; and*

(iv) *The total volume that SMT was proposing to sell under these fixed price contracts was reduced after MMX became involved in the AbR Project.*

7. *The omission of these key aspects of the factual background are significant especially given that the Respondent's case is based on the contention that the fixed price contracts were "unusual" and that the prices agreed between the parties were below market value (that is to say, the price that a willing purchaser of Chemical would offer to pay for Chemical produced by the Appellant).*

8. *We respectfully submit that the existence of these key facts completely undermines the premise of the Respondent's submissions. However, the Respondent has ignored them with the result that the evidence in support of its case is distorted.*

9. *At paragraph 18a of its submissions the Respondent states that it has not been provided with a copy of the Oxygen Sale Agreement between the Appellant and GUI (the joint venture who was constructing, owning and operating the plant). To the extent that this statement implies or suggests that this Agreement was requested by the Respondent but withheld then it is misleading. At no time was this Agreement requested. The Respondent*

could have requested it but did not. Further, it is noteworthy that the Respondent sought (and obtained) an order for interrogatories which included a number of specific questions concerning the Oxygen Sale Agreement, each of which were answered by the Appellant. Had the Respondent considered that the terms of this agreement (beyond those covered by its request for interrogatories) were important or relevant, then it could, and should, have requested it (whether as part of any of the 4 information requests that they issued as set out in the Statutory Bundle at folios 87, 144, 189 and 280, or at any time during the assessment or the objection stages) but chose not to do so. Given the references to the Oxygen Supply Agreement in other documents in the statutory bundle (including those that noted that its terms were similar to the Air Liquide supply agreement with XY) the only inference to be drawn is that the Respondent did not consider this agreement to be of any importance or relevance.

10. *At paragraph 24 the Respondent submits that the Appellant was required to file tax returns of income in the same manner as if the income had not been exempted, and uses this to conclude that there was no exemption from corporation tax but rather a reduction in the rate payable. The statements in this paragraph are contradictory in that the Respondent initially recognizes that the income had been exempted before suggesting that it was not the case that it was exempted by just that the rate of tax had been reduced. The Respondent's submissions may be correct for later years of income, where the rate of tax was reduced – however in respect of the year of income that is relevant to this appeal, we respectfully submit that the Respondent confuses the two concepts. This is not a case where the Government had reduced the rate to a particular percent but rather had granted to the Appellant* ***total relief*** *from corporation tax for income produced by the approved activity during the year of income in question. This language stands in stark distinction to the instances where Parliament reduces the rate of taxation, including those instances where it specifically reduces the rate to zero percent (as may be seen in the Double Taxation Relief (CARICOM) Order, 1994.*

11. *At paragraph 29 the Respondent asserts that the auditor observed that the loss declared by the Appellant would not have existed if the fixed price volume of Chemical had been*

sold at the "market price". However, the actual evidence of the auditor was somewhat different. In her affidavit the auditor was speaking to the fixed price contract and the basket prices that were obtained on the Appellant spot sales. This latter price is not to be confused with the "market value" for the Chemical that was sold under the fixed price contracts. As explained below, the "market value" of those volumes would be the fixed price that, at the time of contracting, could have been obtained for those volumes and for an equivalent term.

NATURAL INFERENCES FROM THE CORRESPONDENCE

12. *There is no dispute between the parties that the Respondent carries an evidential burden in that it is required to satisfy, and in particular must show that "it rightly "appears" to the Revenue to act". There is also no dispute that to do this the Respondent must adduce evidence of the information or material which caused it to appear to the Revenue that the tax-payer was under assessed.*

13. *In its submissions the Respondent contends that it is clear from the Notice of Assessment and the Appellant's Notice of Objection, that it was clear that (a) the parties were dealing with the question of artificiality and the* ***Sharkey v Wernher*** *principle; and (b) the Respondent had satisfied its evidential burden.*

14. *However, nowhere in the Notice of Assessment does the Respondent mention either section 67 or the principle in* ***Sharkey****. The fact that the Appellant objected does not mean that it can infer what were the actual reasons. On the basis of the limited information set out in the Notice of Explanation of Adjustments, the Appellant was left to speculate, and in so doing did indicate that while the Respondent had not indicated a legal basis upon which it had imputed the additional income to the Appellant, it appeared that it may have relied on section 67 of the ITA. As may be seen from the objection, it certainly was not apparent to the Appellant that the Respondent was invoking or purporting to rely on the principle in* ***Sharkey****.*

15. *More importantly, the Explanation of Adjustment was sparse in terms of the matters that they advance so as to permit the Appellant to conclude, with any degree of certainty, the basis for the assessment or, for example, what aspect of section 67 was being considered or invoked including whether the agreements were considered to be artificial (as the Respondent now contends) or whether they were fictitious (as the auditor contends), and it certainly made no mention of the principle in* ***Sharkey****, which never featured in case until the Respondent's submissions.*

16. *In any event, the Respondent cannot satisfy its evidential burden on the basis of the matters set out in its explanation of the proposed assessment. In that document the Respondent set out two reasons for the adjustment. These were that:*
    (a) The price did not reflect the fair market price; and
    (b) The price was below the cost of natural gas.

17. *Even if there were a basis for either of these conclusions (and for the reasons set out below we submit that there were not) they both fall short of the type of material that is required before one could invoke either section 67 or the* ***Sharkey*** *principle. In any event, there was no material (either referred to in the Notice or that was before the Respondent) from which one could reasonably arrive at either of those two conclusions, or any other conclusion, so as to support a finding that the tax-payer was under assessed.*

Reason 1 - No Material that the Price Did not Reflect the Fair Market Price

18. *With regard to the fair market price, the Respondent did not, in its Notice of Assessment, explain the basis for this conclusion – nevertheless, it is clear from the material set out in the Respondent's affidavits, and the cross examination of Ms. Surujbally-Gomez, that in arriving at that conclusion the Respondent: (a) used an inappropriate comparator; (b) took into account irrelevant matters; and (c) failed to take into account relevant considerations. Each of these matters, whether individually or collectively, rendered the*

Respondent's conclusion flawed and results in a failure to discharge the evidential burden.

Inappropriate Comparator

19. *As to the comparator, it is clear from the Respondent's evidence and submissions that the Respondent purported to compare the prices under the fixed price contracts with the prices from the basket sales. This was neither appropriate nor reasonable as it failed to recognize the very important differences between a contract where a purchaser agrees to purchase a fixed volume at a fixed price contract for a period of years, with one where a purchaser has no commitment to purchase any volume, and is free to negotiates a price with any other seller whenever he has the need to purchase product. Using those matters to compare the prices under the ABR fixed price contracts was the equivalent of comparing an apple with an orange and concluding that the apple is not an apple. We respectfully submit that the proper and appropriate comparator would be* ***the fixed price*** *at which a willing, un-related buyer and a willing, un-related seller would agree to purchase/sell Chemical* ***for a period of years****. The auditor who made the assessment on behalf of the Respondent made no reference to, nor adduced any evidence of, such a comparator in either the Notice of Assessment nor her affidavit filed in these proceedings.*

Irrelevant Considerations

20. *The matters that the Respondent took into consideration in determining that the fixed prices were below market value were (a) historic prices; and (b) spot prices that obtained at a later date, many years after the fixed price contracts were agreed and executed. Neither of these were appropriate or relevant.*

21. *In the case of the historic prices, as illustrated below, the material that was before the Respondent confirms that Chemical prices were volatile, and that a number of significant changes had either just occurred or were expected to occur and which were expected to have the effect of driving Chemical prices downwards. As such it was not reasonable to rely on these historic prices, and the information that they contained were not relevant to*

the question as to whether the prices under fixed price contracts were at fair market value.

22. *Similarly, with regard to the prices that in fact obtained many years after the fixed price contracts had been agreed and executed, this information was not available at the time of contracting and is only now available with the benefit of hindsight. As such it is neither fair nor appropriate to use this information to assess whether the prices under fixed price contracts represented the fair market value that could have been obtained at the time of contracting.*

Ignored Relevant Considerations

23. *The Respondent compounded its error of taking into account irrelevant considerations and material by failing to have any or any sufficient regard to the evidence that was actually relevant to this issue and which provided the best comparison as to market value. In particular, the Respondent (whether in its assessment or in its submissions) did not give any or any sufficient weight to the negotiations between SMT and the six unrelated, third parties (referred to above, which the Respondent conveniently omitted from its factual background) and the other fixed price contracts which, according to the Respondent's evidence, were considered by the Respondent when it determined the Appellant's objection and upheld the assessment.*

24. *It is therefore glaringly evident that the Respondent has failed to discharge its evidential onus on this point.*

Reason 2 – Fixed Price Below Cost of Natural Gas

25. *As to the contention that the fixed price was below the cost of natural gas, we respectfully remind the Court that it was conceded by the Respondent (very late in the day and only during the cross examination of Ms. Surujbally-Gomez) that it was no longer relying on the statement in the Respondent's letter of explanation of the proposed assessment (and paralleled in the Statement of Case) that "with respect to that portion of output reported*

as a fixed price contract, it was found that the price was below the cost of the natural gas used in production". As explained by counsel for the Respondent, they took this decision as it was "not something which can be sustained on the evidence".

26. *Having made this concession, the Respondent cannot suggest that this initial reason provides any basis for contending that it has satisfied the evidential burden of showing that the Appellant was under assessed.*

27. *In any event, even without this concession, there will still remain no basis for the Respondent's conclusion. The purpose of the evidential onus is to demonstrate that there is some foundation, in the actual evidence that was before the Respondent, for this conclusion. When applied to this case it is obvious that there was no evidential basis for this conclusion. In particular, we note that the Respondent's witnesses were not able to indicate at what price point the cost of natural gas would have been greater than the sale price under the fixed price contracts. To the contrary, in her exchange with leading counsel as to the Chemical price that would be required in order for the price of gas to equal $110/MT of Chemical, Ms. Surujbally-Gomez stated that it would "take a lot of gas, the purchase of gas, in order to compare it to the 110" ($110/MT being the Chemical price under the fixed price contracts) and accepted the suggestion that the price of Chemical had to be over $300/MT before the price that the Appellant paid for gas will get to the equivalent of $110 per metric tonne of Chemical.*

28. *It is therefore apparent that the Respondent's conclusion in its Notice of Assessment that "with respect to that portion of output reported as a fixed price contract, it was found that the price was below the cost of the natural gas used in production" was derived from mere conjecture.*

29. *This is not a proper basis upon which the Respondent can discharge its evidential burden, less so when that conjecture or speculation is plainly wrong. In this regard, there is no price at which the Appellant makes a trading loss from the sale of Chemical. This is illustrated by the application of the gas price formula as explained by Mr. WE at*

paragraph 66 of his affidavit where he stated that "[u]nder the ABR Gas Supply Contract, for each $10 per metric tonne that the market price of Chemical rose above $135 per metric tonne, $3 per metric tonne of Chemical sold by the ZQ Plant flowed back to the GNL."

30. *Accordingly, as illustrated in the attached appendix A, for each $10/MT increase in the price of Chemical above $135/MT, the Appellant ratio of gross revenue to cost of goods sold increased by a ratio of approximately 5 to 3.*

31. *Furthermore, even if the Chemical that was sold under the fixed price contracts were to be disaggregated from all of the Chemical produced and sold by the Appellant and viewed in complete isolation, it remains the case that the Chemical was not sold for less than the cost of natural gas since there is no evidence that the price of Chemical exceeded $300/MT at any time during the year of income. To the contrary, as confirmed by Mr. CP in his response to the interrogatories, the average monthly basket price of Chemical sold by QR during the year of income in question was USD208.13 – far below the breakeven threshold for the fixed price contracts.*

THE LAW

32. *In its submissions, the Respondent referred to a number of cases in support of what it contended were: (a) the relevant principles that will be considered by a Court in determining whether a transaction is artificial for the purposes of section 67; and (b) whether the Respondent has the power to impute income to the taxpayer where it considers that a transaction was artificial or fictitious. Taking in turn each of the cases referred to by the Respondent, we comment as follows:*

33. *As to the power to impute income to the Appellant, the Respondent relied upon the decisions of the Tax Appeal Board in the* ***X. Ltd*** *and* ***Z Estates*** *cases; the House of Lords decision of* ***Sharkey v. Wernher;*** *and further suggested that the Appellant has distorted and misapplied the statements made in the treatise "Income Tax Law in the*

*Commonwealth Caribbean"***.** *When each of these authorities are considered, we respectfully submit that they are not authorities for the broader propositions as contended by the Respondent and in any event are distinguishable.*

Sharkey v Wernher

34. *With regard to* ***Sharkey v Wernher*** *we respectfully make the following two comments. First, at no time prior to the Respondent's submissions (whether during the audit, in the determination of the objection or in its Statement of Case) did the Respondent indicate (whether expressly or by way of implication) that it was relying on the principles set out in* ***Sharkey v Wernher*** *or that it was invoking any power or authority that was vested in the Respondent otherwise than through section 67 of the ITA and (purportedly) under the Petroleum Taxes Act.*

35. *Second, the facts in* ***Sharkey v Wernher*** *are distinguishable from the instant case. Central to the ratio decidendi of that case was the fact that the property in question was not sold or otherwise disposed of by way of trade but was simply given away at no value by the taxpayer to himself. This is evident from the speech of Viscount Simonds at pg. 69 of the judgment where he said:*

"Yet I cannot refrain from calling attention to what must be fundamental to the solution of the question. For I cannot escape from the obvious fact that it must be determined whether and why a trader, who elects to throw his stock in trade into the sea or dispose of it in any way ***other than by way of sale in the ordinary course of trade****, is chargeable with any notional receipt in respect of it, before it is asked with how much he should be charged."*

36. *Further, the decision in* ***Sharkey*** *was concerned only with the basis of valuation on the assumption that something had to be brought in, as the horses (which were the property disposed of in that case), were already in the books of the taxpayer and could not just disappear – accordingly some receipt had to be brought into the taxpayers books to*

account for their disposal. This is again evident from the speech of Viscount Simonds at pg. 73 where he said:

"But it appears to me that, when it has been admitted or determined that an article forms part of the stock in trade of the trader and that upon his parting with it so that it no longer forms part of his stick in trade ***some sum must appear in his trading account as having been received in respect of it****, the only logical way to treat it is to regard it as having been disposed of by way of trade."*

A similar view was expressed by Lord Oakey who stated, at pg. 76

"Traders must show in their trading accounts the value of their assets. If they sell those assets they must credit the price obtained. If they do not sell then but get rid of them, either by using them themselves or in any other way, they must credit the figure at which the asset stands in their accounts or the profits of the account will be improperly diminished by the amount entered in the account as the value of the asset…. It follows, in my opinion, that such expenses as have been incurred to produce an asset which is withdrawn from the trade cannot properly be deducted and must therefore be withdrawn from the account, which can be done in accordance with accounting practice by crediting the amount of the expenses."

37. *This is a very different scenario to the instant case, in which there is no suggestion that the transaction was a non-trading transaction. Quite the opposite, as accepted by the auditor, Ms. Surujbally-Gomez, the ABR fixed price contracts were "****sensible commercial arrangements****" and had been executed for good commercial reasons. See for example the exchange between leading counsel and Ms. Surujbally-Gomez on the 16th July 2019 where after taking Ms. Surujbally-Gomez through the various reasons for the fixed price contracts, she accepted (in her answer on pg. 78) that the fixed price contracts were a sensible commercial arrangement. This is sufficient to take the present case outside the scope of the* ***Sharkey*** *principle – see* ***Jackaled (Weston Hall) Ltd. V. Castle*** *[1971] Ch. 408. Furthermore, there were sums that appeared in the Appellant's account as having*

*been receive in respect of the sale of the fixed price volumes so that it was not there was not the same issue that arose in **Sharkey** and which prompted the Court to substitute a value for the stock in trade disposed of by the taxpayer.*

BAO Ltd. V BIR

38. *The interpretation of **Sharkey**, and the extent or limit of its principle as applying only disposals of stock other than in the course of trade was confirmed by the Court in **BAO** – see pg. 3 of the judgment where the Court stated "… the principle established in Sharkey v Wernher – 36 T.C 275, is that **in the instance of a trader disposing of his trading stick other than in the course of trade**, income may be imputed to him on the basis of the market value of the stock rather than its cost or other figure." [emphasis added]*

39. *Like Sharkey, BAO was a case of a disposal other than in the course of trade – and it was in that context that the Court was examining the application of both the then equivalent of section 67 of the ITA and the **Sharkey** principle.*

40. *The Court in BAO set out four ingredients which were in existence so as to bring a transaction within the ambit of section 67. The first ingredient was a transaction which is not at arm's length – that is that one party has control over the other. In the instant case the Appellant is owned by two separate owners so that it is not the case that any one party has control over the Appellant. In any event, there is no basis for contending that PDB was in any position to control the Appellant, and certainly – regardless of any interest that APS may have had in the project succeeding, it cannot be said that they were in a position to control the Appellant or ever exercised any such control.*

41. *The second ingredient was that the transaction is one that does not make commercial sense, is unnatural and not one which one would expect in circumstances of persons acting freely with one another. As accepted by the auditor, the ABR fixed price contracts were sensible commercial transactions, that is to say, they made commercial sense. They*

provided a hedge or "floor" against volatile prices to help repay loans and guarantee a rate of return to ABR; they secured volumes for the Appellant and they assisted the Appellant to attract financing for the project.

42. *We note that in its submissions the Respondent contended that* ***BAO*** *noted that "one indicia of artificiality was the fact that the Appellant suffered a loss as in the present case." This was not expressly stated by the Court, so that to the extent that the Respondent is suggesting that suffering a loss is, by itself, a sufficient indicium of artificiality, then this is a misrepresentation of the case law. We accept that the Court did opine that it would not make commercial sense to the taxpayer to set out to incur losses – but that is not the case here. As conceded by the Respondent and as illustrated above, the price of gas was not above the price of Chemical – so that the Appellant did not suffer (and could not have suffered) a trading loss on the sale of its Chemical, whether on its Chemical sales in aggregate or on the fixed price volumes in isolation. While the Appellant did report a loss, this was an accounting loss due to the Appellant being entitled to claim certain wear and tear and capital allowances. Such a loss cannot reasonably be considered to be an indicium of artificiality. Moreover, there is no evidence that the Appellant set out to suffer any such loss. To the contrary, the contemporaneous documents confirm that prices under the fixed price contract were designed to guarantee a rate of return to the Appellant.*

43. *The third ingredient is that there is substantial disparity between the price at which the transaction is carried out and the fair market value of it. As set out in more detail in these submissions, the appropriate "market value" is the fixed price at which a willing buyer and a willing seller would, at the time when the fixed price contracts were executed, agree to purchase a fixed volume of Chemical for a term of years. The Respondent has called no evidence, or referred to any material, which shows that the fixed price contracts were below market value. To the contrary, the material that is before the Court confirms that:*

(i) *The fixed prices at which other third parties were prepared to commit to purchase the Appellant's Chemical for a period of years were lower than the prices agreed in the ABR fixed price contracts; and*

(ii) *The price in the ABR fixed price contracts were better than the prices in the fixed price contracts that were before the Respondent and which were considered by the Respondent in arriving at its decision to determine the objection.*

44. *The fourth ingredient is that the circumstances are such that one can fairly infer that there was a device to reduce or avoid tax by the taxpayer. Again, there are no circumstances from which such an inference may reasonably be made. We respectfully remind the Court that not only was there no attempt to set out to make a loss, but there was no incentive to reduce or avoid tax given that (i) the Appellant was exempt from corporation tax during the year in question; and (ii) the other parties to the fixed price contracts were sited in jurisdictions with a higher tax rate.*

45. *In the circumstances, not a singular ingredient in the **BAO** case is present in the instant case such as to bring the fixed price contracts within the ambit of section 67 of the ITA. To the contrary, the ABR fixed price contracts represented a genuine bargain, neither colorable nor fraudulent, as between companies that were separate entities.*

X Limited

46. *The facts upon which the decision in **X Limited** was based are distinguishable from the instant case. In that case the price at which the land was disposed of was in excess of the fair market value, and it was this excess that the Court found to be artificial and fictitious so that it was within the power of the Revenue to disregard it in the exercise of its power under what was the then equivalent of section 67 of the ITA. Accordingly, that case is not an authority for the proposition that the Revenue has the power under section 67 to impute to the taxpayer **additional** revenue which was never received by the taxpayer but instead is consistent with the section 67 being an annihilating section.*

Z Estates

47. *This case concerned a transaction that was found to be not by way of trade. Moreover, it was a purchase by the taxpayer of property at a gross overvalue – which the Court found was designed for tax purposes. Accordingly, as with **X Limited**, this decision does not involve imputing to the taxpayer any additional income but to the contrary is wholly consistent with the power of the Revenue being to disregard and annihilate a transaction that it considered was artificial or fictitious.*

48. *Further, contrary to the submission of the Respondent, none of these cases address or lay down any rule regarding a party with a "special interest". What they deal with are parties that are not at arm's length because one has control over the other. The elevation of this to "special interest" by the Respondent is an attempt to extend the principles in the cases to parties such as APS who have neither an interest in nor exercise control over the Appellant. To the extent that APS has an "interest", this is limited to seeing the AbR Project succeed and be viable so that it can have a market for the oxygen that it produces. This is not the type of "interest" contemplated by any of the cases.*

Income Tax Law in the Commonwealth Caribbean

49. *The Respondent's submissions on the issue of section 67 being an annihilating provision are set out at paragraphs 45 to 51 of the Respondent's submissions. Here the Respondent attacks the Appellant's reliance on the statement made in the text "Income Tax Law in the Commonwealth Caribbean" which, in speaking of section 67 of the ITA, opined that "[i]t is an annihilating provision **essentially not one which empowers the Revenue to impute income** to the taxpayer" (emphasis added), by saying that this statement was distorted and taken out of context by the Appellant since the Appellant did not also reference the statement that the author subsequently made in relation to the Trinidad Cement case which was in the following terms: "[i]t would appear that the decision in the Trinidad Cement Case has to be regarded at best as one very much on its own facts and cannot provide a precedent for empowering the Inland Revenue to impute notional income to a taxpayer in any scenario where income tax may have been avoided or reduced."*

50. *The Respondent submits that this latter comment qualifies the extremely strong and direct opinion that the learned author had made with respect to the power available to the Revenue under section 67. We respectfully disagree. It is not clear to us how the sentence referred to in paragraph 46 of the Respondent's submissions qualifies the clear statement that the author makes that section 67 does not empower the Revenue to impute income to the taxpayer. Viewed objectively that language was a diplomatic way of saying that the author disagreed with the decision and was suggesting that it should not be followed in later cases and instead confined to the special facts of that particular case. This is reinforced by the very strong language that follows where the author stated that the Trinidad Cement case "cannot provide a precedent for empowering the Inland Revenue to impute notional income to a taxpayer". The partisan argument that the Respondent now seeks to advance in this appeal is diametrically opposed to the objective views, commentary and opinion that counsel expressed in his writings on the topic.*

51. *Finally, the Respondent seeks to support its new found interpretation of section 67 by relying on the power contained in section 83(2) of the ITA and suggesting that the speech of Lord Diplock in the* ***Seramco*** *case supported the Respondent having a power to take positive steps, seemingly including the power to impute income. There is nothing in the* ***Seramco*** *case that deals with the Respondent having a power to impute income. That decision recognized and confirmed that having disregarded the transaction the Revenue could then proceed to assess the taxpayer accordingly. Such an assessment includes the powers given to the Revenue under section 83(2) of the ITA. Suffice it to say, nothing in that section gives to the Revenue a power to attribute to a taxpayer income that the taxpayer did not in fact receive outside of the* ***Sharkey*** *exception, which exception does not apply to the instant case.*

Respondent uses Improper Comparator

52. *In seeking to justify its approach in this case, the Respondent - at paragraph 57 of its submissions - contends that the evidence in this case makes it clear that the market price*

for the Chemical produced by the Appellant in income year 2005 was almost double the price under the fixed price contracts. In making this submission the Respondent errs by confusing the basket price with the price that would have been obtained had the fixed price contracts been executed between a willing buyer and a willing seller who were at arm's length. As noted above:

(i) The proper comparator is not the price obtained for the basket sales, but rather the fixed price that, at that time, was obtainable for a contract with a 10-year term or some similar tenor; and

(ii) The evidence that was before the Respondent (and certainly that is before this Court) is that the price agreed in the ABR Fixed Price contracts was better than the price at which unrelated third parties were, at the time when the fixed price contracts were being negotiated, prepared to commit to purchasing a fixed volume of Chemical for a fixed term commencing in or around 2004.

EVIDENCE OF THE RESPONDENT

53. *In this section the Respondent reviews the evidence of Ms. Surujbally-Gomez in an attempt to find support for her statements in the documentary material as well as in the evidence of Mr. SD, and the evidence of Mr. Ravi Taklalsingh. In so doing the Respondent seeks to downplay the evidence from Mr. Taklalsingh by limiting it to his confirming that the objection had been rejected. However, as a perusal of this affidavit reveals that Mr. Taklalsingh went on to speak to the material and documents that were considered by the Respondent in determining the objection, which documents included the written and oral explanations from the Appellant; the RAC fixed price contract (whose price was lower than the ABR fixed price); the ACX fixed price contract; the CMAZ forecasts (which the Respondent now suggests are inadmissible); and the contract between SCC Corporation and CEL. Moreover, not only did Mr. Taklalsingh say that these were examined, but that it was based on these documents that the Respondent*

concluded that the ABR fixed price contracts were not typical contractual arrangements of parties doing business in the Chemical industry who contracted at arm's length. For the reasons set out in our primary submissions and in this Reply, such a conclusion could not reasonably be drawn from those documents.

54. *At to the evidence of Ms. Surujbally Gomez, the main issue that the Respondent sought to address was the credibility of her evidence on the issue whether the fixed price contracts exposed the Appellant to the risk of loss if the market Chemical price increased.*

55. *Like Ms. Surujbally Gomez, the Respondent <u>does not conduct any analysis of the pricing terms</u> in order to prove this point. Instead, the Respondent sought to support its contention by misapplying the evidence of one of the Appellant's witnesses, Mr. SD. This is evident from paragraphs 62 and 63 of the Respondent's submissions where it comments on the evidence of Mr. SD and suggests that Mr. SD readily agreed with Ms. Surujbally-Gomez. This is not correct. It is a complete distortion of Mr. SD's evidence and a desperate attempt to try to lend credibility to the uninformed, speculative conclusion of Ms. Surujbally-Gomez. In particular, the passage of evidence to which the Respondent refers, conveniently omits the attempt by Mr. SD to explain his position before he was cut short by Counsel for the Respondent. Contrary to the impression that the Respondent tries to create by its submissions, Mr. SD did not "readily accept" the assertion of a loss and repeatedly attempted to explain that theoretically there could be a loss but that any loss in 2005 was an "accounting loss".*

56. *Furthermore, the exchanges between the Mr. SD and counsel referred to in the Respondent's submissions were directed to the fixed price contracts in a vacuum and failed to treat with the full context of the actual structure, which was to have the fixed price contracts in tandem with the basket prices in order to provide a form of hedge or floor price to guarantee that the Appellant would be able to generate enough revenue to meet its loan obligations and generate a return.*

57. *In any event, Mr. SD was wrong when he assumed that the margins would be squeezed. As illustrated by the working example set out in Appendix A, contrary to Mr. SD's assumption, the Appellant's margins increased as the price of Chemical increased.*

58. *Equally it is not appropriate for Counsel to postulate that Ms. Surujbally-Gomez made an error in her responses, and that this was due to some alleged rigorous cross examination. First, it is not proper for Counsel, from the bar table, to seek to supplant the evidence of his own witness. It is even more egregious to do so when counsel had the opportunity to re-exam and seek to clear up any such "error" but did not do so.*

59. *Second, it is disingenuous to suggest that any such "error" was due to a rigorous cross-examination. The Court will no doubt recall counsel's polite and gentle approach (as his norm) to the cross-examination of Ms. Surujbally-Gomez. Unlike the Respondent's cross-examination of the Claimant's witness, counsel was patient with Ms. Surujbally-Gomez and gave her full and every opportunity to respond, even where this entailed her supplementing her responses with information that was far outside the scope of the question.*

60. *Equally, having regard to the experience of the witness as well her professional qualifications, it cannot be simply assumed that she was not au courant with the legal distinction between the concepts of artificiality and fictitiousness.*

61. *Third, the actual evidence confirms that the statement by Ms. Surujbally-Gomez was no casual slip, nor was it a response to a question that was unclear or the result of any confusion on her part. To the contrary, on no fewer than 3 occasions Ms. Surujbally-Gomez expressed with great clarity that she was not saying that the fixed price contracts were artificial. This may be seen from the following extract from her cross-examination on 16th July 2019 at pg. 109:*

Q. No. And although you've seen no other fixed price contracts, you come to the

conclusion that these three I have here been artificial. Okay? Isn't that so? Isn't that so? ***Ms. Gomez, you have said—you say these three are artificial.***

A. ***I'm not saying artificial;*** *I'm saying—*

Q. You're not saying they are artificial? Okay. Good. I'll take that. You're not saying they're artificial. You're not saying these three contracts are artificial. I'll take that. Fine. Okay. Let's go on then .....

And the following extract from her cross examination on 17th July 2019 at pg. 32

Q. Right. Do I—I only want to—just very briefly here. You're saying in order to determine the quantum of a sale, the total revenue earned from the fixed price contract was substituted with the revenue from the sale of basket price. I understand by that, instead of going ahead with the fixed price contract revenue, you replaced that with the basket price revenue, right?

A. Yes.

Q. ***And from something you said yesterday, maybe, you are saying you're doing that why because of section 67 of the Act, artificial, because you treat it as artificial, that's why you replace it?***

A. Not artificial, fictitious.

Q. It's fictitious.

A. Yes.

Q. Oh, even more. Right. You say it's fictitious, and because it's fictitious, you replace it?

A. Yes.

as well as the extract from pg. 62

Q. Yes, you don't know. ***So, you are not in a position to say whether these fixed***

price contracts are artificial? You're not in a position to say that?

A. No.

Q. And I take it you are not in a position to say whether these fixed price contracts are at arm's length?

A. No.

62. *Accordingly, it is clear that Ms. Surujbally-Gomez made no error when she said that she did not base her assessment on the fixed price contracts being artificial and was equally clear as to the basis of her assessment – which was on the ground that the fixed price contracts were fictitious. Counsel cannot change that basis from the bar table.*

63. *In the circumstances, there was no error made by Ms. Surujbally-Gomez as to the basis upon which she made her assessment, and the Respondent should not be permitted to present a case that is contrary to the basis on which the assessment was made.*

64. *In order to treat with this situation, the Respondent has sought to invoke the provisions of section 67(8) of the ITA which gives to the Tax Appeal Board a power, when hearing an appeal, to exercise a discretion conferred on the Revenue under section 67. We accept that the Court has such a power – though, in our respectful submission, this is not a power that should be lightly exercised and instead requires some fairly extreme facts which is not the case here. However, the fact that the Tax Appeal Board has such a power does not mean that Ms. Surujbally-Gomez's answers are of no relevance or could easily be disregarded. First, her answers on this issue go to whether the Respondent has discharged its evidential burden and, for the reasons already set out in our primary submissions and in this Reply, there is no evidence that could rationally support a finding that the fixed price contracts were artificial.*

65. *Second, as her answers and statements clearly demonstrate, Ms. Surreally-Gomez – the auditor who made the assessment – was firmly of the view that the fixed price contracts* ***were not artificial*** *but were* ***sensible commercial arrangements***.

66. *In the circumstances, we respectfully submit that even if the Court were to permit the Respondent to advance its case on the premise that the fixed price contracts were artificial (as opposed to the premise that was actually relied upon by the auditor in making the assessment) there remains no basis to support the application of section 67.*

EVIDENCE OF THE APPELLANT'S WITNESSES

67. *In introducing this area, the Respondent asserts that none of the Appellant's four witnesses worked for the Appellant and represented the interest of their respective employer. This fails to take into account that one of the witnesses – Mr. WE, was the Chairman of ABR, while another - Mr. SD, was a member of the ABR Board. In any event, these persons were called as witnesses as they were the persons who had personal knowledge of the Project and were involved in at least one of the relevant areas (structuring, negotiations or financing) so as to be able to speak from an informed basis and assist the Court with what was done and why it was done. That they are no longer with the company (as is the case with Messrs. WE, SD and RN) or was never an employee (such as Mr. MP) is of no relevance save as a demonstration of their independence and truthfulness.*

68. *In similar fashion, the Respondent's submissions in this section skew and distort the evidence by either taking the evidence out of context, ignoring swathes of other relevant evidence or interpreting the material in an unreasonable and irrational manner. The effect of these actions is to produce an extremely jaundiced and distorted view of the evidence in an effort to force it to fit into the Respondent's theory of the case.*

Relationship Between Evidence in the Statutory Bundle and Affidavit Evidence

69. *One of the first areas where the Respondent interprets the evidence in an unreasonable and irrational manner is where they attempt to discredit the evidence of the Appellant's witnesses by implying that the fact that their affidavits do not refer to several documents in the statutory bundle is either an indictment against the quality of the evidence in the*

affidavit or justifies ignoring the documents in the statutory bundle. The purpose of evidence (whether it be in an affidavit, given orally or in a document) is to place before the Court the material facts. It is then the duty of counsel (and not the witness) to make submissions to the Court based on the evidence in the case. In a tax appeal, the Statutory Bundle comprises evidence – there is no need to refer to it in an affidavit before the Court may consider it. Of course, witnesses may refer to a particular document so that the Court may understand and follow their narrative, or to explain the background to or context in which a particular document came into being – but we respectfully submit that it is incorrect to suggest that there is any expectation, far less requirement, that a witness should refer to all of the documents on which that party intends to rely. That this is the most damning complaint that the Respondent has mustered demonstrates the weakness of its case.

Other Examples of Fixed Price Contracts

70. *The Respondent suggests that the Appellant has not produced examples of fixed price contracts that mirror the ABR fixed price contracts. We respectfully submit that there is neither an onus nor any requirement on the Appellant to produce an example of a fixed price contract that perfectly mirrors the ABR fixed price contracts. What is important is whether the fixed price contract is a contract that made commercial sense, was not unnatural and one that one would expect in similar circumstances to the AbR Project. The ABR fixed price contracts satisfy that test in spades.*

71. *In any event, the Respondent's suggestion that the Appellant has not produced examples of fixed price contracts that mirror the ABR fixed price contracts is wrong. The identical framework to that used in the fixed price contracts is to be found in the XY fixed price contracts which were supplied to, and actively considered by, the Respondent – to the point that they formed part of the material that the Respondent relied upon in arriving at its decision to uphold the assessment. Like the ABR fixed price contracts, the XY fixed price contracts had a firm fixed price for the life of the contract and contained no provision for an escalator or any variation in the price of Chemical on the basis of*

changing economic and industrial factors such as the fluctuation in the price of natural gas, the cost of labour or the market demand for Chemical.

72. To the extent that there are differences between these two sets of contracts they are that:

*(i) The price under the XY fixed price contracts was **lower** than the Chemical price under the ABR fixed price contracts.*

(ii) The tenor of one of the XY fixed price contracts was for a minimum 5 years as opposed to the 10-year tenor of the ABR fixed price contracts. However, like the ABR fixed price contracts, the second XY fixed price contracts had a 10-year tenor.

(iii) The price under the XY fixed price contracts were not FOB Pt Town but included shipping to a foreign destination. To this end it included a provision (the bunkering provision) for adjusting the shipping costs that were to be borne by the purchaser and which shipping costs were included in the total price. The ABR fixed price contracts, being FOB Pt Town, did not contain such a provision as shipping was not included in the price, though we note from the "ABR Shipping & Terminalling Principles" (see Folio A89) that a similar bunker clause was to apply for the shipping of ABR' volumes, and which would have been part of the shipping agreement (as opposed to the Chemical offtake agreement).

To the extent that any of these differences rendered the ABR fixed price contracts a less than perfect "mirror" of the XY fixed price contracts, they are of no moment and certainly they do not take away from the fact that they are examples of the circumstances when two arm's length parties would use a fixed price contract and the type of terms that they would insert into those contracts with regard to pricing.

73. *What is apparent from the evidence is that there is not a single example of a fixed price contract that permits the price of the contract to be varied on account of changing economic and industrial factors such as the fluctuation in the price of natural gas, the cost of labour or the market demand for Chemical. Aside from the Respondent not being able to allude to a single example of such a "fixed price contract" we note that the inclusion of such a provision would cut against the logic of having a price that was fixed and would render the contract as one whose price was not fixed. Such a contract would completely alter the risk profile of the transaction. For example, insisting on only a floor price would change the risk to the purchaser. As may be seen from the SCC and CEL Ltd contract, such a purchaser would most likely insist that the floor be set <u>below</u> the price that was fixed by the ABR fixed price contracts as well as have a ceiling, otherwise the contract would be unfairly weighted against the purchaser. Based on the market conditions that, at that time, were expected to prevail during the startup of the plant and to last for a period of years, such a structure had the potential to negatively impact the cash flows to ABR, and thus its ability to meet its loan obligations.*

The Fixed Price Contracts were Commercially Sound

74. *The Respondent dedicates a sizeable portion of its Written Submissions to trying to persuade the Court that:*

    (a) *the ABR fixed price contracts were not natural or common commercial contracts but instead were unusual; and*
    (b) *the real purpose that they served was to effect a market restructuring into order to allow the Appellant's shareholders (and APS) to benefit from higher prices (having agreed to purchase at low fixed prices)*

75. *These arguments are flawed for the following reasons:*

    (a) *They are based on a misapplication of the principles set out by the Courts for determining artificiality; and*
    (b) *They fail to take into account the legitimate commercial reasons for the fixed price contracts which resulted in those contracts not being "unnatural";*

(c) They misconstrue the rationale for the contracts and attribute the objective behind same to some other purpose.

Misapplication of the Principles of Artificiality

76. The Respondent seeks to support its contentions by referring to extracts from his cross examination of the Appellant's witnesses, and in particular Mr. WE as to whether fixed price contracts were common. However, these questions were posed in the specific context of the business of ***MMX*** *and did not treat with the use of those contracts in the industry and the type of circumstances in which they would be common. Indeed, the exchange included the preface "… so I am saying that* ***the MMX business*** *was being primarily in contracts which are not FPCs" in the question from counsel. This should not be conflated and confused with whether it was unusual for companies in the Chemical industry, and in particular in positions similar to ABR who were seeking to attract financing. Indeed, the evidence before this Court is that these types of contracts were common for attracting project financing, and that similar considerations guided the XY fixed price contracts as well as the SCC and CEL Ltd contract), so that the ABR fixed price contracts were by no means unique.*

77. In any event, The Respondent's submissions focus on whether the fixed price contracts were usual or the common form that was used for purchasing Chemical. In so doing the Respondent wrongly conflated "unusual" with "unnatural".

78. The fact that one may not usually have a fixed price contract does not mean that a fixed price contract is not common – and far less that it is unnatural. It has never been the case for the Appellant that fixed price contracts with a tenor of greater than a year are an everyday, standard form of contract within the Chemical industry. Yet this was the context in which the questions to the witnesses were posed. All the Appellant has attempted to point out is this type of contract was not unique to the AbR Project, and that there are circumstances where it makes sound commercial sense to use this type of contract and in which this type of contract had previously been deployed.

79. This is very different from the criteria of "unnatural" for the purposes of something being artificial, which is suggestive of the type of arrangement that a commercial person, in the same circumstances as the taxpayer, would not be expected to enter into if acting freely and independently.

80. Whether a contract or arrangement is "unnatural" in the sense of being artificial does not turn on whether the arrangement is novel or is not often used. Rather it is a conclusion that is arrived at after a contextual analysis of all of the circumstances to determine whether the choice of such an arrangement is not the type of choice that a commercial man would make.

81. In this regard we accept that the most common form of Chemical sale contract was based on prices negotiated at or around the time of sale, and therefore could vary sharply from month to month and contract to contract. However, that is not to say that fixed price contracts were not also used, as evidenced by the reference to these types of contracts in the MMX Annual Reports.

82. We also accept that these types of contracts were not popular, for the reasons explained by Mr. WE, that is to say that invariably it tended to be the case that under those contracts one of the parties tended to gain while the other tended to lose. Indeed, it is that same sentiment that resulted in MMX suggesting that the volume to be sold under fixed price contracts be reduced from the 80% proposed by SMT to 50%.

83. But that is a far cry from saying that there are not circumstances in which a commercial person would use that type of contract. For the reasons advanced in our primary submissions, and as accepted by Ms. Surujbally-Gomez in her evidence, these fixed price contracts were sensible commercial arrangements.

Respondent failed to take into account the legitimate commercial purpose

84. *As in the case of the XyT Project, there was a need to mitigate the risk of volatility and lock in a customer at a price that would ensure that the company could meet its financial obligations and repay its debt. We respectfully remind the Court that the ABR fixed price contracts were not intended to operate in a vacuum, but were deliberately paired with the basket prices to help the Appellant to manage the risk of price volatility which was prevalent in the Chemical industry, and in particular the risk of low prices that were anticipated to manifest after the completion of the ZQ Plant. As is evident from the project structure, the ABR fixed price contracts were designed to protect the company in those times when the price of Chemical dropped below $110/MT FOB Pt Town, while the basket prices allowed the company to benefit from any upside should prices increase.*

85. *There is nothing unusual in such a risk management strategy – it was the same, or at least very similar to, the strategy that was deployed by XY as well as the strategy deployed SCC Corporation in its contract with CEL Ltd.*

Respondent's theory on Market Restructure is Misguided

86. *From the outset, we wish to note that any theory as to alleged market or industry restructuring was never raised by the Respondent prior to the hearing. There is no reference to it being factor that was considered (far less relied upon) by the Respondent, in any of its Explanation of Adjustment; Determination of Objection; Statement of Case; nor any of the affidavits that the Respondent filed in these proceedings. It is a theory that has been developed at the last minute. Furthermore, the theory advanced by the Respondent at paragraph 92 of its submissions – that the fixed price contracts were created as part of this so-called industry restructure to provide MMX with the opportunity to resell at a profit was never put to any of the Appellant's witnesses.*

87. *In any event, there is no merit in the theory. The Respondent's theory that the objective behind the fixed price contracts was to achieve a "market restructuring" to control the price confuses and conflates documents that are dealing with two distinct and different issues.*

88. *The first of these is the Internal Memorandum dated 10th May 2000. As is clear from the contents of that memorandum, what was being discussed were options and strategies for managing the risk of the Chemical price being as low as $80/MT (which, as recorded in the contemporaneous documents, MMX considered to be possible for between 2 to 3 years) for the first few years of the project. It was in that context that the memorandum was putting forward potential options or suggestions for managing that risk, one of which was to have an industry restructure whereby PDB and MMX would put together a fund of $50M to restructure the industry by buying up and shutting in* ***1 to 1.5MMT*** *of high cost capacity.*

89. *As is also clear from the contents of that memorandum, this was not a step that was to be implemented immediately – rather it was suggested for "the next down cycle", and the evidence from both Mr. RN and Mr. WE was that this never took place.*

90. *It is therefore plainly obvious that this was not something that was linked to the fixed price contracts, and is therefore to be contrasted with the references in the diagrammatic representation found at folio A84. That diagram shows that ABR would sell to a marketing entity who would in turn sell* ***850KT*** *(which was far less than the 1 to 1.5MMT referred to in the previous memorandum) under fixed price contracts to APS, PDB and MMX.*

91. *These were the same volumes that had been proposed at the start of the project (indeed they were significantly less than what was originally proposed by SMT). While we accept that these contemplated that APS and PDB would shut down their plants (as it would be more economical for them to purchase under the fixed price contracts than to produce their own Chemical through their older, morecostly plants), and in that context the document at folio A85 used the description "industry restructure" this was not the same strategy that was being proposed in MMX's 10 May 2000 internal memorandum. Indeed, the shutting in of those plants were contemplated by the parties even before MMX became*

involved in the AbR Project and was part of SMT's strategy as may be seen from folio A64.

92. *The Respondent is therefore wrong to conflate these two concepts in an effort to try to contradict the evidence of the Appellant's witnesses. The witnesses were therefore quite correct when, in speaking of "industry restructure" as used in the MMX internal memorandum that it did not happen. It is also entirely consistent with Mr. SD's evidence when he stated that he was not familiar with the suggested restructure referenced in the 10th March memorandum which, on its face, was described as an internal MMX document and therefore not one to which Mr. SD would have been privy.*

93. *In any event, even if the documents were referring to the same concept (which we do not accept) the motive which the Respondent seeks to ascribe, to wit "a deliberate scheme to keep the Appellant's price of Chemical low for their own consumption in the case of PDB and APS and for resale at a massive profit in the case of MMX" is wildly speculative and entirely out of sync with the contemporaneous documents. In similar vein, the suggestion by the Respondent that the witnesses did not refer to these documents in some calculated attempt to mislead the Court is a matter that should have been put to the witnesses, but was not.*

94. *As demonstrated in the internal MMX memorandum, the purpose of the industry restructure was to help mitigate against prices dropping to as low as $80/MT for the first 2 to 3 years of the project, which would put the project in trouble. In such a price drop scenario, the fixed price contracts offered absolutely no benefit to PDB, APS or MMX since they would be paying $30/MT more than the price at which they would otherwise be able to purchase on the market. Indeed, this was the very concern that PDB had over its entering into the fixed price contract, as noted in the document entitled ETY purchase of ABR Chemical at folio A157.*
95. *It was to address this concern of a price drop to as low as $80/MT that MMX was suggesting (internally) a restructure by buying up high cost capacity and shutting it in so*

as to reduce supply which, in most economic scenarios, will reduce either the likelihood of prices softening or the degree to which they would soften.

96. *If nothing more, this demonstrates that the industry restructures referenced in the MMX internal memo was something very different than the fixed price contracts.*

97. *As to paragraphs 102 to 105, the Respondent takes out of context the fact that the AbR Project was based on the concept of a low-cost strategy. There is no doubt that due to its economies of scale, the ZQ Plant was capable of producing Chemical at a cost that was lower than its competitors in the industry at that time. There is nothing sinister about that. What the Respondent's submissions conveniently ignore is that:*

    (i) *The view that existed at that time was that the coming on stream of the AbR Project (as well as the M5000 project – which was a plant of the same size as ABR) – particularly when layered over other factors – was projected to result in a surplus of Chemical in the global market, especially in the first few years of operation;*

    (ii) *MMC was concerned as to the impact that this would have on its business, especially since the project was likely to go ahead whether MMX participated or not (see folio A68);*

    (iii) *Far from seeing the fixed price contracts as a boon, the contemporaneous documents reflect that at the time when they were negotiating the fixed price contracts, both PDB and MMX had concerns that they were taking on risk by accepting those terms;*

    (iv) *Far from attempting to use the fixed price contracts to syphon value out of ABR, MMX deliberately reduced the volume that was to be sold under the fixed price arrangement by 547,500/MT a year.*

THE SO CALLED MYTHS TO PORTRAY THE FIXED PRICE CONTRACTS AS COMMERCIAL AGREEMENTS

98. *At paragraphs 106 through 139 the Respondent attacks the reasons proffered by the Appellant in support of the contention that the ABR fixed price contracts were commercial agreements. In so doing the Respondent sets out four contentions of the Appellant that the Respondent describes as myths. These are:*
    - *(i) That the Chemical market was soft;*
    - *(ii) That the Appellant relied on the CMAZ Report of July 2001;*
    - *(iii) That APS was an independent and unrelated party dealing with ABR at arm's length;*
    - *(iv) That the fixed price contracts were necessary in order to obtain financing*

99. *An examination of each of these demonstrates that in each case the Respondent is plainly wrong to term them as a myth.*

The Chemical Market was soft

100. *The first so-called myth was the contention by the Appellant that the Chemical market was projected to be soft. In respect of this the Respondent submitted that there was no hint of volatility in the demand for Chemical over the 4-year period 1998 to 2001 and that during that period MMX purchased 2 million metric tonnes of Chemical from third party suppliers to supplement its own production so that it effectively had sufficient demand to consume all of the ZQ Plant production.*

101. *These submissions are based on false logic.*

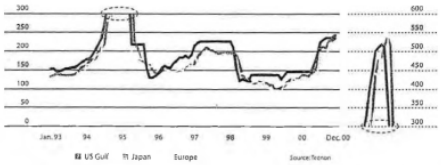
102. *As to volatility, first the Respondent's submissions are based on the false presumption that the volatility to which the Appellant referred was in relation to global demand. That is not so. The volatility to which the Appellant referred concerned the price of Chemical. This volatility is evident from the chart set out in the MMX Annual Information form,*

which is found at Folio D78, and in the Annual Report for 1998, both of which are replicated below for the Court's convenience:

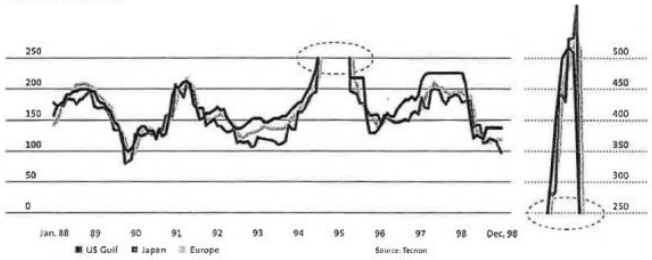
Chemical Prices

Chemicalprices have historically been characterized by volatility and have been sensitive to overall production capacity relative to demand, the availability and price of natural gas feedstock and general economic conditions.

The following chart shows methanol contract prices (in US dollars per tonne) in the world's major chemicalmarkets:



The following chart shows Chemicalcontract prices (in U.S. dollars per tonne) in the world's major chemicalmarkets:



103. *Second, the Respondent's submissions are based on the false assumption that historic demand was a good indicator of future demand. While this may be a fair assumption in certain circumstances, as the contemporaneous documents confirm, at the time when the fixed price contracts were being negotiated there were changes in one of the key users for Chemical, at least in the North American market, that is to say as a fuel additive for MTBE. The Respondent tries to counter taking incomplete statements out of the MMX annual reports while ignoring all of the other statements that express grave concern over the future of this key use for Chemical. To assist the Court, we attach in*

appendix B some extracts from the MMX Annual reports in the Statutory Bundle that give more complete picture of the way in which that company viewed the future potential for MTBE.

104. *Third, the Respondent's submissions are based on the false assumption that price is determined by demand alone and fail to take into account the impact that the introduction of new low-cost supply was likely to have on price. In this regard we remind the Court that, as noted in the contemporaneous documents, the AbR Project was likely to proceed whether with or without the involvement of PDB or MMX – see folio A21 which expressed the concern that "[i]indications are that a replacement equity for AM would be either REN Co or NOX Co" and A68 which noted that "[r]risk that PDB-AM will proceed without MMX".*

105. *Fourth, the Respondent's submissions are based on the false assumption that present or historic prices would be a good indicator of the future price. All of the projections, whether prepared by the independent industry expert CMAZ or the internal PDB and MMX projections, confirm that this was not expected to be the case.*

106. *Similarly, the Respondent's submissions with regard to MMX being able to purchase all of ABR' production is also based on false logic that misses the point.*

107. *While it is the case that the MMX Board paper referred to a sourcing gap, that does not equate to a position of short supply in the global market. All it means is that MMX would purchase supply from third party producers which it then on sold to other users. It is these purchases that are referred to as the "sourcing gap". While MMX had the capacity to swap out supply from these third-party producers with supply from ABR, this did not decrease the overall supply picture. Rather, the additional volumes that ABR was bringing on stream were volumes that were in addition to those that were already being produced by these other third-party producers.*

108. Accordingly, the ability of MMX to purchase all of the production from the ZQ Plant did nothing to change the economics of the Chemical industry. Nor did it change the economics for MMX given that MMX was not itself an end user of Chemical, so that if it committed to purchasing all of the Chemical produced by the ZQ Plant (as it in fact did) it was nevertheless required to find customers for that Chemical, and thus still had to compete for that limited market with all of the existing suppliers as well as ensure that it remained competitive in light of the new, projected supply that was due to come onstream.

109. The position is no different for PDB. While it is true that PDB had a demand for Chemical, this did not change the overall market dynamic and thus the industry economics.

110. The Respondent places reliance on a statement made in the MMX Annual Information Form that "[a]s a result there is little excess supply over demand and it is not expected that this situation is likely to change over the next two years". We do not share the Respondent's view that this statement is a strong expression of confidence in a bullish Chemical market. Rather we read the statement as stressing that, based on factors present at that time, with little change expected over the next two years. Further, this statement was made in March 2001 – before the AbR Project started and before the M4XXX and M5XXX plants were due to come online. The market conditions that existed at that time are set out in the two paragraphs above that from which the Respondent extracted this statement. In those paragraphs MMX analyzes the additional production that was projected to come onstream in the next 2 years - which did not include ABR, M4XXX or M5XXX, which plants were not scheduled to come on stream during that period. Therefore, it is not the case that this statement was reflective of any outlook for the period after the startup of the ZQ Plant, by which time the oversupply was likely to be much more acute.

111. Similarly, the Respondent plucks selected information from the MMX Board paper at folio A186, and ignores other statements such as the statement made on that very page

where the MMX Board was told "[a]s outlined in the recently updated Strategic Marketing Plan, the market is expected to be balanced to short in 2002 to 2003, to turn long over 2004 to 2006 and to turn to balance in 2007 to 2008." Accordingly, it was MMX's view at that time (as illustrated by both the table and the statement) that between 2004 to 2006 the market was likely to be in a position of oversupply, and would only get back to a demand/supply balance in 2008. This is consistent with the sentiments set out in the MMX internal memorandum of 10 May 2000 (folio A77) in which MMX expressed concerns as to the possibility of the price of Chemical dropping to $80/MT during this very period, and stating that if that were to happen the project would be in trouble.

112. *It is therefore wrong for the Respondent to suggest that not a single document provided by the Appellant supports the contention that there was a real threat of a prolonged price drop in Chemical prices to a level that threatened the Appellant's ability to either secure financing for the AbR Project or to continue meeting the obligations to the lenders. The Respondent has either mis-read and misunderstood the documents, or has deliberately cherry-picked statements which it then twisted and distorted in order to support its assessment.*

113. *It is equally disconcerting that the Respondent could submit that the MMX Board paper was not concerned with pricing but rather with demand and supply. Such a submission ignores basic economic concepts including the impact on price of the demand and supply of a fungible product.*

The CMAZ report supports the prices in the fixed price contracts

114. *The Respondent attacks the Appellant's reliance on the CMAZ report by arguing that:*

(i) The CMAZ report was obtained after the price had been agreed; and that in any event

(ii) MMX and PDB were better placed than CMAZ to determine the price for the fixed price contracts; and

(iii)The CMAZ report should be disregarded.

115. *With regard to the timing of the report, we accept that the report was prepared in 2001 and that negotiations on the price started in 2000. However, that does not mean that the CMAZ report played no part in the finalization of the pricing. In particular, the report was an independent check on the pricing that had been discussed between the parties, and in respect of which both parties harboured reservations. That it was confirmatory of the reasonableness of the prices that have been provisionally agreed did not render it any less relevant nor important. Indeed, the fact that the CMAZ report was completed after the provisional agreement on the terms of the fixed price contracts resulted in ABR having the benefit of their being capable of being reviewed by CMAZ, who expressed the very firm view that they were commercially sound and within industry norms.*

116. *As to the Respondent's contention that PDB and MMX were in a better position to determine a price for the fixed price contracts than CMAZ, there is absolutely no evidence to support this. The unchallenged evidence of Mr. SD is that CMAZ is a recognized industry expert who published the pricing index that was commonly used in the Chemical industry. Furthermore, the fact that its views were considered and relied upon by the Respondent when its determined the objection is further testimony not only to its credibility but to the fact that the Respondent did not consider that its views and opinions on future Chemical prices were somehow lacking, deficient or not based on all of the relevant facts.*

117. *Furthermore, in its capacity as publisher of the Chemical pricing index CMAZ has access to a wealth of information that is not otherwise be available to entities such as MMX, such as the prices at which MMC's competitors were selling, which would be needed by CMAZ in order to produce its index. In the circumstances there is no support for this contention. Further, we note that this contention was not put to any of the Appellant's witnesses (and which ought to have been if the Respondent intended to run such an argument).*

118. Taken at its highest, the Respondent's submissions on this point simply serve to emphasize the independence of CMAZ.

119. In any event, while we disagree that PDB and MMX were capable of influencing (or did influence) the market as suggested by the Respondent, we note that both of them did their own projections which demonstrate that they each had a more conservative view of the projected prices than CMAZ.

120. As to the contention that the CMAZ report should be disregarded, this is based on the suggestion that the report, and in particular the statements to the effect that the fixed price contracts were commercially sound and within industry norms, are inadmissible opinion evidence. This contention is misplaced.

121. The Tax Appeal Board is a reviewing Court. It reviews the material that was before the Revenue, together with any other material that it permitted to be relied upon in the exercise of its discretion under section 13(1A) of the Tax Appeal Board Rules. There is no dispute that the CMAZ report, and the comments that the Respondent now seeks to attack on some sort of technical basis, were before the Revenue. It is therefore appropriate for the Court to consider same in determining whether the assessment was justified.

122. Second, the Statutory Bundle was assembled and submitted by the Respondent. In so doing it was open to the Respondent to omit any document that it considered to be inadmissible. Despite this the Respondent (we say properly) included the said reports. This belated attempt to suggest that the material is not admissible therefore rings hollow.

123. Third, the CMAZ report is not being used as expert opinion evidence to guide this Court's decision. Rather, it is being used as evidence as to the steps that the Appellant took in entering into the transactions. In that vein, in considering whether this transaction was artificial and fictitious, it is both properly admissible, and highly

relevant, to consider that the Appellant had submitted the entire contractual structure to an independent industry expert for their review and comments. This type of conduct is not consistent with the type of conduct that one would expect from a taxpayer who was seeking to implement some artifice or fiction.

124. *In the circumstances, there is no basis, whether technical, evidentiary or otherwise, for ignoring CMAZ's comments on the fixed price contracts. Like all of the other material in the statutory bundle, there is no special need to call evidence to "prove" that material. This material was considered by the Respondent in making its decision, and it is open to the Court, in reviewing the decision of the Respondent, to also consider this material and determine whether it should accept it or whether there is a basis for rejecting it – just as the Revenue was required to do. Further, the Respondent itself sought to put CMAZ forecasts into evidence - see affidavit of Taklalsingh at paragraph 5(d) and (e). It is most unusual for the Respondent to rely on a document when it thinks it suits its purposes and to say that it is inadmissible when it is relied upon by the Appellant.*

125. *In a further attempt to attack the CMAZ report the Respondent levels a series of criticisms including that they do not know who the individual was who authored it or what were his qualifications as well as what were the indicia or facts relied upon. Here again the Respondent confuses an expert report that is being submitted in the course of civil proceedings as expert evidence, and material that was before the Revenue when it either conducted its assessment or determined the taxpayer's objection. At best it is a matter that goes to weight, and in that regard, there can be no doubt that:*

(i) CMAZ is a recognized industry expert, and publishes price forecasts for the Chemical industry;

(ii) The Respondent considered the reports published by CMAZ to be relevant as they purported to rely on them in determining the objection;

(iii) In preparing its report CMAZ reviewed and considered the fixed price contracts;

(iv) CMAZ therefore had access to all of the material that was relevant to expressing a view as to the commercial soundness of those contracts and certainly whether they were within industry norms.

126. In those circumstances we submit that significant weight should be afforded to the contemporaneous, informed and independent views and comments from CMAZ.

APS was an Independent and Unrelated Party

127. With regard to APS being an independent and unrelated party, the Respondent's submissions conflate the concept of "vested interest" and related parties. We note that the Respondent has not referred to a single authority that supports elevating a "vested" or "special" interest and equates it with a party who has control over another.

128. We accept that APS had an interest in the AbR Project succeeding, which interest was derived from the fact that it (together with MqN Co) had an interest in the joint venture that was to supply oxygen to the project. This interest is no different to the interest that any other supplier, such as the GNL, would have had in the AbR Project succeeding. For example, in the same vein as the joint venture constructed a plant to supply the ZQ Plant, the NGC would have had to contract with up streamers for a supply of natural gas to supply to the ZQ Plant and would have to invest in infrastructure such as pipelines in order to transport the gas to the Plant. But that is not to be mistaken with having an interest in the plant such as to make APS (or GNL) a related party.

129. Moreover, the "interest" that APS (or any other supplier) had in the AbR Project would work counter to the theory now being proffered by the Respondent in that given the investment that APS was making in building a plant to supply the ZQ Plant with oxygen, it was in APS's interest that the AbR Project be a success, be able to service its loans and not make losses. A loss-making entity that defaulted on its loans would not bode well for the significant expenditure that APS was making in constructing the oxygen plant. Rather, it was in APS' interest for the ZQ Plant to continue to perform and operate, so as to guarantee the demand for the oxygen that was to be produced by APS

through its joint venture with GUI. Similarly, from ABR' perspective, given the reliance that it was placing on APS, it was useful for it to incentivize APS to perform under its supply contract. Getting APS to close its MA plant was key to achieving that as it meant that a failure by APS to deliver under its oxygen supply contract would also impact its other operations thus providing it with the desired incentive to perform.

130. There simply was no benefit that would accrue to either MMX or PDB that would result in their deliberately ceding value to APS – an entity who held no shares in ABR - and thus sacrificing the dividends that it would otherwise have received from ABR.

131. In submitting that the fixed price contract offered to APS was influenced by the tolling arrangement on the oxygen supply and an agreement that APS would shut down its own Chemical production facility in MA State, the Respondent has again jumped to a conclusion that there was some disingenuous motive rather than seek to understand the arrangements for what they were. The Respondent has not explained how this would benefit PDB but in any event we note that, in addition to the matters referred to above (as to why it was important to tie APS to the successful operation of the ZQ Plant), the shutting down of the MA plant was simply in recognition of the fact that leaving that plant in operation would allow APS to use its own production for its own purposes and then market its additional volumes from the ZQ Plant on the market, which would further soften the Chemical price. That this was completely unrelated to any such ulterior motive as conjured up by the Respondent is confirmed by the fact that the principle terms of the deal, including the shutting down of APS' MA plant, had been negotiated between APS and SMT, well before MMX became involved in the AbR Project – as noted in the ABR Chemical Plant Disclosure document which is to be found at Folio A58 and in particular the passage under "Production and Off Take Issues … (b) APS" at A62.

132. Furthermore, the conclusions and inferences that the Respondent seeks to draw from the references to APS in the financing documents are equally misplaced. The Court will no doubt note that the description of project parties, and the examination of contractual

documents, was not limited to APS but included the gas supplier, GNL, and the EPC contractor, RGI. That they had contracted to perform some critical part of the AbR Project does not, by that mere fact, make any of those parties related parties so as to render the agreements between them and ABR not arms' length agreements.

133. Similarly, the Respondent makes heavy weather over the fact that APS's financier (but not APS itself) was allowed to conduct a due diligence exercise on the AbR Project. This submission ignores the fact that a financier will understandably need to make an assessment on the likely performance and financial success of the plant that it was financing. Given that APS had one customer, the financiers would also have had to assess that customer before committing to the financing, It is no different to the assessment that the AbR Project financiers had to carry out of the various constituent contracts and parties who involved in one of the other key areas of the AbR Project, whether that be in supply the gas to the Plant (as was the case with the GNL) or in constructing the plant (as was the case with RGI) – the contracts for each of whom were examined by the financiers. The fact that this permission was being given to the financiers and not to APS itself confirms that APS was not a related party and stood on a very different footing to the project sponsors.

134. The Respondent casually makes the bald assertion that there was a quid pro quo pricing arrangement with APS. The Respondent makes assertion without even explaining how it arrived at this conclusion. In any event it is not supported by a shred of evidence. To the contrary, the evidence shows that the price at which APS contracted to supply oxygen was similar to or the same as the price at which AL Liquids supplied oxygen to the XY Plant.

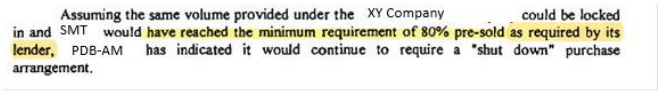
The FPCs were necessary in order to obtain financing

135. As to whether the fixed price contracts were necessary in order to obtain financing, the Respondent's arguments once again demonstrate a complete lack of understanding of the material or a distortion of same.

136. For example, the Respondent attacks Mr. SD and Mr. MP for suggesting that there was a floor price. In so doing it ignores not only the evidence from these witnesses, but also the

way in which the fixed price contracts were intended to work in tandem with the basket prices, so that at times when the Chemical prices were low, ABR was afforded protection through the fixed price contracts, while through the basket prices being able to benefit from the upside when prices were higher. It was in this manner that the fixed price contracts provided a floor (i.e. guaranteed minimum level of income) as confirmed by Mr. MP at paragraph 17(i) of his affidavit where he testified that "[b]y "setting a price floor", I mean that the project was guaranteed a revenue stream because there would be a minimum price for a minimum amount of volume for the Chemical that was being produced" and at paragraph 17(ii)(b) where he explained "the combination of fixed offtake and basket price sales enabled the AbR Project to meet debt service requirements in weaker Chemical markets and to consistently deliver in moderate to strong Chemical markets, ultimately providing protection from Chemical price volatility".

137. The Respondent also seeks to make much of the timing of EF's involvement in order to suggest that considerations of the financing did not impact or influence the fixed price contracts. In so doing the Respondent ignores the experience that the parties had from the XyT Project as well as the direct references to the fixed price contracts being required for financing such as the statement made in the ZQ Plant Disclosure (upon which document the Respondent relies to support some of its other points) in the following terms:


Assuming the same volume provided under the XY Company could be locked in and SMT would have reached the minimum requirement of 80% pre-sold as required by its lender, PDB-AM has indicated it would continue to require a "shut down" purchase arrangement.

138. The Respondent also ignores other documents in the Statutory Bundle which confirm that discussions with financiers had started before MMX's involvement with meetings with advisors from EF and various banks being held in December 1999 – see for example folio E56 and folio E60.

139. Additionally, there were a number of references in the contemporaneous documents as to the tie between the fixed price contracts and the financing of the project, and in particular the correlation between the term of the fixed price contracts and the tenor of the loan. In addition to those documents already referenced in our substantive submissions, as also:

*(i) Folio A157 where PDB noted that the "financing **(and therefore sales contracts)** runs over 10 years";*

(ii) Folio E15 which noted that "Project financing requires 10-year offtake agreements";

(iii) Folio J3 which recorded the thinking behind SMT's strategy to initially have 80% of the offtake sold under fixed price contracts as being "30% of the product will be fixed price long term as a "hedge" in order to get constant cash flow, another 50% would be under long term so as to make the banks happy".

OTHER MATTERS RELIED UPON BY RESPONDENT

140. Aside from attacking the reasons that the Appellant had put forward in support of the fixed price contracts were bona fide commercial agreements, the Respondent advanced two reasons of its own as to why the fixed price contracts were artificial. These were the Respondent's contentions that:

(i) The fixed price contracts were imposed on ABR by its shareholders; and

(ii) The other Chemical sales agreements did not assist the Appellant

FPCs were not Imposed on ABR by its Two Shareholder Companies

141. As to the suggestion that the fixed price contracts were imposed by ABR' two shareholders, namely PDB and MMX, the Respondent has already treated with this in our substantive submissions. In any event, when viewed from the context of whether the fixed price contracts were artificial or fictitious for the purposes of section 67 of the ITA, we submit that in light of all of the circumstances of the instant case, it matters not whether the fixed price contracts were conceptualized or negotiated by ABR (whether through its directors or management) or not. In this regard, the fact that the structuring of the project to rely on fixed price contracts had been deployed on the XyT Project (where the contracts were undoubtedly arm's length with third parties) and had been proposed by SMT long before MMX's involvement in the project demonstrates that there was nothing artificial or fictitious in the structure and in particular the concept of using fixed price contracts.

142. Nor is there any basis for saying that there was anything artificial or fictitious about the pricing of these fixed price contracts, especially in light of the fact that these fixed price contracts:

(i) were for volumes that were lower than those originally proposed by SMT;

(ii) were for prices that were higher than those that SMT had offered and/or was discussing with third parties who undoubtedly stood at an arm's length to the project;

(iii) were for prices that were consistent with and supported by not only both the MMX and PDB internal price projections but also the price projections of an independent expert;

(iv) were reviewed and considered by an independent industry expert and were found to be commercially sound and within industry norms;

(v) had been designed for the logical purpose of providing protection to ABR against the risk of price volatility; and

(vi) had been set at a price such that the AbR Project was financeable, and allowed ABR to satisfy its loan obligations by having a debt service coverage ratio that

was greater than 1.5 (see folio A87) as well as to provide ABR with a rate of return of 14% on the fixed price volumes (see folio A84).

Accordingly, even if the role of the ABR board was limited to approving the fixed price contracts (as opposed to conceptualizing them and participating in their direct negotiation) this cannot render them artificial or fictitious.

143. *We note that the Respondent seeks to treat with the Appellant's submission where we suggest that the unequal shareholding between MMX and PDB effectively rendered the parties at arm's length by suggesting that MMX extracted value in other areas including the marketing fee and the shipping. This is yet another example of an inappropriate attempt by the Respondent to seek to cast negative aspersions against the Appellant (or its shareholders) without a shred of evidence to support it.*

144. *Before making such a submission the Respondent should, at minimum, show the economic benefit that was flowing to MMX from these other "sources" so as to be able to demonstrate that MMX had, as the Respondent contends, in fact "recouped" the "value" that it was ceding to its minority shareholder, PDB. Instead of doing this the Respondent casually submits that these additional avenues of value creation meant that MMX was deriving a higher earning than PDB from the AbR Project. This is pure speculation and conjecture on the part of the Respondent. It is also a matter that is being raised for the very first time in the Respondent's submissions and never put to the Appellant's witnesses, thus depriving the Appellant of the opportunity to lead evidence to rebut the Respondent's theories on these issues or to explain to the Respondent why this theory was misplaced.*

145. *Moreover, the submission made by the Respondent ignores that MMX was performing services in respect of these other "avenues of value creation", and there is not a single shred of evidence to suggest that the marketing commission that was being paid or the shipping rates that Waterfront was charging were either not in respect of services that were actually being rendered and were not in accordance with market rates.*

The Other Chemical Sales Agreements Assist the Appellant

146. *The Appellant's contention that the other Chemical sales agreements (namely the CEL Ltd contract and the XY fixed price contracts) do not assist the Appellant is borne from a misunderstanding of the provisions of those agreements and their effect.*

The CEL Ltd agreement

147. *The Respondent submits that by having a price that ranged between a floor and a ceiling produced a fair balancing of the risk which did not occur in the case of the ABR fixed price contracts. This submission impliedly accepts that the price ceiling under that contract was NOT artificial in that case, even though it was substantially lower than the market price that subsequently obtained. It is noteworthy that despite this implicit recognition on the part of the Respondent, it has persisted in substituting for the ABR fixed price, the market price and not the ceiling price under the CEL Ltd contract notwithstanding the avalanche of evidence that, like the CEL Ltd contract, the ABR fixed price contracts were seeking to manage the risk of price volatility.*

148. *Further, the Respondent's submission takes no stock of the reality that negotiations over a price floor will invariably depend or hinge on negotiations of a commensurate ceiling. The impact of this may itself be seen from the CEL Ltd contract where the ceiling which admittedly was higher than the price under the ABR fixed price contracts, but which also featured a floor price was significantly lower than the ABR price. Accordingly, while the producer of Chemical in the case of the CEL Ltd contract had a slightly enhanced benefit in a higher ceiling at times of higher prices, it also carried a greater risk of lower prices where the price fell below that of the fixed price contracts. Given that the ABR price was significantly higher than the floor price of the CEL Ltd contract, it passes strange that the Respondent could consider that the CEL Ltd contract was fair, while at the same time concluding that the Appellant's shareholders committed to sell low price Chemical for their own benefit.*

149. *Ultimately both the CEL Ltd contract and the ABR fixed price contracts sought to achieve the same thing – the legitimate commercial objective of managing the risk of price volatility. That they each opted to do so in marginally different ways does not render the other artificial or fictitious.*

The XY Fixed Price Contracts

150. *As to the fixed price contracts that XY had with RAC and ACX, the suggestion that reliance on these contracts is misplaced is most surprising given that according to its own evidence these were used by the Respondent as comparators in determining that the ABR fixed price contracts were artificial and fictitious. In any event the alleged points of distinction lack any merit whatsoever.*

151. *The first point of distinction advanced by the Respondent was that the RAC fixed price contract had a tenor of 5 years. In making this submission the Respondent completely ignores that the tenor of the ACX fixed price contract was 10 years. Moreover, its representation as to the tenor of the RAC contract is misleading. The RAC fixed price contract was for a* ***minimum*** *term of 5 years – the effect of clause 3(a) of that contract being that after the expiry of 5 years, the contract would automatically continue from year to year unless one of the parties gave a 90-day notice to terminate the contract. However, what is critical, and what the Respondent's submissions conveniently ignore, is that the right of the Seller to terminate the RAC fixed price contract by such a notice was constrained so that the contract could have been extended for a substantially longer period at the election of the purchaser, RAC.*

152. *In any event, whether the term of the RAC contract was limited to 5 years or was longer, is not a material distinction which would prevent the Court from considering this contract (as the Respondent initially did) in concluding whether the concept of having fixed price contracts was artificial or fictitious, or whether the terms of the ABR fixed price contracts were so off the mark from other contracts that were entered into at or around that period so as to be capable of being considered to be artificial or fictitious.*

153. With respect to Counsel for the Respondent, the suggestion made at paragraph 146(b) of their submissions is not one that can be taken seriously, and it epitomizes the submissions and positions advanced by the Respondent in this case. We again note that it was the Respondent who initially (and up to the time that it presented its evidence to the Court) thought it appropriate to consider these contracts and compare them to the ABR fixed price contracts, there is simply no basis for its sudden about face and apparent suggestion that there is some danger in inferring that these entities were independent. Until the submissions of the Respondent were filed, this had never even been suggested – and for good reason, as there is not a scintilla of evidence that even remotely suggests that RAC and ACX were anything but unrelated, third party offtakers.

154. As to the submissions on the other alleged points of distinction, these are equally spurious and created entirely within the mind of counsel for the Respondent. They represent the only thing in this case that can properly be described as being artificial or a fiction.

155. The suggestion that the eventual project sponsors for ABR ended up being different to the original project sponsors for XY is irrelevant. In any event it ignores the fact that:

- *(i) PDB (through AM) was an original sponsor of both projects;*
- *(ii) The AbR Project was structured before MMX became a project sponsor, and at the time that it was conceived and structured had the same project sponsors as XY;*
- *(iii) As set out above and in our primary submissions, the lenders did require that a minimum percentage of the volume to be produced be pre-sold.*

156. In this regard, the only effect of MMX coming into the project was that the volume of Chemical that had to be sold under the fixed price arrangement was lowered from 80% to 50% and a higher price was negotiated for these fixed price volumes.

157. *The suggestion that the XY sponsors were not producing Chemical for their own consumption ignores the fact that the same XY offtakers (as well as other third parties) were approached to purchase Chemical from ABR under fixed price terms and either declined or were only prepared to accept such a contract at a price that was lower than the price under the ABR fixed price contracts. In addition, the statement made by the Respondent that the Appellant's Chemical would always have a market fails to appreciate that the only reason that it had this market was because these parties were prepared to commit to purchase these volumes. Without such a commitment, they were free to purchase from any other producer. This was one of the benefits that the fixed price contracts produced for ABR – it guaranteed customers for 52% of its offtake as well as a guaranteed stream of revenue from these customers even where prices fell.*

158. *Similarly, that ABR produced a greater volume of Chemical, and that a lower percentage of its offtake was sold under fixed price contracts is not a valid point of distinction. In this regard it is important to keep in mind that:*

(i) The financing arrangements for XY were different in that being a smaller plant, XY was cheaper to build and as such there would be different debt ratios; and further

(ii) AoN was a powerful financial investor whose involvement in the project as an equity investor reduced the need for loan financing.

In the circumstances, we respectfully submit that the differences to which the Respondent alludes in its submissions are of no moment. Instead, the Court should consider that the general project structure was one that a reasonable commercial person who employ in order to manage its risk, while leaving the precise percentages etc. to be determined by matters such as debt ratios.

FINDINGS OF FACT

159. *For the reasons set out above, a number of the Respondent's proposed findings of fact are misplaced and either not supported by any evidence that is before the Court or are the result of a distorted view of the evidence that does exist.*

E. REPLY OF THE RESPONDENT

22. The Reply of the Respondent as filed on the 31st July 2020 was in the following terms: -

Preliminaries

1. *On 13th December, 2019 the Appellant filed its submissions in Reply to the Respondent's Submissions which had been filed on 25th November, 2019. That document is 159 paragraphs in length which is virtually the same as the Appellant's original submissions filed on the 30th September 2019. Those submissions go well beyond the normal scope of a Reply in that:*

    a. *There is very detailed consideration and analysis of the evidence of both sides, much more than as appears in the Appellant's original submissions;*

    b. *There is more detailed analysis and consideration of the relevant case law than appears in the Appellant's original submissions;*

    c. *There is the injection of new arguments including arguments concerning the role of this Court as one of review of the process whereby the Auditor arrived at the decision to raise at the additional assessment; and*

    d. *There are numerous misstatements as to the evidence on record some of which are highlighted in these submissions.*

2. *In view of the foregoing, although this Honourable Court gave no directions for the filing of a Respondent's Reply, the foregoing matters require comment and to do so orally would encroach significantly on the limited time provided for oral address on 4th February, 2020. Accordingly, it is respectfully submitted that in the interest of fairness and proportionality, the most appropriate way to respond to the matters set out above would be to file for the consideration of this Honourable Court, the document herein called the Respondent's submissions in Reply.*

3. *We now turn to consider the foregoing issues set out above.*

This Court is a Court of First Instance which must make findings of fact

4. *It is noted that the Appellant's Submissions in Reply have unsurprisingly sought to shift this Court's focus from considering the evidence before it to instead a review and examination of the process by which the Respondent's auditor arrived at the decision to raise an additional assessment against the Appellant. In so doing the Appellant is attempting to shift the legal burden of proof from itself onto the Respondent. Such an approach is captured by the very last paragraph 159 in the Appellant's Reply submissions:*

> ***"A number of the Respondent's proposed findings of fact are misplaced and either not supported by the evidence that is before this Court…"***

5. *The foregoing approach on the part of the Appellant is wholly inconsistent with the legal position and derives no support from the relevant authorities. First of all, it is clear from the decision of this Court in the* ***EOG*** *case that this is a Court of first instance and not an Appellate Court which is there to review a decision of an auditor by examining the process by which a decision was arrived at to raise an additional assessment. In the decision of this Court in the* ***EOG case*** *at* ***paragraph 26*** *of the Judgment, the Court after referring to the early decision of* ***Marconi v BIR*** *the Court stated as follows:*

"The Court made the observation that although the proceedings before the Tax Appeal Board are by way of 'appeal', the hearing was in fact the hearing of a trial at first instance in which facts are found by the Tax Appeal Board…"

Burden of Proof

6. It is trite law that the burden of proof in a Tax Appeal lies on the Appellant. This is embodied in ***section 8(2) of the Tax Appeal Board Act (the TABA)*** *and has been affirmed in the decision of this Court in* ***Boland Maharaj*** *which is referred to at* ***paragraph 36*** *of the Respondent's submissions.*

The aforementioned approach of the Appellant to the burden of proof

7. This is exemplified by the Appellant contending that the Respondent should have provided evidence of similar FPCs having a 10-year term as the appropriate comparator. Such a contention is wholly misconceived because the Respondent's case is that it has discharged the evidential burden as set out at ***paragraph 36*** *of its submissions and that is the end of the matter. There is no continuing evidential burden on the Respondent to elicit evidence. Having discharged the evidential burden, it is clear from decisions of this Court that thereafter the legal burden rests entirely on the Appellant. Consequently, the Appellant is clearly seeking to divest itself of the legal burden that rests on its shoulders.*

8. Furthermore, and in addition to the foregoing, in pursuing the aforementioned argument the Appellant has departed from its original case as to the appropriate comparator i.e. the comparison between the price under the FPCs and the forecasted or prevailing market price for Chemical. That position has been explicitly advanced by the Appellant from the inception as demonstrated in the table hereunder.

	Document	***Contention***
1.	*Response to proposed objection (folio 343)*	***"Under the Chemical sales agreement, ABR sold 50% of its Chemical production using the fixed price contracts while the other half was sold using a basket price (that is pricing which took into account the prevailing Chemical prices in various regions"*** *Folio 345* ***"…Further, CMAZ forecasted Chemical prices from 1999 onwards and it is evident that the forecasted prices are similar with the prices contained in the FPC..."*** *Folio 357*
2.	*Objection Letter (folio 468)*	***"Pursuant to the basket price arrangement which represents approximately 50% of ABR' sales, MMX pays ABR at a price for sales of the basked volumes determined by a formula. That formula effectively calculates the weighted average price received by MMX (and its affiliates) from the sale of the basket volumes in European, United States and Latin American markets"*** *Folios 471-472* ***"CMAZ…also provided a Chemical price forecast… Based on the forecast period of 2004 to 2014… the average Chemical price for the FOB US Gulf and FOB West Europe regions … was $128/MT. After deducting the approximate shipping costs of US$20/MT to arrive at FOB Pt Town, T&T price point, the net average forecast price of US$108/MT is approximately the same as the PDB and MMX FPC price of US$110/MT. This CMAZ (third party) price forecast supports the arm's-length nature of the FPC price."*** *Folio 472*
3.	*Notice of Appeal*	***"Under the Chemical Sales & Marketing Agreement QR is required to resell … the remainder of the Chemical purchases from the Appellant…to other purchasers at a price reflecting the prevailing Chemical prices in various regions ("the Basket Price")"*** *Para 2(A)(e)* ***"The FPCs were arranged on commercial, arm's-length terms by reference to the prevailing and projected market conditions as well as the prevailing and projected market values of Chemical at that time. In particular*** ***…*** ***(ii) the prices fixed by the FPCs were in line with the price forecasts of independent industry experts such as …CMAZ Para*** *2(A)(g)*

4.	*Answer*	***"… It is averred that the prices paid by "basket customers" for the Basket Chemical Volumes depended on market prices prevailing at the time of sale.*** *Para 12.* ***"It is admitted that the prices at which the Fixed Price Chemical Volumes was sold during 2005 will lower than the prices at which the Basket Chemical Volumes was sold during 2005 and the prices at which Chemical could be sold in the market during that year"*** *Para 16* ***"… The prices agreed in the fixed price offtake agreements are in line with forecasted and actual contract market prices reported in 2001 by independent industry experts, such as CMAZ".***

9. Furthermore, the Appellant continued to make these submissions at ***paragraph 14*** *and the section entitled* ***No Substantial Disparity Between the FPC Price and Fair Market Value*** *at* ***paragraphs 107-114*** *of its original submissions of 30th September, 2019. This confirms that up until that point the Appellant was contending that the commerciality of the price in the FPCs was to be assessed by reference to historical, prevailing and forecasted market prices at the time.*

Recasting of the Appellant's case: The Improper Comparator Approach

10. Notwithstanding the foregoing the Appellant has sought in its Reply at ***paragraphs 11, 19 and 52*** *to recast its case by stating that the aforementioned comparison is inappropriate. Instead, the Appellant is contending that the appropriate comparison would be the price under the FPC in this case as compared to other long term PFCs of a similar tenor of 10 years. (See paragraph 52(i) of the Appellant's Reply.)*

11. In view of the foregoing it was respectfully submitted that this Honourable Court should ignore this attempt by the Appellant to recast its case.

12. *In view of the foregoing, the Respondent submits that it was justified in substituting the basket price (being market based) for the price fixed in the FPCs as set out at* ***paragraphs 28-34*** *of its submissions filed on 25th November 2019.*

Misstatement of the Evidence: Five Clear Examples

13. *In its Reply Submissions the Appellant has misstated the evidence. There are 5 clear examples set out hereunder.*

Example 1

14. *At* ***paragraphs 6ii and iii*** *of its Reply, the Appellant asserts that SMT had approached no less than 7 potential purchasers of Chemical and that they all thought that the* ***prices being offered were too high****. The Respondent submits as follows:*

a. *There is absolutely no primary evidence given by any of the Appellant's witnesses to support this assertion. The only evidence which remotely appears to be related to this assertion is to be found at* ***paragraph 100*** *of the SD Affidavit where the deponent vaguely suggests that a discounted price had been offered to potential buyers. The Court is given absolutely no further particulars of this price or how those proposed terms matched the FPCs in this case. Moreover, as SD did not work for SMT or any of the parties with which it was supposedly negotiating, it is unclear on what basis the deponent can purport to give this evidence.*

b. *This Court ought to review* ***folios A62, A63 and A64*** *as this will demonstrate that these documents in no way support the Appellant's submission on the evidence that prices being offered were too high. At best, those documents suggest that the parties approached by SMT were actively trying to negotiate the best possible contractual terms with SMT. Contrary to the Appellant's assertion, there is absolutely no statement that RAC, ACX and BASF "had expressed dissatisfaction with the prices".*

Example 2

15. *At paragraph 37 of the Appellant's Reply it is being asserted that Ms. Deann Surajbally-Gomez accepted that the FPC were "**sensible commercial arrangements"**. This is a gross distortion of the evidence as she never expressed that view. Those words only appear by way of agreement with questions from Senior Counsel for the Appellant dealing with the alleged purpose of the FPCs as providing certainty as to future income. The question was framed hypothetically. The exchange as recorded it set out below:*

> ***Q.*** ***And they say the purpose of these contracts, and they're including the FPCs here, was to provide certainty in respect of the income earned, and you agree with that, that in fact that's something that the FPCs did, they gave you certainty as to the amount of money that would come in? It doesn't depend on any fluctuation?***
> ***A.*** ***Yes***
> ***Q.*** ***So, you accept that, that it provided certainty?***
> ***A.*** ***Yes***
> ***Q.*** ***Yes. And the other thing they say it was a hedge against the risk the price of Chemical will fall below the agreed fixed price, okay?***
> ***A.*** ***Okay***
> ***Q.*** ***You agree with that. Because even if it falls below, they're still collecting reve – you agree with that?***
> ***A.*** ***[Nodding]***
> ***Q.*** ***And that was a sensible commercial arrangement, isn't it?***
> ***A.*** ***Yes***

<u>Example 3</u>

16. *At paragraph 86 of the Reply the Appellant addressed the Respondent's "industry restructuring point'. The Appellant asserts that this was a recently developed theory from the Respondent which was **never put to any of the Appellant's witnesses.** This assertion is wholly incorrect since the record will show that all the Appellant's witnesses barring Mr. MP were asked a number of questions on this issue by reference to a number of documents produced by the Appellant.*

<u>Example 4</u>

17. *Additionally, there are multiple occasions on which the Appellant exaggerates the evidence. By way of example, there is no evidence that AoN was a **powerful financial***

investor *whose involvement in the project as an equity investor reduced the need for loan financing although this assertion is made at* ***paragraph 158(ii)*** *of the Reply.*

Example 5

18. *At paragraph 14 of the Appellant's Reply it is asserted that neither section 67 nor Sharkey v Wernher were raised in the Notice of Assessment. Although it is true that neither* ***section 67*** *nor* ***Sharkey v Wernher*** *were expressly mentioned in the Respondent's Notice of Assessment, there is no doubt that the Appellant was very much aware that both were in the mind and contemplation of the auditor during the audit process. The Court's attention is directed to letter dated 22nd December 2011 in response to the Respondent's proposed adjustments at* ***Folio 343 at para. 2.0*** *and Objection letter dated 27th January 2012* ***at Folio 468 para. 2.0****. In both letters the Appellant relied on* ***Z Estates Limited case*** *and the* ***Meyerson case*** *both of which rely on and apply the principles in* ***Sharkey****.*

19. *In view of the foregoing misstatements, the Respondent submits that this Honourable Court must exercise great caution before accepting the Appellant's submissions on the evidence.*

Other unsustainable contentions

20. *In addition to the foregoing, the Appellant's Reply contains a number of unsustainable contentions. For example, at paragraph 122, answering the Respondent's submission that the CMAZ report ought to be disregarded by the Court, the Appellant submits that the Respondent ought to have omitted that report from the Statutory Bundle if it considered that report 'inadmissible'. Firstly, that submission simply ignores the Respondent's obligations under* ***section 7(6)*** *of* ***the TABA*** *to forward to the Court copies of all documents relevant to the decision appeal from. Any document produced by the Appellant in support of its objection must necessarily be relevant, if only from the perspective of the Appellant. Undoubtedly the Appellant would have complained had the Respondent omitted any document supplied by it and would be justified in so doing.*

Secondly, whether a document in admissible or not falls to be determined by this Honourable Court not the parties to the appeal.

F. ANALYSIS OF THE SUBMISSIONS

The Factual Background

23. In our consideration of the issues which have emerged in the instant consolidated appeal, the starting point to our deliberations has been a thorough examination of the evidence presented by the respective parties, focusing on the commercial realities underpinning the transactions and agreements in question as well as the chronology of material events which transpired at the earlier stages of the dispute process. In that regard, our findings of fact are as enumerated below: -

    a. The Appellant is an unlimited liability company incorporated in the Republic of Trinidad and Tobago with its primary business activity being the manufacture and sale of Chemical. It was incorporated on the 6th July 1999 and was originally intended as the corporate vehicle in which a joint venture project among three entities, SMT LLC (hereinafter referred to as "SMT"), XYT Finance LLC (hereinafter referred to as "XYT") and PDB LLC (hereinafter referred to as "PDB") was to be realized. The joint venture project was aimed at constructing a high-capacity Chemical plant at Pt Town, Trinidad with the overall business strategy of capitalizing on Trinidad and Tobago's accessible and cost-effective natural gas, essential for Chemical production. MMX Corporation (hereinafter referred to as "MMX") later acquired SMT's interest in the AbR Project.

    b. Following MMX's acquisition of its interest in the AbR Project, the structure of the share capital of the Appellant was settled with the Appellant being owned by two shareholders, MCBR Holdings, a subsidiary of MMX, which held 63.1% of the Appellant's equity and Exploration and Services Limited, an affiliate entity of PDB, which held the remaining 36.9% equity interest.

    c. The shared ownership of the Appellant was also reflective of a broader strategy in the Chemical industry whereby it was common for major players to pool resources and to share business risks.

d. The Appellant's plant was designed as one of the world's largest, capable of producing 1.7 million metric tonnes of Chemical annually. The facility integrated cutting-edge technology to reduce operational costs and improve efficiency supplied by the German company RGI Co. Natural gas and oxygen were the primary feedstocks for the plant, obtained through arrangements with local suppliers.

e. The Appellant was granted a *'tax holiday'* under the provisions of the *Fiscal Incentives Act, Chap. 85:01* commencing the production day which was specified as being 1st October 2003. The tax holiday operated by way of a phased exemption which began with total relief from corporation tax for the first two years, then moved to a reduced rate of 15% for the next five years, and later 20% for three additional years, resulting in a ten-year incentive scheme. The phased introduction allowed the Appellant to benefit from its initial years of operation without immediate tax liabilities thereby incentivizing its substantial initial investment.

f. Due to construction delays, the plant's production start date was deferred prompting a change in the operative 'Production Day' to the 24th July 2004. The delay extended the full exemption into the 2005 income year, which inevitably became central to the instant dispute between the parties.

g. The Appellant entered into a Chemical sales and marketing agreement on the 29th August 2001, which assigned QR (hereinafter referred to as "QR"), a member of the MMX Group of companies, as the exclusive marketer of the Appellant's Chemical. QR received a commission of 4% on the net resale proceeds and the Appellant 96% of the net proceeds.

h. Under the terms of the Chemical sales and marketing agreement, QR was required to sell 880,000 metric tonnes of the Chemical it purchased from the Appellant to a MMX affiliate, a PDB affiliate and to APS Limited under three long-term off-take fixed price contracts ("the FPCs"). The remainder of the Chemical QR purchased from the Appellant was sold to other purchasers at a price reflecting the prevailing Chemical prices in various regions (hereinafter referred to as "the Basket Price").

i. The FPCs were agreed upon in 2001 and were structured to provide stable and predictable revenue to secure debt financing. Under these contracts:

- MMX Inc. and PDB International Ltd, each agreed to purchase 350,000 metric tonnes per year from QR of the Chemical it purchased from the Appellant at a fixed price of US$110 per metric tonne plus transportation costs;
- APS (hereinafter referred to as "APS") was committed to purchasing 180,000 metric tonnes annually from QR of the Chemical it purchased from the Appellant for 15 years at US$125 per metric tonnes including shipping for the first 5 years with an increase to US$130.20 per metric tonne for the remaining term.

j. The evidence of the Appellant as to its rationale for the structure of the FPCs prices and volumes were that these contracts amounting to approximately 50% of the its total production reflected a risk-management strategy, aligning with similar practices in major infrastructure projects where long-term stability is necessary for lender confidence. This financing structure required the Appellant to demonstrate predictable revenue streams to satisfy lender's requirements for cash flow stability which was typical in capital-intensive infrastructure projects. At the time of the FPCs formation, the Chemical market was known for its price volatility and therefore fixed pricing offered the Appellant a buffer against market fluctuations, protecting revenue projections from sudden drops in Chemical pricing and ensuring debt serviceability.

k. The Appellant also relied on a report generated by independent industry expert CMAZ (hereinafter referred to as "CMAZ") that provided market forecasts to justify its pricing methodology under the FPCs which was determined on a 'cost-plus' basis model based on certain estimates on anticipated market stability.

l. In its Corporation Tax Return for the year of income 2005, the Appellant made the following declarations[90]:-

Gross Receipts/Sales	$1,414,499,109

[90] Folio 2 of the Statutory Bundle of Documents

Chargeable Profits	$7,794,972
Corporation Tax Calculated	$2,728,240
Reliefs	nil
Corporation Tax Liability	$2,728,240
Business Levy Liability	$19,376
Total Instalments paid	$15,755
Balance of Corporation Tax payable	$2,712,485

m. In a schedule[91] attached to its Corporation Tax Return for the year of income 2005, the Appellant provided a reconciliation of its accounting profit to its taxable profit and in so doing, it allocated its total accounting profit between exempt income and taxable income sources. There the Appellant declared its accounting profit of $179,360,005 as being sourced from exempt income and $7,794,972 as being sourced from taxable income with the reconciliation to the chargeable profits and losses attributable to both income sources being a chargeable loss of $73,754,282 in relation to exempt income and a chargeable profit of $7,794,972 in relation to taxable income with Corporation Tax liability thereon of $2,727,240.

n. The measure of the tax losses associated with the income derived from exempt sources of $73,574,282 was also reflected in Schedule V-Computation of Loss Relief [92]of the said return.

o. By letter dated the 8th August 2011, the Respondent issued its contact letter in which it advised the Appellant that its Corporation Tax Return for the year of income 2005 was being selected for audit examination and it requested the Appellant to make available it books and records for examination.[93]

[91] Folio 7 of the Statutory Bundle of Documents
[92] Folio 20 of the Statutory Bundle of Documents
[93] Exhibit "DS-G1" to the affidavit evidence of Deann Surajbally-Gomez deposed to and filed on the 19th February 2016.

p. During the course of the audit examination, the Appellant provided, *inter alia*, to the Respondent, the following documents: -

i. A copy of the sales offtake agreement dated 29th August 2021 made between the Appellant and MMC Company[94];

ii. A copy of the three (3) FPCs[95] which were executed between MMC and the following entities: MMX Inc, PDB Limited and APS.

q. The Respondent during the course of its audit examination also had cause to consider the Gas Supply Contract made between the GNL and the Appellant on the 20th September 2001[96]. In so doing, the Respondent noted that the base gas price was tied to the reference price for Chemical and the contractual formula used in the determination of the prices of Chemical was based on various published market prices for Chemical. The Respondent further deduced that if the price of gas increased due to escalating market prices of Chemical, the Appellant then ran the risk of incurring a substantial loss by contracting to sell approximately 50% of its total production at a fixed price that did not reflect the increases in the market price.

r. The Respondent based on the review of the documents submitted to it by the Appellant namely the Appellant's sales schedule, Corporation Tax Return and FPCs, concluded that since the fixed price Chemical volumes (amounting to approximately 50% of the Appellant's entire Chemical output) were resold to parties to the AbR Project under fixed price contract sales and yielded significantly less revenue that the revenue received from parties purchasing basket price Chemical volumes. The income reported from the sale of the fixed price Chemical volumes did not reflect the amount that would have been received from parties transacting business under an arm's length transaction. The Respondent therefore concluded that the income reported by the Appellant for fixed contract sales were therefore understated and that the arrangements under the FPCs had the effect of reducing the total sales revenue reported by the Appellant for tax purposes in Trinidad and Tobago.

[94] Exhibit "DS-G3" to the affidavit evidence of Deann Surajbally-Gomez deposed to and filed on the 19th February 2016.
[95] Exhibit "DS-G4" to the affidavit evidence of Deann Surajbally-Gomez deposed to and filed on the 19th February 2016.
[96] Exhibit "DS-G10" to the affidavit evidence of Deann Surajbally-Gomez deposed to and filed on the 19th February 2016.

s. By letter dated the 15th December 2011[97], the Respondent issued its letter of proposed adjustments relating to income year 2005 to the Appellant, in which it provided the following reasons: -

*"Proposed **Adjustment***

Sales understated-$439,183,501

Green Fund Levy-$439,183

An examination of your books and records revealed the following-

The company's entire output of Chemical was sold to QR a related party. Fifty percent (50%) was invoiced at a price that is termed and referred to hereunder as "the fixed contract price" and the balance (50%) was sold at a price referred to by the company and referred to hereunder as the "basket price".

The sales based on the fixes contract price did not reflect the fair market price.

In the company's audited financial statements note 14 on disclosure of related party transactions, it was stated that all sales and purchases with related parties were carried on commercial terms and conditions and at market prices. In fact, on examination of the records the Board of Inland Revenue (the Board) found that the arrangement entered into was such that the price of the output based on the fixed price contract did not reflect a fair market price.

In addition, the company entered into a Gas Supply Agreement with the GNL for the supply of natural gas, its main input in the production of Chemical. The price of the natural gas is determined by reference to the market prices of Chemical.

With respect to that portion of output recorded at fixed price contract price, it was found that, the price was below the cost of the natural gas used in production.

The arrangement had the effect of reducing total sales reported by your company and further the net result was a reduction of income reported for tax purposes in Trinidad and Tobago.

Several meetings were held with representatives of the company to discuss our finding and the Board's intention to adjust the sales. In response the company provided some explanation regarding their business arrangements at the time the

[97] Exhibit "DS-G11" to the affidavit evidence of Deann Surajbally-Gomez deposed to and filed on the 19th February 2016.

sales contract was entered into. The representatives in most part gave an explanation with respect to their business and financial arrangement. No documentary evidence was provided save and except an email by Mr. RC by which he submitted a statement of projected market prices from 2001. He stated that these prices were considered in their decision in determining the fixed price.

Based on the circumstances outlined above the Board proposes to adjust sales by substituting the fixed price contract for the basket price with respect to the relevant portion of output. The result is an increase in sales of $439,183,501 as shown below.

Sales as per Corporation Tax Return	*$1,414,499,109*
Sales as calculated based on basket price	*$1,853,682,610*
Difference	*$439,183,501*

In accordance with the Fiscal Incentive Order you were granted full exemption from Corporation Tax for this year. The increase in sales however will result in Green Fund Liability at 0.1%.

t. By letter dated 22nd December 2011[98], the Appellant disagreed with the Respondent's proposed adjustments and provided documentary evidence in support thereof.

u. The Respondent subsequently considered the Appellant's representations and documents but nevertheless concluded that the sales of the Appellant were understated and proceeded to calculate the Appellant's unreported income. As a result, thereof, the Respondent under its cover letter dated 29th December 2011 to the Appellant issued its Notice of Assessment, Corporation Tax Audit Report and Explanation of Adjustments to the Appellant[99].

v. The salient terms of the Notice of Assessment issued by the Respondent on the Appellant with respect to the income year 2005 were as follows: -

Adjusted Chargeable Profits	*$7,794,972.00*
Adjusted Tax Liability	*$2,728,240.20*
Adjusted Business Levy Liability	*$0.00*
Adjusted Gross Receipts	*$1,863,370,396.00*

[98] Folios 343-353 of the Statutory Bundle of Documents

[99] These documents were all exhibited to the affidavit evidence of Deann Surajbally-Gomez as

Adjusted Green Fund Levy Liability *$1,863,370.40*

w. The Explanation of Adjustments issued by the Respondent was in similar terms to that which had been previously provided by it in its letter of proposed adjustments dated the 15th December 2011.

x. By letter dated the 27th January 2012[100], the Appellant objected to the assessment made upon it by the Respondent for the year of income 2005, in which it, *inter alia*, contended:-

   i. the Assessment was excessive and not justified;

   ii. the adjustments made were incorrect and not supported in law and in fact; and

   iii. the Respondent's explanation of the adjustments did not provide any legal basis for the Respondent imputing additional income by the Appellant.

y. During the review of the objection, the Respondent considered the written and oral explanations which were submitted to it by the Appellant along with the following documents: -

   i. The documents provided by the Appellant during the audit stage of the dispute process namely the sales offtake agreement between the Appellant and QR as well as the various FPCs;

   ii. The Chemical purchase and sale agreement between RAC CO. and SMT LLC, dated 14th July 1997[101];

   iii. The Chemical purchase and sale agreement between ACX Corporation and SMT LLC, dated 24th March 1997[102];

   iv. The CMAZ (CMAZ) forecasts for the six (6) year period 1997 to 2002 as at 1997[103];

   v. The CMAZ forecasts for the six (6) year period 2001 to 2006 as at 2001[104];

[100] Exhibit " R.T.1" to the affidavit evidence of Ravi Taklalsingh deposed to and filed on the 19th February 2016.
[101] Exhibit " R.T.2" to the affidavit evidence of Ravi Taklalsingh deposed to and filed on the 19th February 2016.
[102] Exhibit " R.T.3" to the affidavit evidence of Ravi Taklalsingh deposed to and filed on the 19th February 2016.
[103] Exhibit " R.T.4" to the affidavit evidence of Ravi Taklalsingh deposed to and filed on the 19th February 2016.
[104] Exhibit " R.T.5" to the affidavit evidence of Ravi Taklalsingh deposed to and filed on the 19th February 2016.

vi. The Chemical and sale purchase agreement between SCC Corporation and CEL Ltd dated 30th June 2003[105];

vii. The notes to the Kick-off meeting for the AbR Project held in WI State, USA on the 23rd May 2001 between representatives of PDB. A&K, EF and MMX[106]; and

viii. The contents of the preliminary financial guidelines attached to an email from EF[107].

z. Upon its review of the documents referred to at (y) above, the Respondent concluded that the FPCs did not represent the typical contractual arrangements of parties doing business in the Chemical industry who contracted at an arm's length.

aa. As a consequence thereof and after consideration of all the representations put forward in support of the Appellant's objection as well as the documents submitted at both the audit and objection stage of the dispute process, the assessment made by the Respondent on the Appellant at the audit stage was confirmed by the Respondent in its determination of the objection lodged by the Appellant to the additional assessment of Corporation Tax and Green Fund Levy liability for the year of income 2005. The decision of the Respondent was communicated to the Appellant in its letter dated 24th January 2014[108] which was served on the Appellant on the 12th February 2014.

24. Having established the background relative to the facts and circumstances relative to the instant appeal that occurred during the course of the audit and objection stages of the dispute process, we shall now proceed to outline the issues which have emerged for our consideration thereto.

The issues defined

25. At the core of this matter lies the question of **whether the FPCs under which the Appellant disposed of approximately 50% of its Chemical output at pre-set rates to affiliate entities constitute genuine, arm's length transactions necessitated by the**

[105] Exhibit " R.T.6" to the affidavit evidence of Ravi Taklalsingh deposed to and filed on the 19th February 2016.
[106] Exhibit " R.T.7" to the affidavit evidence of Ravi Taklalsingh deposed to and filed on the 19th February 2016.
[107] Exhibit " R.T.8" to the affidavit evidence of Ravi Taklalsingh deposed to and filed on the 19th February 2016.
[108] Folio 500 of the Statutory Bundle of Documents

financial underpinnings of the AbR Project, or if the FPCs were devised principally as a means of eroding the taxable profits otherwise attributable to the jurisdiction of Trinidad and Tobago. In our deliberations, we would have conducted an evaluative exercise in which a close examination of the FPCs was done against the backdrop of its economic substance, commercial rationale and conformity with conventional business practice.

26. The Respondent invokes Section 67 of the *Income Tax Act, Chap. 75:01,* asserting that the statutory language permits the Respondent to disregard the FPCS as 'artificial or fictitious' arrangements. This raises the pivotal issue of **whether Section 67 extends to transactions, while atypical, serve a bona fide business purpose.** The Court must therefore determine whether the Respondent has established sufficient grounds to invoke these provisions, or is it that the evidence supports the Appellant's assertion of commercial necessity.
27. The Respondent also contends that the principle devised from the watershed UK authority of *Sharkey v Wernher*[109]entitles it to substitute fair market value for the prices under the FPCs, contending that this doctrine allows for revaluation where transactions between related parties deviate from market standards. This issue invites the Court to consider **whether the *Sharkey* principle, traditionally applied to prevent income shifting is appropriate in the unique context of the Appellant's long-term pricing mechanisms**.

The application of Section 67

28. From our statement of the substantive issues which have arisen in this consolidated appeal, it is evident that the reliance placed by the Respondent in its application of Section 67 of the *Income Tax Act, Chap.75:01* was integral in its disregard of the Appellant's pricing arrangements under the impugned FPCs and its replacement with market prices to ascertain the measure of income derived by the Appellant from related party sales of Chemical.

[109] (supra)

29. In the matter of *Methanex Titan (Trinidad) Unlimited v The Board of Inland Revenue*[110], the principles to be applied in determining whether a transaction is artificial or fictitious for the purposes of Section 67 were summarized by this Court in the following terms: -

"83. If we were to para-phrase some classic lines from the world of Hollywood and the Superhero box office universe and also attributed more classically to Voltaire, it has been said that "with great power, comes great responsibility." If we were then to apply that phrase into the world of tax, the most potent statutory weapon available to the Respondent in its legislative armory is that which exists in its anti-abuse or anti-avoidance provisions as demonstrated by the power it has to disregard transactions which in its opinion fall within the realm of being artificial or fictitious. The concept of beneficial ownership has an intrinsic linkage with anti-avoidance considerations as the genesis of both devices are founded in the doctrine of substance over form.

84. From the perspective of the domestic legislation, the anti-avoidance is found in Section 67 (1) of the Income Tax Act, Chap. 75:01. The section provides: -

"(1) Where the Board is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious, or that full effect has not, in fact, been given to any disposition or settlement, within the meaning of section 72 the Board may disregard any such transaction or disposition or settlement, within the meaning of section 72, and the persons concerned shall be assessable accordingly."

85. The purport of the provision is that it is designed to counteract or nullify arrangements entered into by taxpayers which have the effect of avoiding tax or reducing the taxpayer's liability

86. The key operative words in the section are 'artificial' and 'fictitious'. The jurisprudence as to the interpretation of these terms is fairly settled.

87. A fictitious transaction is one in which those who are ostensibly the parties to it never intended it to be carried out and therefore a sham transaction. Classical judicial pronouncements as to the meaning of the word 'sham' in the context of anti-avoidance have indicated characteristics such as 'while professing to be one thing, it is in fact something different' and ' acts done or documents executed by the parties to the 'sham'

[110] [2015] TTTC (I/102/N2)

which are intended by them to give third parties or to the court the appearance of creating between the parties legal rights or obligations different from the actual legal rights and obligations (if any) which the parties intend to create .'

88. The term "artificial" in the context of the legislation has a broader scope than the term "fictitious". Leading local authorities such as Z Estates Ltd vs Board of Inland Revenue and Myerson Co. Ltd vs Board of Inland Revenue have established the essential characteristics of a transaction that is within the realm of artificiality. These features are:

- *The transaction is not one which is at arm's length in that one party has control over the other.*
- *The transaction is one that does not make commercial sense in that it is unnatural and not one which would be expected of persons acting freely and independently of each other.*
- *There is a substantial disparity between the price at which the transaction is carried out and the fair market value.*
- *The circumstances surrounding the transaction are such that one can fairly infer that it was a device or arrangement to reduce or avoid tax by the taxpayer.*

89. In more contemporaneous times, the approach of the Privy Council as to the construction of the term "artificial", as demonstrated in the matter of Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica Ltd[111] has been to qualify the considerations as to whether the impugned transaction was commercial or fully commercial due to the inherent nature of income tax which affects transactions by way of bounty as well as commercial transactions. What was also emphasised is that the recognition of a transaction as being within the realm of artificiality is an evaluative exercise dependent on the facts and circumstances of the particular scenario and which may require legal experience and judgment in the overall determination."

30. The provisions of Section 67 have been interpreted consistently with the principles established in such cases as *BAO Limited v The Board of Inland Revenue[112]* and *Trinidad Cement Limited v The Board of Inland Revenue[113]* in which the respective Courts have

[111] (2012) UKPC 9
[112] I /105/1982
[113] (1978-1985) 2 T.T.T.C 58

underscored that transactions between related parties must reflect arm's length terms and market value to avoid artificial profit shifting. Moreover, the principles from the seminal UK authority *Sharkey v Wernher*[114], though originating in a different context, have permeated the tax jurisprudence emanating from this jurisdiction, reinforcing the standard that transfers or sales within related parties should be valued at fair market price to maintain the integrity of tax assessments. Collectively, these cases guide the application of Section 67, establishing the parameters in which the Respondent is entitled to scrutinize, disregard or adjust any transaction lacking substantive commercial rationale or deviating from market standards in a manner that diminishes taxable income.

31. We shall now consider these authorities in more detail and in so doing, we shall provide additional context for each of these cases in order to illustrate their relevance to the application of Section 67 of the *Income Tax Act, Chap. 75:01.*

Case Law pertaining to Section 67 in relation to transfer pricing controversies

BAO Limited v. Board of Inland Revenue

32. In *BAO,* the Tax Appeal Board was presented with a classic instance of intercompany transactions where the boundaries of commercial substance and tax avoidance was tested. The Trinidad and Tobago subsidiary, BAO Limited, sold goods to its US parent company at mere cost, a price strikingly divergent from the significantly marked-up rates it charged to independent, unrelated customers. The pricing arrangements, naturally, had the effect of reducing the taxable profits reported by BAO Limited in Trinidad and Tobago, thereby lowering the company's tax liability within the jurisdiction.
33. The Respondent in that matter advocated that such a pricing structure could not be considered commercially rational between independent parties and was, in effect, a contrived mechanism to shift income out of Trinidad and Tobago. In its invocation of the predecessor anti-avoidance provisions which were analogous to those prescribed under Section 67 of the *Income Tax Act, Chap. 75:01,* the Respondent took the position that transactions within a corporate group must mirror those that would have occurred in an open market between independent entities; a principle often encapsulated in the arm's length standard.

[114] (supra)

34. The Court's analysis centered upon the essential distinction between a genuine business transaction and one that, while lawful in form, operates to distort taxable income without legitimate economic rationale. The Court agreed with the Respondent, emphasizing that transactions between related parties must bear the hallmarks of a fair and commercially justifiable arrangement. In BOA's case, the decision to set prices at cost for intercompany sales were not defensible as a market-driven choice but rather a strategy for reallocating profits to a lower-tax jurisdiction.
35. In reaching its conclusion, the Court underscored a critical principle: while tax planning is permissible, arrangements that deviate from market value in intercompany dealings and serve primarily to reduce tax cannot be upheld. The Court affirmed the taxation authorities' right to substitute fair market prices for artificially low transfer prices applied by BAO Limited, effectively recalculating the company's taxable income to reflect what it would have earned had the transactions adhered to market norms.

Z Estates and X Limited

36. We shall consider the decisions of the Tax Appeal Board in *Z Estates v The Board of inland Revenue* and *X Limited v The Board of Inland Revenue* both of which dealt with property transactions executed at values that bore no relation to fair market prices.
37. In *Z Estates*, the court was presented with a sophisticated arrangement where an estate asset was transferred at an inflated price between related entities. The inflated purchase price created a deductible expense for the purchaser, effectively shifting tax liability. On the surface, the transaction appeared legitimate, yet the Respondent, scrutinizing its commercial substance, argued that this elevated valuation was discordant to the asset's actual market worth. Under Section 67, the Respondent contended it was empowered to substitute fair market value for this artificial valuation, nullifying the contrived tax benefit.
38. The Tax Appeal Board in upholding the Respondent' s assessment carefully dissected the transaction, unwinding its formal structure to reveal a transaction crafted solely for tax avoidance. The inflated price was unanchored from any genuine market transaction, wholly lacking in commercial sense and bearing the imprint of artificiality. The court reasoned that Section 67 was intended precisely for such circumstances, i.e. where a

transaction between related entities strays so far from fair market norms that it signals a contrived arrangement rather than a bona fide commercial deal.

39. This judgment in *Z Estates* crystallized a guiding principle for applying Section 67: where in the context of a related party transaction, the transaction's terms prescribe no reasonable relationship to market value, and its primary effect is to lower tax liability, the arrangement is susceptible to adjustment. The court thus fortified Section 67 as a *"shield and a scalpel,"* wielded not to disrupt legitimate business structures but to dismantle those lacking economic substance.
40. In *X Limited*, the Tax Appeal Board again encountered a case where the price in the sale of land between related parties was egregiously inflated, leading to significant tax deductions that would otherwise have been unavailable. The taxpayer, insisting on the sanctity of the agreed price, contended that the Respondent had no basis for interference, as the transaction was executed per formal legal standards. However, the Respondent argued that Section 67 empowered it to look beyond form to substance, assessing whether the transaction had any legitimate commercial basis. Here, the Respondent asserted, the inflated price functioned as a mere tax device, disconnected from economic reality.
41. In affirming the Respondent's assessment, the Court highlighted that Section 67 is not merely a mechanism for nullifying fictitious arrangements but extends to cases where transactions are constructed to evade tax without a genuine commercial objective. It found that the inflated price in *X Limited* was symptomatic of artificiality, allowing the taxation authority to impose a valuation that mirrored fair market principles. The court's judgment underscored that the test of artificiality under Section 67 does not hinge solely on the legality of a transaction but on its economic coherence. When terms deviate markedly from what would be negotiated at arm's length, such deviation itself may evidence an artificial arrangement.
42. The decision in *X Limited* thus extended the interpretative scope of Section 67, affirming that transactions between related entities must withstand scrutiny on their commercial merits. If they do not, the Respondent is justified in disregarding their effects and imposing market values to reflect the genuine economic substance.
43. The decisions of the Tax Appeal Board in Z *Estates* and *X Limited* reinforce the doctrine that Section 67 permits the Respondent to substitute artificial terms with fair market

values where related-party transactions are structured primarily to avoid tax. These cases delineate a threshold of artificiality: if a transaction's terms bear no resemblance to what independent entities would agree upon in a genuine commercial exchange, Section 67 empowers the Respondent to realign those terms with economic reality. The judgments clarify that while taxpayers may structure their affairs as they see fit, they cannot do so at the expense of the tax system's integrity. In this way, Section 67 becomes both a tool for maintaining fairness and a guardian of economic substance within the tax framework.

Trinidad Cement Limited ("TCL")

44. In *TCL*, the Tax Appeal Board addressed the application of anti-avoidance provisions in a case where the taxpayer had structured transactions with a related entity in a manner that the Respondent contended was designed to minimize taxable income within Trinidad and Tobago. The taxpayer's intergroup transactions involved prices and terms that substantially diverged from arm's length standards, creating a tax advantage by reducing profits reported domestically. The Respondent applied Section 67 on the basis that it was of the view that the transactions were artificial and fictitious, structured primarily for tax avoidance rather than genuine economic reasons. The Tax Appeal Board, in its majority decision[115], held that Section 67 empowered the Respondent not only to disregard the artificial elements of a transaction but to also impute notional income attributable to the taxpayer in the quantification of its assessment. Specifically, in that instance, the Respondent applied a formula based on hypothetical income from balances held for the Appellant by the affiliate company resident in the Bahamas at the prevailing Bank of England's rate of interest for each of the disputed years of income plus an additional 1% was applied to the what was regarded as the average balance for each of these years. In so doing, the Respondent had therefore imputed notional income to the taxpayer in a circumstance where income tax may have been avoided or reduced.

Seramco Ltd. v. Income Tax Commissioners

[115] Kelsick (Chairman) and Julumsingh with Burke dissenting

45. In *Seramco Ltd Superannuation Fund Trustees v. Income Tax Commissioner*[116], a case originating from Jamaica, the Privy Council was confronted with an unorthodox structured transaction, one that purportedly carried the semblance of a commercial investment yet displayed an air of contrivance upon closer inspection. In that matter, a company controlled by a single family, replete with undistributed profits, entered into a scheme with the trustees of an exempt superannuation fund. The trustees were to purchase all shares in the family company, ostensibly as an investment, with payment to be made by installments. Curiously, the purchase installments were to be paid directly from dividends issued by the company itself, with an option for the family to repurchase the shares at a reduced price after the majority of profits had been distributed.
46. The Jamaican tax authorities, invoking anti-avoidance provisions, argued that this scheme was not a genuine investment but rather an artificial device aimed at stripping profits without triggering tax liabilities for the family. The tax authority's powers under Section 10(1) of the *Jamaican Income Tax Law 1954* was at issue, allowing the Commissioner to disregard transactions that were "artificial or fictitious."
47. In his judgment, Lord Diplock observed that *"artificial"* is a word of broad meaning, denoting a transaction that, while formally valid, lacks economic substance and serves no legitimate commercial purpose. The arrangement in *Seramco*, with its circular flow of funds and conditional repurchase option, was, in his view, precisely the kind of device Section 10(1) [*the equivalent statutory provision in Jamaica to Section 67*] was designed to counteract. The transaction portrayed the outward guise of an investment but, in substance, was crafted solely to enable the family to extract accumulated profits tax-free.
48. The Privy Council upheld the Commissioner's decision to disregard the transaction entirely. Lord Diplock clarified that tax law permits the authorities not only to disregard artificial arrangements but also to treat them as if they had never existed for tax purposes. The decision underscored a key principle: that tax provisions against artificial transactions are tools not merely for dismantling hollow forms but for ensuring that only genuine commercial arrangements are respected in the computation of tax.

Sharkey v. Wernher

[116] [1976] 2 All ER 28

49. The well-established decision of the House of Lords in *Sharkey v. Wernher*[117] provides further support for the Taxation Authority's right to substitute market-based values in transactions that lack economic realism. In *Sharkey*, Lady Wernher, a racehorse owner, transferred horses from her stud business to her personal use without reflecting their market value. The court held that she was required to account for the horses at market price, as failing to do so would artificially deflate her business income. *Sharkey* is frequently cited as establishing the principle that intra-group or related-party transactions should be valued at fair market rates to prevent the artificial shifting of value.
50. The principle in *Sharkey* is highly relevant to Section 67, as it reinforces that the Taxation Authority may disregard non-arm's-length pricing between related entities and impose an adjustment based on market values. *Sharkey* highlights the obligation to ensure that related-party pricing does not distort income and aligns with the economic reality of arm's-length dealings. The rationale in *Sharkey* has been applied in the local context in the *BOA, Z Estates* and *X Limited* matters in which the Tax Appeal Board affirmed the respective decisions of the Respondent to substitute the actual transfer price with fair market values.

The cases in summary

51. From our review of these authorities, it is our view that purpose of Section 67 is not to penalize tax efficiency but to safeguard the tax system against arrangements between related parties that lack any genuine commercial substance. The focus of the Section is on transactions that, though ostensibly lawful, exist in form alone, crafted solely to diminish tax liability without regard to economic reality. Section 67's reach, therefore, is confined to those contrived schemes where the terms bear little resemblance to what independent parties, acting in their own economic interest, might reasonably agree.
52. The case law, namely *BAO Ltd. v. Board of Inland Revenue* and *Seramco Ltd v. Income Tax Commissioner* provides a clear and consistent principle: Section 67 intervenes only when a transaction fails to reflect genuine business purpose. If the arrangement serves a real economic function, such as to secure financing, stabilize cash flows, or manage commercial risk, it lies beyond the provision's remit, even if it happens to reduce tax. It is

[117] (supra)

not the presence of a tax benefit or the mere incidence of a related party transaction that triggers Section 67, but the absence of a credible, independent commercial rationale.

53. This principle is especially pertinent in the realm of related party transactions, where there is less inherent market tension to ensure fair value. In those circumstances, Section 67 protects against the temptation to set artificial terms in non-arm's length dealings that merely shift profits without economic substance. Conversely, where related party dealings are imbued with genuine commercial logic, faithfully reflecting industry standards or serving practical business aims, they fall outside the ambit of Section 67. We are of the view that to apply Section 67 indiscriminately would be to overreach, substituting the judgment of the tax authority for the reasonable business choices made by the parties.
54. Accordingly, we are of the opinion that Section 67 respects the autonomy of legitimate commercial arrangements while preserving the tax base from erosion through artificial devices. Its purpose is neither punitive nor expansive; rather, it is precise and corrective, designed to ensure that only those transactions devoid of economic authenticity are subject to recharacterization. Where independent business aims drive the transaction, Section 67 has no role. Thus, this potent statutory provision within the Trinidad and Tobago tax legislative framework demands that related party arrangements remain anchored in economic substance, with Section 67 serving as a surgical tool, excising only those constructs that exist solely for tax advantage, preserving the integrity of the tax framework without encroaching upon genuine business practice.

The CMAZ Report: its relevance and weight

55. We shall now proceed to an examination of the evidence in relation to our evaluation of the impugned FPCs.
56. The CMAZ report stands as a pivotal piece of evidence in the Appellant's case, purporting to show that the FPCs were aligned with reasonable market expectations based on credible forecasts of Chemical prices. The Appellant submits that this report provided an industry-standard basis for fixed pricing, which was necessary to secure project financing under a non-recourse arrangement. However, the timing of the report's

issuance, after the FPC prices were first discussed, raises questions about its relevance and consequential weight, matters which the Respondent has rigorously challenged.

57. The Respondent contends that the CMAZ report, issued after the initial FPC pricing discussions, lacks direct relevance as it could not have directly influenced those initial price-setting decisions. Instead, they argue that its use here serves as an ex post justification rather than as contemporaneous evidence of market-informed decision-making. This, in the Respondent's view, weakens the report's probative value, particularly given that spot prices achieved through the basket pricing mechanism would provide a more immediate market comparison than a forecast issued post-facto.
58. Conversely, the Appellant counters that the report was not intended to retroactively validate the FPC prices but rather to provide an independent forecast that corroborated the Appellant's long-term pricing strategy. Mr. SD, a witness for the Appellant, testified to the reliance placed on such forecasts within the industry, asserting that fixed prices were essential to meet lender requirements for stable cash flows in a volatile market. SD emphasized that the report supported a pricing structure aligned with long-term market conditions, which was crucial to secure the non-recourse financing underpinning the AbR Project.
59. SD's testimony further highlights that while the initial FPC prices may have been discussed prior to the issuance of the CMAZ report, the report nevertheless reinforced the commercial rationale behind fixed pricing. It served as a benchmark that substantiated the Appellant's pricing approach, reflecting market expectations consistent with what had been projected. He detailed how such forecasts offered a methodologically sound basis for stabilizing revenue, addressing the inherent risks in a commodity-sensitive industry.
60. In that regard, the Court has noted that while spot prices may indeed reflect immediate conditions, they fail to capture the strategic foresight necessary for long-term financial planning, a foresight that the CMAZ report encapsulated.
61. Moreover, the Court is persuaded that the report, though issued subsequent to the discussion of the FPC prices, aligns with industry norms for evaluating long-term projects. In the realm of capital-intensive investments, it is common practice to refine pricing assumptions as market data evolves. The CMAZ report, while subsequent to initial discussions, provided the Appellant with an authoritative analysis that validated the

economic assumptions upon which the FPCs were founded. The lenders' requirement for fixed pricing, based on credible forecasts, underscores the CMAZ report's role in substantiating the commercial logic of the contracts rather than merely defending a tax position.

62. Thus, while the Respondent's critique regarding the report's timing is not without merit, the Court finds that this does not detract from the CMAZ report's relevance. The report's issuance post-discussion does not negate its function as a credible basis for affirming the price structure demanded by the lenders. It adds weight to the Appellant's position that the FPCs were commercially justified, supported by independent, industry-standard analysis, and aligned with fair market expectations for long-term contracts in the Chemical industry.
63. Although issued after initial pricing discussions, the CMAZ report remains integral to understanding the Appellant's approach to risk mitigation and revenue stability within the AbR Project. In conclusion, we have found that the CMAZ report is relevant and holds substantial weight to our determination of the commercial necessity of the FPCs.

The evaluation of the commercial necessity of the FPCs

64. We shall now proceed to conduct our evaluation as to the *bona fides* of the commercial realism of the FPCs.
65. The Court's inquiry into the FPCs must wrestle with a fundamental question: do these contracts represent a commercially necessary arrangement, driven by legitimate business concerns, or do they reveal an underlying intention to structure profits advantageously beyond the reach of the Trinidad and Tobago's taxing jurisdiction? The Appellant contends that the FPCs were essential to secure financing, with fixed prices demanded by lenders to mitigate the risks of Chemical market volatility. In contrast, the Respondent, urges skepticism, suggesting that the pricing structure lacks the hallmarks of genuine commerciality and diverges from the economic substance expected in the Chemical industry.
66. At the heart of the Appellant's case in this regard lies the testimony of Mr. SD, whose testimony is that the FPCs were indispensable in achieving revenue predictability, a critical component for securing non-recourse financing in a volatile Chemical market. SD

explained that, in industries where debt is serviced through project cash flows, a lender's primary concern is revenue stability rather than maximized profit margins. In his view, fixed prices served as a bulwark against the fluctuations inherent in spot marking pricing, providing a financial architecture sufficiently robust to withstand the vagaries of market cycles.

67. SD's testimony was therefore integral to the Appellant's narrative of financial prudence. Within his affidavit and *viva voce* evidence he described how the fixed prices were not only beneficial to ensuring the project's financial stability, contending that such pricing is neither anomalous nor artificial in high-stakes industrial ventures. Rather, SD portrayed the FPCs as a pragmatic response to the lender's requirements, dictated not by a desire to shift profits but by the necessity of meeting debt obligations under uncertain market conditions. Nonetheless, while SD's account provides valuable insight, the Court must also consider the broader evidential context, particularly the extent to which the Appellant's reliance on fixed pricing genuinely reflects its industry norms and lender requirement, rather than retrospective justification.
68. The evidence of Mr. WE, the first Chair of the Appellant until his departure in 2004, is complimentary to that of Mr. SD on the question of the commercial viability of the FPCs. In his testimony, he addressed the prevailing practices within project financing where lenders routinely demand measures to hedge against market volatility. Yet, while WE's testimony strengthens the Appellant's position, it does not address the Respondent's contention regarding the lack of contemporaneous lender documentation specifically mandating fixed pricing. The absence of written records directly linking fixed prices to lender requirements leaves an evidential gap, which may not necessarily be fatal to the Appellant's case, but would warrant careful consideration.
69. The Respondent, challenging the legitimacy of the FPCs, contends that fixed pricing is atypical within the Chemical industry. In a market characterized by price volatility, where transactions commonly reflect spot pricing or variable formula aligned to market indices, the FPC's fixed pricing appears, in the Respondent's view, to be an unconventional choice. Spot prices, the Respondent advocates, embody the true economic forces of supply and demand, and the fact the FPCs deviate from these spot prices casts doubt on their commercial rationale.

70. On our consideration of these arguments advanced by the Respondent, we are of the view, that whilst forceful, this line of contention seems to overlook the Appellant's specific financing circumstances. The testimony of SD explained that fixed pricing, though indeed distinct from spot transactions, serves a different purpose in long-term contracts. Unlike spot prices, which may fluctuate unpredictably, fixed prices provide a stable revenue base essential for meeting debt obligations over extended periods. SD maintained that reliance on independent forecasts, rather than spot pricing, reflects not an artificial structure but an economic necessity when dealing with capital-intensive projects that demand steady cash inflow.
71. Thus, whilst the Respondent's invocation of spot prices is logical in certain transactional contexts, it fails to capture the strategic foresight that informed the Appellant's fixed pricing approach. The Court must thereby consider whether the FPCs' departure from spot pricing comparability was warranted by specific commercial imperatives of financial stability, rather than dismissing them as irregular without due regard to the financial prudence they may embody.
72. The Respondent further argues that the Appellant has not sufficiently demonstrated that the FPC prices fall within an acceptable fair market value, thereby implying that they were artificially reduced. The Respondent posits that a truly commercial contract would have involved pricing mechanisms more directly reflective of market dynamics, casting the FPCs as a deviation from economic substance that suggests an arrangement intended to achieve tax efficiency.
73. SD and WE in their respective testimonies, have maintained that the fixed pricing was benchmarked against credible, independent forecasts, specifically the CMAZ report, used to model revenue expectations over the project's term. SD testified that these forecasts, specifically the CMAZ report, were essential to aligning the Appellant's pricing model with long-term market projections, and that they served as the best available approximation of the fair value given the FPCs' stabilizing purpose. Nevertheless, the Court is mindful of the Respondent's perspective regarding the absence of explicit lender documentation requiring fixed prices. Whilst the Appellant's witnesses in Messrs. WE and SD have provided credible accounts, the lack of formal documentation imposes a

burden on the Court to scrutinize whether the Appellant's reliance on these forecasts genuinely reflect the commercial purpose claimed.

74. Against the background of these considerations, the Court finds that the Appellant's witnesses, particularly SD and WE to be credible and persuasive in articulating the financial and commercial imperatives that underpinned the formation of FPCs. Their testimony has provided, on balance, a coherent explanation of risk mitigation, grounded in industry norms for capital-intensive projects reliant on predictable cash flows. The Respondent's challenges regarding the timing of the CMAZ Report, reliance on spot price comparability and absence of lender documentation, while noted, do not, in our view, discredit the Appellant's claim that the FPCs were structured with genuine economic rationale.

75. However, these points raised by the Respondent which seek to impair the submission of the Appellant as to the commercial viability of the FPCs, are not without merit as they raise questions about the FPC's alignment with market prices. The Court must therefore weigh the Appellant's testimony and documentary evidence against the Respondent's contention that these contracts reflect an artificial departure from the economic realities of the Chemical market. Ultimately, if the FPCs can be seen as integral to financing stability and rooted in legitimate business strategy, they would not fall within the ambit of Section 67; if, however, they appear to stray too far from market norms without a substantiated business purpose, they would invite closer scrutiny.

76. In our evaluation of the evidence, we have found a consistent narrative which has demonstrated financial stability and market alignment underpinning the FPCs. In that regard, SD's account regarding the CMAZ report's role as a benchmark rather than a justification, coupled with WE's explanation of implicit lender explanations, demonstrate a plausible basis for the Appellant's pricing strategy. Additionally, we are of the view that the reliance on independent market forecasts rather than spot prices is demonstrative of the FPCs addressing the project's financing needs by the Appellant, rather than a methodology being employed to artificially reduce their taxable income.

77. The benefit of hindsight is always a relevant factor when one looks retrospectively at what the eventual spot prices were at the time of the transactions as opposed when these prices were initially settled under the FPCs some time before. However, we are also of

the view that in the context of the settlement of the respective transfer prices under the FPCs, the benefit of hindsight should not impair the Court's assessment of the FPCs. Our evaluation of the FPCs in this instance was based on its original context which was driven by the following variables: -

i. the volatility of the Chemical market;
ii. the financing requirements; and
iii. the information available to the contracting parties at the time of the contract formation.

78. Upon the totality of the considerations as have been enunciated hereinabove, the Court has found, on the balance of probabilities, that the FPCs were commercially viable instruments of commerce and in accordance with industry practices in long-term, high-risk projects. The absence of formal lender documentation, while noted, does not, in our view, decisively undermine the Appellant's case, given what we have considered to be the credible testimony of the Appellant on implicit industry standards. Moreover, we have found that the Respondent's emphasis on spot prices has failed to capture the commercial reality of the FPCs, which sought stability rather than immediate market parity.

79. For these reasons, the Court thus concludes as follows: -

a. The FPCs upon which the Appellant disposed approximately 50% of its Chemical output at pre-set rates to affiliate entities constituted genuine, arm's length transactions necessitated by the financial underpinnings of the AbR Project;
b. The FPCs served a *bona fide* business purpose; and
c. The substitution by the Respondent of the transactional prices prescribed under the respective FPCs to the basket price/spot price of Chemical at the time of the particular transactions to be unjustifiable as a matter of fact and law as the Respondent was not able to prove that the FPCs were artificial and fictitious arrangements devised principally as a means of eroding the taxable profits which would have otherwise been attributable to the jurisdiction of Trinidad and Tobago.

80. Accordingly, we have found that the assessment made by the Respondent on the Appellant for the year of income 2005 with respect to Corporation Tax and in which the

Respondent assessed the Appellant to additional sales revenue of $439, 183,501 and to have also reduced the Appellant's losses carried forward from $73,754,282 to nil to be unjustified as a matter of fact and law.

The assessment to Green Fund Levy (GFL)

81. Our finding that the FPCs were commercially viable instruments would validate the revenue generated and reported under these contracts as being genuine and commercially justified. This would in turn mean that the fixed prices under the FPCs, rather than adjusted or hypothetical market prices, would form the basis for the calculation of gross revenue/receipts for GFL purposes.
82. As a consequence, thereof, we hold that the total adjustments to sales made by the Respondent on the Appellant for the year of income 2005 in the amount of $439,183,501 to be unjustified as a matter of fact and law and, as a consequence, the assessment made by the Respondent on the Appellant to an additional Green Fund Levy liability in the amount of $439,183.00 is to be reversed.

G. DISPOSITION

83. For reasons as have been enunciated hereinabove, it is therefore our decision that: -
    a. the assessment made by the Respondent on the Appellant for the year of income 2005 with respect to Corporation Tax and in which the Respondent assessed the Appellant to additional sales revenue of $439, 183,501 and to have also reduced the Appellant's losses carried forward from $73,754,282 to nil to be unjustified as a matter of fact and law; and
    b. the total adjustments to sales made by the Respondent on the Appellant for the year of income 2005 in the amount of $439,183,501 to be unjustified as a matter of fact and law and as a consequence the assessment made by the Respondent on the Appellant to an additional Green Fund Levy liability in the amount of $439,183.00 is to be reversed.
84. These consolidated appeals are therefore allowed.

H. POSTSCRIPT

85. It would be remiss of the Court to conclude this matter without observing the broader significance of transfer pricing controls in modern tax administration and the need for legislative clarity on this front within the jurisdiction of Trinidad and Tobago. This case, concerning the commercial viability and pricing of transactions between related entities, underscores the limitations inherent in general anti-avoidance provisions when dealing with complex intra-group arrangements.

86. The decision of the High Court of Kenya in *Unilever Kenya Ltd v. Commissioner, Kenya Revenue Authority*[118] of Judge Alnashir Visram highlights the very issues at hand, where the absence of explicit transfer pricing guidelines left tax authorities in Kenya to rely upon broader anti-avoidance principles, resulting in protracted litigation. The *Unilever* decision reinforces the perspective that, in the absence of structured guidance on pricing between related entities, tax authorities may be required to impose adjustments that lack the coherence and predictability necessary for equitable tax governance. It is precisely this uncertainty that transfer pricing legislation and structured mechanisms, such as Advanced Pricing Agreements (APAs), aim to remedy.

87. In recent pronouncements in relation to the National Budget of the Republic of Trinidad and Tobago for the 2024-2025 fiscal year, the Honourable Minister of Finance had expressed the Government's recognition of this legislative gap and signaled an intent to introduce specific transfer pricing rules. The implementation of transfer pricing legislation, aligned with OECD standards and the arm's-length principle, would furnish both the Revenue Authority and taxpayers with a framework that distinguishes genuine commercial transactions from those structured primarily for tax minimization. Such legislation, supported by the option of APAs, would offer taxpayers certainty and predictability by allowing them to agree on acceptable pricing methodologies with the tax authorities in advance, thus mitigating the risk of future disputes.

88. The adoption of APAs could be transformative, providing multinationals operating within Trinidad and Tobago with the confidence that their transfer pricing practices will be respected, provided they adhere to the agreed-upon terms. This approach not only fosters transparency and stability but also aligns with the global movement toward cooperative compliance, where tax authorities and businesses work together to ensure fair outcomes

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in real time rather than through contentious audits which may later manifest into tax disputes fought through the objection and proceedings instituted before this Court.

89. In this Court's view, the timely enactment of transfer pricing legislation would bolster Trinidad and Tobago's tax integrity by offering clarity and predictability, enhancing the capacity of the Respondent whether through its present incarnation as the Board of Inland Revenue or through the Revenue Authority, its successor in waiting, to address complex related-party transactions without resorting to broad anti-avoidance doctrines alone. In anticipation of this legislative reform, the Court encourages the legislators to consider a transfer pricing framework that includes APAs, enabling Trinidad and Tobago to join the ranks of jurisdictions that have embraced proactive measures in the evolving field of international taxation.

90. Through such reforms, Trinidad and Tobago can ensure that its tax system not only meets global standards but also serves the dual purpose of safeguarding the national tax base while promoting a business environment rooted in clarity, fairness, and mutual trust.

91. Before we bring our delivery of this decision to an end, the Court wishes to commend the attorneys-at-law for both the Appellant and the Respondent for their exemplary advocacy in this matter. The issues raised in this case were complex, engaging both intricate points of law and nuanced economic principles, yet counsel on both sides have navigated these with remarkable clarity, precision and intellectual rigor. The respective submissions were of the highest caliber, reflecting a profound understanding of the substantive and procedural aspects at hand, and your respective presentations have been of great assistance to the Court in what we would consider to be a reasoned and balanced determination. The Court expresses its sincere gratitude for the cerebral and dedicated approach taken by counsel throughout these proceedings.

92. We wish to stress that the above paragraphs in this postscript forms no part of the reasoning process of the Court in these appeals but rather may be of general guidance to the parties. With that we now formally bring this matter to a close.

His Honour Anthony D.J. Gafoor

Honourable Chairman

His Honour Roland N. Hosein

Member