SUNRISE (PG) SDN BHD V KETUA PENGATAH JABATAN HASIL DALAM NEGERI
High Court, Pulau Pinang
8 December 1999
Civil Appeal No 14-1-1996
ABDUL HAMID B MOHAMAD J

Revenue law • \ Income tax • \ Whether transfer of land by appellant was a business venture • \ Whether profit therefrom taxable • \ Income Tax Act 1967, s 4(a)

Abdul Hamid b Mohamad, J

This is an appeal against the decision of the Special Commissioners of Income Tax confirming the assessment to income tax in the sum of RM112,339.60 in respect of Year of Assessment 1983. The Special Commissioners decided that the disposal of three pieces of land i.e. lot 729,730 and 57(1), all in the North East District of Penang (• gsubject land• h) by the appellant to Primo Corporations Sdn Bhd (• gPrimo• h) was an adventure in the nature of trade and therefore the profit arising therefrom was taxable under s 4(a) of the Income Tax Act 1967. The total tax payable inclusive of excess profits tax and development tax was RM130,424.50.

The Special Commissioners gave their decisions on May 26, 1993. The appeal was registered in this court in 1996. On May 29, 1996, I dismissed the appeal. On March 4, 1999 the appellant obtained leave to appeal to the Court of Appeal. Hence this ground of judgment.

To give a clearer picture of the events, I shall state the facts, either as agreed, found by the Special Commissioners or are undisputed, in chronological order.

On December 31, 1969 Rekin Sdn Bhd (“Rekin”) was incorporated with the following subscribers: Chew Kok Kin (grandfather of Peter Chew, the managing director of the appellant), Chew Meng Two (uncle of Peter Chew) and Madam Tung Yion Fong (mother of Peter Chew). Among the objects of the company were:

“ 3

- (a) To erect and construct houses, building or works of every description on any land of the Company …

…

(c) To carry on business of capitalists ⋯ and to undertake and execute all kinds

of financial, commercial, trading and other operations.

- … **** 280***
- (h) To carry on any other business which may in the opinion of the Directors be conveniently carried on by the Company, without in any way limiting any of the objects specified …

(i) To perform all or any of the following operation acts or things:

- …

(2) To sell, let, dispose of or grant rights over all or any property of the Company.
…

(8) To enter into arrangements for joint working in business, or for sharing profits …"

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On January 9, 1970, the company acquired Holdings No 186(2), 282, 284, 286 and part Holding No 172(2), TSI North East District, Pulau Pinang ("the Kelawai Road land") from Disco Sdn Bhd ("Disco") for a consideration of RM190,000. Disco was owned by Peter Chew's father and mother.

On the same day Rekin also bought Lot 494(2), Lot 494(3), Lot 674 (Mukim 14) Seberang Perai Tengah for RM29,000 from Khoo Kay Peng.

In 1972, plans for a housing project of the Kelawai Road land were made. RM3,200 was incurred for the preparation of the plans and was capitalised.

On April 17, 1973 Rekin bought the subject lands from Disco for RM58,000. There was an old bungalow on the land. According to the appellant, the intention was to build a guest house for friends and business associates of the Chew family. However, later the appellant decided to pull down the old bungalow in order to build a "dream house" for the Chew children, consisting of a three-storey semi-detached house where all the Chew children could all stay under the same roof. Plans were submitted to the Majlis Perbandaran Pulau Pinang (MPPP) to this effect and were approved. However, the "dream house" was never built and the approval was allowed to lapse. But the development cost totalling RM26,649 which includes RM10,000 architects fees was capitalised and appeared in the Directors' Report for 1973.

In the following year, 1974, Sunrise Towers Sdn Bhd (• gSunrise Towers• h) was incorporated.

There appears to be some confusion on the part of the Special Commissioners whether Sunrise Towers was incorporated in 1974 or that Rekin changed its name to Sunrise Towers in 1974.
According to paragraph (vi) of "Other Facts Found During the Trial" at p 9 of the case stated:

"Rekin Sdn. Bhd. changed its name to Sunrise Towers Sdn. Bhd. in 1974."

According to paragraph (iii) of the statement of agreed facts:

"On 30th January 1980 Rekin Sdn Bhd changed its name to Sunrise (PG) Sdn. Bhd."

According to the written submission of learned counsel for the respondent Sunrise Towers Sdn Bhd was *incorporated* in 1974.

The gist of submission for the appellant states that Rekin changed its name to Sunrise (Penang) Sdn Bhd (the appellant) on January 30, 1980 but makes no mention about Rekin changing its name to Sunrise Towers in 1974 or that Sunrise Towers was incorporated in 1974.

So, we see that both learned counsel for the appellant and the respondent as well as the Special Commissioners are unanimous that Rekin changed its name to Sunrise (Pg) Sdn Bhd (the appellant's present name) in 1980. I am of the view that the Special Commissioners were mistaken when they said that Rekin changed its name to Sunrise Towers in 1974 and in 1980 Rekin again changed its name to Sunrise (Pg) Sdn Bhd. If Rekin had changed its name to Sunrise Towers in 1974, it would not be known as Rekin anymore but as Sunrise Towers since the date of such change. It is also clear that Sunrise Towers and Rekin, later known as Sunrise (Pg) Sdn Bhd (the appellant) are two different companies. Otherwise, Rekin (or the appellant) could not have sold part of the Kelawei Road land to Sunrise Towers as it would, then, be selling to itself. In fact the Special Commissioners, in paragraph (xv), p 11 of the case stated correctly stated that part of the Kelawai Road land was transferred *by Rekin* to Sunrise Towers in 1975. Furthermore, the appellant could not be one of the shareholders of Sunrise Towers, as it cannot be a shareholder of itself. So, the correct fact is that Sunrise Towers was incorporated in 1974, as stated in the respondent's submission. In 1975 Rekin transferred part of Kelawei Roads land to Sunrise Towers in exchange for 44,000 shares of RM1 each fully paid in Sunrise Towers. The shareholders of Sunrise Towers were the appellant, Peter Chew, his father, his uncle and his mother. The directors were the same as in Rekin.

For that transfer, Rekin was assessed to income tax in the sum of RM101,620.40 which was paid.

On January 30, 1980, Rekin changed its name to Sunrise (Pg) Sdn Bhd, the present name of the appellant.

On April 2, 1980, the appellant, by a board resolution changed the objects Clause 3(a) to state that the object of the company was to hold for investment

shares, stocks etc — Exh P1.

On July 1, 1981, the appellant, by a resolution changed objects Clause 3(f) to read:

" 3

- (f) To purchase or otherwise acquire for investment lands, houses, buildings, plantations and any other property of any tenure and any interest therein and any movable property of any description or any interest therein."

This change was not communicated to the Registrar of Companies. But eleven days after it was passed, the respondent was informed of the change. It should also be noted that the objects in Clause 3(c), (h) and (i) were not changed.

In the following year, 1982, the appellant entered into a joint-venture agreement with Beauticon Development Sdn Bhd ("Beauticon') to develop the subject land. For that purpose the appellant and Beauticon incorporated a company called Primo Sdn Bhd ("Primo"). The appellant would transfer the subject land (6633 sq ft) to Primo in exchange for 380,000 shares of RM1 each in Primo, the same number of shares held by Datoapos;Loy even though Dato' Loy's land was much bigger, i.e. 17,514 square feet.

It is the income from this transfer that becomes the issue in this case, i.e. whether it is chargeable to income tax.

It should also be noted that from 1971–1976 development tax was imposed on the appellant and was paid. From 1971–1983, the appellant's computation of tax forwarded to the respondent was based on the method adopted by housing developers. The appellant had claimed that the adjusted loss from the business be carried forward. The appellant also claimed that the capital allowance for the car used in the business be carried forward, which was allowed. The appellant had also declared its adjusted loss from a business in its return forms from 1971 to 1983.

Something should be said briefly, about the function of the court in an appeal from the decision of the Special Commissioners by way of case stated.

The appeal is only on a question of law — paragraph 34, Schedule 5 of the Income Tax Act 1967. It follows that the findings of facts of the Special Commissioners are final unless such findings cannot be supported by evidence. The power of the High Court in an appeal by way of case stated is best described by Lord Denning in the House of Lord's case of Griffiths (Inspectors of Taxes) v

Harrison (Watford) Ltd [1962] 1 All ER 909 @ 916:

• gNow the powers of the High Court on an appeal are very limited. The judge cannot reverse the Commissioners on their findings of fact. He can only reverse their decision if it is "erroneous in point of law". Now here the primary facts were all found by the commissioners. They were stated in the case. They cannot be disputed. What is disputed is their conclusion from them. It is now settled, as well as anything can be, that their conclusion cannot be challenged unless it was unreasonable, so unreasonable that it can be dismissed as one which could not reasonably be entertained by them. It is not sufficient that the judge would himself have come to a different conclusion. Reasonable people on the same facts may reasonably come to different conclusions: and often do. Juries do. So do judges. And are they not all reasonable men? But there comes a point when a judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, he is entitled to interfere."

The onus is on the appellant to show that the transaction is not an adventure in the nature of trade and therefore the amount is not taxable. This is clearly provided by paragraph 13 of Schedule 5 of the Income Tax Act 1967:

"13. The onus of proving that an assessment against which an appeal is made is excessive or erroneous shall be in the appellant."

See also ABC v CIT [1959] MLJ 162.

There is no point to try to define what "trade" or "an adventure in the nature of trade" is. It is not possible of being defined exhaustively. Statements to be found in CIR v Korean Syndicate 12 TC 196, Hesheth Estates v D Craddock 25 TC 7, Swith v Anderson 15 Ch D 258 and MNR v James Taylor 56 DTC 11125 (a Canadian case) and ALB Co Sdn Bhd v DGIR [1979] 1 MLJ (PC) bear testimony to this.

Lord Bridge of Harwick in Waylee Investment Limited v The Commissioner of Inland Revenue [1991] 1 CLJ 211 (PC) puts it very succinctly, when he says:

"The law has never succeeded in establishing precise rules which can be applied to all situation to distinguish between trading stock and capital assets."

Raja Azlan Shah FJ (as he then was) had this to say in Investment Ltd v Comptroller General of Inland Revenue [1975] 2 MLJ 208 (FC), at p 200:

"The question to be asked and answered is whether the facts reveal a realisation of income from business of trafficking in immovable property carried on by the appellant company …

I think it right to emphasise what has already been treated judicially that cases on income tax depend so much on their facts that excessive reliance on precedents may be dangerous. Whether the appellant company was carrying on business of trafficking in immovable property must, in the last analysis, defend on all the surrounding circumstances, so that no single criterion can be formulated."

The case must be looked as a whole, to avoid seeing a distorted picture, as learned counsel for the appellant said in his • ggist of submission• h.

Both learned counsel as well as the Special Commissioners were aware of this. However the learned Special Commissioners, just as both learned counsel have done, did consider the issue under various headings of • gguidelines• h or • gtests• h, namely:

- (i) subject matter of transaction;

(ii) period of ownership;

(iii) frequency of transactions;

(iv) alteration of property to render it more saleable;

(v) methods employed in disposing the property; and

(vi) circumstances responsible for sale.

Even learned counsel for the appellant does not say that the • gguidelines• h applied by the Special Commissioners are wrong. Indeed they are not. All I wish to emphasize is that these guidelines are not to be treated as • gingredients• h of an offence as in a criminal case, where, if one is not proved the offence is not proved. Again, it clear that all parties are aware of this too.

The complaint can be divided into two categories: first, the Special Commissioners have made findings of facts, which are not supported by evidence. Secondly, the Special Commissioners have placed too much emphasis on certain facts but too little or no emphasis at all on other facts.

Example of the first is that the Special Commissioners have said that the appellant had, by applying for an obtaining approval to build a "dream house" for all the Chew family to stay under the same roof, which was not carried out, had changed the land from three small lots into one, thus enhancing its value.

I agree with the learned counsel for the appellant that there is no evidence to that effect and that that finding of fact is wrong. But, as I have said a tax appeal is not a criminal case where a wrong finding of fact may mean that one ingredient of the offence is not proved and the case may fail. As is agreed by all parties, the case must be looked at as a whole.

Examples of the second category of the complaints are, first, that the Special Commissioners are wrong in concluding that the prime motive of the appellant in buying the land to turn the old bungalow into a guest house for friends and business associates is a business consideration. Learned counsel argued that the Special Commissioners did not consider the fact that the subject land had to be transferred to Rekin because Disco was to be liquidated.

Secondly, the Special Commissioners placed too much importance on the fact that the subject land was situated in one of the most prestigious areas in Penang Island, i.e. Persiaran Gurney which has sea frontage and also the fact that the land has a First Grade Title.

Thirdly, the Special Commissioners failed to consider that even though the appellant was given the same number of shares as Dato' Loy whose land was nearly three times bigger, the joint venture was more favourable to the Dato' Loy. That is because Dato' Loy's land alone is not big enough for the building, due to setback.

Fourthly, the Special Commissioners did not consider that the profit and loss account for the relevant years show that the land was a • gfixed asset• h. Fifthly, the Special Commissioners did not consider that the 380,000 shares obtained by the appellant were still held by the appellant.

Lastly, the Special Commissioners did not even consider the Supreme Court decision in DGIR v Khoo Ewe Aik Realty Sdn Bhd [1990] 2 MLJ 415 "the facts of which are somewhat similar". Now, everybody agrees that the case must be looked at as a whole and each case is to be decided on its own facts. No two cases are the same. The guidelines are mere guidelines, to assist the Special Commissioners to arrive at their conclusions. When the Special Commissioners considered the case under each heading of the guidelines, and I see nothing wrong with that, and when a certainfact is repeated under more than one heading, it does appear as if the Special Commissioners had placed too much importance on that fact.

But, we must bear in mind that the appeal is only on points of law. The first question is whether the Special Commissioners have misdirected themselves in law. Even learned counsel for the appellant's submission does not say so. I am also of the view that the Special Commissioners have not misdirected themselves in law.

So, the other question is whether the Special Commissioners' conclusion is so unreasonable that no reasonable man could come to that conclusion, to use the expression of Lord Denning in Griffiths v Harrison (Watford) Ltd [1962] 1 All ER 909. I think the easiest and the best way to consider the case as a whole is to

look at the activities of the appellant company in chronological order. That is why I narrated the facts in chronological order.

In law, a company is a separate entity from its shareholders. But, behind every company there must be people. The people behind the appellant company are Peter Chew, his father, his mother and his uncle. They must be business people. Otherwise they would not have a number of companies to their credit. Even from the evidence in this case, it can be seen that they knew what they were doing, in particular regarding the tax advantages that a company is entitled to, unlike individuals. They had made full use of it. They claimed capital allowance for the • gcompany's car• h even though no one would ever suggest that they did not enjoy the use of the car for private purpose. They had made other claims, which I have stated earlier, which need not be repeated.

The appellant is not the only company incorporated by them. When the appellant company was incorporated, the purpose was no other than to trade. The articles of association say so. Of course there is no specific article that the company was to trade in land.

But, as Gill FJ (as he then was) said in E v Comptroller-General of Inland Revenue [1970] 2 MLJ 117 at p 127, quoting Lord President Clyde in Commissioners of Inland Revenue v Hyndland Investment Co Ltd 14 TC 694:

• gthe question is not what business does the taxpayer profess to carry on, but what business does he actually carry on.• h

Even an isolated transaction may be trading, of course depending in the circumstances of the case. The High Court of Australia explains it very clearly in FC of The v Myer Emporium Limited [1987] CLR 199:

• gAlthough it is well settled that a profit or gain made in the ordinary course of carrying on a business constitutes income, it does not follow that a profit or gain made in a transaction entered into otherwise than in the ordinary course of carrying on the taxpayer's business is not income. Because a business is carried on with a view to profit, a gain made in the ordinary course of carrying on the business is invested with the profit-making purpose, thereby stamping the profit with the character of income. But a gain made otherwise than in the ordinary course of carrying on the business which nevertheless arises from a transaction entered into by the taxpayer with the intention or purpose of making a profit or gain may well constitute income. Whether it does depends very much in the circumstances **** 288*** of the case. Generally speaking, however, it may be said that if the circumstances are such as to give rise to the inference that the taxpayer's intention or purpose in entering into the transaction was to make a profit or gain, the profit or gain will be income, notwithstanding that the transaction was extraordinary judged by reference to the ordinary course of the

taxpayer's business. Nor does the fact that a profit or gain is made as the result of an isolated venture or a "one-off" transaction preclude it from being properly characterized as income: Federal Commissioner of Taxation v Whitfords Beach Pty Ltd (35). The authorities establish that a profit or gain so made will constitute income if the property generating the profit or gain was acquired in a business operation or commercial transaction for the purpose of profit-making by the means giving rise to the profit."

In this case, soon after it was incorporated, the appellant bought two pieces of land. It was argued that the Kelawei Road land was transferred from Disco, another company of the Chews because Disco was to be liquidated. But we are no told why, what was the necessity and what was the real motive behind it. Whatever it is, the purpose of the purchase was to develop it and expenses amounting to RM3,200 was incurred for the preparation of plans and was capitalised. When part of that land was transferred to Sunrise Towers, another company of theirs, the profit was assessed to income tax and was paid. That was in 1975.

In 1973, the subject land were bought by the appellant. It is said that the purpose was to put up a guest house to entertain friends and business associates of the Chew family — again there is a business element in it, while the family will also enjoy it. Had it been purely for the members of the family to enjoy it, it would not have been necessary to purchase them under the company's name, in the first place. But there are advantages, tax advantages, to purchase them under the company's name that was made full use of. I need not repeat.

Then it is said that they changed their mind. Now they wanted to build a dream house for the children to stay under the same roof. That too, was not done. Again, if that was the purpose throughout, why should the land be purchased under the company's name. Again, the consideration, which is not difficult to understand, is tax advantages, which was obtained and enjoyed.

Then, on January 30, 1980, Rekin changed its name to Sunrise Towers. Why, we are not told.

Four months later, the articles of association was amended to state that the company is an investment company. That was followed by another amendment, to make the same even clearer.

Soon thereafter, the joint-venture agreement was signed and the land were transferred to a new company incorporated for the purpose of developing the land.

Why were these amendments which were not communicated to the Registrar of Companies but communicated to the respondent made? The only inference is for tax purposes. The appellant had to pay income tax when it transferred the Kelawei Road lands. Changing the name of the company and amending the articles of association might help. Surely, negotiation with Dato' Loy did not take place in one day.

Of course the joint-venture agreement may be advantageous to Dato' Loy, otherwise he would not have embarked on the project. But it is also advantageous to the appellant. The Chews must have realised the strategic position of their company's land, in relation to Dato Loy's land. They must have realised their bargaining strength and made full use if it. Otherwise they would not have got such a good deal, which in terms of value per square foot is almost three times more than Dato' Loys. That is a business deal. I have no doubt about it.

It was also argued that the land was listed or categorised as • gfixed asset• h in the profit and loss account of the company, which shows that it is a capital asset and profits from its sale is not taxable. Admittedly, that is a factor to be considered. But, like other factors it is not conclusive. Not all books kept by businessmen and companies are always 100% reflective of the true position. Or, it may well be that, at the beginning, it was really intended to be a fixed asset, but, when a good deal comes along, why not grab it? After all, the company exists to make profits.

I do not think I need to discuss every ground given by the Special Commissioners in arriving at their conclusion, nor do I think I need to discuss every point argued by both learned counsel.

The issue is whether the Special Commissioners have misdirected themselves in law or that their conclusion is so unreasonable that no reasonable man would have arrived at. I am of the view that they have not misdirected themselves in law. They have made a few mistakes in their findings of facts which actually are of no consequence to their decision, seen as a whole. Looking at the facts as a whole I am of the view that their conclusion cannot be said to be so unreasonable, considering the facts and the law, that justifies this court to reverse it. On these grounds I dismissed the appeal with costs.

Solicitors

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