

INLAND REVENUE BOARD OF REVIEW DECISIONS

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

1997, No. 91
(Civil)

BETWEEN

CHANWAY INVESTMENT COMPANY LIMITED Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

Coram: Hon Nazareth, V-P, Liu & Mayo, JJA in Court

Date of Hearing: 17 February 1998

Date of Judgment: 17 February 1998

Handing down of Reasons for Judgment: 27 February 1998

J U D G M E N T

Liu JA:

Under section 14 of the Inland Revenue Ordinance, Cap. 112, the appellant (taxpayer) was assessed to profits tax for the period of assessment 1986/1987 ending 31 March 1987. The Board of Review upheld the assessment. The taxpayer appealed by way of Case Stated to Keith, J. on points of law. The appeal was dismissed and it is from that dismissal the taxpayer now appeals.

The taxpayer acquired parcels of agricultural land in the New Territories. On resumption by Government from time to time, the taxpayer accepted Letter B's. Together with three other companies, the taxpayer spent its Letter B's for procuring a piece of land in Tai Po. After various schemes were aborted, the Tai Po land was sold and the taxpayer's share brought a gain of more than \$42 million. It was on this \$42 million gain that the Inland Revenue assessed profits tax.

Leading counsel, Mr Tang, addresses us on the Board's evaluation of five different factual facets on which the decision of the Board of Review was, inter alia,

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founded. Counsel submits that in the absence of what he describes as these five pillar determinations, the foundation for the Board's confirmation would collapse and the decision of the Board cannot stand.

Save for the criticism levelled at the standard of proof, the various complaints of the taxpayer's are conspicuously dressed up as errors of law said to have been committed in the Board's evaluation in its fact-finding process. It is quite unnecessary to deal specifically with the Grounds of Appeal and the submissions advanced on behalf of the taxpayer. Leading counsel for the taxpayer rests its case on two submissions, namely, (1) whether the Board of Review adopted the wrong standard of proof and (2) whether the evidence of Mr Chan, a director of the taxpayer who gave evidence, was given any or any adequate consideration.

The Board observed:

“Therefore to secure exemption from the charging provisions of the Ordinance, the Company will have to show that ALL the acts which found the Company's case are of such ‘quality and characteristics’ as will prove the Company's alleged intention to acquire for the purpose of long term investment the portion of the agricultural land whose Letter B's were used to exchange for the land.” (Emphasis supplied by counsel).

It is common ground that under s. 68(4) of the Inland Revenue Ordinance the burden of proof fell on the taxpayer in its appeal to the Board of Review and that the standard of proof required of the taxpayer was one of balance of probabilities. It is urged upon us that by requiring proof for all the facts grounding the taxpayer's appeal to the Board before which it was primarily sought to vindicate the taxpayer's investment intention, the Board of Review adopted a wrong standard of proof higher than the one laid down by the revenue legislation.

As to “all its acts which found the “[taxpayer's] case”, the relevance and materiality of the grounding assertions in support of the taxpayer's alleged investment intention lie in their, so put by the Board, “quality and characteristics”. That would be a matter of degree. Far be it from the Board to require equal proof of all these acts asserted by the taxpayer for a successful appeal, it merely called for a global consideration of all the assertions of such relevance as would, together, prove the taxpayer's claim of investment, not trading. In the final analysis, when considering the taxpayer's contended intention of long term investment, the words “all the acts” read in the proper context of the impugned passage meant and must have meant, as Keith, J. so ruled, “the acts when taken as a whole.”

Turning to the remaining criticism against the five factual pillars in Mr Tang's submission, the rehearsal of which would not be productive, they would seem to be considerations of a minor nature. They would not even begin to deflect the

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major thrust of trading of the taxpayer in the transaction assessed and generally. It is not seriously pressed upon us that it was not open to the Board to draw the adverse inferences against the taxpayer on the undisputed primary facts, and the Board was entitled so to return the same conclusions. From the conduct and documentation of the taxpayer with respect to its corporate affairs, its audits and governmental communications, there was ample evidence to support the conclusion reached by the Board of Review. The Board faced the difficulty of having just a bare assertion of long term investment from the taxpayer. It is true that the Board made reference to the declaration made on behalf of the taxpayer by its director, Mr Chan as one made with "apparent conviction", but the Board hastened to add that the taxpayer's own documents did not accord with such a declared intention. By the very clear conclusions reached by the Board against the taxpayer, the evidence of its director, Mr Chan and the bare assertion of long term investment advanced by counsel on its behalf must have been implicitly rejected.

There is no substance in this appeal. We dismissed it with costs at the conclusion of counsel's arguments with an intimation that we would give our reasons later, which I now do.

Mayo J.A.:

All of the documentation was consistent with the Respondents contention that it was not the intention of the Appellant to acquire the land in question for long term investment.

There is no merit in the complaint that the Board adopted the wrong standard of proof. It is manifest from the Reasons given for their determination that the Board did indeed decide the appeal on the balance of probabilities.

There is also nothing in the complaint that insufficient consideration was given to Mr. Chan's testimony. No explanation was forthcoming to explain the discrepancies between his evidence and the evidence contained in the documents which were before the Board. A good example of this was the clarification which had been given by the Company's Auditors which indicated that some of the other land concerned was not being held for long term investment. This was notwithstanding the fact that the burden of proof lay upon the Appellant. It was implicit from the Board's findings that it rejected Mr. Chan's testimony.

I agree that this appeal should be dismissed.

Nazareth V-P:

For the reasons also given by my Lords, I agreed that the appeal should be dismissed.

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I would add the following. Such evidence as could be considered to be of assistance all pointed to the land concerned as being intended for the respondent company's trading purposes rather than for long-term investment. The only evidence to the contrary was that of Mr Chan, the respondent's alter ego. The Board were entitled to reject his evidence. Mr Tang complains that no finding to that effect was made. Nonetheless, in my view, it is clear that his evidence on the point must have been rejected; its acceptance could not stand alongside the Board's conclusion, nor could it have been overlooked. Plainly, the Board accepted the evidence pointing to trading in land as the purpose in point; and they were entitled to do so.

That conclusion is reinforced when it is seen what is proffered and urged to the contrary.

It is submitted that the Board applied the wrong standard of proof against the appellant. This is founded entirely upon the use of the word "all" in the passage relied upon by the appellant and quoted by Liu JA. It is implied that the Board must have notionally required the appellant to demonstrate that all the acts the appellant relied upon were of such "quality and characteristics" as would prove the appellant's claimed intention of long-term investment purposes or fail in the appeal. Quite apart from the manifest absurdity of that suggestion, it can be readily seen from the stated case, in particular the record of the Board's decisions, that the Board did nothing of the sort, and evaluated the evidence and considerations in a logical manner. I would add that it seems to me also that what the Board meant by the expression "all the acts" was the acts taken as a whole. There is nothing in this point.

Then a series of alleged errors, it has to be said of a petty and peripheral nature, were relied upon as being defective blocks in the foundation of a pyramid of facts leading to inferences and to the Board's conclusion at the apex, which therefore could not be sustained. I do not find it necessary to detail those alleged errors. Suffice it to say that if errors they were, I do not see how they could even cumulatively begin to counter the evidence and considerations pointing to trading as being the intention and purpose of the acquisition and possession of the land concerned. It is that upon which the Board's conclusion rests.

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There was accordingly no good reason for interfering with the Board's decision.

(G P Nazareth)	(B Liu)	(Simon Mayo)
Vice-President of	Justice of Appeal of the	Justice of Appeal of the
the Court of Appeal of the	Court of Appeal of the High	Court of Appeal of the High
High court	Court	Court

Mr Robert Tang, SC and Mr Dennis Law inst'd by M/s Charles Yeung Clement Lam & Co. for the Appellant.

Mr Robert Andrews inst'd by Department of Justice for the Respondent.