HCAL 204/2002

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

CONSTITUTIONAL AND ADMINISTRATIVE LAW PROCEEDINGS
NO. 204 OF 2002

BETWEEN

PANG CHOR FU & CHOI MEI KAN	Applicants
and	
OFFICE OF THE CLERK TO THE BOARD OF REVIEW	1st Respondent
COMMISSIONER OF INLAND REVENUE	2nd Respondent

Before: Hon Chung J in Court
Date of Hearing: 14 September 2005
Date of Handing Down Judgment: 15 March 2006

J U D G M E N T

Introduction

1. This is the taxpayers' application for judicial review against the Board of Review's decision dated 31 July 2002 (which they claimed was received in August 2002). The taxpayers are husband and wife. Leave to apply was given by Hartmann J on 17 December 2002. For convenience, the Board of Review will be referred to as "*the Board*" below.

2. The grounds in support of this application appear in the re-amended "Notice of Application for leave to Apply for Judicial Review" ("*Re-Amended Form 86A*"). They can be summarized as:

(a) the Board only handed down decision some 17 months after the hearing. This delay caused material errors in the Board's decision;

(b) for example, para. 3 of the Board's decision misstated the couple's unplanned pregnancy as "expected pregnancy". This fact was vital to the rationale behind the taxpayers' conduct since that time;

(c) further, the Board's view of the taxpayers' credibility must have been affected by the delay and/or the said errors;

(d) the Board acted unlawfully in refusing to state a case pursuant to s. 69, Inland Revenue Ordinance (Cap. 112).

Background Facts

3. A formal sale and purchase agreement dated 11 May 1996 named the taxpayers as the purchasers of a flat (at a price of $6,183,000) ("*the suit property*"). The purchase was completed in May 1997.

4. The suit property was sold in July 1997 for $11,000,000 (the sale and purchase agreement was dated 24 May 1997).

5. The gain from the sale ($4,486,065) was put forth to the Commissioner of Inland Revenue ("*the Commissioner*") who considered it to be trading profit and hence taxable. The taxpayers opposed and argued that it was capital in nature. The Commissioner later reduced the assessment gain to $4,008,679 (pursuant to s. 64(2), Cap. 112).

6. The taxpayers lodged an appeal to the Board. As stated above, the Board handed down its decision on 31 July 2002. The taxpayers' application to the Board to state a case was refused by the Board on 5 September 2002.

7. By a corrigendum dated 11 September 2002, the Board amended the part of its decision which reads "expectedly" to "unexpectedly".

8. The taxpayers were dissatisfied with the Board's decision and hence commenced this application.

Ground (1) Delay

9. The Commissioner (who appeared at the hearing to oppose this application) submits that the approach to a complaint against excessive delay in making the decision should be as follows: whether the delay resulted in the decision being "unsafe", and whether it would be "unfair or unjust to let it stand". Delay, of itself, provides no ground to attack a decision. Reliance is placed on *Cobham v. Frett* [2001] 1 WLR 1775:

> "In their Lordships' opinion, if excessive delay, and they agree that 12 months would normally justify that description, is to be relied on in attacking a judgment, a fair case must be shown for believing that the judgment contains errors that are probably, or even possibly, attributable to the delay. The appellate court must be satisfied that the judgment is not safe and that to allow it to stand would be unfair to the complainant" (at p. 1783H-1784A).

10. In *Nais v. Minister for Immigration & Multicultural & Indigenous Affairs* (2004) FCAFC 1, the Federal Court of Australia held by majority decision that neither a delay of 9 months (between the date of written submissions and date of the tribunal's decision) nor one of 12 months (between the date of oral hearing and the date of the tribunal's decision) amounted to a denial of justice. Hill J (who was in the majority) said:

> "… jurisdictional error would be established in a case where there was inordinate delay and the delay was of such an extent that there was a real likelihood that anything which the appellant might have said to the Tribunal by way of evidence or submission would not be recalled by it. This is because in such a case the appellant's right to be heard was not an effective right as a result of the delay.
>
> … the Tribunal's decision will only amount to jurisdictional error where the delay is of such a magnitude as to lead to the conclusion that it is more probable than not that there has been a miscarriage of justice. It may suffice if the Court concludes that there is a real likelihood of injustice to the appellant. It is not necessary in the present case to distinguish between these two formulations … " (para. 14 and 15 of *Nais*).

11. There is evidence that there was in fact no delay on the Board's part to reach a decision. The affirmation of the clerk to the Board, Ms. Chan Chung Man, dated 22 July 2004 deposed:

> "… I have been informed by the Chairman who presided in that appeal ["the Presiding Chairman"] … and verily believe that he completed his draft Decision ["the Draft"] by 22nd March, 2001 …
>
> … I have been informed by the Presiding Chairman and verily believe that the Decision which was delivered by the Board on 31st July, 2002 was identical to the Draft which was prepared by the Presiding Chairman … " (para. 2 and 4 thereof).

12. The delay between 22 March 2001 and 31 July 2002 (a period of some 16 months) was attributed in the affirmation to:

> "A misunderstanding arose between the staff of the Presiding Chairman [a barrister in private practice] and the Board. The staff of the Presiding Chairman maintained that the Draft was sent to the Board on 22nd March, 2001. Records retained by the Board however suggest that what was sent on 22nd March, 2001 was the draft Decision of the [Presiding] Chairman in another appeal" (para. 3 thereof).

13. If the account given in Ms Chan's affirmation is correct, the Board's decision was effectively made the day immediately following the last hearing before the Board. There was no inordinate or excessive delay.

14. The taxpayers do not accept the account deposed to by Ms Chan in her affirmation. They accused the Board of passing the blame to the staff. However, the taxpayers do not accuse Ms Chan of having lied in her affirmation.

15. Having considered the whole circumstance, including the lack of evidence to contradict Ms Chan's account (even though it was in the nature of hearsay evidence), I find her account to be credible and should be given full weight.

16. Accordingly, I do not find the taxpayers to be able to establish any inordinate or excessive delay on the Board's part. I now turn to deal with the errors allegedly made by the Board in its decision.

Ground (2) Errors in the Decision

17. The error in the Decision which has been particularly emphasised by the taxpayers is para. 3 thereof. The relevant part reads:

> "The Taxpayers in their letter of appeal dated 26th May 2000 ("the Letter") asserted that they bought [the suit property] for self-residence but when the Wife became

pregnant "expectedly" in March 1997, they decided to immigrate to Canada and hence [the suit property] was sold as a described above".

18. In the corrigendum issued on 11 September 2002 (less than 2 months after the Board's decision was handed down), the Board amended the word "expectedly" to "unexpectedly". In the letter from the clerk to the Board dated 5 September 2002, the Board explained that the above was an obvious typographical error and that the error had no bearing on the outcome of the appeal.

19. The taxpayers' letter of 26 May 2000 has not been produced as exhibit. But it has been supplied to court by the taxpayers. The relevant part of the letter states:

> "[The taxpayers] … intended to buy [the suit property] for self-residence. Later on, they sold [the suit property] due to the unplanned pregnancy of the wife …".

Para. 3 of the Board's decision must have been an attempt to summarize that part of the letter. Hence, the Board was only trying to summarize an explanation given by the taxpayers about the sale of the suit property. The only proper inference which can be drawn from these circumstances is that the error must have been typographical (as the Board contends).

20. I therefore agree with the Commissioner that there is no substance in the taxpayers' argument that the error has unduly affected the Board's decision.

21. Para. 8, Board's decision reads:

> "It is to be noted that [the suit property] was bought on 11th May 1996, some 2 months before the Wife landed in Canada although obviously by then the Taxpayers must have formed the intention, as so many people in Hong Kong did at that time, that they should eventually immigrate to Canada".

The complaint is that the Board has wrongly assumed the intention common among the people in Hong Kong at the time to be the taxpayers' intention.

22. The complaint has no substance. The Board was only stating a fact prevalent at the time. Further, based on that fact, the Board inferred that the taxpayers must have acted in a similar manner. This is part of the fact-finding function of the Board. It has the power to do so; and the finding cannot be said to be perverse or against the weight of the evidence.

23. Para. 12, Board's decision states:

> "In a reply made to the Revenue's enquiry, the Taxpayers' tax representatives claimed that Property B was acquired with the intention 'to be solely occupied by

> the [taxpayers] themselves'. But in evidence, the Husband admitted that he bought Property B for 'short-term speculation'".

Property B was another property which was purchased on 6 June 1997 (when it was still under construction). The taxpayers say that they always accepted the sale of Property B was a trading transaction.

24. The Commissioner accepts that there was an error here but proffered an explanation for it. Reference is made to the written determination of the Commissioner dated 28 April 2000 (from which the taxpayers appealed to the Board) ("*the said determination*"). In the said determination, the Commissioner stated (among other things) according to the taxpayers, they intended to acquire the suit property as their residence (para. 1(5)(a) thereof). The said determination then stated:

> "… [the taxpayers] objected to the assessment [regarding the suit property] … To validate the objection, Profits Tax Return … was submitted showing Assessable Profits of $682,302, being profit on disposal of Property B … " (para. 1(7) thereof).

The said determination continued:

> "In reply to the Assessor's further enquiry [regarding the suit property] … [the taxpayers] stated … Property B was intended to be solely occupied by the Taxpayers themselves … " (para. 1(9)(a)).

It is said the last reference to "Property B" was an error on the Commissioner's part and he so informed the Board at the 21 March 2001 hearing when the Board raised the matter.

25. Based on the above, the Commissioner submits that the error in para. 12, Board's decision must have been a typographical error (see also para. 7, Ms Chan's affirmation which claims there was a confusion regarding this matter).

26. Whatever might have been the reason for the error, it is unclear if the matter has been considered by the Board in assessing the taxpayers' credibility.

27. Para. 25 to 29, Board's decision contain in gist its findings on:

(a) the taxpayers' credibility;

(b) the taxpayers' intention in acquiring the suit property.

The main reasons given in those paragraphs for disbelieving the taxpayers are:

(1) the explanation that the suit property was sold because they emigrated to Canada was untrue;

(2) they had no financial means to acquire the suit property or to maintain it;

(3) they had been living in accommodation provided by their family at all times;

(4) there was property speculation before and after the purchase of the suit property.

28. In these circumstances, I agree with the Commissioner that the Board' s principal reasons for disbelieving the taxpayers have very little (if anything at all) to do with the error in para. 12, Board' s decision.

29. Accordingly, I agree with the Commissioner that the taxpayers have failed to establish, in relation to the Board' s decision, either that there was an error (other than typographical: para. 3 and 8 thereof), or that the error materially affected the outcome of the appeal to the Board (para. 12 thereof).

30. I consider that the Board was entitled to make the findings of fact the way it did in the Board' s decision even without relying on the matters set out para. 12, Board' s decision. The taxpayers have made other complaints regarding the Board' s decision. There is no merit in these complaints either (whether individually or cumulatively).

31. This is therefore a case where the error in the Decision is not of such importance as to justify the exercise of my discretion in the taxpayers' favour in this application.

32. I have earlier rejected the complaint regarding inordinate or excessive delay. Even if there was such delay, by virtue of the matters set out above, I do not find that it has caused unfairness or injustice so as to justify judicial intervention.

Ground (3) Refusal to State a Case

33. S. 69(1), Cap. 112 provides (among other things):

> "The decision of the Board shall be final: Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a ***question of law*** for the opinion of the Court of First Instance … " (emphasis supplied).

34. The matters in the Board's decision complained of by the taxpayers are in truth factual findings made by the Board. In these circumstances, there is nothing improper in the Board's refusal to state a case for the opinion of this court.

Conclusion

35. This application is refused.

Relief

36. The Commissioner has levied criticisms regarding the relief sought in this application. Because this application is refused, there is no need to deal with this aspect. If for any reason it were necessary to do so, I agree with the Commissioner.

Costs Order Nisi

37. There is no apparent reason to depart from the usual rule that costs should follow the event. There will accordingly be a costs order *nisi* pursuant to Ord 42 r 5B(6) that the costs of this application be paid by the taxpayers to the Commissioner, to be taxed if not agreed.

(Andrew Chung)
Judge of the Court of First Instance
High Court

1st named Applicant (Mr Pang Chor Fu) acts in person and present

2nd named Applicant (Ms Choi Mei Kan) acts in person and present

Mr Eugene Fung, instructed by Secretary for Justice, for the 2nd Respondent