

CACV 150/2011

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 150 OF 2011
(ON APPEAL FROM HCIA NO 6 OF 2009)**

IN THE MATTER of Section 66
and Section 67 of the Inland
Revenue Ordinance (Cap. 112)

BETWEEN

AVIATION FUEL SUPPLY COMPANY Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon Kwan, Fok and Lam JJA in Court
Dates of Hearing: 16 August 2013
Date of Judgment: 16 August 2013

J U D G M E N T

Hon Kwan JA (giving the judgment of the Court):

1. On 4 December 2012, this court handed down judgment dismissing the appeal of the Commissioner of Inland Revenue against the judgment of Barma J. We agreed with the judge that the payment of a sum of US\$449 million odd (“the Sum”) received by the taxpayer AFSC from the Airport Authority was not chargeable to profits tax under section 14 of the Inland Revenue Ordinance, Cap 112 (“the Ordinance”), nor was the Sum

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taxable by virtue of sections 15(1)(m) and 15A(1). The Commissioner does not seek leave to appeal from those parts of our judgment.

2. The Commissioner seeks leave to appeal only in respect of that part of the judgment rejecting his contention that “balancing charges” should be imposed on AFSC. This was not an issue argued in the court below. By the term “balancing charges”, I mean the charges under sections 16G(3), 35(1) and 39D(2) as mentioned in paragraph 63 of the judgment. The arguments advanced by counsel and how these arguments were dealt with appeared in paras 63 to 72 of our judgment.

3. The Commissioner contends that the questions raised in the appeal are reasonably arguable and they are of great general or public importance as they involve the proper interpretation of the relevant provisions in the Ordinance. The “or otherwise” ground is also invoked in that it is argued that this court has overlooked the proper interpretation of sections 16G(3) and 35(1)(a).

4. The two questions set out in the Notice of Motion are as follows:

- “(1) Whether, as a matter of the true and proper construction and interpretation of the Ordinance in particular sections 39B(7) and 39D(3) thereof, for the purpose in relation to a balancing charge to be imposed on the sale of plant and machinery giving rise to sale moneys, the imposition of a balancing charge is avoided by virtue of s 39D in circumstances where the assets pass by way of succession by reason of a sale; and
- (2) Whether the “succession defence” in section 39D(3) is available as against:
 - (a) a charge on proceeds of sale of prescribed fixed assets under s 16G(3) of the Ordinance; and
 - (b) a balancing charge on the sale of industrial buildings or structures under s 35(1)(a) of the Ordinance giving rise to sale moneys.”

5. These questions are premised on the Commissioner’s contention there was a clear finding in our judgment that there was a sale of the business of AFSC, including the Facility (being the plant and machinery, prescribed fixed assets and industrial buildings for the purpose of the balancing charges), with the sale value of each item of the assets to be apportioned when the matter is to be remitted back to the Commissioner so that the correct figures could be arrived at taking into account the question of a balancing charge.

6. Mr Stewart Wong, SC submitted that the above is a fair reading of paras 44, 69 and 71 of our judgment. As this court has found there was a sale of the business by AFSC to the Airport Authority for the Sum, and since the business consisted solely of the Facility, the

finding that the Sum was a payment for the sale of that business necessarily means that the Facility, including all the assets in relation to which deductions or depreciation allowances had been claimed, had been sold by AFSC to the Authority. It follows from there that the payment of the Sum was:

- (1) a sale of the prescribed fixed assets for the purpose of section 16G(3) giving rise to proceeds of sale;
- (2) a sale of AFSC's relevant interest in the industrial building or structure for the purpose of section 35(1)(a) giving rise to sale moneys; and
- (3) a cessation of trade of AFSC within section 39D(2) giving rise to sale moneys.

7. The Commissioner argues that this court is wrong in holding that a balancing charge would not be made by the "succession" defence of AFSC by virtue of sections 39B(7) and 39D(3), in view of the finding that there was a sale of the assets, as sections 39D(3) and 39B(7) only apply to succession to a trade otherwise than by the sale of the relevant plant and machinery, and section 39D(3) does not apply to a charge on proceeds of sale of prescribed fixed assets under section 16G(3) or a balancing charge on the sale of industrial buildings or structures under section 35(1)(a) giving rise to sale moneys. Hence, the two questions as framed should be answered in the Commissioner's favour.

8. Ms Yvonne Cheng, SC submitted on behalf of AFSC that leave to appeal should be refused as the questions framed proceed on the assumption that this court has found there was a sale of the assets (as distinguished from the sale of a business). That assumption was wrong on a proper reading of the judgment. It is not reasonably arguable to find there was a sale of the assets. And the questions do not arise from the judgment properly understood.

9. Whether this court has found there was a sale of the assets was the subject of some correspondence of the parties to the court after the judgment was handed down. The Commissioner applied to this court to vary its judgment with regard to the question of balancing charges or to hold a further hearing to deal with this, and AFSC responded that the proper remedy of the Commissioner is to seek leave to appeal. We have declined to vary the judgment or entertain further submissions as we are functus.

10. We would exercise our discretion to grant leave to appeal in this situation. It would not be appropriate to say anything further about what was meant in the earlier judgment.

11. We order costs of this application be in the cause of the appeal.

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(Susan Kwan)
Justice of Appeal

(Joseph Fok)
Justice of Appeal

(M H Lam)
Justice of Appeal

Mr Steward K M Wong SC, of Department of Justice, for the applicant (respondent)

Ms Yvonne Cheng SC, instructed by Baker & McKenzie, for the respondent (appellant)