FAMV No. 18 of 2013

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

MISCELLANEOUS PROCEEDINGS NO. 18 OF 2013 (CIVIL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM CACV NO. 45 OF 2012)

BETWEEN

BRAITRIM (FAR EAST) LIMITED Applicant

and

COMMISSIONER OF INLAND REVENUE Respondent

Appeal Committee: Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Mr Justice Tang PJ

Hearing and Decision: 19 August 2013

Handing Down of Reasons: 22 August 2013

D E T E R M I N A T I O N

Mr Justice Ribeiro PJ:

1. We dismissed this application for leave to appeal with costs, reserving our reasons. We now provide those reasons.

2. The taxpayer sought unsuccessfully in the Board of Review[1] and in the Court of Appeal (on a leap-frog appeal)[2] to challenge the Commissioner's assessment of its liability to profits tax. The point of contention concerned the deductibility of the taxpayer's expenditure on certain moulds used in the production of plastic garment hangers. The Court of Appeal refused leave to appeal to this Court,[3] hence the present application for leave to appeal.

3. Mr Barrie Barlow SC argued in the first place that leave to appeal is as of right under the first limb of section 22(1)(a) of the Court's statute[4] since rejection of the taxpayer's deductions resulted in an assessment of additional tax payable in the respective sums of $1,829,296, $609,010 and $769,654 for the years of assessment 2000/2001 to 2002/2003, a total exceeding the $1,000,000 threshold.

4. We do not accept that submission. From the outset, the Court has construed the first limb of section 22(1)(a) as referring only to liquidated monetary claims.[5] And it has consistently held that the claim for a known sum resulting from a process of assessment or quantification does not qualify as a liquidated claim.[6] The claim is not a liquidated claim where the dispute is about whether one basis of assessment, producing $X liability, applies as opposed to a competing basis of assessment, producing $Y liability. The present case falls within that category. The Appeal Committee so held in *CG Lighting Ltd v CIR*.[7] It is a misconception to suggest, as Mr Barlow does, that the proposed appeal concerns a liquidated claim because the charge to tax – after assessment – is enforceable as a statutory debt.

5. Mr Barlow SC submits in the alternative that leave to appeal should be granted on the basis that a question of great general or public importance arises concerning the proper construction of the word "lease" in section 2 of the Inland Revenue Ordinance[8] ("IRO"), an issue determinative of the question of deductibility.

6. The taxpayer, a subsidiary of a UK company, was in the business of supplying on a large scale, plastic garment hangers ultimately used by UK retail companies. The hangers, which were made according to the customers' requirements, were manufactured by two Mainland factories. The taxpayer provided those factories with the product designs and the factories designed, constructed and operated the moulds used in the manufacture of the

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1 Decision D18/11 (23 August 2011).

2 CACV 45/2012 (30 November 2012), Kwan, Fok and Barma JJA.

3 CACV 45/2012 (19 April 2013), Kwan, Fok and Barma JJA.

4 (Cap 484). Section 22(1)(a): An appeal shall lie to the Court – as of right, from any final judgment of the Court of Appeal in any civil cause or matter, where the matter in dispute on the appeal amounts to or is of the value of $1,000,000 or more ...

5 *Cheng Lai Kwan v Nan Fung Textiles* (1997-1998) 1 HKCFAR 204 at 206 (adopting *Zuliani v Veira* [1994] 1 WLR 1149 at 1155; *Dr Ki Ping Ki v Oriental Daily Publisher Ltd* FAMV 25/2000 (7 September 2000); *China Field Ltd v Appeal Tribunal (Buildings) (No 1)* (2009) 12 HKCFAR 68 at §18.

6 *Shum Kam Fai v Lam Chi Wai* FAMV 38/2002 (16 December 2002); *Chao Keh Lung v Don Xia* (2004) 7 HKCFAR 260 at §§2-3; *WLK v TMC (No 1)* (2009) 12 HKCFAR 473 at §§7-8.

7 (2011) 14 HKCFAR 750 at §2.

8 Cap 112.

hangers. The moulds, while situated in the premises of the factories, remained the property of the taxpayer which had authorised them to be used by the factories exclusively for the manufacture of the hangers to be supplied to its customers.

7. It was common ground that by the combined effect of the relevant sections of the IRO,[9] the taxpayer's expenditure on the moulds, being capital expenditure, was not deductible unless it came within the particular exception created by section 16G. The issue was whether the taxpayer's arrangement with the Mainland factories came within the statutory definition of a "lease".[10] If it did, the expenditure was not deductible. But it was deductible if the arrangement fell outside the definition.

8. Section 2(1) of the IRO relevantly states: "In this Ordinance, unless the context otherwise requires ... lease, in relation to any machinery or plant includes (a) any arrangement under which a right to use the machinery or plant is granted by the owner of the machinery or plant to another person ..." It was common ground that this involves a wider concept of a "lease" than the concept as commonly understood under the general law. Accordingly, the legislature's definition gives an extended meaning to the word "lease".

9. The Court of Appeal held that it is bound to apply the extended meaning unless something in the context of the Ordinance required the contrary. Mr Barlow sought to argue that this was wrong, contending that where, as in the present case, a statutory definition provides that a certain meaning is "included" in a definition, the Court is bound to consider whether contextually, the commonly understood meaning rather than the extended meaning is intended to apply. We consider that an argument which posits a distinction without a difference. The opening words of section 2(1) emphasise the importance of context in deciding whether the statutory definition applies, as the Court of Appeal accepted. Mr Barlow's submission adds nothing different to that approach.

10. It was also common ground that on its face, the language of the definition does catch the taxpayer's arrangement with the Mainland factories. The taxpayer endeavoured to argue that the extended meaning should nevertheless be discarded as inapplicable in the context because (i) viewed purposively, it cannot have been the legislative intention to create such a narrow exception, effectively confining the deduction to cases where a taxpayer itself uses the machinery or plant and does not enter into an arrangement granting some other person the right to use it; and (ii) the extended meaning was only intended to take effect in relation to anti-avoidance provisions in the Ordinance.

11. In our view, the reasoning of the Court of Appeal[11] rejecting those arguments is unassailable. There is nothing in the context of the Ordinance to require adoption of a meaning other than the legislature's extended meaning even if this results in a relatively narrow class of taxpayers being eligible for the deduction. Nor is there anything to suggest

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9 Sections 2(1), 16(1), 16G and 17; and Item 26 of the First part of the Table Annexed to Rule 2 of the Inland Revenue Rules.

10 In section 2(1).

11 In paragraphs 10 to 19 of Barma JA's judgment.

that the extended meaning is intended only to operate in relation to anti-avoidance provisions. The closing words of section 2(1) give anti-avoidance powers to the Commissioner in respect of hire-purchase arrangements but, as the Court of Appeal held, the legislative history strongly indicates that the extended meaning was intended to apply to section 16G and was not intended to be confined in the manner suggested by Mr Barlow.

12. We accordingly did not consider the proposed appeal reasonably arguable and refused leave, awarding costs to the Commissioner.

(Patrick Chan)	(R.A.V. Ribeiro)	(Robert Tang)
Permanent Judge	Permanent Judge	Permanent Judge

Mr Barrie Barlow SC, instructed by Baker & McKenzie, for the applicant

Mr Eugene Fung SC, instructed by Department of Justice, for the respondent