

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
INLAND REVENUE APPEAL NO 5 OF 2016**

BETWEEN

KING GLOBAL INVESTMENTS LIMITED Applicant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon Au-Yeung J in Chambers
Date of Hearing: 12 January 2017
Date of Judgment: 10 February 2017

J U D G M E N T

Background

1. This is an application by King Global Investments Limited (“**the Taxpayer**”), for leave to appeal against the Decision of the Inland Revenue Board of Review dated 23 August 2016 (“**the Decision**”) dismissing the Taxpayer’s appeal against the profits tax assessments relating to the Taxpayer’s gain on the disposal of the subject **19/F Property**. I adopt all the abbreviations in the Decision.

2. The Taxpayer completed its purchase of the 19/F Property on 14 November 2007. The 19/F Property was sold to **Polywise** 13 days later, at a price that was 46% above the Taxpayer’s acquisition price. Completion was 9 months later on 28 August 2008. The IRD considered that the Taxpayer’s gain on disposal of the 19/F Property was chargeable to profits tax under section 14(1) of the Inland Revenue Ordinance (“**the IRO**”).

3. The **core issue** was the intention of the Taxpayer at the time of acquisition of the 19/F Property – whether it was for the purpose of trading and sold as a trading stock (IRD’s case), or long-term capital investment for rental (Taxpayer’s case).

4. The Taxpayer’s case was that it only agreed to sell the 19/F Property upon wholly unsolicited and successive offers from an estate agent (**Ms Yuen** of Chartersince) that came with a surprisingly attractive price and an offer to acquire a better unit in the same building (**the 34/F Property**) from a confirmor. It provided the opportunity to the Taxpayer to swap the 19/F Property with the 34/F Property at effectively no additional cost (“**the Swap Reason**”).

5. However, the intended purchase of the 34/F Property fell through because the confirmor refused to complete due to insufficient time. The Taxpayer nonetheless ended up swapping for 2 properties, ie the RG Property in Happy Valley and the 41/F Property in Tower One, Lippo Centre, in May and September 2008 respectively. The completion dates for these 2 properties were close to the completion date for the 19/F Property and the sale proceeds of the 19/F Property were used for purchase of the 2 properties. The Taxpayer has retained the RG Property and the 41/F Property to the present day for rental.

6. **Mr Chang** (the directing mind and will of the Taxpayer) gave 2 main reasons to justify a sale 13 days after completion of the 19/F Property: (a) the “Decrease in Yield Reason”; and (b) the “Swap Reason” (Decision, §63). There were other miscellaneous reasons.

7. The Board found that the Decrease in Yield Reason was not the most important reason. It did not find the evidence of Mr Chang credible or reliable and rejected the Swap Reason. The Board upheld the decision of the IRD.

8. The Taxpayer now seeks leave to appeal against the Decision.

Legal principles

9. Leave to appeal may be granted if the Court is satisfied that a question of law is involved in the proposed appeal; and the proposed appeal has a reasonable prospect of success or there is some other reason in the interests of justice why the proposed appeal should be heard: section 69(3)(e) of the IRO.

10. Reasonable prospect of success means that the appeal has merits and ought to be heard and the prospect of success is more than fanciful but without having to be probable: *Wynn Resorts (Macau) S.A. v Mong Henry* [2009] 5 HKC 515 at 519H; and *SMSE v KL* [2009] 4 HKLRD 125 at §17.

11. An error of law is not confined to an error in understanding or applying the substantive law. It may be committed if:

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- (1) The decision was based on a finding of fact or inference from the facts which was perverse or irrational;
- (2) there was no evidence to support the decision;
- (3) the decision was made by reference to irrelevant factors; or
- (4) the decision was made without regard to relevant factors.

Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 at §39.

12. Failure on the part of a judge or tribunal to give adequate reasons for its findings is an error of law: *Welltus Ltd v Fornton Knitting Co Ltd* [2013] 5 HKC 106 at §§19-25.

Errors of law of the Board

13. The Taxpayer puts forth 3 questions of law:
- (1) Whether in ascertaining the Taxpayer’s intention in acquiring the 19/F Property on the totality of evidence, the Board misdirected itself in law and/or erred in law in disregarding the Taxpayer’s subsequent purchase of the RG Property and 41/F Property as “separate transactions not connected with the sale of the 19/F Property” (Decision, §89);
 - (2) Whether in ascertaining the Taxpayer’s intention in acquiring the 19/F Property on the totality of evidence, the Board misdirected itself in law and/or erred in law in disregarding (and not stating whether it had rejected and if so, the reason thereof) the uncontested contemporaneous evidence of Ms Yuen that Mr Chang had refused to sell the 19/F Property on her various initial approaches and had stated to her that the 19/F Property had been acquired for long-term investment for rental income and he had no intention for a quick sale; and
 - (3) Whether the Board misdirected itself in law and/or erred in law in relying on the written reply given by the tax representative of Polywise (namely the client of Ms Yuen which eventually purchased the 19/F Property from the Taxpayer) to the Inland Revenue Department that the 19/F Property was “available in the market” at that time and, in turn, in inferring that the offer “had to be from the owner” and by disregarding (and without explaining the reasons therefor) the clear, uncontroverted and uncontradicted evidence of Ms Yuen and Chartersince that the Taxpayer had

never offered the 19/F Property through her company (Decision, §75).

Question (1)

14. There is no complaint as to the Board's direction of law, ie that ascertaining the Taxpayer's intention "depends on all the facts and circumstances of each particular case and depends on the interaction of the various sectors that are present in any given case". It is necessary "to stand back, having looked at those matters, and look at the whole picture and ask the question ... was this an adventure on the nature of trade?" (Decision, §§28 and 29).

15. The Board also rightly accepted that the sale of a property held for trading purpose did not necessarily attract profits tax if it was involved in an exchange (or swap) of another property for trading or investment purpose (Decision, §62).

16. Mr Shieh SC (leading Mr Jonathan Chang) for the Taxpayer refers this court to §§65-71 of the Decision (which gave reasons for rejecting the Swap Reason) and §§85-87 (which contained findings of facts) and §§88-91 (which dealt with other submissions).

17. Mr Shieh SC submits that the Board had failed to consider the totality of the evidence, both before and after sale of the 19/F Property, before coming to any conclusion on the Taxpayer's intention in acquiring the 19/F Property. He gave this lively analogy:

"Analytically what the Board has done is, out of (say) 8 items of relevant evidence and surrounding circumstances (A to H), to rely upon only 6 (A to F) to reach a factual conclusion and then say that because it had already decided the point, it did not have to consider the other 2 (G and H), when points G and H ought to have been taken into account as part of the totality of circumstances in the first place."

He submits that given the proximity in time, acquisition of 2 properties at about the time of sale of the 19/F Property, was consistent with the Taxpayer's case set out in paragraphs 4-5 above.

18. With respect, this line of submission overlooks §75 of the Decision. There, the Board analyzed Mr Chang's alleged intention to purchase the 34/F Property from the confirmor as part of his scheme to swap but rejected it as not convincing. The Board also commented on the failure of Mr Wing, agent of Savills, who had offered 34/F to Mr Chang, to give evidence. It was after such rejection that the Board referred to the subsequent acquisitions of the RG Property and the 41/F Property and found them to be 2 separate transactions not connected with the sale of the 19/F Property.

19. Read properly in context, the Board was taking a holistic view (as it had directed itself) of the scheme to swap. I am not satisfied that Question (1) has reasonable prospect of success.

Question (2)

20. Ms Yuen was an estate agent who first introduced Polywise to the Taxpayer. It was she who made unsolicited approaches to Mr Chang to sell 19/F Property. Mr Chang had twice rejected her and twice represented to her that he had no intention to do a quick sale, before eventually agreeing to the sale.

21. Ms Yuen's evidence was highly supportive of the Taxpayer's case. Her witness statement was adopted without challenge before the Board. It was contemporaneous in the sense of reflecting the then intention of Mr Chang in keeping the 19/F Property for investment as opposed to trading purpose.

22. It is true that the Board had not devoted a paragraph to state whether it rejected any part of Ms Yuen's evidence, in stark contrast to its treatment of the Taxpayer's failure to call Mr Wing as a witness.

23. However, in §58 of the Decision, the Board expressly referred to the fact that from the end of October 2007 until the 19/F Property was sold by the Taxpayer in late November 2007, Ms Yuen had contacted Mr Chang and given him her client's revised offers *several times, each with a price higher than the previous one*. That paragraph contained footnote 35, which referred to §§8 to 10 of Ms Yuen's witness statement, precisely dealing with Mr Chang's refusal to sell and representation of his intention to her. These were considered in the analyses of Mr Chang's credibility. In that analyses, the Board expressly directed itself that the sale of a property held for trading purpose did not necessarily attract profits tax if it was involved in an exchange (or swap) of another property for trading or investment purpose (Decision, §62).

24. In §75 of the Decision, the Board again dealt with Ms Yuen's evidence in the context of analysing Mr Chang's representation to her that he had sold the 19/F Property because he had an opportunity to swap it with the 34/F Property. Her evidence was found not to be of probative value.

25. In my view, it was quite clear that the Board had not disregarded Ms Yuen's evidence but, instead, used the material parts of it to assess the alleged intention of Mr Chang.

26. Even for judicial judgments, it is recognized that the written reasons could not have fully ventilated each and every relevant argument advanced at the hearing and the full reasoning process could not be adequately captured by written text: *KMM v Torture Claims Appeal Board* [2016] 1 HKLRD 568, at §20, Lam VP. The important thing is for the judicial authority to state the reasons critical to its decision:

“... the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge’s conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, it may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon.” *Welltus Ltd v Fornton Knitting Co Ltd*, at §22, following *English v Emery* [2002] 1 WLR 2409; *Leung Wing Yi Asther v Kwok Yu Wah* (2015) 18 HKCFAR 605 at §59; *Smith v Molyneaux* [2016] UKPC 35, §36.

27. The Board has done just that with regard to Ms Yuen’s evidence. Question (2) has no reasonable prospect of success.

Question (3)

28. The IRD had not called any witnesses from Polywise to testify before the Board. On the other hand, there was direct evidence from Ms Yuen and Chartersince that the Taxpayer had not offered the 19/F Property for sale through Chartersince, but that it was Ms Yuen who took the initiative of inviting the Taxpayer to sell.

29. Mr Shieh SC submits that the Board has erred in law in concluding that the Taxpayer must have been the one who “put” the 19/F Property in the market and then went on to criticize the Taxpayer for not verifying the matter with Ms Yuen. There was nothing to clarify with Ms Yuen because her statement was unchallenged. If anything, the Board ought to have said that it did not know why *the IRD* had not seen fit to clarify Polywise’s reply with Ms Yuen (or Polywise).

30. There is no dispute that the written, unsworn reply from the tax representative was admissible evidence. As pointed out by Mr Paul Leung (counsel for the IRD) in his submission, Polywise also told the IRD that Ms Yuen approached Polywise on her own initiative. Further, Chartersince was not appointed by Polywise as its agent until the signing of the provisional agreement. The inference that *on the face of it*, if there was an offer in the market, the offer had to be from the owner (Decision, §75) could not be said to be unsupported by evidence.

31. Read properly in context, the remark that the Board did not know why the Taxpayer had not seen fit to clarify this with Ms Yuen was but a rhetorical remark to show that there remained an unresolved doubt on the evidence when the burden of proof was on the Taxpayer. In any case, the Board has not stated that it preferred Polywise’s written reply to the evidence of Ms Yuen or Mr Chang.

32. Assuming I am wrong, the position was that the Board had failed to resolve the conflicting evidence of Mr Chang/Ms Yuen that the Taxpayer had not put the 19/F Property in the market and Polywise's letter that it was available in the market. Could it be said that there might be a contrary conclusion from the Board or that there is reasonable prospect of success under Question 3?

33. In *Kwong Mile Services Ltd v Commissioner of Inland Revenue* (2004) 7 HKCFAR 275, §37, Bokhary PJ stated the approach for an appellate court on an appeal on law:

“In an appeal on law only the appellate court must bear in mind what scope the circumstances provide for reasonable minds to differ as to the conclusion to be drawn from the primary facts found. If the fact-finding tribunal's conclusion is a reasonable one, the appellate court cannot disturb that conclusion even if its own preference is for a contrary conclusion. But if the appellate court regards the contrary conclusion as the true and only reasonable one, the appellate court is duty-bound to substitute the contrary conclusion for the one reached by the fact-finding tribunal. The correct approach for the appellate court is composed essentially of the foregoing three propositions...”

34. The Board has given very comprehensive reasons (Decision, §§52-91) for finding against the Taxpayer, including the following:

- (a) It found Mr Chang to be incredible and unreliable. Amongst the evidence relied on by the Board was Mr Chang's investment history.
- (b) It found insufficient evidence to persuade the Board to believe the existence of the offer in relation to the 34/F Property; or that the Reasons put forth by the Taxpayer were reasons for its sale of the 19/F Property or that the 19/F Property was acquired for long term investment purpose. Among the evidence relied on by the Board was the failure to mention the Swap Reason in the audited report of the Taxpayer approved by Mr Chang.
- (c) It considered the “badges of trade” referred to in the case of *Lee Yee Shing*.
- (d) It did not lose sight of the principle that the relevant time to ascertain intention to purchase was *not* 21 August 2007 when the Taxpayer committed to buy 19/F and 38/F. The Taxpayer did not even exist at that time and was “activated” only when Mr Chang was appointed as director on 6 November 2007. So whatever intention Mr Chang might have for and on behalf of the Taxpayer

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on 21 August 2007 in respect of the 19/F Property was irrelevant.
(Decision, §88).

35. Even if Question (3) is arguable, given the weight of the findings, it cannot be said that the contrary conclusion was the true and only reasonable one. Question (3) has no reasonable prospect of success.

Conclusion

36. None of the proposed questions of law put forth have reasonable prospect of success. I decline to give leave to appeal.

37. I make an order *nisi* that costs be to the respondent, summarily assessed and allowed at \$137,913.

38. I thank counsel for their assistance.

(Queeny Au-Yeung)
Judge of the Court of First Instance
High Court

Mr Paul Shieh SC leading Mr Jonathan Chang, instructed by Tong Kan & Co, for the applicant

Mr Paul H M Leung, instructed by the Department of Justice, for the respondent