IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 252

Tax Appeal No 8 of 2019

Between

BZZ

… *Appellant*

And

Comptroller of Income Tax

… *Respondent*

JUDGMENT

[Revenue Law] — [Income taxation] — [Capital allowance]

BZZ
v
Comptroller of Income Tax

[2019] SGHC 252

High Court — Tax Appeal No 8 of 2019
Choo Han Teck J
19 September 2019; 17 October 2019.

24 October 2019 Judgment reserved.

Choo Han Teck J:

1 The appellant sold a property known as AT to the buyer, BMT, who bought it in its capacity as trustee of the beneficiary FCOT, a real estate investment trust. The manager of FCOT is FCAM ("the Manager"). The Manager is a company that, like the appellant, is 100% owned by a company called FCL.

2 The appeal before me is against the decision of the Income Tax Board of Review ("the Board"). The Comptroller of Income Tax ("the Comptroller") levied a balancing charge of $40,476,347 against the appellant arising from the sale of the property. This assessment was raised for the Year of Assessment 2010.

3 In the scheme of things, a taxpayer is given capital allowances on his capital assets to cover capital depreciation. When the capital asset is sold at a

price exceeding the amount of capital allowances not claimed, or what is called the "tax written-down" value, the Comptroller will recover the difference from the seller as the "balancing charge", in this case, $40,476,347. There is no dispute that if a balancing charge were to be levied for the sale in this case, $40,476,347 would be the correct amount to be charged.

4 The appellant disputes the claim by the Comptroller that a balancing charge was necessary in this case. Its appeal was dismissed by the Board on 16 April 2019 and it now appeals against that decision before this court. It is not disputed that a balancing charge is deemed income chargeable with tax under s 10(4) of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the Act"). The only exception is where s 24(1) of the Act applies. Section 24(1) has, very generally, the effect of nullifying a balancing charge if a sale in question can be said to be not a true commercial sale in that the seller is under the control of the buyer or, *vice versa*, the buyer is under the control of the seller, or, in the third situation, both buyer and seller are under the control of a third party. Section 24(1) provides as follows:

> 24.—(1) This section, except subsection (5), shall have effect in relation to any sale of any property where the buyer is a body of persons over whom the seller has control, or the seller is a body of persons over whom the buyer has control, or both the seller and buyer are bodies of persons and some other person has control over both of them, and the sale is not one to which section 33 applies.

5 The Comptroller, represented by Ms Quek Hui Ling, submits that s 24(1) applies only in the situations in which the sale of a property can properly be regarded "as if it had not taken place". That is to say, in idiomatic terms, it is merely a transfer of an asset from the right pocket to the left.

6 Ms Quek reinforces her argument by submitting that although FCL owns the appellant, who is the seller, as well as the Manager, that does not mean that FCL is in control of both the seller and the buyer (BMT) because the Manager and BMT are separate legal entities; one thus has no direct control over the other; and the fact that FCL also has a 22.2% stake in FCOT is immaterial so far as control is concerned.

7 Mr Ong Sim Ho, counsel for the appellant, makes a forceful submission to persuade the court that control must be contemplated in a wider sense, and that the fact that the Manager and BMT are separate legal entities is not a sufficient ground to prevent one having control over the other.

8 Mr Ong points out that under MAS requirements, and accounting procedure, the accounts of FCOT are consolidated with those of FCL. The roles and responsibilities of the Manager and BMT are set out in the Third Amended and Restated Trust Deed ("the Trust Deed"). The terms require BMT to exercise its powers only as directed by the Manager, but it may, "in its absolute discretion, act without or contrary to a direction of the Manager if it considers it necessary to do so", expressly by the Trust Deed, and by law.

9 BMT as trustee is duty-bound to follow the directions of the Manager, but its duties and obligations to FCOT as the subject of its trust rise above its duties and obligations to the Manager. Understood in this light, the apparent control that the Manager has over BMT is not absolute. The question of control is not about the control between the Manager and BMT, but by FCL over the appellant and FCOT.

10 Mr Ong made an intriguing argument that a person may assume fiduciary duties to one and be under the control of another. In the present case,

counsel argues that BMT is bound by fiduciary duties to FCOT, but it is also under the control of the Manager. Mr Ong further submits that, as in *Armitage v Nurse* [1998] Ch 241 ("*Armitage v Nurse*") at 253, so long as BMT, as trustee, retains an irreducible core of its duties, it can be under the control of another. In this case, the control would have to be exercised by FCL over FCOT through the Manager and BMT. Although this argument has some merit, it does not apply because the control envisaged under s 24(1) must refer to the seller and the buyer. Legally, FCL does not control BMT, the buyer. The fact that FCL controls FCOT, the beneficiary, is another matter, and that is a crucial break in the chain of control. I am of the view that *Armitage v Nurse* does not assist Mr Ong's submissions, and was not a case defining the meaning of control in the context of a s 24(1) situation.

11 In this regard, Mr Ong's argument works against him; that is to say, the fact that FCL indirectly controls the beneficiary does not mean that it controls the trustee buyer, which is a separate legal entity. There is no basis to lift the corporate veil in the present instance. More importantly, FCL may own, and therefore, control the Manager 100%, and the manager may control (by managing) FCOT 100%, but FCL is only a 22.2% owner of FCOT. BMT thus has core duties in a much more complex situation, some it may not fully discharge if it is to be constrained to just irreducible core duties.

12 From the facts and the corporate structure of the group, FCL may be in control of the appellant, but the most that can be said in respect of its relationship with FCOT is that it has substantial influence over it. Substantial influence is not control. Influence persuades, but control wields its dominance as an absolute authority. The corporate structure of all the entities concerned is designed to keep FCL at a distance from BMT and FCOT commercially, cosmetically, and

legally. To hold that FCL is in control for the purposes of income tax is contrary to the true relationship of the entities. The submission by Mr Ong is seductively attractive, but it is not only contrary to the definition of control in respect of s 24(1) as it should be understood, namely, that it applies only if the transaction would be as if there was no sale, it will also give rise to a myriad of exceptions that will tax the simple and sensible application of this section.

13 For the reasons above, this appeal is dismissed. I will hear arguments on costs at a later date if parties are unable to agree on costs.

- Sgd -
Choo Han Teck
Judge

Ong Sim Ho, Keith Brendan Lam Xun-Yu and Emma Gan Xin Ci (Drew & Napier LLC) for the appellant;
Quek Hui Ling, Pang Mei Yu and Desiree Sim Wei Yen (Inland Revenue Authority of Singapore, Law Division) for the respondent.