IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 236

Tax Appeal No 10 of 2020

Between

Wee Teng Yau

… *Appellant*

And

Comptroller of Income Tax

… *Respondent*

AND

Tax Appeal No 11 of 2020

Between

Comptroller of Income Tax

… *Appellant*

And

Wee Teng Yau

… *Respondent*

JUDGMENT

[Revenue Law] — [Income taxation] — [Avoidance]

Wee Teng Yau
v
Comptroller of Income Tax and another appeal

[2020] SGHC 236

High Court — Tax Appeals Nos 10 and 11 of 2020
Choo Han Teck J
28 September 2020; 26 October 2020

4 November 2020 Judgment reserved.

Choo Han Teck J:

1. The Appellant, Dr Wee, is a dentist who was employed by a dental clinic known as Alfred Cheng Orthodontic Clinic Pte Ltd ("ACOC") from January 2011 to May 2012. On 1 May 2012, Dr Wee incorporated a company known as Straighten Pte Ltd ("SPL"), of which he was the sole director and shareholder.

2. From 1 May 2012, Dr Wee continued to provide the same dental services to ACOC's patients as he had done before. The only difference is that from 1 May 2012, ACOC paid for Dr Wee's services to SPL instead of to Dr Wee. SPL, in turn, paid Dr Wee a salary and also a director's fee. Tax-exempt dividends were also declared and paid to Dr Wee from the profits remaining in SPL.

3. The fees paid by ACOC to Dr Wee for the year of assessment ("YA") 2012 were $279,194.60. The fees paid by ACOC to SPL and reported as SPL's income for YAs 2013 to 2016 were $1,470,764 in total.

4. For YAs 2013 to 2016, SPL paid a total of $336,000 by way of director's remuneration to Dr Wee. Dr Wee also received $765,205 by way of tax-exempt dividends as shareholder. During this period, the annual remuneration to Dr Wee from SPL (which ranged between $40,000 to $110,000) was significantly lower than the $279,194.60 which Dr Wee had earned directly from ACOC in 2011.

5. The Comptroller thus treated the fees received by SPL from ACOC as Dr Wee's income and levied tax accordingly. Dr Wee objected on the ground that he should only be taxed on his personal income which was the remuneration that SPL had paid him. The balance from ACOC to SPL should be paid by SPL as corporate tax. By this arrangement, the Comptroller submits, Dr Wee would be paying less tax than if the entire ACOC payment to SPL was treated as income to Dr Wee. The matter was reviewed by the Income Tax Board of Review ("ITBR") which agreed with the position of the Comptroller. Dr Wee appealed against that decision before me. The Comptroller, although successful below, cross-appealed against Dr Wee on some of the findings and conclusions of the ITBR.

6. The Comptroller relies on s 33(1) of the Income Tax Act (Cap 134, 2008 Rev Ed; Cap 134, 2014 Rev Ed) ("The Act") as the basis for the levy of the assessed tax on Dr Wee. Counsel for Dr Wee, Mr Lau Kah Hee, submitted that the Comptroller had failed to satisfy the requirements of s 33(1), and further,

that even if it did, Dr Wee would be exempted under s 33(3)(b) of the Act. For convenience, s 33(1) and s 33(3)(b) are set out below:

> **33.**—(1) Where the Comptroller is satisfied that the purpose or effect of any arrangement is directly or indirectly –
>
> > (*a*) to alter the incidence of any tax which is payable by or which would otherwise have been payable by any person;
> >
> > (*b*) to relieve any person from any liability to pay tax or to make a return under this Act; or
> >
> > (*c*) to reduce or avoid any liability imposed or which would otherwise have been imposed on any person by this Act,
>
> the Comptroller may, without prejudice to such validity as it may have in any other respect or for any other purpose, disregard or vary the arrangement and make such adjustments as he considers appropriate, including the computation or recomputation of gains or profits, or the imposition of liability to tax, so as to counteract any tax advantage obtained or obtainable by that person from or under that arrangement.
>
> …
>
> (3) This section shall not apply to —
>
> > …
> >
> > (*b*) any arrangement carried out for bona fide commercial reasons and had not as one of its main purposes the avoidance or reduction of tax.

7. Section 33(1) refers to an arrangement, and that can be broad or narrow, simple or complex, but to refer to two arrangements (as the ITBR did) may lead to confusion. I believe what the ITBR meant was that the arrangement in this case can be seen as having two parts in some other arrangements.

8. The arrangement was for ACOC to pay to SPL, a private limited company wholly owned by Dr Wee, what it had previously paid Dr Wee directly. SPL could then pay a lower salary to Dr Wee that enables Dr Wee to

pay less personal income tax while SPL itself pays a lower rate corporate tax. The net result of this simple arrangement is that Dr Wee gets the same amount of pay from ACOC but avoids paying the tax he used to pay, because he could use SPL to extract tax benefits that he could not himself obtain. For the period in question, this was the sole purpose of SPL. The facts fit directly under s 33(1)(a) as well as s 33(1)(c).

9. The question remains whether Dr Wee's arrangement with ACOC is exempted from s 33(1) by virtue of s 33(3)(b), a provision that is straightforward and clear. But because it is expressed in wide terms, intending to be applicable in varied circumstances, applicants can latch on to those terms as their escape route.

10. In this case, for example, Dr Wee argues that SPL was a legitimate business concern and established for the bona fide commercial reason of operating a dental clinic. If that was all, I would not hesitate to agree that s 33(3)(b) does not apply here. But there is a second condition to s 33(3)(b) and that is that the arrangement must not have "as one of its main purposes the avoidance of tax".

11. It may be argued that one of the purposes of the arrangement was to separate the personal liability of Dr Wee from that of the clinic's; but this was by no means its only purpose. It is clear to me that one of the main purposes of the arrangement was to allow Dr Wee to receive the same income he used to receive from ACOC but now, through the arrangement, reduce his tax liability. He claims that SPL was intended for general practice but in truth, the only patients he had throughout the material tax period were ACOC's patients. The

inescapable conclusion on these facts is that the purpose of this arrangement was to reduce Dr Wee's personal tax.

12. Dr Wee left the employ of ACOC exactly on the day SPL was incorporated. The terms of his termination were not recorded in writing nor were the terms of his continued service to ACOC. He claims that this was because the owner of ACOC was a traditional businessman and did not want contracts in writing. That is unfortunate for Dr Wee.

13. Sections 33(1) and 33(3) are not complicated statutory provisions. The language is simple and unambiguous, but those provisions are intended to have a long and wide reach. Consequently, difficulties arise mainly in applying them to the given facts of each case. And so sometimes courts invent steps to help them understand how the arrangement works in the peculiar facts of those cases. In so doing, additional words like "reasonableness" and "two-step test" or "three-step test" often find their way into judgments. But they need not be construed as creating new elements not found in the statutory provisions, or adding requirements not intended by Parliament. They are often just guides to the proper application of the law to the facts.

14. Mr Lau argues that the ITBR erred in law in finding that the "reasonableness" of the taxpayer's acts had to be considered under s 33(1) even though this was not an element specified in the provision. That is true, "reasonableness" is not mentioned in s 33(1), but when lawyers and judges apply the law, they are invariably guided by the unseen hand of reason. So we look at the full picture to see whether the facts fit the law and vice versa.

15. Both parties cited *Comptroller of Income Tax v AQQ and another appeal* [2014] 2 SLR 847 ("*AQQ*") in support of their (the parties') diametrically opposing positions with regard to s 33. How did such an odd situation arise? As I mentioned, s 33 has a broad reach, and it applies to simple cases as well as complicated ones. *AQQ* was a mammoth of a case. Counsel there were feeling their way, observing different parts of the elephant. The case before me here is the opposite. It is more like a small rodent. The facts are simple and straightforward, and when viewed as a whole, the answer is obvious.

16. On my request, counsel filed further submissions on how s 33 ought to be construed in relation to the incorporation of companies by medical professionals (such as doctors and dentists). I agree with counsel for the Comptroller, Mr Zheng Sicong, that s 33(3)(b) is clear and must be read conjunctively, namely that to be exempted from s 33(1) the arrangement must be for bona fide commercial reasons and must not have as one of its main purposes the avoidance of tax.

17. Mr Lau argued that "the fact that one of the said taxpayer's main purposes in entering into [an] arrangement was to avoid or reduce tax ought not to result in s 33 striking down the entire arrangement". He appears to concede, however, that that is the effect of s 33, and that any reform must necessarily be undertaken by Parliament.

18. I agree with Mr Lau that s 33(3)(b) has an extremely broad reach. That is because it declares that s 33 does not an apply to any arrangement which "had not as one of its main purposes" the avoidance of tax, and the court cannot redraft it by replacing "one of" with "the". Hence, we have to read "bona fide commercial reasons" and "had not as one of its main purposes" together. The

Court must inquire into the tax advantage the taxpayer hopes to obtain from the arrangement in question. If the taxpayer's intentions, as inferred from the surrounding evidence or features of the arrangement, were to reduce or avoid tax liability, s 33(3)(b) does not apply for his benefit (*AQQ* at [74] and [82]). One should bear in mind that s 33(3)(b) is supplemental to s 33(1) and is intended to facilitate the interpretation of that provision.

19. Thus, contrary to Mr Lau's submission, doctors who set up private limited companies with a compendium of purposes such as delegating the management of the business and limiting the liability of the doctors are not the sort of arrangements contemplated in s 33. Section 33 is intended to cover arrangements which are created by the taxpayer so as to reduce the taxes which he would otherwise have to pay. In this case, the facts show that SPL's main, if not only, purpose was to enable Dr Wee to avoid tax. This is precisely the type of arrangement that is covered by s 33(1).

20. Before the ITBR, the Comptroller also advanced the argument that Dr Wee ought to be taxed for the full amount paid by ACOC to SPL on the basis of the "personal exertion" principle, from the New Zealand case of *Spratt v Commissioner of Inland Revenue* [1964] NZLR 272 ("*Spratt*"). The crucial statement relied upon by the Comptroller appears at page 277 of *Spratt* as follows:

> … No taxpayer can, by way of assignment, escape assessment of tax on income resulting from his personal activities – such income always remains truly his income and is derived by him irrespective of the method he may adopt to dispose of it.

21. The ITBR dismissed the Comptroller's argument that the passage above, cited as the "personal exertion" principle, ought to be applied in Singapore. It went on to hold (at [36]) that:

> … A company is a legal person under the laws of Singapore and is capable of deriving its own income. There is no specific provision in the Act that requires such income to be attributed to individuals, merely on the basis that there exists "personal exertion" to earn the income, save in circumstances where an arrangement is found to exist within the ambit of Section 33 of the Act.

The ITBR is right but by interposing the statement that "[a] company is a legal person under the laws of Singapore and is capable of deriving its own income" immediately after saying that the "personal exertion principle should be applied in Singapore", it might have created confusion.

22. Revenue law is one of the most legislation-specific laws and nothing attracts taxation unless the Act provides for it. The "personal exertion" principle is not a common law exception that allows the Comptroller to levy tax that the Act has not provided for. It is merely a judicial expression that was intended to emphasise the fact that a person cannot avoid paying taxes for work done by him, simply by assigning his pay to someone else. This, as the ITBR noted, was not relevant in the present case because ss 33(1)(a) and (c) amply cover such arrangements.

23. For the reasons above, Dr Wee's appeal in TA 10 of 2020 is dismissed with costs to be taxed if not agreed. As for TA 11 of 2020, there is no reason for the Comptroller to file a separate appeal since the application by Dr Wee was dismissed. The Comptroller's submissions regarding the ITBR's interpretation of *AQQ* and the "personal exertion" principle could have been incorporated in

its submissions in TA 10 of 2020. Accordingly, there is no order, including as to costs, for TA 11 of 2020.

- Sgd -
Choo Han Teck
Judge

Lau Kah Hee and Muhammad Fikri Yeong Bin Iskandar Shah (BC Lim & Lau LLC) for the appellant in HC/TA 10/2020 and the respondent in HC/TA 11/2020;
Zheng Sicong and Lau Sze Leng Serene (Inland Revenue Authority of Singapore) for the appellant in HC/TA 11/2020 and the respondent in HC/TA 10/2020.