

NE v Comptroller of Income Tax
[2006] SGHC 199

Case Number : DA 24/2005
Decision Date : 07 November 2006
Tribunal/Court : High Court
Coram : Woo Bih Li J
Counsel Name(s) : Leon Kwong Wing (KhattarWong) for the appellant; Tang Siau Yan and Ong Ken Loon (Inland Revenue Authority of Singapore) for the respondent
Parties : NE — Comptroller of Income Tax

Revenue Law – Income taxation – Deduction – Taxpayer company hiring bodyguard to protect director – Income Tax Board of Review deciding that expenses incurred not deductible against company's taxable income – Whether taxpayer precluded from challenging decision of Income Tax Board of Review – Whether expenses in question incurred wholly or exclusively in the production of income – Sections 14(1), 15(1)(a), 15(1)(b), 81(1) and 81(2) Income Tax Act (Cap 134, 1994 and 1999 Rev Eds)

7 November 2006

Judgment reserved.

Woo Bih Li J:

Introduction

1 The Comptroller of Income Tax ("CIT") had disallowed the appellant from deducting the costs of employing a security guard to protect its director ("C") for certain years for which the CIT had been ascertaining the income of the appellant. Thereafter, the appellant appealed to the Income Tax Board of Review ("the Board"), but the Board dismissed its appeal. It is from the Board's decision that the appellant now appeals to the High Court.

2 The appellant is in the business of exhibiting motion pictures. C serves as one of the appellant's directors. It was undisputed that C was the subject of a violent kidnapping attempt in 1971. At the driveway of his bungalow, he was dragged out of his car at gunpoint by four men. He was shot in the right arm in the struggle, bundled into the boot of a taxi and driven away. C's captors switched cars at a pre-arranged spot where he was again forced into the boot of another vehicle. Despite his wound, C managed to escape when the car halted at a traffic light.

3 The particular bodyguard in question in this appeal joined the appellant in 1989. According to the appellant's case, [\[note: 1\]](#) the bodyguard in question was not the first bodyguard employed for C's security. The bodyguard had taken over this duty from his predecessor. The bodyguard received about \$30,000 per annum. The subject matter of this appeal involved three sums paid to the bodyguard as his salary, employer's Central Provident Fund contribution and bonus of \$28,255 for the Year of Assessment ("YA") 1996, \$31,523 for YA 1997 and \$32,371 for YA 2000. The amount of tax involved, at the corporate tax rate of 26% or 27%, was said by the appellant to be about \$8,000 a year. The relevant calendar years were therefore 1995, 1996 and 1999 and the applicable legislation would be the Income Tax Act (Cap 134, 1994 Rev Ed) and the Income Tax Act (Cap 134, 1999 Rev Ed).

Relevant provisions

4 The relevant provisions of both the above Income Tax legislation are ss 14(1), 15(1)(a) and 15(1)(b). The material portions thereof are identical. Sections 14(1), 15(1)(a) and 15(1)(b) state:

14.—(1) For the purpose of ascertaining the income of any person for any period from any source chargeable with tax under this Act (referred to in this Part as the income), there shall be deducted all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of the income ...

15.—(1) Notwithstanding the provisions of this Act, for the purpose of ascertaining the income of any person, no deduction shall be allowed in respect of —

(a) domestic or private expenses ... ;

(b) any disbursements or expenses not being money wholly and exclusively laid out or expended for the purpose of acquiring the income ...

My decision

5 As can be seen, the substance of s 15(1)(b) is the mirror of s 14(1). The primary dispute was whether the expenditure in employing the bodyguard was incurred wholly and exclusively in the production of income.

6 The Board stated its reasons at [17] to [21] of its written decision (see [2006] SGITBR 4) as follows:

The Board's decision

17. It is for this Board to find, as a question of fact, the purpose of the expenditure in hiring the bodyguard for C. The burden of proof is on the Appellant to convince the Board that the purpose of the expenditure in question was wholly and exclusively incurred in the production of income. It is clear from the cases of in [*sic*] *Mallalieu v Drummond* [1983] STC 665 and *MacKinlay v Arthur Young McClelland Moores & Co* [1989] STC 898 that the expenditure does not qualify for deduction if the object of the expenditure was to serve another private purpose in addition to the business purpose for which it was purportedly incurred. In ascertaining the object of the expenditure for this purpose, the subjective evidence of the Appellant is not determinative. Lord Brightman in *Mallalieu v Drummond* said at (p 673):

"I reject the notion that the object of a taxpayer is inevitably limited to the particular conscious motive in mind at the moment of expenditure. Of course the motive of which the taxpayer is conscious is of vital significance, but it is not inevitably the only object which the commissioners are entitled to find to exist."

18. In this regard, the Appellant called in evidence the testimony of E, the secretary of the company. The affidavit disclosed details about the kidnapping and the role of C in the Appellant's business but little about the purpose the Appellant had in mind at the time the expenditure was first incurred. Under cross examination, E was unable to elaborate further as he was not involved in the relevant decision making process.

19. Even if we were prepared to assume that the employment of the bodyguard for C was regarded as being vital to the business interests of the Appellant, the Board is unable to agree with the counsel for the Appellant that the facts compel us to find that that was the only object

of the expenditure. We are fortified in our view by the judgment of Millett L.J in *Vodafone Cellular Ltd v Shaw* [1997] STC 734 at 742-3:

*"The question does not involve an inquiry of the taxpayer whether he consciously intended to obtain a trade or personal advantage by the payment. The primary inquiry is to ascertain what was the particular object of the taxpayer in making the payment. Once that is ascertained, its characterisation as a trade or private purpose is in my opinion a matter for the commissioners, not for the taxpayer. Thus in *Mallalieu v Drummond* (Inspector of Taxes) the primary question was not whether Miss Mallalieu intended her expenditure on clothes to serve exclusively a professional purpose or partly a professional and partly a private purpose, but whether it was intended not only to enable her to comply with the requirements of the Bar Council when appearing as a barrister in court but also to preserve warmth and decency."*

20. In any event, we are of the opinion that the expenditure incurred in the employment of the bodyguard is similar to those cases involving clothing as in *Mallalieu v Drummond* (Inspector of Taxes). To cite Millett L.J in *Vodafone Cellular Ltd v Shaw* [1997] STC 734 (at p 742) again,

"In the case of an individual taxpayer, the other purpose is usually a private purpose of his own. In a case like the present, where the taxpayer company is a company forming part of a group, the other purpose is likely to be the purpose of the trade of one or more of the other companies in the group. But the same principles apply....."

.....Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made."

21. Thus, we are of the view that the expenditure in question clearly entailed a private purpose as the inevitable and inextricable consequence was the protection of the physical integrity and well being of C. This is indistinguishable from the warmth and decency that Ms Mallalieu enjoyed in relation to the sober garb she wore.

[italics in original]

7 In these circumstances, the CIT relied on s 81(2) of the said Income Tax legislation. For completeness, I cite below ss 81(1) and 81(2):

81.—(1) Except as provided in this section, the decision of the Board shall be final.

(2) In any case in which the amount of tax payable, as determined by the Board (excluding the amount of any costs awarded) exceeds \$200, the appellant or the Comptroller may appeal to the High Court from the decision of the Board upon any question of law or of mixed law and fact.

8 Accordingly, the appellant cannot appeal from the Board's decision if it is purely one of fact. This principle was not disputed by the appellant. The CIT submitted that the Board's decision was based on findings of fact. Paragraph 2 of its skeletal arguments state:

The learned Board had considered all the pertinent facts and made the following findings of fact:

(i) that there was no reliable evidence of the purpose of the Appellant in the

employment of the bodyguard;

(ii) that even if the Board were to assume that the Appellant had a business purpose in the employment of the bodyguard, there must also be a non-business purpose as the protection of the well being of [C] was an inevitable and inextricable consequence of the employment of the bodyguard.

9 On the other hand, the appellant's case did not even assert that its appeal from the decision of the Board was on a question of law or of mixed law and fact. It was only during oral submissions that Mr Leon Kwong Wing, counsel for the appellant, submitted that the Board's decision was wrong as a matter of law. However, Mr Leon still did not elaborate as to what the question of law was on which the Board had supposedly erred.

10 It was not disputed that in considering whether an outgoing or expense was wholly and exclusively incurred in the production of income, the purpose of the expenditure has to be considered. This in turn necessitates a consideration of the taxpayer's "object" in making the expenditure. In *Mallalieu v Drummond* [1983] 2 AC 861 ("*Mallalieu*"), Lord Brightman, who delivered the judgment for the majority of the law lords, said at 870:

To ascertain whether the money was expended to serve the purposes of the taxpayer's business it is necessary to discover the taxpayer's "object" in making the expenditure: see *Morgan v. Tate & Lyle Ltd* [1955] A.C. 21, 37, 47. As the taxpayer's "object" in making the expenditure has to be found, it inevitably follows that (save in obvious cases which speak for themselves) the commissioners need to look into the taxpayer's mind at the moment when the expenditure is made. After events are irrelevant to the application of section 130 except as a reflection of the taxpayer's state of mind at the time of the expenditure.

If it appears that the object of the taxpayers at the time of the expenditure was to serve two purposes, the purposes of his business and other purposes, it is immaterial to the application of section 130 (a) that the business purposes are the predominant purposes intended to be served.

The object of the taxpayer in making the expenditure must be distinguished from the effect of the expenditure. An expenditure may be made exclusively to serve the purposes of the business, but it may have a private advantage. The existence of that private advantage does not necessarily preclude the exclusivity of the business purposes.

I should add that *Mallalieu* involved a consideration of s 130(a) of the Income and Corporation Taxes Act 1970 (c 10) (UK) which is in substance similar to our ss 14(1) and 15(1)(b).

11 In the later case of *Vodafone Cellular Ltd v Shaw* [1997] STC 734, Millett LJ said at 742:

The leading modern cases on the application of the exclusively test are *Mallalieu v Drummond (Inspector of Taxes)* [1983] STC 665, [1983] 2 AC 861 and *MacKinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co* [1989] STC 898, [1990] 2 AC 239. From these cases the following propositions may be derived. (1) The words for the purposes of the trade mean to serve the purposes of the trade. They do not mean for the purposes of the taxpayer but for the purposes of the trade, which is a different concept. *A fortiori* they do not mean for the benefit of the taxpayer. (2) To ascertain whether the payment was made for the purposes of the taxpayer's trade it is necessary to discover his object in making the payment. Save in obvious cases which speak for themselves, this involves an inquiry into the taxpayer's subjective intentions at the time of the payment. (3) The object of the taxpayer in making the payment

must be distinguished from the effect of the payment. A payment may be made exclusively for the purpose of the trade even though it also secures a private benefit. This will be the case if the securing of the private benefit was not the object of the payment but merely a consequential and incidental effect of the payment. (4) Although the taxpayer's subjective intentions are determinative, these are not limited to the conscious motives which were in his mind at the time of the payment. Some consequences are so inevitably and inextricably involved in the payment that unless merely incidental they must be taken to be a purpose for which the payment was made.

To these propositions I would add one more. The question does not involve an inquiry of the taxpayer whether he consciously intended to obtain a trade or personal advantage by the payment. The primary inquiry is to ascertain what was the particular object of the taxpayer in making the payment. Once that is ascertained, its characterisation as a trade or private purpose is in my opinion a matter for the commissioners, not for the taxpayer.

12 Mr Leon stressed that the Criminal Investigation Department had recommended that C be provided with a bodyguard but, in my view, this was neither here nor there as regards the issue before me.

13 Mr Leon also submitted that C, while serving as a director of the appellant, did not hold any shares in the appellant. He said the appellant was controlled by someone else. Again, in my view, this was neither here nor there.

14 Mr Leon also referred to the appellant's overriding interest in protecting C who was its key personnel or key man.[\[note: 2\]](#) However, that again did not carry the matter further. Even if C was a key man in the organisation, that still did not elaborate on the appellant's purpose of employing a bodyguard for him. It may well be said that the purpose was obviously to protect him, but the issue before me was whether the purpose was wholly and exclusively for the production of income. I would also add that counsel for the CIT, Mr Tang Siau Yan, informed me that there was evidence before the Board, although not recorded in the notes of evidence, that other members of C's family also had bodyguards whose services were paid for by other companies. Mr Leon was prepared not to contradict Mr Tang on this point even though he himself did not recollect such evidence.

15 In my view, the Board had concluded at [18] of its written decision that there was a dearth of evidence on the appellant's purpose of employing the bodyguard. To me, this was clearly a question of fact only and it cannot be said that the evidence was such that it did not justify the conclusion which the Board had reached. Accordingly, I am of the view that the appellant is precluded by ss 81(1) and 81(2) from appealing to the High Court.

16 I would add that even if it could be said that the Board's conclusion at [18] of its written decision was one of mixed fact and law, I am of the view that there is insufficient evidence to establish the purpose of the employment of the bodyguard.

17 Accordingly, it is unnecessary for me to venture a view as to whether the Board's decision at [20], where it equated the expenditure incurred in the employment of the bodyguard with the expenditure on clothing in cases such as *Mallelieu*, was sustainable.

18 It is also unnecessary for me to venture a view as to whether s 15(1)(a) is applicable only to a tax payer who is a natural person as opposed to a corporate entity.

19 In the circumstances, I dismiss the appellant's appeal with costs to be agreed or taxed.

[\[note: 1\]](#) At para 17.

[\[note: 2\]](#) See para 14 of the appellant's case.

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