Comptroller of Income Tax *v* BJX
[2013] SGHC 145

Case Number : Originating Summons No 184 of 2013 (Summons No 3474 of 2013)

Decision Date : 30 July 2013

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Alvin Chia and Patrick Nai (Inland Revenue Authority of Singapore (Law Division)) for the applicant; Noelle Seet and Guo Longjin (RHTLaw Taylor Wessing LLP) for the third respondent.

Parties : Comptroller of Income Tax — BJX

Civil Procedure – Judgment and Orders – Enforcement

30 July 2013

Andrew Ang J:

Introduction

1 This was an application by the third respondent, [BJX], for a stay of execution of my order allowing the production of documents in Originating Summons No 184 of 2013 ("the Order"). After hearing the parties, I dismissed [BJX]'s application. I now set out the grounds for my decision.

Background

2 On 26 February 2013, the Comptroller of Income Tax ("the Comptroller") filed Originating Summons No 184 of 2013. This application was made by pursuant to s 105J of the Income Tax Act (Cap 134, 2008 Rev Ed) and O 98 r 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for an order that the first and second respondents, [Bank 1] and [Bank 2], release information, documents and bank records concerning [BJX].

3 On 5 July 2013, I granted the Order in favour of the Comptroller. Subsequently, on 9 July 2013, [BJX] filed Summons No 3474 of 2013, praying for a stay of execution of the Order.

The law

4 The principles governing a stay of execution pending appeal have been concisely summarised in *Strandore Invest A/S v Soh Kim Wat* [2010] SGHC 174 at [7]:

(a) ...

(b) The first principle is that, as a general proposition, the court does not deprive a successful litigant of the fruits of his litigation, and lock up funds to which he is *prima facie* entitled, pending an appeal. There is no difference whether the judgment appealed against was made on a summary basis or after a full trial.

(c) This is balanced by the second principle. When a party is exercising his undoubted right of

appeal, the court ought to see that the appeal, if successful, is not nugatory. Thus a stay will be granted if it can be shown by affidavit that, if the damages and costs are paid, there is no reasonable probability of getting them back if the appeal succeeds.

(d) The third principle follows, and is an elaboration of the second principle, that an appellant must show special circumstances before the court will grant a stay.

All other rules follow and are derived from the application of these three principles to the individual circumstances and facts of each case. For example, the likelihood of success is not by itself sufficient, and a bald assertion of the likelihood of success in an affidavit is inadequate. Otherwise, a stay would be granted in every case because every appellant must expect that his appeal will succeed. Finally, it is neither possible, nor desirable, to give a catalogue of all the circumstances that would qualify to be considered as special. The court in every case will have to examine the facts to see if special circumstances justifying the grant of a stay of execution exist based upon the application of the three principles.

5 I would add that the fact that there may be strong grounds for an appeal is not by itself a reason for granting a stay (see *Lee Kuan Yew v Jeyaretnam Joshua Benjamin* [1990] 1 SLR(R) 772 at [6]).

Application of the law to the present facts

6 Counsel for [BJX], Ms Noelle Seet, submitted that disclosure of confidential information pursuant to the Order would cause an irreparable loss of confidentiality in the information disclosed. This disclosure of information would therefore render the appeal, if successful, nugatory.

7 In response, counsel for the Comptroller, Mr Alvin Chia, submitted that for a stay of execution pending an appeal to be granted, it must necessarily be shown that an appeal was pending (*Singapore Civil Procedure* (Sweet & Maxwell Asia, 2013) at para 57/15/1). Since there was no appeal pending, the stay should not be granted. He further submitted that there were no special circumstances to justify the granting of the application.

8 In my judgment, there were no convincing reasons to grant the application. First, [BJX] had not even filed an appeal against the Order. [BJX]'s mere *intention* to file an appeal was, to me, plainly inadequate. At the hearing, there were no cogent reasons provided for [BJX]'s failure to file an appeal against my Order.

9 Second, there were no special circumstances justifying the grant of the present application. I was not satisfied that there would be any harm done to BJX if the present application were to be denied. If the information ordered to be disclosed to the Indian authorities proves to be of no use to them, there would be no harm caused because the authorities would be bound by their stringent secrecy obligations under the Art 28 of the Agreement between the Government of the Republic of Singapore and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income which came into force on 27 May 1994 ("the Singapore-India DTA"). In particular, Art 28(2) of the Singapore-India DTA (as amended by the Second Protocol signed on 24 June 2011 which came into force on 1 September 2011) states as follows:

Any information received under paragraph 1 by a Contracting State shall be treated as *secret* in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned

with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. *Such persons or authorities shall use the information only for such purposes*. They may disclose the information in public court proceedings or in judicial decisions. [emphasis added]

If, on the other hand, the information ordered to be disclosed turns out to be useful to the Indian authorities, there can be no cause for complaint by [BJX]. [BJX]'s director, [Y], stated in her affidavit in support of the present application that [BJX] would suffer "undue and irreparable prejudice" if the stay was not granted. In my judgment, this was a bald assertion that was not substantiated in any way.

10 Third, I was not convinced that [BJX] had strong grounds for a successful appeal. The information requested by the Indian tax authorities was detailed, specific and foreseeably relevant to the administration or enforcement of Indian tax law. Pertinently, the test of foreseeable relevance was not envisaged to be a high and exacting standard but was intended to provide for the exchange of information in tax matters to the "widest possible extent": see *Update to Article 26 of the OECD Model Tax Convention and its Commentary*, approved by the OECD Council on 17 July 2012 (the "OECD Commentary") at para 5. Moreover, the test of foreseeable relevance only contemplates "*a reasonable possibility* that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial" [emphasis added] OECD Commentary at para 5. Even assuming *arguendo* that [BJX] had strong grounds for an appeal, this in itself would not be a sufficient reason for granting a stay.

Conclusion

11 For the above reasons, I dismissed the application and ordered costs of $1,200 to the Comptroller.