

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 77

HC/Tax Appeal No 16 of 2017

In the Matter of Order 55, Rule 2 of the Rules of Court (Cap 322, Rule 5)

And

In the Matter of Income Tax Appeals No 11 to 15 of 2016

Between

BRE

... Appellant

And

Comptroller of Income Tax

... Respondent

JUDGMENT

[Revenue law] — [income taxation]

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BRE
v
Comptroller of Income Tax

[2018] SGHC 77

High Court —HC/Tax Appeal No 16 of 2017
Choo Han Teck J
21 March 2018

2 April 2018

Judgment reserved.

Choo Han Teck J:

1 BRE is an Australian citizen and TGS is an Australian company. In a letter of 4 March 2011, TGS offered BRE a position in the company. The offer was accepted and BRE signed a contract with TGS on the same date with the commencement of work stated as 4 April 2011. The title of the position was “project development manager”, which reports directly to the general manager of TGS Asia Pacific.

2 BRE was served with notices to pay tax on his income derived from payments to him by TGS between 2012 and 2016. Those payments were all paid into a company called Subjunctive, incorporated in Singapore on 2 June 2010. BRE disputes the notices because he says that he was never an employee of TGS. BRE, at all material times, held an employment pass issued by the Ministry of Manpower, which recorded Subjunctive as BRE’s employer. BRE claims that it was Subjunctive that had a contractual relationship with TGS, and

that the payments made by TGS had been made to Subjunctive. Thus, although the remuneration on which the Comptroller of Income Tax wished to have taxed might have been the same payments, they were payments to Subjunctive and not to BRE, and Subjunctive ought to have been served with the notices to pay tax, not BRE himself.

3 The Income Tax Board of Review (“the Board”) heard BRE’s application for review and on 4 July 2017, it dismissed BRE’s claim that he was not an employee of TGS. BRE appealed before me against the decision of the Board.

4 The sole issue here and below is a straightforward one — was BRE an employee of TGS, or, as BRE claims, was he an employee of Subjunctive which had a contract for services with TGS? The earliest document of significance is the letter of offer by TGS dated 4 March 2011. The subject heading of that letter was “Project Development Manager”. I am of the view that the letter is self-explanatory and answers the questions posed before the Board and repeated before this court. I will therefore set out that letter in full —

Dear [BRE]

PROJECT DEVELOPMENT MANAGER

Please accept this letter as a formal expression of our offer of employment with [TGS]. We are excited about the opportunity to have you join our team and know there are many mutually rewarding experiences that will be shared as our company continues to grow. It is with great pleasure that TGS offers you the position of Project Development Manager with the following compensation and benefits package:

- Base pay of SGD \$228,000 per annum (SGD \$19,000 per month) (gross)

- Annualized target share of Net Income Before Tax of SGD \$68,400 (see details below)
- Accommodation expenses reimbursement at the rate of SGD \$7,000/mth
- Retirement savings plan contributions at the rate of the SGD \$1,500/mth.
- Company funded medical benefits insurance.

This position is based in Singapore and reports to [RS], General Manager – Asia Pacific.

In addition to base salary, the following Net Income Before Tax compensation package will be provided:

Assuming you begin employment on or before April 4th, you will earn a percentage of [TGS's] Net Income Before Tax ("NIBT") beginning in the 4th quarter of 2011. Your NIBT target will equate to SGD \$68,400 per annum.

NIBT represents the pre-tax profit of TGS's worldwide operations as reported to the Oslo Stock Exchange. Payments are made on a quarterly basis two months subsequent to the end of each calendar quarter and you must be employed at the time of payment to be eligible for the quarter's NIBT payment.

Again, we look forward to welcoming you to our company and helping us expand the Asia Pacific region. If you have any questions regarding this office, please feel free to contact me.

This offer is made subject to the full disclosure of any confidentiality or non-compete agreement that you have entered or may subsequently enter into in the process of finalising your appointment with your existing employer.

To complete the appointment, please complete & return the enclosed employment contract together with any required disclosure of the terms and conditions of any confidentiality or non-compete agreements.

Looking forward to working with you [BRE].

5 That letter was accompanied by the formal contract which was entitled "Terms and Conditions – Employment Contract". It was also dated 4 March 2011 although the date of commencement was stated to be 4 April 2011. The

five-page contract was signed by BRE after the signature of Bruce, the Director of Finance of TGS. In his acceptance, BRE declared:

I, [BRE], having read and understood the Terms and Conditions of Employment, hereby accept the position of Project Development Manager, effective Monday, 4 April 2011.

6 There is no need to mark an accent on either the offer letter or the Contract. The documents show plainly and unequivocally that TGS was employing BRE as its project manager in Singapore. The only peculiarity is that BRE did not hold an employment pass under TGS. That was only because when BRE signed the contract with TGS he was already holding an employment pass under Subjunctive — a company created and owned by him, which has no other employee other than BRE himself. The Comptroller also alleged that Subjunctive had no other clients other than TGS (assuming that TGS was its client).

7 BRE claims that he had been working as the Project Development Manager for TGS as an employee of Subjunctive, but he could not produce any contract between TGS and Subjunctive, and was thus compelled to claim that it was an oral contract. Since he is the one and only officer in Subjunctive, the Board, and this court, would require some corroboration from the other party to the oral contract but no one from TGS testified in support of BRE's claims.

8 Mr Lazarus, counsel for BRE, argued that if BRE was treated as the employee of TGS, then it must follow that without an employment pass with TGS, BRE must have been working illegally in Singapore, and that being so, no tax should be payable by him for illegally obtained income.

9 It is not disputed that BRE did not have an employment pass with TGS. It is therefore clear that he had been working illegally in that sense, but illegality is a garden of mixed fruit, and not all are forbidden to the tax authority. Unless BRE can show some ground that offends public policy, income earned by a resident is taxable even if that resident did not have the requisite licence for his work. This appeal is dismissed with costs to be taxed if not agreed.

- Sgd -
Choo Han Teck
Judge

Lazarus Nicholas Philip (Justicius Law Corporation) for the
appellant;
Charles Li Yourui and Shawn Joo Jian Hua (Inland Revenue
Authority of Singapore (Law Division)) for the respondent.
