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DCTC 1003/2013

IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

TAX CLAIM NO. 1003 OF 2013

BETWEEN

THE COMMISSIONER OF INLAND REVENUE Plaintiff

and

GOOD MARK INDUSTRIAL LIMITED Defendant

Coram : Deputy District Judge D. Ho in Chambers (open to public)
Dates of Hearing : 29 November 2013
Date of Decision : 29 November 2013

DECISION

1. This is an application by the plaintiff, the Commissioner of Inland Revenue ("Commissioner"), under Order 18 rule 19 of the Rules of the District Court for an order for striking out the defence filed by the defendant on the basis that it discloses no reasonable defence and for judgment to be entered for the plaintiff with costs.

2. The Commissioner, by its writ of summons, claims against the defendant for a sum of $10,842,964.00 being tax due and payable by the defendant under s.75 of the Inland Revenue Ordinance, Cap 112 ("IRO") for the years of assessment 2005/06, 2006/07 and 2007/08 ("Assessments").

3. The defendant filed a defence which contains a summary of its position as follows:

> "3. In summary, the Defence is that due to the blatant failure of the Plaintiff to comply with a positive obligation imposed on the Plaintiff by Article 24 of *the Specification Of Arrangements (The Mainland of China)(Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion With Respect to Taxes On Income) Order (Cap 112AY)* as amended by Article 1(2) of the *Specification of Arrangements (The Mainland of China)(Avoidance Of Double Taxation And The Prevention Of Fiscal Evasion with respect to Taxes On Income)(Third Protocol) Order (Cap 112BR)*("***the China/Hong Kong Arrangement***").
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> 4. Compliance with such positive obligation pursuant to the above provisions of *the China/Hong Kong Arrangement* at all material times and still means that disclosure of the exchange of tax correspondence between the Plaintiff in Hong Kong and the State Administration of Taxation ("**SAT**") in Mainland China on such matters as those being the subject of the additional assessments for the years of assessment 2005/06, 2006/07 and 2007/08 to the Defendant was necessary on or before the actual raising of those additional assessments for those years of assessment on 20th March 2012 in order to make those assessments valid additional assessments and valid notices of additional assessments against the Defendant. Failure to comply with such positive obligation would render such additional assessments and such notices of additional assessments void or voidable ab initio."
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> (Emphasis added)

4. The Defence further refers to the surcharges (totaling $1,455,114.00) comprised in the said sum of $10,842,964.00 and avers that they are not "tax" for the purposes of Parts 12 and 13 of IRO so that the certificate issued by the Commissioner on 2 May 2013 certifying the said sum of $10,842,964.00 is erroneous.

5. In short, the Defence case is that the Assessments and the notices relating thereto are invalid so that the defendant is not liable to pay any tax thereunder and that the certificate issued by the Commissioner on 2 May 2013 ("Certificate") is erroneous. As noted by Mr. Mike Lui, Counsel for

the Commissioner, the defendant does not dispute the calculation of the profits tax.

6. The general principles in relation to a striking out application are nicely encapsulated in the *Hong Kong Civil Procedure 2014* Vol 1 at para. 18/19/4. For the present purpose, I need only refer to the inappropriateness for the court to decide difficult points of law in striking out proceedings, particularly where an emergent legal principle is at stake. See *Tadjudin v Bank of America National Association* [2010] 3 HKLRD 417 at 420.

7. Mr. Lui submitted that the defence as pleaded seeks to impugn the Assessment and not recovery of profits tax thereunder and as such is caught by s.75(4) of IRO which stipulates:-

> " (4) In proceedings under this section for the recovery of tax the court shall not entertain any plea that the tax is excessive, incorrect, subject to objection or under appeal, but nothing in this subsection shall be construed so as to derogate from the powers conferred by the proviso to section 51(4B)(a) to give judgment for a less sum in the case of proceedings for the penalty specified therein."
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> (Emphasis added)

8. The case law on the interpretation of s.75(4) of IRO is well settled. As pointed out by Mr. Lui, its effect is to preclude any plea in defence seeking to challenge the assessment of tax in recovery actions so that the court is bound to reject such plea as constituting a valid or arguable defence. See *Ng Chun-kwan v CIR* [1976] HKLR 94; *CIR v Lau Chi Sing* (DCCJ 12121 of 2000), unreported, HH Judge Lam, 26 April 2001; and *Tak Wing Investment Co Ltd v CIR* [2001] 2 HKLRD 266.

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9. As Lam J (as he then was) said in *CIR v Lau Chi Sing* (supra) at §8:

> "In the proceedings before the District Court, the court is only required to be satisfied that an assessment has been made against the defendant and he has not paid. If the defendant wishes to raise other matters, the proper avenue is to follow the objection procedures laid down in the Ordinance."

10. Mr. Lui submitted that, being premised on the effect of Article 24 of the China/Hong Kong Arrangement, the defence is in essence a challenge of the validity or correctness of the Assessments. He further submitted that the fact that the objection might be procedural (as opposed to substantive) in nature would not alter the fact that the defendant seeks to dispute the assessment exercise and not the recovery process. See *Tak Wing* (supra) at 270H-271C.

11. Mr. Lui further referred to the argument in the body of the Defence that the Commissioner was acting *ultra vires* in raising the Assessments and drew attention to the remark of Briggs CJ in *Ng Chun Kwan* (supra) at 97 that the term "*ultra vires*" is simply a different way of pleading that an assessment was wrong or incorrect.

12. As to the attack on the Certificate, which concerns only the defendant's liability to pay surcharge imposed under ss.71(5) and 71(5A) of IRO, Mr. Lui submitted that it was devoid of merits when those provisions expressly allowed surcharges to be added to unpaid tax "and recovered forthwith" with s.72 of IRO having defined the term "tax" to include, inter alia, any sum or sums added under ss.71(5) and 71(5A) by reason of default.

13. Article 24 of the China/Hong Kong Arrangement provides, inter alia, that:

> "1. The competent authorities of both Sides shall exchange such information as is foreseeably relevant for carrying out the provisions of this Arrangement or to the administration or enforcement of the domestic laws of both Sides concerning taxes covered by this Arrangement, insofar as the taxation thereunder is not contrary to this Arrangement. The exchange of information is not restricted by Article 1.
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> 2. Any information received under paragraph 1 by One Side shall be treated as secret in the same manner as information obtained under the domestic laws of that Side 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, or the determination of appeals in relation to, the taxes referred to in paragraph 1. 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, including, in the case of the Hong Kong Special Administrative Region, the decisions of the Board of Review."

14. Mr. Lam submitted that this article gains superiority to the IRO itself by virtue of s.49 of IRO which provides that:

> "(1) If the Chief Executive in Council by order declares that arrangements specified in the order have been made with the government of any territory outside Hong Kong with a view to affording relief from double taxation in relation to income tax and any tax of a similar character imposed by the laws of that territory, and that it is expedient that those arrangements should have effect, the arrangements shall have effect in relation to tax under this Ordinance <u>despite anything in any enactment</u>.
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> (1A) If the Chief Executive in Council by order declares that arrangements specified in the order have been made with the government of any territory outside Hong Kong, and that it is expedient that those arrangements should have effect, those arrangements shall have effect and, in particular—
> (a) shall have effect in relation to tax under this Ordinance <u>despite anything in any enactment</u>; and
> (b) for the purposes of any provision of those arrangements that requires disclosure of information concerning tax of that territory, shall have effect in relation to any tax of that territory that is the subject of that provision."
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> (Emphasis added)

15. In reliance on the phrase "despite anything in any enactment" ("despite phrase"), Mr. Lam submitted that s.75 of IRO did not apply here. At the very least, this question of law could not be resolved summarily given,

in particular, the fact that the China/Hong Kong Arrangement is not or not a mere local legislation but an arrangement between two jurisdictions and how the other jurisdiction understands the arrangement would have a significant bearing.

16. Mr. Lam further drew this court's attention to the defendant's appeal from the dismissal of the defendant's application for leave for judicial review of the Commissioner's failure to comply with Article 24 of the China/Hong Kong Arrangement in HCAL 124/2011 where essentially the same argument was run. Mr. Lam submitted that as a matter of good case management the present action should be stayed pending the determination of the appeal.

17. Mr. Lam, however, made no submissions on the defence case that the said surcharge should not be imposed.

18. In my view, the defence case simply cannot get off the ground.

19. For one thing, on a plain reading of the provisions of Article 24 of the China/Hong Kong Arrangement, I doubt if they impose on the Commissioner an obligation to disclose the relevant information to the defendant as suggested by the defence. That said, it is not for me to make a finding as to whether there was such a failure to comply on the part of the Commissioner. This is a question for either or both of the Inland Revenue Board of Review in hearing the objection to the Assessments and the Court of Appeal in hearing the appeal from the refusal of leave for judicial review.

20. The only question before me is whether the defence seeks to impugn the Assessments and not recovery of profits tax so as to be caught by s.75(4). And I answer the same in the affirmative.

21. In so doing, I subscribe to the view that, notwithstanding the defendant's reliance on the effect of Article 24 of the China/Hong Kong Arrangement, the defence is in essence a challenge of the validity or correctness of the Assessments and has no bearing on the recovery process.

22. As Mr. Lui submitted, even if a taxpayer is able to say he should not be taxed by reason of the provisions in Article 24 for relief from double taxation, this would still have to do with assessment and not recovery of tax. If the taxpayer is effectively saying that the Commissioner is wrong to tax him because the Commissioner fails to apply the said provisions for relief from double taxation, then s.75(4) bites.

23. In light of the long line of authorities mentioned above, this Court simply cannot entertain such a plea.

24. I also agree that it matters not whether the objection is procedural or substantive in nature. Indeed, the repeated description of the taxing act of the Commissioner as being *ultra vires* only makes the defendant's complaint sound more like one in a public law sense, hence its decision to apply for leave for judicial review.

25. Mr. Lam stressed that the judicial review process had to do with the jurisdiction to impose tax whereas the proceedings before the Inland Revenue Board of Review deal with the Assessments. In my view, this highlights the Defendant's awareness of the suitable venue for raising objections to the Assessments, that is the Inland Revenue Board of Review.

26. The Defendant must be taken to be aware of the effect of s.71(2) which requires tax to be paid notwithstanding any objection or appeal, unless of course the Commissioner says otherwise. But no submission was

made by the Defendant as to what would happen to s.71(2) should s.75(4) have been disapplied by the China/Hong Kong Arrangement. I shall go back to s.71 below.

27. To conclude, I see no difficult points of law here insofar as the recovery process is concerned. The fact that the China/Hong Kong Arrangement is an arrangement between two jurisdictions does not make me think otherwise. Nor do I see how the other jurisdiction understands the arrangement could have any bearing on the present proceedings. As Mr. Lam rightly pointed out, I need only see if, despite the "despite phrase", s.75 is plainly inapplicable. I answer the same in the negative and would say s.75 does apply so that there is no defence here.

28. As to the request for staying the present action pending the determination of the appeal from HCAL 124/2011, I do not see this as a mere question of case management.

29. A similar scenario featured in *Tak Wing* (supra) where a similar striking out application by the Commissioner went before the District Court. The taxpayer there responded by filing a summons seeking either the stay or the dismissal of the proceedings or the striking out of the writ. Meanwhile, the taxpayer applied for leave to apply for judicial review of (a) the decision of the Commissioner to commence the enforcement proceedings and (b) the decision of the Commissioner to apply to strike out the taxpayer's defence in those proceedings. The relief sought included an order of prohibition prohibiting the District Court from considering the Commissioner's summons and from making any further orders in the enforcement proceedings. The leave application was refused and the taxpayer appealed.

30. It is instructive to note the comment of Keith JA in *Tak Wing* (supra) at 270-271:

> "the statutory regime for challenging the assessments should not hold up the enforcement proceedings in the District Court. The two processes are intended to run in tandem…the enforcement proceedings in the District Court and the statutory regime for challenging the assessments are intended to be parallel processes…
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> "…in my view, this appeal should be dismissed for two reasons. First, if the taxpayer's present application for leave to apply for judicial review was allowed to proceed, it would have the effect of giving to the taxpayer the relief which it could not obtain in the District Court, namely the stay of the enforcement proceedings. The taxpayer would be getting by the back door what it could not get by the front. Secondly, there is a far more appropriate remedy available to the taxpayer, namely an application for leave to apply for judicial review of the Commissioner's failure to determine the objections within a reasonable time. It was, I think, the first of these reasons which caused Seagroatt J to dismiss the present application for leave to apply for judicial review. In his judgment, he said:
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> > "Judicial Review does not lie as a remedy for the [taxpayer] in these circumstances. [It] cannot oust the District Court's jurisdiction in this respect and in this way. It is inappropriate." "

31. In Mr. Lui's submission, it is not just that the prospect of success in the defendant's appeal in the judicial review proceedings is so low that no stay of the present proceedings should be granted. It is higher than that because of the effect of s.71(2) of IRO I mentioned above. If a taxpayer has to pay tax notwithstanding any appeal process, the same applies to any parallel judicial review proceedings. He suggested that this also underlined the first reason for Mr. Justice Keith to dismiss the appeal in *Tak Wing* (supra).

32. I agree. The law is clearly against any stay of the present proceedings.

33. As to the defendant's case on the said surcharge and the related attack on the Certificate, I need say no more than that it is devoid of merits.

34. In conclusion, this is a plain and obvious case that the court should strike out the defence on the ground that it discloses no reasonable defence. I therefore grant the Commissioner's application to strike out the defence and enter judgment in his favour in terms of paragraphs 1 and 2 of the summons dated 16 August 2013 with costs to the Commissioner with certificate for counsel.

35. This is a suitable case for summary assessment of costs and the Commissioner has prepared a statement of costs.

(Discussion on costs)

36. By way of gross sum assessment, I allow the Commissioner's costs at $75,000.00.

(D. Ho)
Deputy District Judge

Mr. Mike Lui, instructed by the Department of Justice, for the Plaintiff.
Mr. Gary Lam, instructed by D. S. Cheung & Co., Solicitors, for the Defendant