

GBF v The Comptroller of Income Tax
[2016] SGITBR 1

Case Number : ITBR Appeals Nos 7/2014, 8/2014

Decision Date : 28 June 2016

Tribunal/Court : Income Tax Board of Review

Coram : Ong Hian Sun; Sum Yee Loong; Leong Kah Wah

Counsel Name(s) : Nicholas Lazarus of Justicius Law Corporation, for the appellant ; Patrick Nai, Michelle Chee for the respondent

Parties : GBF — The Comptroller of Income Tax

Leong Kah Wah (delivering the Grounds of Decision of the Board)

[EDITORIAL NOTE: The details of this judgment have been changed to comply with s 83 (3) Income Tax Act (Cap 134, 2014 Rev Ed)]

1. These Appeals are in relation to the total sum of S\$815,763.00, paid by [B] to [C], as to whether the said total sum should be considered as income in the hands of the Appellant for YA 2009 & 2010. These are our grounds of decision.
2. We first set out the relevant background facts, and they are largely undisputed. The said total sum was paid pursuant to Clause 2.2.3, Share Purchase Agreement dated 6 March 2008 (SPA), which provided that '*[GBF]'s physician compensation will come from a Physician Compensation Pool and will be funded at 40% of Gross Operating Income...*'. The said total sum was for the period of 1 January 2008 to 30 June 2009.
3. [C], a corporate partnership, was formed on 17 July 2008, primarily to receive the Appellant's physician compensation. This partnership has 2 corporate entities as partners, [D] (the Appellant is the sole director and shareholder) and [E] (the Appellant's wife, [F], is the sole director and shareholder). This arrangement is the subject of these Appeals, as to whether the Respondent may rely on Section 33 of the Income Tax Act (ITA) to disregard the arrangement and treat the said total sum as income paid to the Appellant.
4. [G] was incorporated in November 1996 and the plastic and cosmetic surgery business is conducted by [G] under the business name of [H]. [G] is owned by the Appellant and his wife. The Appellant is a medical practitioner specializing in plastic and cosmetic surgery and is employed by [G] since its incorporation and the Appellant is the sole medical practitioner at the clinic.

5. In early 2008, and pursuant to the SPA, the Appellant and his wife sold their shares in [G] to [B]. The principal business activities of [G] remained unchanged. The Appellant and his wife continued as directors, and the Appellant continued to be employed by [G] as the sole medical practitioner at the clinic. About 4½ months after the SPA was signed, [C], the corporate partnership, was formed with the 2 abovementioned corporate entities.

6. There are 2 main issues:

i. Whether the requirements in Section 33(1) ITA were met on the facts of this matter; and

ii. Whether the Appellant could rely on the exception in Section 33(3)(b) ITA.

7. In the seminal decision of **Comptroller of Income Tax v AQQ** [2014] 2 SLR 847, the propositions in relation to the threshold of meeting the requirements, as well as the exception, have been clearly set out by the Court of Appeal. It is an objective test to ascertain the '*purpose or effect*' for Section 33(1) ITA, whereas for the exception under Section 33(3)(b) ITA, it is to discern the subjective intention behind the arrangement, its subjective commercial motives, and the subjective consequences. As stated in **AQQ**, this exception applies to any arrangement that does not have as one of its main purposes, the avoidance or reduction of tax. The Court of Appeal also stated that '*subjective intentions of course might not always be readily apparent and the Board or the Judge may ascertain this by reference to evidence or testimony of the taxpayer's actual contemporaneous state of mind and assess the veracity of this by drawing the requisite inferences from the surrounding objective evidence or features of the arrangement.*'(paragraphs 71 and 82, **AQQ**).

8. The Appellant's case was focused on explaining the subjective intention behind the SPA, as well as the arrangement of the corporate partnership, with its 2 corporate partners. We summarize his reasons for setting up the arrangement. First, the Appellant intended to grow his practice by inviting other practitioners to come onboard as partners. For business convenience and benefits, the Appellant preferred the partnership structure for various reasons given by him. The second main reason was for protection from practice and business risks. The Appellant maintained in his submissions, and also in his oral evidence, that he had no intention to avoid tax but it was merely incidental to the decision to adopt this arrangement that he could invoke Section 43(6A) ITA for a start-up tax exemption for both corporate entities and this was done in the ordinary course of business. We understand the thrust of the Appellant's case was that both Section 33(1) and 33(3)(b) ITA would be resolved in his favor if we accept his explanation of his intention.

9. The Respondent's case may be summarized as follows. 'But for' the arrangement, [B] would have paid the said total sum to the Appellant personally. The arrangement did not change the way the Appellant operated his practice. The true effect of the arrangement therefore satisfied the requirements of all 3 limbs of Section 33(1) ITA. As for Section 33(3)(b) ITA, the Respondent pointed out that it was unusual for the Appellant not to be paid for the medical services rendered to [G] where the Appellant remained employed, even after the SPA. The Respondent also challenged the business convenience and benefits derived, as the arrangement of a corporate partnership, with 2 corporate entities as partners, was a complex one, and could not be readily seen as the usual thing to do. There was also no valid explanation behind the incorporation of [E]. Given the substantial tax savings involved, a reasonable inference was that the tax advantages were at least 1 of the main purposes, if not the predominant purpose of the arrangement.

10. Having reviewed the evidence and considered the submissions, we have formed our views as follows:

i. Our focus is on the arrangement structured to receive the said total sum. The SPA itself stated that the Appellant's physician compensation will come from the Physician Compensation Pool and will be funded at 40% of the Gross Operating Income of the clinic. In our view, the arrangement was formed solely to receive the said 40% and manage it in the most tax efficient manner. There is nothing in writing to corroborate the Appellant's oral evidence that the arrangement was part and parcel of the investment in [B] under the SPA. The SPA did not state that the Appellant was to set up the arrangement to receive the compensation. In the event, the corporate partnership was formed on 17 July 2008, some 4½ months after the SPA was signed. It was as if the Appellant realized *ex post facto* that he had to devise an arrangement, otherwise, his tax liability would have increased when compared to what it was before the SPA.

ii. Moving on to the purpose behind the corporate partnership, there was no partnership agreement in existence. There was no written evidence of any discussion or effort to bring in any other practitioners. (page 43, lines 8 to 17, transcripts) It transpired that until the end of the venture in end-December 2009, there was no other practitioner recruited and the Appellant was the sole practitioner throughout. (page 47, lines 2 to 6, transcripts) The Appellant has 1 'partner', his wife. There was also no written advice tendered, despite the Appellant having received advice from his tax accountant on the arrangement, the Appellant paid S\$40,000.00 for, and which the Appellant said was an oral advice. (page 70, lines 12 to 24, transcripts)

iii. When assessed objectively, the Appellant's explanation of his intention could not be discerned from the documentary evidence, nor his conduct in putting his business plan into action. It was solely based on the Appellant's oral evidence as to what was on his mind at the material time, which in our view, could not be corroborated by any other contemporaneous evidence. The obvious effect of the arrangement resulted in substantial tax savings. On an objective view of the evidence before us and also, the submissions presented, we are of the view that the requirements of Section 33(1)(a),(b) and (c) ITA have clearly been satisfied. We next considered whether the exception in Section 33(3)(b) may be invoked by the Appellant.

iv. The Appellant has stated in his oral evidence and also, via the Appellant's submissions, that the corporate partnership was decided upon due to it being the most convenient structure available and also, the various business benefits it offered. There was nothing in writing to show that at the material time when the corporate partnership was formed, these were in fact the reasons considered by the Appellant. The business convenience and benefits offered were also not enjoyed as no other practitioner was ever invited to come onboard. There was a lag of 4½ months between the signing of the SPA and the formation of the corporate partnership. One would have expected this structure to be set up in tandem with the SPA if it was indeed part of the Appellant's investment in [B]. In the absence of anything in writing, the veracity of the Appellant's expressed intention could not be independently assessed and it would be difficult for us to simply take the Appellant's word.

v. After the SPA, [G] continued to operate the clinic and the Appellant remained a director of [G]. Between the period of 6 March 2008 and 17 July 2008, just as it was before the SPA, the Appellant provided the medical services at the clinic through [G]. After the corporate partnership was formed on 17 July 2008, the Appellant said that he was paid for his role at [G] in managing the clinic. The corporate partnership supplied the medical services to [G]. However, there was nothing in writing to record this provision of medical services through the corporate partnership. (page 69, lines 26 to 28, transcripts) [G] continued to earn the revenue from the patients which the Appellant was responsible for as its sole practitioner. There was no change in the *modus operandi* of the practice of [G].

vi. The Appellant said that he relied on the corporate partnership to offer protection against practice and business risks. It is apparent that there is no interaction between the corporate partnership and the patients of the clinic. The practice risk was managed by having in place the corporate entity [G]. As for the business risk, the only discernible role played by the corporate partnership was to receive the Appellant's physician compensation. No other business was in fact done through the corporate partnership. Upon the unraveling of the SPA, the corporate partnership, and the 2 corporate entities, became dormant. There was in reality, no business risk that was in fact managed by the corporate partnership and its 2 corporate partners.

vii. The role of [E] was equally inexplicable. The Appellant's wife continued to be a director of [G]. The Appellant confirmed that his wife's role at the clinic continued as it was before the SPA. (page 82, lines 23 to 27, transcripts) It was therefore unclear as to what contribution she provided when her company, [E] did not provide any services to the corporate partnership, or to [G]. (page 80, lines 14 to 32, transcripts)

viii. The corporate partnership is an elaborate structure, with 2 corporate partners, specially formed to receive the Appellant's physician compensation. The corporate partnership, with its 2 corporate partners, had no functional role in the practice of [G]. The Appellant has taken on the costs of maintaining this structure even at a time when he has no other practitioners onboard, and also, no actual practice or business risks to manage. As the Respondent has pointed out, the Appellant derived substantial tax savings from this arrangement.

ix. Although we have to consider the subjective intentions of the Appellant, we have to do so by drawing the requisite inferences from the surrounding objective evidence or features of the arrangement. Afterall, subjective intentions can be perfected with time and we have carefully scrutinized the Appellant's explanations in the context of the overall circumstances. Having considered the evidence and submissions presented, we are satisfied that 1 of the main subjective purposes of the arrangement was to avoid tax. Therefore, Section 33(3)(b) ITA may not be invoked by the Appellant.

11. Accordingly, in our judgment, we dismiss the Appeals with costs.

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