COMMISSIONER OF INLAND REVENUE

v

SAMOA PRINTING AND PUBLISHING COMPANY LIMITED

Court of Appeal Apia
30 May; 1 June 1973
Donne P, Moller J

COMPANY LAW (Income tax) - Income Tax Ordinance 1955 s 57(3) - Claim by Company to carry forward losses incurred in previous years - Whether shareholders same at relevant balance dates - Vendors of the Company's total shareholding under an Agreement for Sale of Shares held to have become trustees for the purchasers upon execution of Agreement - Shares thereafter held by the vendors "on behalf of" the purchasers - Accordingly, the shareholders of the Company were not the same following the date of the Agreement and losses incurred by the Company prior to that date could not be carried forward.

CONTRACTS (Sale of total shareholding of private Company) - Whether vendors trustees for purchasers - Discrepancy between terms of Agreement for Sale of Shares as set out in Agreed Statement of Facts before trial Judge and actual terms of Agreement - Actual terms providing for down payment of £1,000 and payment of the balance of £14,000 "by equal regular annual payments of not less than £1,400 each payable always henceforth upon the 1st day of September in each and every year, the first of such payments to be made on the 1st day of September, 1967" - Such terms giving purchasers a contractual right to specific performance on any payment date, the vendors on execution of the Agreement became trustees for the purchasers, and thereafter held the shares "on their behalf":

Stonham on Vendor and Purchaser at p. 581, Cornwall v Henson [1899] 2 Ch 710, Rayner v Preston (1881) 18 Ch D 1 applied.

APPEAL (Hearing and determination) - Error in Agreed Statement of Facts placed before trial Judge by counsel - Relevant terms of Agreement for Sale of Shares wrongly set out - Court of Appeal considering it was not bound by such agreement between counsel and construing Agreement on the basis of its actual terms.

APPEAL against decision of Rothwell CJ, ante p. 58.
Appeal allowed and ruling of Commissioner of Inland Revenue disallowing certain losses claimed by the defendant held correct.

Hay for appellant.
Clarke for respondent.

Cur adv vult

DONNE P AND MOLLER J. This is an appeal against a decision of

Chief Justice Rothwell. It arises out of an objection lodged by the taxpaying Company (now the respondent) against each of three assessments of income tax made by the Commissioner of Inland Revenue (now the appellant) for the years ending 31st December, 1967, 31st December, 1968 and 31st December, 1969, respectively. The objections were disallowed, and a case was stated by the Commissioner, the hearing taking place eventually in the Supreme Court. Chief Justice Rothwell found in favour of the taxpayer, and it is against this decision that the appeal is brought.

The Ordinance relevant to the matter is section 57(3) of the Income Tax Ordinance 1955, which is in these terms:-

> Notwithstanding anything in the foregoing provisions of this section, if in any year of assessment any taxpayer, being a company, claims to carry forward any loss made by it in any former year, the claim shall not be allowed unless the Commissioner is satisfied that the shareholders of the company on the balance date of the company for the year to which the loss claimed is to be carried forward were substantially the same as the shareholders of the company on the balance date of the company for the year in which the loss was incurred. For the purposes of this subsection the shareholders of the company at any date shall not be deemed to be substantially the same as the shareholders on any other date unless, on both such dates, not less than three-fourths of the paid up capital of the company was held by or on behalf of the same persons, nor unless, on both such dates, not less than three-fourths in nominal value of the allotted shares in such company were held by or on behalf of the same persons.

The general position was that the taxpayer sought to set off against profits made in 1967, 1968 and 1969 losses that had been incurred in the income tax years of 1963, 1964, 1965 and 1966. These losses amounted in all to the not inconsiderable sum of $15,910.00.

It is clear from a consideration of Section 57(3) that, in each of the years in respect of which he made his contested assessments, the Commissioner had to examine the state of the shareholding in the taxpayer Company at the balance date of the Company in that year and compare it with the state of the shareholding on its balance date in each of the years in which the losses sought to be carried forward were incurred. (We merely record here that the Company's balance date was also, throughout, 31st December).

It does not appear that the relevant returns of income and the relevant assessments were ever put before the learned Chief Justice; and this we find a little difficult to understand because the Company's returns were documents containing basic information available to the Commissioner at the time that he made all three assessments, namely, 19th May, 1970.

These documents disclose:-

(a) that in the tax year of 1967 the Company had a profit of $2,589.00 and attempted to set off against this the total accumulated losses; the Commissioner, for reasons which were at first a little obscure to us but are now quite clear, allowed a deduction of the actual loss suffered in the year 1966 but disallowed any further set-off; the amount of the loss deducted was $1,666.00:

(b) that in the tax year of 1968 the Company returned a profit of $2,373.00 and claimed to carry forward against that the balance of the accumulated losses, namely, $13,321.00; this the Commissioner wholly disallowed:

(c) that in the tax year of 1969 the Company showed a profit $10,863.00 and attempted to carry forward losses which it then fixed at $10,948.00, which, if the claim had been successful, would have meant that after that year, there still remained, on balance, a small residue of accumulated losses; once more the Commissioner would not allow the losses to be carried forward.

There are two preliminary points of law to be mentioned.

The first is that, both before the learned Chief Justice and before us, the onus lay on the taxpayer to demonstrate that, on the material available to him at the time of his making of the assessments, the Commissioner should have been "satisfied that the shareholders of the Company on the balance date of the Company for the year to which the loss claimed is to be carried forward were substantially the same as the shareholders of the Company on the balance date of the Company for the year in which the loss was incurred", the word "substantially" having, of course, a special interpretation as set out in the last sentence of the subsection.

The second preliminary point of law is dealt with by Dixon J. in Avon Downs Proprietary Limited v The Federal Commissioner of Taxation (1949) 78 C.L.R. 353 at p. 360:-

> But it is for the commissioner, not for me, to be satisfied of the state of the voting power at the end of the year of income. His decision, it is true, is not unexaminable. If he does not address himself to the question which the subsection formulates, if his conclusion is affected by some mistake of law, if he takes some extraneous reason into consideration or excludes from consideration some factor which should affect his determination, on any of these grounds his conclusion is liable to review.

It is common ground between the parties in this appeal that the only basis upon which we can call the Commissioner's decision into question is this: Did he, on the material available to him, misdirect himself on a matter of law?

There was placed before the learned Chief Justice an "Agreed Statement of the Facts". After setting out the extent and nature of the share capital of the Company, this document went on to say that, until 23 September, 1966 there were five shareholders and that, on that date, these five shareholders "entered into an Agreement with Aitken Fruean and Rudolf Ott for the sale of the whole shareholding and undertaking of the Company at the total price of £15,000 to be paid by a deposit of £1,000 on the execution of the Agreement and thereafter the balance by yearly instalments of £1,400 until 1 September, 1976".

The statement then went on to say that the purchasers agreed, "that while any money was outstanding (under the Agreement), they would not mortgage or otherwise secure or encumber the property of the Company to any person other than the Bank of Western Samoa. . . . Further, the Agreement provided that while any money was owing, the purchasers would not transfer their shares of 3,000 each, or any of them, to any other person without the previous written consent of the vendors. The transfers of the shares to Fruean and Ott were to be held by the vendors until final payment under the Agreement was made."

The Agreed Statement of Facts then recited that the register of members of the Company still shows the original five - that is to say, the vendors - "as the shareholders. There has been no change".

The other matters dealt with in counsel's agreement have already been adequately covered earlier in this judgment.

It is at this stage, however, that we draw attention to a serious discrepancy between the Agreed Statement of Facts and the true facts, a discrepancy, moreover, which in our view is vital to the decision in this case. We have quoted above from counsel's agreement which says that the total price was to be paid by a deposit on execution of the Agreement, "and thereafter the balance by yearly instalments of £1,400 until 1 September, 1976." In our view the Agreement says nothing of the kind. It says that the balance is to be paid by equal regular annual payments of not less than £1,400 each payable always henceforth upon the 1st day of September in each and every year, the first of such annual payments to be made on the 1st day of September, 1967". From this it is clear that the Agreement makes no specific mention at all of "1 September, 1976"; nor does the provision that we have first set out contain anything making it essential, if the vendors wanted it to be so, that the payment of the balance must extend over a period of 10 years at the rate of £1,400 per annum. Instead, the purchasers had a contractual right, if

they wished to do so and had the necessary finance, to pay, say, £7,000 on 1st September, 1967 and a final sum of £7,000 on 1st September, 1968. Moreover, it is at least interesting to note that Clause 3 of the Agreement for Sale and Purchase, while providing for escalating interest from 31st August, 1969 expressly says that no interest at all is to be paid by, or chargeable to the purchasers in respect of the three years ending 31st August, 1967, 1968, and 1969, substantially the period covered by the assessments.

It seems to us to be quite inconsistent with the realities of the situation to consider ourselves bound, in a matter of this kind, by any agreement between counsel, and we intend to disregard this part of their document and proceed to our decision from what we consider to be the proper construction of the provision concerned. After all it was that, and not counsel's agreement, that was available to the Commissioner at the crucial time.

The Commissioner, in interpreting the Agreement for Sale and Purchase, considered that the purchasers were the beneficial owners of the shares: in other words that the vendors held the shares "on behalf of" the purchasers. This interpretation Rothwell CJ refused to accept, and it is for us to review his decision to decide whether or not the learned Chief Justice was correct in so holding.

The law is clear that, in an agreement for sale and purchase, from the date of signing, the vendor becomes a trustee for the purchaser who, from that date, becomes the beneficial owner; but this is always on the tacit understanding that the contract is one in respect of which the Court would grant specific performance. The position is put by Stonham on Vendor and Purchaser at p. 581, where the learned author says:-

> Equity looks upon things agreed to be done as actually done. Consequently, upon the signing of a valid and specifically enforceable contract for the immediate sale of land, the vendor's interest is converted into an interest in the purchase money and is personal estate. He becomes in equity a trustee of the land for the purchaser; and the purchaser becomes, in equity, the real beneficial owner of the land, subject to his fulfilling the contract, and subject to the qualifications hereafter mentioned. The contract must be one for which a Court of Equity will grant specific performance; and if, for some reason, equity would not enforce specific performance of the contract, or if the right to specific performance of the contract has been lost by subsequent conduct of the party in whose favour it originally might have been granted, the vendor either never was, or ceases to be a trustee in any sense . . . . The statement that the vendor is a trustee for the purchaser, and the purchaser is the owner in equity, is true only if, and so far as, a Court of Equity, under all the circumstances of the case, would grant specific performance of the contract.

The authorities quoted by the learned author in support of this statement are Cornwall v. Henson [1899] 2 Ch. 710; Rayner v. Preston (1881) 18 Ch. D. 1.

Now, in the case before us, it is necessary that a separate decision as to the shareholding of the Company be made at the end of each Income Tax year. However, since such decisions depend entirely upon the proper interpretation of the contract for sale of the shares, we are able, by such interpretation, to settle all questions. At this point we stress again that the terms of Clause 2 of the Agreement are incorrectly summarised in paragraph 3 of the Agreed Statement of Facts.

In our view, Clause 2 of the Agreement clearly establishes the relationship as between the parties thereto. In our view, by virtue of Clause 2 of the Agreement the purchasers could have called for specific performance of the contract at the end of any one of those three years. It is not for us to speculate whether they had the finance to complete the contract; it is a matter of law to find whether they were entitled to call for specific performance at the relevant times. We have considered the Clauses in the contract upon which counsel for the respondent relies as indicating that there is no alienation of the beneficial

interest in the shares to the purchasers, but we are of the view that the contract, looked at as a whole, transfers the complete beneficial ownership of the shares to the purchasers, even although they have, in the same document, consented to suffer severe restrictions upon the exercise of their rights of beneficial ownership, these having been insisted upon by the vendors for the purpose of protecting their unpaid purchase money.

We accordingly hold that the ruling of the Commissioner showing that he was not satisfied that, in respect of each of the three periods concerned, the shareholders were substantially the same at the critical times was a correct one.

Consequently, we allow the appeal, and the findings we have just made answer the question posed in the case stated.

Costs are allowed to the appellant in the sum of $50.00, any disbursements to be fixed by the Registrar.