IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 50

Companies Winding Up No 192 of 2016
Summons No 5094 of 2016

Between

Comptroller of Income Tax

… *Plaintiff*

And

BLO

… *Defendant*

GROUNDS OF DECISION

[Companies] — [Winding up]

TABLE OF CONTENTS

Comptroller of Income Tax
v
BLO and another matter

[2017] SGHC 50

High Court — Companies Winding Up No 192 of 2016, Summons No 5094 of 2016
Hoo Sheau Peng JC
23 December 2016

13 March 2017

Hoo Sheau Peng JC:

1 This was an application by the Comptroller of Income Tax ("the Comptroller") for a winding up order to be made against the defendant ("the Defendant"), pursuant to s 254(1)(*e*) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") on the ground that it was unable to pay its debts. The Defendant sought a stay of the application on the basis that it intended to object or appeal under the Income Tax Act (Cap 134, 2014 Rev Ed) ("Income Tax Act") against the tax assessments giving rise to the underlying debt. After hearing the parties, I declined to stay the application, and ordered the Defendant to be wound up. The Defendant has appealed against my decision. I now set out my reasons.

Background facts

2 The Defendant was incorporated in Singapore on 13 April 2007, and is

in the business of managing and investing in property. The sole director of the Defendant is [Z].

3 On 13 November 2014, the Comptroller sent the Defendant a letter setting out the Comptroller's position that "the gain" from the sale of two properties by the Defendant "is taxable". Reasons were furnished by the Comptroller for the position, along with the "proposed revised tax computations" for the years of assessment 2011 and 2013 ("the relevant years of assessment"). The Comptroller also stated that by 8 January 2015, the Defendant should inform the Comptroller of any objection. If not, the Comptroller would proceed to "raise additional assessments" for the relevant years of assessment.

4 As the Defendant did not respond before 8 January 2015, the Comptroller proceeded to revise the Defendant's tax assessments for the relevant years of assessment. On 20 January 2015, the Comptroller sent a letter informing the Defendant of the additional assessments, as well as Notices of Additional Assessment ("Notices") stating that the amounts of $ $458,682.01 and $672,319.32 for 2011 and 2013 respectively were to be paid by 21 February 2015 as additional tax. Further, the Notices stated that if the Defendant wished to object to the additional assessments, it had to do so within two months from the date of the Notices.

5 Upon receiving the above, [Z] sent an email to the Comptroller, stating that he "did not recall having read [the Comptroller's letter of 13 November 2014]", and asked for a copy of it. [Z] stated that the Defendant objected to the additional assessments, and was "looking for a Tax lawyer" to handle the matter on its behalf. Thereafter, [Z] purportedly sent a detailed letter on 20 February 2015, setting out the Defendant's objections to the additional

assessments ("the objection letter"). In the objection letter which comprised 12 pages, [Z] alleged that the Comptroller's grounds for the additional assessments were "deeply flawed, biased and untenable". The Comptroller however stated that the objection letter was not received.

6 The Defendant did not make any payments before the Comptroller's due date of 21 February 2015. From 20 April 2015 to 28 March 2016, the Comptroller's tax officers made telephone calls to the Defendant requesting immediate payment. From 31 July 2015 to 29 January 2016, there was also a series of correspondence between the parties via letters and emails. In particular, the Comptroller relied on two letters and seven emails between the parties ("the communications"). The disclosure of the communications was objected to by the Defendant on the grounds of "without prejudice" privilege, and I will discuss this further at [28] – [30].

7 In any case, the Defendant arranged for payments to be made to the Comptroller from the Defendant's associate companies, by way of a cheque dated 2 November 2015 for $75,000 and a cheque dated 24 November 2015 for $10,000. However, most of the additional tax due from the Defendant, together with penalties, totalling over $1m, remained unpaid.

8 The Comptroller's solicitors served a statutory demand dated 5 July 2016 on the Defendant for the sum of $1,131,130.25, being the outstanding tax and penalties owed. The statutory demand stated that the Defendant had "failed, neglected and/or refused to settle the sum owing" as at 4 July 2016, "[d]espite demands made on [it] to settle the aforesaid sum". The statutory demand provided that within three weeks, if the Defendant did not pay, secure or compound for the debt to the Comptroller's reasonable satisfaction, the Comptroller would commence winding up proceedings against the Defendant.

9 The Defendant did not make any further payments to the Comptroller. During this time, [Z] said he was dealing with numerous problems relating to his health, his elderly mother's health and his other businesses. Therefore, he did not respond to the Comptroller's statutory demand.

10 On 26 August 2016, the Assistant Comptroller of Income Tax issued to the Defendant a certificate pursuant to s 89(4) of the Income Tax Act, showing that the Defendant's outstanding tax debt, including the penalties imposed for non-payment, was $1,151,396.01 ("the Certificate").

11 Thereafter, on 7 September 2016, the Comptroller filed the present application to wind up the Defendant. On 19 October 2016, the Defendant filed Summons No 5094 of 2016 to stay the application.

The legal principles

12 I turn to the applicable legal principles. Section 254(1)(*e*) of the Companies Act provides that the court may order the winding up of a company if the company is unable to pay its debts. After service of the statutory demand on the debtor-company, the debtor-company has three weeks under s 254(2)(*a*) to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor. If the debtor-company neglects to do so after expiry of the three weeks, a presumption that the debtor-company is insolvent arises, and the creditor may then present an application to wind up the company under s 254(1)(*e*) of the Companies Act.

13 When there is a *bona fide* dispute over the debt claimed by the creditor, the court should stay or dismiss the winding up application on the grounds that the *locus standi* of the applicant as a creditor is in question, and that it would be an abuse of process for the applicant to try to enforce a disputed debt in this

way: *De Montfort University v Stanford Training Systems Pte Ltd* [2006] 1 SLR(R) 218 at [26].

14 However, a company will not be able to defeat a winding up application merely by *alleging* that a substantial and *bona fide* dispute over the debt existed: see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*"). The applicable standard of proof in showing the existence of a substantial and *bona fide* dispute is no higher than that for resisting summary judgment, *ie*, the debtor-company is required to raise triable issues in order to obtain a stay or dismissal of the winding up application: see *Pacific Recreation at* [23].

The parties' cases

15 I now turn to the parties' cases. Relying on ss 254(1)(*e*) and 254(2)(*a*) of the Companies Act, the Comptroller argued that the Defendant had neglected to pay, secure or compound for its debt to the Comptroller's reasonable satisfaction within three weeks from the date of the Comptroller's statutory demand. Therefore, the Defendant was deemed to be unable to pay its debts. The underlying debt was clearly due as s 85(1) of the Income Tax Act provides that tax assessed is payable "*notwithstanding any objection or appeal against the assessment*". Given the statutory process within the Income Tax Act for the review of tax assessments, it is not for the court to do so. Further, s 89(4) of the same Act provides that the Certificate constituted sufficient authority for the court to give judgment of the amount stated to be due in any suit for tax by the Comptroller. As such, there could not be said to be any substantial and *bona fide* dispute over the underlying debt for a stay to be granted. In any event, the Comptroller argued that in the communications, the Defendant did not dispute liability for the debt, but merely asked for time

to pay its debt. Further, in the communications, the Defendant did not refer to the objection letter at all. As such, the Comptroller contended that the Defendant had admitted liability for the debt.

16 In response, the Defendant relied on the grounds set out in the objection letter, and indicated an intention to object or appeal under s 79(1)(*a*) of the Income Tax Act against the additional assessments which gave rise to the underlying debt. In fact, the Defendant alleged that it had been deprived of its statutory right of appeal thus far. In addition, the Defendant submitted that the communications relied on by the Comptroller were protected by "without prejudice" privilege. Thus, the Defendant objected to the admissibility of the communications. The Defendant explained that the Comptroller's tax officers were not prepared to deal with the objections until the tax had been paid. Based on advice by its lawyers and accountants, the Defendant made "good faith" payments and proposals for instalment plans, and put aside discussing the objections to the additional assessments. Thus, the communications did not refer to the objection letter. Read in that light, there was no admission of liability for the debt in the communications. Based on the above, the Defendant argued for a stay of the winding up application as there was in fact a substantial and *bona fide* dispute over the underlying debt.

Decision

17 Given the Defendant's failure to comply with the statutory demand, by virtue of ss 254(1)(*e*) and 254(2)(*a*) of the Companies Act, the court may order the Defendant to be wound up for its ability to pay its debt. The key issue was whether the Defendant had sufficiently established the existence of a substantial and *bona fide* dispute over the underlying debt, based on its intention to object to and appeal against the additional assessments on the

grounds as stated in the objection letter.

Whether there was a substantial and* bona fide *dispute

18 In relation to this key issue, I agreed with the Comptroller's proposition that tax assessed is payable, regardless of the existence of any objection or appeal on the ground that the assessment is incorrect. Section 85(1) of the Income Tax Act provides as follows:

> Subject to section 91, tax for any year of assessment levied in accordance with the provisions of this Act shall, *notwithstanding any objection or appeal* against the assessment on which the tax is levied, *be payable* at the place stated in the notice given under section 76 within one month after the service of the notice.
>
> [emphasis added]

Under s 85(1), it was clear to me that the additional tax was payable by the Defendant within one month of service of the additional assessments on 20 January 2015, regardless of any objection or appeal by the Defendant.

19 Further, I also agreed with the Comptroller that the Income Tax Act has provided for a statutory process to review tax assessments, and that the statutory process should not be bypassed. To summarise, under the Income Tax Act, any person disputing an assessment must first apply to the Comptroller by notice of objection in writing (see s 76(2)). Should the Comptroller refuse to amend the assessment, the person may then appeal to the Board of Review appointed under s 78. Thereafter, there is the avenue of an appeal to the High Court against the Board of Review's decision (see s 81). It was undisputed that the Defendant had not availed itself of the statutory process, and I shall return to the Defendant's contention that it had been prevented from doing so at [23] onwards. However, it was clearly not for me

to review the additional assessments, or to consider the merits of the grounds of objection raised by the Defendant.

20 The case authorities cited by the Comptroller support the analysis above. In *Comptroller of Income Tax v A Co Ltd* [1965-1967] SLR(R) 322 ("*A Co Ltd*"), the Comptroller applied for summary judgment against the defendant for income tax due. The defendant challenged the amount of tax assessed, and claimed that there was a triable issue. At the material time, the predecessor to the Income Tax Act, being the Income Tax Ordinance (Cap 166), provided an equivalent procedure for objection and appeal against tax assessments as that in the former. Noting that the defendant in *A Co Ltd* had not availed itself of the appropriate procedure for objection and appeal against the tax assessments, the court found no triable issue and upheld the grant of summary judgment against the defendant. The High Court stated at [12] that:

> [O]nce the Comptroller of Income Tax has made an assessment and issued a notice of assessment to a tax payer calling upon him to pay the tax mentioned in the notice, the tax payer is bound by law to pay such tax within one month even though he may be dissatisfied with the assessment. *Whether the assessment is right or wrong, the tax must be paid notwithstanding any objection or appeal.* The scheme of the Income Tax Ordinance is that if any person disputes the assessment, he may apply to the Comptroller to review and revise the assessment made upon him. If the Comptroller refuses to amend the assessment, the aggrieved tax payer may appeal to the Board of Review appointed under s 78 of the Ordinance and the board may, after hearing the appeal, confirm, reduce, increase or annul the assessment or make such order thereon as to it may seem fit. The tax payer or the Comptroller may then appeal to the High Court from the decision of the board upon any question of law or mixed law and fact. *A tax payer has no right to by-pass the Board of Review and take his complaint direct to court.* And when the Comptroller of Income Tax sues a tax payer to recover tax due under a notice of assessment, the tax payer cannot be heard to say that the assessment on which tax has been levied was not made in accordance with the provisions of the Ordinance. Such a complaint must in the first instance be laid before the Board of Review.

[emphasis added]

21 In *Comptroller of Income Tax v Beaver Singapore Pte Ltd* [1979-1980] SLR(R) 75 ("*Beaver Singapore*"), the High Court similarly upheld the Registrar's grant of summary judgment, and refusal to stay execution on the summary judgment. The High Court stated at [5] that a dispute over "the liability to tax or the amount due is not sufficient ground entitling [the defendant] to have leave to defend an action brought by the Comptroller to recover payment of the amount due on the notice of assessment."

22 While I recognise that the above cases cited by the Comptroller dealt with the question of whether summary judgment for the assessed tax should be granted, notwithstanding the existence of any objection or appeal by a defendant, the principles are relevant to the question of whether a winding up application should be stayed. As stated in *Pacific Recreation* at [23], the applicable standard of proof in showing the existence of a substantial and *bona fide* dispute in winding up proceedings is no more than that for resisting summary judgment, *ie*, the debtor-company is required to raise triable issues in order to obtain a stay or dismissal of the winding up application. The cases of *A Co Ltd* and *Beaver Singapore* illustrate that the existence of an objection or appeal against the Comptroller's tax assessment does not constitute a basis for a defendant to resist summary judgment. Similarly, I found that the intended objection or appeal by the Defendant did not lend itself to a finding of a triable issue for a stay of the winding up application.

23 At this juncture, I turn to the Defendant's contention that it had been deprived of its recourse to the statutory process. In brief, the Defendant argued that the objection letter formed its "notice of objection in writing" under s 76(2) of the Income Tax Act, and that the next stage was for the Comptroller

to give notice of his refusal to amend the additional assessments under s 76(6) of the Income Tax Act so that the Defendant may proceed to appeal to the Board of Review under s 78 of the same. The Defendant had been prejudiced because the Comptroller did not give notice of his refusal to amend the additional assessments.

24 In response, the Comptroller's position was that the objection letter was not received. As such, there was no objection in writing for the Comptroller to act on. Pointing out that the Defendant was out of time to lodge the objection, the Comptroller highlighted that by s 76(4) of the Income Tax Act, should the Comptroller be satisfied that "owing to absence, sickness or other reasonable cause, the person disputing the assessment was prevented from making the application [in time]," the Comptroller shall extend the period as may be reasonable in the circumstances. The Comptroller submitted that the proper course was for the Defendant to apply under s 76(4) for an extension of time to lodge its objection. However, the Defendant did not do so.

25 To begin with, I had grave doubts whether the objection letter was in fact sent to the Comptroller. In the communications to which I shall turn shortly, there was no reference at all to the objection letter. Apart from the assertions in [Z]'s affidavits that he mentioned the objection letter in telephone conversations with the tax officers, there was no evidence showing that the Defendant had ever made any query about the objection letter. Further, counsel for the Defendant acknowledged that for some time, the Defendant had been aware of the Comptroller's position that the Comptroller did not receive the objection letter. Despite knowing this, the Defendant did not request for a time extension to formally lodge the objection.

26 In light of the above, I did not accept the contention that the Defendant

had been prejudiced by the Comptroller's omission to provide a notice of refusal to amend the additional assessments under s 76(6) of the Income Tax Act. In my view, the Defendant did not avail itself of the proper procedure in the Income Tax Act for objection and appeal against the tax assessments made by the Comptroller.

27 At the end of the day, the additional tax was payable, and the Defendant cannot "by-pass" the statutory process so as to challenge the additional assessments in these winding up proceedings. Hence, the Defendant's arguments for a stay of the winding up proceedings based on an intention to object or appeal against the Comptroller's tax assessments did not pass muster. There was no substantial and *bona fide* dispute over the underlying debt.

Whether there was an admission of liability to the debt

28 In my view, the above would suffice to dispose of the matter. For completeness only, I deal with the issue of whether the Defendant had admitted liability to the debt, and the sub-issue of whether the communications were privileged.

29 To reiterate, the Comptroller relied on the following communications to show that the Defendant did not dispute liability:

(a) On 31 July 2015, the Comptroller sent a letter to the Defendant demanding payment of the overdue tax of $1,175,551.39 by 14 August 2015, and giving notice that legal action would be taken otherwise ("the letter of demand").

(b) On 17 August 2015, the Defendant replied in a letter stating that its associate companies had applied to their bank, United Overseas Bank Ltd ("UOB"), for additional capital line to pay the Defendant's outstanding tax, and that UOB would take between seven to 14 days to arrange the credit line.

(c) On 18 August 2015, the Comptroller responded in an email to [Z] stating that it would withhold taking legal action until 31 August 2015 to give time for UOB to arrange the credit line.

(d) On 1 September 2015 at 8.55am, [Z] sent an email informing the Comptroller that the Defendant was working to satisfy UOB's due diligence department.

(e) On 1 September 2015 at 3.01pm, after a telephone call with [Z] earlier in the morning of the same day, the Comptroller sent [Z] an email asking him to provide the Comptroller with the amount of tax to be paid up in September 2015, as well as the Defendant's management account, by 8 September 2015.

(f) On 9 September 2015, [Z] sent an email to inform the Comptroller that he was ill in bed with a weak heart, but had nonetheless arranged for partial payment in good faith to be made through his relatives.

(g) On 25 September 2015, [Z] emailed the Comptroller, briefly noting down the terms of a proposal for repayment discussed during an earlier telephone call between the parties. Under this proposal, no less than $100,000 was to be repaid by 30 September 2015, no less than

$100,000 was to be repaid by 31 October 2015, and the balance was to be paid upon release of funds from the Defendant's bank.

(h) On 30 September 2015, the Comptroller sent an email to [Z] enquiring whether the $100,000 due to be repaid by the Defendant in September 2015 had in fact been paid, and for the payment details.

(i) On 1 October 2015, [Z] replied by email informing the Comptroller of a delay in the transfer of funds from [Z]'s relatives, and undertook to send a cheque once he was back in his office.

(j) On 30 December 2015, the Comptroller sent an email to reject another payment proposal by the Defendant, and made a counter-proposal for instalment payments from January 2016 to June 2016 with certain conditions. The Comptroller requested a reply from the Defendant accepting or rejecting this counter-proposal by 8 January 2016.

(k) On 29 January 2016, the Defendant sent an email to explain that he had taken ill again. To further resolve issues with the Comptroller, he was required to travel to make funding arrangements.

Therefore, the Comptroller argued that the Defendant had repeatedly attempted to make arrangements for payment of the outstanding tax, but was unable to meet any of the agreed deadlines. At no time did the Defendant dispute liability. Also, none of these letters or emails mentioned the objection letter.

30 According to the Defendant, it consulted its lawyers and accountants, who advised the Defendant to settle some payments to the Comptroller or to create an instalment plan in order to demonstrate good faith. In fact, the

Defendant was advised by the tax officers along the same lines. Therefore, the Defendant made the payments under protest, and did not make any reference to the objection letter in the communications. [Z] also sought to introduce an email to the Comptroller, dated 28 December 2015, specifically marked "Without Prejudice" ("the 28 December 2015 email"). In it, [Z] made a certain payment proposal. [Z] pointed out that the letter of 30 December 2015 from the Comptroller (set out at [29(j)]) was in direct response to the 28 December 2015 email. However, this critical email had been deliberately withheld by the Comptroller. The Defendant submitted that by withholding the 28 December 2015 email, the Comptroller did not provide full and frank disclosure. Given all these circumstances, the Defendant argued that the communications between [Z] and the Comptroller's tax officer were made "without prejudice", and that the Comptroller should not have presented them in its evidence to the court.

31 Although parties did not cite any cases in their submissions on this issue other than *Rush & Tompkins Ltd v Greater London Council* [1988] UKHL 7, I think it would be useful to briefly set out the uncontroversial principles governing "without prejudice" privilege. Generally, communications between parties made on a "without prejudice" basis in the course of settlement negotiations are not admissible. Section 23 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act") is a statutory enactment of the common law principle relating to the admissibility of such communications. Section 23(1) reads:

> In civil cases, no admission is relevant if it is made —
>
> (a) upon an express condition that evidence of it is not to be given; or
>
> (b) upon circumstances from which the court can infer that the parties agreed together that evidence of it should not be given.

32 As the Court of Appeal clarified in *Mariwu Industrial Co (S) Pte Ltd v* Dextra *Asia Co Ltd and another* [2006] 4 SLR 807 ("*Mariwu*") at [24], s 23(1)(*b*) of the Evidence Act covers cases where a statement is not expressly made "without prejudice", but made in the course of negotiations to settle a dispute. Whether a communication is made in the course of negotiations to settle a dispute must be determined by objectively construing it as a whole in the context of the factual circumstances: *Cytec Industries Pte Ltd v APP Chemicals International (Mau) Ltd* [2009] 4 SLR(R) 769 ("*Cytec*") at [16]. The privilege cannot be invoked where no dispute in fact exists, and "without privilege" privilege will not apply if it can be shown that the communication contains an admission of liability such that there is no longer a dispute between the parties: *Mariwu* at [30]; *Sin Lian Heng Construction Pte Ltd v Singapore Telecommunications Ltd* [2007] 2 SLR 433 at [40].

33 Turning to the facts in the case, none of the communications introduced by the Comptroller by way of affidavit, including the email of 30 December 2015, were marked "Without Prejudice". The question then is whether these letters and emails were made in the course of negotiations to settle a dispute. I noted that the communications began with the letter of demand. In response, and in the subsequent correspondence, the Defendant only raised the deadlines for the payments to be made, the Defendant's reasons for its late payments, as well as proposed payment plans under which neither the existence nor the quantum of the debt was disputed. Considering in

particular [Z]'s email dated 25 September 2015 which set out the proposed terms of a repayment plan under which the whole of the Defendant's tax debt would eventually be paid, I was of the view that there was no longer any dispute between the parties.

34 I should also state that I was not prepared to accept [Z]'s allegations against the tax officers, stating that he had been advised to make payments before raising any objections. Indeed, such a position was contrary to the contents of the additional assessments, which informed the Defendant to raise its objections within a timeline. I also found it highly doubtful that [Z]'s lawyers and accountants gave him similar advice. If he had indeed been so advised, and had then made the payments and proposed the repayment plans under protest, I would have imagined that there would at least be some form of caveat in the communications. However, there was none. Thus, I was of the view that the communications were not sent in the course of negotiations to settle a dispute, and that they were not covered by "without prejudice" privilege.

35 I noted that quite properly, the Comptroller had taken care not to refer to [Z]'s 28 December 2015 email, which was the only correspondence expressly marked "Without Prejudice", for the very reason that it was so marked. In my view, there was no basis to allege that there had been no full and frank disclosure by the Comptroller. More importantly, this sole email could not cloak the earlier letters and emails with privilege, and did not change my view on the nature of the communications as discussed immediately above.

36 In fact, I did not think the 28 December 2015 email itself was covered by "without prejudice" privilege, despite the marking. Such a marking does

not conclusively or automatically render a document privileged, and it remains for the court to determine the true nature of the document: *Cytec* at [16]. A thread of open negotiations preceded the 28 December 2015 email. Its contents were no different in nature from the open negotiations in the letters and emails from 31 July 2015 to 1 October 2015. It seemed to me that [Z]'s inclusion of the "Without Prejudice" header in the 28 December 2015 email was an afterthought, so as to seek to protect its contents, and that the real purpose of the communication was not to reach a settlement. In the same vein, I also did not find that the email by the Comptroller on 30 December 2015, which responded to the proposed payment plan in [Z]'s 28 December 2015 email, to be covered by "without prejudice" privilege. Nonetheless, there was really no need for me to take either of these emails into consideration. It seemed to me that the Defendant had already admitted liability for the debt in the preceding correspondence thread up to 1 October 2015.

Conclusion

37 To conclude, it was clear to me that the Defendant was unable to pay its debt to the Comptroller, such that the court may order the winding up of the Defendant under s 254(1)(*e*) of the Companies Act. There was no substantial or *bona fide* dispute for a stay to be granted. As such, I granted the application to wind up the Defendant, and appointed Mr Aw Eng Hai of M/s Foo Kon Tan Advisory Services Pte Ltd as the liquidator of the Defendant. I ordered that costs be taxed, if not agreed or fixed, and paid to the Comptroller out of the Defendant's assets.

Hoo Sheau Peng
Judicial Commissioner

Teh Ee-Von (Infinitus Law Corporation) for the plaintiff;
Mahmood Gaznavi s/o Bashir Muhammad and Tan Wee En Aylwin
(Mahmood Gaznavi & Partners) for the defendant;
Wileeza Binte A Gapar for the Official Receiver.