

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 41

HC/Tax Appeal No 14 of 2017
(HC/Registrar's Appeal No 339 of 2017)

In the Matter of Sections 40, 39A and 74 of the Stamp Duties Act (Cap 312)

And

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

And

In the Matter of Section 18 of the Supreme Court of Judicature Act (Cap 322)

And

In the Matter of Stamp Duties (Non-Licensed Housing Developers)
(Remission of ABSD) Rules 2015

Between

Asia Development Pte Ltd

... Applicant

And

Commissioner of Stamp Duties

... Respondent

JUDGMENT

[Revenue Law] — [Stamp Duties] — [Appeals]

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Asia Development Pte Ltd
v
Commissioner of Stamp Duties

[2018] SGHC 41

High Court — HC/Tax Appeal No 14 of 2017 (HC/Registrar's Appeal No 339 of 2017)

Choo Han Teck J
15 February 2018

27 February 2018

Judgment reserved.

Choo Han Teck J:

1 The appellant, Asia Development Pte Ltd, carries on the business of property development. After exercising its option to purchase a property known as 55 Moonstone Lane (which has a gross floor area of 634.85m²), the appellant paid the buyer's stamp duty of \$140,000 to the respondent, the Commissioner of Stamp Duties ("the Commissioner"), under the Stamp Duties Act (Cap 312, 2006 Rev Ed) ("the Act").

2 The appellant, being a corporate body, was obliged under s 4 of the Act to pay an Additional Buyer's Stamp Duty ("ABSD"). This amount was based on 10% of the purchase price, which, in this case, was \$4,860,000. The ABSD thus amounted to \$486,000.

3 A buyer is entitled to a remission of the ABSD under certain conditions. The appellant qualified to apply for a remission of the ABSD. It did so on 16 August 2012, 10 days after it exercised the option to purchase 55 Moonstone Lane. In its application, the appellant gave an undertaking that it would complete the development and sale of the properties within three years; that is to say, by 5 August 2015.

4 About two weeks later, the appellant submitted its application to the Urban Redevelopment Authority (“URA”) for planning approval. The URA granted provisional approval, on the condition that the appellant purchase a 15.3m² strip of remnant state land adjacent to the appellant’s plot. The appellant agreed by letter dated 14 March 2013, and paid the stamp duty for it.

5 Despite numerous requests, the appellant was not granted an extension of time to complete the development and sale of 55 Moonstone Lane. The appellant could not meet the original deadline. The Commissioner granted an extension of time to 31 October 2015 to complete development, but not the sale of the development; that remained as 5 August 2015. The appellant could not meet either deadline. The respondent thus required the appellant to pay the ABSD, with interest, since the conditions upon which remission of the ABSD was given had not been fulfilled. The appellant paid the ABSD (amounting to \$556,969) for the main property and \$7,151 for the remnant land, and subsequently asked for another extension of time (“the sixth application”) to develop the property and sell the property (the property was eventually sold by 15 August 2016). The appellant’s sixth appeal for an extension of time was rejected.

6 The appellant then requested the respondent to state a case under the Act as to why it declined to extend the deadlines for development and sale of the

property. The Commissioner declined to state a case on the ground that the decision refusing the extension sought was made by the Minister for Finance (“the Minister”), and that appeals under the Act only apply to decisions made by the Commissioner. The appellant thus filed this Originating Summons as an appeal against the Commissioner’s refusal to state a case. Counsel for the appellant, Mr Mohamed Ibrahim, informed the court that the appellant had also filed an application for a judicial review in the event that the appeal here is dismissed on the ground that the proper party to answer for the rejection of the application for extension of time is the Minister. That application for judicial review has been stayed pending the outcome of this Originating Summons.

7 The sole issue before me is: who made the decision to refuse extension of time? If the decision was made by the Commissioner, then the request to state a case would have been properly made to him, and his refusal is thus subject to an appeal under O 55A r 2 of the Rules of Court. It can be seen that the sole question in this application before me is ostensibly a straightforward and simple one. So what has turned it into a complicated one?

8 Some confusion can be attributed to the earlier applications for extension of time. On 11 May 2015, the appellant persuaded Mr Gan Kim Yong, the Member of Parliament for the Chua Chu Kang Group Representation Constituency, to write an appeal to Mrs Josephine Teo, the Senior Minister of State of Finance. The reply to that was sent by letter dated 19 June 2015, by the Commissioner.

9 On 17 August 2015, the appellant persuaded Mr Khaw Boon Wan, the Member of Parliament for the Sembawang Group Representation Constituency, to write to the Commissioner on the appellant’s behalf, asking for his consideration of an extension of time (to January 2017). The Commissioner

wrote to refuse the application. The appellant instructed their then lawyers, Withers Khattarwong to write to the Commissioner by letter dated 9 November 2015. The Commissioner replied, again rejecting the application. Withers Khattarwong wrote on 11 January asking for the Commissioner's reasons for rejecting the application. The Commissioner replied by email on 20 January 2016 giving brief grounds. In all the letters and email written on behalf of the Commissioner, the writer identified himself or herself as 'we', which, in the context, clearly referred to the Commissioner. In the email of 20 January 2016 for example, it was written:

We refer to your letter dated 11 Jan[uary] 2016 requesting to understand how the decision regarding the appeal for Additional Buyer's Stamp Duty ("ABSD") on the subject properties at 55 Moonstone Lane was arrived at...We have duly considered the case and for the reasons stated above, we regret to inform you that we are unable to grant a further extension of time to your client.

It was signed by one Gerlyn Yip Jun Yee, who described herself as 'Senior Tax Officer (Property Tax – Valuation & Stamp Duty), Inland Revenue of Singapore ("IRAS")'.

10 Then the appellant changed lawyers, and instructed Mr Ibrahim. Mr Ibrahim made a further appeal (the sixth appeal) by email dated 22 March 2017 addressed to the Minister of Finance, Mr Heng Swee Keat, and also to Yip Jun Yee of IRAS. This time, Mr Seah Huaikuan of IRAS replied by letter dated 23 May 2017 rejecting the appeal. The salient portion of that letter reads:

We refer to the above matter. Based on the information provided, we have reviewed your client's sixth (6th) appeal, in consultation with the Ministry of Finance, we note that the reasons provided are part and parcel of the usual course of housing development which developers should be reasonably aware and planned for, given the timeframe to develop and sell the development. Developers should take into account the deadlines of the post-remission conditions in the course of development planning.

11 The obligation to pay ABSD arises under s 4 of the Act. But the e-Tax Guide published by IRAS under the title ‘Stamp Duty: Additional Buyer’s Stamp Duty (ABSD) on Purchase of Residential Properties (Fourth Edition) dated 11 June 2012 allows an exemption from that obligation provided the conditions imposed are met. The appellant had, as stated above, written to the Commissioner to be so exempt, and the Commissioner agreed on the two conditions relating to deadlines for the completion of development and sale, which the appellant could not meet, and thus the subject of all the applications for extension of time.

12 None of the facts from the affidavits filed, nor the submissions of counsel, have pointed to the answer to the question: who made the decision rejecting the appellant’s appeals for extension of time? It is not clear what “we have reviewed your client’s sixth (6th) appeal, in consultation with the Ministry of Finance” from the Commissioner’s letter means. Was the decision made by the Minister, or by the Commissioner after consulting the minister?

13 Miss Tan Bee Lian Doreen, the Chief Tax Policy Officer of the Tax Policy Directorate of the Ministry of Finance, swore an affidavit in support of the Commissioner on 26 September 2017 in the present case. The salient parts of that affidavit read:

In view of this legal action against [the Commissioner], the Ministry was requested by the Inland Revenue Authority of Singapore (“IRAS”) to provide an affidavit to confirm who made the decision (“the Decision”) referred to in paragraphs 2 & 3 of IRAS’ letter to Achievers LLC dated 23 May 2017... I confirm that as authorised by the Minister for Finance, I made the Decision on or about 22 May 2017 after taking into account the representations made by Achievers LLC and the views of the Commissioner. IRAS was requested to write to Achievers LLC to convey the Decision to Achievers LLC.

That message was duly conveyed to Mr Mohamed of Achievers LLC.

14 From that affidavit of Doreen Tan, it appears that the decision was made by the Minister, and not the Commissioner. But that may not be the full answer to the legal problem. There is no provision for asking the Minister to state a case regarding his decision. It would have meant that the only recourse was for the appellant to apply for a judicial review of that decision. Were it not for Miss Doreen Tan's affidavit, the chain of correspondence incline towards the Commissioner as the one who made the decision. Indeed, it was a decision communicated to the appellant in the name of the Commissioner.

15 Was the appellant right in requesting the Commissioner to state a case, or ought he to file an application for judicial review instead? It is not clear, and it was not argued before me, whether a judicial review of this case may be heard on its merits or defeated on procedural grounds such as a lack of standing. Further, the Commissioner may be entitled to demur and state that this was an administrative discretion exercised by the Minister and is therefore non-appealable. In the circumstances, the merits of the appellant's case is at risk of being defeated, not because of lack of merit, but on a technicality of procedure and circumstance, not of his doing.

16 Further, an appeal differs from judicial review in terms of purpose, considerations, and process. As such, some matters may be relevant in one, but not the other. There are two legitimate questions of law involved here. The first is: who is empowered to make a decision approving or rejecting the application for an extension of time? There will then be a question of mixed fact and law as to who in fact made the decision in this case. A judicial review may or may not answer these questions. On the other hand, the Commissioner may state a case and give answers to those questions that will be more likely to address the questions posed. There are, of course, ancillary issues such as whether the Minister and the Commissioner are obliged to give grounds for such

applications; which hinges on whether such applications are matters that are within the administrative discretion of the decision maker.

17 I am of the view that the appellant may properly request the Commissioner to state a case. Order 55A r 6 provides that —

In proceedings for the determination of a case stated, or of a question of law referred by way of case stated, the Minister, chairman or president of the tribunal, arbitrator or other person by whom the case was stated shall be entitled to appear and be heard.

In this way, there can be a merger of all issues, and all parties may be heard as to the merits or otherwise of the appellant's appeal. I will thus allow the appeal and grant an order in terms of TA 14 of 2017.

18 I will hear arguments on costs at a later date.

- Sgd -
Choo Han Teck
Judge

Mohamed Ibrahim s/o Mohamed Yakub (Achievers LLC) for
applicant;
Julia Mohamed, Danny Quah Wei Sheng and Quek Hui Ling (Inland
Revenue Authority of Singapore) for respondent.
