

Ho Kwok Tai

(Applicant)

and

Collector of Stamp Revenue

(Respondent)

Court of First Instance

(Constitutional and Administrative Law List No. 49 of 2015)

Deputy High Court Judge Brian Keith

Date of Hearing : 6 January 2016

Date of Judgment : 18 February 2016

Court of Appeal

(Civil Appeal No. 52 of 2016)

Hon Lam VP, Poon JA and Chow J

Date of Hearing : 6 October 2016

Date of Judgment : 31 October 2016

Administrative and constitutional law – judicial review – the Applicant owned more than one residential property on the date of acquisition of a new residential property – whether the Applicant is entitled to a partial refund of ad valorem stamp duty paid for the acquisition of the new residential property after the disposal of the original properties - Stamp Duty Ordinance (Cap.117) section 29DF

On 12 June 2013, the Applicant entered into a provisional agreement for the purchase of a residential property (“Property 3”). On that date, the Applicant owned two other residential properties jointly with his wife (“Property 1 and Property 2”). He subsequently disposed of Property 1 and Property 2 separately.

The Applicant paid AVD at the enhanced (Scale 1) rates for the purchase of Property 3. After the disposal of Property 1 and Property 2, he applied under section 29DF of the Stamp Duty Ordinance (“the Ordinance”) for a partial refund of the AVD paid. His application was rejected by the Collector of Stamp Revenue (“the Collector”) on the ground that he owned more than one residential property on the date of acquisition of Property 3.

The Applicant sought judicial review on the Collector’s refusal to allow the partial refund of AVD. The Court of First Instance decided in favour of the Applicant and quashed the Collector’s decision. The Collector appealed to the Court of Appeal.

Held, allowing the appeal:

- (1) Section 29DF(2)(b) requires a hypothetical scenario to be satisfied, namely, that had the applicant’s original residential property been disposed of prior to the acquisition of the new residential property, the agreement for the purchase of the new residential property would have been chargeable with AVD at the lower (Scale 2) rates.
- (2) The hypothetical scenario cannot be satisfied in the situation where the applicant owned two (or more) residential properties on the date of acquisition of the new residential property and disposed of them within the allowed period. This is because, had one (or another) of his original properties been disposed of prior to the acquisition of the new property, the agreement for the purchase of the new property would still have been chargeable with AVD at Scale 1 rates in view of the fact that he was the owner of some other residential property or properties on the date of the acquisition of the new property.
- (3) The expression “original property” is defined in Section 29DF to mean “another residential property ... of which the person was a beneficial owner on the date of [acquisition of the new property]”. It is clear from the statutory definition that the expression is not intended to refer to more than one property.
- (4) One of the refund requirements as prescribed in section 29DF(3)(c) is that the application for refund has to be made by the applicant not later than 2 months after the date of the conveyance on sale under which the original property is transferred or divested. If the applicant owned two (or more) residential

properties which he disposed of after the date of the acquisition of the new property, there could be more than one date of the conveyance on sale under which the original property was transferred or divested. In such a case, there would be difficulty in determining the precise timeframe for the applicant to make the application for refund. This indicates a clear legislative intent that an applicant who owned more than one residential property on the date of the acquisition of the new property is not entitled to a partial refund of AVD.

In the Court of First Instance

Ms Lorinda Lau and Mr Forest Fong (instructed by Simon C W Yung & Co.) for the Applicant

Mr Eugene Fung SC (instructed by Department of Justice) for the Respondent

In the Court of Appeal

Ms Lorinda Lau and Mr Forest Fong (instructed by Simon C W Yung & Co.) for the Applicant

Mr Eugene Fung SC (instructed by Department of Justice) for the Respondent (Appellant)

Cases referred to in the judgment of the Court of Appeal

China Field Ltd v. Appeal Tribunal (Buildings) (No 2) (2009) 12 HKCFAR 342

Good Mark Industrial Limited v. Commissioner of Inland Revenue [2015] 2 HKLRD 16

HKSAR v. Cheung Kwun Yin (2009) 12 HKCFAR 568

Leung Chun Ying v. Ho Chun Yan Albert (2013) 16 HKCFAR 517

Moulin Global Eyecare Trading Ltd (in liquidation) v. Commissioner of Inland Revenue [2012] 2 HKLRD 911

PCCW-HKT Telephone Ltd v. Telecommunications Authority (2005) 8 HKCFAR 337

Pepper v. Hart [1993] AC 593

T v. Commissioner of Police (2014) 17 HKCFAR 593