

Wong Chak Sin

(Appellant)

and

Collector of Stamp Revenue

(Respondent)

District Court
Stamp Appeal No. 19 of 2014

Hon Andrew Li J

Date of Hearing: 28 December 2015

Date of Judgment: 8 January 2016

Stamp Duty Ordinance (Cap.117) – appeal against assessment of a sale and purchase agreement chargeable with buyer’s stamp duty under Head 1(1C) – whether the acquisition of a residential property by a father as trustee for and on behalf of his minor daughter is exempted from buyer’s stamp duty – section 29CB(2)(a).

On 17 July 2013, the Appellant, as trustee for and on behalf of his minor daughter, entered into a sale and purchase agreement (“the Agreement”) to purchase a residential property in the capacity as purchaser. At that time, the Stamp Duty (Amendment) Bill 2012 (“the Bill”) was under the scrutiny by the Legislative Council. Under the provisions of the Bill, buyer’s stamp duty (“BSD”) would apply to a chargeable agreement for sale of any residential property executed on or after 27 October 2012. The Bill provided, among others, an exemption from BSD for a purchaser who acted in the transaction as a trustee or guardian for a Hong Kong Permanent Resident (“HKPR”) who was a minor (“the Minor Exemption”). However, the Minor Exemption was removed from the Bill at the resumption of the second reading in February 2014. The Stamp Duty (Amendment) Ordinance 2014 (without the Minor Exemption) (“the Amendment Ordinance”) was enacted on 28

February 2014 and came into effect retrospectively from 27 October 2012.

The Respondent rejected the application for exemption from BSD in respect of the Agreement because the Appellant was not acting on his own behalf under the Agreement. The Appellant appealed against the Respondent's decision and his grounds of appeal were that legislation in Hong Kong must conform with principles of legality and requirement of proportionality and must not contravene the Basic Law ("BL").

The Appellant contended that before the removal of the Minor Exemption, the Government had never made any announcement to the public that where a purchaser entered into an agreement as a trustee for another person who was a HKPR and a minor, the agreement would be chargeable to BSD. The eventually enacted Amendment Ordinance without the Minor Exemption had constituted an interference with purchasers' private ownership of their property without any prior announcement, and therefore contravened Art 6 of BL. Further, the Appellant argued that there was no justification on the proportionality principle for the Government to retrospectively impose BSD on those purchasers who were in his position.

Held:

- (1) There is no prohibition against retrospective legislation in Hong Kong. There is often good reason for tax legislation to be enacted with retrospective effect; otherwise there may be a flood of avoidance measures taken by taxpayers between the time of Government announcement and the time of eventual legislative enactment.
- (2) The Appellant's argument that the Amendment Ordinance did not contain the Minor Exemption and therefore had violated Art 6 of BL was completely flawed. It has been clearly established by higher courts in our jurisdiction that Art 105 (and Art 6) of BL have no application to tax legislation. This is because taxation is governed by a separate provision in BL, viz Art 108.
- (3) There is no need for the Amendment Ordinance to satisfy any test of "proportionality" as alleged by the Appellant. Even assuming there is a requirement of proportionality, the Appellant has entirely failed to show why it is not satisfied.

- (4) A bill which is published by the Government may or may not be ultimately enacted in the same form. Every bill must go through the normal legislative process, and there is always the possibility that it may be amended before being finally enacted.

Appeal dismissed.

Mr Ernest Koo leading Mr Stony Chan (instructed by Simon C.W. Yung & Co.) for the appellant

Mr Wilson Leung (instructed by the Department of Justice) for the respondent

Cases referred to in the judgment:

R (on the application of St Matthews (West) Ltd & ors) v. HM Treasury [2014] STC 2350

James v. IRC [1977] 1 WLR 835

Fine Tower Associates Ltd v. Town Planning Board [2008] 1 HKLRD 553 (CA)

Weson Investment Ltd v. CIR [2007] 2 HKLRD 567 (CA)