Privy Council Appeal No. 42 of 1992

Nina T.H. Wang *Appellant*

v.

The Commissioner of Inland Revenue *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH JULY 1994

Present at the hearing:-

LORD TEMPLEMAN
LORD OLIVER OF AYLMERTON
LORD SLYNN OF HADLEY
LORD WOOLF
LORD LLOYD OF BERWICK

*[Delivered by **Lord Slynn of Hadley**]*

This appeal by Mrs. Nina Wang raises the question as to whether the Court of Appeal of Hong Kong were right when on 19th December 1991 they refused to quash two determinations made by the Commissioner of Inland Revenue confirming two assessments for profits tax for the years 1980/81 and 1981/82. The appellant says that they were wrong so to refuse and that Barnett J. at first instance was right when he quashed those determinations.

The appellant and her husband at all material times controlled the Chinachem Group of Companies included amongst which was World Realty Limited ("WRL"). WRL became the owner of Land Exchange Entitlements, known as "Letters B" which give a preferential right to the acquisition of land but which can also be redeemed or sold. On 9th February 1984 WRL made a profits tax return for the year 1982/1983 in which it claimed as an allowable deduction from profits tax $86 million in respect of the diminution in value of these Letters B.

Not surprisingly because of the amount of money involved the Commissioner looked into this claim. He asked by letter of 26th March 1984 who were the vendors of these Letters B and he was told by the appellant's accountants ("the accountants"), by letter of 23rd October 1984, that

they had been bought from Braulian Investment Limited S.A. ("Braulian") a Panamanian company. The Commissioner ascertained from the District Land Offices in Hong Kong that all the Letters B had been registered in the name of the appellant as leaseholder before they were assigned to WRL and that Braulian was not mentioned in the Registers. It was the appellant who had signed the deeds of assignment to WRL and who had acknowledged receipt of the consideration from WRL, two cheques totalling $104 million being payable to the appellant and one cheque for $62 million being payable to Chinachem Realty Limited.

By letter of 5th March 1986 the accountants told the Commissioner that:-

> "The said sale to our client [WRL] was carried out by Mrs. Nina T.H. Wang for and on behalf of Braulian ... pursuant to Declarations of Trust, copies of which are enclosed."

The sole signature on the Declarations of Trust was that of the appellant and the accountants told the Commissioner that the purchase and sale of the Letters B had been negotiated by the appellant, as the "representative" of WRL, in Taiwan with a Mr. Lam Yin Ching.

By letter of 17th June 1986 the accountants told the Commissioner that the appellant's appointment as trustee for Braulian had been oral, that the monies for the purchase of the Letters B by Braulian had been provided "by way of loan to Mrs. Nina Wang (representing Braulian) by companies within the Chinachem Group" and that the monies paid to the appellant had been paid "to reduce a prior indebtedness (incurred prior to 1st January, 1981) between Lam Yin Ching and Mrs. Wang".

It is the appellant's status in the relevant transactions which has given rise to the problem in this case. Was she acting in her personal capacity, or as an agent for Braulian, or as a trustee for Braulian?

The Commissioner had to start somewhere and his first choice was that of "agent" for Braulian. His first letter of 10th September 1986 addressed to the appellant as "Agent for Braulian" was returned on the footing that she was not the agent and had no authority to accept service. The transmission of the profits assessment form "in the matter of your principal Braulian" met the same fate.

By letter of 4th December 1986 the accountants told the Revenue that:-

> "It has now become clear to us that Mrs. Wang only acted as trustee, on behalf of Braulian, in allowing the Letters B to be registered in her name. We are informed that when the purchase of the Letters B had been concluded, Lam Yin Ching informed Mrs. Wang that as the Letters B had to be registered, he did not want the Letters B to be registered in his name ...

neither did he want the Letters B to be registered in the name of Braulian which was and is a non-resident company. He requested Mrs. Wang to allow the Letters B to be registered in her name. Because of their long standing acquaintance, friendship and business dealings, Mrs. Wang agreed to do so and, for record purposes, Mrs. Wang executed the Declaration of Trust acknowledging that she held the Letters B on trust for Braulian.

The indebtedness of Lam Yin Ching had, by January 1981, reached an excess of $190 million and had led to concern by Mrs. Wang about the size of the indebtedness and security of the same. It was primarily because of this concern shown by Mrs. Wang and the requests made to Lam Yin Ching to reduce it, that Lam Yin Ching suggested that the Letters B previously bought by Braulian and registered in the name of Mrs. Wang, be transferred to Mrs. Wang in order to reduce the said indebtedness. Lam Yin Ching suggested that the most expedient means of achieving this was to vary the terms of the Declaration of Trust thus allowing Mrs. Wang to hold the Letters B as both legal and beneficial owner and which would also do away with the need for a further assignment as between Braulian and Mrs. Wang. It was agreed between Lam Yin Ching and Mrs. Wang that the amount of the indebtedness to be reduced would be determined by the market price of the Letters B as at the date of the transfer.. Our instructions are that at the date of the transfer the market price of the Letters B was approximately $168 million and accordingly it was this price that was fixed for the value of the Letters B and the indebtedness of Lam Yin Ching was accordingly reduced by this amount.

As Mrs. Wang had no personal need for the Letters B, she sold the same to The World Realty Ltd. for precisely the same price i.e. $168 million."

By notices of assessment dated 25th November 1986 the appellant "as agent for" Braulian was assessed to profits tax for the year 1980/1981 and for the year 1981/1982. On 8th December 1986 the accountants gave notice of objection on the ground that the appellant was not an agent and by further letters of the same date it was said that she was not herself carrying on trade in respect of the Letters B and was not an agent. The Commissioner on 17th December 1986 replied that she was chargeable as a trustee.

On 21st January 1987 an assessment for 1980/1981 and on 16th February 1987 an assessment for 1981/1982 were issued to the appellant "trading as Nina T.H. Wang". On 3rd February 1987 assessments in respect of the same two years were issued to the appellant "as Trustee for" Braulian. On 10th February 1987 the accountants gave

notice of objection against the assessments "as Trustee for Braulian" on the grounds that the assessment was excessive and not in accordance with the actual result shown in the profits tax return submitted on 21st January 1987. A similar objection was sent dated 18th February 1987 in respect of the assessment on the appellant in her personal capacity for the year 1981/1982.

On 22nd September 1987 the Inland Revenue Department wrote to the appellant "as Trustee" for Braulian with a draft statement of facts to be placed before the Commissioner so that he could determine the objections.

By letter dated 20th May 1988 the Deputy Commissioner sent his notice of determination confirming the assessments for the two years on the appellant "as Trustee for Braulian". In paragraph 17 of the Determination he said:-

> "(17) In order to protect the revenue, the Assessor had raised alternative assessments for the years of assessment 1980/81 and 1981/82 on the Taxpayer, either in her personal capacity or in the capacity of agent for Braulian, in respect of the same profits from the disposal of the Letters B. Valid objections had been lodged and the tax demanded under these alternative assessments had been stood over in full."

He accepted her claim that she was a trustee for Braulian.

On 17th June 1988 the appellant's solicitors gave notice of appeal against that determination on the basis that the appellant did not trade in Letters B and that the Deputy Commissioner had "failed to adequately take into account or at all that Mrs. Wang did not deal and/or trade with Letters B as trustee for Braulian". On 5th July 1988 they said that they were advised that the appeal "involved complicated issues on law and on facts".

By letter dated 6th June 1990 the Clerk to the Board of Review gave notice that the appeal would be heard on 26th-28th November 1990. The appellant's solicitors on 6th November 1990 sent a draft agreed Statement of Facts to be used for the purposes of the appeal.

On 24th October 1990 the Deputy Commissioner sent his determination of the objection by the appellant as agent for Braulian dated 8th December 1986. He confirmed the assessment and in paragraph 15 of the determination he made the like reservation *mutatis mutandis* as that made in paragraph (17) quoted above. Amongst his reasons he added:-

> "(6) One final word is that the sole reason for issuing determinations on all alternative assessments mentioned in Fact (15) is to avoid duplication of efforts for all parties concerned and to enable the Board of Review to consider all assessments at one time."

A similar determination (with a comparable reservation and explanation) was issued on the same date in respect of the appellant's objection in a personal capacity.

In a letter of the same date Senior Crown Counsel on behalf of the Commissioner said that if there was to be an appeal against the two further determinations it should be heard by the Board of Review at the same time as the trustee determination.

On 19th November 1990 the appellant's solicitors asked for an extension of time to lodge grounds of appeal but on the same date they said that they saw no reason for adjourning the appeal of the appellant "as trustee for Braulian".

The grounds of appeal in respect of the two determinations of 24th October 1990 were sent on 23rd November 1990, but on 26th November, on the application of the Commissioner, the Board of Review decided that the hearing should be adjourned so that all three assessments could be considered at the same hearing.

On 28th November 1990 an application was made for leave to move for an order of *certiorari* to quash the two determinations of 24th October 1990.

One Luk Nai-man of the Inland Revenue Department deposed that in his view on the hearing of the objection to the determination of the assessment as Trustee, the Board would have to decide which of the three bases was correct. He continued:-

> "I therefore caused the two alternative Determinations to be issued, in order that all 3 appeals may be heard together so as to avoid any legal argument as to the jurisdiction of the Board and in order to save time and costs. It had never been considered that the other two assessments should be abandoned."

And:-

> "It is important to note that these alternative assessments arose out of one set of Letters B transactions. By their very nature, if one set of these alternative assessments was found to be correct, the other two sets would have to be cancelled by the Commissioner."

Barnett J. held that the Commissioner did not "confirm, reduce, increase or annul" the two assessments complained of "within a reasonable time", within the meaning of section 64(2) of the Inland Revenue Ordinance (Cap. 112) so that, since this was a mandatory requirement, he lacked jurisdiction to make the two determinations.

In the Court of Appeal Fuad V.-P. said that when turning to the construction of these words:-

"Everything will, of course, depend on the true construction of the statute as a whole, but in my respectful view, a court should be slow to impute to the legislature an intention that the jurisdiction it has conferred on a person or body to perform a duty or exercise a power is necessarily taken away if unreasonable delay occurs.

It must, I think, be observed that s.64(2) does not contain words to the effect: 'If the Commissioner fails to make his determination within a reasonable time [or within (say) 3 months of receiving the objection] the objection shall be deemed to have been upheld.' This is not surprising. If the reasonable time formula were used, no taxpayer would know where he stood and in the event of a dispute between the Commissioner and the taxpayer, ultimately only a court could decide what was a reasonable time. Nor is it surprising that the legislature, in this particular provision (contrasted with so many others in the Ordinance) did not fix a definite period within which the Commissioner must act, for so much would depend on the resources at his disposal, the number of objections that fell for determination at any given time, the other work that needed to be done, and the co-operation of the taxpayer."

He considered that the appellant could in any event have applied for *mandamus* and that even if the two determinations were quashed the two assessments would remain outstanding and would have to be dealt with. It was, therefore, fruitless to quash them. He concluded:-

"It seems to me that the procedure adopted, and the stand taken, by the revenue authorities was perfectly reasonable and certainly lawful, and the Board, as revealed by the record of their proceedings on 26th November 1990, seem to have anticipated no difficulties in performing their statutory duties. Three alternative assessments were made. There were three objections under s.64(1) followed by three determinations under s.64(2) but for which the assessments would not have reached the Board. Only one lot of tax (for the same two tax years) was being claimed. The issue between the taxpayer and the revenue before the Board would be whether any one of the assessments was sustainable. It is clear from a proper reading of the statutory scheme (and this was common ground) that it is the assessment which is the subject of an appeal to the Board, as it stands after the Commissioner's determination; the appeal is not against the determination as such. It would be quite wrong, in my view, to regard the first determination as creating, as it were, some form of estoppel against the Commissioner in relation to the second and third determinations."

The Inland Revenue Ordinance (Cap. 112) makes provision for the charging of profits tax, for the assessment and determination of liability for that tax and for an appeal. It is, however, unnecessary to set out the provisions in detail other than section 64 which is the section in issue in this appeal.

That section provides in sub-section (1) for a person to object to the assessment, stating precisely the grounds of objection within 1 month after the date of the notice of assessment. By sub-section (2):-

> "On receipt of a valid notice of objection under sub-section (1) the Commissioner shall consider the same and within a reasonable time may confirm, reduce, increase or annul the assessment objected to".

For the discharge of his function the Commissioner may call for documents and oral evidence. Unless the Commissioner agrees with the person assessed the amount for which he is liable to be assessed, the Commissioner (by sub-section (4)):-

> "shall, within 1 month after his determination of the objection, transmit in writing to the person objecting to the assessment his determination together with the reasons therefor and a statement of the facts upon which the determination was arrived at, and such person may appeal therefrom to the Board of Review as provided in section 66."

The appellant on this appeal contends, first, that the Commissioner in this case failed to respond "within a reasonable time" to the appellant's objections to the assessment on her (a) "as agent" and (b) in a personal capacity and, second, that, if that is right, then the two purported determinations should be quashed since because of the delay the Commissioner had no jurisdiction to deal with them.

As to the first contention, the appellant points to the fact that whereas the time between objection and determination of the "trustee" assessment was 15 months (which she says in any event is borderline) the time taken for the determination as agent was 3 years and $10\frac{1}{2}$ months and the time taken for the determination in a personal capacity was 3 years 8 months, in each case from the date of her objections. She points to the Inland Revenue departmental practice which specifies a target period of 4 months and contends that she was entitled to believe and did believe that the assessments as agent and in a personal capacity had been abandoned.

Their Lordships accept that these periods baldly stated are long. What is a reasonable time, however, must be considered as a question of fact in the light of all the circumstances. Here it is plain that the three assessments all related to the same Land Exchange

Entitlements and the assessments were all made within a relatively short period between 25th November 1986 and 3rd February 1987. The Revenue proceeded on the basis of what the appellant herself was saying - that her sole capacity was that of trustee for Braulian and that as such she was not liable for the amount assessed. At that stage it was, in their Lordships' view, perfectly reasonable to leave the other two objections in abeyance and that was what the determination of 20th May 1988, as "trustee for Braulian", made clear. The alternative assessments had been made to protect the Revenue but (implicitly) because the Revenue were proceeding on the trustee application "the tax demanded under these alternative assessments had been stood over in full".

The appellant lays great stress on the tense used viz. the assessments "had" been "raised", valid objections "had been lodged", the alternative assessments "had been stood over in full". Their Lordships do not accept this argument based on the tense - i.e. that from the tense used the appellant was entitled to believe that all of the transactions on the later two determinations were in the past, over and done with, abandoned. The only reasonable interpretation of paragraph (17) of the Determination of 20th May 1988 was that the position in regard to these two assessments was being kept open.

Mr. Luk has made it clear in his affirmation that it was only when the hearing of the objection to the trustee assessment got nearer that the Revenue appreciated that it made more sense to have all the matters heard together to avoid the legal dispute as to jurisdiction. It would by then have been clear that the objections to all three assessments (and the consequent determinations) would be persisted in.

There were undoubtedly delays here caused to some extent by both sides (the trial judge referred to "the somewhat obscure way in which the applicant tried to explain the background to the transactions" a phrase which Nazareth J.A. in the Court of Appeal said was "clearly more than generous") even if the delays were principally at the hands of the Revenue. Their Lordships do not however consider that in all the circumstances of this case the Commissioner failed to deal with the two later objections "within a reasonable time", not least since no challenge is made to the 15 months period taken to deal with the first objection.

It is interesting to note in the case of *Thornton v. Repatriation Commission* in the Federal Court of Australia (1981) 35 A.L.R. 485 Fisher J., in considering the reasonableness of delay, said at page 492 - "In the first instance it is, on the evidence, a delay for a considered reason and not in consequence of neglect, oversight or perversity". That seems to their Lordships to be the position in this case.

If their Lordships had concluded that the Commissioner had not acted "within a reasonable time" the question would have arisen as to whether, after the expiry of a reasonable time, the Commissioner lacked jurisdiction to make any determination. This is the principal argument dealt with in the Court of Appeal.

The appellant relies on the word "shall" in section 64(2) to show that a mandatory duty is imposed on the Commissioner, as Barnett J. found. Fuad V.-P. accepted in the Court of Appeal that "mandatory language is used". The appellant argues from this that the words are not merely "directory"; if they are mandatory then a failure to comply means that the two purported determinations are automatically null and void. On the other hand if they are directory then there has been in this case no substantial compliance by the Commissioner with his obligation to act within a reasonable time and in any event the appellant has suffered "substantial and irreversible prejudice". The appellant does not on the other hand contend that there was anything wrong in principle with the Commissioner raising three assessments in the alternative. The vice is in the failure to comply, in the case of two of them, with the mandatory obligation to act within a reasonable time.

The distinction between "mandatory" and "directory" or between "imperative" and "mandatory" the latter in that context being the same as "directory" has a long history and has led to much litigation and on occasion to somewhat refined distinctions.

The starting point, however, upon which both appellant and respondent rely is the well-known case of *Howard v. Bodington* (1877) 2 P.D. 203. Under the Public Worship Regulation Act 1874 a Bishop to whom a representation was made of an illegal act by an incumbent, unless he thought that no proceeding should be taken, "shall within twenty-one days after receiving the representation transmit a copy thereof to the person complained of, and shall then transmit the representation to the Archbishop, who shall forthwith require the judge to hear the matter of the representation". In that case the Bishop did not send a copy of the representation; the Archbishop did so but only some seven weeks after the Bishop had received the representation. The Archbishop required the judge to hear the matter. The Court of Arches held that the proceedings were void and must be dismissed since the time within which the representation should be sent to the party complained of was "imperative", and had not been complied with. Lord Penzance said at pages 210-211:-

> "Well, then, secondly, it was contended that, although it is a positive provision of the Act that a copy of the representation shall be transmitted to the respondent within twenty-one days from the time the bishop received it, yet that that provision is

> only what has been called in the law courts 'directory'. Now the distinction between matters that are directory and matters that are imperative is well known to us all in the common language of the courts at Westminster. I am not sure that it is the most fortunate language that could have been adopted to express the idea that it is intended to convey; but still that is the recognised language, and I propose to adhere to it. The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the Courts have decided that if it is not done the whole thing fails, and the proceedings that follow upon it are all void. On the other hand, when the Courts hold a provision to be mandatory or directory, they say that, although such provision may not have been complied with, the subsequent proceedings do not fail. Still, whatever the language, the idea is a perfectly distinct one. There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the Court to be of that material importance to the subject-matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the Court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end. Now the question is, to which category does the provision in question in this case belong?
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> ...
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> I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory."

Illustrations of the application of this principle are to be found in both directions. Thus on the one hand in *Cullimore v. Lyme Regis Corporation* [1962] 1 Q.B. 718 a borough council, as coastal protection authority, prepared a works scheme for carrying out coast protection under section 6 of the Coast Protection Act 1949. The scheme provided pursuant to section 7(1) and 7(4)(b) of the Act that "The Council will within six months after the completion of the works determine the interest in the contributory land by reference to which coast protection charges are to be levied" and the amount of the charge. The council did not determine these matters until almost 2 years after the completion of the works. Edmund-Davies J. held that the

Council was exercising statutory power (for which they had fixed the period themselves) and that since they did not act in time "I cannot accordingly regard their purported action as having any validity at all" (page 728). In the alternative he said:-

> "It is undisputed in law that if these be mere duties and if, accordingly, the provisions as to their exercise are to be regarded as directory only, it is sufficient if there has been substantial compliance with those directions."

He underlined however that the issue turned on the construction of the particular Act in question and this was stressed in *Grunwick Processing Laboratories Limited v. ACAS* [1978] A.C. 655 by Lord Salmon at page 698:-

> "The result of this appeal turns solely upon whether that part of section 14(1) which I have cited is mandatory or directory. Prima facie the word 'shall' suggests that it is mandatory but that word has often been rightly construed as being directory. Everything turns upon the context in which it is used - the subject matter, the purpose and effect of the section in which it appears."

The respondent points on the other hand to *R. v. Inspector of Taxes, ex parte Clarke* [1974] Q.B. 220 and *Hughes (Inspector of Taxes) v. Viner* [1985] 3 All E.R. 40 where procedural provisions in the United Kingdom Tax Statutes were held to be merely directory.

In *London & Clydeside Estates Limited v. Aberdeen District Council* [1980] 1 W.L.R. 182 Lord Hailsham of St. Marylebone L.C., having stressed that statutory requirements can be of many different kinds with different degrees of obligation and different results flowing from a failure to comply with the obligation, concluded (at page 190):-

> "In such cases, though language like 'mandatory', 'directory', 'void', 'voidable', 'nullity' and so forth may be helpful in argument, it may be misleading in effect if relied on to show that the courts, in deciding the consequences of a defect in the exercise of power, are necessarily bound to fit the facts of a particular case and a developing chain of events into rigid legal categories or to stretch or cramp them on a bed of Procrustes invented by lawyers for the purposes of convenient exposition. As I have said, the case does not really arise here, since we are in the presence of total non-compliance with a requirement which I have held to be mandatory. Nevertheless I do not wish to be understood in the field of administrative law and in the domain where the courts apply a supervisory jurisdiction over the acts of subordinate authority purporting to exercise statutory powers, to encourage the use of rigid legal

> classifications. The jurisdiction is inherently discretionary and the court is frequently in the presence of differences of degree which merge almost imperceptibly into differences of kind."

Having reviewed the authorities cited by the appellant in this appeal, not all of which are referred to in this opinion, their Lordships consider that when a question like the present one arises - an alleged failure to comply with a time provision - it is simpler and better to avoid these two words "mandatory" and "directory" and to ask two questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?

In the present case the legislature did intend that the Commissioner should make his determination within a reasonable time. At the same time it is no less plain that the legislation imposed on the Inland Revenue authorities, including the Commissioner, the duty of assessing and collecting profits tax from "every person carrying on a trade, profession or business in Hong Kong" (section 14). If the Commissioner failed to act within a reasonable time he could be compelled to act by an order of *mandamus*. It does not follow that his jurisdiction to make a determination disappears the moment a reasonable time has elapsed. If the court establishes the time by which a reasonable time is to be taken as having expired, which will depend on all the circumstances, including factors affecting not only the taxpayer but also the Inland Revenue, it would be surprising if the result was that the Commissioner had jurisdiction to make the determination just before but not just after that time. Their Lordships do not consider that that is the effect of a failure to comply with the obligation to act within a reasonable time in the present legislation. Such a result would not only deprive the Government of revenue, it would also be unfair to other taxpayers who need to shoulder the burden of Government expenditure; the alternative result (that the Commissioner continues to have jurisdiction) does not necessarily involve any real prejudice for the taxpayer in question by reason of the delay.

Their Lordships accordingly consider that in the context of this legislation a failure to act within a reasonable time (had it occurred) would not have deprived the Commissioner of jurisdiction or made any determination by him null and void.

Their Lordships will accordingly humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs before their Lordships' Board.