[2010] UKPC 11
Privy Council Appeal No 0050 of 2009

JUDGMENT

Société Royal Gardens et Compagnie & 138 Others

v

The Mauritius Revenue Authority

From the Supreme Court of Mauritius

before

Lord Phillips
Lord Rodger
Lord Walker
Lord Brown
Lord Clarke

JUDGMENT DELIVERED BY
Lord Brown
ON

29 June 2010

Heard on 29 April 2010

Appellant
Mr Ivan Collendavelloo,
S.C.
Michael King Fat

(Instructed by MA Law
LLP)

Respondent
Philip Baker QC
Rajeshsharma Ramloll
Marika Lemos

(Instructed by Royds
Solicitors LLP)

LORD BROWN :

1. This is a most unusual case. In a nutshell the facts are these. The appellant taxpayers, consequent on certain transactions and arrangements, claimed various capital allowances whereby they showed tax losses for the year 1994/1995. The Commissioner of Income Tax (since replaced by the respondent Revenue Authority) thought the purpose of these arrangements to have been tax avoidance and by letter dated 24 June 1999 determined accordingly that they were void pursuant to section 44 of the Income Tax Act 1974 (the Commissioner's first determination). By the same letter the Commissioner also adjusted the losses in any event from Rs196,111,885 to Rs111,361,885 pursuant to sections 28A and 32A of the 1974 Act (the Commissioner's second determination). The taxpayers appealed against both these determinations to the Tax Appeal Tribunal (since replaced by the Assessment Review Committee) which on 20 December 2002 upheld their appeal with regard to the first determination. By letter dated 24 January 2003 the Commissioner maintained his second determination and stated that the appellants' tax liability would be adjusted accordingly. The appellants sought judicial review of that decision on the ground that it contravened the final and binding effect of the Tribunal's unappealed determination of 20 December 2002. By judgment dated 30 April 2008 the Supreme Court (Matadeen SPJ and Balgobin J) dismissed that application, holding that the Tribunal's determination was binding on the parties only to the extent that there had been a determination on the issue in question and that there had been no such determination on the second issue.

2. The taxpayers now appeal to the Board by leave of the Supreme Court granted on 15 January 2009. It may at once be noted that before their Lordships the appellants speedily disavowed any contention that the second issue had in fact been determined by the Tribunal so as to be *chose jugée* (their essential argument before the Supreme Court). Rather they contended that at some stage before the Tribunal's determination (which followed a series of written and, finally, oral submissions) the Commissioner was to be regarded as having abandoned his second determination so as to become estopped from subsequently reasserting it after the Tribunal failed to deal with it. The respondent Revenue Authority for its part submitted to the contrary that it was rather the taxpayers who should be regarded as having abandoned their appeal against the Commissioner's second determination and, since it had been for them to make good their appeal, the second determination was accordingly conclusive against them.

3. With that brief introduction, their Lordships must now return to the facts albeit with no need to recount these in any great detail. There were in all 139 appellants before the Tribunal although, as the Board will later explain, the appeals of the last four came to be adjourned. The first appellant was constituted as a limited partnership

on 20 January 1994, with the second to ninth appellants (the third to ninth also being limited partnerships) as associates. The tenth to one hundred and thirty-ninth appellants were the associates of the third to ninth appellants. Thus the first appellant was largely a partnership of partnerships.

4. On 27 April 1994 the first appellant purchased from Blue Sun (Mauritius) Ltd (in compulsory winding up) the leasehold interest in, and uncompleted buildings and structures of, a proposed hotel (The Mariya Hotel) for the sum of Rs110m. By 30 June 1994 the first appellants had spent a further Rs150,123,363 towards the completion of the hotel (which was finally completed in December 1994) and for the purchase of plant, equipment, furniture and fittings.

5. On 3 August 1994 the third to ninth appellants exchanged their interests in the first appellant for shares in the second appellant so that the first appellant became a wholly-owned subsidiary of the second appellant.

6. In its income tax return for the year of assessment 1994/1995 the first appellant claimed investment and initial allowances of the total capital expenditure incurred, Rs260,123,363, its tax computation for that year showing in the result a tax loss of Rs196,111,885.

7. Since partnerships in Mauritius are transparent for tax purposes, this loss was apportioned to the remaining appellants and the individual and corporate appellants duly made claims in their tax returns to set off their respective shares in this loss against their taxable incomes.

8. As already stated, the Commissioner decided that through these various transactions the appellants had entered into an arrangement one of the purposes of which was the avoidance of tax whereby it was considered void pursuant to the provisions of section 44 of the 1974 Act. The Commissioner concluded that the proper person to whom the relevant losses for the year were attributable was the second appellant so that the losses showing in the returns of the other appellants would be disregarded and their chargeable income recomputed and made subject to notices of assessment. The letter then concluded:

> "You will also note that the losses as at 30 June 1994 transferrable from Ste Royal Gardens to Royal Gardens Ltd have been adjusted to Rs111,361,885 in accordance with sections 28A and 32A of the Income Tax Act 1974 ie initial and investment allowances claimed on the purchase consideration of the leasehold rights and uncompleted buildings and structures have been disallowed. Moreover, the 'ski lane' has not been taken into

consideration for computing capital allowances as it does not qualify for such allowances."

9. Notices of assessment followed dated 28 June 1999. On 12 July 1999 the appellants objected to these on the ground that they wrongly disregarded the claimed losses. On 11 October 1999 the Commissioner rejected these objections, maintained his assessments and reminded the appellants of their right to appeal to the Tribunal under section 4 of the Tax Appeal Tribunal Act 1984.

10. The appellants duly did appeal and there followed a succession of written cases, written submissions and, on various dates between 21 March 2000 and 30 May 2002, oral submissions by the respective parties. The great majority of these submissions plainly went to the first issue – as to whether the arrangements were designed essentially or at least partly for tax avoidance – the issue on which the appellants succeeded. But some at least went to the second issue, the extent of any claimable allowances. Their Lordships think it unnecessary to refer to the detailed cross-fire of submissions in order to demonstrate this. Rather it seems to the Board quite apparent from passages in the Tribunal's (40 page) determination itself. For example, on the very first page of the determination, having noted that "[t]he Commissioner felt that the main purpose or one of the purposes behind that course of conduct was tax avoidance and should therefore be considered null and void", the Tribunal continued:

"The Commissioner further felt that, consequently:

(i) The losses for assessment year 1994/95 are attributable to Royal Gardens Ltd and not Appellants and consequently, the losses shown in the return of the Société Royal Gardens have to be disregarded and the share of losses of the associates have to be considered to be nil.

(ii) The capital expenditure allowance for hotel construction (section 28A) and the investment allowance (section 32A) on the purchase consideration of the leasehold rights and uncompleted buildings and structures claimed by Société Royal Gardens should also be disallowed."

The use of the word "consequently" at the start of that quotation is somewhat puzzling: paragraph (ii) necessarily assumed the failure of the Commissioner's case under paragraph (i). But the reference to paragraph (ii) clearly showed that issue (ii) was still in play.

11. Later in their determination the Tribunal set out extracts from the competing submissions including the following from the appellants' written submissions:

> "Contention of the respondent
>
> . . .
>
> The initial allowance of 50% and the investment allowance of 25% should not be allowed on the purchase consideration of the leasehold rights and the costs of the uncompleted buildings and structures.
>
> . . .
>
> In answer thereto, it is submitted that
>
> . . .
>
> (ii) Capital expenditure was incurred by Société Royal Gardens et Compagnie for the acquisition of physical assets (ie the uncompleted building of what was to have become Mariya Hotel) and completion of the hotel building. As at 30 June 1994 there was no income produced.
>
> (iii) The Société is, according to the provisions of the Income Tax Act 1974 (ie sections 2, 9(2), 9(4), 28A, 32A(1) and 28A(8), duly entitled to investment and initial allowances on the whole cost of the construction of the hotel building (ie the sum of Rs110m incurred for the acquisition of the uncompleted hotel building and the completion costs)."

12. It is equally apparent to the Board, however, that the Tribunal never decided this second issue. Their determination ends as follows:

> "Finally we wish to conclude by perhaps stating the obvious: we accept the evidence led by appellants as true and we are satisfied that they have discharged the burden of proving that the transactions, considered by the Commissioner as an anti-avoidance scheme under section 44, were genuine commercial

transactions and that the tax benefits were only incidental and not the result of any scheme. . . .

Last but not least the respondent in spite of the efforts, has not been able to establish that the documents were a 'mere façade or cloak' for some other transaction and therefore a sham.

We therefore determine all the above appeals in favour of appellants.

Appeal allowed."

13. Following the Tribunal's determination of 20 December 2002, the Commissioner, as already stated, by letter dated 24 January 2003 maintained his decision on the second issue and stated that the appellants' tax liability would be adjusted accordingly. It was that decision which the appellants unsuccessfully challenged by a judicial review application to the Supreme Court, whose decision dated 30 April 2008 is in turn now under appeal to the Board.

14. The Supreme Court correctly recognised that the Tribunal had not decided the second issue and that the appellants could not, therefore, "invoke before [them] the principle of '*res judicata*' or '*autorité de la chose jugeé*'." Their no less critical but altogether more doubtful conclusion, however, was that the appellants had in effect abandoned their case on the second issue. That conclusion emerges clearly from the following passages in the Supreme Court's judgment:

(i) "The Tribunal found that it could do no better than reproduce verbatim some of those documents . . . which . . . set out the case for the applicants but not before making this statement: 'It is worth mentioning that the other issues relating to the relevant Income Tax Act, time barred assessments, ski land, etc, have neither been pressed nor submitted upon by Appellants. We are therefore relieved from determining these issues'."

(ii) "[T]he issue of disallowance of capital allowances was neither pressed nor decided upon by the Tribunal."

(iii) "No evidence was adduced by the only witness for the applicants before the Tribunal on the issue of capital allowances; nor was that issue of capital allowances pressed before the

> Tribunal. And accordingly there was no finding from the Tribunal on that issue."

15. The suggestion in the third of those passages that no evidence had been adduced by the appellants on the issue of capital allowances is a surprising one. Mr Masson, himself an appellant, the appellants' only witness (indeed the only witness before the Tribunal since the respondent called none) gave all the evidence necessary for a decision on the second issue. That issue fell to be decided on the undisputed facts as a pure question of law, in particular by reference to sections 28A and 32A of the 1974 Act, so far as material as follows:

> "28A Allowances for Hotels
>
> . . . (3) In computing the capital expenditure incurred on the erection of any building, no account shall be taken of expenditure incurred on the acquisition of, or of rights in or over, any land, . . ."
>
> "32A Investment Allowances
>
> . . .
>
> (2) No deduction shall be allowed under subsection (1) [a deduction by way of investment allowance of 25% of the capital expenditure incurred on the acquisition of new machinery and plant] in respect of expenditure incurred in the acquisition of any machinery or plant which is - (a) used or second-hand at the date of its acquisition; . . . "

Was the Supreme Court right to have understood the Tribunal to be saying, in the extract from their determination quoted in the first of the above three passages, that the issue of capital allowances had "neither been pressed nor submitted upon by Appellants"? This is the critical question.

16. Although their Lordships can readily see how the Supreme Court came to their understanding – indeed the very fact that the Tribunal never did determine the issue of capital allowances may tend to suggest that they thought the appellants had abandoned their case upon it – we are not in the end persuaded that this was correct. It is apparent from careful examination of the various written and oral submissions that the issue relating to capital allowances was not an issue "relating to the relevant Income

Tax Act" (that concerned rather a point raised by the appellants as to *which* Income Tax Act should apply), nor an issue as to whether the assessments were time-barred (another point raised by the appellants), nor, obviously, as to the ski lane (the construction of which, as the appellants' written submissions expressly accepted, had not even been started in the relevant year). Unless, therefore, this important second issue in the appeal was encompassed within the word "etc", it was not to be regarded as an issue "neither ... pressed nor submitted upon" by the appellants which the Tribunal were therefore relieved from determining. Given that this issue was itself worth, we are told, some Rs5.6m in net tax liability and given, as shown above, that the appellants had already outlined their case upon it in writing, their Lordships do not think the word "etc" capable of bearing so heavy a weight in the present context.

17. What, then, of the appellants' contention that it is rather the respondent who must be regarded as having abandoned his case on the second issue, ie his fall-back position that if the claimed losses are not to be totally disregarded, they are at any rate to be reduced? In support of this argument the appellants pray in aid two passages in particular in the Tribunal's determination. First this:

> "The respondent took the perilous decision of raising assessments on the **sole** ground that what was done amounted to anti-avoidance and therefore contravened section 44 of the Income Tax Act 1974. No alternative ground was given and this, at his risk and peril. Therefore, although the issues may have been raised in the Statements of Case or address of Counsel, we cannot, in fairness, go into issues not raised by the assessment letter issued by the Commissioner, as they are irrelevant."

Secondly, the appellants rely upon the concluding words of the determinations already quoted, particularly the final line: "We therefore determine all the above appeals in favour of Appellants."

18. Again, however, the Board is not persuaded that the respondent is properly to be regarded as having abandoned his case on the second issue. The reference to anti-avoidance in section 44 being "the **sole** ground" of the assessments can be seen on examination to relate to the respondent's decision to confine his anti-avoidance case to section 44, leaving no room for any other attack on the validity of the underlying transactions. And the Tribunal's concluding sentence about determining *all* the appeals in favour of the appellants is simply a reflection of the fact that by an earlier direction the Tribunal had consolidated the appeals of all the appellants. Besides these considerations, in the respondent's case too it would have been odd for him to have abandoned his case on the second issue: a large sum of money was at stake and he clearly had a properly arguable case upon it.

19. In the result, the Board concludes that neither party abandoned their case on issue 2, that the issue was accordingly live before the Tribunal and properly therefore should have been decided. It appears that each party read the determination through rose-tinted spectacles, interpreting it in its own favour with regard to the second issue. Plainly, in hindsight, once it emerged that the parties were in dispute about the outcome of the appeal, they should sensibly have returned to the Tribunal and asked for their decision upon this outstanding issue.

20. What, then, should now be done? As it seems to their Lordships, this second issue remains outstanding to this day and ought now finally to be resolved. In their judgment of 30 April 2008 the Supreme Court noted that the Tribunal had "excluded the appeals by the last four applicants as they had raised other issues in addition to those canvassed in the appeals by the first 135 applicants" and that, as for these four, "their appeals are still pending before the Assessment Review Committee which has now taken over from the Tribunal." Written submissions invited from the parties subsequent to the oral hearing of this appeal in Mauritius on 29 April as to which tribunal should now hear and determine any outstanding issue (submissions, incidentally, noting that two of the four last appellants have now reached agreement with the respondent regarding the other issues) suggest that there is some doubt whether the outstanding issue as to capital allowances should be remitted to the Assessment Review Committee or the Supreme Court. Having considered these submissions the Board concludes that the appropriate course here is to allow this appeal to the extent of setting aside the Supreme Court's order and substituting for it an order on the judicial review application that the issue as to capital allowances be now remitted to the Assessment Review Committee for final determination (to be heard, as that Committee may direct, before, with or following the appeals of any of the last four of the original appellants whose appeals remain outstanding); and further that, if that Committee decide that after all they have no jurisdiction to determine this issue (a question to be decided primarily by reference to the further submissions now before the Board and without prolonged further argument), the issue be instead decided by the Supreme Court of Mauritius. Their Lordships further conclude that, neither party having succeeded fully on this appeal (or on the judicial review challenge), subject to written submissions to the contrary by either party within 28 days, there should be no order as to costs either before the Supreme Court or before the Board.

21. Essentially by way of footnote the Board think it salutary to invite the attention of the profession to paragraph 6-11 of Chapter 6 of Potter and Prosser on Tax Appeals (1991):

> "Given that the Commissioners' determination is binding on the parties only in relation to the issues raised on the appeal, it will sometimes be important in connection with a dispute between the taxpayer and the Inland Revenue to identify the issues which

> were raised and resolved in a previous appeal. The starting-point is the taxpayers' notice of appeal which is supposed to specify the grounds of appeal; but it is unfortunately common practice for a notice to omit to specify the issues and instead to state baldly that the assessment is 'excessive and estimate.' Even where the notice of appeal is more explicit, further issues may have emerged in the course of the hearing. It is clearly in the parties' interests to ensure that a note is made before the end of the hearing of all those issues, not only those which the Commissioners are being asked to resolve, but also those which have been raised but conceded by one side or the other. A copy of the notice should be given to the Commissioners to incorporate in some form in their decision. Then there should be no difficulty in identifying the issues raised on the appeal. Where, as in most appeals, particularly those heard by General Commissioners, this has not been done, it may be necessary to consider the pre-hearing correspondence between the parties and the parties' notes of the hearing in order to find out what the Commissioners actually decided."

The importance of that paragraph hardly requires emphasis in the circumstances of the present case. Had its wise words been observed, a great deal of dispute, delay and expense would surely have been avoided.