[2011] UKPC 34
Privy Council Appeal No 0097 of 2010

JUDGMENT

Sharon Investments Ltd *v* Mauritius Revenue Authority

From the Supreme Court of Mauritius

before

Lord Phillips
Lord Brown
Lord Mance
Lord Wilson
Sir Stephen Sedley

JUDGMENT DELIVERED BY LORD WILSON

ON 12 SEPTEMBER 2011

Heard on 21 July 2011

Appellant
Sir Hamid Moollan QC
Iqbal Moollan

(Instructed by Streathers Solicitors LLP)

Respondent
Philip Baker QC
Rajesh Ramloll
Imran Afzal
(Instructed by Royds Solicitors)

LORD WILSON:

1. Sharon Investments Ltd, the appellant, has appealed to the Board against the order of the Supreme Court of Mauritius dated 17 February 2010 (Balancy and Peeroo JJ), by which it refused the appellant's application for an order that, for use in a pending appeal by the appellant to the Supreme Court against the Tax Appeal Tribunal ("the tribunal") by way of case stated, the record of the proceedings before the tribunal should be brought up to the court and filed in the record of the appeal.

2. At the conclusion of the hearing on 21 July 2011 the Board announced that the appeal would be dismissed. It now gives reasons for its determination.

3. In 1999, almost four years late, the appellant made a tax return for the year 1995/96. For the purpose of income tax it claimed a loss of Rs 1,095,197 for carriage forward into future years. But the Commissioner of Income Tax determined the loss in the reduced sum of Rs 44,055. He did so on the ground that, in that year, the appellant had lent to its sister companies sums amounting to Rs 7,508,189 for which it had not charged interest and that in the circumstances subsections (1)(b) and (c) and (2) of section 43 of the Income Tax Act 1974 entitled him to attribute to the loans a notional return to the company by way of interest such as would give rise to the specified reduction in the loss.

4. On 24 September 2002 the tribunal dismissed the appellant's appeal against the Commissioner's determination. The appellant promptly applied to the tribunal to state a case for the opinion of the Supreme Court pursuant to section 8 of the Tax Appeal Tribunal Act 1984 and to rule 3 of the Tax Appeal Rules 1984 ("the 1984 Rules"). In its application for the statement of a case the appellant identified eleven points of law. On 22 October 2002 the tribunal stated the case.

5. The appellant contends that the case stated on 22 October 2002 is deficient and precludes proper presentation of its appeal. In particular it says that there was no evidence before the tribunal to justify some of its findings; such would of course amount to an error of law.

6. The appellant does not dispute that the proper course for it to have taken was to apply to the Supreme Court under rule 4(3) of the 1984 Rules for an order that the case be remitted to the tribunal for the statement of it to be amended. In an appeal in which a complaint is made of the absence of evidence to justify a finding, an order can of course be made for the statement of case so to be amended as to set out the evidence alleged to justify the finding: *Yip Tong and Sons v Lie Kiem Haw & Co* [1962] MR 156.

7. Rule 4(3) does not prescribe the time within which an appellant should apply for an order for amendment of the statement of the case. But there is English authority that the application should be made speedily: *Spicer v Warbey* [1953] 1 All ER 284.

8. In the Supreme Court the appellant first raised its dissatisfaction with the statement of the case on 23 March 2006, ie more than three years following its receipt of the case. By that time it was too late for the court to order that the case be remitted to the tribunal for the statement to be amended. For on 31 July 2004 the tribunal, which had earlier been replaced by the Assessment Review Committee, had ceased to exist for all purposes. On 23 March 2006, which appears to have been the date set for the substantive hearing of the appeal, the appellant, which had procured a copy of the record of the proceedings before the tribunal, purported to include it in the material to be considered by the court. The respondent objected to its inclusion. The hearing was adjourned until 4 February 2008 when the objection was upheld albeit only on the basis that the appellant should, if so advised, issue, by motion, an application for an order that the record of the proceedings before the tribunal be brought up to the court and filed in the record of the appeal.

9. The appellant issued such an application only on 12 December 2008. It is against the refusal of the application by the Supreme Court on 17 February 2010 that the appeal to the Board has been brought.

10. The ground on which the Supreme Court refused the application was that the appellant's delay in alleging a deficiency in the statement of case was excessive and unexplained.

11. Sir Hamid Moollan QC, who appeared for the appellant at the hearing before the Board, accepted that the delay was excessive and that it was and remains unexplained. He speculated that it might be attributable to what he described as Mauritian laisser-faire. He accepted

(a) that almost two years elapsed between the statement of the case and the tribunal's demise, during which the appellant could and should have applied for an order that the statement be amended; and

(b) that thereafter more than four further years elapsed before the appellant made its application to the court in proper form for an order that the record be brought up.

12. Sir Hamid argued, however, that:

(a) in the admirable words of Collins MR in *In re Coles and Ravenshear* [1907] 1 KB 1 at p 4, "the relation of rules of practice to the work of justice is intended to be that of handmaid rather than mistress";

(b) the deficiency in the statement of the case was excruciating and, without access to the record of the tribunal before the Supreme Court, the door would be closed against the appellant's appeal; but, on the cursory examination of these assertions which Sir Hamid requested the Board to undertake and indeed which alone was appropriate, their validity was not obvious to it;

(c) rule 4(3) did not prescribe the time within which an application for an order for amendment should be made; but, for what it was worth, this point had been noted by the Supreme Court;

(d) the mechanism of appeal by case stated was unsatisfactory in certain respects; this is true (see, for example, the judgment of Yeung Sik Yuen J, as he then was, in the Supreme Court in *Ally Khan Mohamed v Tax Appeal Tribunal* [2002] SCJ 23) but it is irrelevant;

(e) in other appeals by way of case stated orders had been made for the record of the tribunal to be brought up to the court and filed in the record; this is true although Sir Hamid may have gone too far in stating that such orders were not uncommon (see *Hurhangee v Commissioner of Income Tax* [2002] SCJ 100, in which the court stressed their exceptional nature); and

(f) the respondent would not be prejudiced by the order; this is arguable although in answer the respondent raised the spectre of yet

further delay in the collection from the appellant of the correct amount of income tax for the years following 1995/96.

13. But the Supreme Court had a discretion whether to order the record of the tribunal to be brought up to it. The balance to which the Supreme Court referred was for itself to weigh. In the proper conduct of the balancing exercise it was inevitable that the Supreme Court would attach great weight to the shocking delay; indeed in the Board's view it was close to inevitable that its weight would prove decisive against the grant of the application. The appeal to the Board was hopeless and, although it will consider contrary representations if filed and served within 14 days of the date of delivery of this judgment, it is hard to imagine how even Sir Hamid can conjure resistance to an order that the appellant should pay the respondent's costs of and incidental to the appeal.