

Docket: 2011-1069(GST)I

BETWEEN:

SHU WEI CHEN and CHIEN CHUNG TANG,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on May 3, 2012 at Halifax, Nova Scotia

By: The Honourable Justice Judith Woods

Appearances:

For the Appellants: Shu Wei Chen

Counsel for the Respondent: Jan Jensen
Mallory Treddenick (student-at-law)

JUDGMENT

The appeal with respect to an assessment made under the *Excise Tax Act* for the period from January 1 to December 31, 2008 is dismissed. The parties shall bear their own costs.

Signed at Ottawa, Ontario this 14th day of June 2012.

“J. M. Woods”

Woods J.

Citation: 2012 TCC 215
Date: 20120614
Docket: 2011-1069(GST)I

BETWEEN:

SHU WEI CHEN and CHIEN CHUNG TANG,

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REASONS FOR JUDGMENT

Woods J.

[1] The appellants, Shu Wei Chen and Chien Chung Tang, operated a real estate business in partnership under the name Great Tang's Development from 1994 until late in 2010.

[2] The appeal relates to an assessment of net tax under the *Excise Tax Act* in the amount of \$8,702.91. The assessment covers the period from January 1 to December 31, 2008.

[3] The issue is whether the partnership should have collected harmonized sales tax (HST) in respect of three sales of vacant land that took place in 2008. The HST on the three sales, if applicable, is \$11,828.96.

[4] The partnership was represented at the hearing by Ms. Chen. She was married to Mr. Tang during the relevant period and they have since divorced. Although Mr. Tang is no longer a partner, the partnership continues to exist for HST purposes by

virtue of s. 272.1(6) of the *Act*. Ms. Chen now operates the business as a sole proprietor.

[5] Ms. Chen submits that sales are not taxable since the three parcels were acquired for personal purposes and not in the course of a business of buying and selling land. She also submits that two of the properties were owned by her alone and not by the partnership.

Were properties owned by partnership?

[6] I will first consider the appellants' argument that two of the properties were owned by Ms. Chen and not the partnership. The two properties have been identified as Lot S1, Terence Bay Road, Terence Bay, Nova Scotia and 8 Clarence Street, Dartmouth, Nova Scotia.

[7] I would observe that the position of the appellants is contrary to the HST returns filed by the partnership. The sales were reported in the returns. Further, the argument was not raised in the notice of appeal and was first raised at the hearing.

[8] These factors are not fatal to the appellants' case but in these circumstances the appellants need to have clear and convincing evidence in support. Unfortunately for the appellants, the evidence is not clear.

[9] The evidence included a statement of disbursements relating to Terence Bay which suggests that the property was sold by Ms. Chen. What is not clear, however, is whether the property was held by Ms. Chen on her own behalf or whether she was acting on behalf of the partnership as represented in the HST return. It is just as likely that the Terence Bay property, as with other properties, were registered in Ms. Chen's name on behalf of the partnership. The evidence as a whole is not sufficient to overcome the representations that were previously made.

[10] Ms. Chen testified that the HST returns were prepared by a bookkeeper based on information provided by Mr. Tang. She stated that Mr. Tang was careless in dealing with the returns and that she did not review them. This testimony cannot assist the appellants. Even if I accept that the HST returns were carelessly prepared, there is insufficient evidence that the properties were owned by Ms. Chen alone.

Were properties held for personal purposes?

[11] The appellants submit that the properties were held for personal purposes and that they qualify for the exemption in s. 9(2) of Schedule V, Part I of the *Act*. The relevant part of the exemption provides:

9(2) A supply of real property made by way of sale by an individual or a personal trust, other than

[...]

(b) a supply of real property made

(i) in the course of a business of the individual or trust, or

(ii) where the individual or trust has filed an election with the Minister in prescribed form and manner and containing prescribed information, in the course of an adventure or concern in the nature of trade of the individual or trust;

(Emphasis added.)

[12] As a preliminary comment, the respondent attempted to raise an argument that the exemption does not apply in these circumstances because the properties were owned by a partnership and the exemption does not apply to partnerships. It is not necessary that I consider this argument because it was withdrawn by the respondent as it was not raised in the Reply.

[13] The only question, then, is whether the sales of the vacant land occurred in the course of a business.

[14] The evidence reveals that the partnership had substantial activity, and that the appellants had other real estate interests outside the partnership as well.

[15] In particular, the partnership owned a relatively large number of properties of various types, parcels of vacant land, commercial properties and rental condominiums. Some of the properties were large and others were purchased by Ms. Chen at tax sales. Further, in addition to properties held in partnership Ms. Chen and Mr. Tang also owned a corporation that held other real estate. A document that Ms. Chen provided the respondent showed six property sales in 2008 (R-1, Tab 1).

[16] I would also note that the registration of the partnership listed the partnership's business as real estate investment and development. In addition, Ms. Chen also had her real estate license for a period of time.

[17] This evidence strongly suggests that the three vacant parcels sold in 2008 were sold in the course of a business of buying and selling land.

[18] Ms. Chen submitted that the appellants never had plans to become real estate developers and develop the vacant land. This does not assist the appellants because this is not the test.

[19] The earmark of a business is an undertaking with an intent to profit. Accordingly, an undertaking to earn profit by buying and selling undeveloped land is also a business. It does not matter that there is no intent by the appellants to develop the land.

[20] The evidence as a whole is overwhelming that the appellants were actively engaged in buying and selling land for a profit. The appellants sought properties that they considered had a low value. It was hoped that the land would be sold for a profit at some future time. The exemption is not available in these circumstances.

[21] Ms. Chen testified that she only sold land when she needed the money. This may be true but it is of no assistance in this appeal. The appellants may have had an intent to hold land for an indefinite period. But it is the intent to earn a profit at some point that is the crucial factor. The appellants actively pursued a venture which was designed to earn a profit from the sale of land. This is fatal to the appeal.

[22] Ms. Chen testified that she held a number of properties for the purpose of giving them to her sons and that she owned Terence Bay as a recreational property. The evidence on this point was far too vague and lacking in detail to be convincing.

[23] Ms. Chen also argues that the assessment is harsh because if the appellants had known that the sales were subject to HST they would have collected it from the purchasers.

[24] The result may be harsh, but taxpayers have an obligation to seek proper tax advice regarding their obligations under the *Act*. There is no evidence that the appellants did this. Further, the harshness of the result is not sufficient grounds for relief. The Court must apply the legislation as Parliament has enacted it.

[25] The appeal will be dismissed. The parties shall bear their own costs.

Signed at Ottawa, Ontario this 14th day of June 2012.

“J. M. Woods”

Woods J.

CITATION: 2012 TCC 215

COURT FILE NO.: 2011-1069(GST)I

STYLE OF CAUSE: SHU WEI CHEN and CHIEN CHUNG TANG v. HER MAJESTY THE QUEEN

PLACE OF HEARING: Halifax, Nova Scotia

DATE OF HEARING: May 3, 2012

REASONS FOR JUDGMENT BY: The Honourable Justice J.M. Woods

DATE OF JUDGMENT: June 14, 2012

APPEARANCES:

For the Appellants: Shu Wei Chen

Counsel for the Respondent: Jan Jensen
Mallory Treddenick (student-at-law)

COUNSEL OF RECORD:

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Firm:

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