JAMAICA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 53 of 1982

BEFORE: THE HON. MR. JUSTICE ZACCA, P.
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE CAREY, J.A.

BETWEEN DOMINION LIFE ASSURANCE CO. APPELLANTS

AND THE STAMP COMMISSIONER RESPONDENT

2nd & 3rd February; 11th October, 1984

Mrs. Angella Hudson-Phillips for Appellants.
Mr. H. Hamilton and Mrs. C. Batts for Respondent.

ZACCA, P.:

I have had an opportunity of reading the judgment of Carey, J.A. I agree with the conclusions arrived at in his judgment.

I would also allow the appeal with costs to the appellants.

ROWE, J.A.

I have read the judgment of Carey, J.A. in draft form and I agree with his conclusion. I wish, however, to add a few words of my own.

By letter of September 22, 1977, the appellant offered its developed premises at the corner of Knutsford Boulevard and Tobago Avenue, New Kingston, for sale to the Jamaica Public Service Company Limited (J.P.S.) on the following terms and conditions:-

"1. Purchase Price: Two Million Six Hundred and Fifty One Thousand Dollars Jamaican (J$2,651,000).

2. Deposit of : Three Hundred Thousand Dollars to be paid on acceptance of this offer.

3. The balance of Two Million Three Hundred and Fifty-One Thousand Dollars (Jamaican) (J$2,351,000) to be paid by fifty (50) equal semi-annual instalments with interest at the rate of $11\frac{1}{8}$ per cent per annum on the balance outstanding from time to time also payable semi-annually, in each case commencing six months after the date herein fixed for completion and to be secured by freely transferable First Mortgage Sinking Fund Debenture Stock ranking pari passu with all other Debenture Stock issued by the Purchaser and outstanding as are contained in Supplemental Indentures issued by the Purchaser."

Paragraphs 1, 2, and 3 above contained the entire provisions for the consideration to be provided by the Purchaser and these Conditions the Purchaser accepted by letter of November 15, 1977.

It was a term of the agreement for sale that "completion to consist of the delivery of the title ..... and the giving of the sold property by the Vendor to the Purchaser in exchange for the issue of the above mentioned Debenture Stock" together with the Purchaser's share of the costs of Transfer.

During the hearing before the Revenue Court, Mrs. Hudson-Phillips sought an amendment to the pleadings to say:

> "That Receipt of $300,000 cash and Receipt of Debenture Stock Certificates of $2,351,000 was treated by the Appellant as complete discharge of the liability of the Jamaica Public Service Company to make semi-annual payments of Principal and Interest as had originally been set out in Term No. 3 of letter of 22/9/77 (Exhibit 1.)."

This amendment became necessary as there had been an exchange of letters between the Vendor and Purchaser of August 9, 1979 to the effect that upon the retirement of each of the 50 Debentures of a face value of $47,020.00 plus interest at the rate of 11$\frac{1}{8}$ that would completely discharge the obligation of J.P.S. to make semi-annual payments. It was submitted by Mrs. Hudson-Phillips that these letters did not create a novation and Mr. Hamilton did not argue to the contrary.

The appellant sold its entire business enterprise in Jamaica to the Island Life Assurance Company Limited (I.L.I.C.) and in the process transferred to I.L.I.C. the Debenture Stock (with face value of $2,351,000) for $2,320,000. As it was bound to do by virtue of the provisions of sections 3(1) and 3(4)(c) of the Transfer Tax Act, the appellant paid to the respondent, Transfer Tax at the rate of five percent on the sum of $2,320,000 being the consideration money given by I.L.I.C. to the appellant for the Debenture Stocks.

When the transaction between the appellant and I.L.I.C. was complete, the appellant raised the question that it had lost money on the sale of the Debenture Stock, that is to say, it had given consideration to the extent of $2,351,000 for the Debentures, had sold them for $2,320,000 and therefore had suffered a loss of $31,000. In those circumstances, said the Appellants, they were entitled to a refund of the $116,000 paid for Transfer Tax. The Stamp Commissioner rejected the claim and the Revenue Court upheld that decision.

Section 14(1) of the Transfer Tax Act, grants relief from Transfer Tax actually paid in certain circumstances including those in which on the disposal of the property no capital gains have accrued to the transferor. Section 14(3) outlines the methodology for computing capital gains. So far as is relevant, Section 14(3)(a)(i) provides:

> "..... capital gains accruing from the transfer of property shall, for the purposes of sub-section (1), be taken to be the amount on which tax is charged in respect of such transfer, less the amount or value of the consideration in money or money's worth given by the transferor or on his behalf wholly and exclusively for the acquisition of that property....."

The issue before Marsh J, in the Revenue Court, and again before us, is whether on a fair reading of the Contract for Sale between the appellant and J.P.S. it can be said that the appellant gave a consideration, and if so what consideration, wholly and exclusively for the acquisition of the Debenture Stock. For the appellant it was argued that Dominion Life gave so much of its building as was worth $2,351,000 for the sole purpose of acquiring the Debenture Stock. Counsel for the respondent countered by submitting that the appellant sold its building for $2,651,000 consisting of $300,000 cash and a promise to pay the balance over 25 years. The issue of the Debentures, he said, was as Security for that promise and as no Transfer Tax was payable on the issue of the Debentures, what the appellant now seeks is an apportionment of the consideration, and that such an apportionment was impermissible under the Transfer Tax Act.

The two cases to which we were referred, viz., Bentlys, Stokes and Lawless v. Beeson (H.M. Inspector of Taxes) 33 Tax Cases 491, and Bowden (H.M. Inspector of Taxes) v. Russell and Russell, 42 Tax Cases 301, established that the adverbs "wholly" and "exclusively" which appear in section 14(3)(a)(i) of the Transfer Tax Act, are not to be treated as a composite term but each adverb must be given its separate meaning. "Wholly" is used in

reference to the quantum of the consideration and "exclusively" is used in reference to the sole purpose or motive for the giving of the consideration. Applying these tests of "wholly" and "exclusively", Mrs. Hudson-Phillips says that the appellant gave its whole building as consideration for the sole purpose of receiving money or money's worth to the total sum of $2,651,000.

Mrs. Hudson-Phillips submitted that the respondent was approaching the matter from the standpoint of the Jamaica Public Service Company and consequently was looking at what J.P.S. gave as consideration for the appellant's building. Looked at in that way, Mr. Hamilton could submit, that the question of apportionment arose and would give rise to the impossible situation that the J.P.S. gave $300,000 wholly and exclusively for the building and also $2,351,000 worth of Debentures wholly and exclusively for the building.

For the transaction to have any real meaning, the contract must be construed as contended for by Mrs. Hudson-Phillips, viz., that Dominion Life gave its building in Exchange for money $300.000 and money's worth Debentures to the extent of $2,351,000. What did the appellant give for the money's worth? I am constrained to adopt the submission of Mrs. Hudson-Phillips that Dominion Life gave so much of its building as was worth $2,351,000 wholly and exclusively for the acquisition of the Debentures.

It follows then that when the process of subtraction is applied, there was a loss on the sale of the Debentures and that the appellant was entitled to relief under section 14(1) of the Transfer Tax Act.

I would allow the appeal with costs to the appellant here and in the court below to be agreed or taxed.

CAREY, J.A.:

The Dominion Life Assurance Company (hereinafter called Dominion Life) was minded in 1977 to sell its property in New Kingston to the Jamaica Public Service Company Limited, and accordingly the parties entered into a sale agreement at a price of $2,651,000.00; the deposit was set at $300,000.00 with the balance of $2,351,000.00 payable by 50 semi-annual instalments with interest at $11\frac{1}{8}\%$. This amount of the balance was to be secured by a freely transferable first mortgage Sinking Fund Stock to be issued by the purchaser. Prior to completion, however, Dominion Life decided to dispose of its assets in this country. They undertook to transfer their assets to Island Life Insurance Company (hereinafter referred to as Island Life). Those assets included (so far as this appeal is concerned):

"Proceeds of sale of Kingston Building

- Jamaican Public Service Bonds 25 years @ $11\frac{1}{8}\%$ compounded semi-annually	
Par $2,351,000	$2,320,000
- Cash	132,243."

This item "cash" represented the difference between the deposit and the transfer tax paid on the transfer of the $2,351,000.00 registered debenture stock (J.P.S. Co.)

Dominion Life sought a refund of this $116,000 tax paid on the footing that they had suffered a loss on the transfer of the debenture stock of $31,000.00, that is, the difference between the par value of the stock of $2.651M. and the market value of $2.320M. The learned judge of the Revenue Court held that they were not entitled to the refund claimed and accordingly dismissed their appeal against the refusal of the Stamp Commissioner to refund the same. It is from this confirmation by Marsh, J., of the refusal by the Stamp Commissioner to refund the transfer tax that this matter now comes before us.

We are thus concerned in this appeal with the method of ascertaining the consideration given by the transferor, viz., Dominion Life for the acquisition of the debenture stock. When the Stamp Commissioner refused the refund of transfer tax, he gave reasons therefor:

> "I wish to point out that the stock was issued merely as security against any default in the payment of the balance of the purchase price and that in such circumstances neither the issue nor redemption of such is treated as a transfer under the Act."

The respondent in his notice contended that the decision of the Revenue Court was supportable on grounds other than those given by the learned judge, the relevant ground being stated thus:

> "The Act does not treat the issue of stock as a transfer and consequently its face value cannot properly constitute a basis for computing a gain or loss."

The learned judge based his decision on one narrow point, viz., that -

> "There can be no room here for the argument that the value of the consideration given by the transferor was given 'wholly and exclusively' for the acquisition of the stock.
>
> What the appellant got was the promise to pay secured by the debenture stock and, having got that, it subsequently decided to abandon any future claim to repayment of instalments and simply rely on its security."

Although the reasons given by the Stamp Commissioner and the learned judge are differently stated, they nevertheless amount to a finding that there has not been a transfer under the Act and that Dominion Life are not transferors so as to benefit under the provisions of section 14 of the Transfer Act. It will be necessary hereafter to consider these reasons in a little detail. The relevant provision for computing the tax is section 14 (3) (a) (i) which enacts as follows:

"(3) Save as otherwise provided by any regulations made under paragraph (b) of subsection (1) of section 44, capital gains accruing from the transfer of property shall, for the purpose of subsection (1), be taken to be the amount on which tax is charged in respect of such transfer, less -

(a) (i) the amount or value of the consideration in money or money's worth given by the transferor or on his behalf wholly and exclusively for the acquisition of that property (whether after the 1st April, 1970, or not)."

The appellants contended before us, as they did before the judge of the Revenue Court, that the consideration given for the acquisition of the debenture stock was given wholly and exclusively for its acquisition. The respondent argued that since the appellants were required to make an apportionment of the consideration given, so as to attribute $2.351M. as being wholly and exclusively given for the acquisition of the debentures, then that amount could not be said to have been given wholly and exclusively for the debentures. In dealing with this question, the learned judge approached it in this way:

"When one looks at this transaction in its entirety and that is the proper approach to take - the consideration moving on the sale of the building consisted of exchange of the building for:

(1) $300,000 in cash,

(2) a promise by the purchaser to pay the balance of purchase money over a twenty-five year period and

(3) security for that promise in the way of freely transferable debenture stock to the value of the outstanding balance.

All these elements are tied in and wrapped up in the contract of sale of the building. I am not at all certain that this Court is empowered to go behind that bargain and extract elements therefrom in the manner suggested by Counsel so as to bring the Appellant within the test. However, in my view, the matter goes even further, because, even if it were possible as a matter of law to dissect the $2,651,000.00 and remove from the consideration the $300,000.00 cash, I am not satisfied that it would then be a sufficient answer to say that the remaining

> "sum of $2,351,000.00 represented the value of the consideration given wholly and exclusively for the acquisition of the debenture stock. That $2,351,000.00 was given in exchange for a promise by the purchaser to repay in a twenty-five year period, and to underwrite that promise by issue of debenture stock. It is not a straightforward purchase of Debenture Stock, simpliciter; but in fact part of a multi faceted deal; as such it can be said to have a dual or multi purpose motive and since duality and exclusivity are at opposite ends of the pole there can be no room for argument that the value of the consideration given by the transferor, was given 'wholly and exclusively,' for the acquisition of the stock. In my judgment, therefore, even if I were entitled to approach the problem in the manner suggested by Counsel, i.e. by simply deducting the cash deposit; that approach would, in my view still run foul of the subsection.
>
> 12. What the Appellant got was the promise to pay secured by the debenture stock and, having got that, it subsequently decided to abandon any future claim to repayment of instalments and simply rely on its security. That subsequent abandonment does not render the original agreement free of the taint of duality to which I refer."

The terms "wholly and exclusively" are in my view critical to an understanding of this matter. These terms were considered in Bentleys, Stocks & Lowless v. Beeson 33 T.C. 491, where Romer, L.J., at p. 503 provided a useful guideline:

> "The relevant words of Paragraph 3 (a) of the Rules applicable to Cases I and II - 'wholly and exclusively laid out or expended for the purposes of the profession' - appear straightforward enough. It is conceded that the first adverb - 'wholly' - is in reference to the quantum of the money expended and has no relevance to the present case. The sole question is whether the expenditure in question was 'exclusively' laid out for business purposes, that is: What was the motive or object in the mind of the two individuals responsible for the activities in question? It is well established that the question is one of fact: and again, therefore, the problem seems simple enough. The difficulty however arises, as we think, from the nature of the activity in question. Entertaining involves inevitably the characteristic of hospitality. Giving to charity or subscribing to a staff pension fund involves inevitably the object of benefaction. An undertaking to guarantee to a limited amount a national exhibition involves inevitably supporting that exhibition and the purposes for which it has been organised. But the question in all such cases is: Was the entertaining, the charitable subscription, the

> "guarantee, undertaken solely for the purposes of business, that is, solely with the object of promoting the business or its profit earning capacity?"

Learned counsel on both sides accept that the principles therein stated should be adopted by this court. I think we should do so seeing that experienced Revenue Law Lawyers here have accepted those principles and applied them in this jurisdiction. It is, I think, plain that the words are not used in a coterminous sense. Each relates to a different factor. "Wholly" applies to the quantum; in this case, the amount of $2.320M. expended to purchase the debentures. "Exclusively" applies to the motive or purpose of the transaction. Mrs. Angella Hudson-Phillips argues that the sole motive or purpose of the expenditure was the acquisition of the debentures. It is in my view clear that the learned judge regarded the term "wholly and exclusively" as a composite phrase which led him to say - "what the appellant got was the promise to pay secured by the debenture stock ...." That does not, in my view, accord with the test provided by the provisions of section 14 (3) (a) (i) for it speaks of the amount of the consideration in money or money's worth given by the transferor for the acquisition of that property.

The judge thought that -

> "This was not a straightforward purchase of debenture stock, simpliciter; but in fact part of a multi faceted deal; as such it can be said to have a dual or multi purpose motive and since duality and exclusivity are at opposite ends of the pole, there can be no room here for the argument that the value of the consideration given by the transferor, was given 'wholly and exclusively' for the acquisition of the stock."

But the consideration given is ascertainable, it is $2.351M. That was the total amount paid for the debenture stock. In my view, that satisfies the test of "wholly." The next question relates to the motive for the acquisition. So it is the motive of the transferor on which attention must be focussed. The motive of Dominion Life seems plain enough.

It was to acquire the debenture stocks. The Act charges tax on transfers. Section 2 (1) defines transfer -

> ".....any legal or equitable transfer by way of sale, gift, exchange, grant, assignment, surrender, release, or other disposal, and includes a transfer by or at the order or direction of a court of competent jurisdiction or by way of compulsory acquisition and 'transfer,' in relation to such a transfer of property, means the person from whom the property is so transferred."

There was a transfer of property from Dominion Life to Island Life. That property was debenture stock. Debenture stock comes within the ambit of the Transfer Tax Act by virtue of section 3 (4) (c) - viz., securities. That being so, I am quite unable to share the learned judge's uncertainty in thinking that the court is not empowered to go behind the bargain. There appeared to be no difficulty on the part of the Revenue in going behind the bargain and accepting the payment of transfer tax on the transfer of the debenture stock. Accordingly, if one went behind the bargain to dissect its elements, it is the fact that the appellants were transferring all their assets which included a building to Island Life, and the debentures represented pro tanto the building as security for the unpaid balance. There is nothing in the Act which either prohibits the payment of transfer tax on such securities or prevents relief when such payments are made and no capital gain can be demonstrated. This thus leads me to the reasons given by the Commissioner of Stamp Duties. It is well known that transfer tax is not paid on the issue of stock. Paragraph 2 of Part I of the First Schedule to the Transfer Tax Act makes this perfectly clear. It is stated therein as follows:

> "2. Without prejudice to the imposition of any tax to be borne by the transferor in respect of any such transfer as is mentioned in paragraph 1 of this Schedule, no allotment or issue by a company of securities thereof shall be treated as a transfer by the company."

The redemption of such debentures is also exempted from the payment of tax. For which, see para. 3 (a) of Transfer Tax

(Exemption) Order 1971 -

> "3. Subject to paragraphs 4 and 5, no tax shall be charged in respect of transactions in any of the following classes -
>
> (a) transfer, by way of redemption of debentures issued by a company for full consideration, in money or money's worth received by the company, as respects the amount of the payments secured by such debentures, respectively."

Plainly there was no issue of stock by Dominion Life. The debenture stock was stock issued by Jamaica Public Service Company in their normal course of business and denominated series Q. This reference to the issue of stock and redemption being inapplicable to the circumstances of this case, makes it abundantly clear that the Revenue misconceived the legal situation. In my view, the Stamp Commissioner was plainly in error and a valid basis for the refusal must be sought elsewhere.

Mr. Hamilton urged that this court is bound to accept findings of fact of the judge of the Revenue Court, and accordingly, when the judge found that -

> "the consideration moving on the sale of the building consisted of exchange of the building for:
>
> (1) $300,000 in cash
>
> (2) a promise by the purchaser to pay the balance of purchase money over a twenty-five year period; and
>
> (3) security for that promise in the way of freely transferable debenture stock to the value of the outstanding balance"

then this finding of fact should be accepted. I do not, with respect, think this finding is a finding of fact: it is a conclusion of law. What constitutes consideration is a question of law, not fact. This court is not bound by such considerations.

Next, he said that the consideration given wholly and exclusively by the appellants was land valued at $2.651M.

The court was being asked to apportion that consideration, and attribute $2.320M. as being wholly and exclusively given for the acquisition of the debentures. The decision of the court below that the consideration given by the appellants was not wholly and exclusively for the acquisition of debentures, was a finding of fact, which ought not to be disturbed. As I have observed earlier in this judgment, the learned judge fell into error in his application of the principles regarding "wholly and exclusively" as explained in Bowden v. Russell & Russell, supra, and I need say no more about that.

We were asked to ignore the subsequent sale of the debenture stock, to Island Life as "a given." The only provision with respect to apportioning consideration is section 14 (3) (a) (ii), which recites:

> "(ii) in the event of the property being a right or interest created in, over, or otherwise with respect to, any property belonging to the transferor, the amount of value of so much of the consideration for which the last-mentioned property was acquired by him (whether after the 1st April, 1970, or not) as may, to the satisfaction of the Commissioner, be apportioned to the first-mentioned property."

It seems to me that this submission regarding apportionment is largely illusionary. It is plain the Commissioner of Stamp Duty did not consider that any case of apportionment had arisen. The appellants at no time attempted to suggest that the apportionment had arisen. In the absence of any factual basis for any argument in this respect, any consideration would be wholly academic. I desist from any such futile endeavour. It is however enough to say that that provision is not applicable to the circumstances of this case as the provision is concerned with the partial disposal of property.

For my part, I would allow the appeal with the usual consequences.