A

Lee Koy Eng v Pemungut Duti Setem and another appeal

B HIGH COURT (SHAH ALAM) — CIVIL APPEAL NOS BA-14–1–03 OF 2019 AND BA-14–2–07 OF 2019
WONG KIAN KHEONG J
17 AUGUST 2020

C *Revenue Law — Stamp duty — Assessment — Appeal against decision of collector of stamp duty — Whether Forms 14A attracted ad valorem stamp duty or fixed amount stamp duty — Stamp Duty Act s 38A(1)*

D This was the appellant's appeal against the decision of the collector who dismissed the application to review the collector's assessment under s 38A(1) of the Stamp Act ('the SA'). The appellant and another person was appointed as co-administrators of the deceased's estate who died intestate and left three beneficiaries being herself, as the widow to the deceased and two other children. The estate, among other, consisted of the deceased's interest in five E pieces of land ('deceased interest (five properties)'). The appellant and the two children executed a deed of family arrangement wherein the appellant and the two children agreed to distribute among other the deceased's interest (five properties) to the appellant only. Premised on the deed, the High Court issued an order to vest the deceased's interest (five properties) in the appellant F only ('vesting order'). Pursuant to the vesting order, the co-administrators of the estate executed five Form 14A to in relation to the deceased interest (five properties) in favour of the appellant only. The collector had, pursuant to s 36(1) of the SA imposed ad valorem stamp duty on the five Form 14A on the ground that the forms concerned were 'release or renunciation by way of gift' G under item 66(c) of the First Schedule of the SA. The issue to be determined was whether the Forms 14A in this case attracted ad valorem stamp duty under item 66(c) or a fixed amount pursuant to item 32(i).

Held, allowing the appeal with costs:

H

(1) The true nature of Forms 14A was solely to give effect to the renunciation (entitlements under the DA) by the deceased's two children. The true nature of the Forms 14A in this case could not be a gift of the interest of the deceased's two children in the estate from the deceased's two children I to the appellant (see paras 19–20).

(2) A court may order for the refund of excess stamp duty pursuant to s 39(4) of the SA and may order interest on the refund of excess pursuant to s 11 of the Civil Law Act and O 42 r 12 of the Rules of Court (see para 27).

[Bahasa Malaysia summary

Ini merupakan rayuan perayu terhadap keputusan pemungut yang mengetepikan permohonan untuk menyemak taksiran pemungut dibawah s 38A(1) Akta Stem ('AS'). Perayu dan satu orang yang lain telah dilantik sebagai pentadbir bersama estet si mati yang telah mati tak berwasiat dan meninggalkan tiga benefisiari iaitu dirinya sendiri, sebagai janda kepada si mati dan dua orang anak. Estet tersebut antara yang lain terdiri daripada kepentingan si mati dalam lima bidang tanah ('kepentingan si mati (lima hartanah)'). Perayu dan dua orang anaknya telah melaksanakan satu surat ikatan perkiraan keluarga yang mana perayu dan dua orang anaknya bersetuju untuk membahagikan antara yang lain, kepentingan si mati (lima hartanah) kepada perayu sahaja. Berdasarkan suratikatan tersebut, Mahkamah Tinggi mengeluarkan satu perintah untuk meletakhakkan kepentingan si mati (lima hartanah) kepada perayu sahaja (perintah letak hak). Berdasarkan perintah letak hak tersebut, pentadbir bersama estet tersebut telah melaksanakan lima Borang 14A ada alasan bahawa borang berkenaan merupakan pelepasan dan melepaskan hak dengan cara hadiah dibawah item 66(c) Jadual Pertama AS. Isu untuk diputuskan adalah sama ada Borang 14A dalam kes ini dikenakan duti stem ad valorem dibawah item 66(c) atau jumlah tetap dibawah item 32(i).

Diputuskan, membenarkan rayuan dengan kos:

(1) Sifat sebenar Borang 14A adalah hanya untuk memberikan kesan kepada penolakkan hak (hak dibawah DA) oleh kedua-dua anak si mati. Sifat sebenar Borang 14A dalam kes ini tidak boleh menjadi satu hadiah kepentingan si mati berkaitan dengan dua orang anaknya dalam estet si mati dari dua anak si mati kepada perayu (lihat perenggan 19–20).

(2) Mahkamah boleh memerintahkan pemulangan duti stem lebihan berdasarkan s 39(4) AS dan boleh memerintahkan faedah atas pemulangan lebihan berdasarkan s 11 Akta Undang-Undang Sivil dan K 42 A 12 Kaedah-Kaedah Mahkamah (lihat perenggan 27).]

Cases referred to

Chor Phaik Har v Farlim Properties Sdn Bhd [1997] 3 MLJ 188, FC (refd)

BASF Services (M) Sdn Bhd v Pemungut Duti Setem [2010] 4 MLJ 596, FC (folld)

Chua Wee Hee v Pemungut Duti Setem dan satu lagi (Case No JB-16A-1–04 of 2018) (unreported), HC (not folld)

Ch'ng Cheng Siew (suing as administrator of estate of Wong See Yan, deceased) v Pemungut Duti Setem [2016] 7 MLJ 758, HC (folld)

Hor Lim Chee v Pemungut Duti Setem (Case No 24NCVC-1347–12 of 2013) (unreported), HC (not folld)

Ketua Pengarah Pertubuhan Keselamatan Sosial v Wong Ton Feng [2020] 12

A MLJ 625; [2020] 4 MLRH 623, HC (refd)
Sundralingam v Ramanathan Chettiar [1967] 2 MLJ 211, FC (refd)

Legislation referred to

Civil Law Act 1956 s 11
B Distribution Act 1958 s 6(1)(e)
National Land Code Form 14A
Rules of Court 2012 O 42 r 12
Stamp Act 1949 ss 2, 4(1), 16(1), 36(1), 38A(1), 39(1), (4), First Schedule

C *Teaw Zhen Yang (Chambers of Jason Chew) for appellant.*
Cik Marvianna bt Zainol (Revenue Counsel, Inland Revenue Board) for collector.

Wong Kian Kheong J:

D BACKGROUND

[1] The late Mr Tan Kok Lee @ Tan Chin Chai ('deceased') died intestate on 17 May 2018 and left three beneficiaries, namely:

E (a) the deceased's widow who is the appellant ('appellant') in the above two appeals ('two appeals'); and

(b) two children of the deceased, Mr Tan Chun Keat ('Mr Tan') and Ms Tan Kai Hui ('deceased's two children').

F

[2] On 8 August 2018, the appellant and Mr Tan had been appointed by the Shah Alam High Court as co-administrators of the deceased's estate ('estate').

G **[3]** In view of the deceased's intestacy, s 6(1)(e) of the Distribution Act 1958 ('the DA') provides that the appellant and the deceased's two children shall each have one-third of the estate.

H **[4]** The estate consists of, among others, the deceased's interest in five pieces of land ('deceased's interest (five properties)').

[5] The appellant and deceased's two children executed a 'deed of family arrangement' on 2 October 2018 ('deed'). According to cl 1 of the deed ('cl 1'), I the appellant and deceased's two children agreed to distribute, among others, the deceased's interest (five properties) to the appellant only. In other words, the deceased's two children renounced in cl 1 their entitlements to the deceased's interest (five properties) under the DA ('renunciation (entitlements under the DA)').

[6] Premised on the deed, the Shah Alam High Court issued an order on 20 December 2018 to vest the deceased's interest (five properties) in the appellant only ('vesting order'). A

[7] Pursuant to the vesting order, the appellant and Mr Tan (as co-administrators of the estate) executed five 'Forms 14A', instruments of transfer of the deceased's interest (five properties) under the National Land Code, in favour of the appellant only ('Forms 14A'). B

[8] Pursuant to s 36(1) of the Stamp Act 1949 ('the SA'), the collector of stamp duties ('collector') imposed ad valorem stamp duty on the Forms 14A ('collector's assessment'). The collector's assessment was made on the ground that the Forms 14A concerned 'release or renunciation by way of a gift' under item 66(c) ('item 66(c)') in the First Schedule of the SA ('First Schedule'). C D

[9] The appellant objected to the collector's assessment and applied to the collector to review the collector's assessment under s 38A(1) of the SA ('review application'). The review application was made on the basis that stamp duty of RM10 should be assessed for the Forms 14A in accordance with item 32(i) in the First Schedule ('item 32(i)'). E

[10] The review application was dismissed by the collector ('collector's dismissal (review application)'). Hence, the appellant paid the stamp duty in full as stated in the collector's assessment and the appellant then filed the two appeals to the High Court against the collector's dismissal (review application) pursuant to s 39(1) of the SA. F

SOLE ISSUE

[11] The only question posed by these two appeals is whether Forms 14A in this case attract ad valorem stamp duty under item 66(c) (release or renunciation of property by way of a gift) or a fixed amount of stamp duty of RM10 pursuant to item 32(i) (conveyance or transfer which is not specifically charged with stamp duty). There are conflicting High Court decisions on this issue. G H

RELEVANT SA PROVISIONS

[12] I reproduce below ss 4(1), 16(1) of the SA, items 32, 46 and 66 of the First Schedule: I

s 4 Instruments chargeable with duty

A (1) Subject to [SA] and subject to the exemptions contained in [SA] and in any written law for the time being in force, the several instruments specified in the First Schedule shall, from and after the commencement of [SA], be chargeable with the several duties specified in such Schedule.

...

B s 16 Voluntary conveyance inter vivos.

(1) Any conveyance or transfer operating as a voluntary disposition inter vivos shall be chargeable, with the like stamp duty as if it were a conveyance or transfer on sale.

C (First Schedule)

Item 32 CONVEYANCE, ASSIGNMENT, TRANSFER OR ABSOLUTE BILL OF SALE:

D (a) On sale of any property (except stock, shares, marketable securities and accounts receivables or book debts of the kind mentioned in paragraph (c))	For every RM100 or fractional part of RM100 of the amount of the money value of the consideration or the market value of the property, whichever is the greater — (i) RM1.00 on the first RM100,000; E (ii) RM2.00 on any amount in excess of RM100,000 but not exceeding RM500,000; (iii) RM3.00 on any amount in excess of RM500,000 but not exceeding RM1,000,000; F (iv) RM4.00 on any amount in excess of RM1,000,000.
G (b) On sale of any stock, shares or marketable securities, to be computed on the price or value thereof on the date of transfer, whichever is the greater — for every RM1000 or fractional part of RM1000	RM3.00
H (c) On the absolute sale of any accounts receivables or book debts to a bank, merchant bank, or finance company licensed under the Banking and Financial Institutions Act 1989 or under the Islamic Banking Act 1983 or a scheduled institution as defined under section 2 of the Banking and Financial Institutions I Act 1989, pursuant to a factoring agreement	RM10.00
(d) Of any property by way of security or any security other than a marketable security	See Charge.

(e) Of any property as above where the transaction is between trustees and where — (i) the beneficial interest in the property passes; (ii) the beneficial interest in the property does not pass	Duty as in (a), (b) or (c) RM10.00
(f) Of any property, for the purpose of effectuating the appointment of a new trustee or the retirement of a trustee although no new trustee is appointed	RM10.00
(g) Of any property by way of settlement	See Settlement
(h) Of any property by way of gift (whether by way of voluntary disposition or otherwise)	See Gift and Section 16(1)
(i) Of any kind not otherwise specially charged with duty	RM10.00

Item 46

GIFT	See Section 16(1)

Item 66

RELEASE OR RENUNCIATION that is to say, any instrument whereby a person releases any property: (a) if on sale; (b) if by way of security; (c) if by way of gift; (d) in any other case not otherwise specially charged with duty	The same duty as a conveyance on sale. The same duty as a charge or mortgage. The same duty as a conveyance by way of gift RM10.00

CONFLICTING HIGH COURT DECISIONS

[13] In support of the two appeals, the appellant's learned counsel has relied on, among others, a judgment by Vazeer Alam Mydin J (as he then was) in the High Court case of *Ch'ng Cheng Siew (suing as administrator of estate of Wong See Yan, deceased) v Pemungut Duti Setem* [2016] 7 MLJ 758. The facts of *Ch'ng Cheng Siew* are similar to these two appeals. It is decided in *Ch'ng Cheng Siew*, at paras [20]–[28] and [30], as follows:

> [20] *The plaintiff, however, argues that the renunciation of interest by Wong Choon Meng and Wong Phooi Meng in the present case is not a gift inter vivos and that the defendant was wrong in apportioning the stamp duty by separate assessment on the 1/3 portion of Ch'ng Cheng Siew (nominal RM10) and the renunciation of interest by the Wong siblings is not a gift but merely a devolution of interest by operation of law.*

[21] *I had decided in favour of the plaintiff for the following reasons. Firstly, learned counsel for the plaintiff refers to the case of Townson v Tickell* (1819) 3 B & ALD 31, *where Abbott CJ held*:

> *The law certainly is not so absurd as to force a man to take an estate against his will … I concur in that opinion, and think that the renunciation here having been by deed under the hand and seal of the party, must have the effect of making the devise with respect to him null and void … The good sense of the thing is quite the other way; the indeed presumes, that the estate devised will be beneficial to the devisee, and that he will accept of it, until there is proof to the contrary. Here is a renunciation by a most solemn act, viz by deed; and by that he has said, that he did not chose to accept that which is devised to him. It seems to me, that the effect of that is, that the estate never was with him at all.* (Emphasis added.)

[22] *And Holroyd J added*:

> *I think that an estate cannot be forced on a man. A devise, however, being prima facie for the devisee's benefit, he is supposed to assent to it, until he does some act to shew his dissent. The law presumes that he will assent until the contrary be proved; when the contrary, however, is proved, it shews that he never did assent to the devise, and consequently, that the estate never was with him.* (Emphasis added.)

[22] *And Best J said*:

> *It seems to be contrary to common sense to say, that an estate should vest in a man not assenting to it: there must be the assent of the party, before an interest in the property can pass to him. It is stated in the declaration, that this party has, by his solemn deed, expressed his dissent, and renounced the estate devised by the will. It appears to me, therefore, that no interest ever vested in him; and, therefore, there is nothing more to be done for the purpose of giving the sole property to the plaintiff.* (Emphasis added.)

[22] *I must say that though that authority is two centuries old, the law remains the same. In the more recent English case of In re Scott, decd* [1975] 1 WLR 1260, *Walton J, in construing a similar question said at p 1271*:

> *I approach the matter this way. Disclaimer is a refusal to accept an interest. As the old Year Books had it, nobody can put an estate upon another in spite of his teeth, and here Col. Scott and Miss Scott have shown their teeth by executing the deeds of disclaimer. Now, what effect does that have? It seems to me that it leaves the executor of the will still holding the interest attempted to be disposed of under the statute, and still holding it as part of the estate of the deceased. If somebody refuses to accept a slice of the estate of the deceased, then it still remains, in my judgment, a part of the estate of the deceased.* (Emphasis added.)

[23] *The Australian common law position is similar to the English position as is stated in the Principles of Australian Succession Law* (2007) Lexis Nexis Butterworths Australia at p 195 *as follows*:

> *A beneficiary under a will, or indeed, under intestacy, cannot be forced to accept the benefit, but may disclaim it … A disclaimer does not amount to a disposition of the property (it is treated as never having been acquired by the disclaiming party) it may be made by deed, in writing and by conduct … In the case of intestacy, if a person entitled on intestacy disclaims the benefit, that benefit will pass to the other members*

of the class to which the disclaiming beneficiary belonged, and if there are none, then to the next class entitled. (Emphasis added.)

[24] *Thus, it is trite law that a beneficiary to an estate, whether under a will or intestacy, cannot be forced to take or accept his inheritance. And when such a beneficiary renounces his rights or interest, then that benefit will pass by operation of law to the other beneficiaries entitled thereto. Therefore, once Wong Choon Meng and Wong Phooi Meng renounced their interest, it would by operation of law flow to the remaining beneficiary, ie their mother Ch'ng Cheng Siew. There is no evidence to the effect that the Wong siblings passed on their interest in the properties by way of gift to their mother. Once they had renounced their interest, they did not have any right or title in their respective 1/3 share in the properties for them to make a gift.*

[25] *In Words, Phrases and Maxims Legally & Judicially Defined,* (Vol 8) at p 87, *the term 'gift' is defined as the 'act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person without any consideration'. Further in Kumarappa Chettiar son of Raman Chettiar of Klang v The Federated Malay States* [1938] 1 MLJ 9 at p 12, *Thomas CJ in construing the meaning of the term 'gift inter vivos' held as follows*:

A gift inter vivos is defined in 15 Hailsham, p 692 S 1210 as the transfer of any property from one person to another gratuitously. It is an act whereby anything is voluntarily transferred from the true possessor to another person, with full intention that the thing shall not return to the donor, and with the full intention on the part of the receiver to retain the thing entirely as his own without restoring it to the giver.

[26] *Therefore, in order to make an inter vivos gift, the giver must possess the right to the property that is given. The Federal Court in Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188; [1997] 4 CLJ 393, held that:

... in law a beneficiary under an intestacy has no interest or property in the personal estate of a deceased person until the administration of the latter's estate is complete and distribution made according to the law of distribution of the intestate estate.

[27] *And in that case the Federal Court held that it was clear that at the date of the execution of the sale agreements for the conveyance of beneficial interest in the subject property, the administration of the estate of the deceased had not been completed. It followed that until his estate had been fully administered by the administrators and distribution made according to law, the beneficiaries had no interest or property in the estate of the deceased so as to give them any title to the lands. Therefore, the beneficiaries could not have covenanted to convey any title to the respondents.*

[27] *Likewise, in the present case, when the two beneficiaries renounced their interest, the administration of the estate was incomplete and distribution had not been made in accordance to the law of distribution of an intestate estate. Therefore, the Wong siblings did not have any interest in the properties sufficient enough to make a gift of such interest. As pointed out their renunciation of interest would lead to their interest devolving to the remaining beneficiaries by operation of law. Here, there is the averment by the plaintiff that she and her two children had agreed that following the renunciation their interest the estate's 1/2 interest in the properties would vest with her as sole beneficiary.*

[28] *Based on the legal principles enunciated above, I find that this agreement between Ch'ng Cheng Siew and her two children cannot be construed as an inter vivos gift of the*

interest of the Wong siblings, as donors, to their mother, as donee. In this regard, for the aforesaid reasons, I am with respect unable to agree with my learned brother's decision in Hor Lim Chee v Pemungut Duti Setem. In that case there is also a distinguishing feature, in that, the renunciation was in consideration of love and affection and my learned brother had placed reliance on the case of Kwan Teck Meng & Ors v Liew Sam Lee [1963] 1 MLJ 333. *But there is no such consideration found here.*

...

[30] *It is therefore clear that the registration of transfer of the estate's 1/2 interest in the properties sought in the two instruments is based on the vesting order granted by the High Court on 7 November 2014. A vesting order merely vests the rights and interest of an estate onto a beneficiary. Here, the instrument states that the entire 1/2 share of the estate in the properties is to be vested in the name of Ch'ng Cheng Siew as sole beneficiary. The term 'gift' is not used anywhere in the affidavit in support of the originating summons leading to the vesting order. Thus, I find that there is no basis in law or in fact for the defendant to construe the 2/3 interest of the Wong siblings separately as being transferred to Ch'ng Cheng Siew as a gift and for the defendant to then assess and impose ad valorem stamp duty on that basis.*

[30] *Therefore, my answer to the question in the case stated is that the defendant ought to assess stamp duty on the entire 1/2 share of the estate that is being transferred to Ch'ng Cheng Siew based on (item 32(i)), wherein the stamp duty payable is the nominal RM10. The excess stamp duty paid shall be refunded to the plaintiff.* (Emphasis added.)

[14] The learned revenue counsel opposed these two appeals premised on, among others, the following two High Court decisions:

(a) the judgment of Azmi Ariffin JC (as he then was) in *Hor Lim Chee v Pemungut Duti Setem* , Penang High Court Originating Summons No 24NCVC-1347–12 of 2013; and

(b) in *Chua Wee Hee v Pemungut Duti Setem dan satu lagi* , Muar High Court Appeal No JB-16A-1–04 of 2018, at paras [26]–[27], Ahmad Nasfy J (as he then was) has decided as follows:

> [26] *Berdasarkan fakta-fakta dalam kes ini, mahkamah berpendapat bahawa taksiran terhadap Borang-Borang 14A oleh responden adalah betul di mana ia terbahagi kepada dua bahagian seperti berikut:*
>
> (c) 1/3 bahagian daripada hartanah tersebut yang dipindahmilik daripada pentadbir kepada perayu sebagai benefisiari melalui Borang 14A berdasarkan sub-s 6(1)(e), duti setem nominal yang telah dikenakan sebanyak RM10 bertepatan dengan item 32 Jadual Pertama Akta atau secara spesifiknya, item 32(i) yang memperuntukkan 'transfer of any kind not specifically charged with duty'. Pada pendapat mahkamah, pindahmilik di atas tidak terjatuh di bawah mana-mana item 32(a), (b), (c), (d), (e), (f), (g) atau pun (h). Oleh itu, duti nominal sebanyak RM10 dikenakan;
>
> (d) *bagi pindahmilik yang melibatkan 2/3 bahagian lagi, ia merupakan pindahmilik daripada pentadbir kepada perayu hasil daripada pelepasan*

dan penolakan hak benefisiari-benefisiari lain kepada perayu berdasarkan dokumen persetujuan yang diikrarkan pada 18 Mei 2017 dan perintah Mahkamah Tinggi bertarikh 25 July 2017. Pada pendapat mahkamah, oleh kerana terdapat pelepasan dan penolakan hak daripada benefisiari-benefisiari lain melalui dokumen-dokumen persetujuan yang dikemukakan maka item 66 Jadual Pertama Akta Setem 1949 adalah terpakai. Dengan pelepasan dan penolakan hak kepada perayu tanpa sebarang balasan maka borang-borang 14A tersebut hendaklah dikenakan duti setem di bawah item 66(c) iaitu sama seperti duti yang dikenakan kepada pindahmilik secara pemberian/hadiah yang terkandung di bawah item 46 yang merujuk kepada sub-s 16(1) di mana memperuntukkan bahawa bagi pindahmilik secara sukarela (transfer operates as a voluntary disposition inter vivos) hendaklah dikenakan duti sebagaimana duti pindahmilik berdasarkan jualan. Dengan demikian Borang-borang 14A bagi pindahmilik 2/3 bahagian tersebut hendaklah dikenakan duti ad valorem selaras dengan item 32(a) Jadual Pertama Akta.

Kesimpulan

[27] *Berdasarkan alasan-alasan di atas, adalah diputuskan rayuan perayu melalui saman pemula di kandungan (1) ditolak dengan kos.* (Emphasis added.)

[15] The learned revenue counsel has also relied on two High Court orders which have dismissed appeals against the collector's assessments of stamp duties based on item 66(c). There are however no written judgments given in those two cases. From the view point of the stare decisis doctrine, if there is no written judgment in a case, that case cannot be cited as a precedent. It is decided in *Ketua Pengarah Pertubuhan Keselamatan Sosial v Wong Ton Feng* [2020] 12 MLJ 625; [2020] 4 MLRH 623, at para [24], as follows:

[24] *When a court delivers a decision but there is no written judgment regarding the decision, the decision is not a binding precedent under the stare decisis doctrine. It is decided in Syahin Hafiy Danial Bin Soh Ahmad Luptepi Amin v Mansur bin Yunus & Anor [2019] MLJU 914, at [13]–[15], as follows:*

[13] In support of this appeal, the defendant's learned counsel has referred to the following:

(a) sealed judgments and orders as well as draft judgments and orders of the Court of Appeal, High Court and sessions court of other cases ('other cases');

(b) written submission filed in the other cases; and

(c) memorandum of appeal and notice of appeal filed in the other cases.

[14] *I am not able to accept the reference by the defendant's learned counsel to other cases except if written judgments have been delivered in the other cases. This is because from the view point of the stare decisis doctrine, only the ratio decidendi ascertained*

from a written judgment of a superior court, has binding or persuasive effect. I refer to the judgment of Raja Azlan Shah FJ (as His Majesty then was) in the Federal Court case of Malaysia National Insurance Sdn Bhd v Abdul Aziz bin Mohamed Daud [1979] 2 MLJ 29, at p 32 as follows:

> *However, I would once again emphasize what has so often been said before, that precedents are not to be slavishly followed; a case may be followed only for its strict ratio decidendi.* (Emphasis added.)

Without a written judgment of a previous case, the court cannot ascertain the ratio decidendi of the previous case by considering the following three matters ('three matters'):

(a) *the material facts of the case which give rise to the issue to be decided by the court;*

(b) *the rule of law which has been applied by the court to resolve the issue; and*

(c) *the reasoning of the court in applying the rule of law to decide the issue in question.*

[15] *In Datuk Haji Harun bin Haji Idris v Public Prosecutor [1977] 2 MLJ 155, the appellant's learned counsel referred to a digest, summary or extract of a previous decision, Heah Chin Kim. Suffian LP held as follows in the Federal Court in Datuk Haji Harun*, at p 170:

> *The full judgment in Heah Chin Kim [1954] MLJ xxxiii is not available and it is impossible for us to determine its ratio decidendi.* (Emphasis added.)

Based on Datuk Haji Harun, no reliance can be placed on a digest, summary or extract of a previous decision because the court cannot extract the ratio decidendi of the previous case by considering the three matters. (Emphasis added.)

WHAT IS TRUE NATURE OF FORMS 14A IN THIS CASE?

[16] In *BASF Services (M) Sdn Bhd v Pemungut Duti Setem* [2010] 4 MLJ 596, at paras [18]–[21], Suriyadi Halim Omar JCA (as he then was) delivered the following judgment of the Federal Court:

> [18] *Now that this court has identified the transfer form as the instrument that is chargeable to stamp duty, the next step is to decide on whether the infrastructure fees are part of the consideration of the agreement and hence liable under item 32(a). It is generally acknowledged that the real substance of a transaction may not successfully be appreciated by mere perusal of a document, or by a hurried gauging of the machinery adapted by the parties of the transaction. Only after going through the exercise of construing the document as a whole may the real substance of that transaction be known and thenceforth ascertain the respective parties' rights and obligations, and the correctness of the respondent's adjudication (Inland Revenue Commissioners v Duke of Westminster* [1936] AC 1; *Pernas Securities Sdn Bhd v The Collector of Stamp Duties* [1976] 1MLJ 188). *CC Gallagher Highmore's Stamp Laws (4th Ed) at p 7 authored:*

General Rules as to Stamp Duties.

In order to determine whether any, and if any what, stamp duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial … For instance, if a writing were headed by a recital that the parties had agreed to execute the promissory note thereinafter written, yet if in truth the contract set forth was not a promissory note, but an agreement of another character, the stamp duty would be not that of a promissory note, but of the agreement. The question therefore, stamp or no stamp, and if a stamp to what amount, is to be determined upon the real and true character and meaning of the writing. It is sufficient to refer to the case of Rex v Inhabitants of Ridgwell [1827] 6 B & C 665, *to establish this proposition.* (Emphasis added.)

[19] In *Stanway Limited v Collector of Stamp Duties, Ipoh* [1931–32] FMSLR 239, *Throne Ag CJ said:*

Now I would here remark that under the provisions of the Stamp Enactment the parties to an instrument become liable to pay stamp duty upon the instrument made between them, having regard to the effect of the instrument, and they cannot avoid payment of the proper duty by using a form of instrument to carry into effect the transaction which, though in name falls within one category, by its effect into another.

[20] *Tan Kay Thye & Ors v Commissioner of Stamp Duties* [1991] 3 MLJ 150, *likewise echoed the sentiments of CC Gallagher's Highmore's Stamp Laws when the case of Limmer Asphalte Paving Company Limited v Commissioners of Inland Revenue* (1872) LR 7 Exch 211 *was quoted by the court to establish the point that what parties called a document was not important. In the current appeal, the fact that the agreement carries the title 'purchase, sale, development and infrastructure agreement' and implying three possible separate agreements, is not decisive. It is the effect and substance of the agreement that counts (Commissioners of Inland Revenue v Glasgow and South-Western Railway Company* (1887) 12 App Cas 315; EN Alpe, *The Law of Stamps on Deeds and other Instruments* (12th Ed)).

[21] *With the above guidelines in mind, and in order to ascertain the true meaning of the agreement, let us peruse the agreement …* (Emphasis added.)

[17] I adopt the following approach in deciding these two appeals:

(a) s 4(1) of the SA provides that stamp duty is chargeable on an 'instrument'. An 'instrument' is defined in s 2 of the SA to include a 'written document'. Premised on *BASF Services*, the court has to ascertain the true nature of the instrument in question, namely the true nature of the written documenst which constitutes the instrument ('instrument/document'); and

(b) in deciding the true nature of an instrument/document:

(i) the name, title, label or description given to the instrument/document ('label') by the party(ies) in question is not conclusive. The court is not bound by the label and may go behind

A the label to determine the true nature of the instrument/document;

(ii) the court has to construe the instrument/document as a whole;

(iii) in addition to the instrument/document, the court may consider all relevant documents ('relevant documents') so as to ascertain the true nature of the instrument/document;

B

(iv) in deciding the true nature of the instrument/document, the court may consider all relevant circumstances regarding the instrument/document ('relevant circumstances'); and

C

(v) in considering the instrument/document, relevant documents and relevant circumstances, the court determines the following matters:

(A) what is the true nature of the rights and obligations of the party(ies)?

D

(B) what is the effect of the instrument/document, relevant documents and relevant circumstances? and

(C) what is the substance of the instrument/document?

E **[18]** In deciding the true nature of Forms 14A in these two appeals, I take into account the following matters:

(a) Forms 14A;

(b) effect of s 6(1)(e) of the DA;

F

(c) the entire deed, in particular cl 1; and

(d) the vesting order.

G **[19]** By considering all the matters as stated in the above para 18, I am of the view that the true nature of Forms 14A is solely to give effect to the renunciation (entitlements under the DA) by the deceased's two children. This decision is premised on the following reasons:

(a) the intestate death of the deceased has attracted the application of the DA. The entitlement of the deceased's two children to the estate ('entitlement (deceased's two children)') only arises by virtue of operation of law, namely s 6(1)(e) of the DA;

H

(b) the deceased's two children and appellant have entered into the deed which provides for, among others, the renunciaton (entitlements under the DA);

I

(c) the vesting order has been obtained by the co-administrators of the estate so as to give effect to the renunciaton (entitlements under the DA); and

(d) the execution of Forms 14A is performed pursuant to the deed and vesting order, once again, to give effect to the renunciaton (entitlements under the DA).

[20] The true nature of the Forms 14A in this case cannot be a gift of the entitlement (deceased's two children) to the appellant. I decide as such for the following reasons:

(a) by virtue of the operation of s 6(1)(e) of the DA, the deceased's two children are only 'entitled' two-thirds of the estate. An entitlement to an estate is not equivalent to a beneficial and legal right or interest in the estate which can be given absolutely as a gift. Accordingly, when the deceased's two children renounce or disclaim their entitlement to the estate by way of cl 1, the renunciation (entitlements under the DA) cannot constitute a gift of the entitlement (deceased's two children) to the appellant; and

(b) it is clear from the Federal Court's judgment delivered by Mohd Dzaiddin FCJ (as he then was) in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1997] 3 MLJ 188, at pp 195–196, that a beneficiary of a deceased's estate has no right or interest in the estate until the administration of the estate is complete in the sense that the estate has been distributed in accordance with the law of distribution of the estate and the right or interest in the estate has been vested in the beneficiary. The entitlement (deceased's two children) has not been vested in deceased's two children because of the renunciation (entitlements under the DA). As such, there cannot be any gift in the form of the entitlement (deceased's two children) by the deceased's two children to the appellant.

[21] Based on the reasons explained in the above paras 18–20:

(a) item 46 only applies to a 'gift' and cannot be a lawful basis for assessment of stamp duty regarding Forms 14A in these two appeals;

(b) item 66(c) applies to a 'release or renunciation … whereby a person releases any property: … (c) if by way of gift'. Item 66(c) cannot apply to Forms 14A in this case because the deceased's two children do not have 'any property' in the estate — please refer to *Chor Phaik Har* and the above para 20; and

(c) item 32 applies to, among others, 'conveyance, … transfer'. Forms 14A in these two appeals fall within the meaning of 'conveyance' and/or 'transfer' in item 32. None of the paras (a) to (h) in item 32 apply to Forms 14A in this case. Accordingly, only item 32(i) applies to Forms 14A in these two appeals.

[22] In view of the above paras 18–21 and for the reasons stated in *Ch'ng*

Cheng Siew, I follow *Ch'ng Cheng Siew* and respectfully differ with *Hor Lim Chee* and *Chua Wee Hee*. From the view point of the stare decisis doctrine, one High Court is not bound by a decision of another High Court — please see the judgment of Ong Hock Thye FJ (as he then was) in the Federal Court case of *Sundralingam v Ramanathan Chettiar* [1967] 2 MLJ 211 at p 213.

CAN COURT ORDER REFUND OF EXCESS STAMP DUTY?

[23] Section 39(4) of the SA provides as follows:

> *If it is decided by the Court that the assessment* or additional assessment *of the Collector is erroneous, any excess of duty which may have been paid in conformity with the erroneous assessment*, together with any fine or penalty which may have been paid in consequence thereof, *shall be ordered by the Court to be repaid to the appellant, with or without costs as the Court may determine.* (Emphasis added.)

[24] As explained in the above paras 18–22, the collector has erroneously imposed ad valorem stamp duty on Forms 14A in this case. Accordingly, pursuant to s 39(4) of the SA, I order the collector to refund to the appellant ('refund order') the excess stamp duty paid by the appellant to the collector ('excess').

WHETHER COURT MAY ORDER INTEREST ON EXCESS

[25] I reproduce below s 11 of the Civil Law Act 1956 ('the CLA') and O 42 r 12 of the Rules of Court 2012 ('the RC'):

> s 11 *Power of Courts to award interest on debts* and damages
>
> *In any proceedings tried in any Court for the recovery of any debt* or damages, *the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt* or damages *for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:*
>
> Provided that nothing in this section:
>
> (a) shall authorize the giving of interest upon interest;
>
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
>
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.
>
> O 42 r 12 *Interest on judgment debts*
>
> Subject to rule 12A, except when it has been otherwise agreed between the parties, *every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied.* (Emphasis added.)

[26] As a consequence of the refund order, the excess is a:

(a) 'debt' due from the collector to the appellant within the meaning of s 11 of the CLA; and

(b) a 'judgment debt' as understood in O 42 r 12 of the RC.

[27] Premised on s 11 of the CLA and O 42 r 12 of the RC, I order the collector to pay to the appellant interest at the rate of 5%pa on the excess from the date of the oral decision of these two appeals ('oral decision') until the collector's full payment of the excess to the appellant.

COSTS

[28] By virtue of s 39(4) of the SA, the court has a discretion to order costs regarding these two appeals. As the appellant has been successful in the two appeals, in accordance with the rule that 'costs follow the event', I exercise my discretion pursuant to s 39(4) of the SA to order costs of these two appeals to be paid by the collector to the appellant.

COURT'S DECISION

[29] Based on the above reasons, the two appeals are allowed with the following orders:

(a) the collector shall refund the excess to the appellant; and

(b) the collector shall pay to the appellant:

(i) interest at the rate of 5%pa on the excess from the date of the oral decision until the collector's full payment of the excess; and

(ii) costs of the two appeals.

Appeal allowed with costs.

Reported by Izzat Fauzan