

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS70/2015

[2018] SCSC 545

REVENUE COMMISSIONER

Plaintiff

versus

**YANGTZE CONSTRUCTION COMPANY PTY LIMITED (REP. BY THE PUBLIC
OFFICER ZIHAI YANG)**

Defendant

Heard: 26-09-2017, 12-10-2017, 23-10 2017 and 24th October 2017

Counsel: Mrs. Lansinglu Rongmei Assistant Principal State Counsel for the Plaintiff
Mr. Guy Ferley Attorney at Law for the Defendant

Delivered: 8 June 2018

JUDGMENT

Burhan J

[1] The plaintiff filed amended plaint dated 4 March 2016 against the defendant seeking the following reliefs:

a) *For an order that the said amount of SR 4,367,546.42 be paid to the plaintiff by the defendant.*

b) *For costs and*

c) *For such other and further relief as your lordship's court shall deem fit.*

[2] It is averred in the plaint that the said sum is due and owing to the plaintiff, the Revenue Commissioner, for non-settlement of tax arrears or outstanding taxes by the defendant company. This has resulted in a cause of action arising for the plaintiff against the defendant. Accordingly the plaintiff has filed this action to recover the said sum from the defendant together with costs. The outstanding taxes to be recovered are contained in paragraph 13 of the amended plaint which reads as follows:

2008 Business Tax Assessment	----SR 530,370.47
2011 Business Tax Assessment	----SR 810,851.98
July 2010 to December 2011 Income Tax assessment	----SR 1,810,329.64
January 2012 to Dec 2012 Income Tax Assessment	---SR 1,215,994.33
Total	----SR 4,367,546.42.

[3] The defendant filed defence, denying that such a sum was owed to the plaintiff and denied receiving notice of assessment for the Business Tax year 2008 or 2011 and denied receiving any reminders of tax liabilities, in respect of both years. The defendant further denied in the defence filed, receiving any finalisation of audit reports in respect of non-payment of income tax as mentioned in the plaint, nor were any reminders of outstanding tax liabilities received in respect of same. The plaintiff was put to strict proof of all such averments set out in the plaint.

[4] At the hearing, the plaintiff called Rovette Moustache, the prosecution officer of the Seychelles Revenue Commission (SRC). In her evidence under oath she stated that Mr. Zihai Yang was the Managing Director of the defendant company Yangtze Construction Company PTY Ltd which was liable to pay taxes to the plaintiff. Witness stated that the

defendant submitted a Business Tax Return for the year 2008 on the 1st of April 2010, following which the Revenue Commission assessed the tax payer on the basis of the return. Following their assessment, the Revenue Commission issued a Notification of Assessment and reminders for the tax liabilities that were due. The defendant was given 30 days to submit payment to the Commission, and 60 days to object to the assessment. The defendant did not file any objections, nor any payments made within the period of 30 days. However according to her sworn testimony, Mr. Yang attended a couple of meetings with the Revenue Commissioner, the Minister of Finance and the Technical Advisors, wherein he proposed to pay the defendant's debt by instalments, but to date no payments have been made.

- [5] Witness further stated similarly, the defendant filed a Business Tax Self Assessment Return for the years 2011 and 2013, and similarly a Business Tax Notification and reminders were sent, to notify the defendant of the revenue liabilities. The defendant did not make any payments, nor was an objection filed to the assessments. Because there was no compliance with the Notifications, the Revenue Commission sent the defendant a Notice of Intention to Prosecute. She stated the Revenue Commission was trying to recover the sum of SR 4.3 million (approximate value mentioned) from the defendant, which covered the revenue owed from 2008 to 2012 by the defendant.
- [6] Witness produced as P1 dated 11 July 2011, the Notification of the Business Tax for the year 2008 issued to Yangtze Construction dated 11 July 2011 which set out the amount due as SR 1, 843,413.23 and the due date of payment as 10th August 2011. Witness further stated the defendant agreed to make payment of SR 500,000 following a meeting held on 6 October 2011, but failed to make any such payment. Witness also produced as P2 dated 19 January 2012 the Reminder Notice pertaining to Business Tax that was due for 2008 and 2009 amounting to SR 2, 065, 311.74 which sum included arrears.
- [7] Witness further produced as P3, the Reminder Notice dated 21st May 2012, indicating late payment penalty which would accrue due to non-payment on the due date by the defendant. The total amount set out in P3 SR 13,278,443.87 included Social Security contribution arrears and surcharges. Witness next produced document P4 dated 26th June

2012 which was a Notice of Outstanding Revenue Liabilities sent to the defendant amounting to SR 13,278,443.87, where the Revenue Commissioner had rejected the defendant's request for a 6 month grace period to settle the arrears, but agreed for a monthly installment of SR 600,000.00 to be paid towards the balance outstanding commencing from the 30th of June 2012. Witness also produced the Final Notice addressed to the defendant dated 25th September 2012 as P5, detailing the outstanding revenue liabilities amounting to SR 13,278,443.87, to be paid within 21 days, failing which the matter would be referred to the Court for prosecution.

[8] Witness Rovette Moustache next produced P6 dated 17th June 2014, the Self-Assessment Notification to Yangtze Construction Company detailing the Business Tax return for the year 2011, amounting to SR 810, 851.98. Further, document P7 an account summary dated 26th June 2014 addressed to the defendant company covering Business Tax outstanding from 2007-2012 including penalties totaling 5, 976, 290.59 was also produced. Further, document P8 dated 21st November 2014, a further Notification of outstanding tax arrears addressed to the defendant which refers to a meeting between defendant, Minister of Finance, Minister's Advisor and Revenue Commissioner, where the defendant's outstanding tax arrears were discussed and a payment plan agreed upon, in respect of the amount including 8,236, 134.90 for primary tax and 7,430,927.42 as penalties.

[9] The next two documents P9 and P10 produced were documents addressed to the defendant, relating to finalization of audit activities for income tax for the period January 2009 to December 2011 and January 2012 to December 2012. Finally witness produced the Notice of Intended prosecution dated 29th October 2015 (P11), referring to the total amount due as SR 34,785,416.47 and giving a breakdown of the different taxes, CSR assessments and VAT owing. The defendant was advised to settle the amount within 14 days but failed to do so.

[10] It could be gathered from the evidence of witness Rovette Moustache that a suit for recovery of taxes was thereafter filed against the defendant. In the plaint, the plaintiff has demanded payment of 4.3 million rupees although in the Notice of Intention to prosecute, the total amount due payable from the defendant was SR 34, 785, 416.47. Witness stated

at present, steps were being taken to recover this sum and the SRC intended to prosecute on the balance amount at a later date. Witness confirmed that the defendant had not made any repayment to date towards the debts accrued to the government. She further stated that before there is any prosecution, SRC matters may take at least three years to accommodate the negotiation process. The time limit for a case to be brought is five years from the date of assessment.

- [11] Furthermore, witness stated that she was instructed to proceed against the defendant for the sum of 4.3 million rupees because there were negotiations underway for the remaining 30 million rupees. The defendant was supposed to sell some of the assets and at one stage, was supposed to construct a building and then pay parts of the debt. The defendant would come to SRC and negotiate after the sending of these notices. In most cases, the defendant would request a meeting with the Revenue Commissioner. At the two meetings that the witness personally attended, the meetings were in relation to Yangtze Construction Company and the company's revenue liabilities were discussed.
- [12] Witness for the plaintiff Rovette Moustache further stated that mail to the tax payer is sent via ordinary mail. If it is not delivered, the post office usually returns the letter to the sender. The plaintiff never received any mail back from the post office, so they believe the letters to have been delivered to the defendant. Witness admitted she had no proof that the letters were posted to the defendant, but affirmed that she personally put most of the letters in their respective envelopes. In some cases, the witness would oversee that the letter was put in its envelope. The letters would be collected and dispatched by another department. Witness confirmed that she personally served the Notice of Intended Prosecution and also sent the letter P11 via email exhibit.
- [13] Witness confirmed that the letter dated 19 January 2012 (exhibit P2) made reference to the defendant's visit to the SRC office on 6 October 2011 to make payment of SCR 500,000. This was after the issuing of the Notice of Assessment for 2008, thereby confirming that the defendant received the Notice and came to SRC to make a proposal for repayment. The letter also made reference to the monthly installments and confirmed that Mr. Yang had been visiting and having meetings with SRC regarding the outstanding

revenue, indicating he is in receipt of all the notices though denied by defendant in the defence.

- [14] Witness confirmed that the defendant would be aware of their legal obligation to file their returns and pay the necessary taxes by the specified dates, lest they commit an offence. Even if the defendant did not receive the Notice of Assessment, he should be aware of his legal obligations. Witness confirmed that they are claiming SR 4,367,546.42, but that did not mean the balance amount has been written off. Witness stated the defendant did not honor or follow through on his proposal for payment in installments. Witness stated that the Plaintiff decided to proceed in respect of 4.3 million rupees, from the 34 million rupees, because proper procedures were carried out, the assessments were completed, and the relevant notifications and correspondence issued.
- [15] Mr. Zihai Yang gave evidence on behalf of the defendant company. He admitted he was the Managing Director and majority shareholder of the defendant company. In his evidence he referred to several payments made by the company and deductions made by the Treasury from sums of money being paid to it. In order to establish the fact payments had been made, he submitted document D1 which was a payment made to SRC by a garnish order from Barclays bank dated 3rd July 2017 from the defendant's company. He also produced a statement from the MCB bank for May to July 2014. He produced document D2 indicating that further payments to SRC. He also produced document D4, referring to two payments made by the Treasury to the defendant company. The 1st payment was in respect of a payment of SR 1,251,221.31 on 28th February 2014 and 2nd payment of SR 834,147.53. He also referred to several payments made between 17th April 2014 and 6th October 2014.
- [16] Mr. Zihai Yang also referred to payments received from the Central bank for the Hotel School project, where the defendant would pay 5% provisional tax. He stated the deducted provisional tax was 1,536,674.26. He further stated that the company received certain payments from the Treasury D3 which amounts were received after the tax had been deducted. He stated from the total sum received from the Treasury SR 20,356,757.95 a sum of 5,428,468.78 was deducted by them for tax. He further stated that he

did not receive any receipt following any of the deductions, and that the plaintiff ought to have kept a record.

- [17] Mr. Zihai Yang admitted that he could not recall but did not think the defendant company paid taxes in 2011 or 2012. However, he stated that almost 10 million rupees was deducted and if they owed any money, the same should have been offset. He stated that he was not informed of the balance. He further stated that he directly paid to SRC the sum of 1.95 million rupees, made by way of 4 direct payments, these payments following a meeting or negotiation. He received a letter concerning the 34 million rupees the defendant owed in tax, but he do not agree with it. With regard to the 4.3 million rupees claimed in the plaint, witness stated that the amount paid, as deducted from 2013 and 2014, is much more than the sum owed to SRC, and should therefore be offset.
- [18] Mr. Zihai Yang admitted in his cross examination, he was the major shareholder and Managing Director of the Yangtze Construction Company. He admitted receiving document P2 which was the Reminder Notice about business tax 2008 and 2009. He admitted in letter P12 dated 22nd May 2012 signed by him, he had asked the SRC to waive the surcharge against the defendant and grant the defendant company a grace period of 6 months to settle the arrears in respect of Business Tax Assessment for the year 2007 and 2008. He admitted the SRC had replied by letter P4 which was a notice of outstanding revenue liabilities sent to the defendant company amounting to SR 13,278,443.87, where the Revenue Commissioner had rejected the defendant's request for a 6 month grace period to settle the arrears, but agreed for a monthly installment of SCR 600,000.00 to be paid towards the balance outstanding, commencing from the 30th of June 2012.
- [19] He further admitted that P5 which was the Final Notice to recover 13,278,443.87 was familiar to him. It was further brought to the notice of court that in the defence filed the defendant had admitted document P6 dated 17th June 2014, the Self-Assessment Notification of Yangtze Construction Company detailing the Business Tax return for year 2011 amounting to SR 810,851.98. Though witness denied having seen P6, when counsel for the plaintiff pointed out that this letter was admitted in the defence filed Mr. Yang stated that he must have received it if the defence filed accepted it. In relation to

exhibit P8 he admitted having received the document and that the defendant had knowledge of the outstanding tax arrears. He admitted meeting the SRC officers in regards to the arrears. Further, he stated that he told the officers that the defendant had already paid; the debt could be offset. He stated that SRC agreed that if the defendant settled all the tax, they may consider waiving the surcharge.

[20] Mr. Yang also admitted that there were also Social Security fund payments outstanding from his company to the tune of 9.5 million. He admitted 3.4 million was what the defendant owed and 6 million was the surcharge. He admitted the plaintiff did not include the recovery of this amount. He further admitted, he could not tell for which tax he had made payments and could not tell whether it was for business tax, income tax or the social security fund dues he had paid. It appears he was unaware that the amounts deducted and paid by him had gone towards the outstanding social security fund payment amounting to 9.5 million which is given priority in recovery procedures.

[21] When one considers the evidence given by Mr. Yang on behalf of the defendant, it is apparent that under cross examination, he confirms the fact that he is the Managing Director and major shareholder in the defendant company and admits he was running the said construction company. He admitted that a company should pay its income tax by the 31st of every month and confirmed that he was aware of exhibit P2 and that he received it. With regard to exhibit P4, he admitted that he should have that document because the letter was addressed to him, but he could not recall exactly. He acknowledged document P12 (letter by defendant-company addressed to SRC dated 22 May 2012 signed by Mr Zihai Yang) and agreed that he asked the SRC to waive the surcharge and to grant a grace period of 6 months to settle the arrears by a monthly installment of SCR 600, 000. He further agreed that it was in reference to that same letter that SRC wrote to him on 26 June 2012 (exhibit P4).

[22] It is apparent that the social security outstanding against the defendant company includes a big part of the surcharge, namely more than half. The defendant owes 3.4 million rupees but the surcharge is approximately 6 million rupees. Mr. Yang stated that the SRC officer did not advise him to make the social security payment a priority; he believed that tax is all the same and that the SRC officer should decide where the funds go once they

receive the payment from the defendant. It is apparent that the 20% deducted amount was from the defendant's income received in the year 2014, therefore this amount would be offset for 2014 in respect of any taxes due for that year. This has nothing to do with the defendant's income from 2008 to 2012. It is apparent that the defendant contention is that the SRC can use the money already paid to offset all the debts accrued. Mr. Yang stated that whatever sum that has been deducted from their income should cover all the taxes owed to Government. P13 (letter dated 12 June 2013 from Mr. Yang to the SRC) was admitted into evidence, and the defendant clarified that Mr. Chang Lang was the tax agent. Mr. Yang further agreed that he wrote the letter, and confirmed the contents thereof, including that he admitted he was falling behind payment of taxes and encountering delays in paying the salaries of Chinese workers and confirmed that he wrote the payment plan proposal.

[23] Mr. Yang admitted that from the start of 2015 onwards, the defendant company did not pay anything because they were unable to afford any further repayments due to a decline in business. He stated that he thinks they paid tax for 2008 to 2010 because it could not be that much.

[24] Having considered the evidence of both parties before court, it is apparent from the evidence led by the defendant and the cross examination of the plaintiff and the written submissions of the defendant, that the defendant's plea in limine litis, is based on two main grounds. The first is based on Article 2271 of the Civil Code, on a plea of prescription. It is the contention of the defendant that Article 2271 states that all rights of action shall be subject to prescription after a period of five years except as provided for in Article 2262 and Article 2265. The defendant submits that Article 2262 and 2265 relate to rights in land and are therefore not applicable to this case which is not in respect of land rights and therefore the plaintiff's claim for the year 2008, is prescribed by law as the claim to recover same has been filed after a period of 5 years..

[25] In reply, learned counsel for the plaintiff referred to Article 2248 of the Civil Code and stated that as the defendant had acknowledged his debt when the defendant had met the plaintiff on the 6th of October 2011, by agreeing to make payment of monthly instalments of SR 500,000.00 the claim of the plaintiff was not prescribed. It is the view of this Court

that the defendant agreeing to pay the debt by monthly instalments of SR 500,000.00 is an acknowledgement of the debt which occurred in October 2011. This is supported not only by the oral evidence of the prosecution witness Rovette Moustache but also by document, exhibit P2. The defendant had further written seeking a grace period of 6 months and that a waiver of the surcharge be granted as per letter P12 dated 27 May 2012, a letter admitted by the defendant. This is a further indication in writing by the defendant not only acknowledging the debt but seeking further relief by seeking time to settle it. Therefore this court is satisfied that the prescription claimed by the defendant has been interrupted by the acknowledgement of the debt by the defendant.

[26] The next ground urged by learned counsel for the defendant is that the plaint is not in conformity with section 21(1) of the Revenue Administration Act, in that as it states that “*any unpaid revenue may be sued for and recovered in any court of competent jurisdiction by the Revenue Commissioner or by the Attorney General suing on behalf of the government*”. The defendant contends that as the plaint is signed by Rovette Moustache for the plaintiff and was prosecuted by the Attorney General represented by Assistant Principal State Counsel Mrs. Langsilu Rongmei it is procedurally wrong. I am inclined to agree with learned counsel for the plaintiff when she states that the plaint has been filed by the Revenue Commissioner and signed by its authorized officer. The Revenue Commission, a government institution is free to retain a legal officer from the private bar or an officer in the public service which in my view includes an officer serving in the Attorney General’s Department. I therefore proceed to dismiss the two grounds relied on by the defendant in his plea in limine litis.

[27] It appears the defendant has relied strongly on the fact that there is no proof of service of any documents on him and very vaguely the defendant in his evidence stated, he had no knowledge of many of the documents sent to him by the plaintiff. However, it is apparent that he was aware of the arrears of taxes due from him set out in the plaintiff’s numerous documents and even went to the extent of accepting liability and agreeing to pay the amounts claimed by way of instalments and even moved for surcharges levied in respect of the taxes to be set aside. He had even met and had discussions with officers of the SRC regarding the taxes owed by him. Therefore I am inclined not to accept the vague and

dubious evidence of the defendant who was quite clearly clinging to technicalities to disclaim payment, even after having agreed to pay the outstanding claims in instalments. Further, in his evidence, the defendant referred to several payments made by him and deductions made in respect of payments to him from the Treasury. It is apparent that all amounts deducted from his account were used to pay the arrears in his Social Security payments which was always given priority over other taxes.

[28] Further, it is settled law that in cases of this nature, it is not for court to once again proceed to calculate the sum claimed in the plaint. Learned counsel for the plaintiff has very succinctly brought to the notice of this Court the provisions of section 21(2) of the Revenue Administration Act (herein after referred to as the said Act) which reads as follows:

“In an action for recovery of revenue, a copy of the notice of assessment shall be received by the court as evidence that the revenue is due and payable, and the court shall not entertain any plea that the revenue assessed is not recoverable because it has not been properly assessed or that the assessment under which the revenue is payable is the subject of objection and appeal”.

[29] Further section 13(1) of the said Act reads as follows:

The production of a notice of assessment, or a document under the hand of the Revenue Commissioner purporting to be a copy of a notice of assessment, is conclusive evidence of the due making of the assessment and (except in proceedings under Part IV) that the amount and all particulars of the assessment are correct.

[30] In relation to Part IV it is pertinent at this stage to draw attention to section 15 (1) of the said Act which reads as follows:

Subject to subsection (2), a taxpayer dissatisfied with a revenue decision may, within sixty days after service of the notice the decision, serve on the Revenue Commissioner an objection in writing against the decision stating fully and in detail the grounds for the objection.

[31] Section 16(1) of the said Act reads as follows:

A taxpayer dissatisfied with an objection decision may make an application to the Revenue Tribunal in accordance with Section 72 for review of the decision.

[32] Further section 17(1) of the said Act reads as follows:

A party to a proceeding before the Revenue Tribunal dissatisfied with the Tribunal's decision on an objection decision may lodge a notice of appeal against the decision to the Supreme Court in accordance with Section 78.

[33] Further appeal is permitted even up to the Seychelles Court of Appeal. Therefore the law specifically provides for a procedure for relief in respect of revenue decisions.

[34] Learned counsel for the plaintiff also relied on the case of **Yve Bossy v Republic (1980) SLR 40** which held as follows:

(i) where any legislation provided for appeal against the decision of any government official or body, it is that proceeding or method that must be followed;

(ii) it is not permitted to by-pass that procedure and instead make an appeal to court;

(iii) the tax legislation provided a procedure to appeal against an assessment by the Controller of Taxes;

[35] Therefore learned counsel for the defendant's contention in paragraph 3 of his written submission in respect of the maximum rate of tax should be lesser than that assessed in this case, is a matter that this court cannot entertain as according to section 21 (2) of the Revenue Administration Act, court shall not entertain any plea that the tax assessed is not proper.

[36] Similarly in the case of **Controller of Taxes v Ho- Sap (1983) SLR 148**, it was held that an excessive tax was a matter to be raised before the Taxation Board of Review (at present Revenue Tribunal) on an appeal made by the defendant and in the absence of such an appeal, the defendant could not raise it now.

[37] Therefore, the defendant's submission regarding income tax as being excessive, is a matter which could have been raised before the Revenue Tribunal referred to above. Since the defendant did not object or appeal, he cannot now ask this court to question the amount of income tax and decide whether or not it was a correct assessment.

[38] For the above reasons, I believe that no proper defence has been made out and that no reason has been shown in law why the plaintiff should not have judgment in his favour in regard to the amount claimed. I proceed to give judgment for the plaintiff as prayed for in paragraphs (a) and (b) of the prayer of the amended plaint, dated 4 March 2016.

Signed, dated and delivered at Ile du Port on

M Burhan
Judge of the Supreme Court