

TECHNICAL

Direct Taxation

TAX CASE UPDATE

Recovery of professional fees for services rendered by a tax consultant

[City Tax Shelter Sdn Bhd & Dr. Siti Normala Binti Sheikh Obid v Dato' Dr. Mahmood Bin Awang Kecik](#) (High Court) (Civil Action No: S2-22-540-2007)

Date of Judgment: 20 March 2012

Facts:

The first Plaintiff was a consultancy firm specializing in tax matters. The second plaintiff (referred to as "PW1" in the Judgment of the Court) was a tax consultant and a director of the first Plaintiff. The Defendant was a consultant/Urologist attached to a specialist hospital (the Hospital) in Kuala Lumpur. PW1 had commenced this action against the Defendant to recover professional fees due and owing by the Defendant amounting to RM255,866.40, accrued interest and costs. The Defendant denied liability, pleading that the Plaintiffs were not entitled to the sum claimed as they had not performed the task entrusted to them in the manner directed by the Defendant.

For the Plaintiffs, it was claimed that PW1 was at one time under medical treatment by the Defendant and in the course of that treatment, had given her business card to the Defendant, which stated her profession as a tax consultant. About that time, the Defendant received a letter from the Inland Revenue Board (IRB) which requested him to furnish all relevant documents pertaining to his income, business income, assets and bank statements for the years of assessment (YA) 1996 to 2003 for verification by the IRB. The Defendant then sought the services of PW1 to sort out the tax problem with the IRB, and she was then appointed to be his tax consultant and/or agent. The IRB was notified of the appointment vide a letter dated 23.6.2005. Upon her appointment as tax consultant, PW1 took the following course of action:-

1. Applied to the IRB for extension of time to furnish the documents requested for, which was granted. The Defendant was informed of the extension of time vide a letter from PW1 dated 27.6.2005.
2. Wrote to the Defendant as well as the Hospital to request (respectively) for documents and personal particulars pertaining to the Defendant's income for purposes of auditing the Defendant's income. However, not all documents were given to her.
3. PW1 was unable to obtain all necessary documents from the Defendant, especially the bank statements, and therefore was unable to audit the Defendant's income by using the bank statements. She then proposed to the Defendant that the next alternative was to adopt the "Capital Statement" method of determining the Defendant's income, which was agreed by the Defendant.

4. In response to the Defendant's suggestion to audit his income using his company, Uro Medic Services Sdn Bhd. (Uro Medic), and to treat all payments due to him from the Hospital as if they were paid to Uro Medic, PW1 made a search at the Companies Commission Malaysia (CCM) to ascertain the status of Uro Medic. She found that Uro Medic was a dormant/inactive company with poor documentation. Attempts to obtain information from the former secretary of the company ("ex secretary") were also unsuccessful, as the ex secretary's services had been terminated by Uro Medic and his remuneration amounting to about RM14,000 had not been paid.
5. Under the above circumstances, PW1 informed the Defendant that she was unable to audit the Defendant's income through Uro Medic and again proposed that the "Capital Statement" method be adopted to determine his income, and this was agreed by the Defendant.
6. After discussions with the IRB (where the Defendant's wife was also present), PW1 informed the Defendant in a letter dated 25.7.2005, that the IRB had in principle agreed to her computation of taxable income using the "Capital Statement" method, by which the (revised) taxable income was reduced to RM748,467. The Defendant was also informed that PW1 had negotiated for (among other terms) the tax to be paid within 12 months. In the same letter, the Plaintiffs charged the Defendant "20% of the reduced taxable income the Plaintiffs were able to work out and or save...amounting to the sum claimed by the Plaintiffs herein."
7. A Memo dated 11.8.2005 with some documents attached for the Defendant's further action for purposes of IRB, was sent to the Defendant. Instead of responding to the Memo, the Defendant terminated the Plaintiffs' services.

For the Defendant, it was claimed that:

1. PW1 had approached the Defendant and his wife and offered her services as tax consultant.
2. The Defendant had not agreed or given consent to adopt the "Capital Statement" method for computation of his income tax, and denied that he had agreed to pay the Plaintiff for their services on "Success Basis", based on 20% of the reduced taxable income which the Plaintiffs were able to work out for the Defendant.
3. PW1 ought to have audited Uro Medic's income but this was not done. Instead she had treated Uro Medic's income as his individual income and this was not agreed to by the Defendant. In computing his taxable income, PW1 had not considered tax exemptions which the Defendant was entitled to.
4. Being dissatisfied with Plaintiffs' services, the Defendant had terminated the Plaintiffs' services vide a letter dated 18.8.2005. As the Plaintiffs never performed the task of auditing Uro Medic's income as instructed by the Defendant, they were not entitled to the fee charged to the Defendant.

Issues:

The issues for determination by the Court are as follows:

1. Whether the Plaintiffs were appointed by the Defendant to provide professional services as tax consultant or agent to manage the auditing of the Defendant's income for tax purposes;
2. Whether the Defendant is liable to pay the Plaintiffs for their professional services; and
3. Whether the Plaintiff's claim is appropriate and with basis.

Decision:

Judgment entered for the Plaintiffs as prayed plus interests and cost of RM25,000.00

The following are some salient points from the Grounds of Judgment:-

Burden of Proof

- The law on the burden of proof is governed by the provisions in Chapter VII of Part III of the Evidence Act 1950 ("the Act"). Under S101 of the Act, the legal burden of establishing the facts pleaded against the Defendant is on the Plaintiff. The Court has the duty to determine whether sufficient evidence has been adduced by the Plaintiff to prove his case on the balance of probabilities and or beyond reasonable doubt, depending on what is reasonable and applicable to the Plaintiff's pleaded case.
- Until and unless a plaintiff has discharged the onus to prove its case on a balance of probabilities, the burden does not shift to the defendant (*Johara Bi Binti Abdul Kadir Marican v. Lawrence Lam Kwok Fou* [1981] 1 MLJ 139 (FC))

Issue 1

- Based on the testimonies of the witnesses who testified as well as the Defendant, and the evidence (document) adduced, there was sufficient evidence to show that the Plaintiff were appointed by the Defendant as his tax consultant and/or agent for purposes of tax assessment. After reviewing the relevant Notes of Evidence and Exhibits, the learned Judge found that there was a valid and enforceable contract between the Plaintiffs and the Defendant wherein the Defendant had appointed the Plaintiffs to be his tax consultant and to provide consultancy services to audit the Defendant's income, and the Plaintiffs had agreed to undertake that task.

Issue 2 and 3

- Based on evidence adduced, there was no doubt that the Plaintiffs had diligently and professionally provided the services to the Defendant as agreed by both parties to the agreement. However the Plaintiffs were not able to complete the task as they did not receive a positive response from the Defendant, who opted instead, to terminate the Plaintiffs' services "alleging that he could get better deal from other tax consultants". The Defendant did not challenge the Plaintiffs' method of computation by way of credible evidence of another witness, hence the learned Judge had accepted Plaintiffs' evidence pertaining to the "Capital Statement" method as the best method to be adopted under the circumstances of the case. Furthermore, there was no evidence adduced by the Defendant to show that he had objected to the "Capital Statement" method of computation of income.
- After following the testimony of PW1, and DW1 (the Defendant) and DW2 (wife of the Defendant) and having carefully evaluated the evidence, the learned Judge believed the evidence of PW1 and found her to be a truthful witness as compared to DW1 and DW2. PW1 was consistent throughout and her testimony was supported by contemporaneous documents. However, DW1 appeared to be an unreliable witness as he was inconsistent in his testimony and "he appeared to be arrogant, evasive and had given contradictory statements." (The Judge then went on to list the points where DW1's answers to questions put to him during cross examination by Plaintiffs' counsel had shown inconsistencies or evasiveness.)
- The Defendant had never disputed that he had appointed the Plaintiffs as his tax consultant. He could not expect the Plaintiffs to provide services for free. The evidence clearly showed that professional services were in fact provided but the Defendant blatantly denied that work was done. Furthermore, he had not been paying taxes for almost 8 years.

- The Defendant gave an “absurd explanation” as to why he stated in his termination letter that he did not agree with the Plaintiffs’ charges (20% of RM 2.6 million) because it was a mistake on his part and he had not read the letter in full. As someone who had not paid tax for 8 years, he ought to be extremely concerned with the Plaintiffs’ work and “ought to have fine tooth combed the Plaintiff’s letter to check what was due from him to the IRB”. This showed the Defendant’s bad faith in wanting the services to be free of charge.
- The learned Judge was satisfied with the evidence adduced that the method to be used and the fees to be paid on the “Success Basis” as testified by PW1 to be true.
- The Defendant’s claim that PW1 had approached him and his wife to offer the Plaintiff’s services was not consistent with the contemporaneous document filed in Court. The documentary evidence suggested (“common sense would tell us”) that the Defendant was in “dire need of a tax consultant” and not the other way round.
- The Defendant was not able to prove by way of documents that the income he received as a consultant was in fact the income of Uro Medic. There was nothing filed in CCM that the income earned by him was reflected in Uro Medic’s Annual Report. The accusation that the Plaintiffs had not considered tax exemptions that he was entitled to in assessing his tax liability was a “flimsy excuse” as this was actually considered and supported by documents tendered in Court.

Having considered the testimony of both the Plaintiffs’ as well as the Defendant’s witnesses, and examined the manner in which these witnesses testified, and the evidence adduced, the learned Judge chose to believe the testimony of PW1 over that of DW1 and DW2, and was satisfied that the Plaintiffs had established their case against the Defendant on the balance of probabilities. Issue 2 and 3 would have to be answered in the affirmative.

Note

This case demonstrates the vital importance of documenting all work processes performed in the course of carrying out a client assignment, which include working papers, correspondences and discussion notes with the IRB as well as with the client. These serve as evidence to be tendered in court in the event of a law suit, the adequacy of which will determine the outcome of the suit.

Members may read the full [Grounds of Judgment](#) from the Kuala Lumpur Law Courts Official website.

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