

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 Kecil](#) (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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**IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
IN THE STATE OF WILAYAH PERSEKUTUAN, MALAYSIA
CIVIL ACTION NO: S2-22-540-2007**

BETWEEN

- 1. CITY TAX SHELTER SDN. BHD.**
- 2. DR. SITI NORMALA BINTI SHEIKH OBID ... PLAINTIFFS**

AND

DATO` DR. MAHMOOD BIN AWANG KECIK ... DEFENDANT

GROUND OF JUDGMENT

BRIEF BACKGROUND

1. The Plaintiffs commenced this action against the Defendant for recovery of professional fees due and owing by the Defendant amounting to RM255,866.40, accrued interest and costs.

2. The Defendant denied liability and pleaded that the Plaintiffs were not entitled to the sum claimed as they had not performed the task entrusted unto them in the manner directed by the Defendant. The Defendant alleged that he had never consented to the “Capital Statement” method to be adopted by the Plaintiffs for the assessment of his individual income and or that of the Defendant’s company known as Uro Medic Services Sdn Bhd (“**Uro Medic**”) for purposes of the Inland Revenue Board (“**IRB**”). Further the Defendant alleged that he had never agreed to pay the Plaintiffs’ professional fees based on the “Success Basis” which was 20% of the final reduced taxable income which the Plaintiffs were able to work out for the Defendant.
3. This case proceeded by way of a full trial with one witness for the Plaintiffs and two witnesses for the Defendant. After having given much consideration to the evidence, both documentary as well as testimonial, and the submissions by all the learned Counsels for the respective parties I find that the Plaintiffs had proved their case on the balance of probabilities. Hence I allowed the Plaintiffs’ claim against the Defendant with costs.
4. Aggrieved by the said decision the Defendant appealed to the Court of Appeal Malaysia against the whole of the said decision.

THE DOCUMENTS

5. At the outset of the trial parties have agreed for the following documents to be used during the trial:

Description	Document
i. Bundle of Pleadings	- "A"
ii. Common Bundle of Document	- "B"
iii. Defendant's Supplementary Document	- "C"
iv. Issues to be Tried	- "D"
v. Agreed Statement of Facts	- "E"
vi. Plaintiff's Opening Statement	- "F"
vii. Defendant's Opening Statements	- "G"

THE ISSUES TO BE TRIED

6. The issues to be tried were as stated in the document marked as "D". For ease of reference these issues were translated and are now reproduced as follows:

- i. Whether the Plaintiffs were appointed by the Defendant to provide the professional services as his tax consultant and or agent to manage the auditing of the Defendant's income for tax purposes;
- ii. Whether the Defendant is liable to pay the fees for the Plaintiffs' professional services; and
- iii. Whether the Plaintiffs' claim is appropriate and with basis.

THE CASE FOR THE PLAINTIFF

7. The 1st Plaintiff was a consultancy firm specialising in tax matters. The 2nd Plaintiff (“**PW1**”) was a tax consultant and a Director of the 1st Plaintiff. The Defendant was a Consultant/Urologist who was operating clinics at the Ampang Putri Specialists Hospital (“**Ampang Putri**”) and at Pakar Perdana Specialist Hospital, Kota Bharu (“**Pakar Perdana**”). PW1 had sought treatment at the Defendant’s clinic for her medical problem and was placed under the care and supervision of the Defendant. In the course of that PW1 had given her business card to the Defendant which stated her profession as a tax consultant and also her academic qualifications. It was around the time PW1 was receiving treatment at Ampang Putri that the Defendant received a letter (**Exhibit P3** at **page 2 of “B”**) from the Wangsa Maju Branch of the IRB requesting the Defendant, among others, to furnish all relevant documents pertaining to his income, business income, assets and bank statements for the assessment of tax for years from 1996 to 2003 for verification by the said IRB. The said letter (“**Exhibit P3**”) was also sent to Ampang Putri. After receiving Exhibit P3 from the IRB the Defendant then sought the 2nd Plaintiff’s professional services to sort out his tax problem with the IRB.
8. The Defendant had appointed the Plaintiffs to be his tax consultant and or agent and the Plaintiffs had agreed to undertake the said task. Vide a letter dated 23rd June 2005

(**Exhibit P2 at page 1 of “B”**) the Defendant had caused a letter to be sent to the IRB to notify the said IRB of the 1st Plaintiff's appointment.

9. As soon as the 1st Plaintiff was appointed PW1 then applied for further time for the Defendant to furnish the documents sought by the IRB vide a letter dated 24th June 2005 (**Exhibit P6 at page 40 of “B”**) citing that the 1st Plaintiff had just been appointed as the Defendant's tax consultant and or agent as the reason. PW1 had faxed a letter to the Defendant notifying the Defendant of the change of the date to furnish the relevant documents for verification by the IRB (**Exhibit P7A at page 41 of “B”**) which had been agreed by the IRB. Vide a letter dated 27th June 2005 (**Exhibit P7 at page 42 of “B”**) PW1 had confirmed the telephone conversation she had with IRB's officer whereby the Defendant had been granted an extension of time to furnish all the relevant documents to the IRB. A copy of Exhibit P7 was also sent to the Defendant.
10. Pursuant to Exhibit P2 the Plaintiffs would be responsible to handle all matters pertaining to the Defendant's individual income and also that of Uro Medic for income tax for the years of assessment from 1996 to 2003 which was still due and outstanding.
11. PW1 had written to the Defendant (**“Exhibit P4 at page 27 & 28 of “B”**) for the relevant documents to be furnished to her to enable her to proceed with the auditing of the Defendant's income. With the Defendant's permission PW1 had also written

to Ampang Putri requesting for the Defendant's personal particulars pertaining to his income for purposes of auditing. Both the Defendant and Ampang Putri had furnished PW1 some of the relevant documents. However not all documents were given to her. PW1 then held interviews with the Defendant and or his wife, one Datin Dewi Nasa Widiyarti Binti Wayan Putru ("**DW2**") in order to obtain the relevant documents to enable the Plaintiffs to audit the Defendant's income for tax purposes.

12. PW1 was unable to obtain all necessary documents from the Defendant especially the bank statements and some other records pertaining to the Defendant's income. Therefore PW1 could not audit the Defendant's income by using the bank statements. In view of the constraint PW1 had proposed to the Defendant that the next alternative was to adopt the "Capital Statement" method of assessment of the Defendant's individual income which was agreed by the Defendant as the Defendant was very much concerned about the amount of tax to be levied by the IRB.
13. The Defendant had also suggested to PW1 to audit his income by using his company, Uro Medic (**Exhibit P5 at page 3 to 9 of "B"**) and to treat all payments due to him as a Consultant/Urologist at Ampang Putri and Pakar Perdana as if the same had been paid to Uro Medic. The Defendant had also reiterated that all payments due to him for his consultancy services as a Consultant/Urologist in Ampang Putri as well as at Pakar Perdana were in fact paid to Uro Medic and not to him personally. A check with these two Hospitals disclosed that the

Defendant's income as a Consultant/ Urologist was in fact paid to the Defendant himself and not to Uro Medic as communicated earlier.

14. PW1 then made a search with the Companies Commission Malaysia ("**CCM**") to ascertain the status of Uro Medic. On checking PW1 discovered that Uro Medic was a dormant/inactive company with no bank account and poor documentation. PW1 had also attempted to contact Messrs MCR Management Services ("**ex Secretary**") the ex Secretary of Uro Medic if he could provide the information and or the documents pertaining to Uro Medic. However the ex Secretary had refused to furnish these documents since he had been terminated by Uro Medic and his remunerations in the sum of RM14,515.00 had not been paid ("**Exhibit P12 at page 10 of "B"**").
15. PW1 then informed the Defendant that in view of the fact the Uro Medic was a dormant/inactive company with poor documentation and records and the fact that all payments for the Defendant's consultancy services were in fact paid to the Defendant instead of Uro Medic PW1 was not able to audit the Defendant's income through Uro Medic.
16. The Defendant had instead suggested that PW1 use DW2's company. PW1 then informed the Defendant that the Plaintiffs could not use DW2's company for tax purpose as the nature of business of DW2's company was different from the Defendant's business and not in any way related to the Defendant's consultancy services as a Consultant/Urologist.

17. Due to poor and or incomplete documentation and the fact that the Defendant had not paid his income tax for eight odd years continuously PW1 could not use the bank statement for purposes of auditing the Defendant's income. As an alternative PW1 again proposed that "Capital Statement" method to be adopted for the auditing of the Defendant's individual income for IRB purposes and this was agreed by the Defendant.
18. PW1 had held discussions with the IRB as scheduled and as a follow up the PW1 informed the Defendant that the IRB had in principle agreed to the formula used by the Plaintiffs as shown in the letter dated 25th July 2005 sent to the Defendant (**Exhibit P8 at page 45- 46 of "B"**). The details of the computations were as shown in Exhibit P8. The gross taxable income computed and agreed in principle by the IRB was RM2,966,325.89 and after deducting relevant expenses amounting to RM2,027,899.00, the revised taxable income was RM748,467.00. By using the "Capital Statement" method of assessment the Plaintiffs were able to reduce the Defendant taxable income to RM748,467.00. PW1 had also negotiated for the said tax to be paid within 12 months with RM100,000.00 payable upon signing of the agreement. PW1 had also informed the Defendant the Plaintiffs would try to appeal for the Defendant to be given 24 months instead of 12 months to make payment. In the same Exhibit P8 the Plaintiffs had charged 20% of the reduced taxable income the Plaintiffs were able to work out and or save for the Defendant amounting to the sum claimed by the Plaintiffs herein.

19. According to the PW1 notwithstanding the constraint experienced by them they had performed the professional services as instructed by the Defendant to the best of their ability and managed to obtain a reduction in the Defendant's taxable income. However when the Plaintiffs sent a Memo dated 11 August 2005 (**Exhibit P9** at **page 63 of "B"**) attaching a few relevant documents for the Defendant's further action for purposes of the IRB, the Defendant turned around and terminated the Plaintiffs' professional services (**"Exhibit P10** at **page 11 of "B"**). Due to the Defendant's reluctance to respond to the Plaintiffs' Memo the Plaintiffs were not able to wrap up and or complete the task pursuant to the contract. The Plaintiffs pleaded that they were entitled to be paid for the services rendered.
20. Therefore the Plaintiffs claimed from the Defendant the sum of RM255,866.40, interest and costs.

CASE FOR THE DEFENDANT

21. The Defendant was a Consultant/Urologist having his practice at his clinics in Ampang Putri as well as at Pakar Perdana. The Defendant was also a Director of Uro Medic. Besides the Defendant his wife one Datin Dewi Nasa Widiyarti Binti Wayan Putru (**"DW2"**) was also the Director of Uro Medic (**"Exhibit P5"** at **page 3 to 9 of "B"**). The Defendant admitted that PW1 was his patient at Ampang Putri and was a tax consultant at the 1st Plaintiff. According to the Defendant around the year 2005 PW1 had approached the Defendant and his wife and offered her

services as a tax consultant. PW1 had offered to handle the Defendant's individual income tax and that of Uro Medic.

22. Vide a letter dated 23rd June 2005 (**Exhibit P2 at page 1 of "B"**) the Defendant had appointed the Plaintiffs as his tax consultant and or agent to deal with all matters pertaining to the Defendant's income tax. The Defendant had not agreed and or given his consent to adopt the "Capital Statement" method for the computation of the Defendant's income tax. The Defendant also denied that he had agreed to pay the Plaintiffs their professional services based on "Success Basis" as claimed which was equivalent to 20% of the reduced taxable income which the Plaintiffs were able to work out for the Defendant. The Defendant denied having received a copy of the quotation of the fees for the Plaintiffs' professional services (**Exhibit P1 of page 26 of "B"**).
23. The Defendant realized that the Plaintiffs had not complied with his specific instructions upon receipt of a letter dated 25th July 2005 (**Exhibit P8 at page 45 & 46 of "B"**) from the Plaintiffs whereby the Plaintiffs had informed the Defendant that they had adopted the "Capital Statement" method in the computation of the Defendant's individual income. The method adopted by the Plaintiffs had resulted in a huge taxable income of RM6,446,844.44 for the years of assessment from 1996 to 2003 which was unfavourable to the Defendant.

24. As the Defendant's income as a Consultant/Urologist at Ampang Putri and Pakar Perdana were paid to Uro Medic PW1 ought to have audited Uro Medic's income instead of his individual income. However PW1 had treated Uro Medic's income as his individual income and this was not agreed too by the Defendant. In computing the Defendant's income PW1 had not considered the tax exemptions which the Defendant was entitled to. PW1 had never sought the Defendant's permission and or consent before submitting and or discussing the Defendant's outstanding income tax with the IRB but had acted on their own.
25. The Plaintiffs had not performed the task of auditing Uro Medic's income as instructed earlier by the Defendant. Since the Plaintiffs had not performed their professional services as instructed by the Defendant the Plaintiffs were not entitled to charge the Defendant RM255,866.40. The Defendant said that the fee charged were exorbitant and did not commensurate with the work done and obviously contrary to the Defendant's earlier instructions to them.
26. Based on the reasons stated above the Defendant alleged that he was not satisfied with the Plaintiffs' services. Hence the Plaintiffs' services were terminated by the Defendant vide a letter dated 18th August 2005 (**Exhibit P10 at page 11 of "B"**). As the Plaintiffs had not performed the work as directed the Plaintiffs were not entitled to the fees claimed herein and urged this Court to dismiss the Plaintiff's claim with costs.

27. The Defendant's 2nd witness ("PW2") was the wife of the Defendant and also a Director of Uro Medic. PW2 reiterated that the Plaintiffs had not provided their services to audit Uro Medic's income for purposes of IRB. PW2 had also confirmed that it was PW1 who had approached the Defendant and herself to offer the Plaintiffs' services to them to handle matters pertaining to the income of the Defendant and that of Uro Medic's with the IRB. The Plaintiffs were appointed pursuant to **Exhibit P2** (at **page 1 of "B"**). PW2 testified that Uro Medic provided medical services such as consultancy services as well as surgery. This could be seen at pages 2 to 31 of Document marked as "C" which showed payments received by Uro Medic from 1999 to 2004. Despite the Defendant's specific direction for the Plaintiff to audit the income of Uro Medic the Plaintiffs proceeded to act on their own by auditing the Defendant's individual income which was contrary to the Defendant's direction.

FINDINGS AND EVALUATION

Burden of Proof

28. The law on the burden of proof is governed by the provisions found in Chapter VII of Part III of the Evidence Act 1950 ('**the Act**'). Pursuant to section 101 of the Act, the legal burden of establishing the facts pleaded against the Defendant is on the Plaintiff. At the conclusion of the case this Court has a duty to determine whether sufficient evidence had been adduced by the Plaintiff to prove his case on the balance of probabilities and or

beyond reasonable doubt, depending on what is appropriate and applicable to the Plaintiff's pleaded case.

29. Pursuant to section 106 of the Evidence Act 1950 the burden to prove any facts which is especially within the knowledge of the Plaintiff lies on the Plaintiff.
30. In ***Johara Bi Binti Abdul Kadir Marican v. Lawrence Lam Kwok Fou [1981] 1 MLJ 139 (FC)***, His Lordship Chang Ming Tat FJ approved of the judicial approach of the High Court that until and unless a plaintiff has discharged the onus on it to prove its case on a balance of probabilities the burden does not shift to the defendant and no matter if the defendant's case is completely unbelievable, the claim against him must be dismissed.
31. With this principle in mind I would now evaluate the Plaintiffs' and the Defendant's evidence in order to ascertain if the Plaintiffs had met with the standard of proof envisaged by the law in respect of its claim against the Defendant which was on the balance of probabilities.

ISSUE i

Whether the Plaintiffs were appointed by the Defendant to provide the professional services as his tax consultant and or agent to manage the auditing of the Defendant's income for tax purposes.

32. Based on the testimony of PW2 and DW1 and the Defendant as well as Exhibit P2 there was sufficient evidence before me that the Plaintiffs were appointed by the Defendant as his tax consultant and or agent to provide professional services to audit the Defendant's individual income as well as Uro Medic's income for purposes of tax assessment (see **Q and A 2, 3, 4, 8, 8A of "WS PW1", Q & A 1, 3, 4 (Cross Examination of PW1)** which were reproduced at questions **2 & 3 at page 17 Notes of Evidence of PW1, Q and A 5 & 6 of "WS DW1"** which was reproduced at page 4 of the **Notes of Evidence of DW1, Q & A 5, 6 and 7 of "WS DW2"** which was reproduced at page 3 of the **Notes of Evidence of DW2 and Exhibit P2 at page 1 of "B"**). In view of the above there was a valid and enforceable contract between the Plaintiffs and the Defendant wherein the Defendant had agreed to appoint 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 the said task.
33. For the above reason Issue I should be answered in the affirmative.

ISSUE ii and iii

Whether the Defendant is liable to pay the fees for the Plaintiffs' professional services; and

Whether the Plaintiffs' claim is appropriate and with basis.

34. Based on the evidence adduced by the Plaintiffs through PW1 soon after the 1st Plaintiff was appointed PW1 had taken steps to collate all the relevant documents pertaining to the Defendant's individual income as well as that of Uro Medic for auditing purposes (**Exhibit P4 at page 27-28 of "B"**). While undertaking the task PW1 discovered that the Defendant did not have in his possession the complete documentation either in respect of his individual income or that of Uro Medic. The Defendant had not provided his bank statements in respect of his income as a Consultant/Urologist at Ampang Putri and Pakar Perdana to the Plaintiffs for purposes of auditing. Therefore PW1 was not able to audit the Defendant's income based on bank statements.
35. PW1 then recommended to the Defendant that based on the available documents PW1 would be able to work out the Defendant's income based on "Capital Statement". The Defendant had suggested to PW1 to treat as if his income had been paid to Uro Medic and for the Plaintiffs to audit the income of Uro Medic for tax purpose instead. However PW1 was unable to do so as Uro Medic was a dormant/inactive company with no proper documentation filed with CCM. This was proved by the search conducted by PW1 at the office of CCM as well as inquires with the ex Secretary of Uro Medics whose services had been terminated by the Defendant. After being told of the constraint to audit Uro Medic's income for purposes of tax the Defendant suggested that DW2's company to be used for auditing of his income. PW1 had told the Defendant she was not able to do so as the nature of DW2's business was different from that of his.

36. PW1 had informed the Defendant of the constraint faced by the Plaintiffs in the auditing of the Defendant's income as well as that of Uro Medic due poor and incomplete documentation and the fact that the taxes were overdue for a long period, which was from 1996 to 2003. PW1 then suggested to the Defendant that the only alternative opened to the Defendant to resolve his tax problem was to adopt the "Capital Statement" method in respect to his individual income. PW1 told the Defendant she had sufficient documentation to audit the Defendant's income by using the "Capital Statement" and the Defendant agreed to the suggestion and requested the Plaintiff to move forward and complete the task in the manner suggested. The method adopted by the Plaintiffs was within the Defendant's full knowledge as the Defendant himself knew he had not maintained the documents pertaining to his income in an organised manner and or that he had intentionally suppressed some of the documents from the Plaintiffs.
37. It is evident that the Plaintiff had taken all reasonable steps in their attempt to audit the Defendant's income as an individual and that of Uro Medic as a company but due to incomplete and or insufficient documentation and the fact that the Defendant had not paid his taxes for almost eight years, the Plaintiffs were not able to audit the Defendant's income using the bank statements. PW1 had informed the Defendant that based on the available documentations she could however audit the Defendant's individual account based on "Capital Statement" for

purposes of submission to the IRB and this was agreed by the Defendant.

38. It is also evident that PW1 had held discussions with the Defendant and DW2 and also with the IRB officers to sort out the Defendant's overdue tax and had worked out the computation to be discussed and sorted out with the IRB officers and the IRB had agreed with the assessment made by the Plaintiffs. The IRB had also agreed to the "Capital Statement" method as well as the computations shown in **Exhibit P8** (at **page 45-46 of "B"**). The sum total of the Defendant's reduced taxable income which was worked out by the Plaintiffs for years of assessment 1996 to 2003 was RM748,467.00. By using the "Capital Statement" method of assessment the Plaintiffs were able to reduce the Defendant's income to RM748,467.00. The Plaintiffs had set down the computation in detail which could be seen at page 45 and 46 of "B". (**"Exhibit P8"**). Even DW2 admitted that she had met up with the Plaintiff no less than 4 times to discuss the problem. DW2 had also admitted had she had gone to the IRB with PW2 and had meetings with two IRB officers in charge of the file. I have no doubt in accepting PW1's evidence that work was done and the final taxable income tax was worked out with the cooperation of the officer's of IRB.
39. From the evidence which was led what was left was only the tail end of the Plaintiffs task, which was to get the Defendant's co-operation to comply with the Plaintiffs' directions as stated in the Plaintiff's Memo dated 11th August 2005 (**"Exhibit P9 at page 63**

of “B””) which was received by the Defendant informing the Defendant the following:

- i. That the IRB had in principle agreed to the assessment prepared by the Plaintiffs;
 - ii. “CP 103-Pin 5/96” (**Capital Statement**) could not be filled up because awaiting the Defendant’s appeal to be made to the IRB. A draft was even prepared by the Plaintiffs and sent to the Defendant together with the Memo for the same to be reproduced and sent back to the Plaintiffs (see **page 61 & 62 of “B”**);
 - iii. IRB would issue the certification as soon as the amount of tax and penalty were agreed to by IRB and the Defendant; and
 - iv. The Plaintiffs would be submitting the CP 103-Pin 5/96 (Capital Statement) to IRB after they received a letter from the IRB pertaining to the reduction.
40. Based on the above evidence adduced during the trial there was no doubt that the Plaintiffs had diligently and professionally provided the services to the Defendant as agreed by both the respective parties to the agreement. However the Plaintiffs were unable to wrap up their task as they had not received a positive response from the Defendant. Instead of adhering to the Plaintiff’s request as stated in the Memo (“**Exhibit P9 at page 63 of “B”**”), which was not challenged by the Defendant, the

Defendant had opted to terminate the Plaintiff's services alleging that he could get better deal from other tax consultants. As the Defendant did not challenge the Plaintiffs' method of computation by way of credible evidence of another witness I accepted the Plaintiff's evidence pertaining to the method to "Capital Statement" as the best method that could be adopted by the Plaintiffs in view of the circumstances of this case. How else could the Plaintiff's perform the task when the Defendant himself was not cooperative and was not able to furnish crucial documents for the Plaintiff's further action.

41. After following the testimony of PW1 and DW1 & DW2 and having evaluated the evidence carefully I believed the evidence of PW1 and found PW1 to be a truthful witness as compared to DW1 and DW2. PW1 was consistent throughout and her testimony which was supported by contemporaneous documents as discussed above. The testimony of PW1 which was tested by way of rigorous cross examination by the Defendant's learned Counsel remained consistent throughout as compared to the Defendant's evidence and that of DW2 which I will discuss shortly. PW1 answered all questions with honesty and sincerity. This could be seen from the demeanour and answers given even during the cross examination of PW1 by the learned Counsel for the Defendant.

42. Turning now to the Defence case. DW1 appeared to me to be an unreliable witness as he is inconsistent in his testimony. He appeared to be arrogant, evasive and had given contradictory statements. This could be seen throughout the cross

examination of the Defendant by the Plaintiffs' Counsel. The inconsistencies and evasiveness could be seen in his answers pertaining to:

- i. As to how the Defendant met PW1 and matters pertaining to PW1's appointment (**page 14, 16, 17 & 18 of Defendant's Notes of Proceedings ("DNP")**);
- ii. That he had no problem with the IRB (declaration and submission of income tax returns and payment of his income tax from 1996 to 2003) (**page 14 & 15 of "DNP"**);
- iii. The payments for professional fees to be rendered by the Plaintiffs (**page 18, 19, 20, 21 of "DNP"**);
- iv. Pertaining to how Defendant was paid for his services as a Consultant Urologist (**page 22,23, 24 & 25 of "DNP"**);
- v. How his personal particulars were released to the Plaintiffs for auditing purpose (**page 26 & 27 of "DNP"**);
- vi. Failure to pay Uro Medic ex Secretary's remuneration (**page 28 of "DNP"**);
- vii. Actual reduced taxable income Plaintiffs were able to work out for the Defendant and reason for termination (**page 29, 30, 31, 32, 36, 33, 34, 35, 36 & 37 of "DNP"**);

viii. What the Plaintiff's claims were for and or about (**page 38 of "DNP"**); and

ix. That the Plaintiffs had not provided the services ;

43. The Defendant disputed the Plaintiffs' effort in adopting their "Capital Assessment" method to the IRB in respect of the Defendant's individual account. One moment the Defendant testified that the Plaintiffs were not entitled to be paid and in the same breath the Defendant said he had never said he did want to pay but he wanted to negotiate with the Plaintiffs to resolve the issue of payment. This could be seen at page 48 of the Notes of proceedings of the Defendant's testimony. (**See six lines from the bottom at page 48 of the Notes of Evidence**).

44. The Defendant had also never disputed that he had appointed the Plaintiffs as his tax consultant. The Defendant could not expect the Plaintiffs to provide their consultancy services for free especially in the situation where there was poor and incomplete documentation and the Defendant and his wife DW2 were not helpful in providing the necessary documentations. Further the Defendant had not been paying his income tax for almost 8 years.

45. The Defendant gave an absurd explanation as to why he had stated in his termination letter (Exhibit P10) that did not agree with the Plaintiffs' charges which was 20% of RM2,600,000.00 because it was a mistake on his part and he had not read the letter in full. I find this hard to believe because it was so clear

from Exhibit P8 the Defendant's final taxable income was RM748,467.00 by using the "Capital Statement" method. As a reasonable man who had not paid his income tax to the IRB for eight consecutive years the Defendant ought to be concerned with the outcome of 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 clearly showed the Defendant's clear intention not to pay for the Plaintiff's services and his desire to get rid of the Plaintiff after work was supposed to be completed only if he had cooperated (also **see Q & A 22 of WS DW1 at page 6**). Vide Exhibit P10 the Plaintiffs had informed the Defendant that the IRB was satisfied with the computation based on "Capital Statement" method and the Defendant's taxable income was merely RM748,467.00 for the years of assessment 1996 to 2003. This also clearly showed the Defendant's bad faith in wanting the services to be free of charge. The manner the Defendant tried to explain the discrepancy clearly showed that he was lying while on the stand so was DW2.

46. There was no evidence adduced by the Defendant to show that he had objected to the "Capital Statement" method despite the fact that DW2 who was the Defendant's wife was present throughout the discussion the PW1 and DW2 had with the officers of the IRB.
47. The evidence clearly showed that the professional services were in fact provided but the Defendant had blatantly denied that work was done in this case. I am also 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. I have no doubt in the credibility of PW1. Having listened to both DW1 and DW2 I found these two witnesses unreliable and despite on oath had not told this Court the whole truth. Even the Defendant himself had admitted in evidence that he had appointed the 1st Plaintiff to perform the task of preparing the assessment of his income tax returns and meetings were held to discuss the problem as well as the services of the Plaintiff. It is unfair for the Defendant to ignore the Plaintiffs’ effort and terminate the Plaintiff’s services (**Exhibit P10 at page 11 of “B”**) when all was set and done but only awaiting the Defendant’s further action. Further the amount claimed by the Plaintiff herein was in respect of the Defendant’s individual tax and not that of the company.

48. I am not convinced by the Defendant’s testimony in Court. He appeared to give contradictory evidence and evasive. The Defendant testified that PW1 had approached him and DW2 to offer the Plaintiffs’ services. This piece of evidence was not consistent with the contemporaneous document filed in Court. From the documentary evidence (**Exhibit P3 at page 2 of “B”**) common sense would tell us that it was the Defendant who was in dire need of a tax consultant and not the other way round as he had not paid his income tax for almost eight years and now the IRB was after him to claim the unpaid taxes and he was required to appear at the IRB to justify. Who wouldn’t be worried!
49. DW2 admitted having met PW1 in no less than 4 times and DW2 had also gone to the IRB with PW1 to discuss the Defendant’s tax problem as the Defendant was too embarrassed to present

himself at the said IRB for reasons known to him. DW2 told this Court that despite the fact that she was present at the time PW1 discussed the Defendant's tax problem but conveniently said in Examination In Chief that she could not understand what took place in the discussion room and she was not informed by PW1 subsequently of the outcome of the discussion. I was not convinced by this testimony as she is an Indonesian whose mother tongue is Bahasa Indonesia which is no different from Bahasa Melayu and the fact that she is married to the Defendant and was given a Malaysian Identity Card No.500514-71-5012, to come to this Court and testify that she could not understand the discussion which took place in a IRB's office. Further DW2 spoke in very excellent Bahasa Melayu with the Indonesian accent while in the stand.

50. The Defendant had faulted the Plaintiffs for submitting the Defendant's individual income for assessment instead of that of Uro Medic. However the Defendant was not able to prove by way of documents that the income he received for the consultancy services was in fact the income of Uro Medic. There was nothing filed with the CCM to show that the income earned by the Defendant as a Consultant/Urologist was reflected in the Uro Medic's Annual Report. Even the Defendant's own letter to the Manager of Ampang Putri (**Exhibit D15 at page 1 of "C"**) had clearly stated that the Defendant had agreed for payment due to him to be paid to Uro Medic. The Defendant has also found a flimsy excuse to dispute the Plaintiff's work that the Plaintiffs had not considered the exemptions he was entitled to in the assessment of his individual income tax when this was actually

considered and was supported by documents tendered in Court (see page 43 and 44 and page 47 to 59 of “B”).

51. The Defendant had even disputed the fact that he had given permission to PW1 to obtain the relevant information from Ampang Putri and turned around to say it was the PW1 who had obtained his personal particulars without his permission as these personal particulars are readily available (see page 26 and 27 of the Defendant’s Notes of Evidence) is also absurd as common sense would tell you that one could not easily access to other person’s personal details unless with the other’s permission. This again clearly showed the Defendant’s attitude in trying to lie and being evasive. DW2’s testimony was some what similar to the Defendant’s testimony.

CONCLUSION

52. Having considered the testimony of both the Plaintiffs’ witness as well as the Defendant’s witnesses and having examined the manner these witnesses testified in Court and the evidence they adduced I chose to believe the testimony of PW1 over that of DW1 or DW2. Based on the oral testimony of PW1 as well as the documentary evidence the Plaintiffs herein I am satisfied that the Plaintiffs had established their case against the Defendant on the balance of probabilities. Issue ii and iii posed for this consideration would have to be answered in the affirmative.

Hence judgement was entered for the Plaintiff as prayed plus interests and cost of RM25,000.00.

(ASMABI BINTI MOHAMAD)
Judicial Commissioner
High Court Of Malaya
Kuala Lumpur
(Civil 4)

Dated : 20 March 2012
Date of Decision : 30 November 2011
Date of Notice of Appeal : 28 December 2011

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