

Chiniah v. The Commissioner of Income Tax (Mauritius) [2007] UKPC
23 (17 April 2007)

Privy Council Appeal No 101 of 2005

Jayram Chiniah

Appellant

v.

The Commissioner of Income Tax

Respondent

FROM

**THE COURT OF APPEAL OF
MAURITIUS**

REASONS FOR DECISION OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE
28th February 2007, Delivered the 17th April 2007

Present at the hearing:-

Lord Hoffmann
Lord Scott of Foscote
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe
Lord Mance

[Delivered by Lord Rodger of Earlsferry]

1. Chiniah & Sons Ltd (“the company”) is a limited liability private company which was incorporated in 1986. Since the beginning the appellant, Jayram Chiniah, has been the registered owner of 99 out of the 100 issued shares. His brother owns the one remaining share.
2. From the outset until they resigned in 1996 the appellant and his wife, Mrs Ellamah Chiniah, were the only two directors of the company. In terms of

article 113 of the Articles of Association the management of the business is vested in the board of directors. With certain exceptions which are not relevant for present purposes, the board may exercise all the powers and do all the acts which the company is authorised to exercise or do. By article 142 the directors are to cause accounting records to be kept and by article 144 they are to cause profit and loss accounts, balance sheets and reports to be prepared and laid before the company in general meeting.

3. In 1987 the appellant and his wife bought a house and land at 10 Avenue Stanley, Quatre Bornes.
4. The company did not submit any returns of income or any accounts to the Commissioner of Income Tax for the years of assessment 1991-92 to 1994-95. The Commissioner then issued assessments for those four years in the sum of Rs 6,900,000. It is accepted that those assessments are not now open to challenge.
5. On 19 September 1995 the Commissioner wrote to the company informing it that the tax for the year of assessment 1991-92 was payable. On 21 March 1996 the Commissioner addressed a letter to “the manager” of the company. The letter said that the tax due under the assessments for 1992-93 to 1994-95 was payable forthwith. The letter came to the attention of the appellant. Ten days later, on 31 March 1996, his wife resigned as a director, followed by the appellant on 17 April 1996.
6. On 23 April 1999 the appellant was informed that the Commissioner had taken an inscription of privilege over the property at Quatre Bornes. On 15 May 2000 the appellant moved the Supreme Court to order the removal and erasure of the inscription of privilege in the sum of Rs 6,900,000 on his property at Quatre Bornes and to prevent the Commissioner from executing and taking any further action in respect of the inscription of privilege. On 18 September 2002 KP Matadeen J refused the appellant’s motion and on 10 December 2004 the Court of Civil Appeal (YKJ Yeung Sik Yuen ACJ and P Lam Shang Leen J) dismissed his appeal.
7. As will be obvious from their Lordships’ narrative, the inscription of privilege was taken over property owned by the appellant in respect of tax which ought to have been paid by the company. It is necessary to explain briefly how this comes about.
8. Under section 116 of the Income Tax Act 1995 every company must submit to the Commissioner a return specifying all income derived by it during the preceding income year and, at the same time, pay any tax payable in accordance with its return. Section 81(2) provides:

“Every secretary, manager or other principal officer of a company, société or other body of persons shall be deemed to be the agent of the company, société or other body of persons in respect of income derived by it.”

So the principal officer of the company is deemed to be its agent in respect of the income derived by the company. Their Lordships express no view on whether in an appropriate case there might be more than one “principal officer”.

9. Section 79 provides inter alia:

“Subject to this Act, every agent shall -

(a) be answerable for the doing of all such things as are required to be done under this Act in respect of the income derived by him in his representative capacity, or derived by the principal by virtue of the agency, and for the payment of income tax on it;

(b) in respect of that income, make returns and be liable on that income but in his representative capacity only...

(c) be authorised and required to retain out of any money or other property received by him in his representative capacity so much as is sufficient to pay the income tax which is or will become payable in respect of that income;

...

(e) be personally liable for the income tax payable in respect of the income to the extent of any amount that he has retained, or should have retained under paragraphs (c) and (d);

(f) be indemnified for all payments which he makes under this Act or for any requirement of the Commissioner;

...

(h) for the purpose of ensuring the payment of income tax, be liable, to the extent provided in paragraph (e), in respect of attachable property of any kind vested in him or under his control or management or in his possession to the same measures which the Commissioner may enforce against the property of any taxpayer in respect of income tax.”

Where section 79(e) applies, the agent becomes jointly and severally liable to pay the tax due by the company, but has a right to be indemnified for any payments which he makes. The reality is, of course, that if the company is not in a position to pay the tax, the agent’s chances of being indemnified are likely to be poor.

10. In the present case the Commissioner proceeded on the basis that the appellant was the “principal officer” of the company and, as such, its agent in respect of the income derived by it (section 81(2)). The appellant denies that he was the principal officer of the company. But before the Board his counsel accepted that, if he had been, then, by reason of section 79(c), he would have been required to retain enough money to pay the tax in question out of the income received by the company. On the basis of section 79(e), the Commissioner held the appellant personally liable for the tax which the company had not paid and for which he ought to have retained the necessary money under (c). Then, in terms of paragraph (h), the Commissioner took the inscription of privilege over the property at Quatre Bornes for the amount of the tax due by the company.
11. Counsel for the appellant argued only two points in support of his appeal. The first was that the Commissioner had not established that the appellant was the principal officer of the company. The second was that section 79(h), which permitted the taking of an inscription of privilege over the property of a principal officer, infringed section 8(4) of the Constitution of Mauritius.
12. In dealing with the first of these points, their Lordships are content to assume that the onus was on the Commissioner to show that the appellant was the principal officer of the company. What does the material before the Board show? First, it must be assumed – since the assessments were not, and cannot

now be, challenged – that the company was sufficiently active between 1991 and 1995 to earn profits on which tax of Rs 6,900,000 is due. Someone must have been managing the business which was earning all that profit. In his affidavit accompanying his motion in the Supreme Court all that the appellant says, however, is that “neither my wife nor myself took any active part in the management of the company.” No-one could have been in a better position than the appellant to know who was actually managing the company and nothing could have been simpler than to identify that person. But the appellant did not name anyone as having carried out that role either in his initial affidavit or at any subsequent stage in these proceedings. Next, the evidence shows that the appellant was not only a director: he also held 99 out of the 100 issued shares. Counsel for the appellant criticised the courts below for taking his shareholding into account, but their Lordships reject that criticism. While his shareholding does not demonstrate that he was controlling the company’s affairs, it is nevertheless a factor to be taken into account since his dominant shareholding meant that he was in a position to control its affairs. He could, in effect, ensure that whatever he wanted was done, whenever he wanted it done.

13. These various factors, when taken together, are sufficient to justify, and indeed impel, a provisional conclusion that the appellant was the principal agent conducting the affairs of the company. That conclusion would, of course, have had to be reassessed if the appellant had presented evidence which pointed to someone else having had that role. But there is no such evidence. All that counsel could suggest was that it was significant that the Commissioner had addressed his letter of 21 March 1996 to “the manager” of the company – the idea being that this showed that the Commissioner himself thought that the company had a manager. The Board see no force in that argument. In the absence of any inside knowledge of the working of the company, writing to its “manager” would be the natural thing for the Commissioner to do.
14. In these circumstances the Board considers that the concurrent findings of the Supreme Court and the Court of Civil Appeal on what is essentially a matter of fact cannot be criticised and should not be disturbed. In terms of section 81(2) of the Income Tax Act the appellant is indeed to be regarded as the principal officer of the company. The first ground of appeal accordingly fails.
15. Section 8(1) of the Constitution of Mauritius provides that, subject to certain exceptions, no property of any description is to be compulsorily taken possession of, and no interest in or right over property of any description is to be compulsorily acquired. Subsection (4) then provides *inter alia*:

“Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) –
(a) to the extent that the law in question makes provision for the taking of possession or acquisition of property –
(i) in satisfaction of any tax, rate or due

...

except so far as that provision or, as the case may be, the thing done under its authority is shown not to be reasonably justifiable in a democratic society...”

16. Counsel accepted that section 8(4) envisaged that nothing in a law making provision for the taking possession or acquisition of property in satisfaction of any tax was to be held inconsistent with subsection (1), except so far as the provision was shown not to be reasonably justifiable in a democratic society. His contention was, accordingly, that, while the measures against the agent's property envisaged in section 79(h) are indeed for the purpose of ensuring the payment of income tax, the provision is not excluded from the scope of section 8(1) because it is not reasonably justifiable in a democratic society. More particularly, the provision was not reasonably justifiable because it was arbitrary: the Act allowed the Commissioner to identify someone as the principal officer of the company but, unlike taxing statutes in some other countries, it contained no provision for the individual concerned to challenge that identification and show that he was not to be regarded as the principal officer.
17. There is nothing in that submission. While the Income Tax Act contains no provision of the kind which counsel desiderated, such a provision is unnecessary. The procedure by way of motion and affidavit in the Supreme Court affords a way of challenging any incorrect identification. Indeed, one of the purposes of these very proceedings, which were started in that way, has been to challenge his identification as the principal officer. His challenge has failed, not because the necessary remedy is unavailable, but because he has not put before the court the necessary factual material to make good his challenge.
18. For these reasons the appeal must be dismissed with costs.