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Estate Duty Planning and the Application of Ramsay's Case in Hong Kong

Andrew Halkyard examines a recent decision of the Court of Appeal applying the anti-avoidance doctrine to cases involving Hong Kong's Estate Duty Ordinance

Ever since estate duty planning became prevalent in Hong Kong in the mid-to-late 1980's, a vexed yet critical question has played on practitioners' minds. That is, does the judge-made anti-avoidance doctrine set out in a series of House of Lords decisions such as Ramsay v IRC [1982] AC 300 and Furniss v Dawson [1984] AC 474 apply in the context of Hong Kong's Estate Duty Ordinance (Cap 111)?

That question has now been answered affirmatively in a much-awaited decision of the Court of Appeal, Shiu Wing Ltd & Ors v Commissioner of Estate Duty [1999] 3 HKC 711, decided on 20 August 1999.

The facts of the Shiu Wing case can be briefly summarised as follows.

Within three years of his death, the deceased disposed of shares in a number of Hong Kong companies and two pieces of land in Hong Kong to the first plaintiff, a Manx company. The Manx company was the sole trustee of five unit trusts. It was owned by the second and third plaintiffs, two companies who were the trustees of discretionary trusts for the ultimate benefit of the deceased's family members. Under a composite transaction, a pre-ordained series of some 20 transfers, all but one of which took place on the same day, vested ownership in the unit trusts of the company shares and the land owned by the deceased.

These asset transfers were financed by a bank loan made to the wife of the deceased. A so-called 'round robin' series of financial transactions then took place and the funds were returned to the bank on the same day. The deceased also made loans to the second and third plaintiffs, in their capacities as trustees of the discretionary trusts, to subscribe for the units in the unit trusts. Subsequently, within his lifetime, the deceased forgave the debts owed to him by the second and third plaintiffs.

It was irrelevant that the deceased had genuine motives for wanting to transfer his property outside of Hong Kong.

The Commissioner sought to charge the plaintiffs with estate duty in respect of the various dispositions but the Court of First Instance declared them not chargeable (see [1998] 3 HKC 44). The Commissioner appealed.

The plaintiffs submitted that the transactions involved 'sales' and not gifts of property in Hong Kong. The only 'gifts' made by the deceased were forgiving debts and transferring the proceeds of sale of one of the properties. These were effected when the debts and sale proceeds were offshore. Hence no charge to estate duty arose by virtue of s 10(b) of the Estate Duty Ordinance.

The Commissioner argued that the transactions whereby the deceased's property situated in Hong Kong was converted into property situated outside Hong Kong before any gift of it was made by the deceased, ought for fiscal purposes to be disregarded. If the transactions were disregarded, the end result was that the deceased was to be treated as having made, less than three years before his death, gifts of the property held by the plaintiffs as trustees of the family trusts. Such gifts were chargeable to estate duty in Hong Kong by virtue of s 6(1)(c) of the Estate Duty Ordinance.

In the result, the Court of Appeal by majority (per Mortimer VP, Godfrey and Rogers JJA dissenting) allowed the Commissioner's appeal on the following basis.

The deceased had a number of good reasons for effecting the transfers of property, partly fiscal and partly non-fiscal. However, the true and only reasonable conclusion on the facts of the case is that, although each step in the series of transactions took effect according to its tenor, the purpose of this pre-ordained series was purely fiscal. The purpose was to transfer all the beneficial interest in the transferred property on or before his death from the deceased to his children.

It was irrelevant that the deceased had genuine motives for wanting to transfer his property outside of Hong Kong. Motive and purpose are discrete concepts. The transactions served no commercial purpose and amounted to an artificially contrived concatenation of transactions' devised not for any commercial purpose but for the purpose of avoiding estate duty. Applying the principles in Ramsay's
case, the conversion of the property to place it offshore must be disregarded and the real transaction must be regarded as a gift of Hong Kong property by the deceased to his children.

It was unnecessary to deal with the alternative argument that the transactions were a 'sham' or as having no legal effect. Nor was it necessary to deal with the submission that the transactions were 'associated operations' as defined by s 3(1) of the Estate Duty Ordinance.

In his dissenting judgment, Rogers JA decided that the Ramsay principle did not apply to the facts of this case. Moreover, no disposition of property was made by 'associated operations'; nor were the loans for the purpose of the asset purchases 'shams'. Hence in Rogers JA's view, the declarations granted by the Court of First Instance were correctly granted.

This may not be the final word in this case. In view of the importance of the case, and the amount of duty in dispute, it may well be that the plaintiffs will lodge a further appeal to the Court of Final Appeal.

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遺產稅務規則與反避稅規條

為探討最近上訴法庭把反避稅規條應用到香港《遺產稅條例》的一宗案件

自八十年代中至末期，遺產稅務規則在香港一直大行其道，而從事稅務的律師也經常被一個具關鍵性的重要問題困擾：透過一連串英國上議院判例（如 Ramsay v IRC [1982] AC 300 及 Farniss v Danson [1984] AC 474 兩案）建立的反避稅規則，是否適用於香港《遺產稅條例》（第 111 章）（以下簡稱《條例》）的範疇？

這問題的答案，終於在上訴法庭於今年 8 月 20 日裁定的案件，Shiu Wing Ltd & Ors v Commissioner of Estate Duty [1999] 3 HKC 711 中得到肯定。

Shiu Wing 一案的案情摘要如下：死者在去世前三月，及於香港設有公司和客戶土地轉於第一原告人（一家產業公司）。第一原告人是五間單位受託的單位受託人，該公司由第二及第三原告人擁有。第二及第三原告人是兩家公司，也是按法例規定為死者家庭成員利益而設的財產受託人。通過上訴的二項事項，轉移屬於綜合性交易，死者擁有的公司股份及土地擁有權轉換為該單位受託人的單位名下，除了其中一項事項，該宗交易中所有有關轉移都是同一日進行。

有關的資產轉移，乃利用一筆由銀行向死者妻子作出的貸款進行，其後進行的「循環」財務交易按之而發生，上述交易於同一日進行。