Loon Wai Yang *v* Public Prosecutor
[2020] SGHC 34

Case Number : Magistrate's Appeal No 9055 of 2019

Decision Date : 18 February 2020

Tribunal/Court : High Court

Coram : Chua Lee Ming J

Counsel Name(s) : Abraham S Vergis and Loo Yinglin Bestlyn (Providence Law Asia LLC) for the Appellant; Jordon Li (Attorney-General's Chambers) for the Respondent.

Parties : Loon Wai Yang — Public Prosecutor

Criminal Law – Statutory offences – Goods and Services Tax Act (Cap 117A, 2005 Rev Ed)

18 February 2020

Chua Lee Ming J:

Introduction

1 Mr Loon Wai Yang ("the Appellant") was convicted by a Magistrate's Court on five charges for offences under s 62(1)(*b*) read with s 74(1) of the Goods and Services Tax Act (Cap 117A, 2005 Rev Ed) ("GSTA" or "the Act") relating to false goods and services tax ("GST") returns submitted by a company known as Web Weaver Fusion Pte Ltd ("the Company") between May 2006 and April 2008. The District Judge ("DJ") sentenced the Appellant to a total of eight weeks' imprisonment. Pursuant to s 62(1)(i) of the GSTA, the Appellant was also ordered to pay a penalty of $433,090.56 (*ie*, three times the amount of GST overstated).

2 The Appellant appealed against both his conviction and sentence. I allowed his appeal in respect of the first to fourth charges, set aside his convictions and sentences, and acquitted him. However, I dismissed his appeal in respect of the fifth charge.

Background

3 At all material times,

(a) the Appellant held 50% of the shares in the Company while his parents each held 25%; and

(b) the Company was in the business of data communication services and development of other software.

4 The Company was registered under the GSTA in 2002 and consequently became a "taxable person" under the GSTA.

5 As a taxable person under the GSTA,

(a) the Company was required to charge and collect GST on the taxable supplies of goods and services it made or rendered. The GST charged and collected is referred to in the GSTA as

"output tax". The Company was required to account for and pay the output tax to the Comptroller of GST ("the Comptroller");

(b) the Company could claim from the Comptroller any GST incurred on the supply of goods or services to it for business purposes. Such GST is referred to in the GSTA as "input tax"; and

(c) the Company was required to submit a GST return in Form 5 ("the GST F5 return") to the Comptroller at the end of each prescribed accounting period. The Company elected to file its GST F5 returns on a quarterly basis.

6 The GST F5 return reports the output tax charged and the input tax incurred for each accounting period. Where the output tax exceeds the input tax, the taxable person pays the excess amount to the Comptroller. Where the output tax is less than the input tax, the taxable person claims a refund of the difference from the Comptroller.

7 In November 2007, the Company was randomly selected by the Inland Revenue Authority of Singapore ("IRAS") for an audit of its GST returns. The IRAS conducted an audit on the Company's GST F5 returns for the quarters ended 30 June 2006 to 30 September 2007. Subsequently, the audit extended to the returns for the quarters ended 31 December 2007 and 31 March 2008.

8 The IRAS found that the Company had made false entries in its GST F5 returns for the following five quarters:

(a) the first quarter of 2006 ("2006 Q1");

(b) the first quarter of 2007 ("2007 Q1");

(c) the second quarter of 2007 ("2007 Q2");

(d) the third quarter of 2007 ("2007 Q3"); and

(e) the first quarter of 2008 ("2008 Q1").

9 In essence, the Company had either under-reported the output tax collected by it or over-reported the input tax incurred by it. [note: 1] Some of the invoices, purporting to support the input tax allegedly incurred by the Company, were fictitious.

10 The IRAS' investigations showed that the Company had overclaimed a total amount of $144,363.52 as GST refunds: [note: 2]

	Amount of GST refund claimed in GST F5 return (A)	**Net amount (refundable) or payable, after investigations (B)**	**Amount of GST refund (overclaimed) (C) = (A) – (B)**
2006 Q1	($3,104.20)	$238.55	($3,342.75)
2007 Q1	($29,570.00)	$137.83	($29,707.83)
2007 Q2	($36,010.00)	$473.20	($36,483.20)

2007 Q3	($35,150.71)	($1,573.62)	($33,577.09)
2008 Q1	($42,062.02)	($809.37)	($41,252.65)
TOTAL	($145,896.93)	($1,533.41)	($144,363.52)

11 The GST F5 returns for the five quarters set out above formed the subject matter of the five charges against the Appellant.

Liability under the GSTA

12 For present purposes, the primary offence is found in s 62(1)(*b*) of the GSTA, which provides as follows:

> **62.**––(1) Any person who wilfully with intent to evade or to assist any other person to evade tax ––
>
> …
>
> (b) makes any false statement or entry in any return, claim or application made under this Act;
>
> …
>
> shall be guilty of an offence …

13 Section 62(2) of the GSTA provides a rebuttable presumption as to intent and reads as follows:

> Whenever in any proceedings under this section it is proved that any false statement or entry is made in any return, claim or application furnished under this Act by or on behalf of any person or in any books of account or other records maintained by or on behalf of any person, that person shall be presumed, until the contrary is proved, to have made that false statement or entry with intent to evade tax.

14 Section 74(1) of the GSTA is a deeming provision, which reads as follows:

> **74.**––(1) Where an offence under this Act has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in that capacity shall be deemed to be guilty of that offence unless he proves that ––
>
> (a) the offence was committed without his consent or connivance; and
>
> (b) he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

15 The effect of s 74(1) is that an individual's liability for an offence committed by an organisation is limited to cases where there is consent, connivance or a failure to exercise the requisite diligence.

However, s 74(1) presumes such consent, connivance or a failure to exercise the requisite diligence and shifts the burden to the individual to prove otherwise on a balance of probabilities.

16 The Company had committed an offence under s 62(1)(*b*) with respect to each of the five GST F5 returns set out in [10] above. In this connection, by virtue of s 62(2), the Company was presumed to have made the false entries in each of the GST F5 returns with the intent to evade tax.

17 The charges against the Appellant were based on the allegation that as a manager of the Company, the Appellant was deemed, under s 74(1), to be guilty of the offences committed by the Company. Each of the charges [note: 3] against the Appellant alleged that he,

> … being a manager, in [his] capacity as Vice-President of [the Company] when [the Company] did wilfully with intent to evade tax, made a false entry in the [GST return of the Company] … and [he had] thereby committed an offence under section 62(1)(*b*) of the [GSTA], read with section 74(1) of the same, and punishable under section 62(1)(i) and (ii) of the same.

Appeals against conviction

18 The DJ's Grounds of Decision are reported as *Public Prosecutor v Loon Wai Yang* [2019] SGMC 39 ("the GD").

19 The Appellant did not dispute that he was a "manager" for the purposes of s 74(1) of the GSTA. His defence was that the offences were committed without his consent or connivance and that he had exercised the requisite diligence.

The first to fourth charges

20 The first to fourth charges against the Appellant related to the Company's GST F5 returns for 2006 Q1 and 2007 Q1, Q2 and Q3.

21 The Appellant did not prepare these GST F5 returns; they were prepared by his adopted sister, Ms Loon Cheng Yee ("LCY"). The Appellant's mother was the declarant in all four returns. The Appellant was merely named as the "Contact Person" in the return for 2006 Q1; his mother was named as the "Contact Person" in the other three returns.

22 The Appellant resigned as a director of the Company on 1 August 2005, [note: 4] due to some disagreements with his mother (who was a co-director) and LCY over how the Company should be managed. He remained in the Company and continued to do business development, mainly outside the country.

23 LCY joined the Company in July 2003 and was appointed as the chief technical officer. She was responsible for financial administration and control, including GST reporting. She took charge of the finance function in the Company from its former finance manager in December 2005. LCY handled the Company's accounts and GST filings from 2005 until September 2007 when she left the Company.

24 Ms Tan Mei Ling ("Tan"), [note: 5] a Senior Tax Investigator with the IRAS, conducted the investigations into the Company's GST F5 returns. Tan confirmed that based on her investigations, the Appellant was not in charge of the accounting department, [note: 6] and apart from being an authorised signatory to the Company's bank account, he was not in charge of the finance department. [note: 7] Tan also confirmed that her investigations did not reveal that the Appellant had

anything to do with the submissions of the GST F5 returns for 2006 Q1 and 2007 Q1–Q3 or that he had seen the returns that were submitted to IRAS. [note: 8]

25 The Appellant submitted that there was no consent or connivance because he was not involved in the filing of the GST F5 returns.

26 "Consent" and "connivance" require an awareness of what is going on; however, whereas "consent" requires a more explicit agreement for the illegal conduct to take place, the agreement in "connivance" is tacit, not actively encouraging what happens but letting it continue and saying nothing about it: *Abdul Ghani bin Tahir v Public Prosecutor* [2017] 4 SLR 1153 ("*Abdul Ghani*") at [99].

27 The DJ applied the definitions in *Abdul Ghani* and found that the Appellant had proven on a balance of probabilities that he had not consented to or connived in the commission of the offences by the Company. [note: 9] There was no evidence that the Appellant was aware of the false entries in the GST F5 returns. The Prosecution argued that the Appellant would have been alerted to the fact that the GST refunds had been wrongly credited into the Company's bank account because he had access to the Company's bank account and the credited GST refunds far exceeded the account balances in the Company's bank account at the relevant time. However, Tan's investigations did not show that the Appellant was aware of the circumstances leading to the deposit of the GST refunds. The DJ rejected the Prosecution's argument and declined to infer that the Appellant would have been in a position to know whether the Company qualified for the GST refunds that had been credited into the Company's account.

28 As for the requirement to exercise the requisite diligence, the Appellant referred to the following and submitted that he had exercised all such diligence possible in the circumstances:

(a) The Appellant had resigned as a director due to disagreements with his mother and LCY over the management of the Company. He was not in charge of finance or filing the GST F5 returns in question.

(b) LCY, who was 12 years older than the Appellant and had considerable experience working in the finance industry, had taken over the finance function since December 2005.

(c) The Appellant's role in the Company was that of a marketing and business development manager. Financial administration, including GST reporting, was under LCY's charge. He was therefore not required to concern himself with the Company's GST reporting. In this regard, the Appellant also referred to his difficult relationship with LCY.

(d) Tan's investigations showed that the Appellant was not in charge of the accounting department or the finance department. There was no evidence indicating that the Appellant's role in the Company included any oversight over LCY's work.

(e) There was no reason for the Appellant to be put on notice that anything was amiss.

29 The Appellant also relied on *Pillay v Public Prosecutor* [1965] 1 MLJ 35 ("*Pillay*"). That case concerned ss 16A(1)(*c*) and 18(2) of Malaysia's Employees Provident Fund Ordinance ("the Ordinance") which, when read together, imposed liability on, among others, a manager of a company for non-payment of contributions by the company to its employees. The language used in s 18(2) of the Ordinance is similar to that found in s 74(1) GSTA. The Malaysian Court noted that the manager (who was the appellant in that case) was concerned only with sales and was not responsible for the payment of employees' salaries. The Court thus held that " … there could be no failure on the part of

the appellant in showing any diligence in the doing of what he was not expected to concern himself".

30 The DJ rejected the Appellant's submission. First, the DJ concluded that it was implausible that, as a member of the senior management of a small family-run company, the Appellant had no involvement or responsibility in the filing of the GST F5 returns. [note: 10] In the DJ's view, it was hardly conceivable that there was such a clear demarcation of roles that the Appellant was completely uninvolved in the process of filing the GST F5 returns.

31 I disagreed with the DJ's conclusion. The question was whether the Appellant had exercised all such diligence to prevent the commission of the offences as he ought to have exercised. It was clear from s 74(1)(*b*) GSTA that all the circumstances of the case, including the nature of the Appellant's functions in the Company, had to be considered in answering this question.

32 In my view, the DJ erred in finding that there was no demarcation of roles simply because the Company was a small family-run company. The mere fact that the Company was a small family-run company did not in and of itself mean that there was therefore no demarcation of roles. All the circumstances had to be considered.

33 In my view, the evidence established that it was more probable than not that the Appellant was not involved in, and had no oversight over, the preparation or filing of the GST F5 returns in question. I noted that the Appellant was part of the senior management of the Company and had been the declarant for several GST F5 returns filed between 2002 and 2005. However, that did not change the fact that he ceased to be involved in the GST filings after he had resigned as director in 2005 and that LCY took over the finance function and handled the Company's accounts and GST filings. As the Appellant's role in the Company did not require him to be responsible for the filing of the GST F5 returns, he could not be expected to exercise any supervision over LCY's preparation and filing of the GST F5 returns. In this regard, I agreed with *Pillay*. It could not be said that the Appellant had failed to show the requisite diligence when the preparation and filing of the GST F5 returns were not matters that he was expected to concern himself with.

34 Second, the DJ concluded that the Appellant had not been entirely truthful about his role in the filing of the GST F5 returns because of some inconsistencies between his testimony in court and the statements recorded from him. [note: 11] The inconsistencies related to whether (a) his role was to make purchases for the Company or only to make recommendations for such purchases, and (b) he had verified the figures prepared by LCY for some earlier GST F5 returns in which he was the declarant. In my view, the inconsistencies were not material to the question of whether the Appellant's functions in the Company meant that he had failed to exercise such diligence as he ought to have exercised. The evidence was clear that, on a balance of probabilities, the Appellant's functions in the Company did not include oversight of LCY's work and did not require him to concern himself with LCY's work. Further, the evidence did not show that the Appellant had any reason to suspect that there was something wrong with the GST F5 returns in question. In this regard, I noted as well that the DJ declined to infer that the Appellant was in a position to know whether the Company qualified for the GST refunds that were being credited to the Company's account. [note: 12]

35 In my view, there was no evidential basis for the DJ's conclusion that the Appellant had some involvement in the filing of the GST F5 returns such that he could and ought to have done something more to prevent the commission of the offences in the first to fourth charges. On the contrary, the evidence showed that the Appellant had proved, on a balance of probabilities, that he had satisfied the requirement to exercise the requisite diligence in s 74(1)(*b*) GSTA.

36 In the circumstances, I set aside the convictions and acquitted the Appellant on the first to fourth charges.

The fifth charge

37 The fifth charge related to the GST F5 return for 2008 Q1, which the Appellant had prepared. Clearly, he could not rebut the presumption against him under s 74(1) GSTA since he could not prove that the offence had been committed without his consent.

38 The Appellant sought to rely on s 79 of the Penal Code (Cap 224, 1985 Rev Ed) ("PC") instead. The version of s 79 that was in force at the time of the offence stated as follows:

> **79**. Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be justified by law, in doing it.

39 The Company claimed, in its GST F5 return for 2008 Q1, that it had paid an input tax of $42,062.02 (see [10] above). The amount of input tax claimed was based on the Company's reported purchases amounting to $643,014.02. [note: 13] However, the IRAS' investigations revealed that the Company had made purchases amounting to only $12,371.65, [note: 14] which meant that the Company had only paid an input tax of $809.37.

40 The Appellant claimed that the amounts in the GST F5 return were honest mistakes made without any intention of evading or assisting the Company to evade tax. He argued that since the IRAS was already investigating the Company at the time when the GST F5 return was submitted, he would not have deliberately attempted to commit the same offence. The Appellant claimed that the mistakes were borne out of a genuine lack of understanding of the requirements for submitting GST claims. In addition, the Appellant contended that he had wrongly assumed that he could rely on the IRAS to regularise the Company's tax filings and correct any errors in the GST F5 return.

41 The DJ rejected the Appellant's claim that the false entries in the GST F5 return for 2008 Q1 were honest mistakes. [note: 15] He found the Appellant's claim to ignorance unconvincing as the Appellant had registered the Company under the GSTA and had previously been the declarant for several GST F5 returns filed between 2002 and 2005. Further, the DJ found that the disparity between the value of purchases claimed by the Company ($643,014.12) and the value verified by the IRAS ($12,371.65) was too large to be attributable to a mistake.

42 I agreed with the DJ. It was unbelievable that the Appellant could have made such a huge mistake as to the value of purchases made by the Company.

43 In any event, even if there had been a mistake, s 79 PC required the Appellant to have believed in good faith that the claims made in the GST F5 return were correct. In this regard, s 52 PC provides as follows:

> **52**. Nothing is said to be done or believed in good faith which is done or believed without due care and attention.

44 To avail himself of the s 79 defence, the Appellant therefore had to prove on a balance of probabilities that he had exercised due care and attention in making the claims in the GST F5 return (see *Tan Khee Wan Iris v Public Prosecutor* [1995] 1 SLR(R) 723 at [17], [19]).

45 The DJ found that the Appellant had failed to exercise the requisite diligence. I agreed with the DJ. Clearly, the Appellant had acted without due care and attention. He did not seek help from a professional when preparing the GST F5 return. As the DJ put it, it was not open to the Appellant "simply to file a GST F5 return willy-nilly, expecting IRAS to correct any mistakes". [note: 16]

46 In my view, the conviction on the fifth charge was sound. Accordingly, I dismissed the appeal against the conviction.

Appeals against sentence

47 The offence under s 62(1) GSTA is punishable with a fine not exceeding $10,000, imprisonment for a term not exceeding seven years, or both. In addition, the offender must pay a penalty of three times the amount of tax which has or would have been undercharged in consequence of the offence or which would have been undercharged if the offence had not been detected.

48 As I had set aside the convictions on the first to fourth charges, it followed that the sentences imposed, and penalties ordered, by the DJ in respect of these four charges could no longer stand.

49 As for the fifth charge, the DJ had sentenced the Appellant to three weeks' imprisonment. As the amount of GST refund had been overstated by $41,252.65 (see [10] above), the DJ ordered the Appellant to pay a penalty of $123,757.95 (*ie*, three times the amount overstated) to the Comptroller.

50 Before me, the Appellant accepted (in my view, correctly) that the sentence of three weeks' imprisonment in respect of the fifth charge was not manifestly excessive. As for the penalty ordered in relation to the fifth charge, that was as provided for by s 62(1)(i) GSTA. I therefore dismissed the appeal against sentence in respect of the fifth charge.

Conclusion

51 I allowed the Appellant's appeal against conviction in respect of the first to fourth charges and acquitted him accordingly. It followed that the sentences imposed, and penalties ordered, in respect of these charges could no longer stand.

52 However, I dismissed the appeals against conviction and sentence in respect of the fifth charge.

[note: 1] Record of Appeal ("ROA"), vol 2, pp 18 – 22.

[note: 2] ROA, vol 2, p 14, table 6.

[note: 3] ROA, vol 1, pp 7 – 11.

[note: 4] ROA, vol 1, p 911.

[note: 5] PW6.

[note: 6] ROA, vol 1, p 218:21 – 23.

[note: 7] ROA, vol 1, p 218:24 – 219:18.

[note: 8] ROA, vol 1, p 219:19 – 26.

[note: 9] GD at [40].

[note: 10] GD at [43].

[note: 11] GD at [44].

[note: 12] GD at [39].

[note: 13] GD at [21].

[note: 14] GD at [21].

[note: 15] GD at [50].

[note: 16] GD at [50].