Chong Barbara v Commissioner of Estate Duties
[2005] SGHC 172

Case Number : OP 5/2004

Decision Date : 16 September 2005

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : K Shanmugam SC, Stanley Lai, Kevin O'Shea and Nicholas Lum (Allen and Gledhill) for the petitioner; Andre Yeap SC and Lai Yew Fei (Rajah and Tann) for the respondent

Parties : Chong Barbara — Commissioner of Estate Duties

Revenue Law – Estate duty – Recovery of duty – Recovery of duty – Whether dividend yield method or net asset value method of valuation of estate's shares in private companies appropriate – Whether greater discount applicable to valuation of minority shareholdings in private companies – Whether deferred income taxation liability to be considered in calculation of net asset value of company – Section 24 Estate Duty Act (Cap 96, 2001 Rev Ed)

16 September 2005 *Judgment reserved.*

Lai Siu Chiu J:

1 This Petition was an application by Barbara Chong ("the Petitioner"), who is the administratrix of the estate of the late Tan Keng Siong ("the Estate"), under s 47(1) of the Estate Duty Act (Cap 96, 2001 Rev Ed) ("the Act"). Section 47(1) of the Act states:

> An executor or other accountable person aggrieved by —
>
> (*a*) any claim by a notice of assessment by the Commissioner for payment of estate duty, interest thereon or penalty; or
>
> (*b*) the refusal of the Commissioner to return any estate duty, interest thereon or penalty alleged to have been overpaid,
>
> may, on payment of, or giving security under subsection (5) for, the amount claimed by the Commissioner or such portion of it as is then payable by him, apply to the High Court within 3 months from the date of the claim or refusal, as the case may be.

2 The dispute relates to the valuation of 200,000 shares in Siong Lim Pte Ltd ("Siong Lim") and 20,000 shares in Chulin Pte Ltd ("Chulin") (known collectively as "the Companies") as at 29 March 2001, owned by the late Tan Keng Siong ("the Deceased"). The Petition prayed *inter alia* for the following reliefs:

> (a) a declaration that the estate duty payable assessed for the Estate's shareholding in Siong Lim and Chulin was incorrect; and
>
> (b) a declaration that the Commissioner should give a discount of between 31% to 50% in his valuation of the Estate's shareholding in Siong Lim and Chulin.

Background facts

3 The Deceased died intestate on 29 March 2001 and Letters of Administration were granted by the court to the Petitioner and Kenneth Boon Beng Tan on 1 October 2001. On 26 July 2004, Kenneth Boon Beng Tan withdrew as the administrator of the Estate, leaving the Petitioner (who is the Deceased's widow) as the sole administratix of the Estate.

The Companies

4 The Deceased had amongst his assets, the aforementioned 200,000 shares in Siong Lim and 20,000 shares in Chulin. The Companies are private limited companies registered in Singapore, with their principal activity being the holding of investments. They are essentially family-owned companies controlled by the Deceased's father, Tan Sri Tan Chin Tuan ("Tan").

5 The Deceased's shareholdings in Siong Lim and Chulin formed only 14.7% and 4% of the issued capital and only 3.5% and 4% of the voting rights respectively, in the Companies. The detailed shareholding structures of the Companies, as at 29 March 2001, were as follows:

Siong Lim

Shareholders in Siong Lim	**Shares**	**Total Votes**	**Percentage of votes (%)**
Founder's shares to Tan Sri Tan Chin Tuan	70,000	2,100,000	36.8
Ordinary shares to Tan Sri Tan Chin Tuan	599,150	599,150	10.5
Founder's shares to Kambau Pte Ltd	80,000	2,400,000	42.0
Ordinary shares to Kambau Pte Ltd	213,000	213,000	3.7
Ordinary shares to Tiong Cheng Pte Ltd	175,000	175,000	3.1

Ordinary shares to the Deceased	**200,000**	**200,000**	**3.5**
Ordinary shares to Tan Kheng Choo	25,000	25,000	0.4
Total	1,362,150	5,712,150	100

Chulin

Shareholders in Chulin	**Shares**	**Percentage (%)**
Shares held by Kambau Pte Ltd	90,000	18
Shares held by Tan Chin Tuan Pte Ltd	90,000	18
Shares held by Tiong Cheng Pte Ltd	100,000	20
Shares held by Integrated Holdings Pte Ltd	90,000	18
Shares held by Consultant Services Pte Ltd	90,000	18
Shares held by the Deceased	20,000	4
Shares held by Tan Kheng Choo	20,000	4
Total	500,000	100

6 It is not disputed that both Kambau Pte Ltd ("Kambau") and Tiong Cheng Pte Ltd ("Tiong Cheng") are controlled by Tan. It is also worth mentioning that Tan Kheng Choo is the daughter of Tan. The shareholding structures of the Companies are reflective of Tan's philosophy of keeping the Companies within the family.

7 The Companies' memorandum and articles of association also maintained the status quo. To ensure that only the family members of Tan and/or other approved persons hold the shares, the Companies' memorandum and articles of association contain severe restrictions on the transfer of the shares. Not only do the articles give the directors the right in their absolute discretion, without assigning any reason, to refuse to register a transfer of shares, they also provide that where there is a refusal to register, but where there is an entitlement to the shares by transmission, the representative of the estate is only entitled to receive dividends but cannot receive notices of or attend or vote at any meeting or exercise any of the other rights and privileges of a member.

8 In addition, Siong Lim's articles of association entrench the control of Tan by conferring on the holder of founder's shares 20 votes for each founder's share. This is to be contrasted with the one vote conferred by each ordinary share. The effect of this provision can clearly be seen from the table above in [5], with Tan being entitled to 47.3% of the total votes of Siong Lim. The articles also confer on Tan the right to demand that the remaining founder's shares be issued to him at par.

9 It should further be noted that, for the purposes of accumulating wealth in the Companies, the Companies are obliged to transfer the gains on the sale of investments in shares and properties to the capital reserve account, and are not allowed to distribute the gains by way of dividends to the shareholders.

Sale of shares of the Companies

10 There have only been two transactions each in the shares of Siong Lim and Chulin since their incorporation on 21 June 1957 and 9 January 1976 respectively. The first transaction occurred when the estate of Helene Tan (who is the Deceased's mother and Tan's wife) disposed of its shareholdings of 175,000 shares in Siong Lim and 100,000 in Chulin to Tiong Cheng for $25.50 and $2.65 per share respectively, on 22 April 1999 and 29 May 2000. The second occurred when the Estate sold the Deceased's shares to Amberlight Pte Ltd ("Amberlight") on 21 January 2003. The shares in Siong Lim and Chulin were similarly sold for $25.50 and $2.65 per share respectively.

The respondent's valuation of the shares

11 On 3 October 2002, the respondent valued the Estate's shareholdings in Siong Lim and Chulin at $177.74 and $6.49 per share respectively. This valuation was based on the audited accounts of Siong Lim and Chulin as at 30 June 2001 and 31 March 2001 respectively, with adjustments being made to the value of immovable properties and quoted investments and allowing a 30% discount on the adjusted net assets value of each share for non-marketability. In total, the Estate's shareholdings in Siong Lim and Chulin were valued at $35,548,000 and $129,800 respectively.

12 At the date of the valuation by the respondent, there were no audited financial accounts of Siong Lim as at 31 March 2001, which is the period just after the date of the death of the Deceased. Pursuant to the Petitioner's requests to Siong Lim to carry out an audit of the company as at 31 March 2001, Siong Lim's auditors, Ernst & Young, finally produced the audited accounts on 1 July 2005, barely a week before this application was heard.

The dispute

13 The Petitioner's position was that the respondent's valuation of the Estate's shareholdings in the Companies was manifestly excessive. The Estate had to pay estate duty on the shares at the respondent's valuation of $35,548,000 and $129,800 on its shareholdings of Siong Lim and Chulin respectively, when it only realised $5,100,000 and $53,000 from the sale of its shareholdings in Siong Lim and Chulin respectively.

14 The Petitioner contended that:

(a) the respondent's method of valuation of the Estate's shareholdings in Siong Lim and Chulin based on the net asset value of the respective companies was not appropriate;

(b) a valuation based on the last transacted prices of the shares of Siong Lim and Chulin at $25.50 and $6.49 respectively should have been used; and

(c) a discount of 90% should have been applied to the valuation of the Estate's shareholdings in Siong Lim and Chulin instead of the 30% discount applied by the respondent.

The law

15 At this juncture, it would be useful to set out the relevant provisions for the valuation of shares under the Act. There were two main provisions raised by the parties as being helpful in this case, *viz* ss 22 and 24 of the Act. Section 22(1) states:

> Where there pass on the death of any person dying after 22nd April 1940 any shares (not being preference shares) in any company to which this Part applies, then if either —
>
> (*a*) there is deemed by virtue of the provisions of this Part to pass on the death a sum of money computed by reference to the value of the total assets of the company; or
>
> (*b*) the control of the company was immediately before the death in the hands of the deceased,
>
> the principal value of those shares for the purposes of estate duty *shall not be ascertained in the manner provided by section 24, but shall be ascertained by reference to the value of the total assets of the company*.
>
> [emphasis added]

16 Section 24(1) of the Act states:

> The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioner, that property would fetch if *sold in the open market* at the time of the death of the deceased. [emphasis added]

17 It was common ground that the Estate's shareholdings in the Companies were minority shares and that the Deceased did not have any influence or control in the Companies. Accordingly, there was no disagreement between the parties that s 22 of the Act did not apply to the valuation of the Estate's shareholdings in the Companies; it was agreed that s 24 of the Act was the applicable provision.

18 However, the parties held differing views on the interpretation of s 24 of the Act and how it

should be applied to determine the value of shares in a company. This consequently formed the crux of the dispute between the Petitioner and the respondent. It did not help that there is a dearth of authorities on this point.

19 Before discussing this question further, there is a preliminary issue relating to the correlation of ss 22 and 24 of the Act that needs to be addressed. It was suggested by the Petitioner that s 22 of the Act excluded the valuation of shares by reference to the value of the total assets of a company under s 24 of the Act. However, the case of *Hong Kong and Shanghai Bank Hong Kong (Trustee) Ltd v Commissioner of Estate Duty* [1975] HKLR 696 states otherwise. Pickering J commented (at 699) on the equivalent of s 22 of the Act in Hong Kong as follows:

> Had the deceased's shareholding been a majority holding no choice of method would have arisen for s 44 of the Estate Duty Ordinance (Cap. 111) provides that in such a case the valuation shall be made on what we have termed the assets backing basis. That is not to say, however, that that basis may not be appropriate in any circumstances in the case of a minority holding.

20 Furthermore, the Petitioner's expert witness, Mr Kaka Singh ("Mr Singh"), conceded during cross-examination that there was no prohibition in using any method to come up with the open market value, pursuant to s 24 of the Act.

21 As such, I find that s 22 of the Act does not exclude the valuation of shares by reference to the value of the total assets of a company under s 24 of the Act. It is possible to determine the open market price of shares through the net asset value of a company, pursuant to s 24 of the Act.

How section 24 of the Act should be applied

22 The parties' expert witnesses (Mr Singh for the Petitioner and Mr Chan Ket Teck ("Mr Chan") for the respondent) had contrasting views as to how the value of the shares of a company ought to be determined under s 24 of the Act. They were unable to agree on the manner in which one should estimate the price that the shares would fetch if sold in the open market at the time of the demise of the Deceased. Mr Singh was of the opinion that the valuation of the Estate's shareholdings in the Companies should be done using the dividend yield method, whereas Mr Chan held the view that the valuation should be based on the net asset value of the Companies. Although both experts also made references to other methods of valuation (*viz* the discounted cash flow method and the capitalisation of future maintainable profits method), I need not deal with those methods as ultimately, they were not applied by these witnesses in determining the value of the Estate's shares in the Companies.

The petitioner's submissions

23 Mr Singh was of the view that the dividend yield method should be used to value the Estate's shareholdings in the Companies as he felt that the principal reason that a purchaser would buy the Estate's shares was for the income which he would receive by way of dividends, rather than for any prospect of realisable capital gain. Although shareholders can typically expect to receive a cash dividend payment and the cash flow proceeds of the eventual sale of the company, a minority shareholder with little influence or control has relatively little certainty of being able to obtain the benefit of his or her *pro rata* share of the company as a whole. A liquidation of the Companies is also far more remote than the event of their paying dividends. Therefore, the only proceeds that can be expected with reasonable confidence to be received are dependent upon the capitalised value of future dividends. For these reasons, Mr Singh considered that the level of dividends was the key factor in determining the value of minority shareholdings in private companies.

24 Mr Singh's position was supported by Christopher G Glover, ("Glover") the author of "The Valuation of Unlisted Shares", *Accountants Digest* No 132, (1983) ("*Accountants Digest*") at p 30 who states the following:

> The assets basis alone should be used only to value companies which have readily realisable assets with a value independent of the business. Property companies, investment trusts and ship-owning companies and, of course, companies in liquidation are examples of businesses which might well be valued on this basis. Nevertheless, the value of small minority holdings in such companies, other than those in liquidation, should always be justifiable in terms of the dividend yield since, barring a take-over or possibly a listing, the only way those assets are likely to represent a cash return to the minority shareholder is in the form of future dividends.

25 While he recognised that the Companies have not paid dividends since their respective dates of incorporation, Mr Singh opined that that in itself did not rule out the use of the dividend yield method. According to Wayne Lonergan ("Lonergan") in *The Valuation of Business Shares and Other Equity* (Business & Professional Publishing, 3rd Ed, 1998) at p 129, the valuation of minority interests in profitable companies which have not paid a dividend can be assessed at the present value of the eventual return such shares might offer to a prospective purchaser, which will normally be the prospect of a dividend at some time in the future.

The respondent's submissions

26 Mr Chan on the other hand, valued the Estate's shareholdings based on the net asset value method as he considered that the principal purpose of the Companies was the accumulation of wealth and not the production of income for distribution to their shareholders. While he acknowledged that the general rule was that the net asset value basis was not appropriate for valuing uninfluential minority shareholdings (as they had no influence whatsoever to force the voluntary liquidation of the company to release the full value of the shares to the rightful owners), Mr Chan opined that such a family investment company whose principal activity was the passive holding of investments was a special situation which fell outside the general rule.

27 Furthermore, in deciding on the appropriate method of valuing the Estate's shares in the Companies, Mr Chan placed great emphasis on the fact that the Companies had not paid any dividends since their respective dates of incorporation. He was of the view that it would be arbitrary to use the dividend yield method – a valuer who values a company which does not pay any dividends at all, on a dividend yield basis, would have to impute a hypothetical future maintainable dividend rate to calculate what the value of a share in the company would be. In coming to this opinion, Mr Chan relied on the proposition by Glover in *Valuation of Unquoted Securities* (Gee & Co (Publishers) Ltd, 1987) at p 203 that:

> If the value of an asset is a function of its cash return, any valuation based on an imaginary cash return must itself be imaginary. The fact that there is a substantial discount merely makes it a discounted imaginary valuation. It is no more logical to value non-dividend paying shares on an imaginary dividend than it is to value shares in a loss-making company on an imaginary profit, say, the profit it would earn if it were properly managed or if the industry prospects were different. Shares must be valued on the basis of their actual not their hypothetical prospects.

The decision

28 Having reviewed the reports of both expert witnesses, I regret that I am unable to accept either expert's opinion completely; both were only correct in part.

29 With regards to Mr Chan, it was erroneous of him to hold that this was a special situation that fell outside the general rule that the net asset value basis was not appropriate for valuing uninfluential minority shareholdings. It was unequivocally stated by Glover in *Valuation of Unquoted Securities* ([27] *supra*) at p 238 that the same general rule applied regardless of whether the company was a family investment company:

> For this reason, the assets basis should never be used to determine the value of a company, other than one whose assets have a readily realisable exchange value, such as, property investment companies, investment trust companies and so-called "money-box" businesses. Such companies are investment intermediaries and not economic enterprises. These remarks apply to controlling interests. *Where minority interests are concerned, the assets basis should never be used, even where the company is an investment intermediary.* This is because the assets values are out of reach of the minority shareholder. His interest in the company is restricted to dividends. [emphasis added]

30 As regards Mr Singh, he was not entirely accurate either in saying that the fact that the Companies had not paid out any dividends since their respective dates of incorporation had no effect on the application of the dividend yield method. Granted that Lonergan in *The Valuation of Business Shares and Other Equity* ([25] *supra*) at p 129 did state that the valuation of minority interests in profitable companies which have not paid a dividend in recent years may be assessed on the prospect of a dividend at some time in the future, however, Lonergan also went on to say at pp 129–130:

> Where no dividend payment is likely, a minority shareholder *would only acquire the shares on the basis of some prospective capital gain*. The nature of this gain and the likely timing and probability of its occurrence will vary according to the factual circumstances of the case.
>
> …
>
> Accordingly, the value attributable to a share in such circumstances will be very low and will be at a very large discount (at least 50 per cent and frequently much higher) *to the underlying asset backing of shares* or the true market value of the shares calculated on the basis of comparison with listed companies.
>
> [emphasis added]

31 As such, where no dividend payment is likely, as in this case of the Companies, a minority shareholder would focus more on the prospect of some future capital gain rather than the income that he would receive by way of dividends. Consequently, the valuation of the Estate's shares in the Companies should be based on the net asset value method, instead of the dividend yield method proposed by Mr Singh.

32 In addition, Glover in *Valuation of Unquoted Securities* ([27] *supra*) doubted the value of using a *hypothetical* dividend yield in the valuation of shares. It was stated (at p 402) that:

> Lastly, before leaving this topic, we should perhaps turn to the hypothetical dividend yield basis of valuation described in Chapter 9. This technique is sometimes used to value minority shareholdings in non-dividend paying companies. For the reasons given in Chapter 9 this method should never be used in commercial or legal valuation work. It has no realistic basis to it. It seems to be used in the valuation of shares for fiscal purposes (not by the author), and if it enables agreement to be reached on the correct values it may serve a useful purpose. However, it should only be used to justify a valuation arrived at by correct principles; it should never be used to

arrive at a value in the first place.

33 Although Glover advocates the use of the dividend yield method to value minority shareholdings, as seen in [24] and [29] above, he does not advocate using it hypothetically. In fact, on the facts of this case, Glover would not recommend the use of the hypothetical dividend yield basis in the valuation of the Estate's shares in the Companies. Mr Singh's use of the dividend yield method for valuing the Estate's shareholdings in the Companies is thus contrary to that expressed by Glover, since no dividends have been paid by the Companies and all Mr Singh relied on were purely hypothetical figures.

34 At this juncture, I turn to consider some of the more pertinent examples and cases raised by the respondent in support of its position that the net asset value method should be used as the basis for the valuation of shares. Unfortunately, all of them can be distinguished from the case at hand.

35 The first illustration which the respondent used to show that the net assets value basis was appropriate for the valuation of shares of the Companies was the recent takeover of Raffles Investments Limited ("RIL") by Aequitas Pte Ltd ("Aequitas") in 2004, in which Aequitas acquired 2,354,500 ordinary shares, which represented 49.83% of the issued share capital of RIL, from Select Securities Limited, a subsidiary of Oversea-Chinese Banking Corporation, for a price of $51.70. This price was based on a 1.17% discount on the adjusted net asset value of RIL and its subsidiaries. The respondent argued that since Aequitas accepted that the net asset value method was the appropriate basis for the valuation of the RIL shares, and Aequitas was a subsidiary of Siong Lim, with Siong Lim holding 38% of the shares in Aequitas, Siong Lim's shares should similarly be valued using the net asset value basis. However, the problem with this parity of reasoning is that it was a majority shareholding of RIL that Aequitas acquired. It is clearly distinguishable from our case given that the Estate's shareholdings in the Companies are minority shareholdings. As already mentioned earlier, at [15], [24] and [29], there are different bases for the valuation of shares depending on whether it is a minority or majority interest in the company. Moreover, RIL is a public company.

36 The respondent also relied on the case of *Wong Ser Wan v Ng Bok Eng Holdings Pte Ltd* [2004] 4 SLR 365 ("*Wong Ser Wan*") in support of its position that the net asset value basis ought to be used for the valuation of the Estate's shareholdings in the Companies. In that case, the plaintiff had alleged that her ex-husband was dissipating his assets, which included his shareholdings in the defendant company, by selling them at an undervalue, so as to deprive her of any share in them. In ascertaining the value of the shares in the defendant company, the court held (at [55]) that:

> As far as the NBEH shares were concerned, since NBEH is a private company tightly controlled by the family, there really is no possibility of shares in the company being sold to any third party and to that extent, there was and is no market value for the shares. The dividend method appears inappropriate to me as the company had no regular policy of paying dividends and everything depended on the whim of BB Ng or whoever was controlling the company at the time. The more appropriate method of valuing the NBEH shares was that adopted by Mr Chan, though the accuracy of that valuation depended on the accuracy of the values given to the assets of the company.

37 Although the structure and policies of NBEH are rather similar to that of the Companies, it is possible to distinguish that company on the basis that the court there was concerned with the fair value of the shares. Here, we are concerned with the open market value of the shares. According to Glover, in *Accountants Digest* ([24] *supra*) at pp 3–4, there is a distinction between market value and fair value.

> The central idea in the concept of market value is that of the most probable buy and sell price. The basis of market value is the assumption that if comparable property has fetched a certain price then the subject property will realise the same price, or something near to it.
>
> …
>
> The concept of fair value is based on the desire to be equitable to both parties. The transaction is not in the open market; the buyer has not been able to look around for the lowest price, nor has the seller been able to hold out for the highest price.

38 Mr Chan also accepted, during cross-examination, that the two concepts were different. As such, it would be inappropriate to assume that the same method of valuation can be used to calculate the two distinct values.

39 It is also possible to distinguish the case on the fact that although the shares concerned were a minority shareholding, they belonged to a controlling shareholder. A controlling stake in a company is valued differently from that of a pure minority interest as the controlling shareholder would have a say in realising his *pro rata* share of the company.

40 I come now to the final case cited by the respondent, *In re Harry Charrington, deceased* [1975] HKLR 81 ("*Charrington*"). The court there held (at 94) that:

> I do not, therefore, consider it possible to place reliance on either the basis of dividend yield or earnings yield. I am convinced that in the highly volatile atmosphere of Hong Kong the ordinary investor is attracted more readily by the possibility of capital gain than by the probability of secure annual returns. This, as much as the fact that there had been no dividends paid over the years but only the interest on shares which the board was obliged by the articles to pay, or the fact that its mounting land values was an important factor in giving its shares a high attraction, leads me to forsake the dividend yield and earnings yield methods of valuation. I am left with the "asset backing" method and am convinced that any shrewd seller would refuse to calculate a selling price on any other basis in the peculiar circumstances of this company.

41 Apart from standing for the proposition that the net asset value method should be used for the valuation of shares, the above quoted passage also plainly shows why the case should be distinguished from ours. The court had considered the highly volatile atmosphere of and the mounting land values in Hong Kong to be peculiar circumstances that warranted the application of the "asset backing" method in the valuation of the company. This is quite distinct from our case where the Companies are earning low but stable returns. The ordinary investors in our case would not be as attracted by the assets of the Companies. In addition, unlike the facts of the present case, there was no one controlling shareholder in *Charrington*. The shares were held by four different families and three independent individuals. With no overarching policy laid down by the patriarch of the family to keep the company within the family and to accumulate wealth, it would have been easier for the shareholders, even the minority shareholders, to obtain their *pro rata* share of the company as a whole through a sale of the company.

42 I did, however, find the case to be useful in assisting me to come to my decision. It focused my attention on the fact that "when unquoted shares in private companies are to be valued what is to be ascertained is what would be the price which a hypothetical willing purchaser would pay to a hypothetical willing seller for the right to stand in the shoes of the deceased" ([40] *supra* at 87). At the appeal of *Charrington*, the court in *Hong Kong & Shanghai Bank Hong Kong (Trustee) Ltd v Commissioner of Estate Duty* ([19] *supra*) further elaborated by stating (at 702) that:

> [I]n each case the most satisfactory method [of valuation] was likely to be that in which the factors which would have the greatest weight with the hypothetical purchaser are those which form the basis of valuation.

43 Taking all of the above considerations into account, I am of the view that the Estate's shareholdings in the Companies should be valued on the basis of the net asset value method rather than the dividend yield method. Though none of the cases cited by the respondent to support its position are directly applicable, it is nonetheless my opinion that a hypothetical purchaser of the Estate's shares in the Companies would be attracted by the underlying value of the Companies rather than by the possibility of dividends. The Companies have almost $304m worth of assets in total, a large proportion of which is cash. While a hypothetical purchaser would recognise that the possibility of a liquidation of the Companies is rather slim, given Tan's philosophy, there is no denying that the Companies do have a huge amount of underlying and valuable assets. The purchaser would still be buying into companies worth a particular value. In addition, it should be noted that the Companies are investment-holding companies. A hypothetical purchaser would naturally be more interested in the underlying assets of such companies, as compared to that of trading companies, as they represent the entire worth of the companies.

44 In contrast, a hypothetical purchaser has no basis for focusing on the possibility of the Companies distributing dividends. No dividends have been paid by Siong Lim and Chulin for 50 and 30 years respectively, since their respective dates of incorporation. There is no figure that the hypothetical purchaser can rely on realistically as the potential dividends that he would be able to receive. Consequently, the possibility of dividends would not weigh as heavily as the underlying value of the Companies in the mind of a hypothetical purchaser of the Estate's shareholdings in the Companies.

45 In addition, following the reasoning of Lonergan and Glover, as mentioned in [30] to [33] above, the net asset value method is undoubtedly the more appropriate basis for the valuation of the Estate's shares in the Companies since no dividend is likely in this case.

The effect of the last transacted prices of the shares

46 It was contended by the Petitioner that the sale of the shares in the Companies by the estate of Helene Tan to Tiong Cheng in 1999 and 2000, and by the Estate to Amberlight in 2003, reflected the open market value of the shares and should accordingly form the basis of the valuation of the Estate's shareholdings in the Companies.

47 I am, however, unable to accept this proposition. As stated by Reginald K Johns and Roy R Greenfield in *Dymond's Death Duties* vol 1 (Oyez Publishing Limited, 15th Ed, 1973) at pp 734–735:

> In the case of shares in a company for which there is no Stock Exchange quotation or regular market, ***it is rarely possible to obtain reliable guidance as to the value of the shares for Estate Duty purposes from the prices at which actual sales may have taken place***. Even if the articles of association do not positively restrict the transfer of the shares, sales are usually infrequent and do not take place under open market conditions. Unquoted shares tend, by their very nature, to be "lock-up" investments, and sales tend to be forced realisations, and to be negotiated more or less privately; so that the prices obtained at sales within a short time of the death (either before or after) usually indicate no more than the *minimum* value.
>
> …

> Yet it should not be thought that actual sales can always be ignored. On the contrary, genuine sales under conditions similar to those of the open market do sometimes occur, and they are an important check on theoretical methods of valuation.
>
> [emphasis added in bold italics]

48 It is therefore clear from the above quoted passage that the basis of the valuation of the Estate's shareholdings cannot possibly be the last transacted prices of the shares.

49 The authors, however, qualified their position by stating that the actual sales cannot always be ignored. Even so, I am of the opinion that the last transacted prices cannot play a role in the valuation of the Estate's shareholdings in the Companies. The sales cannot be accepted as genuine sales conducted under conditions similar to those of the open market. I am not, however, suggesting that there was any fraud or that there were any facts that impugned the validity of the transaction. The sale to Amberlight, for instance, was negotiated by the patriarch of the family and controlling shareholder of the Companies, Tan. Prices offered by him would naturally not be indicative of the open market values of the Companies, as he already possessed the controlling stake in the Companies and the additional shares would not affect his position. It does not matter that it was ultimately found that Tan did not have any interest in Amberlight whatsoever. The fact remained that the sale price only came about through Tan's negotiations with the Estate. As such, I hold that the Estate's shares of the Companies should be valued independently of their last transacted prices.

The discount to be applied

50 A discount is usually applied in the valuation of shares to reflect the restrictions on and the disadvantages suffered by, the shareholders of a company. As stated by Lonergan in *The Valuation of Businesses, Shares and Other Equity* ([25] *supra*) at p 130:

> [A] willing but not anxious purchaser of [a minority shareholding, with no dividend payment likely,] may be faced with
>
> - a long investment period
> - a high opportunity cost in terms of alternative income foregone
> - considerable uncertainty
> - a highly illiquid investment
> - the risk that the underlying assets may be dissipated, or substantially eroded by investment decisions in the meantime.
>
> Accordingly, the value attributable to a share in such circumstances will be very low and will be at a *very large discount* (at least 50 per cent and frequently much higher) to the underlying asset backing of shares …
>
> [emphasis added]

51 There are two main reasons why a discount should be applied to the net asset value of the Companies in the valuation of the Estate's shareholdings. The first is the lack of marketability. Secondly, the Estate's shares were minority shareholding in the Companies.

Discount for lack of marketability

52 According to Glover in *Valuation of Unquoted Securities* ([27] *supra*) at p 209, unquoted shares lack marketability in two ways:

> First, most unquoted companies have few shareholders. The resultant narrowness in the market for a company's shares makes it difficult, and sometimes impossible, to deal. Second, many private companies' articles of association contain share transfer restrictions. These typically provide that an intending seller must offer his shares to existing members who, if they do not like the intending seller's offer price, can elect to have the fair value of the shares determined by the company's auditors. Only if there are no buyers among existing members is the intending seller free to find a buyer outside the company. And in all private companies the directors have the right to refuse to register a transfer of shares.

53 The same sentiment was also shared by Leonard J in *Charrington* ([40] *supra*) as he stated (at 91) that:

> The narrower such a market is, the greater will be the difficulties facing the prospective purchaser when he comes to sell so that almost invariably restrictions on transfer must materially [diminish] the price.

54 I should also mention that although it was alleged by Mr Chan, in his report, that no discount of the value of shares needed to be given for restrictions on the transferability of the shares, he conceded during cross-examination that he had made an error and that restrictions on transferability were very serious discounting factors on the price of the shares in a small, tightly-held private company.

55 Applying the above concepts, there is no doubt that a discount should be applied to the value of the Estate's shareholdings of the Companies. The Estate's shares, being unquoted shares of a private company, have little liquidity and lack marketability. It would certainly not be as easy for a shareholder to dispose of his shares in the Companies as compared to listed shares. Additionally, there are severe restrictions on the transferability of the Estate's shares in the Companies. Not only do the Companies' articles give the directors the right in their absolute discretion, without assigning any reason, to refuse to register a transfer of shares, they also provide that where there is a refusal to register, but where there is an entitlement to the shares by transmission, the representative of the Estate is only entitled to receive dividends but cannot receive notices of or attend or vote at any meeting or exercise any of the other rights and privileges of a member.

Discount for minority shareholding

56 As a minority shareholder would not have any control or influence on the company, nor have a say in the management of the company, it is usually more difficult to dispose of minority shareholdings. Consequently, such shareholdings are typically discounted to reflect this disadvantage.

57 In this case, a discount should certainly be applied to the Estate's shareholdings in Siong Lim and Chulin since they represent only 14.68% and 4% respectively, of the Companies' issued share capital. A purchaser of the Estate's shares in the Companies would be in the minority and would effectively be at the mercy of the controlling shareholders. This disadvantage is further aggravated in the case of Siong Lim as its articles of association entrench Tan's control by conferring on him, as a holder of founder's shares, 20 votes for each founder's share. This is to be compared to the one vote conferred for each ordinary share. The articles also confer on Tan the right to demand that the

remaining founder's shares be issued to him at par. A purchaser of the Estate's shares in Siong Lim would thus additionally be subjected to the whims of holders of founder's shares.

Amount of discount to be applied

58 Before proceeding further, it is important to state at this juncture that "the size of the discount is not a matter of calculation, or even perhaps of convention, but rather of individual preference" (Glover in *Valuation of Unquoted Securities* ([27] *supra*) at p 209).

59 A discount of 30% was applied by the respondents in the valuation of the Estate's shareholdings in the Companies. Mr Chan considered that this discount was fair. On the other hand, Mr Singh contended that a greater discount of between 87.07% and 93.54% and of between 84.05% and 92.01% should be applied to the valuation of the shares of Siong Lim and Chulin respectively.

60 According to Glover in *Valuation of Unquoted Securities* (*ibid*), the most popular discount level, amongst those who felt strongly about liquidity being a valuable attribute of an investment and the lack of it being a depreciatory factor, is 25%, although it can be as high as 50% for some institutions. This level of discount is deemed to be even higher for minority shareholdings. Glover stated (at p 212) that:

> The minority shareholder, on the other hand, suffers considerably from the lack of marketability, and for this reason, discounts must be at their greatest for the small, uninfluential shareholding. As it would not be unusual when valuing such shareholdings to use a dividend yield at least double that available in the stock market, a marketability discount of 50% may well be justified.

This discount of about 50% is in line with that stated in Lonergan at [30] above.

61 Given that I have already decided that the dividend yield method is inappropriate for the valuation of the Estate's shares in the Companies, little weight can be placed on Mr Singh's discount figures since they were derived from his application of the dividend yield method. Mr Chan's opinion that a 30% discount is fair is also unreliable as he accepted during cross-examination that no hypothetical purchaser of the Estate's shares in the Companies would offer 70% of its price. Since the positions taken by both expert witnesses are doubtful, I have decided to adopt the middle ground and accept the textbook authorities. I will therefore apply a discount of 50% to the net asset value of the Companies.

The actual value of Siong Lim's assets

62 There were two main areas of concern over the value of Siong Lim's assets. First, there was the issue of which of Siong Lim's financial accounts to use. Second, the parties disagreed as to whether deferred tax liability ought to be included in the calculation of the net asset value of Siong Lim. These were matters of concern as it was important that the value of Siong Lim's assets used in the valuation of the Estate's shareholdings in Siong Lim was correct. According to the case of *Wong Ser Wan* ([36] *supra*), the accuracy of valuations depended on the accuracy of the values given to the assets of the company.

Siong Lim's financial accounts of 30 June 2001 and 31 March 2001

63 As mentioned earlier at [11], the respondent's valuation of the Estate's shareholding in Siong Lim was based on its audited financial accounts of 30 June 2001. According to these financial statements, the value of Siong Lim's net assets as at 30 June 2001 was $345,857,943, and the net

asset value of each share was $253.91. The respondent then applied a further 30% discount to arrive at a value of $177.74 per share, upon which estate duty was levied. Although s 24 of the Act states that the shares should be valued as at the time of the death of the Deceased, the respondent could only rely on the figures of 30 June 2001 as there were no audited accounts of Siong Lim as at 31 March 2001 provided to him.

64 However, the Petitioner was subsequently able to persuade Siong Lim to carry out an audit of the company as at 31 March 2001. As these accounts were only produced on 1 July 2005, the respondent was not able to include these figures in his calculations of the value of Siong Lim's shares. I am therefore relying on Mr Singh's calculations set out in his second affidavit of 4 July 2005, which were based on the respondent's method of valuation, to reflect the values obtained from the 31 March 2001 accounts. According to his calculations, the net asset value of Siong Lim as at 31 March 2001 was $325,960,000, and the value per share was $239.30. Again applying a discount of 30%, each of Siong Lim's shares was valued at $167.51, bringing the total value of the Estate's shareholdings in Siong Lim to $33,502,000. Considering that these values based on the accounts of 31 March 2001 are better able to reflect the financial position of Siong Lim as at the time of the death of the Deceased, being the period just after the death of the Deceased, I am of the opinion that they should be used instead of the earlier values, which were based on the accounts of 30 June 2001.

The issue of deferred tax liability

65 The audited financial accounts of Siong Lim for 2001 did not record deferred income tax liability on the interest income held overseas, nor did they reflect the market values of the quoted investments and properties. The deferred income tax liability was not reflected because under the old Statement of Accounting Standard ("SAS") 12, a company had a choice or option of recording a liability in the accounts, that is, depending on whether the company opted for the "partial" or "all" method for timing or temporary differences that gave rise to the deferred tax liability. This provision was subsequently changed such that, for financial statements starting from 1 April 2001, full provision for all deferred tax liabilities, subject to some exceptions which are not applicable to Siong Lim, was required. As the new SAS 12 also provided that the changes in the accounting policies were to be applied retrospectively, the deferred income tax liability was corrected in the June 2001 column of the audited financial statements for June 2002, to reflect an amount of $20,239,764 of deferred tax liability.

66 The dispute between the parties was thus concerned with whether the $20,239,764 ought to be considered a liability in calculating the net asset value of Siong Lim as at the time of the death of the Deceased. The respondent alleged that though there was a need to provide for deferred taxation due to the change in the SAS, that did not mean that there was a liability. Payment of the income tax liability had yet to be due as at 29 March 2001. I am, however, of the view that that is incorrect. The rationale for the change in the accounting standard was to notify third parties of the complete financial position of the company. This is surely indicative of the fact that third parties, including a hypothetical purchaser of the Estate's shares in Siong Lim, do consider deferred income taxation to be a liability, for otherwise, there would have been no need to change the SAS. Consequently, the deferred income tax liability should be regarded as a liability in calculating the net asset value of Siong Lim.

67 Support for this position can also be drawn from s 18 of the Act. The section states that in calculating the "value of the total assets of the company", there ought to be deducted therefrom "such sum as on a just and fair computation represents any future or contingent liabilities thereof which are uncertain in amount". Given that deferred income taxation is a contingent liability

dependent on when the income held overseas is brought back into the country, it ought to be accounted for as a liability in the determination of the net asset value of Siong Lim.

68 Finally, it is only fair that deferred income tax liability be taken into account. The respondent cannot take into account the foreign dividends and interest earned and held overseas as assets of Siong Lim and ignore the related taxes. As mentioned above at [65], the audited financial accounts of Siong Lim for 2001 did not record the market values of the quoted investments and properties. However, the respondent did make adjustments to reflect the market values in calculating the net asset value of Siong Lim. As such, as a matter of fairness, he should have made similar adjustments to reflect the deferred income tax liability of Siong Lim.

Conclusion

69 For the foregoing reasons, I dismiss the Petition in part. Although I am allowing the respondent's method of valuation to stand, I am of the view that a higher discount of 50% ought to be applied to the net asset value of the Companies. Consequently, I grant the declaration sought in para 8(1) and an order in terms of para 8(3) of the Petition with the discount fixed at 50%; para 8(2) of the Petition is dismissed.

70 Neither party can claim to have succeeded in these proceedings. Whilst the Petitioner did obtain a higher discount in the valuation of the Estate's shareholdings in the Companies, it was based on the respondent's method of valuation; the Petitioner failed in her application to have the shares of the deceased valued at their last transacted prices. Consequently, the most equitable order as regards costs would be for each party to bear its own costs and I so order.

Order accordingly.

Copyright © Government of Singapore.