

BCH Retail Investment Pte Ltd v Chief Assessor
[2006] SGHC 133

Case Number : OM 30/2005
Decision Date : 25 July 2006
Tribunal/Court : High Court
Coram : Tan Lee Meng J
Counsel Name(s) : David de Souza and Jeanette Lee (De Souza Tay & Goh) for the appellant; Foo Hui Min and Joyce Chee (Inland Revenue Authority of Singapore) for the respondent
Parties : BCH Retail Investment Pte Ltd — Chief Assessor

Revenue Law – Property tax – Annual value – Whether owner of shopping centre entitled to deduct all reasonable advertising and promotional expenses from gross rental paid by tenants for purpose of ascertaining annual value of shopping centre

25 July 2006

Judgment reserved.

Tan Lee Meng J:

1 This case raises an important issue as to whether or not owners of shopping centres in Singapore may deduct all their reasonable advertising and promotion expenses from the gross rental paid by their tenants for the purpose of ascertaining the annual value of their shopping centres, which is relevant to how much property tax has to be paid.

2 The appellant, BCH Retail Investment Pte Ltd (“BCH”), the owner and operator of a shopping centre known as “Parco Bugis Junction”, appealed against the Valuation Review Board’s dismissal of its appeal against the Chief Assessor’s refusal to allow it to deduct the entire amount that it had spent on advertising and promotion of the shopping centre in 2003, namely \$2,591,707.00, from the actual gross sums paid by its tenants for the purpose of computing the annual value of Parco Bugis Junction. During the hearing of the appeal, BCH was content to argue that only its “reasonable” advertising and promotion expenses should be deducted from the gross rental to determine the annual value of its shopping centre.

3 The outcome of the present appeal depends on the effect of s 2 of the Property Tax Act (Cap 254, 1997 Rev Ed), which defines “annual value” as follows:

“annual value” —

(a) in relation to a house or building or land or tenement ... means the gross amount at which the same can reasonably be expected to be let from year to year, the landlord paying the expenses of repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax); ...

4 When considering what Parco Bugis Junction, which has around 203 tenants, can reasonably be expected to be let from year to year, it is relevant to note that tenants pay BCH a “basic rent”, which is a fixed sum computed on a per square metre basis. Furthermore, all tenants except one pay BCH an “additional rent”, which is an agreed percentage of the tenant’s gross sales. Apart from the basic rent and additional rent, tenants pay BCH an “advertising and promotional contribution” (“A & P”), which is defined in the lease agreement as a fee “payable by the Tenant to the Landlord

for advertising and promotion as provided in the Lease” and is computed on the basis of \$3.23 per square metre occupied by the tenant. For the purpose of this judgment, the basic and additional rent and the A & P contributions will be referred to as the “gross rental”.

5 This is the second time that BCH has come to the High Court for a ruling on the annual value of Parco Bugis Junction. In *BCH Retail Investment Pte Ltd v Chief Assessor* [2002] 4 SLR 844 (“the *BCH (No 1)* case”), BCH argued that for the purpose of computing the annual value of Parco Bugis Junction, the tenants’ A & P contributions, which amounted to \$591,677.00 in 2003 and which had been regarded as part of the gross rental collected from tenants, should be deducted from the gross rental. This argument was rejected by the Chief Assessor, whose decision was affirmed by the Valuation Review Board. However, Lee Seiu Kin JC (as he then was) allowed BCH’s appeal against the decision of the Valuation Review Board. He explained at [18]:

If the owner can satisfy the Chief Assessor, in relation to the A&P contributions, that: (1) it was reasonable to provide those services; (2) the tenants had agreed to pay for such services; (3) the services were in fact provided; and (4) the costs of providing them were reasonably incurred, then he ought to deduct such sums from the gross rent in arriving at the annual value.

6 With respect to the four conditions listed at [18] of his judgment, Lee JC held that in the light of modern operating conditions of shopping centres, it was reasonable for BCH to provide advertising and promotional services and as the tenants had agreed to pay for these services and their contributions had actually been spent on such services, the only question left was whether the cost of providing these services had been reasonably incurred. On this issue, he found that as BCH had actually spent over \$2m on advertising and promotion, the \$591,677.00 paid by the tenants as A & P contributions should be regarded as having been reasonably incurred. As such, the A & P contributions paid by the tenants of Parco Bugis Junction should be deducted from the gross rental for the purpose of determining the annual value of Parco Bugis Junction.

7 After persuading Lee JC that the \$591,677.00 paid by tenants as A & P contributions should be taken into account for the computation of the annual value of the shopping centre, BCH went one step further and asserted that all its reasonable expenses in advertising and promotion should be deducted from the gross rent to arrive at the annual value. As BCH had spent \$2,591,707.00 on advertising and promotion in 2003, what it was claiming was that if this entire sum had been reasonably incurred, another \$2,000,030.00 should be deducted from the gross rental for Parco Bugis Junction when determining its annual value.

8 During the hearing of this appeal, both parties relied on the decision of Lee JC in the *BCH (No 1)* case. According to the Chief Assessor, all the four conditions enunciated by Lee JC in his judgment at [18], including the second condition regarding the tenants’ agreement to pay for the advertising and promotion expenses, must be complied with before any such expenses may be deducted for the purpose of computing the annual value of Parco Bugis Junction. He contended that as the tenants had not agreed to pay the additional advertising and promotion expenses incurred by BCH, these were not deductible when determining the annual value of the shopping centre. On the other hand, BCH asserted that this second condition need not be met, an argument that was flatly rejected by the Valuation Review Board.

9 The issue before Lee JC in the *BCH (No 1)* case was a very limited one, namely whether sums collected by BCH from the tenants as A & P contributions might be deducted from the gross rent collected from the tenants for the purpose of determining the annual value of Parco Bugis Junction. It was in this context that Lee JC laid down the four conditions which had to be satisfied before the tenants’ A & P contributions could be taken into account for the purpose of computing the annual

value of Parco Bugis Junction. Lee JC's aim was to ensure that colourable devices in the form of extravagant A & P contributions that were intended to depress the annual value of properties would be struck out. It is trite that landlords cannot evade property tax by disguising part of the gross rent as deductible expenses: see *Tan Lark Sye, Trustees for Rubber Trade Assn v Chief Assessor* [1959–1986] SPTC 7.

10 Whether or not any part or all of the additional advertising and promotion expenses incurred by BCH might also be deducted from the gross rental paid by tenants of Parco Bugis Junction was not considered by Lee JC in the *BCH (No 1)* case and it is not altogether helpful to mount a case for or against the additional deduction sought by BCH on the basis of his judgment in that case.

11 There is a world of difference between the tenants' A & P contributions and BCH's own additional advertising and promotion expenses, which amounted to more than \$2m in 2003. Unless the A & P contributions were intended to be a colourable device to deflate the annual value of a property, in which case they would have fallen outside the ambit of Lee JC's ruling in the *BCH (No 1)* case, they should either not be included as part of the gross rent for Parco Bugis Junction in the first place or, if they have been so included, they must be deducted from the gross rent collected when assessing the annual value of the shopping centre. In contrast, the additional advertising and promotion expenses incurred by BCH were never regarded by the property tax authorities as a part of the gross rent paid by the tenants of Parco Bugis Junction. The additional amounts spent by BCH on advertising and promotion are business expenses which may be relevant for income tax purposes but that is a different matter altogether from the annual value of the property and the property tax. Ms Foo, the Chief Assessor's counsel, rightly asserted that if BCH's approach is correct, landlords can easily adjust the annual values of their properties by increasing their advertising and promotion expenses. If this can be done, annual values will no longer represent hypothetical rents. Neither will it be possible to determine the annual value of a property by reference to rents of comparable properties in similar sites because the annual values of the comparable properties will depend on how much was spent by their owners on advertising and promotion.

12 To bolster its arguments, BCH relied on cases concerning deductions from the gross rent for the cost of lift maintenance, cleaning and air-conditioning with respect to flats and commercial buildings. Admittedly, in the *BCH (No 1)* case, Lee JC noted at [17] that in the modern context, tenants' A & P contributions are "probably as essential to the tenants as the traditional ones such as watching, cleaning and air-conditioning" but this comment was made in the course of explaining why the tenant's A & P contributions, which had been computed as a part of the gross rental for Parco Bugis Junction, should be deducted for the purpose of ascertaining the annual value of the shopping centre. However, there is a clear difference between a building owner's maintenance costs and its advertising and promotion costs that its tenants have not agreed to bear. While lift maintenance must be carried out, whether or not advertising and promotional expenses additional to those that tenants have agreed to pay for should be incurred is at the building owner's discretion. It should not be overlooked that s 2 of the Property Tax Act describes the deductions that may be taken into account for assessing annual value as the "expenses of repair, insurance, maintenance or upkeep and all taxes (other than goods and services tax)". Cases such as *Chartered Bank v The City Council of Singapore* [1959–1986] SPTC 1, which concerned the deduction from the gross rent of the owner's expenses for hiring watchmen, cleaning, lifts, air-conditioning and supervision, and *Bell Property Trust, Limited v Assessment Committee for the Borough of Hampstead* [1940] 2 KB 543, which concerned deductions from the gross rent of the owner's expenses for providing hot water, central heating and other services in high-end service apartments in England, are not relevant for determining whether advertising and promotion expenses which tenants are not required to pay for may be deducted from the gross amount collected by BCH for the purpose of the assessment of the annual value of Parco Bugis Junction.

13 For the reasons already stated, BCH's appeal is dismissed with costs.

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