IN THE SUPREME COURT OF NEW ZEALAND

SC 46/2007
[2007] NZSC 73

	BETWEEN	CH'ELLE PROPERTIES (NZ) LIMITED Applicant
	AND	COMMISSIONER OF INLAND REVENUE Respondent

Court: Blanchard, McGrath and Anderson JJ

Counsel: D G Hayes for Applicant
R J Ellis and S J Reeves for Respondent

Judgment: 6 September 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with costs to the respondent of $2,500.

REASONS

[1] The proposed appeal is against a decision of the Court of Appeal confirming the view of both the Taxation Review Authority and the High Court that an arrangement under which the applicant taxpayer, Ch'elle Properties (NZ) Ltd, sought to claim GST input tax credits constituted tax avoidance and was void under s 76 of the Goods and Services Tax Act 1985 (as that section stood at the relevant time).

[2] In brief, the arrangement involved 114 shell companies formed by the promoter of the scheme, Mr Ashby, agreeing to buy 114 lots in a subdivision for $70,000 each payable on 31 August 1999 and then reselling them to another

shell company, Ch'elle, formed by an associate of Mr Ashby. The price payable by Ch'elle for each lot was about $700,000. A deposit of $30,000 was payable at a time when a GST tax refund was expected to have been received. The balance of the price was deferred for between 10 and 20 years, by which time each property was to be developed.

[3] The use of 114 companies enabled the value of the taxable supplies by each company to be kept at less than $1 million in the year in question and so each company could choose to account for GST upon receipt of payments. On the other hand, Ch'elle was to account on the usual invoice basis and could claim an immediate tax credit which plainly was to be the source of funding the amounts payable to the subdivider. The balance between inputs and outputs was by this means to be artificially distorted to the advantage of the promoter of the arrangement.

[4] Ch'elle wishes to argue in support of its proposed appeal, first, that the Court of Appeal erred in finding that it was unnecessary for the Commissioner to show an intention on Ch'elle's part to defeat the intent and application of the Act. Its second proposed ground is that an arrangement can defeat the intent and application of the Act only if there is a tension between the commercial and the juristic nature of the transaction. It is unnecessary for us to express any view on the merits (or otherwise) of these arguments, which incidentally do not appear to be available on the current version of s 76 (in force since 2000), because the Taxation Review Authority in fact made findings, amply justified on the facts, that Ch'elle did have an intention to defeat the intent and application of the Act and that, absent the input tax refunds, the arrangement was wholly inexplicable in commercial terms.

[5] The third proposed ground is equally hopeless. It is that the taxpayer did not gain a "tax advantage" from the arrangement. But s 76 contained a definition of that term and one of the specifically included species of tax advantage is "any increase in the entitlement of any registered person to a refund of tax". So quite clearly s 76 contemplated that a type of tax advantage could be obtained by means of obtaining a refund, which is exactly what Ch'elle was

seeking to achieve from the arrangement. Even if the language from the definition which we have quoted does not in itself stretch far enough to encompass what occurred in this case, the definition was inclusive and there was certainly an advantage of the same general kind which is covered by the expression "tax advantage" read in the light of the specific example from the definition.

Solicitors:
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