requires population proportional distribution and it is also the same in local assembly elections

However, this Supreme Court decision held that keeping regions in balance in the prefectural assembly should be considered, and POEA provides a distribution of the quorum of each district according to the actual situation and stability of elections. Then, the Court assumes that, unlike the national Diet election, in local assembly elections the equality of the vote value includes not only population proportional distribution but also keeping a balance between regions.

The problem is the justification of keeping regional equality, just in the local assembly election system, despite Article 14 (1). This decision justified keeping between regions equality because it is with in the discretionary power to consider the bbalance between regions. However it seems too weak a theory to justify violation of Article 14 (1).

2. Administrative Law

Yahoo Japan Corporation v. Japan
Supreme Court 1st P.B., February 29, 2016
Case No. (*Gyo-Hi*) 75 of 2015
70(2) MINSHU 242; 2300 HANREI JIHOU 29; 1424 HANREI TAIMUZU 68

Summary:

The Supreme Court held that the concept of an act or calculation that is "deemed to result in unreasonably reducing the burden of corporation tax" in Article l32-2 of the Corporation Tax Act refers to an act or a calculation of a corporation that will result in a reduction in the burden of corporation tax by improperly using the provisions as a means of tax avoidance. Determination of whether or not any such improper use was committed should be made by first taking into consideration, (a) whether the corporation's act or calculation is of an unnatural nature, and (b) whether there was any business objective or any other reasonable ground for performing such an act or calculation, other than reducing the tax burden.

Reference:

Corporation Tax Act (prior to the amendment by Act No.6 of 2010), Articles 132-2, 57 and 2, Item12-8; Order for Enforcement of the Corporation Tax Act (prior to the amendment by Cabinet Order No.51 of 2010), Article 112, Paragraph 7.

Facts:

The appellant of final appeal is a stock company engaged in information processing services and others. C served as its representative director and president, and D as its director and chairman. A Corporation (this corporation is hereinafter referred to as "A") is a stock company engaged in controlling and managing the business activities of both Japanese and foreign companies by acquiring their shares and others. D served as its representative director and president, C as its director. A held approximately 42.1% of the voting rights of the appellant.

In February 2005, A acquired, from a U.K. company, all of the issued shares of B, which is a stock company engaged in maintenance, management and operation of information and communications facilities for business and others, and made B its wholly-owned subsidiary company. B had a huge amount of losses, and it was expected to take considerable time for the company to write off the amount of unappropriated loss. In this case, the portion of the above-mentioned amount of unappropriated loss, which totals about 54 billion yen, is the subject of dispute (this amount is hereinafter referred to as "the Amount of Loss").

In 2008, with regard to B, the department of A in charge of B made a plan for a business transfer and a plan for corporate spin-offs with the objective of raising funds for business investment in facilities and contributing to improving the financial conditions of A, which would make it possible to write off the whole amount of unappropriated loss of B. Around mid-October, 2008, D received a report on the abovementioned plans concerning B, and thought it appropriate to sell it to the appellant. Therefore, on November 21, 2008, A proposed to the appellant a plan of reorganization through the 4 steps procedure including the appellant's acquiring of B (hereinafter referred to as"Proposal") in writing. On November 27, 2008, D asked C to assume the office of director and vice

president of B, and C accepted this offer. On December 26, 2008, C was appointed as director and vice president of B by the resolution of the shareholders meeting and the resolution of the board of directors of B (hereinafter referred to as "C's assumption of the office of the vice president of B"). After that, C held a meeting with F, who was the representative director of B, and others to discuss the future business policy for B, and attended a meeting of the board of directors of B, casting a vote on matters on the agenda. However, C was a part-time director without the right to represent B, and, moreover, C was not assigned to any exclusive function for which he would have a specific authority in connection with its business, nor did he receive any remuneration as an officer from it.

Based on the "Proposal", the procedure for organizational restructuring was carried out through the steps below.

(a) On February 2, 2009, B formed a new stock company named IDC Frontier (hereinafter referred to as "IDCF") by an incorporation-type company split. The directors of B assumed the office of the directors of IDCF, and all of the employees of B were employed by IDCF.

(b) On February 20, 2009. B transferred all of the issued shares of IDCF it held to the appellant.

(c) On February 23, 2009, A entered into a share transfer agreement with the appellant to transfer all of the issued shares of B it held to the appellant, and transferred these shares to the appellant on February 24, 2009 (hereinafter referred to as "the Acquisition"). As a result, B became the appellant's wholly owned subsidiary company, and a specified capital relationship was thus established between these two companies.

(d) At the meeting of the board of directors held on February 25, 2009, the appellant decided to effect a merger with B, and on the said day, it entered into a merger agreement with B (hereinafter referred to as "the Merger"). On March 30, 2009, the Merger between the appellant and B based on the said merger agreement took effect. The Merger falls within the category of qualified merger set forth in Article 2, item (12)-8, (a) of Corporation Tax Act (hereinafter referred to as the "Act").

On June 30, 2009, the appellant filed a final return of corporation tax for the business year from April 1, 2008, to March 31, 2009 (hereinafter referred to as the "Business Year"), while regarding the Amount of Loss

as the amount of loss of the appellant under Article 57, paragraph (2) of the Act, and including it in the amount of deductible expenses, on the grounds that since C, who had been the representative director and president of the appellant at the time of the Merger, assumed the office of the director and vice president of B, the Merger meets the requirement of continuance in office of specified officers as referred to in Article ll2, paragraph (7), item (5) of the Enforcement Order, and that in combination with the fact that the Merger also meets the requirement of business relevance as referred to in item (1) of the said paragraph, the Merger meets the requirement of deemed joint business as referred to in Article 57, paragraph (3) of the Act. In response, the District Director of the Azabu Tax Office considered that the series of acts performed by the appellant, including C's assumption of the office of the vice president of B, were abnormal or irregular acts that were aimed at meeting the requirement of continuance in office of specified officers only in appearance and regarding the Amount of Loss as the amount of loss of the appellant, and determined that these acts, if allowed. would result in unreasonably reducing the burden of corporation tax. On these grounds, pursuant to Article l32-2 of the Act, the district director calculated the amount of income of the appellant for the Business Year without regarding the Amount of Loss as the amount of loss of the appellant, and issued a reassessment as well as an assessment and determination of penalty tax for understatement regarding the appellant's corporation tax for the Business Year (hereinafter referred to as the "Reassessment and Other Tax Dispositions"). Therefore, the appellant filed this action against the appellee of final appeal to seek revocation of the Reassessment and Other Tax Disposition.

Tokyo District Court dismissed the claims of the plaintiff, subsequently Tokyo High Court also dismissed the claims. Therefore the appellant made an appeal to the Supreme Court.

Opinion:

Dismissed.

1. "Since an organizational restructuring may be carried out in complicated and diversified forms and methods, it is easily employed in a tactical attempt at tax avoidance and is likely to be improperly used as a means of tax avoidance. Article l32-2 of the Act is interpreted as therefore ensuring

that, in order to maintain equity in tax burden, if an act is conducted or calculation is made through an organizational restructuring in a manner that it will presumably result in an unreasonable reduction in the burden of corporation tax, the district director of the tax office has the authority to reassess or determine corporation tax based on the assumption that the relevant act or calculation were performed normally. Thus, the said Article is designed to comprehensively prevent tax avoidance attempted through an organizational restructuring. In light of such a purport and objective of the said Article, the concept of an act or calculation that will "result in unreasonably reducing the burden of corporation tax "as referred to in the said Article should be interpreted as meaning that an act conducted or calculation made by a corporation will lead to a reduction in the burden of corporation tax by improperly using the provisions concerning the tax system for organizational restructuring as a means of tax avoidance. Determination as to whether or not any such improper use was committed should be made by first taking into consideration, among others, (a) whether the corporation's act or calculation in question is of an unnatural nature, (e.g. it employed a procedure or method of organizational restructuring that would not have normally been thought of, or it resulted in the creation of an appearance that is alienated from reality), and (b) whether there was any business objective or any other factor that could be a reasonable ground for performing such an act or calculation, apart from reducing the tax burden; and then by considering whether the act or calculation in question can be deemed to have been performed in an attempt to reduce the tax burden by taking advantage of organizational restructuring and aimed at seeking or avoiding the application of the provisions concerning the tax system for organizational restructuring in a manner that deviates from the original purposes and objectives of those provisions."

2. (1) According to the fact-finding by the court, the series of acts pertaining to the organizational restructuring disputed in this case should be held to have been performed through the scheme whereby, on the basis of the procedure based on the Proposal made by A, the appellant executed the Acquisition and the Merger, so that the appellant would be able to make use of the whole amount of the unappropriated loss (the

Amount of Loss), by deeming the said amount of unappropriated Loss as the amount of loss of the appellant pursuant to Article 57, paragraph (2) of the Act and including it in the appellant's deductible expenses, and it should also be said that these acts were carried out in a planned manner within a very short period of time .
(2) Concerning C's assumption of the office of the vice president of B, in view of circumstances such as no evidence of the objectives in business terms or of its necessity, the short period of being in the office of director and vice president, and not having any exclusive function nor any remuneration, "it is unlikely that there was any business objective or any other factor that could be a reasonable ground for C's assumption of the office of the vice president of B, except for reducing the tax burden."

3. "Taking all these matters into consideration, it should be concluded that C's assumption of the office of the vice president of B was performed in an attempt to reduce the tax burden by taking advantage of organizational restructuring and aimed at seeking or avoiding the application of the relevant legal provisions, ...in a manner that deviates from the original purposes and objectives of those provisions. Accordingly, it is appropriate to construe that C's assumption of the office of the vice president of B would result in reducing the burden of corporation tax by improperly using the above-mentioned provisions concerning the tax system for organizational restructuring as a means of tax avoidance, and hence it constitutes an act that will "result in unreasonably reducing the burden of corporation tax," as referred to in Article l32-2 of the Act."

Editorial Notes:

1. There are four provisions in the Act, applied generally against financial affairs organized by a corporation under specific conditions for the purpose of avoiding taxes; an act and calculation by family corporations (Art.132), involved in reorganization (Art.l32-2), on consolidated corporations (Art.132-3), and on PE-attributed income of a foreign corporation (Art.147-2). These provisions prescribe commonly that "when it is found that any acts conducted or calculations made by the corporation will, if allowed, unreasonably reduce the burden of corporation tax", the District Director of the tax office may calculate the tax base of corporation

tax related to the corporation and others, "based on his/her own recognition, notwithstanding the said acts or calculation."

This is the first case where the Supreme Court made a judgement concerning the application of Art. 132-2. The main issue was the meaning of the concept of an act or calculation that is "deemed to result in unreasonably reducing the burden of corporation tax", and the method of determining whether the act or calculation in question constitutes such an act or calculation.

2. (1) Concerning the concept of an act or calculation that unreasonably reduces the burden of corporation tax, the court judgements interpreting Art.132 tend to be divided into two main opinions; One is that it refers to those which a non-family company would never conduct, and the other is those which are too unreasonable or unnatural for a real businessperson to conduct (hereinafter referred to as the "economic rationality method"). Considering the applicability, the economic rationality method is thought to be more appropriate, and the concept of a lack of economic rationality is generally thought to indicate that an act or calculation is abnormal or irregular, and there would be no reasonable grounds nor business purposes, other than reducing the tax burden.
(2) The first instance in this case held that the concept of unreasonability referred to in Art.132-2 includes (a) the economic rationality generally accepted in considering Art.132, and (b) the cases where the allowance of reducing the burden of corporation of tax would be obviously in breach of the purport and the aim of the tax system for reorganization or each of the provisions concerning it, though parts of a series of acts pertaining to reorganization may meet the provisions in appearance. The second instance added to (b) that "only if the breach is obvious", but this point is thought to mean merely that this provision should not be applied in general, for the second instance made almost the same decision in terms of the concept of unreasonability itself, with a little amendment, as the first instance. Both judgements were criticized for (b), since the range of disallowance could be enlarged by the discretion of a District Director of the tax office, if he/she took the purport and the aims into consideration.
(3) The Supreme Court held that the concept of unreasonability should be referred to as an improper use of provisions concerning the tax system for

reorganization as a means of tax avoidance (hereinafter referred to as the "Improper method"), abandoning both of the methods above. Subsequently, the Supreme Court made the decision concerning the method of determining whether the act or calculation in question constitutes such an act or calculation at the first time. On the ground, this judgement is regarded as more explicit.

3.(1) There were two other notable decisions made in 2016, concerning the concept of unreasonability referred to in the provisions of the Act. The one was that the Second Petty Bench of the Supreme Court judged on the same date of this case where IDCF, which was formed through an incorporation-type company split, carried out as the first step in the series of acts pertaining to organizational restructuring in this case, made an appeal (Supreme Court 2nd P.B., February 29, 2016, Case No. (Gyo-Hi) 177 of 2015, 70 (2) Minshu 470; hereinafter referred to as the "IDCF Case"). In this case, IDCF filed this action to seek revocation of the reassessments and others issued by applying Art. l32-2 of the Act.

In the IDCF Case, the first instance (Tokyo District Court, March 18, 2014; Zeimusoshousiryou 264 (Jungou12436)), and the second instance (Tokyo High Court, January 15, 2015; Supreme Court of Japan web site) dismissed the claims of IDCF, and subsequently the Supreme Court dismissed them as well. Although the judgement of the IDCF Case was held in the different bench from this case, the Supreme Court the Second Petty Bench adopted the same Improper method in considering the concept of unreasonability referred to in Art.132-2, using the same words as in this case.

(2) The other case (hereinafter referred to as the "IBM Case"), concerning Art.132 which applies to a family corporation, was affirmed by the Supreme Court, not accepting the appeal of the appellant, in that same February , 2016. In the IBM case, the second instance denied applying Art.132 to the acts in question, therefore the case was terminated in favor of the taxpayer as a plaintiff (Supreme Court, February 18, 2016, Case No. (gyo-hi) 304 of 2015; the second instance, Tokyo High Court, March 25, 2015, 61 (11) Shoumugeppou 1995; 2267 Hanreijihou 24).

Concerning the unreasonability referred to in Art.132, the second instance in the IBM Case held that it should be determined in accordance

with objective and rational ways whether or not the act or calculation in question is unreasonable or unnatural as those of real businesspersons from the point of view of exclusively economical and substantial considerations. In addition, it is appropriate to think that in the case of the lack of economic rationality there may be transactions which are different from arm's length transactions in the light of the aim of this provision, which is to hold the equity of the burden of tax between family and non-family corporations. Furthermore, the court held that it is inconsistent with not only the terms of the provision but also the sequence of law amendments to assume that the intention of tax avoidance, other than business purposes or reasonable grounds, is always imperative and exclusive to apply this provision.

Although Act.132 was not applied to the plaintiff's transaction in the IBM Case even considering those conditions above-mentioned, the judgement shown in this case is controversial, since the applicable range of the criteria in that judgement may be wider.

4. Recently complex tax schemes to reduce the burden of corporation tax made by enterprises are hotly disputed. Under such circumstances, the Supreme Court gave a meaningful judgement in terms of making a judgement concerning the concept and the method referred to in Art.132-2.

However, there has not been established a definite interpretation about this judgement yet, and the scope of its application still remains uncertain, the same as the scope of application of Art.132. Therefore, how to apply the provisions against a corporation's act or calculation deemed to avoid the tax burden, considering of the meaning of unreasonability, is thought to be left to further cases and studies.

3. Family Law

X v. Y

Chiba Family Court Matsudo Branch, March 29, 2016

Case No. (*Ka Ho*) 19 of 2012

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