Case No. D30/87(A)

Appeals – Board of Review – request to state a case for the opinion of the High Court – whether the issue raised by the appellant was a question of law – s 69(1) of the Inland Revenue Ordinance.

Panel: Henry Litton QC (chairman), Michael A Olesnicky and H J Dickson.

Date of hearing: 18 April 1988.
Date of decision: 18 May 1988.

The Board of Review had allowed a taxpayer's appeal against a profits tax assessment. The issue before the Board had been whether gains from the disposal of shares were trading profits or capital. The Commissioner required the Board to state a case for the opinion of the High Court on the question of whether, on the whole of the evidence before the Board, the only proper conclusion was that the taxpayer's gains were chargeable to profits tax.

Held:

The question posed by the Commissioner was not a question of law. Accordingly, the Board refused to state the case.

(a) It is a question of law whether the Board had properly found a fact or improperly had refused to find a fact. However, the appellant must identify in his application the particular facts which are being challenged. Otherwise, the Board is in no position to state a case.

(b) It is not appropriate simply to ask the High Court to review the whole of the evidence, make fresh findings of fact therefrom, and thereby reach a different conclusion. This was effectively asking for a full rehearing rather than an appeal on a question of law.

Application denied.

[Editor's note: The Commissioner of Inland Revenue has instituted legal proceedings by way of an application for judicial review against the Board's refusal to state a case, and the proceedings are pending.]

Case referred to:

INLAND REVENUE BOARD OF REVIEW DECISIONS

Chinachem Investment Co Ltd v CIR CA, Civ App No 116 of 1986.
Edwards v Bairstow (1955) 36 TC 207
Ransom v Higgs (1974) 50 TC 1

P F Feenstra for the Commissioner of Inland Revenue.
John Gardiner QC with J J Swaine instructed by Woo Kwan Lee & Lo for the taxpayer.

Decision:

1. We give this ruling following the meeting of the Board of Review held on Monday, 18 April 1988, attended by the parties and their representatives. The meeting was convened for the purpose of giving the Commissioner an opportunity of satisfying us that there is a question of law for the opinion of the High Court in this proposed appeal.

2. The matter is fundamental. Under section 69(1) of the Inland Revenue Ordinance, our decision on the appeal is final: provided that if, in the Commissioner's written application under section 69(1), there is a question of law for the opinion of the High Court, it is our duty to state a case on that question of law. Equally, if the written application does not properly raise a question of law, our duty is to decline to state a case.

3. It is important to bear in mind the scheme of the Ordinance for dealing with objections and appeals. Up to the stage when the Board gives its decision on an appeal, the Taxpayer is protected by section 4 from having his affairs publicly revealed. The Board of Review is, under the Ordinance, the only tribunal given the task of making findings of fact: an exercise often of fine judgment made on a mass of evidence pointing in different directions. The functions of the Board of Review under section 68 are very different from those of the High Court under section 69. The Board is composed of persons from different backgrounds. Under section 65 it is only the Chairman of the Board who is required to be legally trained. The paramount intention of the legislature is plainly that where an assessment to tax (made by an assessor under Part X of the Ordinance) has gone through a process of objections and appeals under sections 64 and 66, the decision of the Board should be final. Tax is charged annually, and it would be intolerable if every objection to an assessment were to find its way to the Court of Appeal.

4. Equally, the legislature recognises that Boards of Review, in the discharge of their functions, could err in law. Therefore, power is given to the High Court to hear appeals from decisions of the Board of Review on questions of law. When this happens, the protection of secrecy under section 4 disappears, and appeals in the High Court are always heard in open court. But the parties are protected by the procedure laid down in section 69 to this extent: the High Court hears and determines an appeal on the case as stated by the Board – see section 69(5). Accordingly the function of the Board is to set out such of the facts (found by the Board) as are relevant to the question of law which is the subject of the

appeal. It is plainly not the intention of the legislature that, under the guise of an appeal under section 69(1), there should be a re-hearing in the High Court of the whole case as heard by the Board.

5. As Sir Alan Huggins VP remarked in Chinachem Investment Co Ltd v CIR (Civil App No 116 of 1986, 16 April 1987):

> ' all too often the case stated process is adopted in an attempt to raise as an issue of law what is in truth an issue of fact.'

And when a party, in his application to the Board of Review to state a case, asserts that the only way in which the 'question of law' can properly be argued is for the entirely of the evidence (both documentary and viva-voce) as adduced before the Board to be made part of the 'case stated', then the Board should be alert to the possibility of abuse.

6. It is with these thoughts in mind that we now proceed to review the history of this matter.

Background

7. On 11 August 1987 we gave our decision on an appeal by A Company, appealing against a profits tax assessment in the sum of $344,825,190 made by the assessor in the company's 1980/81 profits tax assessment, as confirmed by the Commissioner in his determination. By our decision of 11 August 1987, we allowed A Company's appeal and annulled the assessment.

8. By letter dated 9 September 1987, the Commissioner made an application to us requiring us to state a case for the opinion of the High Court under the provisions of section 69 of the Ordinance. The 'questions of law' set out in the application were formulated as follows:

(i) Whether the decision of the Board of Review was correct in law.

(ii) Whether the Board of Review applied correctly the provision of section 68(4) of the Inland Revenue Ordinance in holding that the onus of proof that the assessment was erroneous was satisfied by A Company.

(iii) Whether on the whole of the evidence before the Board of Review the only proper conclusion was that the sum of $344,825,190 received by A Company was profit chargeable to tax in accordance with section 14 of the Inland Revenue Ordinance.

9. By letter dated 14 September 1987, the Clerk to the Board of Review asked the Commissioner to prepare a draft of the case stated and to send the same to A Company's solicitors for their agreement. A time-limit of three weeks was given for this purpose. The

solicitors were at the same time asked to agree the draft or propose amendments thereto within two weeks from the receipt of the same from the Commissioner.

10. Thereafter there was an exchange of letters between the Clerk to the Board and the Commissioner concerning, among other matters, requests for extensions of time by the Commissioner for the purpose of preparing the draft case stated.

11. On 8 December 1987 the Clerk to the Board wrote to the Commissioner as follows:

> ' I refer to your letter dated 4 December 1987 and in particular to your request for an extension of 28 days to submit the draft Case Stated.
>
> I am directed to inform you that the Chairman is concerned over the time taken for preparing a draft. He is willing to grant a final extension to Friday, 29 January 1988 (which is more than the 28 days requested). If the draft is not produced by then, the Board of Review will then act on the basis of your application dated 9 September 1987, on its own motion. In this connection, I am directed to point out that the points of law upon which you have asked for a case to be stated for the opinion of the High Court are not at present well perceived, nor are they sufficiently understood by the Board to enable it to draft the case.
>
> If it should be necessary for the Board to prepare its own draft, without the assistance of the parties, the Board would need elaboration and clarification on the three 'questions' set out in your letter dated 9 September 1987 before it can proceed and will, for that purpose, convene a hearing to be attended by the parties.
>
> I would remind you that the draft to be submitted by 29 January 1988 should either be agreed by the respondent, or, if there is no agreement, should contain the respondent's proposed amendments.'

12. By letter dated 23 January 1988, A Company's solicitors wrote to the Clerk stating that the draft case stated had been received from the Commissioner and asked for more time to consider the draft. By letter dated 1 February 1988, A Company's solicitors told the Clerk that they had sent that day a copy of the amended draft case stated to the Inland Revenue Department for its agreement and comment, and enclosed a copy of their covering letter to the Inland Revenue Department. The draft case stated was not, at that time, enclosed with the solicitors' letter of 1 February 1988 so it was not possible, at that point in time, to determine what were the points of law which the draft case stated covered. But it was plain from the letter to the Commissioner of the same date, copied to us, that the parties were seeking agreement concerning the formulation of the 'questions of law' to which the case stated would relate.

13. By letter dated 29 February 1988, the Commissioner wrote to the Clerk stating that the draft case stated had been received from A Company's solicitors, and the letter went on to say:

> 'Having studied their comments, I can agree to the format of their draft in principle. However, I need more time to study the transcript in order to extract the relevant facts to be incorporated into the Stated Case. For this reason I should be grateful if the Chairman would grant an extension of time until the end of March 1988.'
>
> An extension of time was accordingly given to 31 March 1988.

14. By letter dated 30 March 1988, the Commissioner wrote to the Clerk to the Board, seeking an extension of time for finalising the draft until the end of April 1988. In that letter the Commissioner said:

> 'I have studied the revised draft Stated Case prepared by the respondent's solicitors. Although I can agree to the format of their draft in principle, I found it impossible to extract the relevant parts from the transcript to put into the Stated Case as additional facts to support my appeal. I have to propose to include the whole transcript in the Stated Case because my case before the Court will be on the whole of the evidence the Board could not come to the decision it did.'

15. With the letter of 30 March 1988, the Commissioner enclosed a copy of his draft stated case. As formulated in the Commissioner's draft, the only question of law for the opinion of the High Court was as follows:

> 'Whether on the whole of the evidence before the Board of Review the only proper conclusion was that the sum of $344,825,190 received by A Company was profit chargeable to tax in accordance with section 14 of the Inland Revenue Ordinance.'

16. Before the Board was able to deal with the Commissioner's letter dated 30 March 1988, the Clerk received a letter from A Company's solicitors dated 8 April 1988 which enclosed, for the first time, a copy of the draft case stated submitted by the solicitors to the Commissioner on 1 February 1988 – a draft the 'format' of which, according to the Commissioner, was agreeable to him in principle. The question of law, as formulated in the solicitors' draft, was as follows:

> 'Whether on the facts found by us, it was open to the Board of Review, as a matter of law, to hold that the shares in [B Company] constituted capital assets with the consequence that the profit arising from the acquisition and disposal of the same was not chargeable to profits tax.'

17. It will be readily apparent that the question of law, in the revised draft case stated as submitted by A Company's solicitors, is formulated in a way quite different from that in the Commissioner's draft. If the appeal to the High Court proceeds on the basis of A Company's solicitors' draft, it would proceed on the basis of the facts found by us as embodied in our decision dated 11 August 1987 – subject to any further findings of fact which we might make upon the invitation of both parties and embody in the case stated. Thus formulated, the thrust of the appellant's submission in the High Court would then presumably be that, upon the facts as found by us, no reasonable tribunal properly directed as to the law could have arrived at the conclusion which we reached (that is, that the profit amounting to $344,825,190 arose from the acquisition and disposal of capital assets and was accordingly not chargeable to profits tax). In other words, the appellant would not seek to disturb any of the findings of fact which we made. The High Court would then have to determine whether on the facts set out in the case stated the only conclusion was that the transaction was an adventure in the nature of trade. This would have been a perfectly proper appeal, within the confines of section 69(1) of the Inland Revenue Ordinance. And, on the basis of such an appeal, there would be no need to annex the transcript of evidence, as proposed by the Commissioner – except, possibly, as regards such other findings which the appellant might argue we ought to have made, and erroneously failed to do so.

18. In their letter dated 8 April 1988 to the Clerk, A Company's solicitors went on to say:

> ' The question stated for the consideration of the Court in the Commissioner's draft is not one which we can agree and, indeed, in our view, is wholly inappropriate to a Case Stated.
>
> It appears, to some extent at least, to be almost seeking a re-hearing. The appropriate question is that set out at the end of the draft submitted by us on 1 February 1988.'

The letter went on to say that the draft submitted with the Commissioner's letter of 30 March 1988 would, in the view of A Company's solicitors, simply constitute an abuse of the case stated process.

19. The correspondence between the parties and with the Clerk thus ended, and in these circumstances we convened a hearing (at which A Company's solicitors were invited to attend) to enable the Commissioner's representative to satisfy us that the 'question' in the Commissioner's draft is a question of law within the meaning of that expression in section 69(1) of the Ordinance and that, in the circumstances of this case, we are duty-bound to state a case for the opinion of the High Court on that question.

20. It will be readily apparent that the 'question' in the Commissioner's draft is the same as question (iii) in the original application dated 9 September 1987 as set out in paragraph 8 above.

Questions (i) and (ii) have disappeared from the face of the draft, but Mr Feenstra, who appeared for the Commissioner at the hearing before us, stated that questions (i) and (ii) have not been abandoned: they have simply been 'subsumed' in question (iii). Mr Feenstra said that question (iii) 'encompassed' the first two questions. Why the Commissioner should have earlier stated that the 'format' of A Company's draft was agreed in principle (subject to extracts from the transcript to be incorporated in the stated case as additional facts), and then apparently resiled from that position later on, has never been explained.

21. At the hearing, Mr Feenstra made it plain that the Commissioner no longer accepted the formulation of the question as set out in paragraph 16 above. His submission was that the 'ultimate' question in the appeal – whether the sum of $344,825,190 was trading profit or capital gain – was a mixed question of law and fact, and he was entitled to simply ask the High Court to look at the whole of the evidence and determine whether we (the Board of Review) had come to a 'proper' conclusion on the ultimate question. It is by no means clear from Mr Feenstra's formulation whether the appellant is challenging the Board's findings of primary facts; or its application of the law to the facts; or the reasonableness of the conclusion which the Board drew from these facts.

22. The appellant's use of the word 'evidence' suggests that he is challenging the Board's findings of primary facts. There is no other reason for asking the High Court to examine the evidence. On the other hand, the phrase 'only proper conclusion' suggests that the appellant is challenging the Board's conclusion, drawn from the primary facts. From the 'question of law' as formulated, it is impossible to say what in particular the appellant is challenging and what he intends to argue on appeal. The question as formulated spans the entirety of the case from the evidence to the conclusion and everything in between.

A Company's appeal against the profits tax assessment

23. To consider whether the 'question' in the Commissioner's draft case stated is a question of law within the meaning of that expression in section 69(1) of the Ordinance, it is necessary for us briefly to revert to the appeal which gave rise to the matter now in issue. This took place over quite a number of days: 1, 2, 3, 6, 7 and 8 July 1987. Four witnesses were called before us, three of whom were extensively cross-examined. In addition to the oral evidence, a large number of documents were admitted in evidence, the bulk of which consisted of a statement of agreed facts and many documents which were put before us by agreement. Our decision dated 11 August 1987 was a lengthy one, consisting of 71 paragraphs. In our introductory paragraphs we stated this:

> ' 1. A Company has objected to the 1980/81 profits tax assessment raised on it. That assessment charges to profits tax the profit realised by A Company from the sale by it, on 18 September 1980, of the whole of the share capital of a subsidiary company, namely B Company. The share capital of B Company consisted of 2 shares of $1 each.

2. The amount of such profit is $344,825,190. After deduction of a loss of $10,455, as returned for the period, the assessor raised on A Company on 27 April 1984 an assessment charging to profits tax the sum of $344,814,745 with tax payable thereon of $56,894,432.

3. The profit of $344,825,190 on the sale of the two shares in B Company is computed as follows:

		(HK$)	(HK$)
Sale Price			346,657,155
Less:	Cost of B Company Shares	2	
	Commission paid	1,354,422	
	Legal and professional Charges	477,441	1,831,965
	Profit		344,825,190

4. On the face of it, the transaction giving rise to the profit is the sale of shares. If it is a sale in the course of a trade or business carried on by A Company, the profit is chargeable to tax under section 14 of the Inland Revenue Ordinance; if it is the sale of a capital asset, the profit realised is not chargeable.

5. The underlying asset, which gave value to the shares in B Company, was a large number of Letters of Entitlement ("Letters B") issued by the Crown at various times relating to a total of 793,268 square feet of land in the New Territories. The Letters B had been acquired by B Company from C Company on 9 September 1980 at a consideration of $194,788,831.80; this purchase was wholly financed by loan from A Company. Thus, the transaction giving rise to the profit of $344,825,190 realised on the sale of the shares in B Company occurred only 9 days after B Company's acquisition of the Letters B.'

24. The evidence which was put before us on the appeal was complex. Much of it formed the backdrop to the matters lying at the heart of the dispute. A Company together with another private company called D Company were the vehicles by which X Company entered into a joint venture with Y Company to 'purchase Letter B Land Entitlements and, thereafter, to develop land acquired in exchange for such Letter B Land Entitlements and to engage in such other business which can be conveniently carried out in connection therewith' (as the object of the joint venture was described in a document dated 31 December 1978.) In the implementation of the joint venture, a large number of subsidiary companies – of both A Company and D Company – were involved. To determine the intention of the joint venture partners with regard to the Letters B, we were invited to examine fairly closely the activities of these subsidiaries (or, as the Commissioner's representative preferred to put it, the activities conducted through these subsidiaries). In particular, there was an A Company subsidiary called C Company, whose history went back to 1972. Much time was therefore devoted at the hearing to these background facts.

25. The way we formulated the ultimate question for our determination was as follows (paragraph 43 of the decision):

> 'Was the transaction on 18 September 1980, which gave rise to the gain of $344,825,190, a sale of a capital asset, or was it a transaction carried out in the course of trade: or as Mr Nigel Kat, on behalf of the Commissioner puts it, a deal in property and interests in property ...'

26. To arrive at that 'ultimate' question, we evaluated the evidence bearing on that question and this is set out in paragraphs 44 onwards in our decision. In the course of this evaluation, we made a great number of findings of fact: some in favour of the Commissioner and some in favour of A Company.

The Board's function as a fact-finding body

27. As we understand our function as the fact-finding body, it was to consider all the evidence put before us (written and oral) which we deemed relevant.

28. It would be an unusual case to find any single factor being in itself decisive, particularly where the web of evidence was as complex as it was in this case. Each piece of evidence would vary in weight and direction: some would favour the Commissioner, some would be against him and some neutral. Having weighed the relevant evidence as seemed to us appropriate, it was then our duty to determine ultimately whether the transaction giving rise to the profit was carried out in the course of trade or whether it was, as A Company contended, in truth the sale of a capital asset. The burden of proof was, of course, upon A Company to show that the assessment was incorrect (as we stated in paragraph 12 of our decision).

29. Where the evidence is as extensive and complex as in this case, no two tribunals of fact would weigh and assess every piece of evidence in precisely the same way. The emphasis which different tribunals would give to identical facts would vary to a greater or lesser extent, and it is upon the whole of this process of evaluation that the fact-finding tribunal can, at the end of the day, come to a conclusion upon the ultimate question. These must necessarily be matters of degree.

Application for case stated

30. We cannot see how it can be proper for an appellant in the circumstances of a case such as this to apply to a Board of Review under section 69(1) of the Ordinance and say in effect to the Board of Review:

> 'We do not say whether any of the findings of fact which you have made are perverse or not; we would like you simply to annex to your "case stated" the whole of the evidence adduced before you, and we will then ask the High Court

to say that on that evidence the only "proper" conclusion is that the profit received by the Taxpayer is a profit chargeable to tax.'

This is the effect of the 'question' formulated in the Commissioner's draft, as set out in paragraph 15 above; although in argument Mr Feenstra did say he was challenging our findings on the basis either (i) that there was no evidence to support the findings, or alternatively (ii) that the evidence compelled findings which we failed to make. As to (i) above, Mr Feenstra gave no particulars. As to (ii) above, A Company through its solicitors had already indicated that it concurred in some additional findings which it agreed should be incorporated in the case stated: in which case the appeal could proceed on the question formulated in paragraph 16 above.

But Mr Feenstra would not agree to any other formulation of the 'question of law' apart from that in paragraph 15 above.

31. If this is a proper appeal on a 'question of law' under section 69(1), then the identical question would be raised every time a party is dissatisfied with a decision of a Board of Review. And there is no reason why such an appeal 'on a question of law' need be confined to an assessment made under section 14. The same point could be raised on a salaries tax appeal, or any other kind of appeal under the Ordinance, and a party's rights under section 69 would, in effect, be the same as his rights under section 14 of the Supreme Court Ordinance in a civil matter. The 'case stated' would serve very little purpose, except as the vehicle by which an appeal is conveyed to the High Court. The appeal would be a re-hearing in the fullest sense.

32. When Mr Feenstra was asked at the hearing which of the many findings of fact made by us were sought to be impeached, he said he did not need to disclose his hand at that stage: it was not necessary for him to identify the findings which the Commissioner would ultimately challenge. He said that the Commissioner's case was that the Board erred in law by either (a) not finding as facts matters upon which the evidence pointed only one way or (b) finding as facts matters when there was no evidence which could have supported such findings. We accept of course that the matters in either (a) or (b) above do raise questions of law, and that if a party desires to contend in the High Court that there was no evidence to support a particular finding of fact (or conclusion by way of inference from particular findings of fact) it may be necessary to include the whole of the evidence adduced before the Board (written and oral) in order to demonstrate the negative proposition to be argued. But it would be necessary for the party, in his application under section 69(1), to identify the findings of fact (or conclusion by way of inference from particular findings of fact) which are impeached, to enable the Board to state a case. This the Commissioner has not done in the present case.

33. The reality of this case is that the whole of the evidence adduced before us was massive; and we made very many findings, some favouring the Commissioner and some against him. What the Court is being invited to do, on the basis of the Commissioner's draft, is to review the whole of the evidence to make findings afresh on the basis of such review,

and then following such fresh findings to reach a different conclusion. This the Court is not empowered to do under section 69(1).

34. Sometimes, a case before the Board of Review may turn on one or two crucial issues of fact: for example, the intention of a taxpayer in acquiring a property, and his motives for deciding on its realization. In such a case it might be legitimate for the taxpayer to say: 'But there was no evidence before the Board which could have enabled the Board to conclude that we intended to acquire the property for re-sale.' And to go on to say: 'The evidence which was before the Board regarding our motives for realization points only one way: it was to re-invest the proceeds in another capital asset.' In such a case, the conclusion reached by the Board that the taxpayer had engaged in an adventure in the nature of trade might be said to be perverse. The appeal would have raised a question of law: Edwards v Bairstow (1955) 36 TC 207 at 224 and Ransom v Higgs (1974) 50 TC 1 at 45-46. And, to resolve the question of law, it might be necessary to annex part (or indeed the whole) of the evidence as part of the case stated. But the present is not such a case.

35. Mr Feenstra submitted that, if we felt that there was no properly formulated 'question of law' in the Commissioner's application for a case stated, we should nevertheless draw up a case stated, expressing if necessary our reservations in the case stated. This we decline to do. What Mr Feenstra proposes is, in our view, an abuse of the procedure under section 69(1).

36. For the reasons stated above, we decline to state a case. And since the only application to state a case under section 69(1) is that made by letter dated 9 September 1987, where no question of law has been properly formulated, we dismiss the application.