HCIA 4/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

INLAND REVENUE APPEAL NO. 4 OF 2005

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BETWEEN

CHINA MAP LIMITED Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

———————

HCIA 5/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

INLAND REVENUE APPEAL NO. 5 OF 2005

———————

BETWEEN

CHINA NAME LIMITED Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

_____

HCIA 6/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

INLAND REVENUE APPEAL NO. 6 OF 2005

_____

BETWEEN

CHANCE INVESTMENT LIMITED Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

_____

HCIA 7/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

INLAND REVENUE APPEAL NO. 7 OF 2005

BETWEEN

COMEBRIGHT DEVELOPMENT LIMITED Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon Chung J in Court
Dates of Hearing: 5 and 6 June 2006
Date of Handing Down Judgment: 4 August 2006

J U D G M E N T

Introduction

1. This is the taxpayers' application under the proviso to s. 69, Inland Revenue Ordinance (Cap. 112):-

> "… either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance … ".

Although there are four case-stated, the questions posed in each are the same. The parties sensibly (and correctly) agree that they can be dealt with as if they were one case-stated.

2. Save those concerning the taxpayers' intention in relation to the property transactions which attracted tax, the background facts are essentially undisputed. They can be summarised as follows.

Background Facts

3. The taxpayers were property holding companies, and were subsidiaries of the same parent company. The ultimate plan of the parent company was to acquire the whole of 304-312 Jaffe Road and 325-337 Lockhart Road, Wanchai for the purpose of property redevelopment.

4. Although there was no express agreement between the parties (when they appeared before the Board of Review ("*the board*")), the taxpayers' evidence relating to the pieces of land having been acquired by the taxpayers as part of the parent company's property redevelopment plan was unchallenged: see, for example, para. 5 to 29, case-stated and para. 16 to 18 and 25 to 35, taxpayers' skeleton submissions.

5. During the period from about July 1988 to about April 1993 (a period of less than 5 years), through purchases effected at different times, the taxpayers acquired various lots of land along Jaffe Road and Lockhart Road ("*the subject lots*"). In short, before the decision to dispose of all the subject lots, the taxpayers owned 308-312 Jaffe Road and 325 and 329-337 Lockhart Road.

6. Unfortunate for the taxpayers' parent company, another company was apparently also attempting to acquire the same lots, having acquired some of the lots nearby for a similar purpose (it appears from a letter from the Commissioner that the company owned 304-306 Jaffe Road and 327 Lockhart Road).

7. At the end, all the relevant lots (including the subject lots) were sold by the taxpayers' parent company, and the said competing company, to the developer who actually redeveloped the site subsequently.

8. More precisely, the subject lots were sold by the taxpayers in August 1993 and December 1994. Profits (which totalled about $192 million) were made by the taxpayers as a result. They were included in the accounts for the year of assessment 1994/95. The Commissioner determined on 26 February 1999 that they were trading profits and hence taxable. The taxpayers disagreed and claimed that they were capital gains.

The Board's Decision

9. Not satisfied with the Commissioner's determination, the taxpayers appealed to the board pursuant to s. 66, Cap. 112. In a decision dated 26 September 2003, the board dismissed their appeals and confirmed the said determination.

10. S. 68(4), Cap. 112 reads:-

> "The onus of proving that the assessment appealed against is excessive or incorrect shall be on the [taxpayers]".

11. The argument raised on the taxpayers' behalf at the hearing before the board was mainly that the Commissioner has the burden of proving that the profits were trading profits. It is part of that main argument that the burden cast upon them by s. 68(4), Cap. 112 was a burden merely to provide sufficient evidence to show that the Commissioner's conclusion that they were trading was wrong. In other words, the taxpayers only needed to show that they had not carried on a trade, profession or business in relation to the sale of the subject lots (s. 14(1), Cap. 112).

12. The board's reasons for dismissing the taxpayers' appeals can be summarised as follows:-

(a) s. 68(4) provided that the burden of proving that the assessment was excessive or incorrect was on the taxpayers;

(b) the taxpayers' argument that the burden of proof was on the Commissioner was rejected;

(c) in the appeals before the board, the taxpayers' stated intention with regard to the subject lots was to redevelop them into the offices of their group of companies and for rental purpose. The verbal evidence of the taxpayers was to this effect;

(d) however, the taxpayers had earlier at various stages put forth different versions regarding their intention;

(e) they once indicated the redeveloped property was for rental income and to be held for long term purpose;

(f) another version was that the existing buildings were initially acquired for rental income purpose; only subsequently did the taxpayers state that they would be redeveloped into a "high class composite residential cum commercial building for rental purpose";

(g) the third version was set out in a supplemental witness statement. The redeveloped property would be "commercial/office or simply for commercial user". Residential use was not mentioned.

The board's decision also recorded that the taxpayers' intention was a question of fact and the board, having considered the above matters, decided against the taxpayers on that issue.

13. The matters summarised above can be found in para. 5 to 29 (findings of agreed facts), 49 (redevelopment for rental income) and 50 to 59, case-stated.

14. The board also took into account other matters when deciding on the taxpayers' stated intention:-

(1) there was no evidence about the likelihood of acquiring other lots of land for the purpose of the alleged redevelopment;

(2) there was no evidence about the total purchase costs of all the lots for the purpose of the alleged redevelopment;

(3) there was no evidence about the time period within which all the occupiers of the lots would be evicted;

(4) there was no evidence about the time period within which the redevelopment would be completed;

(5) the taxpayers being $2 companies, there was no evidence about their financial ability to undertake the alleged redevelopment;

(6) there was no evidence about the financial worth of the taxpayers' shareholders;

(7) there was no evidence about the taxpayers' financial ability to repay the instalment loan which they might obtain from the bank for the purpose of the alleged redevelopment;

(8) there was no evidence about the occupancy rate of the proposed new building, or the amount of rents receivable.

In such circumstances, the board found that it was unable to conclude the taxpayers' stated intention of redevelopment was genuinely held, realistic or realisable.

15. The matters summarised above can be found in para. 60 to 67, case-stated.

16. By virtue of the above matters, the board concluded that the taxpayers had failed to discharge the burden placed upon them by s. 68(4), Cap. 112 and dismissed the appeals.

Questions Posed in the Case-stated

17. The first question posed in the case-stated is:-

"In the light of all the evidence before the Board and the findings made by the Board, whether the Board's conclusions in paragraphs 66 and 67 of the Decision, namely, that the [taxpayers] had not proved any of the following:-

(i) that at the time of the respective acquisitions of Blocks 1, 2a, 2b, 4, 5, 6, 7, 8 or 9, the intention of any of the [taxpayers] was to hold any of them or any proposed new building(s) on a long term basis, whether for rental income or at all;

(ii) that the [taxpayers'] financial ability, with or without their shareholders and directors and ultimate beneficial owners of their shares, to demolish the old buildings, construct the proposed new building(s), and to keep the proposed new building(s) indefinitely,

and that the [taxpayers] had not proved that the 'stated intention' was in fact held, not to mention genuinely held, realistic or realisable; was contrary to the true and only reasonably conclusion".

18. The second question posed in the case-stated is:-

"Upon the proper construction of [s. 68(4), Cap. 112], and given that the stated ground of appeal before the Board was that 'the profits referred to in the determination were capital in nature and were not assessable to Profits Tax or alternatively that the assessment was excessive'

(a) whether in the light of the Board's conclusions as set out in question (1) above the Board was correct in law in dismissing the appeal on the basis that the [taxpayers] had not discharged the onus under [s. 68(4), Cap. 112] of proving that any of the assessments appealed against was excessive or incorrect;

(b) whether the Board had erred in law in dismissing the appeal without making a finding that the [taxpayers] were, in acquiring and disposing of the relevant properties, carrying on a trade or, in the alternative, an adventure or concern in the nature of trade, within the meaning of [Cap. 112]".

19. Although the above two questions have been posed in the case-stated, the essence of the taxpayers' main complaints made during the hearing can be summarised as follows:-

(a) the board is under a duty to make a positive finding that the profits allegedly liable to tax fall within s. 14(1), Cap. 112. It has failed to discharge that duty in only concluding that the taxpayers had failed to establish their case: para. 5, 17 to 21, 24, 36 to 42, 54 and 59, taxpayers' skeleton submissions;

(b) further (and related) to sub-para. (a) above, s. 14, Cap. 112 specifically provides that "profits arising from the sale of capital assets" are to be excluded from profits tax. However, this is only one instance of profits not being assessable: para. 12 and 13, taxpayers' skeleton submissions;

(c) the board failed to consider all the relevant circumstances: para. 16 to 17, 25 to 35 and 53, taxpayers' skeleton submissions;

(d) on the other hand, the board has considered irrelevant circumstances: para. 54 to 58, taxpayer's skeleton submissions.

The Board's Duty to Make Findings and S. 68(4), Cap. 112

20. The text of s. 68(4), Cap. 112 has been set out in para. 10 above and will not be repeated.

21. In support of their argument that the board's duty to make findings goes beyond merely deciding whether the taxpayers have discharge the burden of proof, the taxpayers quoted the passages from the cases set out below.

(1) "The ***intention of the taxpayer***, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, ***genuinely held, realistic and realisable***, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree [with the submission that the taxpayer's intention at the time of acquisition is determinative]. But as it is a ***question of fact***, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be ***determined upon the whole of the evidence*** …

A number of matters have been urged … They include, for example, that ***real property*** can ***equally be acquired as an investment or for trade*** so that the nature of the asset is equivocal or neutral.

Also that the ***redevelopment of property*** is not *per se*, or necessarily, an adventure in the nature of trade. This is so even if the intention is to sell part to cover the development costs provided that the remainder is for investment.

Also, an investment, of course, does not become trading stock because it is sold. … " (emphasis supplied) (*All Best Wishes Ltd. v. CIR* (1992) 3 HKTC 750, 771).

(2) "Now, what is the dividing line between the case of a man buying and selling in an isolated transaction and buying and selling in a transaction which is also isolated but which can be said to yield a taxable income?

…

… I think it is quite clear that what the Commissioners have got to find is whether there is here a concern in the nature of trade. Now what they have found they say in these words … : That the property was acquired with the sole object of turning it over again at a profit and without any intention of holding the property as an investment. That describes what a man does if he buys a picture that he sees going cheap at Christie' s, because he knows that in a month he will sell it again at Christie' s.

That is not carrying on a trade. Those words will not do as a finding of carrying on a trade or anything else. ***What the Commissioners must do is to say, one way or the other***, was this, I will not say carrying on a trade, but was it a speculation or an adventure in the nature of trade … " (emphasis supplied) (*Leeming v. Jones* (1930) 15 TC 333, 340-1).

(3) "… the crucial point which the Commissioners have found … is that the receipts were trading receipts. That is all they have found. There is no finding whether did or did not trade. If ever there is a question of trading or no trading, I must ask the Commissioners, if they will please give it to me, for a finding ***whether there is trading or whether there is not***. I have had occasion before to quarrel with a finding … which did not decide [the last-mentioned matter] … I insisted in that case that there should be a finding whether there was trading or was not, and I insist now" (emphasis supplied) (*Hillerns and Fowler v. Murray* (1932) 17 TC 77, 82).

(4) "… These cases were relied on by counsel for [the taxpayer]. He submitted that it was the duty of the Special Commissioners to include findings on every point desired to be used by a party in support of an argument to be advanced on appeal. …

I find myself unable to accept the breadth the submission by counsel for [the taxpayer] which would, as I see it, deprive the court of any discretion in what must be in the end a discretionary jurisdiction. I accept, gratefully, the guidance

from the cases to which I have been referred. From them I think these principles appear.

(1) The findings of fact are for the commissioners. They cannot be instructed to find facts, nor as to the manner in which they express their findings.

(2) The parties are entitled to expect that the commissioners will in the case stated make findings covering the matters which are relevant to the arguments adduced or intended to be adduced on appeal.

(3) If a request is made for a case stated to be remitted for additional findings to be made or to be considered, the applicant must, in my opinion, show that the desired findings are (a) material to some tenable argument, (b) at least reasonably open on the evidence that has been adduced and (c) not inconsistent with the finding or findings that have already been made. I would add this. In my opinion the commissioners must be protected from nit-picking. If the case stated is full and fair, in that its findings broadly cover the territory desired to be dealt with by the proposed additional findings, the court should I think be slow to send the case back … " (*Consolidated Goldfields plc v. IRC* [1990] 2 All ER 398, 402).

22. The Commissioner disagrees and contends that the board has sufficiently dealt with the matter in its decision. To this end, the Commissioner relies on the observations of the court in the decisions set out below.

(1) "The question for [the board] is ***not whether the Commissioner erred*** in some way, but whether the assessment is excessive …

And the onus of proving that the assessment is excessive lies on the taxpayer appellant … If certain facts are not agreed, the ***onus of introducing evidence*** before [the board] in the first instance lies upon the taxpayer. If he gives no evidence, [the board] should deal with the case on the material before it. The assessor is entitled to have his ***assessment confirmed unless it is satisfactorily challenged*** by the taxpayer and shown to be excessive. If the taxpayer has given *prima facie* evidence of disputed facts, the assessor will be entitled to introduce evidence in rebuttal; and [the board] will then resolve any conflict of evidence in the ordinary way on the basis of the evidence before them … " (emphasis supplied) (*In re Herald International Ltd.* (1964) 1 HKTC 393, p. 402).

(2) "… [The] privileged position in which the Commissioner is placed of resting upon his assessment until the taxpayer proves that the assessment is excessive

> [cannot be destroyed by the board deciding the width of the ground of challenge] … [The taxpayer cannot] force his terms on the Commissioner, as it is suggested he may do by making it a ground of appeal that the Commissioner was in error in making a certain finding of fact. He must make disclosure and prove what the proper assessment should be … " (*In re Herald* (above), pp. 408-9).

(3) "No court or tribunal likes to decide a case by the mere application of the burden of proof. That would be a decision of last resort. …

> It is also abundantly clear that where the tribunal of fact is not able to come to a positive decision one way or the other, … it is open to it to say that the party which bears the onus of proof has failed to discharge that burden and must therefore be taken to have lost. This principle was expressed as follows by Lord Brandon in *Rhesa Shipping Co SA v. Edmunds & Another* [1985] 1 WLR 948 at pp. 995H-956A:
>
> "… the judge is not always bound to make a finding of fact one way or the other with regard to facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases however in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take … " (*Real Estate Investments (NT) Ltd v. CIR* [2006] 1 HKLRD 821, para. 35 and 44).

23. There is a difference between:-

(a) the legal principle relating to the burden of proof imposed upon a litigant by law; and

(b) how such legal principle is to be applied to the facts of the case before the tribunal.

The contents of the said legal principle do not vary with the circumstances of each case whereas the manner in it should be applied does.

24. The flaw in the taxpayers' argument summarised in para. 19(a) above lies in the failure to recognise that difference.

25. Stripped of the laborious way in which the complaint summarised in para. 19(a) and (b) above was set out in their skeleton submissions, the taxpayers' real point is, in short, that the way in which the board reached its conclusion is inadequate.

26. But this is an invalid complaint in the context of this case-stated because:-

(1) as has been correctly pointed out in *Consolidated Goldfields* (and also *Rhesa Shipping* referred to in *Real Estate Investments*), whether to decide an appeal purely on the burden of proof (and whether to make findings on every point raised by the parties) is ultimately a matter of discretion for the board;

(2) unless the discretion has been exercised unreasonably in the sense that no reasonable board would so exercise the discretion, the complaint is not properly one concerning a question of law: *Consolidated Goldfields* and *Rhesa Shipping* referred to in *Real Estate Investments.*

27. Because of the evidence placed before, and facts found by, the board, the main dispute between the parties was in gist whether the subject lots were intended by the taxpayers to be capital assets. As stated above, it is the taxpayers' own case (which appears to be undisputed by the Commissioner) that the acquisition of the subject lots arose from their parent company's property redevelopment plan.

28. Whether the subject lots were intended by the taxpayers to be capital assets was closely related to the use to which the redeveloped property would be put. As has been pointed out in *All Best Wishes Ltd.*, the last-mentioned matter could only be properly determined by the board "upon the whole of the evidence". The onus of proving this fell on the taxpayers: s. 68(4), Cap. 112 and *In re Herald International Ltd.*

29. In brief, the board's decision was that the taxpayers had failed to discharge the burden cast upon them by s. 68(4), Cap. 112: para. 12 and 16 above. Having done so, and in the factual context of the case-stated, the board, in exercise of its discretion, could have gone further and made positive findings regarding the intended use of the redeveloped property and the like. But it was just as proper an exercise of the board's discretion for it not to do so. In fact, in view of the paucity of evidence regarding the intended use of the yet-to-be redeveloped property (upon the rejection by the board of the evidence adduced by the taxpayers), the board was correct not to make any finding on the point; it would have been highly speculative to do so.

Considering Irrelevant Matters / Failing to Consider Matters

30. The taxpayers have not raised any objection to the board's reasons (summarised in para. 12 above) for rejecting the taxpayers' stated intention that the subject lots would be

demolished and the land would be redeveloped into a building which would become their (or their parent company' s) capital asset.

31. Their complaint is that the board has wrongfully:-

(1) failed to make positive findings relating to the above matter;

(2) taken into account improper matters.

The complaint summarised in sub-para (1) above has already been dealt with under the previous heading "The Board' s Duty to Make Findings and S. 68(4), Cap. 112" (especially para. 27 to 29 above).

32. As regards the complaint summarised in sub-para. (2) above, it is in gist contended that the board was wrong to have taken into account the matters set out in para. 14 above. In order to better understand this complaint, the approach apparently adopted by the board will be set out below by reference to the relevant parts of the case-stated.

33. Paragraph 49 thereof set out the taxpayers' stated intention: para. 12(c) above. The board then said this at para. 51 thereof:-

> "Whether the stated intention was in fact the intention was a question of fact. [The board] decided against [the taxpayers] on this factual issue".

The matters summarised in para. 12 above were then set out (these must have been the reasons for board' s conclusion above).

34. The board continued in para. 60 thereof:-

> "As in D30/01 and D11/02, the significance of the evidence in [the case-stated] lies in what [the board] had **not** been told".

It then referred to the matters summarised in para. 14 above, and concluded at para. 66 to 68 thereof:-

> "For the reasons given, [the taxpayers] had not proved any of [the matters set out in sub-para. (a) and (b) of the first question in the case-stated].
>
> [The taxpayers] had not proved that the ' stated intention' was ***in fact held***, not to mention ***genuinely held, realistic or realisable***.
>
> [The taxpayers] had not discharged the onus under [s. 68(4), Cap. 112] … ".

35. The Commissioner contended that the matters set out in para. 14 above were merely the additional reasons given by the board for rejecting the taxpayers' case. Irrespective of whether they are called "additional" reasons (or part of the reasons), these matters clearly formed part of the reasoning process whereby the board reached its conclusion.

36. For the two reasons set out below, I agree with the taxpayers that the board's reasons, summarised in para. 14 above, do not appear to be proper reasons in support of its conclusion.

37. First, the way in which the Commissioner opposed the taxpayers' case (which remains the same in the case-stated) gives the impression that the taxpayers' purpose of acquiring the subject lots (for property redevelopment) was undisputed. Such being the case, purely from a procedural fairness point of view, the board ought not have taken upon itself the task of examining matters which essentially were related to the feasibility of the property redevelopment plan (not at least without giving adequate notice to the taxpayers).

38. Secondly, it can be inferred that the board examined the last-mentioned matters having taken into account the observations in *All Best Wishes Ltd.*:-

> "The ***intention of the taxpayer***, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, ***genuinely held, realistic and realisable***, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree [with the submission that the taxpayer's intention at the time of acquisition is determinative] … " (emphasis supplied) (p. 771).

39. In doing so, it is unclear if the board thought that, not only must an intention be genuinely held, it must also be realistic and realisable. In my view, the observations in *All Best Wishes Ltd.* did not, as a matter of law, lay down such additional requirements; it would be wrong to think that those observations have done so.

40. It is an extremely difficult task to judge if a business decision is "realistic" or "realisable". Just as the temperaments of people differ, whether a business venture is perceived as "realistic" and/or "realisable" differs from one person to another (and from one businessman to another): what is "realistic" and/or "realisable" to one person may not be so for another. Put in another way, while commercial risk is inherent in almost all business ventures, different businessmen will have different views of how much risk is acceptable.

41. The matters considered by the board (see para. 14 above) can be used as examples to illustrate the point. Any attempt to acquire pieces of land from various land owners for the purpose of property redevelopment in Hong Kong is well-known to have highly uncertain results;

some were successive while others were not. Nevertheless, it can be assumed that when land developers decide to make such attempts, at least in the beginning they almost always believe they will succeed. When they suffer a setback in their attempts, precisely when they perceive the attempts to have failed will depend on the temperament of the individuals concerned. Likewise, matters such as the time periods within which the existing occupiers can be evicted or within which the redevelopment can be completed, or the total purchase costs of the pieces of land, or the occupancy rates of the redeveloped property, are similarly uncertain. But such uncertainties do not mean that the land developers' intention to redevelop the land is not genuine.

42. As regards financial abilities to complete the redevelopment, various kinds of financial arrangements may be adopted. It is common for land developers to obtain building loans from banks, using the acquired land as security; sometimes corporate (or even personal) guarantees or indemnities will have to be executed in the banks' favour as well. But irrespective of the precise arrangements, they are often only contemplated towards the more advanced stage of the redevelopment plan.

43. Hence, the lack of evidence regarding these matters does not necessarily mean that any adverse inference can properly be made; this is especially so when the opposing party has not raised any issues relating thereto.

44. In this case-stated, the redevelopment plan might still have been at its relatively early stage when the taxpayers decided to dispose of the subject lots. There was evidence that, although redevelopment plans have at one stage been approved, they were never implemented and further lots of land were still acquired afterwards. This may be an indication that the redevelopment plan was still not finalised.

45. This is not to say that the above matters can never be considered by the board. Sometimes it may be appropriate for them to be taken into account when assessing whether the stated intention was genuinely held. But even in such cases, questions such as whether something is commercially "realistic" or "realisable" will have to be judged by looking at the inherent plausibility or implausibility of the matter(s) concerned: see, for example, *R v. Ng Wing Ming* [1994] 2 HKC 464, 465G-H and 467H-I; and not merely using the objective test (or the "reasonable man" test) commonly adopted in, for example, negligence cases.

46. However, having concluded that some of the board's reasons for rejecting the taxpayers' case are improper does not necessarily mean that the case-stated must be determined in the taxpayers' favour.

47. The Court of Final Appeal observed in *Kwong Mile Services Ltd. v. CIR* (2004) 7 HKCFAR 275:-

> "Appeals from the Board of Review to the courts lie only on questions of law. … Just because there is no appeal on facts, it does not mean that the appellate court is precluded from detecting and correcting errors of law buried beneath conclusions ostensibly of fact …
>
> [The taxpayer appellant] said that taking irrelevant factors into account and leaving relevant ones out of account are grounds for judicial review … rather than grounds for appellate intervention on the *Edwards (Inspector of Taxes) v Bairstow* basis. I can see [the taxpayer appellant's] point. But … taking irrelevant factors into account or leaving relevant ones out of account can ***lead a fact-finding tribunal so far astray as to reach a conclusion contrary to the true and only reasonable one***" (emphasis supplied) (para. 31 and 33).
>
> "Lord Radcliffe, having noted various ways of putting it, ultimately preferred to put it in terms of the determination appealed against being ***contradicted by the true and only reasonable conclusion***. And I respectfully share that preference. But I of course acknowledge … that there are other ways of saying the same thing … the same as saying that there was ***no evidence*** upon which the impugned determination could be reached … Yet another way of putting it … [is to say] that an error of law can 'consist in a finding of fact which is ***perverse***' … "(emphasis supplied) (para. 34 to 35).

It also helpfully indicated in subsequent parts of the judgment when it is appropriate for the appellate courts to interfere:-

> "In an appeal on law only the appellate court must bear in mind what scope the circumstances provide for reasonable minds to differ as to the conclusion to be drawn from the primary facts found. If the fact-finding tribunal's conclusion is a reasonable one, the appellate court cannot disturb that conclusion even if its own preference is for a contrary conclusion. But if the appellate court regards the contrary conclusion as the true and only reasonable one, the appellate court is duty-bound to substitute the contrary conclusion … The correct approach for the appellate court is composed essentially of the foregoing three propositions … " (para. 37).

48. RHC Ord. 55 r. 7(7) provides:-

> "The Court shall not be bound to allow the appeal [to it from any court, tribunal or person] on the ground merely of misdirection, or of the improper admission or rejection of evidence, unless in the opinion of the Court substantial wrong or miscarriage has been thereby occasioned".

The Commissioner has fairly conceded that that rule does not apply to a case-stated from the board: Ord. 55 r. 1(2)(a). However, in view of the observations in *Kwong Mile Services Ltd.* quoted above, I agree with the Commissioner that similar considerations apply.

49. Even though I have reservations regarding the correctness of the board's reasoning summarised in para. 14 above, I do not find the board has thereby been led "so far astray as to reach a conclusion contrary to the true and only reasonable one", or that its conclusion is unsupported by evidence, or that its findings of fact is perverse. The board was quite entitled to reject the taxpayers' case based on matters summarised in para. 12 above (which it has done: para. 16, 33 and 34 above).

Conclusion

50. The answers to the questions of law posed in the case-stated are therefore:-

(a) in relation to the first question, in the negative; that is, the board's conclusions are not contrary to the true and only reasonable conclusion;

(b) in relation to para. (a) of the second question, in the affirmative; that is, the board was correct in law in dismissing the appeal on the basis the taxpayers had not discharged the onus of proof under s. 68(4), Cap. 112, and in relation to para. (b) of the second question, in the negative; that is, the board has not erred in law in dismissing the appeal without making a finding that the taxpayers were carrying on a trade or an adventure or concern in the nature of trade.

Accordingly, the board's decision is confirmed.

Other Matters

51. The phrase "In the light of all the evidence before the Board" has been included in the first question of the case-stated (in addition to "In the light of … the findings made by the Board"). This kind of language is only apt in a challenge based on the Court of Final Appeal's observations in *Kwong Mile Services Ltd* quoted above. Even in such cases, particulars pertaining to the alleged "taking irrelevant factors into account or leaving relevant ones out of account" must be given: *CIR v. Common Empire Ltd*. HCIA 1/2004 (4 Jun 2004), para. 18, 38 to 43 and 45. Procedural fairness and the need for efficient administration of justice requires a definitive case to be identified in the case-stated.

52. The taxpayers' real complaint which falls within this category has been helpfully set out in their skeleton submissions: see para. 19(c) and (d) above. But the more appropriate way of proceeding would still have been to have them set out succinctly in the case-stated as well.

Costs Order

53. The parties agreed that the usual rule that costs should follow the event is applicable to the case-stated. There will accordingly be a costs order that the costs thereof be paid by the taxpayers to the Commissioner to be taxed if not agreed.

(Andrew Chung)
Judge of the Court of First Instance
High Court

Mr Benjamin Chain and Ms Catria Lam, instructed by Messrs Tsang, Chau & Shuen, for the Appellants

Mr Ambrose Ho, SC leading Mr Michael Yin, instructed by Department of Justice, for the Respondent