HCIA4/2008

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

INLAND REVENUE APPEAL NO. 4 OF 2008

IN THE MATTER OF Appeal by way of Case Stated by Board of Review (Inland Revenue Ordinance)

and

IN THE MATTER OF Section 69 of the Inland Revenue Ordinance, Cap. 112

BETWEEN

AHN SANG GYUN Taxpayer

and

COMMISSIONER OF INLAND REVENUE Respondent

Before : Hon Burrell J in Chambers
Date of Hearing : 19 January 2009
Date of Decision : 25 February 2009

D E C I S I O N

1. This is an application by a taxpayer, Mr Ahn Sang Gyun, pursuant to section 69(4) of the Inland Revenue Ordinance, Cap. 112 ("the Ordinance") to send back a Case Stated to the Board of Review ("the Board") for amendment.

2. The original appeal to the Board concerned the assessments made against the taxpayer from 1998 to 2001. At the material time he worked for Goldman Sachs (Asia) LLC ("GSALLC"). The Board determined that the whole of his income from GSALLC was sourced in Hong Kong whereas his claim was that his employment was a non-Hong Kong employment so that he would only be liable to pay salaries tax on the days he actually worked in Hong Kong. Whether the salary he earned on days he was working elsewhere would be subject to other countries tax regions or would be tax free was not made clear. The Revenue's understanding was that such income would be free of any tax to the taxpayer.

3. GSALLC is a company registered in Hong Kong as an oversea company and carried on business from its offices at Citibank Plaza in Central, Hong Kong (at the material time).

4. The Case Stated is set down for hearing over two days in March 2009. As this is a preliminary application to amend the Case Stated I will only refer to the evidence and issues in so far as it is necessary to decide this application.

5. In short the Board decided that the locality of an employee's employment is determined by looking at a "totality of factors" and applied the test set down in *CIR v. Goepfert* [1987] 2 HKTC 210. The taxpayer had argued, and continues to submit, that the proper test is the "3-Factors Test".

6. After a 4-day hearing in August 2007 the Board handed down a detailed and reasoned written decision on 13 November 2007. For the purposes of this application it is necessary to set out a summary of the Board's findings, the case as stated by them and the amendments sought by the taxpayer.

THE BOARD'S CONCLUSION

7. Paragraph 17 of the Case Stated reads :

"The Board reached the following conclusions :

(1) ' Having considered all the evidence with care and having had the opportunity to review all submissions forcefully put to us by Mr. Olesnicky and Ms Cheng, we have no difficulties in concluding that the Taxpayer' s employment was sourced and came to him in Hong Kong. Our view and analysis of the evidence clearly shows that the Taxpayer' s employment was that of the PLA [Principal Investment Area] Team in Hong Kong and he was interviewed by key personnel here in Hong Kong. We conclude also that the contract of employment was clearly most closely connected with Hong Kong and that the particular post was specifically created for the PLA Team. The Taxpayer reported to his various supervisors in Hong Kong who were in turn responsible for his promotion. The Taxpayer was also paid in Hong Kong.'

(2) ' We also have no hesitation in concluding that GSALLC was clearly resident in Hong Kong. We have examined all the relevant authorities and have looked at the evidence and again, it is quite clear that the central management and control of GSALLC was in Hong Kong. We rely on the fact that the constitution of GSALLC vested the management of the company in its directors to the exclusion of its shareholders will also conclude that very wide management powers were given to the directors.'

(3) ' We also rely on the relevant returns that were made to the SFC where it was unequivocally stated that GSALLC was not controlled or managed by anybody other than its shareholders and its directors. There was never any mention in any returns that the New York committees controlled, managed or ran GSALLC.'

(4) ' We also rely on the fact that during the relevant years of assessment, there were 27 directors who had their residence in Hong Kong and various business operations were conducted by GSALLC. The evidence clearly shows that these directors were senior people and were within the managing director class.'

(5) ' It is also quite clear that GSALLC through its various teams would submit various business proposals to various committees in New York for their consideration. Although there was a strong interaction and dialogue between the committees and GSALLC, it is clear that those committees never by-passed or usurped or took over the management of the directors.'

(6) ' It is also quite clear from the evidence that we have heard that GSALLC did put forward time and time again proposals to New York for their review and consideration.'

(7) ' Hence, considering all matters and having carefully reviewed the evidence, we find it as a matter of fact that GSALLC was resident in Hong Kong and we again accept the submissions of Ms Cheng that it is plainly unarguable that GSALLC was resident in New York.'

(8) ' Therefore, we have no hesitation in dismissing the Taxpayer' s appeal.' "

THE CASE STATED BY THE BOARD

8. This is contained in paragraph 18 :

"The questions of law raised for the opinion of the Court of First Instance are :

(1) whether the Board erred in law in not applying the ' 3-factors Test' as propounded by the Taxpayer, namely, that in determining the source of the Taxpayer' s income, the Board should only have had regard to 3 factors, namely, the place of residence of the Taxpayer' s employer, the place of conclusion of the Taxpayer' s contract of employment, and the place where the Taxpayer was paid;

(2) whether the Board erred in law in relying on the constitution of GSALLC as having ' unequivocal and incontrovertible' effect that ' the central management and control of GSALLC were vested in its directors' in paragraph 30 of its Decision as reproduced in paragraph 7(8) above;

(3) whether on the facts found by the Board, no reasonable board would have concluded that the Appellant had failed to show that GSALLC was resident outside Hong Kong; and

(4) whether on the facts found by the Board, no reasonable board would have concluded that the source of the Taxpayer' s employment income was Hong Kong."

THE PROPOSED AMENDMENTS

9. Although the proposed amendments are lengthy it is necessary, for a proper understanding of the application, to set them out in full. I take them from the Taxpayer' s Summons dated 30 September 2008 :

"(i) state the additional questions of law in the form or along the lines as set out in Schedule 1 hereto or as the Court may allow or direct, for the opinion of the Court of First Instance; and

Schedule 1

(1) Whether, in determining the source of the Taxpayer's employment income, the Board erred in law in not applying the '3-Factors Test' as propounded by the Taxpayer and/or in not having regarded as of decisive or central importance the following 3 factors, namely (a) where the employer was resident; (b) where the employment contract was negotiated and concluded; and (c) from where the employee's remuneration was paid.

(2) If the answer to Question (1) is no, whether the Board erred in law in applying the 'totality' or 'all-factors' test (if and to the extent that it did apply that test) in determining the source of employment income.

(3) If the answer to Question (2) is no, whether the Board in determining the source of the employment income nevertheless erred in law by not considering as relevant the off-shore factors stated in Question (9) below.

(4) Whether the Board misdirected itself in law in finding that the Taxpayer's employment contract only became effective and concluded after the work permit and SFC registration had been completed notwithstanding that the signed and posted back his employment contract from Korea, and/or the finding is one which no reasonable tribunal could have come to or is one which contradicts the only true and reasonable conclusion on the facts.

(5) Further and/alternatively, in holding that Goldman Sachs (Asia) L.L.C. ('GSALLC') was resident in Hong Kong, whether the Board had failed to apply, or had misapplied, the 'central management and control' test laid down in ***De Beers Consolidated Mines Ltd. v. Howe*** [1906] AC 455 at 458 (per Lord Loreburn) in failing to recognise or otherwise failing to take any or any proper account of (i) the difference between the day-to-day running of the business by the directors and other personnel of GSALLC at the operational level and the exercise of central management and control by the relevant Committees located in New York (ii) relevant evidence (which included the matters set out in Schedule II hereto) that it was the Committees which laid down the policies and made the key decisions which the personnel of GSALLC would comply with and implement; and (iii) the difference

between the mere existence of legal powers under the company' s constitution and the actual reality of central management and control.

(6) If contrary to the Taxpayer' s contention, the Board had found as a primary fact that the operations of each business division led by the directors of GSALLC were not subject to the policies, directions and/or guidance of the relevant ' Committees' located in New York or that the investment decisions taken by the directors of GSALLC, insofar as they were relevant to this case, were not subject to the approval of the relevant off-shore Committees, whether the finding is one which no reasonable Tribunal could have come to on the evidence or which contradicts the only true and reasonable conclusion on the facts.

(7) Whether in any event, the Board' s finding or conclusion, in paragraph 42 of the Decision, that ' there was no usurpation any management or control of GSALLC by the committees in New York so as to ensure that GSALLC became resident outside Hong Kong, i.e. in New York' is one which no reasonable tribunal, properly directed as to the law, would have come to and/or is one which contradicts the true and only reasonable conclusion on the facts, namely that there was in fact such ' usurpation' within the meaning of the term as held in ***Bullock v. Unit Construction Co. Ltd*** [1960] AC 351.

(8) Further and/alternatively, whether the Board misdirected itself in law in relying on the declaration contained in the returns and forms filed with the SFC by GSALLC as ' unequivocal' evidence *against* the Taxpayer' s case that the central management and control was with the Committees in New York in that the Board overlooked or failed to have regard or proper regard to (i) that ' shareholders' referred to in the declaration filed included the offshore holding companies and thus involved the larger framework of the Group to which GSALLC, itself also incorporated offshore, belonged; (ii) that the Committees existed as an organ that exercised management and control within the Group; and (iii) that, in any event, the true and correct test (whether couched in terms of ' usurpation' or otherwise) was the fact of central management and control and not the mere existence of legal powers.

(9) Whether the Board should have found all or any of the following facts :-

(i) that the first two interviews were conducted in Korea by persons with whom the Taxpayer worked exclusively after taking up the employment;

(ii) that the Taxpayer and the PIA Team were also based outside Hong Kong;

(iii) GSALLC was formed to do business also outside Hong Kong;

(iv) that the Taxpayer was employed to advise solely on offshore investments because of his expertise in dealing with offshore investments;

(v) that the Taxpayer's bonuses depended on the performance of the offshore funds;

(vi) that the Taxpayer's promotion depended on the performance of the offshore funds, not the location of his superiors;

(vii) that the Taxpayer participated in a US retirement scheme;

(viii) that the Taxpayer incurred medical expenses abroad and sought reimbursement from the US insurers;

(ix) that the Taxpayer's remuneration was ultimately borne by Goldman Sachs & Co.

(10) Whether the Board's conclusion, in paragraph 21 of the Decision, that the true payer of the Taxpayer's remuneration was not Goldman Sachs & Co. is one which no reasonable tribunal, properly directed as to the law, would have come to and/or contradicts the true and only reasonable conclusion on the facts.

(11) Whether on the primary facts found by the Board, no reasonable board would have inferred or concluded that the operations of each business division led by the directors of GSALLC were not subject to the policies, directions and/or guidance of the relevant 'Committees' located in New York or that the investment decisions taken by the directors of GSALLC insofar as they were relevant to this case, were not subject to the approval of the relevant off-shore Committees.

(12) Whether on the facts found by the Board, no reasonable board would have concluded that the central management and control of GSALLC was in Hong Kong.

(13) Whether, having regard to the answers to the foregoing questions, the Board's conclusion that the Taxpayer's employment income was taxable under section 8(1) of the IRO is one which no reasonable tribunal, properly directed as to the law, would have come to and/or is one which contradicts the true and only reasonable conclusion on the facts."

and :

"(ii) incorporate the additional paragraphs as set out in Schedule 2 hereto into the Stated Case.

Schedule 2

Paragraph 7A

'Ms Liu also gave evidence, *inter alia*, to the effect that GSALLC needed to go through the treasury people in New York for opening of bank accounts which requirement was for control purpose.'

Paragraph 8A

'Mr Xu also gave evidence, *inter alia*, to the effect as follows :

(i) The teams in GSALLC had to obtain approval from the Commitments Committee in New York before a deal could proceed;

(ii) As the Commitment Committee considered a lot of deals on a global basis every week, his team would first prepare memos and send them to the Committee for consideration to get a slot for meeting the Committee for their proposed deals;

(iii) Normally, they would have 1 to 1.5 hours for meeting the Committee for their proposed deals;

(iv) A deal would typically go through 4 stages :-

Stage I : to identify the deals and get approval for committing resources – this process took about 6-10 months;

Stage II : to commit resources such as hiring lawyers, accountants, performing due diligence and present to the Commitment Committee for it to consider how real, good or reliable the deal;

Stage III : to prepare financial projections, prospectus etc;

Stage IV : to file with the Regulatory Committee issue paper and/or research report before putting the deal on the roadshow, marketing & underwriting;

(v) It was unimaginable to do a deal without approval form the Commitment Committee as there would be simply no resources;

(vi) Although the process with the Commitment Committee was interactive, they had to have the Commitment Committee' s directions, guidance and approval for otherwise they would not get the assignment of resources;

(vii) He only signed the engagement letter for a deal after approval was obtained from the Commitment Committee.'

Paragraph 9A

' Mr Crossman also gave evidence, *inter alia*, to the effect as follows :

(i) Although GS used multiple legal entities, as required by local rules and jurisdictions, they operated as one unit supporting the various producing divisions;

(ii) The more senior people sat in the committees in New York;

(iii) The committees set the parameters under which people could operate and he gave detailed explanation of the structure and operation of the various committees;

(iv) All the directions of GSALLC were obliged to comply with the requirements of the committees in New York;

(v) All key business decisions of GSALLC were required to be approved by the relevant committees in New York, as set down in the various charters of the committees;

(vi) All bank accounts of GSALLC must go through New York to be opened up; and

(vii) The remuneration of the Taxpayer was charged to GS & Co in New York, which was the main broker operating the fund activities.'

Paragraph 10A

' Mr William also gave evidence, *inter alia*, to the effect as follows :

(i) The Amended LLC only gave the directors of GSALLC legal authority but it was not how GSALLC was actually operated;

(ii) He disagreed that the committees in New York did not control GSALLC but only guided or influenced GSALLC; and

(iii) GSALLC was formed to do business in Asia.' "

LEGAL PRINCIPLES

10. Section 69 of the Ordinance states that the Board' s decision shall be final subject to an application to the Board "to state a case on a question of law for the opinion of the Court of First Instance".

11. Any proposed amendment to the Stated Case must constitute a question of law. For it to be a question of law, it must fall into one of the following three categories (as *per* Barnett J in *CIR v. IR Board of Review* [1989] 2 HKLR 40:

(a) The Board misdirected itself in law.

(b) The Board made a finding of fact that no person acting judicially and properly instructed as to the relevant law could have found.

(c) The Board made a finding of primary fact which was unsupported by any evidence or the Board failed to make a finding of primary fact where the evidence pointed only to such a finding.

12. Counsel at this hearing (Mr Denis Chang, SC with Mr Newman Lam for the taxpayer and Ms Yvonne Cheng for the Commissioner) have helpfully referred me to a number of authorities in which the legal principles have been considered at length. Ultimately there was little or no dispute between counsel concerning the above principles. The issue has been whether or not the additional questions posed fall into any of the three categories.

13. In short, reasonable findings of fact based on credible evidence cannot be challenged. The evaluation of the evidence and assessment of the witnesses are wholly matters for the tribunal.

The proper approach was succinctly set out by Millett NPJ in *ING Baring Securities (Hong Kong) Ltd v. CIR* (2007) 10 HKCFAR 417:

> "Appeals [by way of case stated] are on law only; it is the Board's function to find the facts. The role of the Court is limited. It will set side the Board's decision only where its determination is erroneous in point of law, where there is no evidence to support a particular finding of fact, or where the only reasonable conclusion on the facts which the Board has found contradicts its determination."

14. It is not necessary for the Board to set out every fact which it found was *not* established unless the particular negative finding is necessary to explain the Board's conclusion on any particular issue. Neither is it permissible to annex extracts from the transcripts if the real purpose of so doing is to re-argue the merits of any given factual issue. The annexure of evidence is only permissible where necessary to argue a question of law as defined by the three categories cited above. Such occasions are bound to be rare. The annexing of pieces of evidence is likely to be selective and partial. It is likely to be an attempt to elevate a question of fact into a question of law and should be carefully guarded against. By the same token questions of law should whenever possible be succinctly stated. Lengthy, verbose and unwieldy questions should be discouraged.

THE INDIVIDUAL QUESTIONS

15. To avoid any risk of pre-empting any issues which will be the subject matter of the substantive "Case Stated" hearing in March 2009, I propose to make relatively brief decisions in relation to each of the proposed amendments. Mr Chang has helpfully shortened the matters calling for a decision by not pursuing some of the questions as set out in the summons.

16. He does not pursue questions 4, 5, 8, 12 and 13 on the basis, primarily, that these questions are "taken care of" in questions 3 and 4. (He does not pursue question 4 on the basis that the Board has already clarified the matter.) It is thus conceded that the answer to question 3 will also resolve questions 5, 8, 12 and 13. If 3 is not permissible, then neither are the others. If 3 is permissible, then the others become superfluous.

17. As will be seen from the remainder of this decision, I am satisfied that the Case Stated will be properly and adequately argued within the confines of the questions of law as stated by the Board. I do not permit the amendments sought by the taxpayer.

18. Having said that, when hearing the Case Stated, such flexibility and latitude as is necessary to do justice to the case will be permitted subject to the caveat that existing tests and principles will be applied. In short, the court will be wearing neither a straightjacket nor blinkers. Thus, I take the view that, in part, the proposed new questions are not necessary rather than not permissible. I consider the Board's questions sufficient to enable this court to fully address the core issues whilst ensuring that it does not embark on a re-evaluation of the witnesses' evidence.

Question 1

19. As framed, the Board' s first question will require the court to decide if it was wrong not to apply the "3-Factors" test. To answer this it will be necessary to consider the test that was actually applied and also to consider what factors were deemed relevant when applying that test.

20. The Board' evaluation of those three factors which make up the "3-Factors" test will be relevant to the question of whether or not the Board' s decision to apply the "totality of factors" test (and how it did so) was wrong in law or not.

21. Thus, such latitude as will be permitted on appeal means that the boundaries of the legal argument will not be materially different whether question 1 is amended or not. Much that the taxpayer wishes to advance under the new question will be considered on appeal. For the avoidance of doubt this approach should not be interpreted as permitting an unfettered exploration into the evidence below. The approach as outlined by Lord Millet *(supra)* remains paramount. If any amendment were necessary to clarify this approach it would be to add the words "in applying the ' totality of factors test' ", after "Board" in the first line of question (1) and no more.

Question 2

22. Question 2 is an alternative to question 1, should the answer to question 1 be in its negative. Given my response to question 1, I do not see the need to address question 2 save that the debate on appeal should be confined to consideration of the two named tests. The possibility of a third undefined unspecified test is plainly beyond the boundaries of what the court can consider in the appeal by Case Stated.

Questions 3 and 9

23. Questions 3 and 9 were originally a single question. The original question was not a question of law on any view. This objection has not be cured by splitting the question into two. The new questions have to be read together, and together they are objectionable for the same reason as before.

24. The so-called "facts" in question 9 are in fact selective pieces of evidence. The Board heard all the evidence (or, put another way, the facts advanced by both sides) and attached such weight to the various aspects of the evidence as it saw fit.

25. It seems to me that question 3/9 is a poorly disguised attempt to attach greater weight to facts advanced by the taxpayer. Even if a "fact" was adduced in evidence but disregarded as being of no weight, it does not follow that it was not "considered".

Questions 4 and 5

26. In the taxpayer's written skeleton submission, question 4 is "not pursued by the Taxpayer as the Board had clarified its holding" and question 5 is "not pursued by the Taxpayer as the question has been taken care of in the existing question 3 and 6". (Subject to the schedule 2 matters becoming attached to questions 6 rather than 5.)

Questions 6 and 11

27. Questions 6 and 11 are considered together because the latter is in the alternative to the former.

28. Question 6 suggests that the Board's finding of fact is contrary to the only true and reasonable conclusion on the facts, whereas question 11 suggests that the Board drew inferences from facts which no reasonable Board would have. The subject matter in each question is the same.

29. The issue, for this court on appeal by way of case stated, will be addressed in substantially the same way whether on the basis of the Board's questions 2 and 3 on the one hand or the taxpayer's questions 6 and 11 on the other. This comment is subject to the criticism of the "schedule 2" matters made by Ms Cheng, with which I agree, that it is not proper to include such a list of "evidence" in the formulation of a question of law. It is the same criticism as was made of question 9. It is a list of the taxpayer's best pieces of evidence. The Board heard it all. Again, because it may not have been persuasive does not mean it was overlooked. Only if there was *no* credible evidence capable of supporting a finding of fact does a question of law emerge.

Question 7

30. In its reformulated form, question 7 asks whether a conclusion reached by the Board on the evidence is one which no reasonable tribunal, properly directed as to the law, would have come to.

31. In my judgment, this merely redrafts an issue covered by question 3 of the Case Stated in a formula preferred by the taxpayer. In so far as it represents an attempt to open doors of argument not permitted in a case stated, it should be rejected. The taxpayer's question does not suggest that the Board's finding on this issue was unsupported by *any* evidence and thus it does not qualify as a permissible question of law.

Question 8

32. This question is "not pursued by the Taxpayer as it has been taken care of by the existing question 3".

Question 10

33. An issue before the Board was "who paid the taxpayer's remuneration?" It seems there was plentiful evidence that even if the taxpayer's remuneration was "charged to" Goldman Sachs & Co. in New York, his salary comes from GSALLC who claimed it in their own tax assessment.

34. Again, the taxpayer does not frame the question on the basis that the finding of fact was unsupported by any evidence, and neither could it do so.

Question 12

35. Question 12 is not pursued on the same basis as question 8 is not pursued.

Question 13

36. The correct way to "case state" this issue is as drafted by the Board in their 4th question.

CONCLUSION

37. For the above reason, I decline to return the Case Stated dated 24 June 2008 to the Board of Review for amendment pursuant to section 69(4) of the Ordinance and dismiss the taxpayer's summons dated 30 September 2008. I reserve the question of costs to the substantive hearing.

(M.P. Burrell)
Judge of the Court of First Instance
High Court

Mr Denis Chang, SC and Mr Newman Lam, instructed by Messrs Baker & McKenzie, for the Taxpayer

Ms Yvonne Cheng, instructed by Department of Justice, for the Respondent