HCAL7/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 7 OF 2010

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BETWEEN

HONORCAN LIMITED Applicant

and

THE INLAND REVENUE BOARD OF REVIEW Respondent

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Before : Hon Fok J in Court
Date of Hearing : 26 May 2010
Date of Judgment : 11 June 2010

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J U D G M E N T

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Introduction

1. This judicial review concerns the refusal of the respondent, the Inland Revenue Board of Review ("the Board") to state a case under section 69(1) of the Inland Revenue Ordinance ("the Ordinance").

2. The background facts can be stated briefly.

3. Additional assessments to profits tax were made against the applicant in March 2006 and January 2007. The applicant challenged those additional assessments under

section 64 of the Ordinance and, pursuant to section 69(2) of the Ordinance, the Commissioner of Inland Revenue ("the Commissioner") issued a Determination dated 31 October 2007 confirming the additional assessment.

4. In November 2007, the applicant appealed to the Board under section 66(1) of the Ordinance and the Board heard the appeal in early September 2008. On 18 February 2009, the Board delivered a Decision in which it upheld the additional assessments and dismissed the applicant's appeal.

5. On 17 March 2009, the applicant sought to appeal, under section 69(1) of the Ordinance, by requesting the Board to state a case on a question of law for the opinion of the Court of First Instance. The applicant initially suggested six questions of law to be so stated but eventually replaced those six questions with three in a draft Case Stated.

6. The Commissioner wished to challenge those three suggested questions and, for this purpose, the Board fixed a hearing on 13 July 2009. The applicant and Commissioner were represented by counsel at that hearing.

7. On 5 January 2010, the Board delivered its Decision refusing to state a case. That is the decision which the applicant seeks to challenge in this judicial review by originating summons dated 1 February 2010, leave to apply for judicial review having been granted on the papers on 20 January 2010. Whilst the Board as respondent has not taken part in this judicial review, the Commissioner has appeared as an Interested Party.

The statutory regime

8. Part XI of the Ordinance deals, under the heading Objections and Appeals, with the way in which a person aggrieved by an assessment made under the Ordinance may challenge the assessment.

9. Thus, in summary, by section 64(1), the taxpayer may, within one month of the date of the notice of assessment, object to that assessment by notice in writing to the Commissioner stating precisely the grounds of objection. By section 64(2), the Commissioner must consider the objection. Under section 64(3), in the event the Commissioner agrees with the taxpayer who has validly objected to the assessment, any necessary adjustment of the assessment shall be made. On the other hand, under section 64(4), if the Commissioner fails to agree with the taxpayer, the Commissioner shall transmit his determination in writing to him and the taxpayer may appeal from that determination to the Board as provided in section 66.

10. By section 66(1), where the Commissioner has failed to agree with the taxpayer on his objection to a notice of assessment, the taxpayer (referred to as the appellant) may give notice to appeal to the Board against the Commissioner's determination. Unless the appeal is 'leapfrogged' to the Court of First Instance under section 67, the hearing and disposal of an appeal to the Board is governed by section 68 of the Ordinance. The onus of proving that the assessment appealed against is excessive or incorrect is on the taxpayer,

pursuant to section 68(4). By section 68(8)(a), after hearing the appeal, the Board shall confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner with its opinion on it.

11. By section 69(1) of the Ordinance, it is provided that :

> "The decision of the Board shall be final:
>
> Provided that 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. Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, together with a fee of the amount specified in Part II of Schedule 5, within 1 month of the date of the Board's decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, shall be the date of the communication by which the decision is notified to him."

12. The proviso to section 69(1) is central to the determination of this judicial review. Under that proviso, it is clear that there is a right on the part of the appellant taxpayer or the Commissioner to require the Board to state a case on a question of law for the opinion of the Court of First Instance. However, the principal question that arises in this case is whether the Board is required to subject any question of law it is asked to state to a vetting procedure by way of qualitative assessment and, if so, what is the nature of that vetting procedure.

The Board's decision

13. As summarised in the Introduction above, the appeal to the Board concerned additional profits tax assessments made in respect of the applicant. Those additional assessments related to the years of assessment 1999/2000, 2000/01, 2001/02, 2002/03, 2003/04 and 2004/05 and additional tax payable in the aggregate sum of $31,223,306.

14. The assessments were made by the Commissioner under section 61A of the Ordinance, in order to disallow deductions claimed for expenditure in respect of quota charges paid by the applicant to a company called Wellfit Trading Services Limited ("Wellfit") under a Procurement Agreement dated 30 December 1996. These deductions had been made in the calculation of the applicant's assessable profits for the years of assessment 1999/2000 to 2003/04.

15. Before the Board, the applicant appealed against the additional assessments and Determination on the following grounds :

(1) The quota charges paid by the applicant to Wellfit during the relevant years of assessment were expenses incurred in the production of chargeable profits.

(2) The entering into of the Procurement Agreement and the payment of quota charges to Wellfit was commercially realistic.

(3) Without prejudice to (2) above, the entering into of the Procurement Agreement and the payment of the quota charges was neither artificial nor fictitious within the meaning of section 61 of the Ordinance.

(4) The entering into of the Procurement Agreement and the payment of the quota charges was not entered into for the sole or dominant purpose of enabling the aplicant to obtain a tax benefit and thus section 61A of the Ordinance had no application.

(5) The quota charges were genuine expenses incurred, deduction of which being a right conferred by the law, did not constitute a tax benefit for the purposes of section 61A of the Ordinance.

(6) The various assessments were otherwise excessive and incorrect.

16. The Board framed the issues before it in the following way in its Decision :

"22. In order to win this appeal, the [applicant] must, therefore, show to our satisfaction that the purported quota charges it paid to Wellfit were deductible expenses under section 16(1) of the Ordinance and that the deduction would not be disqualified by virtue of either section 61 or section 61A of the Ordinance."

17. On the question of deductibility of the quota charges under section 16(1) of the Ordinance, the Board held that, although the applicant paid Wellfit, it failed to satisfy the Board that the expenses were paid for export quota and since the applicant had not put forward any alternative case as to the purpose of such payment, it had no basis to rule that such expenses were incurred in the production of the applicant's chargeable profits[1].

18. On the question of disregardability under section 61 of the Ordinance, the Board held that it was not satisfied the Procurement Agreement had been extended or substituted to cover the relevant years of assessment. Hence, there was no formal legal basis for Wellfit to charge the applicant such expenses. To the contrary, the Board accepted the Commissioner's case that the charges for quota had been included in the FOB contracts of purchase. On those findings and analysis, the Board found that the payment of the

[1] See §§24 to 43 of the Decision, esp. at §36.

purported quota charges to Wellfit lacked the necessary commercial reality and should be disregarded pursuant to section 61 of the Ordinance[2].

19. On the application of section 61A of the Ordinance, the Board considered that the relevant transaction for the purposes of section 61A was the payment of the purported quota charges by the applicant to Wellfit. Having regard to the matters set out in section 61A, the Board held that the relevant transaction was entered into or carried out for, at least, the dominant purpose of enabling the applicant to obtain a tax benefit, namely the ability to reduce its assessable profits derived from its trade and thereby pay less tax[3].

20. Accordingly, the Board held that the applicant failed on all three issues before it and so the appeal was dismissed and the additional assessments confirmed[4].

The Board's refusal to state a case

21. As summarised in the introduction above, the applicant eventually forwarded a draft Case Stated to the Board requesting it to state a case for the opinion of the Court of First Instance on three questions of law.

22. The questions of law identified in the draft Case Stated were :

> "(1) On the facts found by the Board and on the true construction of the Ordinance, was the Board correct in their conclusion that the quota charges paid by the [applicant] to [Wellfit] during 1999/2000 to 2004/2005 were not deductible expenditure for the purposes of calculating the [applicant's] assessable profits during those years of assessment?
>
> (2) On the facts found by the Board and on the true construction of the Ordinance, was the Board correct in their conclusion that the quota charges are not deductible expenditure by reason of section 61 of the Ordinance?
>
> (3) On the facts found by the Board and on the true construction of the Ordinance, was the Board correct in their conclusion that the parties to the payment by the [applicant] to Wellfit of the 'purported quota charges' entered into or carried out those transactions for the dominant purpose of enabling the [applicant] to obtain a tax benefit?"

23. After receiving written submissions from the applicant and the Commissioner and following an oral hearing on 13 July 2009, the Board issued its Decision dated 5 January 2010 declining to state a case under section 69(1) of the Ordinance.

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2 See §§44 to 50 of the Decision.
3 See §§51 to 69 of the Decision.
4 See §70 of the Decision.

24. In that Decision, the Board summarised the submissions for the Commissioner as follows :

> "9. [Counsel for the Commissioner] submitted, in his skeleton argument, that the [applicant] just converted the conclusion of this Board on section 16 into the first question by asking whether that conclusion was correct 'on the facts found by the Board and on the true construction of the Ordinance' without indicating where the Board had erred in law or challenging the Board's findings of fact. Since the issues on sections 61 and 61A only arise if the [applicant] succeeded on section 16, [counsel for the Commissioner] submitted that consequentially such issues do not arise given that the [applicant] had no prospect of success on section 16. He also submitted that the second and third questions were also unarguable on the same basis that the facts found by the Board were not being challenged."

25. After referring to the judgment of Barnett J in the case of *CIR v Inland Revenue Board of Review & Anor* [1989] 2 HKLR 40, commonly referred to as the *Aspiration Land* case, the Board held :

> "16. The Board should, therefore, decline a request to state a case unless the Applicant can show that a proper question of law can be identified: *Aust-Key Co. Ltd v Commissioner of Inland Revenue* [2001] 2 HKLRD 275. A proper question of law is one which is not just a question of law and relates to the decision sought to be appealed against, but also an arguable question and would not be an abuse of process for such a question to be submitted to the Court of First Instance for determination: for example, *D26/05* in which an earlier unpublished decision *D 98/99* was also referred to. [Counsel for the applicant] challenged the decision of *D 26/05* by saying that the Board hearing that case did not have the benefit of legal argument. Factually we cannot object to that observation. However, objectively the Board did go through and analyze the relevant authorities, including the *Aspiration* case before reaching its conclusion. On the other hand, to reinforce the importance of the 'qualitative' requirement in *D24/05* [sic], [counsel for the Commissioner] referred us to *Quan Bing Kay Derek v Commissioner of Inland Revenue*, HCAL 32/98 (October 1998) in which Findlay J agreed with the Board that there was no proper question of law in the context of the case because he found that there was no arguable point of law and hence refused to give leave for judicial review.
>
> 17. From these authorities, it is clear that the [applicant's] statutory right to appeal under section 69 is neither general nor unreserved. There is a 'qualitative' aspect that any proposed question of law must satisfy for the purposes of section 69. Even if we accept

> that the three questions in the [applicant's] draft Stated Case are questions of law, it does not automatically make them proper questions for the Court of First Instance to consider. The Board's power to scrutinize the proposed questions cannot be disputed. We are not saying that we are going to decide all the arguments which arise in relation to those proposed questions; however, we see it our duty to ensure that they are ones which they [sic] are proper for the Court to consider.
>
> 18. We cannot, therefore, agree with the basis [counsel for the applicant], with respect, chose to have taken in approaching this application. Without dealing with the 'qualitative' aspect of those proposed questions, we do not see how the [applicant] could expect to succeed. In that regard, we can just accept the submissions of [counsel for the Commissioner] as summarized in paragraph 9 above."

The grounds of judicial review

26. The applicant seeks an order of certiorari to quash the Board's Decision dated 5 January 2010 and an order of mandamus requiring the Board to state a case on the three questions of law raised by the applicant for the opinion of the Court of First Instance.

27. The grounds on which the applicant applies for judicial review as set out in the Form 86A Notice are five-fold, namely :

> "(a) Once the Board have delivered their decision in exercise of their statutory duty under section 68(8)(a) of the Ordinance, the Board is *functus officio* in so far as judicial or quasi-judicial functions or powers are concerned.
>
> (b) By section 69(1) the Board has a mandatory administrative duty to state a case on a question of law when required to do so by a party with *locus standi* to do so.
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> (c) Neither section 69 nor Part XI of the Ordinance confer any jurisdiction upon the Board to police the procedural regime of the Court of First Instance (such as RHC O.18 R.19) and being a statutory tribunal the Board has no inherent jurisdiction (and in particular no inherent jurisdiction to exercise procedural powers which are the sole prerogative of the Court of First Instance).
>
> (d) As the Board (correctly) concluded that the three proposed questions are questions of law and as the Applicant had required the Board to state a case on those questions for the opinion of the Court of First Instance, the Board had no discretion, no power and no right to refuse to perform its

(administrative) mandatory statutory duty. In particular, the Board had no right or power to block the Applicant from exercising its statutory right of appeal from the Board to the Court of First Instance.

(e) Further and alternatively:-

(i) each of the three questions of law is an arguable question of law;

(ii) the Board gave no (or no meaningful) reasons for its apparent conclusion to the contrary (which would have been required had the Court of First Instance been exercising its powers under RHC O.18 R.19 – since it will only exercise them in clear and obvious cases); and

(iii) therefore, even if section 69 conferred upon the Board the power, pre-emptively, to assess *in limine* the arguability of proposed actual questions of law (which is denied), then the Board wrongfully exercised that power and the Decision was *ultra vires* section 69 of the Ordinance."

The Commissioner's contentions

28. Mr Paul H.M. Leung, counsel for the Commissioner, submitted that the Ordinance does confer a jurisdiction or power on the Board to evaluate questions of law put forward by an applicant and that the Board's duty is to ensure that only questions of law proper for the opinion of the Court are included in a Case Stated. A satisfactory question of law has to be identified to trigger the preparation of the case. The questions of law should be stated clearly and concisely and care should be taken to ensure that the questions are not wider than is warranted by the facts. An applicant for a Case Stated may not rely on a question of law which is imprecise or ambiguous.

29. He also submitted that an intended appellant could not challenge a conclusion of the Board simply by converting it into a question using the traditional form of wording from previous cases. Otherwise, he submitted, this would make the opening words of section 69(1) meaningless.

30. In support of these submissions, reliance was placed on the *Aspiration Land* case and also two earlier decisions of the Board, namely *D 26/05* and *D 45/07*. Reliance was also placed on the decision of the Court of Appeal in *Nam Tai Trading Co. Ltd v Board of Review*, CACV 114/2009, unrep., 28 October 2009.

31. Ultimately, it was the Commissioner's contention that the applicant has no prospect of success on the section 16 issue, which is the subject matter of the first question of law in the draft Case Stated. It was also submitted that, in any event, the proposed points of law in relation to sections 61 and 61A were also unarguable because the facts found by the Board are not being challenged by the applicant.

32. On this basis, it was submitted that the Board was entitled to conclude that the proposed questions of law in the draft Case Stated were not proper questions to be submitted to the Court of First Instance for its opinion.

Discussion

33. It is trite that, on an application for judicial review, the Court is primarily concerned with the decision-making process and not the decision itself. The function of the Court on review is to check the exercise of authority that has no lawful basis or which, although lawful, is exercised unfairly or unreasonably.

34. The question here is whether the Board was correct in holding that section 69(1) of the Ordinance required it to apply a qualitative assessment to the proposed questions of law which the applicant sought to have referred to the Court for its opinion and, if so, whether the Board correctly applied the relevant test in reaching the conclusion that the proposed questions of law were not proper ones for the opinion of the Court.

The first ground of challenge

35. I do not consider that the applicant's first ground of challenge is correct.

36. The statutory function of the Board in reaching a decision on an appeal to it under section 68 of the Ordinance is different to the statutory function of the Board in considering an application to state a case for the opinion of the Court of First Instance under section 69(1). Therefore, although the Board may be *functus officio* so far as its decision on an appeal to it under section 68 is concerned, it does not follow that the Board does not have functions or powers in respect of an application that may be made to it to state a case under section 69(1).

The second, third and fourth grounds of challenge

37. The applicant's second, third and fourth grounds of challenge may be taken together, for which purpose it is necessary to analyse the provisions of section 69(1).

38. In my opinion, although section 69(1) of the Ordinance provides that the Board's decision on an appeal to it is final, that finality is qualified in that either party may make an application to require the Board to state a case on a question of law for the opinion of the Court of First Instance. Thus, the Board has a duty to consider the application requiring it to state a case.

39. But is that duty wholly unqualified so that the right of appeal by way of case stated is absolute and not subject to any vetting process by the Board?

40. In the *Aspiration Land* case, Barnett J held (at pp.57H-58B) :

> "After reviewing the authorities and carefully considering the arguments which have been addressed to me, I am satisfied of the following matters:
>
> 1. An applicant for a case stated must identify a question of law which it is proper for the High Court to consider.
>
> 2. The Board of Review is under a statutory duty to state a case in respect of that question of law.
>
> 3. The Board has a power to scrutinize the question of law to ensure that it is one which it is proper for the court to consider.
>
> 4. If the Board is of the view that the point of law is not proper, it may decline to state a case.
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> 5. If an Applicant wishes to attack findings of primary fact, he must identify those findings.
>
> 6. Only in the most exceptional circumstances should a complete transcript of the evidence and the documents produced before the Board be attached to or incorporated in the case stated.
>
> 7. Both an Applicant and the Board should be astute to use 'facts' and 'evidence' correctly."

It is the third and fourth propositions above that are of particular importance in the present case.

41. Those propositions were supported by two older English authorities included amongst the authorities cited to Barnett J, namely :

(1) *R v Shiel* (1900) 82 LT 587, for the proposition that where the question raised is one of law but the question has been decided by the Board in accordance with a previous binding decision of an appellate court, the Board should decline to state a case; and

(2) *R v Special Commissioners of Income Tax, (In Re G Fletcher)* (1891) 2 Tax Cases 289, for the proposition that where the question raised is one of law but is obviously a bad point, a case should not be stated.

42. Although Barnett J's judgment in the *Aspiration Land* case refusing to grant an order of mandamus to require the Board to state a case was appealed, the appeal was compromised by the Board agreeing to state a case before the appeal was fully opened: see the report of the appeal at [1989] 2 HKC 66 at 68G-H and 70I. The Court of Appeal did not therefore comment on Barnett J's propositions.

43. However, Barnett J's approach was followed by Findlay J in *Quan Bing Kay Derek v Commissioner for Inland Revenue*, HCAL 32 of 1998, unrep., 12 October 1998, refusing leave to apply for judicial review against a refusal of the Board to state a case. At para.16, Findlay J observed :

> "With the best will in the world, I do not think any counsel could sit down seriously with these documents before him and formulate a concise *arguable* point of law that arises from this matter." (*emphasis added*)

44. In *Aust-Key Co. Ltd v. Commissioner of Inland Revenue* [2001] 2 HKLRD 275, Chung J dismissed an appeal by way of case stated under section 69 of the Ordinance but concluded his judgment (at p.283B) by stating that, when asked to state a case involving no proper question of law, the Board should decline the request. He had held earlier in his judgment that the first question in the case stated was inappropriate since "the answer must invariably be in the affirmative" (see p.280E), i.e. the point was not arguable and would be bound to fail.

45. More recently, in *Same Fast Limited v Inland Revenue Board of Review* (2007-08) IRBRD, Vol. 22, 321, Reyes J dismissed an application for judicial review against the Board's refusal to state a case on the grounds that the questions were prolix, argumentative, not easy to understand and embarrassing as a whole. There is no suggestion in his judgment that the Board's exercise of determining whether the proposed questions of law were proper was in excess of its jurisdiction.

46. Barnett J's approach in the *Aspiration Land* case has also been followed by the Board itself in *D 26/05* (2005-06) IRBRD, Vol. 20, 174 and *D 45/07* (2007-08) IRBRD, Vol. 22, 1085. In the former, the Board held that the function of the Board under section 69 is not simply to rubber stamp any application where a point of law can be formulated and that the requirement that such a point has to be proper involves meeting the requirement that it is arguable. Having cited the *Aspiration Land* case, the Board formulated the following proposition :

> "10. … we take the view that the threshold for an appellant to satisfy is a low one in that the Board may decline an application under section 69 in the event that the point of law before it is **plainly and obviously** unarguable. This is the test applied by [the] Hong Kong court in applications to strike out pleadings and is familiar to legal practitioners of this jurisdiction." (Emphasis in original)

This approach was adopted in the latter case, *D 45/07*: see para.12 at p.1092 of the report.

47. In *Nam Tai Trading Company Limited (formerly known as Nam Tai Electronic & Electrical Products Limited) v Board of Review (Inland Revenue Ordinance)*, CACV114/2009, unrep., 28 October 2009, the Court of Appeal considered an appeal against a refusal of leave to apply for judicial review to challenge a refusal by the Board to state a case. The facts of that case were that the proposed applicant/taxpayer had not

exhausted the process of engaging in a genuine and cooperative effort on the part of all the parties involved in order to formulate the questions for the Case Stated before launching the judicial review application. In the circumstances, Tang VP (with whom Cheung JA agreed) held that the application for leave to apply for judicial review was premature (paras. 10 and 14). However, it is noteworthy that leading counsel for the taxpayer in that case conceded that an applicant for a Case Stated has to identify a question of law which it is proper for the Court to consider (para. 13).

48. Tang VP went on to deal with the proposed first question on an *obiter* basis. That involved a challenge to the Board's conclusion that various management fees and other deductions claimed on behalf of the taxpayer were allowable pursuant to section 16(1) and section 17(1)(b) of the Ordinance. Whilst accepting that a question framed as to whether, on the facts found, the Board's decision was correct, raises a question of law, Tang VP held that, in the context of that case, it was not a proper question since, on the Board's findings of fact, the application had no reasonable prospect of success (para. 18). This conclusion, albeit *obiter*, seems to me to be entirely consistent with the approach of Barnett J in the *Aspiration Land* case and those decisions which have followed it.

49. As will be apparent from the cases cited above, it has not been held that the right of appeal under section 69(1) of the Ordinance is unqualified and absolute. But that is the contention made on behalf of the applicant by Mr Barrie Barlow SC. In my view, however, that contention is not correct and section 69(1) does not confer such a general right of appeal.

50. Whilst it might be thought that an absolute requirement to state a case is supported by the reference to the words towards the end of the proviso, namely "the period within which either of such persons *may require a case to be stated*" (emphasis added), I do not consider that section 69(1) does confer an absolute and unqualified right of appeal. In my judgment, the Board is duty bound to decline to state a case if the question of law proposed to be stated is not a proper one, as the authorities have consistently held. A question proposed to be stated may, it seems to me, be improper for various reasons, as illustrated in the cases discussed above: it may be irrelevant or premature; it may be academic to the outcome of the appeal; it may be embarrassing; it may be plainly and obviously unarguable.

51. I acknowledge that none of the cases that have dealt with this point are binding on me and are merely persuasive but, in my opinion, they are correct in holding that it is only where a proper question of law is framed that the Board has a duty to state a case under section 69(1) and supported by the *obiter* view of the Court of Appeal in the *Nam Tai* case.

52. That there is a duty on the part of the Board to decline to state a case even where a question of law is identified is further supported, in my view, by the structure of section 69(1), the opening words of which make it plain that the intention is that the Board's decision on an appeal under section 68 of the Ordinance should be final with a limited exception to that finality. The Board's decision is final as to any primary finding of fact and

it is only if there is a question of law that a case need be stated for the opinion of the Court of First Instance.

53. If the Board did not have a duty to decline to state a case where a party sought to require it to state a case on a wholly unarguable question of law, there would inevitably be a risk of frivolous appeals being pursued in the Court of First Instance by way of the case stated procedure. I do not discern any intention in section 69(1) of the Ordinance that this should be the position.

54. As was submitted to Barnett J in the *Aspiration Land* case (at p.53G-H) :

> "[Counsel for the Board] submitted that if the Board is right to decline to state a case where it clearly appears that the procedure is being abused, the problems which he has pointed out can be held in check and the procedure made to perform its proper statutory function. He said that unlike the judicial review procedure, which is the subject of the present hearing, no leave has to be obtained from the court before the hearing of a case stated. Once a case is stated, the court will have to hear it (although, of course, the case stated may be remitted for amendment). The Board, therefore, provides a useful preliminary check and ensures that only genuine questions reach the court."

It is implicit in the conclusions reached by Barnett J in that case that he accepted this submission.

55. For all these reasons, I do not consider these grounds of challenge are made out.

The fifth ground of challenge

56. This ground was Mr Barlow SC's fallback ground. If the three questions proposed by the applicant are questions of law which are not plainly and obviously unsustainable, so that they are therefore proper questions of law, the Board's refusal to refer them in a Case Stated for the opinion of the Court of First Instance will have constituted a failure to comply with the duty imposed on the Board by section 69(1) of the Ordinance.

57. The issue then is whether those three questions are proper questions of law as so understood. In this context, it is important to note that the applicant must show that the first question proposed to be stated (regarding deductibility under section 16 of the Ordinance) is a proper question of law, since it is common ground that the second and third questions do not arise if the applicant fails on the issue of deductibility, with which the first question is concerned.

58. Mr Barlow SC relied on two cases in support of his submission that the question of whether the Board's conclusion as to the deductibility of a particular payment under section 16 of the Ordinance is one of law, namely *Sanford Yung-tao Yung v Commissioner of Inland Revenue* [1979] HKLR 429 and *Commissioner of Inland Revenue v*

HIT Finance Ltd [2007] 10 HKCFAR 717. Here, the applicant was not seeking to challenge the Board's findings of fact but simply its conclusion as to deductibility based on those facts. That, he submitted, was a question of law.

59. I accept that submission but it remains necessary to consider whether, given the findings of fact, any conclusion other than that which the Board reached is possible.

60. In para. 28 of its Decision, the Board noted that the applicant's case was that it made payments to Wellfit for the quota of PT Bumi Garmentex Jaya ("Bumi") and PT Hoop Year Company Indonesia ("Hoop Year"), the two companies to whom the quotas had actually been allocated by the Indonesian government, and made use of that quota for its trade which produced its profits chargeable to tax in Hong Kong.

61. In para. 36 of its Decision, the Board held :

> "The [applicant] paid Wellfit but has failed to satisfy us that the expenses were charges paid for export quota. Because the [applicant] does not put forward any alternative case as to the purpose of such payment, we have no basis to rule that such expenses were incurred in the production of the [applicant's] chargeable profits. We find that the appeal can be readily dismissed."

62. Furthermore, in para. 50 of its Decision, the Board held :

> "We are not satisfied that the Procurement Agreement had been extended or substituted to cover the relevant years of assessment. In the absence of such an extended or substituted agreement, there was no formal legal basis for Wellfit to charge the [applicant] such expenses on its own. Neither was there any formal legal basis for Wellfit to receive from the [applicant] such charges for and on behalf of Bumi and Hoop Year. In fact, Bumi and Hoop Year never received such charges from Wellfit. To the contrary, we accept the Respondent's case that charges for quota had been included in the FOB contracts of purchase. …"

Although this was said in the context of discussion of the section 61 issue, the findings are nevertheless relevant, in my view, to the issue of deductibility.

63. Thus, the Board made a finding of fact that the applicant's payments to Wellfit were not in fact for export quota at all. The Board also found that the payments made to Wellfit were never in fact paid over or credited to the two companies to whom the quotas had actually been allocated by the Indonesian government.

64. Given these findings of fact, which the applicant was not seeking to challenge in the proposed Case Stated, Mr Leung submitted that the substratum of the applicant's factual case on the issue of deductibility was undermined so that there was no possibility of any other conclusion on the issue of deductibility and therefore no basis on which the Board

could rule that the payments made to Wellfit were incurred in the production of the applicant's chargeable profits.

65. I agree with Mr Leung. On the basis of the Board's findings of fact, which the applicant is not seeking to challenge, it seems to me that there is simply no arguable basis for challenging the Board's decision on the deductibility issue. I am therefore satisfied that the first question proposed to be stated was unarguable and bound to fail. As such, it is not a proper question of law for the purposes of section 69(1) of the Ordinance.

66. This conclusion on the deductibility issue is similar to the conclusion reached by the Court of Appeal in the *Nam Tai* case. There, the taxpayer sought to claim deductions for management fees and other deductions. Tang VP at para. 18 said this :

> "I accept that the question as formulated … raises a question of law and, depending on the circumstances, it may be a proper question. Here, however, the Board has found as a matter of fact that the expenses and deductions were not incurred or expended in or for the purpose of making the profits. It is difficult to understand how the first question could be a proper question in the context of this case. On those findings of fact, the application has no reasonable prospect of success. …"

67. So too, here, the Board has found that the payments to Wellfit were not paid for export quota and there was no basis for it to rule that the payments were incurred or expended in or for the purpose of making the profits charged to tax. And, similarly, in the context of this case, I do not consider that the first question is a proper question of law for a Case Stated since it has no reasonable prospect of success.

68. As I have already noted, it is necessary for the applicant to succeed on each of the three questions proposed to be stated in order to succeed in its appeal by way of Case Stated. In the light of my conclusion on the first question, it is therefore unnecessary to consider whether the second and third questions, which I accept are questions of law, are proper questions in the context of this case.

Basic law challenge

69. I would add, for the sake of completeness, that, in his skeleton submissions, Mr Barlow SC raised an argument that the Board's refusal to state a case was a breach of the applicant's rights under Articles 35 and 105 of the Basic Law. This ground of challenge was not included in the Form 86A Notice and no application has been made to amend that Notice to include this additional ground of challenge. I therefore need not consider this any further since this ground is not properly before me.

Disposition and costs

70. For the reasons given above, I dismiss the applicant's application for judicial review.

71. I make an order *nisi* that the applicant pay the costs of this application to the Commissioner, to be taxed if not agreed.

(Joseph Fok)
Judge of the Court of First Instance
High Court

Mr Barrie Barlow, SC, instructed by Messrs W.K. To, for the Applicant

Mr Paul H.M. Leung, instructed by Department of Justice, for the Respondent