HCAL 40/2008

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

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO. 40 OF 2008

BETWEEN

LEE YEE SHING JACKY	1st Applicant
YEUNG YUK CHING	2nd Applicant

and

BOARD OF REVIEW (INLAND REVENUE ORDINANCE)	1st Respondent
COMMISSIONER OF INLAND REVENUE	2nd Respondent

Before: Hon Lam in Court
Date of Hearing : 18 January 2011
Date of Judgment : 22 February 2011

J U D G M E N T

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1. This case has a rather long history. The Applicants are taxpayers who were assessed by the Commissioner of Inland Revenue in respect of their tax liabilities for several tax years: from 1993/94 to 1997/98. The assessments were made after due consideration of the representations made by the tax representative of the Applicants. The reasons for the assessment and the material considered by the Commissioner were fully set out in a written

determination by the Deputy Commissioner of 3 November 2003[1]. After the assessments were issued, the Applicants appealed against the same to the Board of Review. The appeal was heard in July 2004 and the Board gave its decision in writing on 6 December 2004. The main issue in the appeal was whether losses sustained by Mr Lee from some share and securities transactions should be deducted from their total income. The appeal was dismissed.

2. The Applicants were not satisfied with the outcome. They further appealed by way of case stated to the Court of First Instance in HCIA 11 of 2005. In the Case Stated dated 29 September 2005, two questions of law were raised. By the time when the matter was heard in the Court of First Instance, it was agreed that only one of them needed to be addressed. The question was framed as follows in the Case Stated,

> "Whether, as a matter of law, and on the facts found, we are entitled to reject the Taxpayers' contention that Mr Lee Yee-Shing Jacky was carrying on business and trading in securities and future index activities within the meaning of Section 14 of the Inland Revenue Ordinance and that therefore the losses sustained by such business and trade carried on by Mr Lee during each of the years of assessment from 1993/94 to 1997/98 were properly deductible in the computation of the tax liabilities of the Appellant under Personal Assessment for the relevant years."

3. The appeal was heard by Burrell J in March 2006 and His Lordship answered the question in the affirmative. The appeal was accordingly dismissed on 29 March 2006. The Applicants then appealed to the Court of Appeal in CACV 180 of 2006 and that appeal was dismissed on 14 February 2007. The Applicants further appealed to the Court of Final Appeal. On 31 January 2008, the Court of Final Appeal dismissed the appeal in FACV 14 of 2007[2].

4. Having exhausted the statutory appeal channel, the Applicants now seek to challenge the appeal procedure by way of judicial review. After hearing submissions from the Applicants and the putative respondents, A Cheung J granted leave on 20 April 2009[3]. It is contended on their behalf that the case stated procedure wrongly restricted their right of access to the court and as such unconstitutional.

5. The relief sought, as set out in a draft submitted to the court by Mr Dykes SC during the hearing on 18 January 2011, are in the following terms,

> "(1) A declaration to declare that the provisions of the Inland Revenue Ordinance Cap. 112 ["the Ordinance"], as they relate to appeals by way of appeal to the Board of Review and further appeals therefrom, in particular the Case Stated on questions of law from the Inland Revenue

[1] Hearing Bundle B1 at p. 149 to 252
[2] The judgment of the Court of Final Appeal is reported at [2008] 3 HKLRD 51
[3] Reasons for granting leave are set out in the judgment of A Cheung J handed down on 20 April 2009.

Board of Review as provided in Section 69 of the ordinance, are unconstitutional, null and void and of no effect, for breach of Article 35 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

(2) A declaration that an order of Certiorari to quash the Case Stated by the Inland revenue Board of Review dated 29 September 2005 in B/R 124/03.

(3) A declaration to declare that, in fulfillment of the constitutional guarantees contained in article 35 of the Basic Law, notice of appeal to the Board of Review by the Applicants shall be treated as notice of appeal directing at the Court of First Instance in the manner as set out in Sections 65 to 67 of the Ordinance as blue penciled."

Attached to the draft is a copy of the relevant sections with the offending parts blue-penciled.

6. It would appear that draft relief (2) is seeking an order of certiorari quashing the Case Stated instead of seeking a declaration, see paragraph (1) of the Originating Summons. Whilst paragraphs (1) and (2) of the draft relief had already been set out in the Originating Summons, paragraph (3) was not. Thus, Mr Yuen SC (appearing for the 2nd Respondent) urged this court to hear him further on the proposed blue-pencilling of the Ordinance if the court were to conclude that such exercise should be undertaken. I bear this in mind but as it shall emerge there is no need to embark on such exercise.

7. Stripped of the niceties as to the form of relief in the context of judicial review, in a nutshell the Applicants invited this court to hold that the previous appeal by way of case stated to be a nullity and to order that his appeal be heard afresh by the Court of First Instance.

8. I further note that there is a departure in the proposed draft from the prayer in the Originating Summons. In the latter, paragraphs (3) and (4) seek to have an appeal from the decision of the Board of Review to the Court of First Instance on both facts and law. Thus, the premise was that the legality of the decision of the Board of Review was not challenged. However, in the draft relief handed up during the hearing, the new paragraph appears to proceed on the basis that the appeal would be heard by the Court of First Instance in lieu of the Board of Review. Implicitly, it seems the Applicants are seeking to have the decision of the Board of Review quashed as well. That would accord with my understanding of Mr Dykes' oral submission that (instead of blue penciling of the sections to such extensive manner as set out in the draft submitted) it would be constitutionally compliant if Section 67 was changed to give a taxpayer a right to choose to appeal to the Court of First Instance (even without the consent of the Commissioner) instead of an appeal to the Board of Review.

9. The purpose of setting the draft relief in this judgment is to explain what the Applicants are trying to achieve by this judicial review. Implicitly, they are saying what had been done in the case stated appeal is null and void. It is however not clear to me whether they are saying that the orders as to costs made at the various stages in such proceedings are null and void as well.

10. At the outset, it should be clearly stated that the challenge by the Applicants is a systemic challenge. There is no specific allegation by the Applicants as to how and in what manner in which their appeal has been prejudiced due to their inability to have an appeal on facts or how their presentation of their appeal had been prejudiced by the Case Stated procedure. They said they were not obliged to show that they would have succeeded on their appeal if it were not circumscribed by the Case Stated procedure. Thus, they are content to base their present challenge purely on legal submissions concerning the inconsistency between Article 35 of the Basic Law and Section 69 of the Ordinance.

11. With such preamble, I shall now turn to the existing regime for challenging a tax assessment before I discuss the Applicants' legal arguments on the unconstitutionality of such regime.

The existing tax appeal regime

12. I shall start with the relevant statutory provisions. The procedures for a taxpayer to raise objection to an assessment and to appeal against the determination of the Commissioner are set out in Part XI of the Ordinance. In the Affidavit of the Chief Assessor, the practice and procedure available to a taxpayer to challenge an assessment are explained at paragraphs 4 to 11. First, the taxpayer may object by notice in writing under Section 64 of the Ordinance. The assessment would be considered by the Commissioner in the light of the objections. Section 64(2) to (4) set out how the Commissioner shall deal with the objections including his power to investigate into the facts pertaining to the objections. If the Commissioner agrees with the objections, he is required by Section 64(3) to make the necessary adjustment. If he disagrees with the objections, under Section 64(4), he shall give his determination in writing together with the reasons for the same and a statement of facts upon which the determination was arrived at.

13. The next tier is appeal against a determination under Section 64(4) to the Board of Review in accordance with Section 66. The appeal is commenced by the giving of a notice of appeal to the Board and a statement of the grounds of appeal (Section 66(1) of the Ordinance). There is no limitation as to the nature of the grounds of appeal. In other words, it can be an appeal on facts as well as an appeal on law.

14. Section 65 deals with the constitution of the Board. The panel is made up of a chairman and 10 deputy chairmen and they shall be persons with legal training and experience. As it is, according to the affidavit of the Chief Assessor, there is a chairman and 7 deputy chairmen. The chairman and 3 deputy chairmen are senior counsel. The remaining 4 deputy chairmen are experienced solicitors.

15. In addition, the panel shall have not more than 150 other members. At present, there are 96 members, 50 of whom are legally qualified and 10 others have accounting qualifications. The remaining members consist of professors from local universities and people from business circles.

16. The members of the Board (including the chairman and the deputy chairmen) are appointed by the Chief Executive and each of them holds office for 3 years and shall be eligible for reappointment. See Section 65(1). Three or more members with one of whom being either the chairman or deputy chairman shall be nominated by the Chief Secretary for Administration to hear each appeal.

17. As an alternative to having the appeal heard by the Board, a party to an appeal (including the Commissioner) can give notice that he desires the appeal to be transferred to the Court of First Instance, see Section 67(1). If the other party consents and notifies accordingly, the appeal would be transferred to the Court of First Instance, see Section 67(3). There is no restriction as to the nature of the grounds that can be relied upon in such transferred appeal. The procedure of such appeal is governed by Order 55 of the Rules of the High Court. The power of the Court of First Instance in hearing the appeal are provided for under O. 55 r. 7, including the power to receive further evidence, the power to draw inferences of fact. Upon a decision or judgment, the court can make such order that ought to have been made by the Commissioner and such further order as the case may require. The court can also remit the matter with the opinion of the court for rehearing or reconsideration by the Commissioner. O. 55 r. 7(7) further provides that the Court of First Instance shall not be bound to allow the appeal 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 thereby occasioned.

18. In the affidavit of the Chief Assessor, it is said that normally the Commissioner would not oppose to an application for such transfer if the taxpayer serves a Section 67(1) notice unless the appeal is purely factual and the quantum of tax involved is small. She also said that the transfer procedure has not been that often used because of costs and time considerations.

19. The Board's power to order costs against a losing taxpayer under Section 68(9) is more circumscribed than the court. The amount of costs that can be ordered against an unsuccessful appellant is limited by Part I of Schedule 5. The prescribed amount is $5,000 and it is much cheaper than the costs of an appeal conducted in the Court of First Instance where an unsuccessful taxpayer could be ordered to pay the costs of the Commissioner who would invariably be represented by counsel. This would particularly be so if the appeal involves the hearing of factual evidence which can last for several days.

20. Unlike hearing at the court, there is no limitation on the right of audience. Section 68(2) permits representation by an authorized representative before the Board and there is no qualification requirement for such representative. According to the statistics for

the three tax years up to 2008-09 produced by the Chief Assessor in respect of reported cases[4], out of 149 cases only 19 of them were the taxpayers represented by lawyers. Another 19 of them were represented by accountants. The taxpayers acted in person in the remaining 111 cases. In the present case, the Applicants were represented by his tax representatives before the Board.

21. Another advantage of hearing before the Board is that the privacy of the taxpayer is protected as, by virtue of Section 68(5), the hearing is in camera and publication of the report of the appeal has to be in a manner that the identity of the taxpayer is not disclosed.

22. According to the Chief Assessor, a transfer of the appeal to the Court of First Instance under Section 67 is appropriate in two types of cases: (1) where there is no dispute of facts and the issues are complex legal issues; or (2) where the parties expect at the outset that the case will proceed all the way to the Court of Final Appeal and a direct appeal to the Court of First Instance would save one tier of appeal, thus saving costs and time.

23. Statistics as to cases transferred to the Court of First Instance under Section 67 were not produced to this court. But there is no dispute that the procedure has been rarely used. In contrast, many appeals are heard by the Board over the years. The statistics produced by the Chief Assessor by reference to the decisions delivered shows: in 2004/05 there were 124 decisions; in 2005/06 95 decisions; in 2006/07 113 decisions; in 2007/08 60 decisions; in 2008/09 70 decisions. And by reference to cases disposed of: in 2004/05 there were 166 cases; in 2005/06 124 cases; in 2006/07 150 cases; in 2007/08 89 cases; in 2008/09 90 cases. The differences between the numbers of decisions and the numbers of cases are explained by cases being withdrawn. The statistics also show that the number of new cases received and cases remaining to be disposed of at the end of each year. A comparison of those figures suggests that for most appeals to the Board, they can be disposed of either in the same tax year or the next one. From the figures set out in Table 3 produced by the Chief Assessor, the hearing time before the Board, on average, is about 2 to 3 sessions (with two hours in each session). For the tax year 2008/09, the average is even lower, with 70 cases disposed of in 136 sessions, viz. an average of slightly less than 2 sessions.

24. For appeals dealt with by the Board, the Board can hear evidence and it also has the power to summon witnesses. After hearing the appeal the Board shall confirm, reduce, increase or annul the assessment or it may remit the case to the Commissioner with the opinion of the Board, see Section 68(8)(a). Though the Ordinance does not have express provision regarding the manner in which a decision is made, in practice they are generally in writing. According to the statistics produced by the Chief Assessor, of the decisions given between 2004/05 and 2008/09, there were altogether only 5 oral decisions out of a total of 462 decisions.

[4] Decisions of the Board are reported in the IRBRD Reports.

25. Section 69 provides for the appeal from the Board to the Court of First Instance. Subject to the right of the taxpayer or the Commissioner to apply for a case stated on a question of law for the opinion of the Court of First Instance, the decision of the Board is final. As an alternative, the taxpayer or the Commissioner may seek leave of the Court of Appeal under Section 69A to have the case stated to be heard by the Court of Appeal instead of the Court of First Instance in a case where it is desirable to have the matter heard in the Court of Appeal by reason of the amount of tax in dispute or of the general or public importance of the matter or its extraordinary difficulty or for any other reason.

26. Thus the only statutory avenue for challenging a decision of the Board is by way of the case stated procedure. I refer to the "statutory avenue" because apart from that, some aspects of the decision making process of the Board may be challenged by way of judicial review. I shall discuss this later after considering the case stated procedure.

The case stated procedure

27. According to the statistics provided by the Chief Assessor, the number of case stated to the Court of First Instance in the three tax years from 2006/07 to 2008/09 were 2, 7, and 7 respectively. It is by no means a procedure fallen in disuse.

28. In the judgment of the Court of Final Appeal in the Applicants' tax appeal[5], McHugh NPJ highlighted some unsatisfactory aspects of the case stated procedure and suggested that it should be replaced by an appeal on questions of law. At para. 109, His Lordship said,

> "[The Case Stated procedure] probably had its origins in the practice of *nisi prius* judges referring disputed questions of law to their brethren at Westminster for informal discussion and advice … In days when tribunals and courts seldom had access to transcripts, where there were no appeals and where lay tribunals needed advice on question of law, the Case Stated procedure no doubt served a useful purpose. But times and circumstances change. The Case Stated procedure now seems an anachronism. Certainly, it creates delay, takes up the time of tribunals and parties and increases the expense of conducting litigation. Often enough, dissatisfaction with the contents of the Case leads to interlocutory litigation."

29. The other judges in the Court of Final Appeal shared this concern of McHugh NPJ[6]. The administration has taken up the task of carrying out such a review and I understand proposals for reform are being considered. It is agreed at the beginning of the hearing that such proposals are not germane to the issues that this court has to decide. Therefore, notwithstanding the inclusion of some materials in the trial bundles concerning such proposals, I do not see the need to refer to them in this judgment.

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[5] [2008] 3 HKLRD 51

[6] See Bokhary and Chan PJJ at para. 40; Ribeiro PJ at para. 41 and Sir Noel Power NPJ at para. 42 of the CFA judgment

30. The Applicants however go one step further. They contended that the Case Stated procedure restricted their right of access to court and therefore unconstitutional. Whilst I would respectfully agree that the Case Stated procedure is cumbersome and perhaps inefficient (in the sense of being more costly and time consuming for the parties), whether such procedure has the effect of watering down the Applicants' right of access to court is quite a different issue. To deal with that issue, we have to examine at greater length how the Case Stated procedure operates in practice and then consider it in the light of the entire regime (including the possible redress in terms of judicial review). After all, it has to be borne in mind that apart from tax appeals, the Case Stated procedure is currently used in other areas of law, both criminal and civil. At the suggestion of this court, Mr Yuen has helpfully produced two schedules: one for civil statutory appeals by way of case stated on questions of law[7] and one for statutory appeals on points of law only. Mr Dykes suggested there are other examples of appeals by way of case stated identified at *Hong Kong Civil Procedure 2011* at para. 61/2/2.[8] Thus, if the Applicants were correct in their contention, the ramifications can be far-reaching though I understand from Mr Dykes that his submission would not affect appeals by way of case stated from magistracies.

31. The Ordinance itself does not have much to say about how a case should be stated. Section 69(2) requires the stated case to set forth the facts and the decision of the Board. The actual practice adopted in Hong Kong has been considered in several local cases.

32. In Chinachem Investment Co Ltd v Commissioner of Inland Revenue CA 116/83, 3 April 1987, Huggins VP said,

> "There was much discussion before us and before the judge as to the form of the case stated and the procedure for settling it. It has never ceased to amaze me how much argument this simple and straightforward process engenders. A properly drafted case stated is the most satisfactory process of all for deciding a question of law, for it concentrates attention on the essentials of the case, but it does require those concerned to marshall and state with precision the issues, the facts (and, where necessary, the evidence), the arguments and, finally, the conclusions attacked. Criticism was directed at the Board of Review for failing to produce an acceptable case. In my view that criticism was almost entirely misdirected. Whatever may be the present practice in England, the established practice in Hong Kong is that where parties are professionally represented they shall draft the case stated and submit it to the tribunal. The reason is obvious:

[7] Telecommunications Ordinance Cap. 106, s. 32R; Municipal Services Appeals Board Ordinance Cap. 220, s. 13(1); Hong Kong War Memorial Pensions Ordinance Cap. 386, s. 15; Occupational Retirement Schemes Ordinance Cap. 426, s. 65(1); Mandatory Provident Fund Schemes Ordinance Cap. 485, s. 39(1); Non-Local Higher and Professional Education (Regulation) Ordinance Cap. 493, s. 31(1); Unsolicited Electronic Messages Ordinance Cap. 593, s. 53(1).

[8] I further note that the case stated procedures are still being used in England, e. g. see Halsbury's Laws of England, 5th Edn Vol. 12 para. 1691.

> the parties know better than anyone else what points they wish to take on the appeal, what findings of fact they wish to contend are relevant to those points and what arguments they advanced. The tribunal has the final responsibility for stating the case and is not bound by the draft submitted to it. It can, therefore, after consulting the parties, alter the draft if it is inaccurate or incomplete. Even if the drafting were to be done by the tribunal itself, it would be the duty of the parties to apply for any necessary amendment. As I have often said before there may be cases where it is impossible adequately to state the case without annexing one or more documents, but such cases are few and far between. The documents may even include a transcript of evidence, but that is to be avoided if possible, because such a transcript inevitably contains unessential matter which it is the object of the process to exclude. Thus, where the issue on appeal is whether there was any evidence to support a finding of fact, a transcript of all the evidence may be a necessary annexure, but a transcript is not to be annexed where what is required is a statement of the facts found or assumed or where with proper diligence a précis of the material evidence can be included in the case stated itself."

33. The local practice was considered again by the Court of Appeal in *Commissioner of Inland Revenue v Inland Revenue Board of Review* [1989] 2 HKC 66. Despite being urged by counsel to consider the adoption of the English practice (where the case would be drafted by the Special Commissioners instead of the parties), the Court of Appeal did not see any need to direct any changes of the local practice. It was however emphasized that the Board had the final responsibility for stating the case and the Board was free to draft the case themselves. The Court further stressed the importance of setting out the findings of fact clearly in the case. At p. 70G to H, Fuad VP said,

> "While we think that it is right to allow a certain measure of flexibility and discretion to the Board as to the precise manner in which they state the case, we would stress that the case stated itself must set out the facts found by the Board if the Board's written determination has merely summarized the evidence led before it without saying whether particular evidence is accepted or rejected. The facts found by the Board must clearly appear."

34. Up to today, the practice of having the case stated in a tax appeal drafted by the party seeking to appeal continues to apply. Hence, McHugh NPJ said at para. 52 of *Lee Yee Shing v Commissioner of Inland Revenue* [2008] 3 HKLRD 51,

> "In the absence of legislation or rules of court or a direction of the tribunal of fact to the contrary, the responsibility for preparing a Case Stated lies on the party requiring the Case to be stated. The Case should be prepared in accordance with the principles to which I have referred. As a matter of practice, it should be served on the other party or parties before being submitted to the tribunal of fact. It is, of course, for the tribunal to determine whether it will accept or amend or reject the applicant's draft. If either party is dissatisfied with the form

> of the Case, that party has its remedies as the judgment of Mr Justice Bokhary PJ and Mr Justice Chan PJ shows. In an extreme case, where a tribunal refuses to state a Case, those remedies include an order in the nature of mandamus."

35. In *ING Baring Securities v Commissioner of Inland Revenue* [2008] 1 HKLRD 412, Lord Millett NPJ gave some guidance on the drafting of a case stated at para. 153,

> "In stating a case for the opinion of the court, the Board should set out as clearly and succinctly as possible: (i) the facts agreed between the parties; (ii) the further facts found by the Board; (iii) any facts alleged by either party which the Board has found not established with brief reasons for its finding; and (iv) the legal principles which it has applied to reach its determination. It is customary to annex the Decision, not for the purpose of explaining or amplifying the Case Stated, but so that the court can understand the Board's reasoning."

36. What His Lordship said at para. 154 is also important,

> "In the present case the Board found that the Taxpayer had not discharged the burden of showing that the assessment was wrong. In such a case it is incumbent on the Board to set out the Case Stated as briefly as possible both the facts which it has found and the facts which it considers that the taxpayer needed to prove but had failed to establish. The court can then decide whether, as a matter of law, the unproved facts are material and, if so, whether the evidence was sufficient to establish them. Even in such a case it should rarely be necessary to annex the whole of the evidence. If either party is dissatisfied with the contents of the Case Stated, it can ask the Board to amend or supplement it. If a party wishes to contend on appeal that the Board has overlooked a relevant piece of evidence or has made a finding which is contradicted by the evidence, it can ask the Board to annex the relevant part of the evidence. If it wishes to contend that the Board has made a finding which is unsupported by the evidence, it can ask the Board to identify the evidence on which it has relied."

37. Thus, a properly drafted case should provide a good platform for the court to work on in determining whether there is any error of law in the decision subject to challenge by way of the Case Stated procedure.

38. The history of *ING Baring* provides some insight into what the court can do in an appeal by way of Case Stated. In that case, the Board held that the taxpayer had failed to discharge the burden of showing that the relevant income was earned offshore and therefore not taxable. In the Court of First Instance, Barma J overturned the decision of the Board of Review holding that the Board had misdirected itself in law and erred in failing to conclude that on the facts as found the income was offshore. In the Court of Appeal, it was held that Barma J had usurped the function of the Board in fact finding and short of the case of the findings of the Board being perverse or absence of evidence supporting the same the court

could not intervene[9]. However, the Court of Final Appeal held that Barma J did not stray beyond what he was open to do in an appeal by way of Case Stated. Lord Millett said at para. 167,

> "Nor did the judge assume the Board's fact-finding role as the Court of Appeal claimed. Rather he embarked on the task of attempting to discover just what were the relevant facts which the Board had found. This was no easy matter, and the Judge was compelled to describe some of the Board's crucial findings as 'implicit'."[10]

39. In the tax appeal of the Applicants, Bokhary and Chan PJJ made the following observations regarding the contents of a Case Stated at para. 8 of their joint judgment,

> "The parties to an appeal by way of case stated should be given an adequate opportunity to put forward their views as to what ought to be included in the case to be stated. And such views should be duly considered by those who state the case. But neither party alone nor even both parties in unison can insist on the case being stated in a particular form of terms. … As to what a case stated must contain in order to be regarded as sufficiently covering the issues, the present appeal provides the Court with a welcome opportunity to recognize the utility for Hong Kong's purposes of the practical guidance offered by Scott J in the *Consolidated Goldfields* case."

40. In *Consolidated Goldfields plc v Inland Revenue Commissioners* [1990] 2 All ER 398, Scott J set out the following propositions at p. 402f to h,

> "(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,

[9] [2006] 3 HKLRD 315 at para. 26

[10] See also Bokhary PJ at para. 2 and Chan PJ at paras. 7 and 8 in the *ING Baring* judgment

> particularly so if it appears that the Special Commissioners have had the proposed findings in mind when settling the final form of the case stated."

41. Under the case stated procedures, the function of the appellate court is limited to the consideration of the points of law in the light of the facts set out in the case. However, in considering whether such limitation curtails an appellant's access to court, it is necessary to have to regard to the duty of the appellants in ensuring that the necessary materials are included in the Case as highlighted in the authorities[11]. As observed by Huggins VP in *Chinachem*, an appellant should know better than anyone else what points they wish to take on the appeal, what findings of fact they wish to contend are relevant to those points and what arguments they would advance.

42. Section 69(4) gives the Court of First Instance the power to send back a stated case for amendment. Though the power has to be exercised in accordance with the guidance laid down in *Consolidated Goldfields*, if a factual finding is materially relevant to an intended argument of the appellant and if it was omitted from the Case Stated despite the representation by the appellant on the draft case, he could seek redress under this sub-section.

43. And it has to be remembered that in this context, a point of law may encompass a challenge to a finding of fact as being perverse or contrary to or unsupported by any evidence or a challenge that the tribunal of fact failed to take into account of relevant evidence or improperly took into account of irrelevant materials[12]. Thus, as stated in *The Queen v Rigby* (1956) 100 CLR 146 at p. 150-1[13],

> "Upon a case stated the court cannot determine questions of fact and it cannot draw inferences of fact from what is stated in the case. Its authority is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of parties. *The question may be one of the relevance of evidence and then the nature of the evidence becomes in a sense an ultimate fact for the purpose of that question*." (My emphasis)

44. Thus, if an appellant wishes to challenge the Board's determination on the basis of its failure to make findings on the relevant materials, he should advance the argument in his grounds of appeal and identify the relevant materials in order to facilitate the same to be included in the Case Stated.

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[11] See in particular the judgment of Huggins VP in *Chinachem* and Lord Millett NPJ in *ING Baring* at para. 154 and McHugh NPJ in the tax appeal in the instant case at para. 52.

[12] See *Edwards v Bairstow* [1956] AC 14; *Kwong Mile Services Ltd v Commissioner of Inland Revenue* (2004) 7 HKCFAR 275 at paras. 31 to 37; *ING Baring v Commissioner of Inland Revenue* [2008] 1HKLRD 412 at para. 19; *Lee Yee Shing v Commissioner of Inland Revenue* [2008] 3 HKLRD 51 at para. 28.

[13] Cited and applied by McHugh NPJ in *Lee Yee Shing v Commissioner of Inland Revenue* [2008] 3 HKLRD 51 at para. 45

Supervision by judicial review

45. Since the Appellants are advancing a systemic challenge based on his right of access to the court, I need to briefly mention about the alternative of a taxpayer by seeking judicial review over certain aspects of a tax appeal.

46. First, it is well established that a Board's refusal to state a case can be challenged by judicial review. This was alluded to by McHugh NPJ in *Lee Yee Shing v Commissioner of Inland Revenue* [2008] 3 HKLRD 51 at para. 52. See also *Commissioner of Inland Revenue v Board of Review* [2006] 2 HKLRD 26.

47. Second, a Board's refusal to exercise its discretion to entertain appeal to it out of time can also be challenged by judicial review: see *Chow Kwong Fai v Inland Revenue Board of Review* [2004] 2 HKLRD 963.

48. Third, as a matter of principle, as in the case of other inferior tribunals, the Court of First Instance has general supervisory jurisdiction over the Board's conduct of the proceedings in hearing appeals to ensure their fairness and legality. For alleged defects in the process that can adequately be ventilated as points of law on appeal, naturally the Court of First Instance would decline to exercise its supervisory jurisdiction by way of judicial review. However, in cases where appeal cannot provide adequate redress, judicial review can provide the necessary remedy[14].

49. Fourth, in respect of the alternative of transferring the appeal directly to the Court of First Instance with the consent of the parties, even though it is not an absolute right, a refusal on the part of the Commissioner to give his consent may be open to challenge by way of judicial review if his refusal is *Wednesbury* unreasonable.

50. Therefore, though it is common ground that the Board is not a court for the purpose of Article 35 of the Basic Law, there are avenues by way of appeal or judicial review for a taxpayer to come to court to challenge a tax assessment. The question is whether these avenues are adequate as safeguards for the Applicants' access to court under Article 35.

Article 10 of the Hong Kong Bill of Rights

51. Though Mr Dykes referred to Article 10 of the Hong Kong Bill of Rights in his written submissions, counsel candidly admitted in his oral submissions that according to European authorities tax assessment is not within the scope of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, see *Ferrazzini v Italy* (2002) 34 EHRR 45; *Emesa Sugar NV v Netherlands* (13/1/2005 ECtHR); *Viktor Ketko v Ukraine* (3/4/2006 ECtHR) and *Impar v Lithuania* (5/4/2010 ECtHR). At para. 21

[14] See *Stock Exchange of Hong Kong v Onshine Securities* [1994] 1 HKC 319, approved by the Court of Final Appeal in *Stock Exchange of Hong Kong v New World Development* [2006] 2 HKLRD 518 at paras. 114 to 117 and para. 128.

of the last decision, the principle was summarized,

> "The Court has consistently held that, generally, tax disputes fall outside the scope of 'civil rights and obligations' under Article 6 of the convention, despite the pecuniary effects which they necessarily produce for the taxpayer."

52. The rationale for that was discussed at length in *Ferrazzini v Italy* (2002) 34 EHRR 45 paras. 20 to 31. The European Court regarded tax matters as part of the hard core of public-authority prerogatives with the public nature of the relationship between the taxpayer and the tax authority remaining predominant. Thus it falls outside the scope of civil rights and obligations.

53. Mr Dykes submitted that such rationale stemmed from the distinction in the European countries between civil law and public law. Counsel also referred to the difference in wordings between our Article 10 and their Article 6.

54. However, it has been held by Judge Cheung (as Cheung JA then was) in *Commissioner of Inland Revenue v Lee Lai-ping* (1993) 3 HKPLR 141 that the expression 'rights and obligations in a suit at law' in our Article 10 has the same meaning as the expression 'civil rights and obligations' in Article 6 of the European Convention. At p. 152, after considering the European jurisprudence and the submission that different interpretation should be given to our Article 10, the Court held that assessment of profit tax does not involve any determination of private right. Rather it is a matter arising out of an administrative act.

55. I respectfully agree with Judge Cheung and hold that tax matters fall outside the scope of Article 10 of our Bill of Rights. But it does not mean that the process of assessment of tax needs not be fair. As explained, the process is subject to the supervision of the court by means of judicial review and the court can intervene if the process is unfair. There is simply no need to resort to any constitutional underpinning for what I would call a traditional judicial review challenge based on unfairness in an administrative process[15]. However, if there is no unfairness in the process, Article 10 cannot provide a basis for any constitutional challenge in relation to the process of tax assessment.

Article 35 of the Basic Law

56. In his oral submissions Mr Dykes focused on the right of access to court in Article 35 of the Basic Law. The relevant parts of the article are as follows,

[15] In this connection, see *Stock Exchange of Hong Kong v New World Development* [2006] 2 HKLRD 518 at para. 91 where Ribeiro PJ said the principle of fairness provide the appropriate framework to deal with the question of legal representation even though the Disciplinary Committee is not a court.

> "Hong Kong residents shall have the right to … access to the courts … for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.
>
> Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities …"

57. Mr Dykes submitted that the right under Article 35 of the Basic Law is not co-extensive with Article 10 of the Bill of Rights. In that respect, counsel said the conclusion of Judge Ng to the contrary in *Commissioner of Inland Revenue v Nam Tai Trading* [2010] 3 HKC 1 at para. 78 was wrong.

58. Drawing support from several Australian authorities, Mr Dykes submitted that the right of access to court encompasses a right on the part of a taxpayer to have a factual dispute relevant to the assessment of his tax liability ultimately determined by a court performing judicial function. In his written submissions, counsel said whatever the nature of the relevant rights or interests of a resident (viz. be it public law right or interest or private right or interest) he has the right to come to court to seek redress or protection whether by initiating proceedings or by way of responding to an action that threatens such rights or interests. He further said only courts and judges can exercise judicial power and it is unconstitutional to have a non-judicial body finally adjudicating on rights and obligations.

59. At the same time, Mr Dykes said in his oral submissions it was not his case that the primary fact finder must be a court of law. However, counsel said the findings, or at least the key findings, must be open to review by a court. Thus, it was accepted that the requirement can be satisfied if the fact finding process can be reviewed by a court of full jurisdiction.

60. In the present context, Mr Dykes contended that a Hong Kong resident has the legal right not to be taxed excessively or on the wrong basis. The Case Stated procedure, counsel said, curtails a resident's right of access to court for the determination of his tax liability because of the limitations inherent in the procedure prescribing that the decision of the Board (not a court for article 35 purposes) shall be final subject to an appeal on point of law by way of Case Stated. By reason of that, an appeal which might succeed if the appellate court could take a different view of the facts will fail if the legal points identified in the case stated are not resolved in the appellant's favour.

61. The Australian cases Mr Dykes relied on are *British Imperial Oil Co. v Federal Commissioner of Taxation* (1925) 35 CLR 422 and *Shell Company of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275. Counsel alluded to the similarities in the function of our Board of Review and the Board of Appeal and the limitation on appeals in *British Imperial Oil*. In that case, the High Court of Australia held that such a regime conferred on the Board judicial power of adjudication between adverse parties as to legal claims, rights and obligations and as such infringed Section 71 of the Australian Constitution which provided for the exercise of judicial power by the courts. Mr Dykes

submitted that the same conclusion should be reached in Hong Kong by virtue of Article 85 of the Basic Law.

62. The wordings of Section 71 of the Australian Constitution are different from those in Article 85 of the Basic Law. Section 71 reads,

> "The judicial powers of the Commonwealth shall be vested in a federal Supreme Court, to be called the High Court of Australia, and in such other Federal Courts as the Parliament creates, and in such other Courts as it invests with Federal jurisdiction …"

63. On the other hand, Article 85 of the Basic Law is in the following terms,

> "The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. …"

64. Reference should also be made to Articles 80 to 83 as well as Article 19 of the Basic Law. In particular, Article 80 provides that the judiciary comprising of the courts at all levels shall exercise the judicial power of the Hong Kong Special Administrative Region.

65. Before examining the applicability of the Australian cases in Hong Kong, we should have regard to some Hong Kong jurisprudence on these articles in the Basic Law. In *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457, Hartmann J (as Hartmann JA then was) held at para. 38,

> "It has not been disputed that the Basic Law is founded on what is commonly called the Westminster model. As such, the powers of the legislature, the executive and the judiciary are separate. In terms of article 80, judicial power is vested in those appointed to hold judicial office. That being so, what the legislature cannot do, consistent with the separation of powers, is to place judicial power in the hands of the executive."

66. In *Yau Kwong Man*, the court was concerned with the exercise of powers in the field of punishment for criminal offences (see para. 41 of the judgment) and the learned judge readily concluded that in substance the power bestowed upon the Chief Executive under Section 67C of the Criminal Procedure Ordinance was the exercise of judicial power. The court therefore declared that the provisions under Section 67C were inconsistent with Article 80.

67. But Hartmann J also recognized that it could be difficult to decide whether the exercise of a particular judgment is an exercise of judicial or administrative power[16].

68. Nowadays, with the developments in our administrative law, the law requires

[16] *Yau Kwong Man v Secretary for Security* [2002] 3 HKC 457 paras. 39 and 40

those responsible for the exercise of administrative powers to act fairly and, as observed by His Lordship, in many instances with judicial fairness and detachment. It is not difficult to find references to the exercise of "quasi-judicial" power by an administrative body in the cases. In most of the cases, even in the context of an administrative decision, the decision maker has to ascertain the relevant facts before he gives consideration to how a policy, discretion or a statutory or non-statutory power should be exercised. The fact finding process inevitably involves assessment of evidence available to the decision maker and the requirement of fairness, in some instances, dictates that a person affected by the decision should be given an opportunity to make representations. Thus, the mere resemblance of a process to the judicial process to ensure fairness cannot be the acid test for deciding whether the decision maker was exercising the judicial power of the state. Ultimately, one has to examine the nature, function and character of the decision in question in order to determine whether it involves the exercise of the judicial power of the state which by law reserves exclusively for the judiciary.

69. The concept that a decision making body conducting a process seemingly akin to a judicial process (thus can be described loosely as acting judicially or performing judicial function) need not be performing the function of a court in the exercise of the judicial power of the state is not novel, see *Royal Aquarium & Summer & Winter Garden Society v Parkinson* [1892] 1 QB 431; *AG v British Broadcasting Corp* [1981] AC 303 and *General Medical Council v British Broadcasting Corp* [1998] 1 WLR 1573. In the last case, Robert Walker LJ (as he then was) said the following in respect of the Professional Conduct Committee of the General Medical Council at p. 1580,

> "Mr. Henderson emphasised the importance which Lord Scarman attached to purpose, and he also emphasised the distinction drawn by all their Lordships between judicial and administrative functions. He submitted, correctly, that the P. C. C. of the G. M. C. has to adjudicate in a formal and judicial manner on very serious issues which are of public importance and may also have the gravest effect on the reputation and career of an accused medical practitioner. Mr. Henderson was correct in submitting that the P. C. C. is exercising a sort of judicial power but in our judgment it is not the judicial power of the state which is being exercised. In *Attorney-General v. British Broadcasting Corporation,* the valuation court was part of the state's machinery of government, but an administrative part, and that explains the emphasis which the House of Lords placed on the distinction between judicial and administrative functions or purposes. In this case, by contrast, the P. C. C. is a statutory committee of a professional body specially incorporated by statute. It exercises a function which is recognisably a judicial function, and does so in the public interest. It acts in accordance with detailed procedural rules which have close similarities to those followed in courts of law. Nevertheless it is not part of the judicial system of the state. Instead it is exercising (albeit with statutory sanction) the self-regulatory power and duty of the medical profession to monitor and maintain standards of professional conduct."

70. These cases were considered by Ribeiro PJ in conjunction with Articles 35 and 80 of the Basic Law in *Stock Exchange of Hong Kong v New World Development* [2006] 2 HKLRD 518. Though the main issue in that appeal was the meaning of "court" in Article 35, the judgment of Ribeiro PJ[17] contained an insightful exposition on the context and the proper approach to the interpretation of these articles. After referring to Articles 19 and 80 to 85, His Lordship said at para. 45,

> "The purpose of the Basic Law provisions referred to is to establish the constitutional architecture of that system revolving around the courts of law, catering for the system's separation from that of the mainland, its continuity with what went before and safeguarding the independence of the judiciary."

71. As regards Article 35, Ribeiro PJ said at para. 50,

> "This is a crucial additional feature of the constitutional architecture of the Basic Law in relation to the judicial system of the Region. Article 35 ensures that the fundamental rights conferred by the Basic Law as well as the legal rights and obligations previously in force and carried through to apply in the HKSAR are enforceable by individuals and justiciable in the courts. It gives life and practical effect to the provisions which establish the courts as the institutions charged with exercising the independent judicial power in the Region. This dimension of art. 35 is therefore concerned with ensuring access to the courts for such purposes, buttressed by provisions aimed at making such access effective."

72. At paras. 72 to 76 and 82 to 97 in the judgment in *New World* Ribeiro PJ considered the English cases on the concept of a court. In conjunction therewith, His Lordship also referred to *Yau Kwong Man* and *Shell Company of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275 at paras. 78 and 79 of the judgment. For present purposes, I find the following observation of His Lordship at para. 76 pertinent,

> "Accordingly, the common law has adopted the concept of a 'court' as a body 'exercising the judicial power of the state' in the context of contempt, which, as it happens, is the same concept adopted by the Basic Law."

73. The corollary of this proposition is that the Articles in the Basic Law concerning access to the courts only apply in respect of a decision making process involving the exercise of the judicial power of the state. Under our legal system the judicial power of the state can be exercised in two different capacities: (1) original; and (2) supervisory. In the exercise of its original jurisdiction, the courts (meaning the courts of law) adjudicate upon disputes between parties and such disputes can be disputes of facts or laws.

74. In the exercise of its supervisory jurisdiction, the High Court through the

[17] *Stock Exchange of Hong Kong v New World Development* [2006] 2 HKLRD 518 at paras. 41 to 45, 49 to 50

mechanism of judicial review ensures all administrative bodies and inferior tribunals observe the rule of law. Legality, rationality and fairness are the touchstones of this jurisdiction. It is described as "one of the great historic artefacts of the common law" and it stems from "the constitutional role of the High Court as the guardian of standards of legality and due process"[18]. In the words of Law LJ in *R (Cart) v Upper Tribunal* [2010] 1 All ER 908 at para. 36,

> "The sense of the rule of law with which we are concerned rests in this principle, that statute law has to be mediated by an authoritative judicial source, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered."

Then at para. 37,

> "The principle I have suggested has its genesis in the self-evident fact that legislation consists in texts. Often --- and in every case of dispute or difficulty --- the texts cannot speak for themselves. Unless their meaning is mediated to the public, they are only letters on a page. They have to be interpreted. The interpreter's role cannot be filled by the legislature or the executive: for in that case they or either of them would be judge in their own cause, with the ills or arbitrary government which that would entail. Nor, generally, can the interpreter be constituted by the public body which has to administer the relevant law: for in that case the decision makers would write their own laws. The interpreter must be impartial, independent both of the legislature and of the persons affected by the texts' application, and authoritative --- accepted as the last word, subject only to any appeal. Only a court can fulfil the role."

The same can be said for the construction of the relevant departmental policy and other relevant documents.

75. Also, the court must be the ultimate arbiter in determining whether an administrative body acts in accordance with the standard of fairness and due process prescribed by the common law.

76. However, in the exercise of this supervisory jurisdiction the court has limited role in relation to factual findings. For the purpose of this judgment, I can take the relevant principles from *Halsbury's Laws of England,* 5th Edn. , Vol. 61 at para. 624[19],

[18] *R (Cart) v Upper Tribunal* [2010] 4 All ER 714 at paras. 20 and 35

[19] See also the judgment of Lord Slynn in *R (Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295 at paras. 49 to 53, and the judgment of Lord Nolan at pars. 61 and 62 and Lord Clyde at para. 169. For a local case where the court intervened on account of material mistake as to an established fact, see *Smart Gain Investment v Town Planning Board* HCAL 12 of 2006, 6 Nov 2007, A Cheung J.

> "In exercising their functions, public bodies evaluate evidence and reach conclusions of fact. The court will not ordinarily interfere with the evaluation of evidence or conclusions of fact reached by a public body properly directing itself in law. The exercise of statutory powers on the basis of a mistaken view of the relevant facts will, however, be quashed where there was no evidence, or no sufficient evidence, available to the decision-maker on which, properly directing himself as to the law, he could reasonably have formed that view. The court may also intervene where a body has reached a decision which is based on a material mistake as to an established fact."

77. Para. 624 continues to state that a different approach applies in respect of jurisdictional facts.

78. In certain cases, in addition to the common law supervisory function, there are legislations conferring statutory appellate jurisdictions on the courts in respect of the decisions of some administrative bodies. In such cases, whilst the court handling the appeals would be exercising the judicial power of the state, this should not be confused with the nature and character of the decision making process of the administrative body in question. In other words, it does not necessarily follow from the fact that there is a statutory mechanism for appeals to the court that the primary decision maker is exercising a judicial power of the state. Appeals are creatures of the statutes and the permissible scope of an appeal are determined by the relevant piece of legislation.

79. Therefore, in the consideration of the substance of a resident's constitutional right of access to the courts as enshrined in Article 35 of the Basic Law and buttressed by Article 80, the first question to be asked is in what manner the exercise of the judicial power of the state should be involved regarding the subject matter at hand. If the primary decision is, upon proper analysis, in substance an exercise of original judicial power of the state, an exercise of such power by a body other than the courts of law is prima facie a curtailment of the constitutional right. Such curtailment would then have to be justified under the proportionality test laid down in *Solicitor v Law Society of Hong Kong* (2003) 6 HKCFAR 570 and recently applied in *Charles Mok v Tam Wai Ho* FACV 8 of 2010, 13 December 2010[20]. On the other hand, if the primary decision is an administrative one, the constitutional right of access to the courts manifests itself in the form of the exercise by the court of its supervisory jurisdiction through judicial review. It is then for the court to decide on the facts and circumstances in each case the extent to which the court could intervene (including intervention on the basis of errors of material facts). As held by the English Court of Appeal in *R (Cart) v Upper Tribunal* [2010] 4 All ER 714 at para. 28,

> "In our judgment the scope of judicial review available in relation to any amenable decision-making body is necessarily a matter of law. As Lord Diplock said in *IRC v National Federation of Self Employed and Small Businesses* [1982] AC 617 at 639-640, the rules of standing in judicial review,

[20] The proportionality test is summarized by Chief Justice Ma at para. 28 of the judgment in *Charles Mok*.

> ‘ were made by judges; by judges they can be changed, and so they have been over the years to meet the need to preserve the integrity of the rule of law despite changes in the social structure, methods of government and the extent to which the activities of private citizens are controlled by governmental authorities …’
>
> What is true of the rules of standing is equally true of the substantive principles of judicial review.”

80. At this juncture, I shall digress from my analysis on the constitutional role of our courts of law in the context of our Basic Law and consider the Australian cases relied upon by Mr Dykes.

81. In *British Imperial Oil Co. v Federal Commissioner of Taxation* (1925) 35 CLR 422, the High Court of Australia held that the Board of Appeal created under the Income Tax Assessment Act was conferred judicial power which could only be exercised by the High Court or the Federal Court under Section 71 of the Australian Constitution. There was an alternative procedure for appeal to the courts. However, if a taxpayer appealed to the Board of Appeal, the decision of the Board on questions of fact was final though there was a right to appeal to the High Court on questions of law. Knox CJ said at p. 432 to 433,

> “The power conferred on the Board of determining questions of law, the association of the Board as a tribunal of appeal with the High Court and the Supreme Court of a State, and the provision of an appeal to the High Court in its appellate jurisdiction from any order of the Board, except a decision on a question of fact, in my opinion establish that the expressed intention of Parliament was to confer on the Board portion of the judicial power of the Commonwealth, which at any rate includes the power to adjudicate between adverse parties as to legal claims, rights and obligations, and to order right to be done in the matter. … And it is clear by the express terms of s. 44 that the Board of Appeal in hearing references is to have the same powers, so far as applicable, as are conferred on it by s. 51 in regard to appeals. It follows that Parliament has by this legislation purported to vest in the Board of Appeal … portion of the judicial power of the Commonwealth. The decision in [*Waterside Workers’ Federation of Australia v JW Alexander* (1918) 25 CLR 434] establishes that the judicial power of the Commonwealth can only be vested in ‘Courts’, that is, in Courts of law in the strict sense …”

82. As a result of that decision, the Income Tax Assessment Act was amended. The Board of Appeal was substituted by a Board of Review with a major difference that the decision of the Board of Review was not stated to be conclusive for any purpose. The new Board of Review was challenged again and the case reached the Privy Council in *Shell v Federal Commissioner of Taxation* [1921] AC 275. The Judicial Committee held that the Board of Review was in the nature of administrative machinery to which a taxpayer can

resort at his option and there was no transgression of the Constitution. Mr Dykes stressed the importance placed by the Judicial Committee between the old Board of Appeal and the Board of Review in terms of the finality on the Board's finding of facts. But what was said by their Lordships at p. 296 to 298 suggested a more refined approach. The following parts of the judgment are indicative of the approach,

> "The authorities are clear to show that there are tribunals with many of the trappings of a Court which, nevertheless, are not Courts in the strict sense of exercising judicial power. " (at p. 296)
>
> "… it may be useful to enumerate some negative propositions on this subject:
>
> 1. A tribunal is not necessarily a Court in this strict sense because it gives a final decision.
> 2. Nor because it hears witnesses on oath.
> 3. Nor because two or more contending parties appear before it between whom it has to decide.
> 4. Nor because it gives decisions which affect the rights of subject.
> 5. Nor because there is an appeal to a Court.
> 6. Nor because it is a body to which a matter is referred by another body." (at p. 297)
>
> "1An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. Mere externals do not make a direction to an administrative officer by any an ad hoc tribunal an exercise by a Court of judicial power." (p. 298)

83. The actual decision in that case was set out at p. 298. The Judicial Committee expressed agreement with the views of the High Court of Australia in the *Shell* case. After referring to the judgment of Issacs J, the conclusion of the High Court was summarized by the Judicial Committee as follows,

> "In that view they have come to the conclusion that the legislation in this case does not transgress the limits laid down by the Constitution, because the Board of Review are not exercising judicial powers, but are merely in the same position as the Commissioner himself --- namely, they are another administrative tribunal which is reviewing the determination of the Commissioner who admittedly is not judicial, but executive."

84. Even though the difference between the old Board of Appeal and the Board of Review was referred to, in the light of the approach of the Privy Council in the *Shell* case as demonstrated above, it is by no means clear to me that the Judicial Committee agreed with the approach of Knox CJ in deciding whether the old Board of Appeal was exercising judicial power in the context of the Australian Constitution.

85. However, for present purposes, it does not really matter. First, even in the context of Australian law, the law has moved on. The more recent Australian cases show that the question (whether a particular body exercises judicial power reserved exclusively to the courts of law) cannot be determined solely by inquiring whether it exercises a power to adjudicate between adverse parties. There are several authorities on point and they were referred to by A Cheung J in *Luk Ka Cheung v Market Misconduct Tribunal* [2009] 1 HKLRD 114. It suffices to say that the later Australian cases show that there is no satisfactory single formula for defining judicial power. Depending on the facts of the case many facets of the relevant decision have to be considered including historical development, the practical effect of the decision, the wordings of the relevant statute, how the decision is to be enforced etc. , see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at p. 267-9 and *Albarran v Companies Board* (2007) 231 CLR 350 at paras. 68 to 90. I would just quote from one dicta cited by the court in *Brandy* at p. 267 taken from the earlier decision of *Precision Data Holdings v Wills* (1991) 173 CLR 167 at 188-189,

> "The acknowledged difficulty, if not impossibility, of framing a definition of judicial power that is at once exclusive and exhaustive arises from the circumstance that many positive features which are essential to the exercise of the power are not by themselves conclusive of it. Thus, although the finding of facts and the making of value judgments, even the formation of an opinion as to the legal rights and obligations of parties, are common ingredients in the exercise of judicial power, they may also be elements in the exercise of administrative and legislative power."

86. Second, for the reasons given by A Cheung J at paras. 29 to 36 of his judgment in *Luk Ka Cheung*, it is unsafe to simply borrow and apply the Australian jurisprudence on the meaning of judicial power without regard to the difference between the strict Australian constitutional approach to separation of power based on the United States federal model and the constitutional order in Hong Kong enshrined in the Basic Law. For this reason, it is more pertinent for our purposes to have regard to the purpose of the relevant articles in the Basic Law dealing with access to the courts as explained by Ribeiro PJ in *New World*. His Lordship pinpointed continuity with the previous legal system practiced in Hong Kong as one of the objectives.

87. In *Luk Ka Cheung*, A Cheung J acknowledged that the principle of separation of power is enshrined in the Basic Law and the judicial power of the HKSAR is exclusively vested in the Judiciary. The issue before the court was whether the Market Misconduct Tribunal exercises such power. His Lordship took into account of the following facets of the jurisdiction of the Tribunal in concluding that the Tribunal does not exercise the judicial power of the State: (1) the novelty of the subject matter; (2) the Tribunal did not decide criminal guilt; (3) the Tribunal does not decide civil liability; (4) nature of the function of the Tribunal; (5) registration of the Tribunal's orders; (6) the Tribunal's powers; and (7) policy intention. The theme of continuity was again highlighted in his judgment at para. 36,

> "It is plain that in a modern society like Hong Kong, administrative tribunals and bodies have an important role to play. This is not a new phenomenon. It was already the case before the Basic Law was promulgated. Given the theme of continuity, it would be very surprising if the effect of the Basic Law, upon its proper interpretation, were to outlaw these administrative tribunals and bodies for ousting the jurisdiction or usurping the judicial functions of the courts of judicature of the HKSAR. Or put in another way, the Basic Law should be interpreted in such a way as to enable, so far as violence is not done to the principle of separation of powers as understood in the tradition of English common law, the continued existence and development of administrative tribunals and bodies. This calls for a flexible and realistic, as opposed to an idealistic, approach to the doctrine of separation of powers, and a purposive and contextualized interpretation of the scope and meaning of 'judicial power' in the Basic Law, rather than following indiscriminately the strict interpretation adopted by the Australian courts towards their own Constitution, which was written under very different circumstances in order to serve its own purposes."

88. Third, *British Imperial Oil* was decided in 1925. At that time judicial review was not as developed as it is. Thus, no consideration was given in that case to the possibility of judicial control in respect of the Board of Appeal's decision in the exercise of the supervisory jurisdiction of the court. Further, the possibility of challenging factual findings in the context of an appeal on questions of law based on the principles laid down in *Edwards v Bairstow* [1956] AC 14 was also not as well established as today. Insofar as the rationale for the holding in *British Imperial Oil* that the Board was exercising judicial power was based on the conclusiveness of its factual findings, it has lost much of its force in today's setting due to subsequent developments in the law in these two areas.

89. Fourth, I do not find anything in the *British Imperial Oil* judgment that invalidates my analysis at paras. 65 to 79 above. In the light of Mr Dykes' submissions, the Applicants' challenge in the present proceedings is directed towards the conclusiveness of the factual findings of the Board of Review instead of denial of access to court in terms of its supervisory jurisdiction. It is not disputed that the High Court can entertain judicial review in respect of some aspects of the decision making process of the Board of Review. Further, the availability of appeal on question of law by case stated provides an additional statutory mode of bringing the matter to a court of law. In accordance with established principles, in the exercise of its supervisory jurisdiction by way of judicial review, the High Court will have regard to the alternative available to an applicant by way of statutory appeal and normally resort should be made to that alternative. However, in cases where an applicant can demonstrate that the statutory alternative of appeal is not sufficient to safeguard his interest, application for judicial review can be made[21].

90. As explained above, the availability of statutory appeal to a court of law does not necessarily mean that the lower tier tribunal, viz. the Board of Review, exercises judicial

[21] See for example *Three Weekly Limited v Obscene Articles Tribunal* HCAL 42 & 43 of 2003, 29 June 2006; on appeal [2007] 3 HKLRD 673

power of the HKSAR. The latter question has to be answered by an analysis as to the true nature, character and function of the power exercised by the Board of Review. If the conclusion from such analysis were that the Board of Review only exercises an administrative power, the right of access to the courts only confers our residents the right to evoke the court's supervisory jurisdiction by way of judicial review plus whatever statutory appellate jurisdiction over the subject matter conferred upon the courts of law by statutes.

91. Thus, the crucial issue in the present application is whether the Board of Review exercises the judicial power of the HKSAR. To answer that question, one must examine the relevant facets of a decision by the Board of Review.

Does the Board of Review exercise judicial power of the state?

92. In my judgment, one should start with the fundamental nature and function of a tax assessment in Hong Kong. As recited earlier in this judgment, the tax assessment process starts with an assessment by an assessor. The assessor has to apply the statutory provisions in the Inland Revenue Ordinance to the facts of the particular case before him to arrive at an assessment. The facts are taken from the tax returns and whatever additional information the assessor obtains from his inquiry.

93. The function and purpose of a tax assessment is to facilitate the collection of revenue for the HKSAR[22]. Traditionally collection of revenue is not regarded as judicial business. Rather, it is part of the function of the executive arm of the government. Mr Dykes did not suggest that the assessment by an assessor is a judicial act as opposed to an administrative act. Likewise, when an objection is raised and determined by the Commissioner, the determination is an administrative one. Thus, in *Commissioner of Inland Revenue v Lee Lai-ping* (1993) 3 HKPLR 141 at p. 151, Judge Cheung (as Cheung JA then was) regarded the assessment to be an administrative act instead of a determination of the private right of the taxpayer even though the fiscal measure had repercussion on her property rights. See also Lord Wilberforce in *R v IRC, ex p Federation of Self-Employed* [1982] AC 617 at p. 632C to E. This characterization of the nature of an assessment is also in line with the judgment of the Privy Council in *Shell v Federal Commissioner of Taxation* [1921] AC 275 and the European jurisprudence on Article 6 in the context of holding that taxation matters are not within the meaning of "civil rights and obligations". The obligation to pay taxes is regarded as "public" obligations deriving from a citizen's "normal civic duties in a democratic society", see *Schouten & Meldrum v Netherlands* (1994) 19 EHRR 432 para. 50.

94. Is there any reason why the nature and character of the process change upon an appeal against an assessment to the Board of Review? The purpose and function of such an

[22] Articles 7, 106, 107 and 108 of the Basic Law laid down the fundamental principles regarding the fiscal system of the HKSAR: it shall have independent finances and the financial revenues of the HKSAR shall be used exclusively for its own purposes; the principle of keeping expenditure within the limits of revenues in drawing up budgets; keeping an independent taxation system with reference to the low tax policy previously pursued.

appeal remains the same, viz. the ascertainment of the quantum of the tax payable by the taxpayer. Though the process and the procedure adopted by the Board of Review has great resemblance with a proceedings in a court of law, this is to achieve fairness for the parties and, as observed by the Privy Council in *Shell*, such features per se would not negate the possibility that the Board is performing an administrative function.

95. As regards the conclusiveness on the factual findings by the Board, given the expanded scope of possible challenges even in the context of question of law along the *Edwards v Bairstow* line, the apparent finality provided for under Section 69(1) of the Ordinance cannot exclude supervision by a court of law as to the rationality and sufficiency of evidence for a material finding of facts. Thus, such finality by itself cannot attract too much weight in deciding whether the appeal before the Board is administrative or judicial in nature.

96. Plainly, the Board of Review does not determine upon the guilt or innocence of a taxpayer. For the reasons given in the authorities on Article 6 of the European Convention and Article 10 of our Bill of Rights, neither does the Board determine any civil rights or obligations of the taxpayer. Though it is provided in Section 75 of the Ordinance that the tax due and payable shall be recoverable as a civil debt due to the Government, the recovery process involves legal proceedings in the District Court. Admittedly the scope of defence is limited by Section 75(4) in such proceedings, the rationale for such limitation is that challenges based on arguments that the tax is excessive or incorrect should have been canvassed in the statutory appeal mechanism where access to the courts is available in an appeal by way of case stated. The interposition of another set of proceedings in the District Court between an enforceable judgment and a tax assessment is an indication that the proceedings before the Board of Review is not judicial business per se.

97. The Board of Review was first established in 1940. According to the affidavit of the Chief Assessor, taxation of income was introduced in Hong Kong in 1940 under the War Revenue Ordinance and section 40 of that ordinance provided for appeal to the Board. After the war ended, the Inland Revenue Ordinance was introduced in 1947 to make the war time tax regime permanent. Section 66 of the Inland Revenue Ordinance 1947 provided for the establishment of the Board of Review. Originally, there was a proviso in Section 70(1) for appeal from the Board of Review to the Supreme Court on question of fact with the leave of the court. That proviso was deleted in 1957 for the reason that there was no procedure for obtaining such leave. Thus, notwithstanding what appeared in the statute book, in Hong Kong there had never been any appeal on question of fact to the Supreme Court.

98. Historically, the Board of Review has been an efficient and relatively inexpensive avenue for taxpayers to seek redress if the Commissioner determined against their objections to assessments. It has long been a feature in our tax assessment regime before the promulgation of the Basic Law. Bearing in mind the theme of continuity in the application of the Basic Law, there has to be very compelling and sound reason before it can be concluded that the combined effect of Articles 35 and 80 of the Basic Law is to render the exercise of the Board of its statutory jurisdiction unconstitutional.

99. Having regard to all the circumstances and the relevant facets of the Board's power, I conclude that the Board only exercises administrative power and its determination of tax appeal does not involve the exercise of the judicial power of the HKSAR. In this connection, I find the observations of Starke J in the *Shell* case apposite in the present context,

> "[The function of the Commissioner] is to ascertain the amount of income upon which the tax is imposed. That does not, in my opinion, involve any exercise of the judicial power of the Commonwealth; it is an administrative function. The decision of a Board of Review stands, as we have seen, precisely in the same position. Its functions are in aid of the administrative functions of government."[23]

100. In coming to such conclusion, I am conscious of the distinction between the Board of Review in the *Shell* case and our Board of Review, in particular as to the right of further appeal on facts to the court as regards the former. However, as the Privy Council observed, the mere fact that a decision of a tribunal is final is not conclusive in deciding whether it exercises judicial power of the state. The observations of Robert Walker LJ[24] again serves as a good reminder, and I respectfully echoed with modifications what His Lordship said in the present context,

> "[The Board of Review] It exercises a function which is recognisably a judicial function, and does so in the public interest. It acts in accordance with detailed procedural rules which have close similarities to those followed in courts of law. Nevertheless it is not part of the judicial system of the state. Instead it is exercising (albeit with statutory sanction) [an administrative appeal function in aid of the duty of the Commissioner in tax assessment]."

101. Taking all relevant facets into account, I hold that the Board does not exercise any judicial power of the HKSAR.

The Applicants' access to the courts

102. Given the administrative nature of such appeal, the Applicants' right of access to the courts is primarily satisfied by the exercise of the court's supervisory jurisdiction through the availability of judicial review. In addition, statutory appeal on questions of law is available and such an appeal provides an alternative avenue for the challenge of factual findings on the *Edwards v Bairstow* basis. In the context of a tax appeal, these avenues provide sufficient access to the court with full jurisdiction. As observed by Lord Hoffmann in the *Alconbury* case[25], "full jurisdiction" does not mean full decision-making power. Rather it means full jurisdiction to deal with the case as the nature of the decision requires.

[23] Cited in the judgment of the Privy Council at p. 295
[24] In *General Medical Council v British Broadcasting Corp* [1998] 1 WLR 1573
[25] [2003] 2 AC 295 at para. 87

103. In *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430, the court considered and rejected the contention that because an administrative decision involved disputes of fact Article 6 of the European Convention mandated such determination to be made by an impartial and independent body and the availability of appeal to county court on point of law was not sufficient to redress the lack of independence of the primary decision maker. After referring to the relevant Strasbourg jurisprudence, Lord Hoffmann identified the following as the great principle drawn from the cases including *Bryan v United Kingdom* (19950 21 EHRR 342 at para. 45,

> "in assessing the sufficiency of the review … it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal."

104. At para. 57 in the judgment of *Runa Begum,* Lord Hoffmann set out the constitutional importance of the right under Article 6,

> "`The concern of the court … is to uphold the rule of law and to insist that decisions which on generally accepted principles are appropriate only for judicial decision should be so decided. In the case of decisions appropriate for administrative decision, its concern, again founded on the rule of law, is that there should be the possibility of adequate judicial review. For this purpose, cases like *Bryan* and *Kingsley*[26] make it clear that limitations on practical grounds on the right to a review of the findings of fact will be acceptable."

105. Further at para. 59, Lord Hoffmann went on to say,

> "In my opinion the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact."

106. *Runa Begum* was a case concerning the duty of the local housing authority to secure accommodation for a homeless person and the decision being challenged was whether an offer of accommodation was suitable. Admittedly the context is different from a tax appeal. However, I believe what was said by Lord Hoffmann in these dictum can be applied generally.

107. As we have seen, tax assessment has always been regarded and universally accepted as an administrative function. The European jurisprudence steadfastly maintained that tax matter forms part of the hard core of public-authority prerogatives. That being so, utilitarian considerations involving the balancing of public interest for efficient

[26] *Kingsley v United Kingdom* (2002) 35 EHRR 177

administration against private interest are relevant, see Lord Hoffmann at paras. 43 to 45 of *Runa Begum*. Assessment of tax is part of the process of the collection of revenue for financing the operation of the Government. The costs taken for the collection tax must not be disproportionate to the revenue generated. And there should not be undue delay in the process of assessment.

108. An appeal to the Board of Review is conducted in a manner similar to a judicial process with all the safeguards to fairness. The panel is independent and an appellant can appear with legal or other professional representation. Reasoned decision is given by the Board.

109. In such circumstances, it is difficult to see how it can be suggested that the statutory appeal and judicial review (with the permissible scope of challenges as discussed earlier) do not provide sufficient redress to satisfy the requirement of access to the courts of full jurisdiction.

110. In this connection, I am reinforced by the decision of the Supreme Court of Mauritius in *Mauritius Breweries v Commissioner of Income Tax* [1997] MR 1 which was subsequently endorsed by the Privy Council in *Jauffur v Commissioner of Income Tax* [2006] UKPC 32.

111. Is there anything in the case stated procedure which curtail the Applicants' exercise of their rights of access to the courts in respect of the tax assessments? Bearing in mind what I have said as to how the Case Stated procedure should have been applied in accordance with the guidance set out in the cases discussed above, I do not think there is any inherent obstacle in the procedure that hinders the effective presentation of their case to the courts within the proper remits of the exercise of the supervisory or appellate jurisdictions of the court. Whilst the procedure is cumbersome, the Applicants have had every opportunity in drafting the Case Stated to cater for a permissible challenge that could be entertained in the supervisory jurisdiction of the court. It was a matter for them to decide upon their grounds of challenge. As observed by Huggins VP in *Chinachem* they should ensure all the necessary essential matters were set out in the Case Stated. Any inadequacy in the Case could and should have been rectified by either a request for additional materials to be added or a challenge by way of judicial review or an application for an order under Section 69(4). But the Applicants could not complain about the court's omission to deal with a ground which has not been adequately canvassed in the Case if they did not ensure that the ground was properly formulated and the necessary material was included in it in the first place.

112. This appears to be what had happened in the present case. I have read the judgments in the Applicants' tax appeal from first instance to the Court of Final Appeal. I have also read the Case Stated and Appellants' Case and the Respondent's Case presented to the Court of Final Appeal. In the Appellants' Case, an attempt was made to argue that at first instance Burell J failed to accede to their request for remitting the Case to the Board for additional findings. At paras. 9 to 14 of the judgment of the Court of Final Appeal, Bokhary and Chan PJJ considered that contention and explained why Mr Swaine was incorrect and in

any event the additional findings did not assist the Appellants. Further at para. 15 of the judgment, Their Lordship pointed out that the Applicants' complaint of misdirection (that pure speculation is a factor against the finding that a person is carrying on a trade) was not the subject matter of any question posed in the Case Stated. Thus, the only question before the Court of Final Appeal was whether the true and only reasonable conclusion open to the Board was that the husband's dealings in securities and futures amounted to the carrying on of a trade or business (see para. 19 of the judgment). To this question, the Court of Final Appeal unanimously answered in the negative and the appeal was therefore dismissed.

113. In the course of the hearing of the present application, Mr Swaine submitted that the Applicants did not have the opportunity of properly putting before the court a case of misdirection in terms of the Board's failure to consider certain relevant matters and to make the relevant findings on the same because nobody perceived such matters to be relevant until the Court of Final Appeal changed the law. Counsel referred to paras. 65 to 96 in the judgment of McHugh NPJ.

114. I am not sure whether the Court of Final Appeal had changed the law in the light of the scope of the appeal before that court and the basis on which the other members of the Court of Final Appeal disposed of the appeal. It may be that counsel was encouraged by para. 100 to 102 of the judgment in making such submission.

115. However, even assuming that the law has been changed, as Mr Yuen submitted the Applicants' predicament was not caused by the Case Stated procedure. The crux of the matter is that the Applicants had not perceived the case in the same way as McHugh NPJ did and the tax appeal had never been argued accordingly. Thus, they would face with the same predicament whether the appeal was brought by way of Case Stated or otherwise.

116. Admittedly the Applicants could not bring an appeal on facts under the statutory appeal regime. But this limitation has nothing to do with the Case Stated procedure. Rather this is a restraint set upon the supervisory and the appellate jurisdiction of the court in respect of administrative decisions.

117. Hence, I conclude that the Applicants have all along enjoyed access to the courts with full jurisdiction to deal with all the proper complaints that could have arisen from his tax assessments.

Results

118. I therefore hold that the statutory appeal regime in the Inland Revenue Ordinance does not infringe any provisions of the Basic Law and the appeal conducted by the Applicants in HCIA 11 of 2005 culminated in FACV 14 of 2007 were valid and binding on the Applicants.

119. The application for judicial review is dismissed. I also make a costs order nisi that the Applicants shall pay the 2nd Respondent's costs, such costs to be taxed if not agreed.

(M H Lam)
Judge of the Court of First Instance
High Court

Mr Philip Dykes, SC, Mr John J E Swaine and Mr Anthony Wu, instructed by Messrs Raymond C P Lo & Co, for the Applicants

Mr Rimsky Yuen, SC and Ms Jennifer Tsui, instructed by the Department of Justice, For the 2nd Respondent