

CACV 119/2010

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATION REGION
COURT OF APPEAL
CIVIL APPEAL NO. 119 OF 2010
(ON APPEAL FROM HCIA NO. 8 OF 2009)**

BETWEEN

COMMISSIONER OF INLAND REVENUE Appellant

and

C G LIGHTING LIMITED Respondent

Before: Hon Tang Ag CJHC, Cheung JA and Yuen JA in Court
Date of Hearing : 5 May 2011
Date of Decision : 5 May 2011

DECISION

Hon Tang Ag CJHC:

1. This application for leave to appeal to the Court of Final Appeal is put first on the basis that it is as of right pursuant to section 22(1)(a) of the Hong Kong Court of Final Appeal Ordinance (Cap 484). Mr Barlow relies on both limbs of section 22(1)(a). The first limb is clearly inapplicable.

2. As for the second limb, in *Happy Dragon Restaurant Ltd v. The Director of Lands*, FAMV 18/2010 (unreported, 15 November 2010), the Chief Justice, after citing a passage (para. 24) from the judgment of the Appeal Committee, given by Ribeiro PJ in

China Field Ltd v Appeal Tribunal (Buildings) (No. 1) (2009) 12 HKCFAR 68, said in para. 11(3):

“(3) Applying this test, we are unpersuaded that the applicant’s claim for compensation was ‘clearly quantifiable’ at \$1 million or over. As noted above, the exercise in the quantification of compensation under the [Lands Resumption Ordinance, Cap. 124] is in many ways similar to the assessment of unliquidated damages. For this reason alone, this is likely to be a bar in many cases where compensation is claimed for a resumption. This is all the more so in the present case where the quantification of the applicant’s claim was at one stage nil (as the Lands Tribunal found) or substantial (as the Court of Appeal found). The respondent clearly fails to satisfy the requisite test.”

3. In *Best Origin Ltd v. Commissioner of Rating and Valuation*, CACV 67/2008 (unreported, dated 15 April 2011), this Court (Tang Ag CJHC, Kwan JA and A Cheung J) held that a rating appeal was indistinguishable from claims for compensation and that the second limb did not apply to a rating appeal.

4. Here we are concerned with an appeal against an assessment of profits tax. It is true that the result of Fok J and our judgment is that profits tax in excess of \$1 million will be payable. Even so, I believe the present application is covered by what the Chief Justice said in *Happy Dragon*. Moreover, at the Board of Review where the taxpayer was successful, the Board had remitted the matter to the Commissioner for apportionment which is akin to assessment.

5. Secondly, Mr Barlow relies on section 22(1)(b) and seeks leave on the basis that the proposed appeal raises questions of great general or public importance concerning the principles applicable to the identification of the source of the trading profits of Hong Kong taxpayers who engaged in manufacturing finished goods outside Hong Kong for the purpose of supplying offshore customers under contracts of sale entered into in Hong Kong.

6. In our judgment, we have endeavoured to apply the decisions of the Court of Final Appeal such as *ING Baring Securities (Hong Kong) Limited v CIR* (2007) 10 HKCFAR 417 and *Ngai Lik Electronics Co. Ltd v CIR* (2009) 12 HKCFAR 296.

7. It is said that we have misapplied or misunderstood the decisions. Even if that is right, that is not a question of great general or public importance.

8. Mr Barlow also submits that there is a widespread perception that liability to profits tax is being created by the court (meaning presumably the Court of Final Appeal) and not by the legislature. We are also told that Hong Kong Manufacturers Associations are particularly unhappy that they have been assessed to profits tax on such profits.

9. In my view, the courts have only applied the law as they understand it.

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10. In any event, the solution is not leave to appeal to the Court of Final Appeal but legislation.

11. So for the above reasons, I would dismiss the application for leave to appeal with costs.

Hon Cheung JA:

12. I agree.

Hon Yuen JA:

13. I agree.

(Robert Tang)
Ag Chief Judge, High Court

(Peter Cheung)
Justice of Appeal

(Maria Yuen)
Justice of Appeal

Mr Barrie Barlow, SC, instructed by Messrs Allen & Overy for the Taxpayer/Appellant

Mr Benjamin Yu, SC and Mr Eugene Fung, instructed by Department of Justice of the Appellant/Respondent