

INLAND REVENUE BOARD OF REVIEW DECISIONS

HCIA 1/2000

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

HIGH COURT INLAND REVENUE APPEAL NO. 1 OF 2000

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BETWEEN

AUST-KEY COMPANY LIMITED                      Appellant

and

COMMISSIONER OF INLAND REVENUE                      Respondent

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Coram: Hon Chung J in Court

Dates of Hearing: 21 July 2000 and 2 March 2001

Date of Handing Down Opinion: 21 March 2001

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**O P I N I O N**

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**Introduction**

This is the decision on the case stated by the Board of Review (said to be) pursuant to section 69 of the Inland Revenue Ordinance Cap. 112 which reads :

“(1)    The decision of the Board shall be final.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, together with a fee ...within 1 month of the date of the Board's decision ...

- (5) Any judge of the Court of First Instance shall hear and determine any question of law arising on the stated case and may in accordance with the decision of the court upon such question confirm, reduce, increase or annul the assessment determined by the Board, or may remit the case to the Board with the opinion of the court thereon. Where a case is so remitted by the court, the Board shall revise the assessment as the opinion of the court may require ...".

The 2 questions posed for the opinion of the Court by the Board are :

- “(1) After considering the evidence on valuation presented to the Board of Review by both parties, whether the Board was entitled to come to its own conclusion on the market value of the Property as at early November 1988.
- (2) Whether the Board of Review was obliged to seek third party professional opinion if the market value of both parties to the appeal are not accepted by the Board of Review”.

I shall discuss whether these questions can properly be called “questions of law” below. For the moment, I shall proceed to consider them assuming that they are.

### *The Background Facts*

The background facts leading to the hearing before the Board have been set out in the case stated and arose in the following manner.

The taxpayer used to own shop premises in Tai Po (“*the Property*”). It is common ground that when the Property was acquired, it was intended to be the taxpayer's capital asset. The taxpayer applied to the authorities sub-divide the Property into 87 shop units in August 1988. By July 1989, sub-division work was completed. From April 1989 to March 1993, the taxpayer sold 73 of the sub-divided units (5 of which were sold with existing tenancies). The 14 units still owned by the taxpayer were rented out.

The Revenue considered that when the Property was converted into 87 units, the taxpayer changed its intention from treating the Property as a capital asset to trading stock. The

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Board in essence agreed with the Revenue regarding this matter despite the taxpayer's arguments to the contrary. This point is no longer in issue before the Court in the case stated.

As a result of the taxpayer's change of intention regarding the shop units, the sale proceeds therefrom became taxable. The Revenue considered the value of the Property (before sub-division) should be \$16 million, based on a valuation by the Rating and Valuation Department ("*the R & V*"). On the other hand, the taxpayer assessed (through valuers engaged by it) that the value should be \$30 million.

The taxpayer's value was at one stage accepted by the Revenue but this was no longer the case when the matter was heard by the Board. At the time of the Board hearing, the taxpayer argued *inter alia* that the Revenue, having accepted its valuation, is estopped from departing from it after a reasonable period of time. Again, this argument is not relevant to this case stated.

At the end of the hearing, the Board assessed the Property's value to be \$25.5 million (not \$16 million or \$30 million). The practical consequence (to the taxpayer) of the difference in the Property's value is this. If the Property's value is higher, the difference between it and the amount of sale proceeds (that is, the profit) would be smaller and hence the amount taxable would be less.

### *The Relevant Findings of the Board*

From the 2 questions posed, it is apparent that the Board's findings relevant to the case stated are related to the valuation of the Property. In view of its importance herein, the relevant passages will be set out below :

"..On 16th May 1989, ..the Taxpayer's Valuer ..issued a brief valuation report valuing the Property to be worth HK\$30M ..The Taxpayer's Valuation Report is a one page [sic] with a description report annexed thereto. The Taxpayer's Valuation Report valued the Property as one single unit with vacant possession ... The Taxpayer's Valuer said in his testimony to the Board that he used the comparable approach in the valuation. The Taxpayer's Valuation Report stated that the ...instruction was to prepare a valuation ..."*for internal account purpose*" ...

..The evidence relating to the market value ..presented ..by the Taxpayer were [sic]:-

..The Taxpayer's Valuation Report ...

..The Taxpayer's Valuer gave evidence at the hearings ...

## INLAND REVENUE BOARD OF REVIEW DECISIONS

..The valuation evidence presented .. by the Revenue were [sic]:-

..An inter-departmental memo dated 2nd August 1994 ..written by a C. Mak for [the R & V] ...

..A Valuation Report by a valuation surveyor from [the R & V], Mr. K. C. Tsang (“**R&V Valuer**”) ...

..The R&V Valuer gave evidence at the hearings before the Board ..Mr. or Ms. C. Mak ...was not called to give evidence nor were any working papers to support the valuation in the Interdepartmental Memo presented to the Board ...

..The Taxpayer’ s Valuer testified that he had lost his file and working papers relating to the Taxpayer’ s Valuation Report. Thus, he was unable to go into any details at all to support the valuation of HK\$30M ..The Taxpayer’ s Valuer had seen the R&V Valuation Report and was able to provide the Board ...with valuable comments thereon ...

... The Revenue relied on both the R&V Valuation Report and the Interdepartmental Memo to support its HK\$16M valuation ...

### Board’ s Decision on Valuation

..Other than a bare assertion ..that the value of the Property ..was \$30M, the Taxpayer’ s valuer was unable to provide any evidence to support his valuation. Only a one page letter ..remains. His working file has been lost ..Therefore, the Taxpayer’ s Valuer evidence was of no assistance to this Board ...

..The Taxpayer’ s Valuer, however, did give valuable comments on [the R&V’ s] valuation report and offered alternative views on the R&V’ s valuation, the comparables used and the adjustments made ...

..[The R&V’ s] valuation ...was presented to this Board through the oral testimony of a valuation of surveyor ..The comparables and calculations used ... was subject to examination by the Taxpayer’ [sic] Representative and this Board. This valuation forms the basis upon which we make our finding ...

..We note the comments of the Taxpayer’ s Valuer on [the R & V] valuation ... We do not fully agree with adjustments made to the 3 comparables used by [the R & V]. We would make the following adjustments to the comparables as follows ...

## INLAND REVENUE BOARD OF REVIEW DECISIONS

..The time adjustments ..based on the Rental and Price Indices ..don' t directly apply to the Property. For lack of better evidence, we used it as a basis for our determination ...

..We do not agree that there should be any design/finishing adjustment. Hence this adjustment for the first comparable is reduced to zero ...

..We do not agree that the amount of the Quantum Allowance ..will be lost in the sub-divided units of the Property. According to [the R & V], one-third of the area will be lost to corridors and circulation/commercial areas. However, one must also consider that there is undoubtedly a difference in the [unit floor] price ... between large and small units, all else being equal. Smaller units will have a higher unit price ...

...Based on the adjusted price ...We find that the market value ...to be HK\$25.5M”.

### *The First Question in the Case Stated*

As state above, the first of the 2 questions posed by the Board is :

“(1) After considering the evidence on valuation presented to the Board of Review by both parties, whether the Board was entitled to come to its own conclusion on the market value of the Property as at early November 1988.”

The inappropriateness of this question for an opinion of the Court is obvious. As it is now phrased, the answer must invariably be in the affirmative. The Board :

- (a) is set up by s. 65 of Cap. 112 for “the purpose of hearing appeals”;
- (b) at the hearing of the appeal, one of the powers of the Board is that it “may ...admit or reject any evidence adduced, whether oral or documentary ...”: s. 68(7) of Cap. 112.

As a statutorily established appeal tribunal, it is obvious that the Board has the power *inter alia* to decide on the facts relevant to the appeal. In order for it to properly do so, as s. 68(7) above clearly shows, the Board has been empowered to admit or reject any evidence adduced as appropriate.

With the above in mind, not only is the Board entitled to make its own findings of fact after having considered the evidence (including valuation evidence if relevant), it is under a duty to do so.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

It became apparent during the hearing before the Court that the taxpayer's real complaint against the Board is this. Having rejected the value assigned to the Property by both parties, the Board is not entitled to, and should not, make a finding on the Property's value (which is different from that assigned by either party).

At the beginning of the hearing on 21 July 2000, I informed counsel of my concern over the difference between the first question (as worded) and the real complaint of the taxpayer. As a result, the hearing was adjourned to enable the taxpayer to consider whether to amend the case stated. When the hearing resumed on 2 March 2001, a draft amended case stated was placed before the Court. Counsel for the Revenue opposed the draft amended case stated by reason that it has not been amended according to s. 69(4) of Cap. 112. However, counsel for the Revenue indicated he would not object to arguments relating to the real complaint being put forth in the absence of an amendment.

The taxpayer's real complaint only has substance if the Board had rejected all valuation evidence adduced by both parties. In such a case, there will be no evidence left for the Board to base a finding on the Property's value.

As a fact, however, the Board has not rejected all valuation evidence. What it has done can be summarized as follows :

- (a) the taxpayer's valuation evidence is totally rejected;
- (b) the R & V's valuation was used to form the basis upon which the Board made its finding on the Property's value;
- (c) adjustments were made by the Board to the comparables used in the R & V's valuation in the following manner;
- (d) the comments of the taxpayer's valuer on the R & V's valuation, comparables and the adjustments made were taken into account by the Board;
- (e) the design/finishing adjustment (-10%) in the R & V's valuation was rejected (to the taxpayer's favour);
- (f) the time adjustments in the R & V's valuation were adjusted by the Board using the Rental and Price Indices as a basis;
- (g) the "Quantum Allowance" (or size efficiency) was adjusted by the Board taking into consideration the higher unit price of smaller units. The R & V's adjustments were halved (to the taxpayer's favour);

## INLAND REVENUE BOARD OF REVIEW DECISIONS

- (h) the value of \$25.5 million was arrived at as a result.

Although my view is strictly irrelevant to the case stated, I do not consider there is anything wrong in the Board's approach set out above. There is no complaint that the Board's finding is irrational or perverse and I do not consider any such complaint can be validly made.

As a tribunal of fact,

- (a) the extent to which a piece of evidence should be accepted;
- (b) the extent to which a piece of evidence should be rejected;
- (c) the use to which the evidence which has been accepted by the Board should be put,

are all matters falling within the Board's jurisdiction and are matters for it to decide.

### *The Second Question in the Case Stated*

The second question posed by the Board is :

- “(2) Whether the Board of Review was obliged to seek third party professional opinion if the market value of both parties to the appeal are not accepted by the Board of Review”.

I do not see how this question (as presently worded) can be answered as a matter of law. The inappropriateness of this question is shown by the argument of counsel for the Revenue to the effect that the Board has not completely rejected the parties' evidence relating to the market value of the Property. Strictly speaking it is not open to him to do so because the question can be read as meaning that the evidence has been totally rejected. The taxpayer, however, did not object to this line of argument at the hearing.

If the question had been :

- “(2) Whether the Board of Review was obliged to seek third party professional opinion if the market value of both parties to the appeal are completely not accepted by the Board of Review” (emphasis supplied),

the answer to this question would have been in the negative. There may be (subject to further arguments on this point) inherent jurisdiction on the part of the Board to decide (as a matter of discretion) whether further expert evidence is needed if the expert evidence adduced has been totally rejected. However, the Board may decide further expert evidence is not needed and the

## INLAND REVENUE BOARD OF REVIEW DECISIONS

appeal can be determined based on the burden of proof (in other words, the party which bears the burden of proof will fail on the point where expert evidence is needed). Where there has only been a partial rejection of the evidence, the proper answer will have to depend on (a) the extent to which and/or (b) the reason(s) why, the Board did not accept the valuation evidence.

In the factual context of the case stated, I do not find that there is any error in the Board' s approach (but this is strictly irrelevant to the case stated). Likewise, there is (correctly) no complaint that the Board' s finding is irrational or perverse.

### *Conclusion and Other Matters*

It follows from my earlier observations (see above) that the case stated has not raised any question of law properly within the meaning of s. 69 of Cap. 112. However, assuming that they are properly questions of law raised thereunder, the Court' s opinion is that :

- (a) in relation to the first question, the Board is entitled to come to its own conclusion on the market value of the Property as at early November 1988 after considering the evidence on valuation presented to the Board by both parties;
- (b) in relation to the second question, the Board was obliged to seek third party professional opinion if the market value of both parties are completely not accepted by the Board.

Further, having considered the circumstances of this case, I would if necessary confirm the Board' s finding on the market value of the Property.

The proper course for the Board to take when it is asked to state a case but which involves no proper question of law is to decline the request. If the applicant (whether the taxpayer or the Revenue) is dissatisfied with the Board' s refusal to state a case, it is up to the applicant to decide whether to take further action (and if so, what action to take).

### *Costs*

The parties agreed that a costs order nisi pursuant to RHC Ord 42 r 5B(6) can be included. No useful purpose has been achieved by the case stated. The Revenue has in essence been successful herein. The costs should be paid by the taxpayer to the Revenue adopting the usual rule that costs should follow the event.

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



INLAND REVENUE BOARD OF REVIEW DECISIONS

Ms Lily Yew, instructed by Messrs. W. L. Yuen & Co., for the Appellant

Mr. Ho Chi Sum, SGC of the Department of Justice, for the Respondent

INLAND REVENUE BOARD OF REVIEW DECISIONS

HCIA000001M/2000

HCIA 1/2000

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CORRIGENDUM  
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Kindly note the following amendment in the Opinion handed down by the Honourable Mr Justice Chung sitting in Court on 21 March 2000:

Add "not" before "obliged" which appears between C and D in page 11.

Dated the 22nd day of March, 2001

(Lau Chi Pang)  
Clerk to Hon. Chung, J.