HCIA6/2003

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

INLAND REVENUE APPEAL NO.6 OF 2003

BETWEEN

HUI KING YIN Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before : Hon Yam J in Court
Date of Hearing : 27 April 2004
Date of Judgment : 27 April 2004

J U D G M E N T

Introduction

1. On 7 October 1996, the appellant by a provisional sale and purchase agreement purchased the subject property in this appeal at $26.6 million, known as House B7, Springfield Garden, 5-9 Shouson Hill Road West, Hong Kong ("Springfield B7"). On 9 February 1997, the

appellant sold Springfield B7 by a provisional sale and purchase agreement for $37 million. The sale was completed on 9 May 1997.

2. On 24 December 2001 the Acting Deputy Commissioner of Inland Revenue determined that the appellant was liable to profit tax in respect of the gain he made in the purchase and sale of Springfield B7.

3. By a majority decision of the Board of Review of Inland Revenue ("the Board") dated 17 January 2003, the Board dismissed the appellant' s appeal against the said Determination. The present appeal is by way of Case Stated brought by the appellant under section 69 of the Inland Revenue Ordinance, Cap.112 ("the Ordinance") against the decision of the Board. The main ground of appeal is that the appellant maintained that Springfield B7 was not purchased by way of trading. He only intended House B7 to be his place of residence at the time when he purchased the same in October 1996.

The finding of facts by the Board

4. Before I set out the Case Stated, I shall set out herein below further facts of the case which were either not disputed by the appellant or found by the majority of the Board.

5. After the aforesaid purchase and sale of Springfield B7 and by a letter dated 26 June 1997, the appellant' s accountants, one Messrs Paul M.P. Chan & Co. informed the assessor of the Inland Revenue Department in the tax return for the year of assessment 1996/1997 for the appellant as follows:

> "For your information, we are instructed by our client [i.e. the appellant] to furnish the details regarding his property transactions during the year as follows:"

6. In the following table, the learned accountants listed out two sections, namely "trade nature transactions" and "non-trade nature transactions". Three properties were stated under the former category and Springfield B7 was one of them.

7. The other two transactions involved House No.114, Cedar House [*sic*] which is in Red Hill Peninsula ("Cedar Drive 114") and Flat A2, 2/F and Carpark No.27, Tower I, Broom Garden, 1 Broom Road, Hong Kong. (The appellant apparently later said this Broom Garden flat was originally purchased for his mother-in-law and therefore not a trade nature transaction but this is not a subject matter of this appeal.)

8. The next thing that happened, as surely as night follows day, was on 10 September 1998, the Inland Revenue issued an assessment against the appellant in respect of, *inter alia*, the profits arising from his sale of Springfield B7.

9. By a further letter dated 9 October 1997, Messrs Paul P.M. Chan & Co. objected to that assessment only on the basis that the sale was completed on 9 May 1997 and thus the profit of this transaction should be included in the following year, i.e. "1997/1998 assessment". Nothing was said that the subject property should *not* be a "trade nature transaction" or that they had made a mistake to include the same under this category.

The appellant's case

10. However, the appellant's case in relation to Springfield B7 now is basically as follows:

(1) The appellant came to Hong Kong from the Mainland in 1979. He is an accomplished musician heavily involved in the production of musical works for children. The appellant got married on 2 December 1988. They have two sons: the first son was born in July 1992 and the second one in February 1996. He wanted his sons to study at the Singapore International School in Nam Long Shan Road and therefore he looked for premises in the vicinity. His elder son was about four or five years old in 1996/1997 and the younger was one to two years old. In other words, he was trying to improve the living conditions for his family since 1995. The appellant had actually sold his place of residence there and then in Taikooshing on 18 September 1996.

(2) The appellant and his wife have also been heavily involved in the trading of landed properties in Hong Kong and as such controlled a large number of private limited companies for such purposes. (The Board had listed out 12 of them in its decision.) The appellant and those companies under his control bought and sold a large number of properties during the height of the property market. Some of their transactions pertaining to properties in the southern part of the Hong Kong Island for the period between April 1996 to February 1998 were set out in the majority decision.

(3) Prior to the purchase of Springfield B7, the appellant had bought Springfield B3. However, the majority of the houses in Springfield Garden had swimming pool outside the sitting room and he was afraid that the pool would be dangerous to his younger son.

(5) Subsequently, he bought Springfield B7 because it had no swimming pool. But he said he had not taken any *fungshui* advice there and then.

(6) Later, one Mr Leung Tze Hang, the one who controlled the company Megaford (being the original vendor of Springfield B7), told him that the layout of Springfield B7 would bring extramarital affair to males living in that house.

(7) He then consulted two *fungshui* experts, namely Mr Chiang Man Ching and Mr Sze Ma Cheung On. Both of them said that the *fungshui* of Springfield B7 would not be good to his marriage and his career. As he really cared for his marital relationship, he therefore decided to sell the house.

11. In short, as aforesaid, the appellant's case was that he did not purchase Springfield B7 for the purpose of trading but for his own residence. However he sold it because this house, as he was so advised, would have bad *fungshui* on his marriage.

12. The appellant called Mr Sze Ma to testify before the Board. Mr Sze Ma said that he was consulted by the appellant in relation to the names of his two sons. He was also invited by the appellant to view the *fungshui* of Springfield B7.

13. The appellant also called his estate agent one Mr Wong Ying Yiu to testify. Mr Wong said that he learned from the market that the appellant was looking for a *residence* for himself, and the appellant told him that he was looking for premises similar to units in Springfield Garden but without any swimming pool. Since there was no swimming pool in Springfield B7, the appellant bought it.

The majority decision of the Board

14. The majority ruled that the June 1997 letter of classification of the appellant's accountants is an important piece of evidence. It was written shortly after the material events and pursuant to the appellant's instructions. As a result of this letter, the Revenue assessed a substantial profit arising from the disposal of Springfield B7.

15. Although the majority accepted the appellant's professed affection for his wife and his children, the majority also took the view that the appellant would put commercial gain before provision of a settled home for his family members. His intention in relation to each property was flexible. Each property would be available for sale if the price was right.

16. The majority did not find Mr Wong Ying Yiu, the appellant's estate agent, to be a credible witness.

17. The majority did not regard the fact that the appellant wanted to reside near to Singapore International School as a strong indicator of the appellant's intention to acquire Springfield B7 as his residence.

18. The majority did not accept the appellant's evidence that he assumed the advice of Mr Chiang Man Ching in relation to Cedar Drive 114 was applicable to Springfield B7.

19. In respect of Mr Sze Ma's evidence, the majority ruled that the appellant merely had a *casual* encounter with him and he only offered *general* comments in relation to Springfield B7. In fact, Mr Sze Ma was not even paid for his advice.

20. By reason of the aforesaid matters, the majority was satisfied that the appellant did trade in relation to Springfield B7.

The legal position in this appeal

21. The legal position of the present appeal before me is not a subject matter of serious dispute or argument between the parties except that Mr Dennis Law, counsel for the appellant, also relied on a so-called Pyramid Principle which I shall deal with immediately after this section.

22. This appeal is by way of Case Stated pursuant to section 69(1) of the Ordinance which provides that:

> "(1) The decision of the Board shall be final:
>
> Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. …"

Thus, this is not a rehearing and Order 55 of the Rules of High Court (in respect of "Appeals to the High Court from Court, Tribunal or Person") does not apply to an appeal by way of Case Stated from the Board (see Order 55, rule 1(2)(a)). This is in stark contrast to an appeal from a master which is by way of rehearing.

23. In other words, the appeal is limited by the statutory provision creating the right to appeal to points of law and the provisions of Order 55, rule 3(1) will have no application as decided in the case of *Green v. Minister of Housing and Local Government* [1967] 2 QB 606 at 615C-616B.

24. Accordingly, this court's jurisdiction to review the Board's decision pursuant to section 69(1) of the Ordinance is limited to questions of law arising from the primary facts found by a Board of Review as decided in the case of *Kaifull Investments Ltd v. Commissioner of Inland Revenue* 5 HKTC 598 at 626, paragraph 13.

25. Lord Radcliffe explained the position in *Edwards (Inspector of Taxes) v. Bairstow* [1956] AC 14 at 36 (which was also quoted in *Kaifull* at 626-7, paragraph 14 thereof) as follows:

> "When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law[:]

> [1] If the case contains anything *ex facie* which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law.
>
> [2] But, without any such misconception appearing *ex facie*, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal.
>
> In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether
>
> [a] this state of affairs is described as one in which there is no evidence to support the determination or
>
> [b] as one in which the evidence is inconsistent with and contradictory of the determination, or
>
> [c] as one in which the true and only reasonable conclusion contradicts the determination.
>
> Rightly understood, each phrase propounds the same test.
>
> For my part, I prefer the last of the three [i.e. (c)], since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur." *[Paragraphing supplied]*

26. Thus in this appeal, the guiding principle is whether the state of affairs is one in which the true and only reasonable conclusion contradicts the determination of the majority decision of the Board. Before I apply this legal principle to this appeal, I would like to dispose of the appellant's submission on a so-called pyramid "principle" first.

The Pyramid "Principle"?

27. Much time had been spent in this appeal in counsel's argument for the appellant by relying on what counsel called the Pyramid Principle as found in the judgment of Barnett J in the case of *Commissioner of Inland Revenue v. Inland Revenue Board of Review & Another* [1986] 2 HKLR 40 at page 57. In this *CIR's* case, Barnett J said:

> "The decision of a Board of Review is like a pyramid. At its base is a number of blocks consisting of primary facts found by the Board upon evidence presented to it. Above these is another line of blocks, consisting of inferences drawn from the primary facts. At the apex of the structure lies the Board's final conclusion based upon the primary facts and inferences.
>
> The final conclusion may be attacked in three principal ways. *First*, it can be impugned upon the basis that the Board has misdirected itself, for example, upon the burden of proof, or by misinterpretation of a statute. *Second*, an inference or inferences or the final conclusion may be attacked upon the basis that the primary facts do not admit of an inference drawn from them, or that the primary facts or inferences, or a combination, do not admit of the final conclusion. *Third*, one or more findings of primary fact may be attacked upon the basis that there was no evidence upon which they could be found. *Alternatively*, it may be contended that the Board should have made findings of other relevant facts. If the applicant is successful in displacing any of the blocks below the final conclusion or is successful in inserting additional blocks of fact, the structure may be so distorted that the final conclusion must topple and will be set aside by the court." *[Emphasis added]*

28. I am afraid the Pyramid *analogy* of Barnett J was just an analogy drawn by him as an illustration of the application of *Lord Radcliffe's* principles which he has so closely followed. But this has been used by counsel for the appellant as a Pyramid Principle and in some cases even metamorphosised into a fertile ground for germinating attacks against the Inland Revenue Board of Review under the disguise of a Case Stated. In other words, for some of the cases like the present one, counsel for an appellant, by using the Pyramid Principle, would develop an argument which is basically an argument against the factual findings of the Board. This is unacceptable as an appeal on Case Stated is restricted to a point of law only.

29. In order to understand the analogy as stated by Barnett J, one would have to look at the actual *ratio decidendi* of that case and in turn the facts thereof. In that *CIR's* case, the court was faced with the refusal by the Board of Review to state a case since they considered that the request of the Commissioner was a request on the Board to state the case for the opinion of the High Court basically as to whether the proper conclusion on the sum received by the appellant was profits chargeable to tax in accordance with section 14 of the Ordinance. The Board obviously found as a matter of fact that that was profits so chargeable.

30. Understandably, the Board refused to state the case and the Commissioner, by way of judicial review, applied before Barnett J for an order of *mandamus* directing the Board to state a case. However, Barnett J agreed with the Board's decision.

31. It was in the judgment of Barnett J that an applicant for a Case Stated had to identify a question of law which it was proper for the High Court to consider. However, the Board had

power to scrutinise the question of law to ensure that it was one which it was proper for the court to consider. If not, it might decline to state the case. On the facts of those findings made by the Board, Barnett J was satisfied that the Board was entirely entitled to make such findings and there was no point of law involved in the attack of the Commissioner against such findings. The application was therefore dismissed.

32. As I have said, the judgment contained detail discussion as to what legal principle should be followed on a Case Stated and the well-known passage in Lord Radcliffe' s judgment as aforesaid was consistently followed.

33. It was only at the end of the long judgment that Barnett J, probably by way of *obiter dictum*, made an analogy with the well-known man-made structure called the pyramid which was built nearly 4,500 years ago at *Gizeh* (*Khufu – 2,530 B.C.*, *Khafre – 2,500 B.C.* and *Menkure – 2,460 B.C.*).

34. However this notion, to my mind, is quite difficult to apply in an appeal on a Case Stated under the Ordinance.

35. In the first place, this so called Pyramid Principle is just an analogy. On application, as I have said, it will become an unduly fertile ground for counsel to develop an argument as to whether certain "blocks" are necessary basic facts without which the pyramid would topple or what "blocks" are unnecessary without which the pyramid would not topple. Consequently an appeal on Case Stated will become an appeal on facts alone.

36. Whether a pyramid will or will not topple is basically an architectural question to be answered by civil engineers. Afterall, the pyramid structure is one of the most stable forms of structure invented by mankind. It is by no coincidence that this structure had been the tallest structure built by mankind for a few thousand years. However, modern architecture has already invented the *inverted* pyramid structure and thus it has changed the whole concept of stable structure in the form of a pyramid. One example of an inverted pyramid structure is our Coliseum in Hunghom. In any event, even up till now no one actually knows for sure how the pyramid was built in the first place.

37. For my part, I would say that those principles as stated by Lord Radcliffe are sufficient enough to dispose of an appeal on Case Stated as the one now before the court. Here, I just ask and answer this question: whether the state of affair is one in which the true and only reasonable conclusion contradicts the determination of the Board. If not, the appeal must be dismissed.

Answers to questions cited in this case

38. The following are the questions raised by the Board and my answers thereto, namely:

Question (a):	Whether the majority erred in law in attaching weight to the two letters of Messrs Paul M.P. Chan & Co.?
Answer:	No.
Question (b):	Whether the majority erred in law in failing to afford due weights to the evidence of Mr Sze Ma and Mr Wong?
Answer:	No.
Question (c):	In the light of the answers to questions (a) and (b), and in the light of the other facts as found by the Board, whether the majority erred in law in holding that the appellant failed to discharge his onus under section 68(4) of the Ordinance?
Answer:	Surely not as answers to (a) and (b) are both answered in the negative.

39. The three questions and my short answers thereto were only stated at the back of this judgment. This is deliberate. To my mind, the only "criticism" of the Board is that it was too lenient in citing a case in which there was basically no questions of law. In my view, the Board should adopt what the Board of Review did in the *CIR's* case above and refused to state a case since there was no question of law involved at all. However, I do sympathise with the Board herein because the appellant was unrepresented at that time and there was a dissenting voice in the Board.

40. Mr Law for the appellant started off with a mild criticism of the Board by submitting that it was an unusual way of citing a case without stating the primary findings of facts, the conclusion of the majority thereon, the applicable law in respect thereof, and the final conclusion of the majority decision. However, this criticism is actually indicative of the difficulty faced by the Board since there was in effect no question of law involved in the Board's consideration of the primary facts in respect of the two letters of the appellant's accountants and the question of weights they should or should not attach to the evidence of Mr Sze Ma and Mr Wong.

41. The only question of law in respect of their finding of facts is whether the state of affair as found by the Board is one in which the true and only reasonable conclusion contradicts the majority decision of the Board. Once the Board have reached its conclusion that one could not possibly say that the true and only reasonable conclusion would contradict the majority decision, there is no question of law involved.

42. In the end I cannot possibly say that those "facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal". That will be sufficient to dispose of the appeal.

Conclusion

43. For the aforesaid reasons, I have dismissed the appeal on the very day of the hearing of the same with costs to the respondent.

(D. Yam)
Judge of the Court of First Instance,
High Court

Mr Dennis Law, instructed by Messrs K.W. Ng & Co., for the Appellant

Mr Valentine Yim, on fiat, for the Secretary for Justice, for the Respondent