HCAL118/2004

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

CONSTITUTIONAL AND ADMINISTRATIVE LAW
LIST NO. 118 OF 2004

BETWEEN

COMMISSIONER OF INLAND REVENUE	Applicant
and	
BOARD OF REVIEW (INLAND REVENUE ORDINANCE)	1st Respondent
INDOSUEZ W I CARR SECURITIES LIMITED	2nd Respondent

Deputy High Court Judge Mayo in Court
Date of Hearing : 19 and 20 December 2005
Date of Judgment : 4 January 2006

J U D G M E N T

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1. The applicant is seeking a judicial review of a ruling ("the Ruling") of the Inland Revenue Board of Review ("the Board") dated 22 July 2004 when it declined to state a case against a decision ("the 2nd Decision") by which the Board revised its first decision ("the 1st Decision") dated 10 May 2000. This was consequent upon an order made by Deputy Judge Longley dated 30 January 2002 supplemented by a further order dated 24 April 2003. The judge made these orders after hearing the Case Stated in relation to the 1st Decision.

2. The relief the applicant is seeking to obtain is an order of *certiorari* to quash the Ruling and an order of *mandamus* requiring the Board to state a case pursuant to section 69 of the Inland Revenue Ordinance and such other relief as may be appropriate.

3. In very simple terms it is the contention of the Board in the Ruling that the Case Stated being requested by the applicant repeats in substance the questions which were the subject matter of the earlier Case Stated or if questions had not been raised they should have been. This constituted an abuse of process.

4. Mr Mok for the applicant submitted the 2nd Decision gave rise to new issues and that his client was fully entitled to require the Board to state a case in relation to it.

5. The 2nd respondent carries on business as a broker in Hong Kong and occupies five floors at One Exchange Square employing 200 staff. This office serves as the headquarters for the Asia Pacific region.

6. The 2nd respondent performs a variety of services for its clients.

7. Included amongst the services performed is investment in the Asia Pacific region for clients. Some of these clients are based in Hong Kong while others are based outside Hong Kong.

8. The 2nd respondent requires clients to enter into a "client agreement" under which they are required to pay much higher fees than would be payable to a discount broker.

9. The reason for this is that the 2nd respondent undertakes what is described as being "quality" research and it assumes responsibility for the execution of orders both in and outside Hong Kong.

10. They also undertake management, group accounting control, and various other functions.

11. So far as investment in overseas markets is concerned commission and management fees are paid to overseas agents. It is one of the applicant' s contentions that these payments should simply be treated as disbursements which have been incurred by the 2nd respondent.

12. In very general terms one of the issues which has been the subject of consideration by the Board is the extent to which the services which are being performed are liable to the incidence of profits tax in Hong Kong and the extent to which they are not subject to tax as constituting work performed offshore.

13. To obtain an understanding of the issues which have been ventilated in these proceedings it is necessary to consider in some detail the background to the matter.

14. Deputy Judge Longley set out the five questions which were posed by the Board in relation to the 1st Decision at page 7 of his judgment:

> *"Questions 1 and 3*
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> 14. Two of those questions Question 1 and Question 3 were posed at the instance of the Commissioner of Inland Revenue in order to challenge the Board's finding that the profits from the commission from orders from overseas clients arose substantially outside Hong Kong and were not chargeable to tax. The questions are these:
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> (1) Whether upon the evidence before the Board of Review and in all the circumstances of the case, the Board of Review erred in law and drawing an inference that the taxpayer engaged overseas offices as its agent in performing various tasks such as the maintenance of the relationship with the client, the processing, handling and management of the orders and the provision of the primary research materials.
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> (3) Whether on the facts found by the Board of Review, the Board of Review erred in law in concluding that the profits generated by the Taxpayer from orders from overseas clients on overseas markets arose substantially outside Hong Kong and are not chargeable to tax.
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> 15. These questions therefore centre on the question of the agency of the overseas offices within the group and relate to orders placed by overseas customers.
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> *Questions 2, 4 and 5*
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> 16. Questions 2, 4 and 5 have been posed by the Taxpayer.
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> 17. Question 2 and 4 centre on the Board's finding that the actual execution of an order on the overseas stock exchanges was not the act of the taxpayer, but predominantly the act of local overseas brokers engaged by the relevant office as independent contractors. The questions are as follows:

(2) Whether on the facts as found by the Board of Review, the Board of Review erred in law in not concluding that the actual execution of the orders at the overseas market were the acts of the Taxpayer performed through its agents, the brokers.

(4) Whether on the facts found by the Board of Review, the Board of Review erred in law in concluding that the source of profits generated by the Taxpayer from orders from Hong Kong clients executed on overseas markets was predominantly Hong Kong or that Hong Kong was where the acts more immediately responsible for the receipt of the profits were undertaken.

18. Question 5 posed by the Taxpayer is as follows:

(5) Whether the Board of Review was correct in law in determining that it was not permitted by law to apportion the profits derived from commission earned from Hong Kong clients from the execution of orders in the overseas market, which the Board of Review would otherwise have done on the basis of 60% onshore and 40% offshore on the facts as found by the Board of Review."

15. The way in which the judge answered the questions and remitted the case to the Board is set out in his order previously referred to:

"AND UPON FINDING that the answers to the questions of law stated by the Inland Revenue Board of Review in the said case or findings of the Court were:

1. Yes.
2. Yes in so far Hong Kong clients are concerned.
3. Yes.
4. Redundant in view of the next answer.
5. No.

IT IS ORDERED that the case be remitted to the Board of Review for the purposes of:

(1) Reconsidering its conclusion that the Taxpayer engaged the overseas offices as agents in performing the various tasks such as the maintenance of the relationship with the client, the processing, handling and management of the orders and the primary research materials, based on the opinion of the Court that it has erred in law in the manner of reaching its conclusion.

(2) Reconsidering its conclusion, in so far as overseas clients are concerned, whereby it concluded that the acts of execution of orders of the overseas markets were not the acts of the Taxpayer in the light of its reconsideration of the evidence of the relationship between the overseas clients and the Taxpayer and in the light of the Court's ruling in relation to Hong Kong clients that the actual execution of the orders in the overseas markets was the act of the Taxpayer performed through its agents the brokers.

(3) Reconsidering its conclusion, in the light of its reconsideration under (1) and (2) above, that the profits generated by the Taxpayer from orders from overseas clients on overseas markets arose substantially outside Hong Kong and are not chargeable to tax.

(4) Reconsidering its conclusion based on the opinion of the Court that it erred in law in not concluding, insofar as Hong Kong clients are concerned, that the actual execution of the orders at the overseas markets were the acts of the Taxpayer performed through its agents as brokers.

(5) In the light of the opinion of the Court that it was both permissible in law and appropriate for the Board of Review to apportion profits derived from commission earned from Hong Kong clients for the execution of orders in the overseas markets, and in the light of its reconsideration under (4) above, apportioning the said profits.

AND IT IS FURTHER ORDERED nisi to costs unless either party applies to be heard on the question of costs: that the costs occasioned and related to questions 1 and 3 be borne by the Taxpayer, that the costs occasioned by and related to questions 2, 4 and 5 be paid by the Commissioner of Inland Revenue.

AND UPON HEARING Leading Counsel for the Appellant/Respondent and Leading Counsel for the Respondent/Appellant on 24th April 2003

IT IS FURTHER ORDERED that:

(6) In the light of the opinion of the Court that apportionment is permissible in law to consider whether profits generated by the Taxpayer from orders from overseas clients on overseas markets should be apportioned and, if so, in what proportion."

16. What is of particular significance to the present application is the last two orders being paragraphs (5) and (6), namely, the direction that apportionment was permissible in relation to profits generated from orders on overseas markets.

17. This had been an issue which had been canvassed before the judge.

18. In the Case Stated it had been accepted that because there was no specific power to apportion in the Ordinance this was not permissible. See the judgment of Reece J in *Commissioner of Inland Revenue v. Hong Kong and Whampoa Dock Co. Ltd* [1960] HKLR 166.

19. However, Deputy Judge Longley accepted that the Privy Council Decision in *Commissioner of Inland Revenue v. Hang Seng Bank Ltd* [1990] 1 AC 323 undermined the reasoning in *Hong Kong and Whampoa Dock Co. Ltd* and that apportionment was permissible in Hong Kong.

20. The fact that the judge accepted that apportionment was permissible had a significant impact upon the issues which had to be determined by the Board.

21. Also it has to be said that there was no way that the applicant could have anticipated that the judge would come to this conclusion. This being the case, there was no way that the applicant could have foreseen any of the questions impacting on the issue of apportionment when the earlier Case Stated was prepared.

22. One consequence of this is to severely undermine the submissions made by Mr Clifford Smith SC who represented the 2nd respondent to the effect that the applicant should have canvassed all of the matters the subject of the second Case Stated in the earlier one.

23. There is a further important point. Not surprisingly in his judgment Deputy Judge Longley gave no directions or guidance upon how the Board should proceed with an apportionment in the instant case.

24. What he did however direct was that there should be apportionment of profits earned from Hong Kong clients from the execution of orders in overseas markets and so far as overseas clients were concerned the Board should consider whether there should be an apportionment and if so what the proportion should be. This was a new task to be performed by the Board.

25. The other significant findings by the judge were that so far as Hong Kong clients were concerned the actual execution of orders was undertaken by the overseas agents as agents for the 2nd respondent.

26. The judge annulled the Board's finding that the profits generated from orders from overseas clients arose substantially outside Hong Kong.

27. The Board considered Deputy Judge Longley's judgment and order and heard submissions from the parties.

28. Its conclusion at the end of the hearing was summarised as follows:

> "24. In the light of these findings, we have to revisit our conclusions on the source of profits generated from commission earned from overseas clients and profits generated from commission earned from Hong Kong clients.
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> *Overseas clients*
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> 25. For overseas clients, we take into account the fact that the orders would be processed, handled and managed by the taxpayer's agents overseas. We must also take into account the fact that the execution of the orders was carried out by the brokers overseas as agents for the taxpayer. At the same time, we have to exclude from our consideration the provision of primary research materials insofar as there is no evidence that these were done by overseas offices on behalf of the taxpayer. In paragraph 34 of the Case States, we have alluded to some of the taxpayer's activities in Hong Kong which contributed to the making of profits. We have also considered Annex B to Miss Li's submissions on this issue. We have previously come to the view that whilst some of the taxpayer's activities in Hong Kong would also have contributed to the making of the profits, we regard these as minor and indirect. We see no reason to alter that view. Having reconsidered the matter in the light of the judgment of the Court of First Instance, we remain of the view that the profits generated from orders from overseas clients arose substantially from an offshore source and that such contribution as there was by activities of the taxpayer in Hong Kong does not, in the circumstances of the present case, call for an apportionment of those profits.
>
> *Hong Kong clients*
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> 26. As for profits derived from commission generated from orders places by Hong Kong clients, we have, in paragraph 35 of the Case Stated, referred to the presence of the Hong Kong office and the efforts of the Hong Kong sales team as important factors. The day to day marketing and solicitation of business, including business in the overseas market, would have been a substantial reason for bringing in the profits. These were all carried out in Hong Kong. The orders were placed and handled in Hong Kong. We must, however, bear

in mind that the execution of the orders would be carried out on behalf of the taxpayer outside Hong Kong. In our earlier decision, we referred to the fact that the basic research on the overseas market was performed overseas as one of the pointers towards an offshore source. However, for the reasons given above, we are unable to find that the staff of overseas offices carried out researches in overseas market as agent for the taxpayer; and are accordingly unable to take this matter into account as being part of the acts of the taxpayer.

27. Having reconsidered the evidence, we are of the view that the profits derived from commissions generated from orders by Hong Kong clients can truly be said to be partly onshore and partly offshore. We would therefore have to render our opinion on the apportionment of those profits. Having considered long and hard about the relative importance of the various factors and taking an overall view of the matter, we have come to the view that these profits should be apportioned 50% onshore and 50% offshore.

Disposal of the appeal

28. In the circumstances, we would remit the case to the Commissioner with our opinion that the profits generated from orders placed by clients outside Hong Kong for execution at overseas markets should not be taxable; and that the profits generated from orders placed by clients in Hong Kong on overseas markets should be apportioned on the basis of 50% onshore and 50% offshore."

29. It is also pertinent to observe that the Board had second thoughts on the extent of the work undertaken by overseas agents. Paragraph 23 of the 2nd Decision reads:

"However, we are unable to find on the evidence that any work performed by overseas offices in building up and maintaining a relationship with the client or in the provision of quality research reports done by the overseas offices as agents for the taxpayer. There is no evidence before us to suggest that the provision of these services were contracted by the taxpayer as part of its duties to clients. Nor is there any evidence of the relationship between the taxpayer and the overseas offices on these matters."

30. A further point worth noting is that in the earlier Case Stated at question 5 the Board indicated that if an apportionment was permissible in relation to orders made by Hong Kong clients for overseas investments they would have done so on the basis that 60% was undertaken onshore and 40% offshore.

31. In the 2nd Decision the Board did vary this proportion and state that after further consideration the proportion should be 50/50. This of itself would appear to justify the applicant in case stating that change of stance.

32. So far as overseas clients were concerned the Board held that there was no need for there to be an apportionment. This was in spite of a finding of fact made by the Board that there was no evidence that research had been undertaken by overseas agents. Again, this would appear to be a question which is amenable to a Case Stated.

33. The Department of Justice wrote to the Secretary of the Board on 7 May 2004 giving particulars of 13 questions he wished to raise which were questions of law in relation to the 2nd Decision. These questions are conveniently set out in the Ruling:

> "(1) Whether the Board misdirected itself on the relevant test for determining the source of the profits, namely, in stating the test to be '*what the taxpayer or its agent did to earn the profits and where was this done'*
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> (2) Whether, even where a service was in law performed by an overseas agent (a local broker, or overseas office or subsidiary) on behalf of the taxpayer, the Board erred in law in failing to take into account what the precise commercial arrangements were between the taxpayer and such agent, including whether such service had been purchased by the taxpayer by the payment of a fee or commission representing the value of such service.
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> (3) Whether the Board erred in law in finding that the execution of orders by local brokers was relevant in determining the source of the taxpayer's profits, having regard to:
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> (a) its finding that such brokers had been paid their own commission for providing such service and the evidence in support of such finding; and
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> (b) the Court's finding that the taxpayer derived its profits '*from the difference between the commission it charged to the client and the commission it had to pay the local stockbroker*'.
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> (4) Whether:
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> (a) the Board's finding that the management of clients' orders were functions performed by the overseas offices and subsidiaries is supported by any evidence, and

(b) the Board, in making such finding, failed to take into account its early finding at paragraph 5(4) of the Decision.

(5) Whether:

(a) the Board erred in law in inferring from the facts found that '*the overseas offices and subsidiaries which performed these functions [ie the processing, handling and management of the orders] must have been doing the work on behalf of the taxpayer*; and

(b) there is any evidence in support of such finding.

(6) Whether, even if the orders of the overseas clients were processed, handled and managed by the overseas offices and subsidiaries on behalf of the taxpayer the Board erred in law in failing to take into account any payment or fee or commission made by the taxpayer to such offices and subsidiaries to compensate them for the said services, or to ascertain whether such payment had been made.

(7) Whether, having excluded:

(a) the building up and maintenance of a relationship with a client; and

(b) the provision of quality research reports

as acts done by the Taxpayer's overseas offices on behalf of the Taxpayer, the Board erred in law in not altering its earlier view that the Taxpayer's activities in Hong Kong were merely '*minor and indirect'*.

(8) Whether the Board erred in law in inferring that the Taxpayer's activities in Hong Kong which contributed to the making of the profits from overseas clients were '*minor and indirect'*, having regard to:

(a) the facts found by the Board and

(b) the matters set out in the preceding questions.

Alternatively, whether the Board erred in law in holding that the Taxpayer has, on the facts found by the Board, discharged its burden to show that the said activities were '*minor and indirect'*.

(9) Whether, in apportioning the profits attributed to Hong Kong clients as 50% onshore and 50% offshore, the Board failed to take into account whatever fee or commission had been paid to the taxpayer' s overseas agents or brokers.

(10) Whether the Board erred in law in making an apportionment on such basis when the taxpayer has failed to affirmatively establish that part of the profits which arose outside Hong Kong or where there is no evidence in support of such apportionment.

(11) Whether the Board erred in law in making any apportionment as regards the profits attributed to the Hong Kong clients on the facts of this case.

(12) Whether on the facts found by the Board, and on the matters set out above, the Board erred in law in not concluding that source of profits derived by the taxpayer from orders from Hong Kong clients executed on overseas markets was Hong Kong or predominately Hong Kong.

(13) Whether on the facts found by the Board, and on the matters set out above, the Board erred in law in not concluding that source of profits generated by the taxpayer from orders from overseas clients executed on overseas markets was Hong Kong or predominately Hong Kong."

34. With the possible exception of question 1 all the questions are to a greater or lesser extent dependant upon the issue of apportionment and how this exercise should be undertaken.

35. It is necessary to consider the way in which the Board dealt with the 13 questions which the applicant posed. This can be seen from pages 11 onwards in their Ruling:

"*What is a proper question of law*

12. This Board should not accede to a request to state a case unless the applicant can show that a proper question of law can be identified, see **Aust-Key Co. Ltd. v Commissioner of Inland Revenue** [2001] 2 HKLRD 275.

13. The present application to state a case related to a revised assessment made by the Board under section 69(5). In carrying out such assessment, the Board is bound to follow the opinion of the Court already expressed in the appeal on the case stated. If the Board errs in discharging that function, a proper question can be framed and the aggrieved party can appeal by way of a second case stated. However, it would not, in our view, be a proper question of law if that question does not even relate to the exercise performed.

14. Would it be a proper question of law if it is one which would be an abuse of the process of the Court to raise it? We would have thought the answer must be 'no'. In the present case, many of the questions now sought to be raised could have been ventilated by the Commissioner at the initial before the Board and could have been framed as questions for determination by the Court of First Instance in the case stated. No explanation has been offered why that was not done. It seems to us that in the present case to allow the Commissioner to re-open these matters would be to sanction an abuse of process of the Court. That being so, we should decline to state a case on these questions.

15. In our view, a proper question of law must be one which (a) is a question of law, (b) relates to the decision sought to be appealed against, (c) is arguable and (d) would not be an abuse of process for such a question to be submitted to the Court of First Instance for determination. We turn to consider each of the questions sought to be raised.

Each question considered

16. We have already made our observations on question (1): see paragraph 6 above. In our view, question (1) is not a proper question. It is not a question which raises from the November 2003 decision. It would, in our view, be an abuse of process for the Commissioner to seek to raise it now. We are in any event not persuaded that it is arguable.

17. Questions (2) (6) and (9) can be taken together. The Commissioner seeks to argue that in determining the source of the profits, the Board must take into account what the precise commercial arrangements were between the taxpayer and the agent. In our decision in May 2000, we noted that brokers would have charged their own commission (see paragraph 32 of the Case Stated). The Court of First Instance expressed the opinion, certainly as far as Hong Kong clients are concerned, that the brokers were the agents of the taxpayer (see Judgment at paras. 51-54). The Commissioner is, of course, bound by the decision of the Court of First Instance. If she wishes to argue that, notwithstanding the relationship of agency, precise commercial arrangements were material in determining the question of source, such argument could have been raised before the Court. It was not.

18. We are not satisfied that these are proper questions for the same reasons as applicable to question (1).

19. We have difficulty in understanding question (3). It seeks to raise the question whether the Board erred in law in finding that the execution of orders by local brokers was relevant in determining the source of the profits. But this was one of the findings of the Court of First Instance, see paragraph 59 of the Judgment. Paragraph (2) of the Order specifically directed the Board to reconsider its conclusion re overseas clients on the footing that the actual execution of the orders was the act of the taxpayer performed through its agent. We are bound by the Order. The Commissioner is equally bound by it. It would be an abuse of process for the question to be raised. We are not satisfied that question (3) is a proper question for the same reasons as applicable to question (1).

20. We next take questions (4) and (5). These relate to the Board's finding that the management of clients' orders were functions performed by overseas offices, and the finding that these overseas offices were doing the work on behalf of the taxpayer. These were findings made by the Board in its initial decision in May 2000. As pointed out by Mr. Smith, there is ample evidence to support those findings. They were not challenged in the case stated. We are unable to see how questions (4) and (5) could be proper questions. They are in our view unarguable, and are but an attempt to dress up an attempt to appeal on facts as questions of law.

21. Questions (7) and (8) do not appear to us to raise a question of law either. The Board took the view that the taxpayer's activities in Hong Kong were merely minor and indirect. The Board adhered to this view in its November 2003 decision. That is plainly a finding of fact. The attempt to frame questions of law in seeking to challenge this finding must be rejected.

22. We have difficulty understanding question (10). The Court of First Instance directed this Board to make an apportionment in respect of Hong Kong clients. We cannot see any proper question of law here.

23. Questions (11) to (13) are framed in general terms. They are described by Mr. Mok as 'wrap-up' questions. They must go if the Commissioner is unable to identify any specific question.

24. We have considered each and every question sought to be raised by the Commissioner. We are not satisfied that any proper question of law has been identified. We accordingly dismiss the application."

36. One of the matters which needs to be considered is not only the questions themselves but also the subject matter under debate. It is in this area where in my opinion the Board was in error.

37. It came to the conclusion that no proper question of law arose which required consideration by them. Their main concern centered upon the question of issue estoppel. The Board referred to the judgment of Kaplan J at page 405 of *Commissioner of Inland Revenue v. Aspiration Land Investment Ltd* [1990] 3 HKTC 395:

> "These passages make it clear to my mind that it matters not what Mr Freestra of the Commissioner thought would be the position following the dismissal by consent of the Commissioner's appeal. The fact remains that had not the appeal been dismissed by consent, the Commissioner would have been forced to traverse the very matters traversed before me (and Barnett J.) or else he would have had to accept the question of law which the Board had always been prepared to state and not the ones which he then sought and continues before me to seek. Although the judicial review application did not relate specifically to the transcript of evidence and the other documents the subject matter of the summons before me, it is clear to me that the issue is the same. The transcript of evidence goes hand in hand with the phrase used in the Commissioner's question(3) 'on the whole of the evidence'.
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> To use the phrase of Lord Shaw in **Hoystead v. Commissioner of Taxation** (1928) A.C. 156&171 'the present point was one which if taken went to the root of the matter on the prior occasion.'
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> I have come to the very firm conclusion that this application is an abuse of the process of this court and I propose to dismiss this summons. Parties must appreciate that when they are before the court and fail to take a point which was open to them at that stage, subsequent hearings or applications involving the same issue may well be held to be an abuse of process. I accept that shutting out a litigant from arguing a point should only be exercised (in the words of Privy Council in **Yat Tung)** 'after a scrupulous examination or all the circumstances'. I have conducted such an examination of the circumstances, with considerable assistance from both counsel, and I can find nothing in the way or 'special circumstances' to justify the Commissioner having a second bite at the cherry.'

38. If I understood Mr Mok correctly, it was not his contention that there were no circumstances when issue estoppel might arise. It was his contention that the present case was undoubtedly not a case when this arose.

39. The next matter to be determined on this application is the law governing issue estoppel and what constitutes an abuse of process.

40. Mr Clifford Smith placed considerable reliance upon the case of *Hoystead v. Commissioner of Taxation* [1926] AC 155. The passage he referred to was at page 165 of the speech of Lord Shaw:

> "Very numerous authorities were referred to. In the opinion of their Lordships it is settled, first, that the admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started, with a view of obtaining another judgment upon a different assumption of fact; secondly, the same principle applies not only to an erroneous admission of a fundamental fact, but to an erroneous assumption as to the legal quality of that fact. Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle. Thirdly, the same principle — namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, had not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs."

41. These observations have to an extent been overtaken.

42. Lord Bingham laid down a wider and more comprehensive approach in *Johnson v. Gore Wood & Co.* [2002] 2 AC 1. At page 30 of his judgment he said:

> "It may very well be, as has been convincingly argues (Watt, ' The Danger and Deceit of the Rule in *Henderson v Henderson:* A new approach to successive civil actions arising from the same factual matter" (2000) 19 CLJ 287), that what is now taken to be the rule in *Henderson v Henderson* has diverged from the ruling which Wigram V-C made, which was addressed to res judicata. But *Henderson v Henderson* abuse of process, as not understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or

defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

43. These views were supported by Lord Millet at page 59 of the Report:

"However this may be, the difference to which I have drawn attention is of critical importance. It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen's right of access to the court conferred by the common law and guaranteed by article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1953). While, therefore, the doctrine of res judicata in all its branches may properly be regarded as a rule of substantive law, applicable in all save exceptional circumstances, the doctrine now under consideration can be no more than a procedural rule based on the need to protect the process of the court from abuse and the defendant from oppression. In *Brisbane City Council v Attorney General for Queensland* [1979] AC 411, 425 Lord Wilberforce, giving the advice of the Judicial Committee of the Privy Council, explained that the true basis of the rule in *Henderson v*

> *Henderson* 3 Hare 100 is abuse or process and observed that it ' ought only to be applied when the facts are such as to amount to an abuse: otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation' . There is, therefore, only one question to be considered in the present case: whether it was oppressive or otherwise an abuse of the process of the court for Mr Johnson to bring his own proceedings against the firm when he could have brought them as part of or at the same time as the company' s action. This question must be determined as at the time when Mr Johnson brought the present proceedings and in the light of everything that had then happened. There is, of course, no doubt that Mr Johnson *could* have brought his action as part of or at the same time as the company' s action. But it does not at all allow that he *should* have done so or that his failure to do so renders the present action oppressive to the firm or an abuse of the process of the court. As May LJ observed in *Manson v Vooght* [1999] BPIR 376, 387, it may in a particular case be sensible to advance claims separately. In so far as the so-called rule in *Henderson v Henderson* suggests that there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action."

44. What this boils down to is that the burden is placed upon the Board to prove that there has been an abuse of process. The court in determining this issue will take into account all relevant circumstances.

45. It should perhaps also be added that when the Board does consider the matter it should adopt a liberal approach and if necessary amend the question or questions to enable the case to be dealt with in a constructive manner. Blair Kerr J put it in this way at page 268 in *Commissioner of Inland Revenue v. Rico International Ltd* [1965] 1 HKTC 229:

> "Counsel for the appellants objected to submissions (b) and (c) on the ground that they raised new points of law which should have been expressly raised in the case stated; counsel did not seek an adjournment on the ground that he was taken by surprise; he put his objection on the footing that, as the Commissioner had not asked the Board to include these points of law in their case, it was not open to him to raise them at this stage. Before the learned judge the appellants did not take the point that the case stated raised no point of law.
>
> Appeals from the decisions of the Board of Review are regulated by section 69 of the Ordinance which reads in part:
>
> (69) (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 Supreme Court;

(2) The stated case shall set forth the facts and the decision of the Board….

(3) —

(4) —

(5) Any judge of the Supreme Court shall hear and determine any question of law arising on the stated case….

The phraseology used in the Income Tax Acts 1918 and 1952 is to the same effect. Under section 149 of the former Act, the appellant, if dissatisfied with the determination of the Commissioners as being erroneous in point of law, may require them to state and sign a case which shall set forth the facts and the determination of the Commissioners; and under section 149(2)(a):

'The High Court shall hear and determine any questions of law arising on the case.'

In other words, in both the English and Hong Kong enactments the case stated must include the facts and the determination; but not necessarily agreed points of law. The effect of the decision appears to be summarised in *Simon's Income Tax (2nd Ed.)* Vol. 1 at p. 280, where the learned author says:

'The Court will give effect to any point of law arising on the facts stated in the case; but when it is sought to raise a question which was not raised before the tribunal below and this depends upon further evidence being taken, the Court will refuse to give effect to the point so sought to be raised.'

Of course, while it may be legally unobjectionable for the Board to frame one question in terms sufficiently general to include any question of law which could arise on the facts and on their determination, it is also desirable that whenever possible they should be asked to say on what particular questions of law the opinion of the judge is being sought. However, section 69(5) is in the same terms as the corresponding English provision; and it would appear that the judge not only may, but is under a duty to, hear and determine 'any question of law arising on the case stated' (which need only include the facts and the determination) provided, of course, it is open to counsel to argue the point on the facts as found. The position in tax appeals appears to be different from that which obtains in appeals under section 103 of the Magistrates Ordinance.

> In my view, the facts that the Board were not asked to, and did not, include the specific questions of law raised before this court and before the learned judge, is not fatal to this appeal."

46. It was Mr Clifford Smith's submission that all of the 13 questions either had already in substance been the subject of the previous review or if they had not they should have been ventilated.

47. He went on to argue that if the applicant had on the previous occasion been dissatisfied with the way in which the judge had answered the questions or his reasoning he should have appealed against the judgment. It was too late now for him to seek to open these issues again.

48. I have no doubt in adopting the approach recommended by Lord Bingham and Lord Millet that what I am required to do is to consider all of the circumstances at large.

49. In particular it is necessary for me to consider the issues which were before the Board when they decided both of the decisions.

50. The most obvious difference is the fact that when the Board was seized of the 2nd hearing they did so on the basis that an apportionment was definitely required so far as Hong Kong clients were concerned and that they were required to consider whether an apportionment was appropriate in relation to the overseas clients.

51. In my view, this went to the very root of the matters which the applicant is seeking to raise in the 13 questions which were placed before the Board.

52. There were also the other matters earlier referred to where the Board changed its findings in the light of the directions it received from Longley DJ.

53. The 2nd respondent has not discharged the burden placed upon it of demonstrating that the questions constitute an abuse of process.

54. Accordingly this application is successful.

55. I order that the Ruling is to be quashed and that an order of *mandamus* do issue requiring the Board to state a case under section 69 of the Inland Revenue Ordinance.

56. I also declare that the Case Stated is to be based on the 13 questions posed by the applicant.

57. I make an order *nisi* that the applicant is to have its costs.

(Simon Mayo)
Deputy High Court Judge

Mr Johnny S.L. Mok, instructed by the Department of Justice, for the Applicant

The 1st Respondent, in person, absent

Mr Clifford Smith, SC and Mr Neil Thomson, instructed by Messrs Johnson, Stokes & Master, for the 2nd Respondent