CACV 97/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 97 OF 2006
(ON APPEAL FROM HCIA NO. 9 OF 2005)

BETWEEN

YAU WAH YAU	Appellant
and	
THE COMMISSIONER OF INLAND REVENUE	Respondent

Before: Hon Le Pichon, Tang JJA and Sakhrani J in Court
Date of Hearing: 10 May 2006
Date of Handing Down Judgment: 30 May 2006

J U D G M E N T

Hon Le Pichon JA:

1. The relevant background and the Board' s Decision appear in paragraphs 16 to 28 of the judgment of Tang JA. I do not propose to repeat those matters here and gratefully adopt them as well as the designations of the parties as part of this judgment.

2. So far as the judgment below is concerned, I agree with paragraphs 29 to 36 (inclusive) of the judgment of Tang JA which explains why the test set out in paragraph 19 of the judgment below was not the correct test. I further agree that notwithstanding the judge' s strictures mentioned in paragraph 17 of his judgment, it would appear that he did proceed to make findings of fact which was not within his province. For those reasons, I agree that the judgment below should be set aside.

3. As will become apparent, I take the view that this case should be remitted to a differently constituted Board for determination for the reasons set out below.

4. I turn first to the Board' s decision set out in paragraphs 22 to 28 of the case stated. In paragraph 23, there was a clear finding that the taxpayer had made contradictory statements to the Commissioner in the course of the Commissioner' s investigation. Quite apart from holding, correctly in my view, that the Memoranda of Lease were inadmissible by reason of section 15 (1) of the Stamp Duty Ordinance, the Board also refused to accept that the Memoranda were genuine contemporaneous documents as it was entitled to do. It followed from the rejection of the Memoranda that the Board also rejected the assertions of the taxpayer (to be found in paragraph 11 (c) of the case stated) in his letter dated the 22 August 2003 to the Commissioner "as to the circumstances leading to the execution of the Memoranda" (paragraph 24). It is to be noted that those appear to be the only findings made by the Board.

5. One then comes to paragraph 25 which bears repeating:

> "The Board was of the view that the Internal Memo carried no weight. Quite apart from the stamp duty point, that document only "represented the preliminary intention and negotiation"; therefore, it threw no light on the contractual relationship between the Appellant and Rich Conquest."

For convenience, the Internal Memo which was a letter signed by Rich Conquest and the taxpayer dated 23 December 1998 is reproduced below:

> "*[Rich Conquest] agreed to charge HK$50,000.00 per month to [the taxpayer] for renting of above premises starting from 24 December 1998. [The taxpayer] has the right to terminate the renting of [the Subject Premises] with 2 months advance notice*."

6. The Internal Memo was produced by the taxpayer in response to the Assessor' s inquiries relating to the quarters provided for the year 1998/1999. Quite when it was furnished is

unclear from the case stated except that it must have been prior to 9 May 2001 because on that date the Commissioner raised certain inquiries about it with Rich Conquest which led to Rich Conquest' s response of 18 May 2001 to the effect that the Internal Memo

> "is not a tenancy agreement. It is just an internal memo for our record and it is not legal (*sic*) binding. In fact, no tenancy agreement was signed in the said period, and therefore no stamped tenancy agreement is available."

7. I find paragraph 25 problematic. First, I do not see that any stamp duty point was involved. It appeared to be common ground that the Internal Memo was not a tenancy agreement. Not being a tenancy agreement, it did not require to be stamped. Its evidential value was something quite independent of the (misconceived) stamp duty issue. Second, the Board opined that the Internal Memo "carried no weight". The stated reason was that the document only "represented the preliminary intention and negotiation", apparently quoting from the taxpayer' s letter to the Commissioner dated 22 August 2003 being part of the assertions specifically rejected by the Board. But in dismissing the Internal Memo as throwing "no light on the contractual relationship between the taxpayer and Rich Conquest," the Board did not appear to have considered the question whether the document could have constituted evidence of the terms of an oral tenancy between the taxpayer and Rich Conquest regarding the Subject Premises and did not consider its effect in conjunction with the Intimation Letter dealt with below. Rather, according to the Board, there was an "absence of evidence" to prove the underlying contractual arrangement (paragraph 26).

8. Apart from the Internal Memo, there is also the Intimation Letter dated 2 November 1998 from the employer to the taxpayer which, in my view, also speaks to the arrangement between the taxpayer and Rich Conquest regarding the Subject Premises. Mr Wong who appeared for the Commissioner criticised the Intimation Letter in two respects. First, if my understanding is correct, it was said that it could not have been known on the date that letter was written what the terms of the tenancy would be given that, according to the taxpayer, he did not enter into negotiations with Mr Siu (the Finance & Administration Manager of Rich Conquest) until some six weeks later. Mr Wong also drew attention to the words (Without Tenancy Agreement) following "Tenancy Period" observing that it was remarkable for the employer to know six weeks prior to the negotiations that there would be no Tenancy Agreement.

9. Mr Wong' s criticisms appear to be misplaced. Given the circumstances, the fact that the terms could be outlined six weeks prior to the taxpayer' s negotiations with Mr Siu is not as extraordinary as it might seem. From the taxpayer' s s point of view, assuming (in the absence of any finding by the Board) the impending termination of his tenancy agreement at The Regalia by 24 December 1996 (and in relation to which I have some observations to make in paragraph 11 below), what would be important would be the ' in principle' approval of Rich Conquest to a new tenancy of the Subject Premises upon the expiry of the tenancy at The Regalia. Further, the words "Without Tenancy Agreement" could not reasonably or fairly be read in the manner suggested: it

meant no more than that the Intimation Letter was written without the benefit of any written tenancy agreement.

10. For my part, whilst the weight to be accorded to any piece of evidence is a matter for the fact-finding tribunal, what needs to be considered is whether the Board had overlooked relevant evidence. The Board considered that there was no evidence to support the oral tenancy, but in so doing, the Board did not state any reasons for disregarding the Intimation Letter and it is not for this court to speculate if its reasons were those articulated by Mr Wong. In any event, as explained above, those would not have been valid reasons for disregarding that piece of evidence.

11. Moreover, nowhere in the case stated was any mention or reference made to the fact that the 1998/1999 return by the employer showed that from 1 April 1998 to 23 December 1998, it had provided quarters, being a flat in The Regalia, in respect of which the taxpayer had paid $330,410 to the landlord. It would appear that the reimbursement of that amount to the taxpayer had not caused any additional assessment to be raised for that tax year. Again, this was relevant evidence in that it would have some bearing on the likelihood of an oral tenancy of the Subject Premises commencing on the expiration of the Regalia tenancy.

12. Finally, I should mention that I find paragraph 10 of the case stated being part of the 'Background leading to the appeal before the Board' unsatisfactory. Whilst the Memoranda of Lease dated 1 April 1999 and 1 April 2000 should be ignored for the reasons given in paragraph 23 of the case stated, the terms of the "applicable internal memo" are of relevance given that the employer's tax returns for 1999/2000 and 2000/2001 show differing amounts of 'rent' paid to the landlord by the employee for those respective tax years. It is unclear what those internal memos showed or when they were produced.

13. The paucity of findings of fact in the case stated is regrettable. As May LJ observed in *Morris v London Iron Co.* [1988] 1 QB 493 at 504 E

> "Judges should, so far as is practicable and so far as it is in accordance with their conscientious duty, make findings of fact."

It is difficult to comprehend why the Board refrained from so doing other than in relation to the Memoranda of Lease. Whilst it is clear it considered that the Memoranda and, it must follow, the board minutes of 24 December 1998 were not contemporaneous documents, it failed to address the question whether the documents adduced in evidence (including but not limited to the Intimation Letter, the Internal Memo, the employer's tax returns, the debit note dated 28 December 1998, the official receipt dated 1 January 1999,) submitted prior to 22 August 2003 (and it would seem well before that date) were accepted as having been contemporaneous documents or otherwise and to identify those that were not considered contemporaneous and the reasons therefor.

14. Without making findings of primary fact, the tribunal is handicapped in not being in a position to draw inferences from such findings where appropriate. It seems to me wrong in principle for the Board to reject all documentary evidence adduced simply because it had come to the conclusion that what the taxpayer produced on 22 August 2003 was an attempt to 'beef up' the evidence.

15. For these reasons, I find the Board' s decision unsustainable and, in the circumstances, the only fair course to take is to remit the matter back to a differently constituted Board for determination. Having come to that conclusion, it would plainly be open to the Commissioner to take the section 61 point at the re-hearing. I would also propose an order *nisi* that costs here and below be in the cause of the re-hearing.

Hon Tang JA:

16. This is an appeal by the Commissioner of Inland Revenue ("the Commissioner") from the judgment of Deputy Judge Gill on a case stated by the Board of Review.

17. The questions of law requiring answer are:

> "1. Whether the Board erred in law in holding on the facts as found by the Board that the Appellant failed to discharge his onus of proof in establishing that the sums in question were refunds of ' rent' paid in respect of a tenancy which was said to subsist in fact between the Appellant and Rich Conquest?
>
> 2. In the even that the answer to the question posed by the Appellant is in the affirmative
>
> (a) whether, on the facts as found by the Board
>
> (i) the purported ' letting' of the Subject Premises by Rich Conquest to the Appellant and/or
>
> (ii) the alleged provision of quarters by Realink Paging to the Appellant by way of rent refund were ' artificial of fictitious' and should be disregarded pursuant to section 61 of the Inland Revenue Ordinance? Or
>
> (b) whether the matter should be remitted to the Board for its determination of the issue in (a) above."

18. The judge answered the first question in the affirmative and his answers to questions 2(a) and 2(b) were "no".

Background

19. This appeal concerns the taxpayer's claim that the sums of HK$150,000, HK$360,000 and HK$840,000 paid by his employer Realink Paging Limited ("Realink Paging") to the taxpayer for the years of assessment 1998/99 to 2000/01, both inclusive, were refunds of rent within the meaning of section 9(1A)(a) of the Inland Revenue Ordinance, Cap. 112 ("the Ordinance").

20. The appeal arose out of three assessments all dated 7 June 2003 in respect of the three years of assessments. In these assessments, the following notations appeared:

> "The purported rent reimbursement is assessed as cash allowance as there were no tenancy agreement."

21. The taxpayer objected to the assessments under section 64 of the Ordinance.

22. The Deputy Commissioner (exercising the power of the Commissioner under section 3A of the Ordinance) decided on the appellant's objection dated 22 March 2004.

23. The taxpayer appealed to the Board of Review under section 66 of the Ordinance.

24. By the decision dated 25 October 2004, the Board dismissed the taxpayer's appeal.

25. The taxpayer appealed by way of case stated.

26. Before the Board, the taxpayer did not give evidence. The evidence available to the Board as narrated in the case stated are as follows:

> '**BACKGROUND LEADING TO THE APPEAL BEFORE THE BOARD**
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> 5. By letter dated 10th February 1991, Realink Industries Limited ['Realink Industries'] offered to the Appellant the position of Managing Director in that company. Clause 3 of that letter provided that:
>
> '*Your basic salary will be $27,500.00 per quarter and [Realink Industries] is agreed to provide quarter to you at the time when the Board of Directors approve…*'.
>
> 6. By letter dated 1st April 1994, Realink Industries informed the Appellant that his employment was transferred to Realink Paging consequential upon the re-organization of the Realink Group of Companies.

7. On 31st May 1999, 2000 and 2001, Realink Paging filed employer's returns for the years ended 31st March 1999, 2000 and 2001 respectively in respect of the Appellant which showed the following particulars:

Year of assessment	Capacity employed	Period of employment		Salary	Quarters provided				
		From	To		Period Provided	Address	Nature	Rent paid to landlord by employee	Rent refunded to employee
1998/99	Managing Director	01/04/1998	31/03/1999	$307,152	01/04/1998 to 23/12/1998	Flat C, 11/F, Tower 2, The Regalia, No. 33 King's Park Rise, Kowloon	Apartment	$330,410	[Blank]
					24/12/1998 to 31/03/1999	Duplex A and Roof, 22/F and 23/F, Block 7, King's Park Villa, No.1 King's Park Rise, Kowloon ['the Subject Premises']	Apartment	$150,000	
1999/2000	Managing Director	01/04/1999	31/03/2000	$300,400	01/04/1999 to 31/03/2000	The Subject Premises	Apartment	$360,000	[Blank]
2000/2001	Managing Director	01/04/2000	31/03/2001	$300,400	01/04/2000 to 31/03/2001	The Subject Premises	Apartment	$840,000	[Blank]

8. The Subject Premises was purchased by Rich Conquest Limited ['Rich Conquest'] on 10th February 1998 for $25,593,200. The Appellant and one Yau Wong Ching were the only directors and shareholders of Rich Conquest. The Appellant held 50% of the shares in Rich Conquest.

9. In response to the Assessor's enquires relating to the quarters provided for the year 1998/1999, the Appellant furnished to the Respondent various documents including the following:

(a) A letter ['the Intimation Letter'] dated 2nd November 1998 from Realink Paging to the Appellant in these terms:

'*In view of the termination of your tenancy agreement dated 24 December 1996, the Board of Director has approved to provide the following new quarter to you.*

1 New Address of quarter : [The Subject Premises]

2	*Rental Charges*	*:*	*HK$50,000.00 per month inclusive of Management fee, government rent and rates.*
3	*Tenancy Period (Without Tenancy Agreement)*	*:*	*Start from 01 January 1999 until further notice, [Realink Paging] has the right to give 2 months advance notice to terminate the quarter.*'

(b) A letter signed by Rich Conquest and the Appellant dated 23rd December 1998 [' the Internal Memo'] which provided that

'*[Rich Conquest] agreed to charge HK$50,000.00 per month to [the Appellant] for renting of above premises starting from 24 December 1998. [The Appellant] has the right to terminate the renting of [the Subject Premises] with 2 months advance notice*'.

In response to enquires from the Respondent dated 9th May 2001, Rich Conquest informed the Respondent on 18th May 2001 that the Internal Memo '*is <u>not</u> a tenancy agreement. It is just an internal memo for our record and it is not legal binding. In fact, no tenancy agreement was signed in the said period, and therefore no stamped tenancy agreement is available*' . The letter was signed by Javis Siu [' Mr. Siu'] as its ' Finance & Admin. Manager' .

(c) A Memorandum of Lease said to have been made on 24th December, 1998 between Rich Conquest and the Appellant whereby Rich Conquest let the Subject Premises to the Appellant for 3 months from 24th December, 1998 to 31st March, 1999 with rent at $50,000 per month payable '*in advance without any deduction on or before the 2nd day of each calendar rental period during the term provided.*' This Memorandum of Lease was not stamped. It was not submitted to the Respondent until 22nd August 2003.

(d) Minutes of a meeting of the Board of Directors of Realink Paging dated 24th December 1998 approving the said Memorandum of Lease and resolving that Realink Paging shall reimburse the Appellant ' the monthly rent paid by him to the landlord according to the Memorandum [of Lease]' .

(e) A Debit Note dated 28th December 1998 from Rich Conquest to Appellant for $150,000 being '*Rental Fee 01/01/99 to 31/03/99*

(Including all charges, i.e. Government Rent and Rates and Management Fee).'

(f) An 'Official Receipt' dated 1st January 1999 from Rich Conquest to the Appellant for $150,000.

10. The documentation in respect of the Appellant's claim for the subsequent years followed a similar pattern as that applicable to the claim for the year 1998/1999. The differences were:

    (a) The applicable internal memo and memorandum of lease were dated the same date, namely, 1st April 1999 and 1st April 2000.

    (b) Rich Conquest issued monthly receipts for rental fee paid 'by settlement of the amount due to [the Appellant] from the company':

11. In correspondence exchanged between the Appellant and the Respondent prior to the hearing before the Board, the Appellant asserted:

    (a) In a letter dated 14th August 2001 that '*No tenancy agreement was signed with [Rich Conquest], the landlord, in respect of my residence covering the periods 1.4.1999 to 31.3.2000 and 1.4.2000 and 31.3.2001. Copies of the rental receipts for the same period are enclosed for your perusal*'.

    (b) In a letter dated 9th June 2003 that '*No tenancy agreements were signed between [Rich Conquest] and me because I own 50% shareholding of [Rich Conquest]. As such, [Rich Conquest] has no risk of not signing tenancy agreement with me for cases like I do not pay rental to [Rich Conquest] promptly etc, and there is no need to obtain such documents for any court case. Alternatively, I have signed an internal document for the lease with [Rich Conquest], and [Rich Conquest] issued official receipts to me monthly.*'

    (c) In a letter dated 22nd August 2003 that '*Mr. Jarvis Siu, the Finance Manager of [Rich Conquest], was responsible to negotiate the tenancy with me. He verbally offered me the monthly rent of [the Subject Premises] according to the fair market rent, and we would negotiate the terms of the tenancy. Upon mutual agreement on all terms of the tenancy, a Memorandum of Lease would be signed by the Director of [Rich Conquest] (as landlord) and I (as Tenant) and Mr. Siu acted as witness for the Memorandum ... In fact, [the Internal*

Memo] (dated 23.12.1998) only represented the preliminary intention and negotiation of the tenancy between Mr. Siu and I … The final agreed monthly rent and other terms of the tenancy for the period from 01.01.1999 to 31.03.1999 should be referred to … Memorandum of Lease dated 24.12.1998, which was signed by the Director of [Rich Conquest] and I'.

12. In response to enquiries from the Respondent, Rich Conquest also stated in a letter dated 14th August 2001 that '*No formal tenancy agreements were signed by [the Appellant] and [Rich Conquest]. Instead, copies of the internal records agreed by both parties covering the periods are enclosed for your reference.*'"

27. It is against such background that one turns to the Board's decision in the case stated:

"**THE BOARD'S DECISION**

22. It was the Appellant's case that his relationship with Rich Conquest was one of the landlord and tenant. By virtue of section 68(4) of the IRO, the onus of proof rested on the Appellant.

23. The Board found that the Appellant made contradictory statements to the Respondent in the course of the Respondent's investigation. At all material times right up to 22nd August 2003, the Appellant's position was that no tenancy agreement had been signed with Rich Conquest. The sudden emergence of the Memoranda of Lease on 22nd August 2003 demonstrated the Appellant's awareness of the need to prove his requisite contractual nexus with Rich Conquest. Quite apart from the inadmissibility of these Memoranda by virtue of section 15(1) of the Stamp Duty Ordinance, the Board was not prepared to accept these as genuine contemporaneous documents. The history of their revelation bore all the hallmarks of these being self-serving documents produced to advance the Appellant's case.

24. It followed from the Board's rejection of the Memoranda that the Board did not accept the bare assertions of the Appellant made in his letter dated 22nd August, 2003 as to the circumstances leading to the execution of the Memoranda. Since the Appellant did not attend the hearing before the Board, the bare assertions were untested by cross examination. The Board did not have any explanation from the Appellant for his inconsistencies.

25. The Board was of the view that the Internal Memo carries no weight. Quite apart from the stamp duty point, that document only "represented the

preliminary intention and negotiation"; therefore, it threw no light on the contractual relationship between the Appellant and Rich Conquest.

26. The Board agreed with the representative of the Appellant that by virtue of section 6 of the Conveyancing and Property Ordinance, a written tenancy agreement was not necessary for a term of less than 3 years. The Board took the view that the difficulty of the Appellant's case was the absence of evidence to prove the underlying contractual arrangement. Conflicting assertions were made in pre-hearing correspondence passing between the Appellant and the Respondent. It behoves the Appellant to give the Board some explanation of the inconsistencies and to describe how the tenancy was in fact concluded. In the absence of such evidence in this case, the Board agreed with the views expressed in *Case No. D33/97* at page 239

"*However, as this decision indicates, that benefit cannot be obtained where, in a case involving an alleged rental refund, as a matter of law no relationship of landlord and tenant existed. It is not enough simply to rely … upon the formal niceties of paying cheques to a family member, issuing receipts and completing property returns.*"

27. The Board noted that the Respondent also relied on section 61 of the Ordinance. Given the Board's views as stated above, the Board held that it was not necessary to make any ruling in relation to this alternative submission of the Respondent.

28. For the above reasons, the Board rejected the contentions of the Appellant and confirmed the assessments."

28. As stated, the appeal from the Board was successful.

29. The judge in his judgment followed the well-known dictum of Barnett J in *Commissioner of Inland Revenue v Inland Revenue Board of Review and Another* [1989] 2 HKLR 40 at page 58 that:

"The Court is not permitted to re-evaluate that or any other evidence to see whether it might have made a different finding."

30. The judge summarised the competing arguments before him as follows at para. 16 of his judgment:

"16. The competing arguments in respect of question 1 are narrow in compass; namely, as asserted by the Commissioner, has the Board undertaken a fact

finding exercise and, on the evidence evaluated, found that the taxpayer has not discharged his burden of proof; or, as asserted for Mr Yau, did the Board improperly consider or overlook the evidence available to it, and in doing so apply the wrong standard of proof, and thereby err in law?"

31. But at para. 19, the judge said:

"19. As Mr Barlow for the taxpayer and Ms Chung for the Commissioner both accept the test to be applied is as follows: is there evidence to establish the existence of a tenancy agreement, and is there evidence that a tenancy was performed?"

32. Mr Barlow, who appeared for the taxpayer, submitted that his argument was not put in quite that way. His submission below was that on the evidence before the Board, the Board was required to find the existence of a tenancy agreement.

33. Indeed, having read the carefully prepared written submission by Ms Ada Chung, Acting Principal Government Counsel, who appeared for the Commissioner below, it seems to me the judge at para. 16 has correctly summarised her submission and that para. 19 was not a correct statement of Ms Chung's submission.

34. In any event, the test stated in para. 19 is not the correct test. The question was not whether there was evidence before the Board to establish the existence of the tenancy agreement. If there was no such evidence the taxpayer would have no case at all. The question before the Board was whether they were satisfied on the evidence before them that the payments were refunds of rent within the meaning of section 9(1A)(a) of the Ordinance. The test as stated is unhelpful. The fact that there was evidence to establish the existence of a tenancy would not answer the question whether on the evidence the Board ought to have found a tenancy. The question "is there evidence that a tenancy was performed" is equally unhelpful.

35. Furthermore, it is not clear whether the judge actually applied that test, since it would contradict what he said in para. 17 of his judgment:

"17. Of course it is not within my proper function to impugn the Board's evaluation of the evidence, for that would undermine the Board's role as a fact-finding tribunal."

36. The judge went on to say as follows in his judgment:

"20. The following is incontrovertible or not challenged:

(a) Mr Yau was entitled to the rent relief as a term of his contract of employment;

(b) Rich Conquest owned quarters, invoiced Mr Yau for rent of those quarters and receipted Mr Yau for payment of those invoices;

(c) Mr Yau occupied those quarters;

(d) Realink Paging at a Board meeting approved the memorandum of lease and reimbursement to Mr Yau of the rent paid by him;

(e) Realink Paging in its employer' s returns declared the payments to have been made."

37. Mr Stewart Wong, who appeared for the Commissioner before us, does not accept that these facts are incontrovertible or not challenged. Certainly, they were not accepted as proven. They were the evidence of the taxpayer. As for 20(d) of the case stated, it is clear from the Board' s decision at para. 23 of the case stated, that the Board was not prepared to accept the Memoranda of Leases "as genuine contemporaneous documents". It must follow that they were not prepared to accept the "genuineness" of the minutes purporting to approve the Memoranda of Leases. As for 20(e) of the case stated, Mr Barlow, accepted that the employers' returns (see para. 26 above, and para. 7 of the case stated) did not say that there had been any refund of rent to the taxpayer. As for 20(a), 20(b) and 20(c) of the case stated, there were indeed evidence to such effect. But the burden of proof was on the taxpayer and the Board was not obliged to accept such evidence.

38. The judge went on to say:

"21. The Board reached its findings having found Mr Yau to have been inconsistent in his responses to queries raised and rejected as inadmissible the memoranda of lease because they were not stamped. There can be no fault in that but that does not in my view entitle it to ignore the evidence that was admissible and which points to a bona fide tenancy, albeit informally entered into, and performance.

22. Furthermore, there is nothing to indicate that Rich Conquest had not filed profits tax returns to show the rent had been received, and there is nothing to suggest that Realink Paging had by its returns set out to defraud the Revenue; in other words, nothing to disturb the presumption of their having conducted themselves lawfully in each case.

23. By opting out of the incontrovertible evidence upon which no realistic finding of fact could be reached save that there was a tenancy and it was performed, I am

> satisfied that the Board erred in law in its findings of fact by applying the wrong standard of proof. The answer to question 1 is ' Yes' ."

39. I believe the judge had in mind Mr Barlow' s submissions which were repeated in paras. 6(6) and 6(7) of his written submission:

> "(6) If a Board of Review has before it sufficient material to constitute a prima facie case, then it is obliged to decide the appeal upon the evidence before it plus any applicable presumptions of law, e.g. Morris v. London Iron and Steel Co Ltd [1988] 1 Q.B. 493 (C.A.) at 504C-H and 506G-507B.
>
> (7) If a Board' s determination of an appeal is inconsistent with and contradictory of the facts found by them, then it is wrong in law e.g. Edwards v. Bairstow (L.F.' s No.11) at 36; Kwong Mile Services Ltd v. CIR (L.F.' s No.13) at 288 & 289."

40. Mr Barlow submitted the Board was confronted with two opposing cases. For the taxpayer, the payments were refunds of rental. For the Commissioner, they were cash allowances. He said on the evidence the Board should make up his mind and decide of the two versions which was more probable. He submitted that since there was no evidence to support the case that the payments were cash allowances, whereas, despite the inconsistencies described by the Board and which he did not dispute, the evidence from the taxpayer showed that the payments were refund of rent.

41. Mr Wong referred us to the decision of Mortimer J (as he then was) in *All Best Wishes Ltd v Commissioner of Inland Revenue* [1992] 3 HKTC 750 at 773, where he said:

> "The Board considered the whole of the evidence, including the oral evidence of Mr. LI, the written evidence and the documents. They considered the whole picture, from beginning to end. It may not have been completely straightforward. It is a fact that other tribunals could have reached a different conclusion. I am not saying that I would have done so, for it is not my task to even consider that. My task is simply to decide whether there was evidence upon which the Board could properly reach the findings which are challenged. The answer I do not find difficult. Looking at the whole of the evidence, there is no question in my mind but that the Board were entitled to find, or infer, those matters.
>
> A tribunal, which hears oral evidence and considers documents, is not in the position (as is submitted) that it has to find what the witness says is the fact, even if he is not cross-examined, and even if he is not contradicted by other evidence. A tribunal, in those circumstances, may look at the whole of the circumstances presented to it and may find that the oral evidence is not acceptable on particular matters. Or, may find

> certain facts contrary to the evidence that has been given and, indeed, contrary to what appears in the documents and other material before it.
>
> The Board' s approach to the whole of the evidence including the oral evidence, is set out on pages [757 to 762 in this print] in detail. I do not propose to rehearse it. Was the conclusion that this was trading, unreasonable or perverse? As I have said, even if other tribunals may have reached a different conclusion, on the whole of the evidence of what was done and said and the whole nature of this enterprise as presented to the Board, I cannot say that the Decision was either unreasonable or perverse. In my judgment it was a conclusion which was plainly open both on the evidence and on facts found."

42. Mr Wong also referred us to the decisions of the House of Lords in *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948 at 955, where this well-known dictum of Lord Brandon of Oakbrook can be found:

> "The first reason is one which I have already sought to emphasise as being of great importance, namely, that the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take."

43. The same approach was adopted by Deputy Judge Carlson in *Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue* [2006] 1 HKLRD 821 at 831, where an argument similar to that advanced by Mr Barlow before us was rejected by the judge at page 831 as follows:

> "***Question (i) – Whether, as a matter of law and on the facts found, and having held that we were unable to come to a positive finding as to the relevant intention, were we right to conclude that the appellant had not discharged its burden of proof in the appeal and consequently to dismiss the appeal and confirm the determination?***
>
> 42. I am satisfied that, save for the one aspect that I have already referred to and decided, the Board came to factual conclusions which were entirely open to it and that it cannot be faulted in any way as to the manner that it approached its task nor in the way in which it sought to weigh the evidence. Mr Swaine has not attempted to argue otherwise. He has approached the matter by inviting me to look at the consequences of the Board' s finding. By producing an apparent

'scoreless draw' on the evidential contest before it, Mr Swaine submits that the accounts at the very least amounted to a *prima facie* case of an intention to hold the Property on a long-term basis for rental purposes. This amounts to the taxpayer presenting the Revenue with an evidential burden for it to discharge which it has singularly failed to do. He says this because the Board also felt unable to say whether the taxpayer intended to trade as at the date that it acquired the Property. Once the Revenue failed to overcome the evidential burden created by the *prima facie* case, as I have just described it, then as a matter of logic and law the essence of the case fell to be resolved on the basis of the unanswered *prima facie* case and therefore on a proper analysis the taxpayer had carried its burden and the appeal ought to have succeeded. Although I have expressed it as a 'scoreless draw' the consequence was by no means a draw but that of an unanswered goal by the taxpayer. Although expressed by me as a sporting metaphor it appears that this properly illustrates the effect of Mr Swaine's submission.

43. Mr Mok submits that where s.68(4) of the Inland Revenue Ordinance (Cap. 112) (the Ordinance) requires the appellant to prove that the assessment is excessive or incorrect, a failure to establish its case will be fatal to any appeal. That is the simple consequence of this statutory requirement. There is ample authority to support the fact that the onus is on the appellant. See for example *All Best Wishes Ltd v Commissioner of Inland Revenue* (1992) 3 HKTC 750, *Mok Tse Fung v Commissioner of Inland Revenue* (1962) HKLR 258 and recently *Cheung Wah Keung v Commissioner of Inland Revenue* [2002] 3 HKLRD 773.

44. It is also abundantly clear that where the tribunal of fact is not able to come to a positive decision one way or the other, as is the case in this matter, it is open to it to say that the party which bears the onus of proof has failed to discharge that burden and must therefore be taken to have lost. This principle was expressed as follows by Lord Brandon in *Rhesa Shipping Co SA v Edmunds & Another* [1985] 1 WLR 948 at pp.995H-956A:

… the judge is not always bound to make a finding of fact one way or the other with regard to facts averred by the parties, He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases however in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.

45. This was the course that was also adopted by the Court of Appeal in *Li Tim Sang v Poon Bum Chak* (unrep., CACV No 153 of 2002); all three Justices, Le Pichon and Cheung JJA's, and Stone J referring to this part of Lord Brandon's speech in *Rhesa Shipping Co SA v Edmunds & Another* [1985] 1 WLR 948.

46. Unquestionably, it was therefore open to the Board to decide the matter on the basis of the burden of proof. That then leaves over the analysis advanced by Mr Swaine that the rejection of the Revenue's case that the Property had been acquired for trading purposes must amount to acceptance of the *prima facie* case at least that the Property had been acquired as a long-term capital asset.

47. I do not consider that this can be a correct analysis of the Board's inability to come to a decision one way or the other. All that this can mean is the failure by the appellant taxpayer to do what the Ordinance required of it which is to discharge the burden of proving that the assessment was incorrect or excessive. There is no place in my judgment for any gloss on this perfectly straightforward statutory requirement. Once no finding could be made by the Board the burden of proof engaged and it followed that the appellant will have failed.

48. The answer to the question therefore is 'Yes'."

44. These authorities show that Mr Barlow's submission is unsound. Mr Barlow also referred to *Morris v London Iron and Steel Co Ltd* [1988] 1 QB 493, which concerned a claim in an industrial tribunal for unfair dismissal. The industrial tribunal held on the preliminary issue, whether the employee had been dismissed, found the probabilities equally balanced, that it was unable to make a finding of fact one way or the other and dismissed the claim. The employee appealed to the Employment Appeal Tribunal, which held that tribunals of fact were under a duty to make findings on at least the important issues of fact before them and that the industrial tribunal had failed to discharge that duty, and remitted the case for rehearing by another industrial tribunal. On appeal by the employer to the Court of Appeal, the appeal was allowed. May LJ said at 504:

"I think it unnecessary further to analyse those decisions. In my opinion what they come to is this. Judges and tribunals of fact should make findings of fact in relation to matters before them if they can. In most cases, although in some cases it may be difficult, they can do just that. Having made them, the tribunal is entitled to draw inferences from the findings of primary fact where appropriate. In the exceptional case, however, a judge conscientiously seeking to decide the matter before him may be forced to say 'I just do not know:' indeed to say anything else might be in breach of his judicial duty. In this connection, however, I would say this. Speaking from my own experience some people find it easier to make up their minds than others and it should not be thought that a swift reliance upon where the burden of proof lies and a

failure to decide issues of fact in the case, ought in any way to be considered an easy or convenient refuge for anybody who does find it difficult to make up his mind in a particular case."

45. As is clear from the passage quoted above in an exceptional case a tribunal:

"… may be forced to reach the conclusion that they do not know on which side of the line the decision ought to be."

46. Normally when a tribunal is presented with two different versions of a factual event, say, a claim for negligence or breach of contract, one would expect a tribunal to be able to choose between the two versions. Here, the Board was concerned with a situation where the facts were peculiarly within the knowledge of the taxpayer. Section 68(4) of the Ordinance puts the onus of proof on the taxpayer. In such situations, it is not perhaps less exceptional that decisions should turn on whether the taxpayer has discharged the onus of proof.

47. Nor is this a case where the Commissioner has put forward an alternative case of a cash allowance. It was the taxpayer's case that the sums were refunds of rent paid. Unless the taxpayer proved to the satisfaction of the Board that they were refunds of rent, they were taxable. Contrary to Mr Barlow's submission, the Commissioner does not have to prove that the taxpayer was contractually entitled to the "cash allowance". If the taxpayer had received a cash payment, it is taxable, unless, in this case, he has proved that it was refund of rent.

48. Mr Barlow then submitted that the Board's decision was perverse. If the decision that the taxpayer had not proved his case is perverse, then of course the Board would have erred in law.

49. But I do not accept that the decision of the Board could be said to be perverse. In proceedings before the Board of Review, very often the taxpayer's case is perfect on paper. It is also often the case that the Commissioner has no positive evidence. But it cannot mean that, under such circumstances, the Board is obliged to accept the taxpayer's case, or that refusal to do so is perverse. If a taxpayer chooses to call oral evidence. There may be good reason to disbelieve the oral evidence. But it does not follow that if a taxpayer chooses to call no evidence and to rely solely on documentary evidence, the Board is obliged to accept the taxpayer's case as proven. That in substance was Mr Barlow's submission.

50. Moreover, here, the Board found in relation to the Memoranda of Leases:

"… the Board was not prepared to accept these as genuine contemporaneous documents. The history of their revelation bore all the hallmarks of these being self-serving documents produced to advance the Appellant's case."

51. So we are not concerned with a case which is perfect on paper. It was perfectly open to the Board to conclude following their rejections of the Memoranda that,

> "… the Board did not accept the bare assertions of the Appellant made in his letter dated 22nd August, 2003 as to the circumstances leading to the execution of the Memoranda. Since the Appellant did not attend the hearing before the Board, the bare assertions were untested by cross examination. The Board did not have any explanation from the Appellant for his inconsistencies,"

the taxpayer has not proved his case.

52. They were also entitled to place no reliance on the internal memo for the reasons given by them.

53. Mr Barlow has submitted that a written tenancy agreement was not necessary. There could have been an oral tenancy. That is correct. But on the evidence presented to the Board I do not agree with Mr Barlow's submission that the Board was bound to find that there was an oral tenancy. Moreover, it was not the taxpayer's case that there was an oral tenancy, so I do not believe the Board could be faulted for not considering whether there might have been an oral tenancy.

54. At para. 22 of the judgment, the judge said that there was:

> "… in other words, nothing to disturb the presumption of their having conducted themselves lawfully in each case."

55. I believe this is based on Mr Barlow's submission that the presumption of regularity applied. Mr Barlow referred to the Osborn's Concise Law Dictionary (10th ed.) at page 286 as well as *The Attorney General v Fung Kam Chuen* [1982] HKLR 494 in support. In Osborn, "omnia praesumuntur rite et solemniter esse acta" was translated as "all acts are presumed to have been done rightly and regularly". Better help could be obtained from Phipson on Evidence (15th ed.) at 4-28:

> " (i) *Omnia praesummuntur rite esse acta*
>
> This presumption is somewhat similar to the presumption of innocence. On the proof that a public or official act has been performed, it is presumed that the act has been regularly and properly performed. So too persons acting in public capacities are presumed to have been regularly and properly appointed. It has been used in connection with conduct of machines as well as men. Its application in criminal cases has in general been more patchy."

56. I do not believe the presumption of regularity comes into the matter at all. In any event, it only arises where there is no evidence to the contrary. Here having regard to the inconsistencies, the Board was perfectly entitled to reject the Memoranda of Leases.

57. *The Attorney General v Fung Kam Chuen* concerned a consent order for possession under section 53(2) of the Landlord and Tenant (Consolidation) Ordinance, Cap. 7, on the ground that the landlord required the premises for his own occupation. Mr Barlow, who also appeared as counsel in that case, argued that on the basis of the presumption of regularity, it must be presumed that the judge had satisfied himself that the premises were indeed so required before making the order. But there is no indication that the Court of Appeal decided the matter on that basis.

58. Nor do I accept that if a taxpayer can present a case which, if believed, establishes a *prima facie* case, the Board, is bound, in the absence of evidence from the Commissioner to the contrary, to accept the taxpayer's case. If authority is needed, *All Best Wishes Ltd* is clear authority to that effect.

59. So, my answer to the first question is "no" and I would allow the appeal.

60. I turn to the second question. Section 61 of the Ordinance provides:

> "**61. Certain transactions and dispositions to be disregarded**
>
> Where an assessor is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the person concerned shall be assessable accordingly."

61. As noted above, in para. 27 of the case stated, the Board held:

> "… that it was not necessary to make any ruling in relation to this alternative submission of the respondent."

62. In para. 26 of the judgment, the judge said:

> "26. In my view on the evidence before it the Board could not have found the transactions to have been either fictitious, a sham, nor that they were artificial. There is nothing to be gained from returning the matter back to the Board for consideration for a second time. The answers to questions 2(a) and 2(b) are 'No'."

63. I do not agree.

64. As the first affirmation of Go Min Min Mecky made on the 6 January 2006 shows, the Deputy Commissioner in his decision of 22 March 2004 said:

> "(5) Furthermore, having considered the factors mentioned in paragraph (4) above, I am of the view that the alleged letting between the Taxpayer and RC [Rich Conquest Limited] was an artificial and fictitious transaction in the context of section 61 of the IRO. Such letting, in my view, was created solely for the purpose of reducing the Taxpayer' s tax burden by excluding the Relevant Sums from assessment under section 9(1)(a) of the IRO and bringing into charge only the rental value within the meaning of section 9(2). The transactions should be disregarded and the Relevant Sums were part of the Taxpayer' s income which should be fully assessed to salaries tax."

65. Neither the judge nor I know what were the factors which were relied on by the Deputy Commissioner.

66. There has been no adjudication on the point by the Board. So if it were necessary to do so, I would have ordered this issue to be remitted to the Board for its determination.

67. Mr Barlow has a number of submissions to the contrary.

68. First, that there was no case under section 61. He submitted that there might have been a case under section 61A, but since that had not been relied on by the Commissioner it was irrelevant. He has referred to the *Commissioner of Inland Revenue v Howe* [1977] HKLR 436 where Cons J (as he then was) has given guidance on the meaning of "artificial or fictitious" in section 61 of the Ordinance. I do not understand how Mr Barlow was able to say that no case under section 61 could be made since he too did not know what were the factors relied on by the Deputy Commissioner. Nor can I conclude on the basis of the passage quoted in para. 63 above that the statement that:

> "… Such letting, in my view, was created solely for the purpose of reducing the Taxpayer' s tax burden by excluding the Relevant Sums from assessment …"

necessarily show that it was not artificial or fictitious within the meaning of section 61. Nor do I read *Howe* as authority that even if the letting was created "solely" for the purpose of reducing the taxpayer' s tax burden, it could not be regarded as either "artificial or fictitious".

69. Mr Barlow also submitted that the burden was not on the taxpayer to show that the assessment based on section 61 is incorrect. But that is contrary to the decision of this court in

Cheung Wah Keung v Commissioner of Inland Revenue [2002] 3 HKLRD 773 at para. 43. Anyway, it is plainly wrong.

70. Mr Barlow then submitted that the appeal was against the assessment by the assessors, and since the notations referred to in para. 20 above did not refer to section 61, therefore, it was not a point which was open to the Commissioner. The appeal was not against the assessment, it was against the determination of the Deputy Commissioner. And as Cons J has explained in *Howe* at pages 443-444, the effect of section 64(2) is to require the Commissioner to reconsider the assessment and if necessary to reassess it from the very beginning. Moreover, as section 66 of the Ordinance shows, the appeal to the Board was effectively an appeal against the determination of the Commissioner.

71. Mr Barlow then argued that to remit the section 61 issue to the Board amounts to a re-litigation and is an abuse of process. I do not agree.

72. So, in the event that I should be wrong in the answer I gave to the first answer, I would order that the matter be remitted to the Board for its determination. My answer to question 2(b) is "yes".

73. For the above reasons, I would allow the appeal.

Hon Sakhrani J:

74. I have had the benefit of reading the judgments of Le Pichon JA and Tang JA in draft. I agree with the judgment of Le Pichon JA and the reasons that she has given. I also agree with the order that she proposes. There is nothing that I can usefully add.

Hon Le Pichon JA:

75. The appeal is accordingly allowed but the case is to be remitted back to be heard *de novo* by a differently constituted Board. There is also to be an order *nisi* that the costs, here and below, be in the cause of the re-hearing.

(Doreen Le Pichon)	(Robert Tang)	(Arjan H Sakhrani)
Justice of Appeal	Justice of Appeal	Judge of the

Court of First Instance

Mr Barrie Barlow, instructed by Messrs Robertsons, for the Appellant/Respondent

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