CACV 83/2006

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

CIVIL APPEAL NO. 83 OF 2006
(ON APPEAL FROM HCIA NO. 1 OF 2004)

BETWEEN

THE COMMISSIONER OF INLAND REVENUE Appellant

and

COMMON EMPIRE LIMITED Respondent

Before: Hon Rogers VP, Le Pichon JA and Barma J in Court
Date of Hearing: 28 November 2006
Date of Judgment: 28 November 2006
Date of Handing Down Reasons for Judgment: 5 December 2006

REASONS FOR JUDGMENT

Hon Rogers VP:

1. This was an appeal from a Judgment of Deputy High Court Judge To given on 17 January 2006. The matter before the judge was an appeal by way of case stated from the Board of Review. On that occasion the judge dealt with the first and second questions in the case stated. The judge allowed the appeal by the Commissioner. At the conclusion of the hearing of this appeal, this court dismissed the appeal with reasons to be given in writing.

The questions arising on this appeal

2. The questions which arise on this appeal have been concisely stated in the amended case stated as follows:

> "(1) Whether the Board of Review erred in law in holding that, in the absence of fraud, the assessor had no power to "re-open" a statement of loss issued by an assessor in respect of any particular year of assessment after more than 6 years had elapsed since the expiration or end of that year of assessment?
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> (2) For the purpose of Question (1) above (and without prejudice to the generality thereof), whether [the Board] has erred in law in treating the computation of a Taxpayer's profit or loss in any particular year as an "assessment" for the purpose of section 60 of [Cap. 112] "the Ordinance"?"

3. The respondent to the appeal to the High Court, which for convenience will be referred to as the Taxpayer, had purchased agricultural land in 1990 and 1991. The details of the purchase and sale, including by that the resumption by Government, are not significant save to say that the Taxpayer had treated the gains made on the disposal of the land as being non taxable. The Commissioner had issued a statement of loss for the year 1993/94 of $2,175,763. The Commissioner and the Taxpayer agree that a gain of $3,490,917 which had been derived from resumption of one of the lots of land accrued to the Taxpayer in the year of assessment 1993/94, thus the Taxpayer's profits for that year of assessment should (if that gain were taxable) have been $1,315,154. By the time this was appreciated, however, more than six years had elapsed and the parties were in agreement that by virtue of section 60 of the Ordinance no assessment to profits tax could be made in respect of those profits. The questions in this case arose because the Commissioner had revised the statements of loss for the years 1993/94 to 1997/98 to nil. The Commissioner then issued an additional profits tax assessment for the year 1998/99 based on the fact that there had been no loss to be carried forward to that year.

4. The crucial question in this appeal is whether a statement of loss issued by an assessor should be treated in the same way as an assessment of tax. The Board came to the conclusion that it was not open to the Commissioner to revisit a statement of loss issued more than six years previously. The Board referred to a number of sections of the Ordinance and, in short, considered the power of the Commissioner to revise a statement of loss should be governed under the same provisions as the power of the Commissioner to make an additional assessment under section 60(1)

of the Ordinance. The Board referred to situations where even if tax had been refunded wrongly, the Commissioner was unable to obtain a repayment or refund of the tax more than six years later. Reference was also made to section 29(6) and section 70A, which limited the time available for the correction of errors to six years. The Board also referred to section 80(3) which likewise limited the period during which a person might be liable to any penalty under section 80 of the Ordinance.

5. The Board considered that the position was confirmed by the fact that sections 51C and 51D provided for the keeping of various records for a minimum period of seven years reinforced the conclusion that absent any fraud there was a time limit of six years from the end of the year of assessment for all matters relating to taxation.

6. The judge below considered the matter as a question of construction of the statute and came to the conclusion in paragraph 39 of his judgment:

> "From the above analysis, the only reasonable meaning which could be given to the word "assessment" for the purpose of section 59 and likewise sections 60 and 62 is that it is a process of ascertaining or computing the net assessable value of a property subject to property tax or the net chargeable income of a person subject to salaries tax or the assessable profits of a person subject to profits tax and the application of the appropriate rate of tax to that amount assessed to yield a positive amount of tax chargeable against the person assessed to tax. An ascertainment of loss which does not result in the application of the appropriate rate of tax to that loss is not an assessment within the meaning of the Ordinance."

7. In my view the judge was correct. Part X of the Ordinance is concerned with assessments. Section 59(1) provides that an assessor is required to assess a person when the assessor is of the opinion that that person is chargeable with tax. The implication, therefore, is that if the assessor is not of the opinion that a person is chargeable for tax then the assessor is not required to assess that person. This reading of section 59 is reinforced by sections 59(1A), (1B) and (1C). It is unnecessary to set out those sections because it suffices to say that they provide instances where not only is the assessor not obliged to proceed to make an assessment, for example in cases where assessable profits do not exceed the limits for taxation set out in schedule 4, but they even provide in section 59(1C) that an assessment may be annulled if a person has no income, property or profits chargeable to tax under the Ordinance in any year of assessment. It is also clear from section 62 that there is a distinction drawn in the Ordinance between a notice of assessment and an assessment. Under section 62(1) the Commissioner is required to give notice of assessment to each person who has been assessed.

8. From the foregoing I reach the conclusion that an assessment is a process by which an assessor, and in some circumstances an Assistant Commissioner, determines the amount of tax payable by a person. If there is no tax payable by a particular person, the assessor does not assess that person.

9. In contrast, there is no statutory reference to a "statement of loss". A statement of loss is simply an administrative document which has no statutory force. Under section 19C of the Ordinance a person who sustains a loss in any trade, profession or business can have the amount of that the loss carried forward and set off against the amount of his assessable profits from that trade, profession or business for subsequent years of assessment. But even in the statutory provisions relating to losses and the ability to carry them forward there is no reference to the issue by the Commissioner of a statement of loss. All that is stated in the Ordinance is under section 19D which provides that the amount of the loss shall be computed in the same manner and for the same basis period as assessable profits for any year of assessment.

10. Mr Barlow, who appeared on behalf of the Taxpayer, argued that the Ordinance should be given a purposive construction which would entail a statement of loss being treated on the same basis as an assessment. Relying on the approach adopted by the Board of Review, he argued that it was anomalous, illogical and unfair if the Commissioner were not to be bound by the terms of a statement of loss in the same way as the Commissioner is bound by an assessment under section 60 of the Ordinance.

11. In my view there is no illogicality, unfairness or other objection to the Commissioner requiring a taxpayer to establish the existence of a loss at such time as it is sought to set off that loss against profits, even if that does not happen for more than six years after the year of assessment in which the loss took place. The statutory requirements imposed on taxpayers to keep records are for minimum periods. It would seem logical that if a taxpayer were to seek a reduction of tax by reason of a loss which he has made in any year of assessment the taxpayer should be able to establish that loss. It was suggested in argument that this might impose excessive burdens particularly on public companies. No figures were presented to this court, but it would seem surprising if many taxpayers, particularly public companies, had losses which needed to be carried forward for more than six years.

12. In the course of argument particular reliance was placed on the case of *Lloyd's Bank Export Finance Ltd v Commissioner of Inland Revenue* [1991] 2 AC 427. In that case the Privy Council construed the New Zealand tax legislation and came to the conclusion that the Commissioner made an assessment for the purposes of the New Zealand Act when he concluded that the taxpayer had income on which tax was to be paid or that there had been no taxable income or that a loss which could be carried forward and deducted from assessable income had been incurred. The Privy Council held that the Commissioner's determination that no tax was payable constituted an assessment and, therefore, was binding on the Commissioner after the prescribed time limit had expired. Without, in any way, doubting the decision, it remains to be said that it was a decision on the New Zealand legislation which was considerably different from the Ordinance. Furthermore, in coming to its conclusion the Privy Council referred to the Australian case of *Batagol v Commissioner of Taxation of the Commonwealth of Australia* (1963) 109 CLR 243 where a similar issue as to whether an assessment was time barred had arisen. The

Privy Council declined to follow the Australian decision on the basis that the wording of the Australian statute was significantly different from the New Zealand legislation.

13. Mr Barlow helpfully drew this court's attention to the more recent Australian case of *Commissioner of Taxation of the Commonwealth of Australia v Ryan* [2000] 201 CLR 109 in which the *Batagol* was affirmed. Nevertheless, Mr Barlow placed particular emphasis on the dissenting judgment of Kirby J indeed, adopting his argument that it would be absurd if the Commissioner were bound by an assessment made of very few dollars but were not bound if the Commissioner had come to the conclusion that no tax was payable. Similarly it was said that it was anomalous for the Commissioner to be able to reopen his giving a statement of loss at any time in the future but not able to reopen a case where fraud had been established more than 10 years after the year of assessment. As already stated, it would not seem to be too onerous to require a Taxpayer to keep the necessary records for him to be able to establish the occurrence of a loss at such time as it was proposed to take that loss as a deduction against income for the purpose of assessing taxable profits.

14. In my view therefore the judge came to the correct conclusion and for these reasons I considered that the appeal fell to be dismissed.

Hon Le Pichon JA:

15. I agree.

Hon Barma J:

16. I agree.

(Anthony Rogers) Vice-President	(Doreen Le Pichon) Justice of Appeal	(Aarif Barma) Judge of the Court of First Instance

Mr Ambrose Ho SC & Mr Michael Yin, instructed by Department of Justice, for the Appellant/Respondent

Mr Barrie Barlow, instructed by Messrs Pang & Associates, for the Respondent/Appellant