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 Tang VP, Le Pichon JA and Sakhrani J in Court
Date of Hearing: 6 December 2006
Date of Handing Down Decision: 8 December 2006

D E C I S I O N

Hon Tang VP:

1. I agree with the judgment of Le Pichon JA and have nothing to add.

Hon Le Pichon JA:

2. On the 30 May 2006, judgment was handed down in this appeal, allowing the appeal and setting aside the judgment below. By a majority, it was directed that the case stated from the decision of the Board of Review be remitted back to be heard *de novo* by a differently constituted Board ("the direction") and that the costs of the taxpayer of the appeal and in the court below be in the cause of the rehearing.

3. Prior to the order being drawn up, on 19 June 2006, the Commissioner filed a notice of motion for an order that the direction be rescinded or set aside and that the appeal be allowed. On 22 June 2006 it was ordered that no further steps be taken to draw up an order or enter judgment or otherwise perfecting the terms of the judgment of 30 May 2006 until final determination by this court of the notice of motion. Time for the Commissioner to file an application for leave to appeal to the Court of Final Appeal was also extended to 28 days after the order had been perfected. That notice of motion as well as the Commissioner' s application to vary the costs order nisi made on 30 May 2006 are before this court.

Jurisdiction to remit

4. At the appeal hearing in May 2006, no submissions were made as to the jurisdiction of the court to remit the matter back to the Board, be it as originally constituted or differently constituted. The question which arises is whether the court has jurisdiction to give the direction.

5. It was submitted on behalf of the Commissioner that the court' s powers are delimited by section 69 of the Inland Revenue Ordinance ("the Ordinance"). In pertinent part, that section reads:

> "(1) The decision of the Board shall be final:
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> Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, together with a fee of the amount specified in Part II of Schedule 5, within 1 month of the date of the Board' s decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, shall be the date of the communication by which the decision is notified to him.
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> …

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

It is clear that the statutory provisions do not confer any general power to remit the case to the Board for rehearing *de novo.* See *Commissioner of Inland Revenue v Hang Seng Bank Ltd* 2 HKTC 614 at 638 where Cons VP observed that the jurisdiction of the court under section 69:

> "is to "hear and determine any question of law". We may, in accordance with our decision, "confirm, reduce, increase or annul the assessment determined by the Board". We may also … remit the case to the Board with our opinion thereon, but that opinion would have to relate to a question of law. We have no power to remit for the Board to reconsider their findings on the facts. We have to take these as the Board has found them. We may only interfere if the findings are not justified by the evidence."

6. Mr Barlow who appeared for the taxpayer did not take issue with the Commissioner's position and accepted that the Court of Appeal does not have the jurisdiction to order that an appeal originating under section 69 be returned to the Board, differently constituted, for a rehearing *de novo.* From the wording of section 69, it is clear beyond peradventure that this court does not have jurisdiction to give the direction.

7. The issue between the parties then focused on the disposal of the appeal and that turned on how question 1 raised in the case stated had been answered. For convenience, that question is set out below:

> "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?
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> …"

8. Mr Barlow sought to argue that the Board had seriously erred in the way in which it had undertaken its fact-finding duties given that the majority of this court considered the decision of the Board to be "unsustainable" and that accordingly that decision should be set aside. He referred to *Wong Ning Investment Co Ltd v Commissioner of Inland Revenue* (2000) HKTC 222 and

Stanwell Investments Ltd v Commissioner of Inland Revenue [2004] 2 HKLRD 227 as examples.

9. For the reasons explained in my judgment of 30 May 2006, I was troubled by the lack of findings of primary fact on the evidence that was before the Board. But for the constraints of the case stated procedure, I would have remitted the case for a rehearing *de novo*, that being, in my view, the sensible course to take. Regrettably, that is not an option open to this court. One may perhaps question whether the technicalities and constraints of the case stated procedure serve a useful purpose and are conducive to achieving a fair and just result.

10. Be that as it may, for the purposes of question 1, the taxpayer agreed to proceed "on the facts as found by the Board". It is also to be noted that the question was not framed as a general mishandling of the case by the Board as Mr Barlow would have it now. Rather, it was whether the Board had adopted the wrong standard of proof, thereby erring in law.

11. Where a party considers that a case stated should incorporate further findings, procedurally, he would have to apply to the Court of First Instance for the case stated to be remitted to the Board to incorporate further findings of fact. In this regard, section 69(4) is similar to section 56(7) of the Taxes Management Act 1970 which was considered by Scott J (as he then was) in *Consolidated Goldfields PLC v Inland Revenue Commissioners* [1990] 2 All ER 398. It was held (at 402 g-h) that the applicant must show that the desired findings were (a) material to some tenable argument, (b) at least reasonably open on the evidence that had been adduced and (c) not inconsistent with the findings already made. It was therefore open to the taxpayer to take such a course had he seen fit to do so prior to the matter being heard by the judge below. As already noted, in the present case, not only did the taxpayer not adopt such a course, it asked the Board to state the question on the basis that the Board's findings of fact were accepted.

12. Given the way in which the first question in the case stated was framed, it has to be answered in the negative. Notwithstanding the fact that I have found the Board's decision wanting and unsatisfactory in certain respects, that was not the basis of any question of law posed and none could now be added. The authorities cited by Mr Barlow are of no assistance. In the present case, as explained above, the taxpayer was in a position to do something about the paucity of factual findings. He did not avail himself of the opportunity to do so and cannot now complain.

Costs

13. Since there will be no rehearing and the judgment below has been set aside, costs should follow the event. I would therefore order that the costs of the appeal including the hearing of the present applications and the costs below be to the Commissioner.

Hon Sakhrani J:

14. I agree with the decision of Le Pichon JA.

(Robert Tang)	(Doreen Le Pichon)	(Arjan H Sakhrani)
Vice-President	Justice of Appeal	Judge of the Court of First Instance

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

Ms Yvonne Cheng, instructed by the Department of Justice, for the Respondent/Appellant (Applicant)