HCIA 14/2005 AND HCIA 15/2005

HCIA 14/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL
INLAND REVENUE APPEAL NO. 14 OF 2005

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BETWEEN

HIT FINANCE LIMITED Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

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HCIA 15/2005

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL
INLAND REVENUE APPEAL NO. 15 OF 2005

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BETWEEN

HONGKONG INTERNATIONAL TERMINALS LIMITED Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon Rogers, Tang VPP and Le Pichon JA in Court
Date of Hearing: 22 June 2007
Date of Judgment: 22 June 2007
Date of Handing Down Reasons for Judgment: 24 July 2007

REASONS FOR JUDGMENT

Hon Rogers VP:

1. These were applications by the taxpayers to vary the orders *nisi* that these matters should be remitted to the Board of Review. The taxpayers sought that those orders should be set aside and in lieu thereof there be orders that the assessments determined by the Board of Review be annulled. There were also applications on behalf of the taxpayers for leave to appeal to the Court of Final Appeal in the event of their application to vary being unsuccessful.

2. At the conclusion of the hearing of these applications this court ordered that the cases should be remitted to the Board of Review for reconsideration in the light of the judgment of this court and the answers given to the questions in the case stated. This court set aside the order *nisi* giving the appellant the costs before the Board of Review.

3. The taxpayers were also given leave to appeal to the Court of Final Appeal in so far as that was necessary given the fact that the respondent, the Commissioner, had already been given leave to appeal. In the light of the fact that the respondent was not, of course, required to provide security for costs on her appeal and given the sums involved in the respective cases, this court considered it was unnecessary and inappropriate in the circumstances to order that security for costs be provided by the taxpayers.

4. Before turning to other matters mention can be made of the fact that, by oversight, this court had previously acceded to a paper application consented to by the parties that leave should be given to the Commissioner to appeal to the Court of Final Appeal. That application and the corresponding order was made prior to the order of this court being settled. That, of course, should not have happened and had this court been alert to the fact that the order on the appeal had not yet been finalised or perfected no order granting leave to appeal would have been made until the order had at least been settled.

5. On this application there was considerable discussion as to the form of order which this court should make. It was the taxpayers' contention that this court should simply allow the appeal and set aside the assessments. Questions were also raised as to the powers of the Board of Review to make further findings of fact and, indeed, to hear further evidence.

6. Under section 69(5) of the Ordinance the Court has power to remit the matter to the Board with the opinion of the court thereon. The Ordinance is, seemingly, silent as to what steps the Board should take when that is done, specifically as to whether the Board holds further hearings and hears further evidence. Although it may not be of overriding importance it can be observed that section 69(5) provides simply that:

> "Where a case is so remitted by the court, the Board shall revise the assessment as the opinion of the court may require."

7. In contrast it can be observed that in relation to the powers of Board when remitting a matter to the Commissioner section 68(8)(b) provides that:

> "Where a case is so remitted by the Board, the Commissioner shall revise the assessment as the opinion of the Board may require and in accordance with such directions (if any) as the Board, at the request at any time of the Commissioner, may give concerning the revision required in order to give effect to such opinion."

8. Our attention was also drawn to the Taxes Management Act 1970 where section 56(6) empowers the court in England and Wales to make "…such other order in relation to the matter as to the Court may seem fit."

9. It is clear that although in the appeals to the Board in the present cases on the issues which arose, and, in particular, on the case posited on behalf on the Commissioner under section 61A of the Ordinance, a great deal of the argument was directed to there being no real money, the case for the Commissioner was not confined to that. The matter was put on a general basis that there had been a tax benefit: see for example the Final Submissions of the Commissioner before the Board of Review.

10. Because this court was unanimous that there was real money and the holding that there was no real money was unsustainable, the basis upon which the Board held against the taxpayer was vitiated. Since the finding that there was no real money was so fundamental to the reasoning of the Board, it is not be possible for this court to hold how the Board would have decided the appeals had it not held that there was no real money. In those circumstances it is, of course, necessary for this matter to be remitted to the Board for reconsideration in the light of this court' s judgment' s and answers to the questions.

11. The parties then raised the question as to whether it would be open to the Board to hear further evidence. Relying on the decision of this court in *Yau Wah Yau v Commissioner of Inland Revenue* (No 2) [2007] 1 HKC 417 it was said that the court has no power to remit the matters to the Board to reconsider their findings. That submission would appear to me to be correct in so far as it relates to findings of fact but it needs qualification in respect of conclusions of law based on such findings. What was said in the *Yau Wah Yau* decision was that there is no general power to remit the case to the Board for rehearing *de novo.* Reference was made in that decision to the case of *Commissioner of Inland Revenue v Hang Seng Bank Ltd* (1989) 2 HKTC 614 at 638 but what was being referred to there by Cons VP was his statement that the court had no power to remit a case to the Board to reconsider their findings of fact. That was in answer to an argument on behalf of the Commissioner that the facts as assumed and accepted before the Board were in fact wrong. That was a simple case, therefore, of the court saying that the appeal by way of case stated was an appeal as to a matter of law and not as to a matter of fact.

12. That said, there may be a difference between making findings of fact in respect of matters where there have been no findings of fact at all and the Board being asked to change findings of fact. Counsel for the Commissioner drew our attention to the case of *Wing Tai Development Co. Limited v Commissioner of Inland Revenue* [1979] HKLR 642 where Roberts CJ said that when a matter was remitted to the Board additional evidence was permissible in exceptional circumstances and the court on that occasion left it to the Board to decide in its discretion whether or not to permit either or both of the parties to adduce further evidence.

13. After the mid-day adjournment this court drew the attention of the parties to what had been said in a number of cases in particular the case of *R.A. Bird & Co. v The Commissioners of Inland Revenue* 12 TC 785 at 794-5 where the Lord President (Clyde) refused to send a case back to the Commissioners to supplement evidence which the appellant had failed to call. In *Archer-Shee v Baker* 15 TC 1 Lord Hanworth MR said at page 11 that he did not know of a case where the matter had been sent back for a complete new trial. He said that in the context of upholding the judge below, who had agreed with the Commissioners that evidence of American law should not be admitted in the reconsideration of a case which had been submitted back to the Commissioners by the House of Lords. The primary reasoning seemed to be that what was required was that the Commissioners should consider questions of law and that American law appeared to have been treated by the House of Lords as a matter of law rather than fact. Greer LJ, on the other hand, dissented from the decision of the majority in that case and held that further

evidence was admissible on a point which was an integral part of facts that were required to be found following the House of Lords decision which had remitted the case back for questions to be answered.

14. I would also mention a further case which has come to this court's attention subsequent to the hearing and that is the case of *Redditch Electro-Plating: Ltd and others v Ferrebe (Inspector of Taxes)* (1973) 48 TC 635. In that case Megarry J said at page 643:

> "In many ways the case as stated is indeed unsatisfactory, though I sympathise with the Commissioners in having to deal with complexities such as these. Counsel for the Crown cited certain authorities which tended to show that it would be wrong to remit the case for what in fact and in substance would be a complete rehearing. Remission to enable one party to adduce evidence on a point which you failed to take below may indeed be wrong, but it does not necessarily follow that there is no power to remit for a hearing if the hearing as a whole was so unsatisfactory that nothing save a rehearing de novo would do justice. The terms of the Taxes Management Act 1970, section 56(6) and its predecessors, are very wide, and, this despite dicta such as that of Lord Hanworth MR in *Archer-Shee v. Baker (Inspector of Taxes)*…, I should be slow to hold that if there was what Lord Goddard used to call a real good old country muddle before the commissioners, the language of s 56(6) was too narrow to allow the court to remit the case for a complete rehearing. However, in the present case, in the face of a lack of enthusiasm for remission I think I ought to do the best I can to resolve the case on the material before me; and if the unsuccessful party is disappointed with the result, I must leave him with the reflection that it might after all have been better to have pressed for remission."

15. Whilst I find the procedure of case stated to be slightly antiquated and, to a certain extent, enshrouded in the mists of legal history, I would venture to propose the following guidelines, the essentials elements of which were put in draft to the parties at the hearing:

1. Whether to remit a case stated is a matter of discretion.

2. The power to remit must be in the context of the case which has been stated. That is because the appeal under section 69(1) is an appeal as to law and apart from that power to have a case stated on a matter of law arising out of a decision, the decision of the Board is required to be final.

3. The Board may be asked whether there was evidence which they did not refer to in the case stated that supports a finding of fact which they have made.

4. Although there is no bar to the Board hearing further evidence it can only be directed to issues arising in the questions on the case stated and the answers given by the court.

5. The court will not, except in very exceptional circumstances, remit a matter for a hearing *de novo*. One such circumstance might be that if the Board had erroneously considered itself bound by some earlier decision and had not, in truth, heard the case: see *Edwards v The "Old Bushmills" Distillery Company Ltd* (1924-1926) 10 TC 285 at 300-1.

16. In my view, as already said, it is impossible for this court to determine what decision of the Board would have arrived at had it not been sidetracked with the submissions in respect of no real money. In those circumstances I considered that the matter should be remitted to the Board. It is a matter for the Board to be masters of their own procedure within the context of their having held a hearing and issued a decision which was final subject to the case stated. I see no grounds in this case for having a hearing *de novo* and, indeed, neither of the parties has requested that. It is impossible to determine, at this stage, whether it would be correct to admit further evidence. Until the nature of any proposed evidence is known that would simply be a matter of guess work. It must be left to the Board to decide whether to permit further evidence that might be considered essential in the light of the fact that the composition of the Board may have changed. Nevertheless, it seems clear that the parties are not entitled to call evidence which would in effect constitute a new case.

17. In my view the taxpayers were entitled to leave to appeal to the Court of Final Appeal particularly in view of the fact that the Commissioner had already obtained such leave, albeit prematurely.

Hon Tang VP:

18. I agree. The question of additional evidence before the Board is likely to be academic so far as the Revenue is concerned. It was the Revenue's case before the Board that the burden was on the taxpayer to establish affirmatively that there was no transaction falling within section 61A. It is highly unlikely that the Revenue would wish to adduce additional evidence before the Board.

19. Mr Ho submitted that the Revenue might have asked the Board to amend the case stated and decide whether the taxpayer had otherwise discharged its burden. I do not need to decide whether or not the Revenue might have done so.

20. In the appeal, we were asked to decide on the facts that there was no transaction falling within section 61A. This shows that the taxpayer recognised that such a finding was required for the resolution of the appeal. We declined to do so, preferring to remit the matter to the Board for determination as we were entitled to do under section 69A.

Hon Le Pichon JA:

21. I agree with the judgments of Rogers and Tang VPP.

22. I wish to add this. In *Yau Wah Yau v Commissioner of Inland Revenue* (No 2) [2007] 1 HKC 417, I accepted the Commissioner's position (with which counsel for the taxpayer in that case concurred) that the Court of Appeal does not have jurisdiction to order that an appeal originating under section 69 be returned to the Board, differently constituted, for a rehearing *de novo*. In reaching that conclusion, I was unaware of the decision of Megarry J in *Redditch Electro-Plating: Ltd and others v Ferrebe (Inspector of Taxes)* (1973) 48 TC 635 referred to in paragraph 14 of the judgment of Rogers VP. Having regard to *Redditch*, it would appear that there was no jurisdictional bar to the course I had originally proposed in paragraph 15 of my judgment in the *Yau Wah Yau v Commissioner of Inland Revenue* [2006] 3 HKLRD 586. Whether and in what circumstances it would be appropriate to remit for a hearing *de novo* is of course another matter but given the way in which matters proceeded in *Yau Wah Yau*, that was not a matter that ever came to be considered.

(Anthony Rogers)	(Robert Tang)	(Doreen Le Pichon)
Vice-President	Vice-President	Justice of Appeal

Mr Ambrose Ho SC & Mr Kenny C P Lin, instructed by Messrs Woo, Kwan, Lee & Lo, for the Appellant/Applicant

Mr Stewart K M Wong, instructed by Department of Justice, for the Respondent/Respondent