FACV No. 28 of 2007

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

FINAL APPEAL NO. 28 OF 2007 (CIVIL)
(ON APPEAL FROM CACV NO. 341 OF 2006)

BETWEEN

CHINA MAP LIMITED Appellant

and

THE COMMISSIONER OF INLAND REVEUNE Respondent

AND

FACV No. 29 of 2007

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

FINAL APPEAL NO. 29 OF 2007 (CIVIL)
(ON APPEAL FROM CACV NO. 342 OF 2006)

BETWEEN

CHINA NAME LIMITED Appellant

and

THE COMMISSIONER OF INLAND REVEUNE Respondent

AND

FACV No. 30 of 2007

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

FINAL APPEAL NO. 30 OF 2007 (CIVIL)
(ON APPEAL FROM CACV NO. 343 OF 2006)

BETWEEN

CHANCE INVESTMENT LIMITED Appellant

and

THE COMMISSIONER OF INLAND REVEUNE Respondent

AND

FACV No. 31 of 2007

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

FINAL APPEAL NO. 31 OF 2007 (CIVIL)
(ON APPEAL FROM CACV NO. 344 OF 2006)

BETWEEN

COMEBRIGHT DEVELOPMENT LIMITED Appellant

and

THE COMMISSIONER OF INLAND REVEUNE Respondent

Court : Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Mortimer NPJ and Mr Justice Gault NPJ

Hearing and Decision : 16 April 2008

Handing Down of Reasons : 28 April 2008

J U D G M E N T

Mr Justice Bokhary PJ :

1. At the conclusion of the hearing, we dismissed these appeals with costs (which were not resisted) indicating that we would hand down our reasons later, which we now do by this judgment. All of our references to sections and subsections will be to those of the Inland Revenue Ordinance, Cap.112.

2. These appeals are essentially fact-sensitive. But the arguments urged in support of them raise points on the practice and procedure regulating appeals to the Board of Review ("the Board"). The circumstances are these.

Nine blocks acquired and sold at a profit

3. Four taxpayers ("the Taxpayers") have come here having lost at every level below. Here and at every level below, their appeals have been heard together. Each of them is a subsidiary of the same parent. Between them they acquired nine blocks in Wanchai. That was achieved by various purchases during the period from July 1988 to April 1993.

4. Of these nine blocks, three blocks ("the Jaffe Road blocks") front upon the Jaffe Road while six blocks ("the Lockhart Road blocks") front upon Lockhart Road. All the Jaffe Road blocks are contiguous. They are on the even-numbered side of the road, and form 308-312 Jaffe Road. The Lockhart Road blocks are on the odd-numbered side of the road. Five are contiguous, and form 329-337 Lockhart Road. One forms 325 Lockhart Road, and is separated from the other five Lockhart Road blocks by 327 Lockhart Road. Nothing lies between the Jaffe Road blocks and the Lockhart Road blocks apart from the service lane which they all back upon.

5. Throughout the Taxpayers' nine blocks have been referred to as Blocks 1, 2A, 2B, 4, 5, 6, 7, 8 and 9 respectively. Such numbering has nothing to do with location. It is based on the chronological order in which the blocks were acquired by the Taxpayers. Numbers 308, 310 and 312 Jaffe Road are Blocks 1, 7 and 2A respectively while numbers 325, 329, 331, 333, 335 and 337 Lockhart Road are Blocks 6, 5, 8, 9, 4 and 2B respectively.

6. On 11 August 1993 the Taxpayers agreed to sell their nine blocks to Jaffe Development Ltd ("Jaffe") for a total of $570 million. Those sales were completed on 15 January 1994.

Assessments to profits tax disputed

7. This brings one to the assessments the subject-matter of the present case. They are assessments to profits tax on the Taxpayers' profits arising from those sales, which profits came to about $192 million. According to the Revenue, the nine blocks were trading stock so that the profits arising from the sales thereof are caught by the general charging provision for profits tax, namely s.14(1) which reads :

> "Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part."

8. Disputing the assessments, the Taxpayers appealed against them to the Board. As material for present purposes, s.66 reads :

> "(1) Any person (hereinafter referred to as the appellant) who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may … either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by a copy of the Commissioner's written determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal.
>
> (1A) …
>
> (2) The appellant shall at the same time as he gives notice of appeal to the Board serve on the Commissioner a copy of such notice and of the statement of the grounds of appeal.
>
> (3) Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1)."

Grounds of appeal : section 66(3) consent

9. By its representative, each of the Taxpayers put forward the grounds of appeal that the profits in question "were capital in nature and were not assessable to Profits Tax or alternatively that the assessment was excessive". None of the Taxpayers pursued its alternative ground that the assessments were excessive. That left only one question raised by the grounds of appeal given in accordance with s.66(1). Did the profits in question arise from the sale of capital assets? But at the

hearing before us, Mr Patrick Fung SC for the Taxpayers contended that there was an antecedent question. Were the profits in question from the carrying on of a trade, profession or business?

10. No such question is raised by the Taxpayers' grounds of appeal given in accordance with s.66(1). But Mr Fung contended that the Board is to be treated as having consented under s.66(3) to the Taxpayers relying on a fresh ground which raised such a question. For this contention, Mr Fung relied on an exchange between the Board's chairman and the Taxpayers' counsel (not Mr Fung or his junior Ms Catrina Lam). That exchange took place after the close of the evidence and during final speech. By its nature, such a question is fact-sensitive and its answer inherently dependent on evidence. For a tribunal of fact to entertain such a question after the close of the evidence would be unusual and plainly inappropriate if done without offering the party against whom the question is raised an opportunity to call further evidence. No such opportunity was offered to the Revenue. We do not think that the Board is to be treated as having consented under s.66(3) to the Taxpayers relying on a fresh ground which raised the antecedent question for which Mr Fung now contends. If and whenever s.66(3) consent is sought, it should be sought fairly, squarely and unambiguously. Nothing of that kind occurred in this case.

11. So the Taxpayers' challenge to the assessments rests on their contention that the nine blocks were capital assets with the consequence that the profits from the sales thereof are excluded from charge to profits tax by the exclusion expressly provided by s.14(1).

What the Taxpayers said that they had planned to do

12. According to the evidence which they led at the hearing before the Board, the Taxpayers had planned to :

(i) acquire 304-312 Jaffe Road and 325-337 Lockhart Road;

(ii) extinguish the service lane between them;

(iii) amalgamate the resulting property to form a single site ("the Site"); and

(iv) redevelop the Site by the erection of building to be held as a long-term investment generating rental income.

13. Why did that plan not come to fruition? It was, according to the Taxpayers' evidence, because they failed to acquire 304-306 Jaffe Road and 327 Lockhart Road. In 1991, 304-306 Jaffe Road was acquired by one subsidiary of an unrelated company named Wah Foo Enterprises Co. Ltd ("Wah Foo") while 327 Lockhart Road was acquired by another Wah Foo subsidiary.

14. According to the Taxpayers' evidence, Wah Foo had also planned to acquire all the property needed to create the Site. If so, Wah Foo and the Taxpayers foiled each other. At any

rate, Wah Foo (through its subsidiaries) also ended up by selling to Jaffe. On 23 December 1994, the Wah Foo subsidiaries agreed to sell 304-306 Jaffe Road and 327 Lockhart Road to Jaffe for a total of $238 million. Those sales were completed on 30 May 1995.

Board affirmed the assessments

15. As one sees by the case which it stated, the Board referred to s.68(4) which provides that "[t]he onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant". It noted that the Taxpayers' "stated intention … was to redevelop for rental income". Then it noted that the Taxpayers had put forward materially different versions of the facts on which they sought to rely and had led no evidence on a number of material matters. And then, under the heading "Conclusion", it said this :

> "For the reasons given, the [Taxpayers] had not proved any of the following :
>
> (a) that at the time of the respective acquisitions of Blocks 1, 2a, 2b, 4, 5, 6, 7, 8 or 9, the intention of any of the [Taxpayers] was to hold any of them or any proposed new building(s) on a long term basis, whether for rental income or at all;
>
> (b) the [Taxpayers'] financial ability, with or without their shareholders and directors and ultimate beneficial owners of their shares, to demolish the old buildings, construct the proposed new building(s), and to keep the proposed new building(s) indefinitely.
>
> The [Taxpayers] had not proved that the 'stated intention' was in fact held, not to mention genuinely held, realistic or realisable.
>
> The [Taxpayers] had not discharged the onus under section 68(4) of proving that any of the assessments appealed against was excessive or incorrect. All 4 appeals would therefore be dismissed.
>
> The Board was of the opinion that all 4 appeals were obviously unsustainable. All 4 [Taxpayers] should have realised that their appeals were hopeless after D30/01 and D11/02 had been drawn to their attention. Pursuant to section 68(9) of the Ordinance, the Board would order each [Taxpayer] to pay the sum of $5,000 as costs of the Board."

Questions of law stated by the Board

16. After the Board gave its decision affirming the assessments, the Taxpayers asked the Board to state a case. The Board declined to do so. Whereupon the Taxpayers sought and

obtained an order from the High Court (Chu J) directing the Board to state a case for the opinion of the High Court on the following questions of law :

> "(1) In the light of all the evidence before the Board and the findings made by the Board, whether the Board's conclusions … that the [taxpayers] had not proved any of the following :-
>
> (i) that at the time of the respective acquisitions of Blocks 1, 2a, 2b, 4, 5, 6, 7, 8 or 9, the intention of any of the [Taxpayers] was to hold any of them or any proposed new building(s) on a long term basis, whether for rental income or at all;
>
> (ii) that the [Taxpayers'] financial ability, with or without their shareholders and directors and ultimate beneficial owners of their shares, to demolish the old buildings, construct the proposed new building(s), and to keep the proposed new building(s) indefinitely,
>
> and that the [Taxpayers] had not proved that the 'stated intention' was in fact held, not to mention genuinely held, realistic or realisable;
>
> was contrary to the true and only reasonable conclusion.
>
> (2) Upon the proper construction of [s. 68(4) of the Inland Revenue Ordinance], and given that the stated ground of appeal before the Board was that 'the profits referred to in the determination were capital in nature and were not assessable to Profits Tax or alternatively that the assessment was excessive'
>
> (a) whether in the light of the Board's conclusions as set out in question (1) above the Board was correct in law in dismissing the appeal on the basis that the [Taxpayers] had not discharged the onus under [s. 68(4)] of proving that any of the assessments appealed against was excessive or incorrect;
>
> (b) whether the Board had erred in law in dismissing the appeal without making a finding that the [Taxpayers] were, in acquiring and disposing of the relevant properties, carrying on a trade or, in the alternative, an adventure or concern in the nature of trade, within the meaning of [the Inland Revenue Ordinance]."

High Court's answers

17. On the Taxpayers' appeals by way of case stated to the High Court, Chung J answered those questions against the Taxpayers, saying this :

> "(a) in relation to the first question, in the negative; that is, the Board's conclusions are not contrary to the true and only reasonable conclusion;
>
> (b) in relation to para.(a) of the second question, in the affirmative; that is, the Board was correct in law in dismissing the appeal on the basis the Taxpayers had not discharged the onus of proof under [s.68(4)] and in relation to para.(b) of the second question, in the negative; that is, the Board has not erred in law in dismissing the appeal without making a finding that the Taxpayers were carrying on a trade or an adventure or concern in the nature of trade."

Chung J awarded the Revenue costs.

Court of Appeal agreed with High Court's answers

18. The Court of Appeal (Rogers VP and Suffiad and Saunders JJ) agreed with Chung J's answers to the questions posed in the case stated, dismissed the Taxpayers' appeals from him to them and made an order *nisi* as to costs in the Revenue's favour.

19. With leave granted by the Court of Appeal, the Taxpayers now appeal to us.

Taxpayers' argument now

20. The Taxpayers have not presented any argument to us on the first question posed in the case stated. On the second question posed therein, the Taxpayers' argument presented to us may be taken from the opening paragraph of Mr Fung's "speaking note", with copies of which he considerately supplied us. It is that "the Board had committed an error of law in dismissing [the Taxpayers'] appeals on the basis that they had failed to discharge the burden of proof by failing to prove their 'stated intention', without making a finding that [the Taxpayers] were carrying on a trade or an adventure or concern in the nature of trade".

21. Whether the Taxpayers were carrying on a trade or an adventure or concern in the nature of trade is in effect Mr Fung's antecedent question. That question, as we have already said, does not arise on the grounds of appeal to which the Taxpayers are confined.

Complaint that the Board decided the case on the onus of proof

22. The Taxpayers' argument is therefore reduced to a complaint that the Board decided the case on the onus of proof. It is true that the Board did not make a finding that the nine blocks

were trading stock as the Revenue contended. But the Board did say that it was a question of fact whether the Taxpayers' stated intention of acquiring the properties concerned with view to redevelopment by the erection of a building to be held as a long-term investment generating rental income was their actual intention. And the Board did say that it decided against the Taxpayers on this factual issue. In the course of the hearing of these appeals, Mr Justice Gault NPJ asked Mr Fung if that was a finding of fact, and Mr Fung properly accepted that it was.

23. In the circumstances, it cannot be said that the Board had resorted to the onus of proof so as in effect to abdicate its duty to find the facts. A distinction is to be drawn between finding the facts and determining whether a case is proved on the facts found. The Taxpayers' essential assertion was that their intention was to acquire the properties concerned with a view to redevelopment by the erection of a building to be held as a long-term investment generating rental income. That was disputed by the Revenue, and thus put in issue. The Board made a finding on this issue, resolving it against the Taxpayers. It was upon this finding that the Board determined that the Taxpayers had failed to discharge their s.68(4) onus of proving that the assessments appealed against were excessive or incorrect.

Proof of intention

24. There remains a note of caution to be sounded. The Board treated the gaps in the Taxpayers' evidence as a reason for deciding against them on the issue of intention. In that, the Board was justified in the circumstances. But some of what the Board said may give the impression that there is a catalogue of matters on which there must generally be evidence before a taxpayer's stated intention can be regarded as proved. That would be too rigid. What evidence is needed to prove any given intention depends on all the circumstances.

Conclusion

25. The foregoing are the reasons why, despite everything urged by Mr Fung with his customary ability, we dismissed these appeals with costs (which were not resisted).

(Kemal Bokhary) Permanent Judge	(Patrick Chan) Permanent Judge	(R.A.V. Ribeiro) Permanent Judge

(Barry Mortimer)
Non-Permanent Judge

(Thomas Gault)
Non-Permanent Judge

Mr Patrick Fung SC and Ms Catrina Lam (instructed by Messrs William Sin & So) for the appellants, the Taxpayers

Mr Ambrose Ho SC and Mr Michael Yin (instructed by the Department of Justice) for the respondent, the Revenue