CACV 147/2020
[2020] HKCA 1084

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO 147 OF 2020
(ON APPEAL FROM HCIA NO 3 OF 2017)

BETWEEN

SUEN HUNG SHAN Applicant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon Kwan VP, Chu JA and Barma JA in Court
Date of Hearing: 10 December 2020
Date of Judgment: 31 December 2020

J U D G M E N T

Hon Kwan VP:

1. This is an appeal brought by the Commissioner of Inland Revenue ("the Commissioner") against the decision of G Lam J handed down on 11 March 2020 ("the Judge's Decision")[1]. The appeal was brought with leave granted by the judge on 26 May 2020[2] and raises the question whether the procedure for leave to appeal to the Court of First Instance against a decision of the Board of Review ("the Board") would apply to a determination of the Board that the notice of appeal to the Board was not given within time and that no extension of time should be given to the appellant. This turns on the proper construction of the relevant provisions of the Inland Revenue Ordinance, Cap 112, in particular sections 66, 68, 68AA, 69, 69AA and 70[3]. This question has not been considered since the new regime was introduced in 2015 to abolish the case stated procedure and replace this by an appeal procedure with leave on a question of law.

2. The Commissioner appeared by Mr Johnny Ma on appeal. The taxpayer, Suen Hung Shan ("Mr Suen"), acted in person throughout.

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1 [2020] 2 HKLRD 173
2 [2020] HKCFI 1065
3 Unless otherwise stated, all references to statutory provisions in this judgment are in respect of the Inland Revenue Ordinance.

Background

3. The relevant background matters may first be stated as follows.

4. By a determination dated 30 April 2015 ("the Determination"), the Deputy Commissioner of Inland Revenue confirmed the Personal Assessment for the year of assessment 2009/10 raised on Mr Suen. The Determination was sent under cover of a letter of the same date ("the Letter") from the Deputy Commissioner to Mr Suen's address on record, which was in Macau, by registered post. The Determination and the Letter were returned to the sender on 15 June 2015.

5. On 30 June 2015, the Letter with the Determination were resent to Mr Suen at his address in Macau by ordinary post.

6. By a fax dated 28 December 2016, Mr Suen informed the Department of Inland Revenue of his change of mailing address to an address in Shatin, Hong Kong and directed the Department to "send tax demands of 2011/12 & 2012 together with 2009/2010 director's decisions and any letters from May 2015 onwards."

7. On 24 January 2017, the Letter with the Determination were resent to Mr Suen at his address in Shatin by ordinary post.

8. On 21 February 2017, the Office of the Clerk to the Board of Review received a notice of appeal of Mr Suen against the Determination. A copy of the Determination with the Grounds of Appeal reached the Office of the Clerk on 22 February 2017.

9. By a letter to Mr Suen dated 12 May 2017, the Assessor (Appeal) raised a preliminary issue whether Mr Suen's appeal could be entertained by the Board. This depended on whether the time prescribed under section 66(1)(a) for giving notice of appeal to the Board against the Determination had been observed and, if not, whether time should be extended under section 66(1A).

10. The Board held a hearing on 20 June 2017, which Mr Suen attended in person. The Board gave a decision on 11 September 2017 ("the Board's Decision").

11. On the preliminary issue, the Board held that the notice of appeal was lodged late and there was no reasonable cause for exercising its discretion in favour of Mr Suen to extend time for giving the notice of appeal[4]. The Board stated "this could have put [Mr Suen's] appeal to its end" but decided to continue with an analysis of the substantive issue of Mr Suen's case in the notice of appeal on the basis of the evidence and submissions before it[5]. The Board reached the conclusion that the Personal Assessment for the year of assessment 2009/10 would be confirmed[6] even if it had extended the time for lodging the

4 The Board's Decision, §§32 to 38
5 The Board's Decision, §38
6 The tax payable was $50,597

appeal[7]. The Board found the appeal "obviously unsustainable" and invoked section 68(9) and ordered Mr Suen to pay as costs of the Board $25,000[8].

12. The Office of the Clerk to the Board of Review wrote to Mr Suen on 11 September 2017 enclosing a copy of the Board's Decision and drew his attention to section 69(1) (which governs an appeal to the Court of First Instance against the Board's decision on a ground involving only a question of law) and Practice Direction 34 (which sets out the procedural requirements for an application for leave to appeal against a decision of the Board).

13. On 11 October 2017, Mr Suen issued a summons in the High Court (HCIA 3/2017) which reads as follows: "Application for leave to appeal against Board of Review's decision Case No B/R 32/2016. Hearing on 20/6/2017 and decision made on 11/9/2017." On the same day, he filed an affirmation which had attached to it a "Statement of Appeal" containing grounds of appeal of 16 pages.

14. On 4 March 2019, the Commissioner issued a summons for an order that the summons and statement of grounds of appeal filed by Mr Suen on 11 October 2017 be struck out "on the ground that they disclose no reasonable cause of action (i.e. ground of appeal)." It was stated in the margin that this summons was issued pursuant to Order 18 rule 19 of the Rules of the High Court.

15. This summons was heard by G Lam J on 18 October 2019 and he dismissed it on 11 March 2020, which led to the Commissioner's appeal to this court. Pursuant to leave to appeal granted by the judge, the Commissioner filed a notice of appeal on 2 June 2020 and Mr Suen filed an amended respondent's notice on 24 July 2020.

The Judge's Decision and this appeal

16. The crux of this appeal is whether section 69(1), which provides for an appeal to the Court of First Instance against a decision of the Board, is engaged in the present situation. I have mentioned at the outset that the question raised on appeal is whether the procedure provided for in section 69(1) would apply to a determination of the Board that the notice of appeal to the Board was not given within time and that no extension of time should be given to the appellant. However, that is not exactly how the judge has viewed the issue raised before him.

17. Section 69(1) provides as follows:

> "Where the Board of Review has made a decision on an appeal under section 68, the appellant or the Commissioner may appeal to the Court of First Instance against the Board's decision on a ground involving only a question of law."

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7 The Board's Decision, §55

8 The Board's Decision, §§56, 57

18. As stated in §14 of the Judge's Decision:

> "The wording [of section 69(1)] makes it quite plain that an appeal lies where the Board "has made a decision on an appeal under section 68". An appeal from the Board to the Court of First Instance is a statutory creature. The Court of First Instance has no general inherent jurisdiction to hear appeals from the Board. It follows that unless a decision of the Board falls within a decision on an appeal under s 68, the court has no jurisdiction to give leave for an appeal or to hear the appeal."[9]

19. The judge held that the Board's Decision was "a decision on an appeal under section 68" and section 69(1) is engaged, as the Board had "*heard the appeal* (including the question whether the notice of appeal was given out of time and whether an extension of time should be granted) pursuant to s 68(1), the clerk to the Board having fixed a time and place for the hearing as provided in that subsection"[10]. He took the view that "*having heard an appeal* in the way provided for in s 68, it would be open to the Board to reject the appeal on the ground that it was out of time" (emphasis supplied). That seems to be "no less "a decision on an appeal under section 68" than a decision under s 68(8)(a) confirming, reducing, increasing or annulling the assessment appealed against" and section 69(1) does not confine an appeal to a decision of the Board under s 68(8)(a). He further noted that a costs order was made against the taxpayer pursuant to section 68(9)[11].

20. It would appear from those parts of the Judge's Decision mentioned above that his construction of the relevant provisions in the statute was to some extent influenced by the manner in which the hearing took place before the Board in this instance.

21. Mr Ma submitted on appeal that the judge was in error in construing the words "a decision on an appeal under section 68" in the way he did, and was wrong to take into consideration matters of practice and case management concerns (namely, the proliferation of proceedings)[12] as an aid to construction. Mr Ma also criticised the judge for using materials for legislative amendment as an aid to construction for showing that there was no intention in the new legislation to prevent the Board's decisions on whether an appeal was within time and decisions on extension of time from being challenged by way of appeal rather than by way of judicial review[13].

The practice and whether use could be made as an aid to construction

22. The judge referred to a practice of the Board of treating a late appeal by having it scheduled for hearing and that an application for extension of time under section 66(1A) will be considered by the Board at the hearing, quoting from a letter of the Clerk to the

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9 See also *Chan Min Ching v Commissioner of Inland Revenue* [1999] 2 HKC 848 at 851B
10 The Judge's Decision, §24
11 The Judge's Decision, §25
12 The Judge's Decision, §18
13 The Judge's Decision, §21

Board of Review in the decision of *Case No D13/16*, 20 June 2016. He went on to say as follows:

> "The taxpayer may of course contend that the appeal is not in fact late, in addition to seeking an extension of time if it is. The Board may, as it did in the present case, proceed to hear the argument whether the appeal is late and the application for extension of time *and* the appeal itself, and render a decision on both matters subsequently."[14]

23. In §4 of *Case No D13/16*, the letter from the Clerk to the taxpayer was mentioned in this way:

> "The Clerk referred to section 66(1) of the Inland Revenue Ordinance and the stipulation therein that 'any person who wishes to appeal to the Board should file a written notice of appeal, together with **a copy of the Commissioner's determination and a statement of grounds of appeal, within one month from the date of the Commissioner's determination**. As a matter of practice, any appeal filed beyond the one-month period would be treated as a late appeal and that an application for an extension of time under section 66(1A) of the IRO will be considered by the Board **at the hearing**. If the Board accepts the appellant's reasons for being late in lodging an appeal, it will proceed to hear the merits of his/her appeal in the usual way either on the same day as appropriate, or on the other date(s) to be fixed later on' (bolded text in the original). The substantive part of this letter ended with: 'As such, please forthwith ensure compliance with section 66(1) of the IRO should you intend to lodge an appeal with this Board.' "

24. In the parts of the Clerk's letter as quoted, no mention was made as to how the Board would proceed if it should rule that the notice of appeal was not given within time and no extension of time should be granted. In fact, in *Case No D13/16*, directions were given by the presiding chairman of the Board for a hearing to be scheduled to determine the application to appeal out of time first on 27 October 2015 (at §7) and a decision was given by the Board on 20 June 2016 holding that the appeal was out of time and no extension of time should be given to the taxpayer and the Board declined to entertain his notice of appeal (at §40). This was different from the present case in which the Board proceeded to hear evidence and submissions on the appeal and analysed the merits of the substantive appeal in its decision notwithstanding its conclusion that the appeal was out of time and no extension would be granted.

25. There is no evidence before the court of any uniform or settled practice in the Board as regards a notice of appeal that was lodged out of time.

26. Mr Ma referred us to *Bennion on Statutory Interpretation* (7th ed) at Section 24.20 page 641 in which the learned author stated this proposition on settled practice:

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[14] The Judge's Decision, §18

> "Where the meaning of a statute has been considered by the lower courts and business or other activities have been ordered on that basis for a significant period of time, the courts may be slow to overturn settled practice and understanding. However, the extent to which settled practice is relevant to interpretation (if at all) is presently unclear."

27. The extent to which settled practice or understanding as to the meaning of a statutory provision can be relied on as an aid to construction was considered by the Supreme Court in *R (on the applications of ZH and CN) v London Borough of Newham and London Borough of Lewisham* [2015] AC 1259. Lord Carnwath JSC said at §95:

> "In my view this case provides an opportunity for this court to confirm that settled practice may, in appropriate circumstances, be a legitimate aid to statutory interpretation. Where the statute is ambiguous, but it has been the subject of authoritative interpretation in the lower courts, and where businesses or activities, public or private, have reasonably been ordered on that basis for a significant period without serious problems or injustice, there should be a strong presumption against overturning that settled practice in the higher courts. This should not necessarily depend on the degree or frequency of Parliamentary interventions in the field. As in the *Anglesey* case[15], the infrequency of Parliamentary intervention in an esoteric area of the law may itself be an added reason for respecting the settled practice. On the other hand it may be relevant to consider whether the accepted interpretation is consistent with the grain of the legislation as it has evolved, and subsequent legislative action or inaction may be relevant to that assessment."

28. Lord Hodge JSC agreed at §53 that the settled practice principle "is available where there is ambiguity in a statutory provision". However, Lord Neuberger of Abbotsbury PSC (at §148) and Baroness Hale of Richmond DPSC (at §168) in their dissenting judgments expressed reservations about the "customary meaning" rule, as "a court should not lightly decide that a statute has a meaning which is different from that which the court believes that it has" and "so to decide could be said to be a breach of the fundamental duty of the court to give effect to the will of Parliament as expressed in the statute" (at §148).

29. Mr Ma submitted that even if a settled practice over a significant period of time may be admissible as an aid to statutory interpretation in appropriate circumstances, there is no evidence of a settled practice regarding the Board and it is wrong in principle to have regard to what the Board did in the present case, which is not necessarily the practice adopted in all or many other cases, in deciding upon the proper construction of the relevant statutory provisions. I agree.

30. Mr Ma also prayed in aid another passage in *Bennion on Statutory Interpretation* at Section 24.20 pages 643 to 644 in which the author stated: "Whatever the status of settled practice as an aid to construction in cases involving ambiguity, it is clear that it cannot be used to undermine a clear statutory provision so as to give it a meaning

[15] *Anglesey County Council v Welsh Ministers* [2010] QB 163

that it does not have". *MacMillan v T Leith Developments Limited (in receivership and liquidation)* [2017] CSIH 23 was cited in support of this and the Lord President Carloway (with whom other members of the Inner House of the Court of Session concurred) said at §68:

> "The short answer to this point is the same as that given by the majority in *R (N) v Lewisham London Borough Council*. There is no ambiguity in the provision. In these circumstances, settled practice cannot convert the ordinary legal meaning of the words used into something conveying a different sense."

31. I would also agree with Mr Ma's submission that whilst the Board in the present case did hear evidence and submissions of the appeal proper and gave its analysis of the substantive merits of the appeal in the Board's Decision, the practice and procedure adopted by the Board in this instance should not alter the legal effect of the decision actually rendered at the hearing or change the ordinary legal meaning of the words used in the statutory provisions into something conveying a different sense.

32. For the above reasons, I decline to use the actual or settled practice (if any) of the Board in dealing with late appeals as an aid to statutory construction. I turn to consider the relevant provisions in the Ordinance.

Analysis of the relevant statutory provisions

33. The principles for statutory interpretation are well established. As stated in the Judge's Decision at §23:

> "The statute has to be construed using a purposive approach. The words of the statute must be construed in the light of their purpose and context. This does not, however, allow the court to attribute to the statutory provision a meaning which the language of the statute, understood in the light of its context and the statutory purpose, is incapable of bearing."[16]

34. Mr Ma added the requirement that the Ordinance should be construed in the context of the whole statutory scheme[17]. I do not consider this to be controversial.

35. The relevant provisions are in Part 11 of the Ordinance, which is headed "Objections and Appeals". As pointed out by Mr Ma, Part 11 provides for the procedures for a taxpayer to challenge an assessment in different stages.

36. The first stage is an objection to the Commissioner under section 64 by a notice in writing. A valid objection is made where it states precisely the grounds of objection to the assessment and is received by the Commissioner within one month after the date of the

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16 Citing *HKSAR v Fugro Geotechnical Services Ltd* (2014) 17 HKCFAR 755, §22; *Yung Chi Keung v Protection of Wages on Insolvency Board* (2016) 19 HKCFAR 469, §22.

17 *Chan Chun Chuen v Commissioner of Inland Revenue* [2012] 2 HKLRD 379, §39

notice of assessment (section 64(1)). The Commissioner has power to extend time for giving notice of objection if satisfied that owing to absence from Hong Kong, sickness or other reasonable cause, the taxpayer was prevented from giving notice within time (proviso (a) to section 64(1)). On receipt of a valid notice of objection, the Commissioner shall consider the same and may "confirm, reduce, increase or annul the assessment objected to" (section 64(2)).

37. Where a valid objection to an assessment is made but the Commissioner has failed to agree with the taxpayer, the taxpayer may appeal to the Board under section 66(1), by giving a notice of appeal to the Board within (a) one month after the transmission to him of the Commissioner's determination with the reasons therefor and a statement of the facts upon which the determination was arrived at[18] (section 66(1)(a)); or (b) such further period as the Board may allow (sections 66(1)(b) and (1A)). This is the second stage. The power of the Board under section 66(1A) to extend time for giving a notice of appeal is similar to the power of the Commissioner to extend time for giving a notice of objection in section 64(1).

38. Sections 68 and 68AA make detailed provision regarding the hearing and disposal of appeals to the Board. I will italicise the words in the provisions mentioned hereafter that should be noted.

39. Section 68(1) stipulates that except for the situations where the appeal is to be transferred to the Court of First Instance[19] or where a settlement is reached[20], "*every appeal under section 66* shall be heard by the Board in accordance with this section" and the clerk to the Board shall "fix a time and place *for the hearing of the appeal*, and shall give 14 days' notice thereof to the appellant and the Commissioner". Section 68(2) provides that an appellant shall attend at the meeting of the Board "*at which the appeal is heard*" in person or by an authorized representative. Section 68(2B) makes provision where the appellant fails to attend in person or by an authorized representative. The assessor who made the assessment or some other person authorized by the Commissioner shall attend the meeting of the Board in support of the assessment (section 68(3)). The onus of proving that the assessment is excessive or incorrect is on the appellant (section 68(4)). All appeals shall be heard in camera (section 68(5)). The Board is given power to summon at the hearing any person it considers able to give evidence respecting the appeal and may examine him as a witness on oath or otherwise (section 68(6)). "*At the hearing of the appeal*", the Board may admit or reject any evidence adduced, whether oral or documentary, and the provisions of the Evidence Ordinance, Cap 8 relating to the admissibility of evidence shall not apply (section 68(7)).

40. Section 68AA makes further provision, without limiting section 68, that the person presiding "*at the hearing of an appeal under section 66*" may give directions on the provision of documents and information for the hearing and refuse to admit in evidence any document or information not given in compliance with such directions (section 68AA(1)).

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18 As required by section 64(4).

19 Under section 67

20 Under section 68(1B)

41. Sections 68(8)(a) and (9) provide as follows:

> "(8)(a) *After hearing the appeal*, the Board shall confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner with the opinion of the Board thereon."

> "(9) Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the appellant to pay as costs of the Board a sum not exceeding the amount specified in Part 1 of Schedule 5, which shall be added to the tax charged and recovered therewith."

42. Section 68(11) provides that "subject to section 69, the Board's decision on the appeal is final."

43. The third stage is where an appeal under section 66 has been heard by the Board and the Board has made a decision on an appeal under section 68 ("where the Board of Review has made *a decision on an appeal under section 68*"), the taxpayer or the Commissioner may appeal to the Court of First Instance against the Board's decision under section 69, on a ground involving only a question of law (section 69(1)), where leave to appeal has been granted by the Court of First Instance or by the Court of Appeal if a further leave application is made to the Court of Appeal (sections 69(2) and (4)). The leave application to the Court of First Instance must be lodged with the court and served on the other party within one month after the date on which the Board's decision is made, or, if the Board's decision is notified by notice in writing, the date of the communication by which the decision is notified (section 69(3)).

44. Section 69AA makes provision regarding the hearing of an appeal where leave to appeal has been granted under section 69. On hearing such an appeal, the Court of First Instance may draw any inference of fact, "confirm, reduce, increase or annul the assessment determined by the Board, or remit the matter back to the Board with any directions", and make any order as to costs (section 69AA(1)(a)).

45. Section 70 provides for the situations in which an assessment is regarded as final and conclusive for all purposes of the Ordinance. The relevant parts of this section read as follows:

> "*Where no valid objection or appeal has been lodged within the time limited by this Part* against an assessment as regards the amount of the assessable income or profits or net assessable value assessed thereby, or where an appeal against an assessment has been withdrawn under section 68(1A)(a) or dismissed under subsection (2B) of that section, or where the amount of the assessable income or profits or net assessable value has been agreed to under section 64(3), *or where the amount of such assessable income or profits or net assessable value has been determined on objection or appeal*, the assessment as made or agreed to or determined on objection or appeal, as the case may be,

> shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income or profits or net assessable value …" (emphasis supplied).

46. The statutory scheme lays down a time limit in respect of each stage for the challenge of the decision made by the decision maker, with power to extend time for giving notice of the challenge. In providing for an assessment to be regarded as final and conclusive for all purposes of the Ordinance, section 70 makes a clear differentiation between the situation where no valid objection or appeal has been lodged within the time limited, and the situation where there is a determination on an objection or appeal that has been lodged within time.

47. Section 66(1) governs the situation where the taxpayer "has validly objected to an assessment" but with whom the Commissioner has failed to agree. In this situation, there would be an "appeal under section 66" which "shall be heard by the Board in accordance with [section 68]". And after hearing the appeal, "the Board shall confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner with the opinion of the Board thereon", as stipulated in section 68(8)(a). Subject to any appeal on a question of law that may be brought with leave of the court, the amount of such assessable income or profits or net assessable value that has been determined on such an appeal to the Board shall be final and conclusive, as provided in section 70.

48. Where the taxpayer has not validly objected to an assessment, by giving a notice of appeal within the one-month time limit or within such extended time as may be allowed by the Board, the belated notice of appeal given by the taxpayer cannot be regarded as a valid objection to an assessment. In this situation, the Board has no jurisdiction to hear a belated intended appeal "in accordance with [section 68]" as if it were a validly constituted appeal. And where no valid notice of appeal has been lodged within the time limit, the assessment as determined by the Commissioner on an objection of the taxpayer shall be final and conclusive, as provided in section 70.

49. As correctly submitted by Mr Ma, two distinct decision-making processes are contemplated under the statutory scheme, each involving different considerations. The first is to consider and decide whether the notice of objection or notice of appeal is given within time, and if not, whether an extension of time should be given to the taxpayer. The second is where the notice of objection or notice of appeal is validly lodged, the Commissioner or the Board, as the case may be, shall proceed to determine the objection or the appeal.

50. On this analysis, section 69(1) ("Where the Board of Review has made a decision on an appeal under section 68"), clearly applies only to the second decision-making process and not the first. In the present case, where the Board has determined that the notice of appeal was lodged late and has declined to exercise its discretion to extend time for lodging the notice of appeal, the legal effect is that "no valid … appeal has been lodged within the time limited", as provided in section 70. The fact that the Board went on to analyse and give a conclusion on the substantive merits of the intended appeal should not alter the legal effect of the statutory provisions. Nor should the fact that the Board chose

to hear evidence and submissions at the same hearing on whether the notice of appeal was lodged within time and on the substantive merits of the intended appeal affect the legal analysis. As submitted by Mr Ma, an analogy may be drawn with a "rolled-up" hearing in judicial review proceedings of an application for leave to seek judicial review and the substantive application for judicial review. The practice of holding a "rolled-up" hearing cannot circumvent the two-stage process prescribed by statute (*Chee Fei Ming v Director of Food and Environmental Hygiene (No 2)* [2016] 3 HKLRD 412 at §6).

51. In this instance, there was no "appeal under section 66" that could be heard "in accordance with [section 68]", and section 69(1) was not engaged as the Board has not made "a decision on an appeal under section 68". I would differ from the judge's view that the Board has heard the appeal and rejected the appeal on the ground that it was out of time[21]. On the plain meaning of section 68(8)(a), "after hearing the appeal", the Board has these options: to "confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner with the opinion of the Board thereon". To reject the appeal on the ground it was out of time is not among them. It would be to distort the plain meaning of section 68(8)(a) if a decision that a notice of appeal was not given within time is regarded as a decision "to reject the appeal on the ground that it was out of time" and construed as no less "a decision on an appeal under section 68" than a decision under section 68(8)(a)[22].

52. The judge referred to sections 68 and 68AA giving various powers to the Board in the hearing of appeals to the Board including the power to summon and examine witnesses, the admission or rejection of evidence, the power to give directions on the provision of documents and information. He observed that it would be strange if these provisions only applied to the appeal on the merits but not to the Board's determination whether the appeal has been brought within time and whether time should be extended. He reasoned that in the latter situation, the Board is nevertheless "hearing an appeal" and it would be "most anomalous if [such powers in sections 68 and 68AA] were to apply only to part of the hearing but not to the part that deals with time"[23].

53. I do not think that should pose a difficulty. Even though the powers given to the Board in the hearing of appeals in sections 68 and 68AA would apply only to an "appeal under section 66" and not a hearing to determine whether a notice of appeal was given within time and whether time should be extended, one can pray in aid section 40(1) of the Interpretation and General Clauses Ordinance, Cap 1[24] to confer on the Board such powers as are reasonably necessary for the purpose of dealing with the issue whether there the notice of appeal has been given within time and the extension of time. Besides, in dealing with a relatively simple issue of this nature, the more extensive powers under sections 68 and 68AA may not be necessary.

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21 The Judge's Decision, §25

22 The Judge's Decision, §25

23 The Judge's Decision, §24

24 Section 40(1) reads: "Where any Ordinance confers upon any person to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing."

54. The judge considered the situation where the Board heard evidence and submissions on both the time issue and the substantive merits of the appeal and rendered "a decision on both matters". He took the view it would easily lead to a multiplicity of proceedings if the taxpayer has to bring proceedings for judicial review to challenge the Board's decision that the notice of appeal was not within time (if section 69(1) is construed not to apply to such a decision) and bring separate proceedings for leave to appeal against the decision dealing with substantive merits. The same multiplicity would obtain if the Board rules in favour of the taxpayer on both matters and the Commissioner wishes to challenge the decision on both matters, or if the Board should rule in favour of one party on one matter and against that party on another matter. The judge opined this should militate against the construction put forward by the Commissioner and provide a "powerful reason to avoid that construction if it is avoidable"[25].

55. I do not agree with the judge. In the situation where the Board has determined that the notice of appeal was not given within time and no extension of time should be granted, there is only one decision, not a decision on the time issue and a decision on the substantive merits of the appeal, even if the Board should give its views on an *obiter* basis on the merits of the intended appeal. In this situation, only the decision on the time issue may be challenged by judicial review, if there are public law grounds for bringing this challenge. There is no question of the taxpayer applying for leave to appeal, as there is no decision "on an appeal under section 68". If the taxpayer should fail in the judicial review, that would be the end of the matter. It is only if he succeeds that the case will be remitted to the Board for a decision on the appeal, and from such a decision an application for leave to appeal under section 69(1) may arise.

56. I agree with Mr Ma that the judge has fallen into error to dispense with the two stage process out of what are in effect case management considerations. There is no power to compress the two distinct decision-making processes into one.

57. In the situation where the Board rules in favour of the taxpayer on the issue of time, the Board will hear the appeal and there will be a decision "on an appeal under section 68". If the Commissioner wishes to challenge the Board's decision on the time issue, it is open to the court to stay any application for leave to appeal under section 69(1) pending the outcome of the proceedings for judicial review. I do not regard this as leading to the kind of multiplicity of proceedings to warrant an alternative construction to avoid that outcome. Besides, one must have regard to the words of caution that it is impermissible to adopt an approach which would "distort or even ignore the plain meaning of the text and construe the statute in whatever manner achieves a result which they [the courts] consider desirable"[26].

58. The judge made reference to *Chow Kwong Fai v Inland Revenue Board of Review* [2004] 2 HKLRD 963[27], which quoted from *Chinachem Investment Co Ltd v*

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25 The Judge's Decision, §§18, 20

26 *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342 at §36

27 The Judge's Decision, §§10 to 12, 19 to 21

Commissioner of Inland Revenue (1989) 1 HKTC 110, in which Sir Alan Huggins V-P said the following:

> "There is another aspect of the matter which calls for a mention. It was argued that some of the matters raised before the High Court were such that they should have been made the subject of an application for judicial review and not an appeal by way of case stated. Whilst there may be some logic in the argument, I am satisfied that convenience and the avoidance of a multiplicity of proceedings may justify the taking by way of a case stated of some points for which the process was not designed. Thus, it is contended here that the Chairman of the Board of Review entered into the arena so as flagrantly to breach the rules of natural justice."

59. The *Chinachem* case was not concerned with a situation that the notice of appeal to the Board was not given within time or that no extension of time should be granted. As apparent from the above extract, in the appeal to the High Court by way of case stated, the taxpayer sought to raise a complaint there was breach of the rules of natural justice, and the Commissioner argued that such complaints should have been made the subject of an application for judicial review and not an appeal by way of case stated. It was in that context that Huggins V-P expressed the view that "convenience and the avoidance of a multiplicity of proceedings may justify the taking by way of a case stated of some points for which the process was not designed".

60. In *Chow Kwong Fai*, the applicant failed to give a notice of appeal within the one-month period and the Board declined to grant an extension of time. He sought to have the Board's decision referred to the Court of First Instance by way of a case stated. When the Board refused to state a case for consideration by the Court of First Instance on the ground that the questions to be the subject of the case stated were questions of fact not of law, the applicant challenged the refusal by judicial review. Hartmann J took the view as the real issue would appear to be the reasonableness (in the public law sense) of the Board's refusal to allow the applicant to appeal out of time, it would have been more appropriate to seek a judicial review of that challenge, rather than to seek to proceed by way of case stated in respect of the identical issue, as it would add to the risk of a multiplication of proceedings (at §§15 and 18). He remarked that when the lawfulness of a decision of the Board is challenged on classical judicial review grounds rather than on the basis that the Board has wrongly directed itself on a point of law, "common sense and economic prudence dictate that a direct challenge by way of an application for judicial review is more appropriate" (at §16). It was in that context that Hartmann J quoted the observations of Huggins V-P in the *Chinachem* case, in support of his thinking that "in respect of classical judicial review matters such as procedural fairness and rationality, it is best to proceed by way of judicial review but that, if the same issues are taken forward by way of case stated, while not correct, it *may* still be procedurally acceptable" (at §18).

61. G Lam J cited the *Chinachem* case and *Chow Kwong Fai* as examples to show that prior to the amendments of the Ordinance in 2015 to abolish the case stated procedure, "under the old procedure, the courts allowed challenges based on judicial review

considerations to be made through an appeal by way of a case stated"[28], and that "an appeal by way of case stated was, at least in appropriate circumstances, a permissible procedure for challenging a refusal of extension of time."[29] He then referred to the legislative materials for the amendments in 2015[30] and deduced from the two cases and the legislative materials that "the purpose of the legislation does not suggest that there was any intention to prevent the Board's decisions on whether an appeal was within time and decisions on extension of time from being challenged by way of appeal rather than application for judicial review" and "there was nothing that indicated any intention to outlaw the procedure permitted in *Chow Kwong Fai*, which would usefully and economically allow a decision on time to be challenged in a single appeal together with the decision on the merits."[31]

62. It seems to me that the judge is reading too much into *Chow Kwong Fai* as support for his proposition that prior to the legislative amendments in 2015, it was procedurally permissible to challenge in a single appeal a decision on time and a decision on the merits of the assessment. Unlike the current section 69(1) (which provides that an appeal with leave on a question of law may be engaged "where the Board of Review has made a decision on an appeal under section 68"), the old section 69 provided that the Board may be required to state a case on a question of law in respect of "the decision of the Board". And insofar as a decision on time was treated as a "decision of the Board" in *Chow Kwong Fai*, Hartmann J did not appear to have considered whether a decision on time without there being any determination of the assessment being appealed against could constitute a "decision of the Board" in respect of which a case might be stated under the old section 69.

63. Insofar as the judge is relying on the legislative materials for the 2015 amendments for the purpose of showing that the legislature indicated no intention to "outlaw the procedure permitted in *Chow Kwong Fai*", this is tantamount to "tacit legislation", namely, relying on the legislature's failure to reverse or alter earlier judicial authorities as indicating that the legislature endorses them. The notion of "tacit legislation" was called into question by Lord Carnwath and Lady Hale in *R (on the applications of ZH and CN) v London Borough of Newham and London Borough of Lewisham* in the extracts below:

> "… Parliament legislates by what it says, or what is said under its authority, not by what it does not say. Anything else can only be justified, if at all, as "judge-made law", and the criticisms implicit in that expression must be faced." (§82)
>
> "In any event, we were referred to no authority which has applied that principle to a case where, as here, the most that can be said is that Parliament has failed to take what might have seemed an obvious opportunity to legislate. Absence of legislation may be governed by many factors which have nothing

[28] The Judge's Decision, §19
[29] The Judge's Decision, §21
[30] Being the Legislative Council Brief on the Inland Revenue (Amendment) (No 3) Bill 2015 and Legal Service Division Report on Inland Revenue (Amendment) (No 3) Bill 2015.
[31] The Judge's Decision, §21

> to do with the perceived merits of a possible change, not least Parliamentary time and other Government priorities" (§85) (per Lord Carnwath)
>
> "… Parliament can always legislate to change a decision of the higher courts should it wish to do so, but no conclusions can be drawn from the fact that it has not. There must be many, many decisions which the Parliament of the day finds surprising, inconvenient or downright wrong, but has done nothing to correct. The reasons for inaction may range from ignorance, indifference, lack of Parliamentary time or Whitehall resources, to actual approval. Moreover, Parliament's failure to act tells us nothing about what Parliament intended when the legislation was passed, which is what this court must decide. …" (§167) (per Lady Hale)[32]

64. Similar statements were made by Andrew Cheung J (as he then was) in *Kao Lee & Yip v Lau Wing* [2007] 3 HKLRD 365 at §77:

> "As a general observation, I do not accept that tacit legislation means that whenever Parliament has a subsequent opportunity to alter the effect of a decision on the legal meaning of an enactment, but refrains from doing so, the implication is that Parliament approves of that decision and adopts it. That is too sweeping a proposition to accept. A watered-down version of it that an inference to that effect could sometimes be drawn is, in my view, nearer the mark. … For my part, I would be very slow to accept that tacit legislation is relevant at all unless the previous decision is substantially connected with or reasonably related to the subject matter of the subsequent legislation, which gives rise to the so-called "opportunity" that Parliament is said to have to correct the earlier decision. Indeed Parliament can of course at anytime pass whatever law it likes and there is not much point in speaking in terms of "opportunity"."[33]

65. I agree with Mr Ma that the legislative materials for the 2015 amendments ought not be relied on as indicating a legislative intent not to "outlaw the procedure permitted in *Chow Kwong Fai*". The concept of "tacit legislation" is problematic. Further, the mischief which the 2015 amendments were intended to remedy (ie to abolish the time-consuming and expensive case stated procedure and to enable the parties to apply to the court direct for leave to appeal on a question of law) cannot be said to be "substantially connected with or reasonably related to" the procedure permitted in *Chow Kwong Fai*.

66. For all the above reasons, I hold that on a proper construction of the relevant statutory provisions, the leave to appeal procedure in section 69(1) does not encompass a decision of the Board that the notice of appeal given by the taxpayer was not within time and that no extension of time should be granted.

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[32] See also *Bennion on Statutory Interpretation* at Section 24.20 pages 642 to 643

[33] The decision of the Court of Appeal (Stock JA, Yuen JA and Andrew Cheung J) was affirmed by the Court of Final Appeal in *Kao Lee & Yip v Lau Wing* (2008) 11 HKCFAR 576, see §§35 to 36.

67. It would follow that the Board has no power to order Mr Suen to pay $25,000 as the costs of the Board under section 68(9), as this power may only be invoked where a validly constituted appeal has been heard by the Board. This has been acknowledged by Mr Ma. In light of that acknowledgment, it seems unlikely that the costs order would be enforced against Mr Suen. I do not propose to deal with the costs order.

The contentions raised by Mr Suen

68. Mr Suen made copious submissions in writing in the amended respondent's notice and his skeleton argument, which he repeated and expanded in his oral submissions at the hearing. What is mentioned below is not meant to be a comprehensive account of his submissions, but only some of the salient contentions. His submissions are not mentioned in the earlier discussions about the proper construction of the relevant statutory provisions because they are immaterial for the reasons mentioned below. I have fully considered his submissions before arriving at the conclusion above and it is purely a matter of presentation that his contentions are mentioned in the last part of this judgment.

69. He contended that there is a "mandatory duty" of the Board to hear and dispose of his notice of appeal and consider the substantive merits of the appeal even though the notice of appeal was given out of time, as this is a "legitimate expectation" of the taxpayer. He asserted that as all the requisite documents have been submitted to the Board, there is a "mandatory duty" to the Board to entertain the appeal and whether the notice of appeal was given within time is not a "prerequisite criteria" [sic]. The prescribed period of one month for giving a notice of appeal is not mandatory, but merely a "directory provision for ease of administrative purpose". But all these arguments go to the merit or otherwise of his contention that the decision of the Board on the time issue was in error, they are of no relevance to the question of statutory interpretation that is germane to this appeal.

70. He complained that the Board's Decision was given on 11 September 2017 but the Commissioner's summons to strike out purportedly made pursuant to Order 18 rule 19 was issued only on 4 March 2019. He contended that the Commissioner should be regarded as having waived the right to strike out on account of the delay and the letter of the Office of the Clerk to the Board dated 11 September 2017 enclosing the Board's Decision in which reference was made to section 69(1) and Practice Direction 34, which he claimed to have followed by issuing his summons on 11 October 2017 seeking leave to appeal.

71. Order 18 rule 19 applies to the striking out of pleadings and indorsement of any writ in the action. It is not apposite to the present application to strike out the summons and statement of grounds of appeal filed by Mr Suen on 11 October 2017. The power to strike out in this situation is founded on the inherent jurisdiction of the court and the basis for striking out is that there is no jurisdiction to give leave to appeal according to the proper construction of section 69(1). This has nothing to do with the "right of unimpeded access to the courts". Leaving aside the question whether there was clear representation in the letter of the Office of the Clerk to the Board to found a waiver at law, waiver would have no relevance on a matter touching upon the jurisdiction of the court. Other submissions of

Mr Suen premised on Order 18 rule 19 (that striking out under this provision is available only in a plain and obvious case and that the claim is bound to fail) are wide of the mark.

72. Mr Suen also sought to re-argue his case that his notice of appeal to the Board was not given out of time and contended that the Board's refusal to grant an extension of time was an abuse of power. These arguments are totally irrelevant to the present appeal.

73. I reject all the contentions of Mr Suen. His arguments are entirely misconceived and fail to add anything of substance to the present debate.

Conclusion and costs order

74. For all the above reasons, I would allow the Commissioner's appeal and I would order that the summons and statement of grounds of appeal filed by Mr Suen on 11 October 2017 be struck out. The judge's order awarding the costs of the striking out summons to Mr Suen must be set aside. I would replace this with an order that the costs of and occasioned by the striking out summons be paid by Mr Suen to the Commissioner, to be taxed if not agreed.

75. We have heard submissions on the costs of this appeal. The Commissioner seeks costs against Mr Ma in the event that the appeal is allowed. Mr Suen has argued that he should not have to pay costs in that the Commissioner should sue the Board, not him.

76. There is no reason why costs of the appeal should not follow the event. And no reason why the Commissioner should sue the Board in seeking to strike out the summons and statement of grounds of appeal filed by Mr Suen. G Lam J has given fair warning to Mr Suen about his potential exposure on costs and explained to him that it is his choice whether actively to take part in the appeal which concerns a point of statutory construction to which the contribution he could realistically make acting in person, with every respect to him, may not be proportionate to the risks of costs to which he might be subject in case the appeal is allowed[34]. As Mr Suen has chosen to take an active part in this appeal and he is unsuccessful in opposing the appeal, I would order him to pay the Commissioner's costs of this appeal, to be taxed if not agreed.

Hon Chu JA:

77. I agree with the judgment of Kwan VP.

Hon Barma JA:

78. I agree with the judgment of Kwan VP.

[34] [2020] HKCFI 1065 at §3

(Susan Kwan)	(Carlye Chu)	(Aarif Barma)
Vice President	Justice of Appeal	Justice of Appeal

The Applicant (Respondent), acting in person

Mr Johnny Ma, instructed by the Department of Justice, for the Respondent (Appellant)