IN THE COURT OF APPEAL 1989, No. 32 (CIVIL)

BETWEEN

COMMISSIONER OF INLAND REVENUE — Applicant (Appellant)

and

INLAND REVENUE BOARD OF REVIEW — 1st Respondent (1st Respondent)

ASPIRATION LAND INVESTMENT LIMITED — 2nd Respondent (2nd Respondent)

Coram : Fuad, V.-P., Penlington, J.A. & Bewley, J.

Date of Hearing : 21 November 1989

Date judgment handed down : 28 November 1989

J U D G M E N T

Fuad, V.-P. (giving the judgment of the Court):

On 3 May 1984, the Taxpayer, Aspiration Land Investment Limited, a private company incorporated in Hong Kong, objected, under section 64(1) of the Inland Revenue Ordinance, Cap 112, to the profits tax assessment raised upon it for the year of assessment 1980/81. The assessor had, on 27 April 1984, decided that tax was payable in the amount of $56,894,432 on assessable profits of $344,814,745. The Taxpayer has all along claimed that the $344,800,000 profit which was derived from the sale of the shares of one of its subsidiaries, was profit arising from the sale of capital assets and not a sale in the course of a trade or business carried on by it so as to make the profit chargeable to tax under section 14 of the Ordinance.

The Commissioner of Inland Revenue confirmed the assessment objected to under section 64(2) of the Ordinance and forwarded his determination to the Taxpayer, together with his reasons therefor and a statement of the facts upon which the determination was arrived at, as required by section 64(4) of the Ordinance, on 26 July 1984.

The Taxpayer gave notice of appeal on 23 August 1984 to the Board of Review constituted under section 65 of the Ordinance, in the manner, and within the time provided by section 66. There was a hearing before the Board of Review under the chairmanship of Mr Henry Litton, QC on six days in July 1987. On 11 August 1987 the Board delivered its decision in writing. This was a fully reasoned decision running to some 30 pages, set out in 71 paragraphs. The Board allowed the appeal and annulled the assessment, in the exercise of its jurisdiction under section 68(8)(a) of the Ordinance.

On 9 September 1987 the Commissioner made an application in writing requiring the Board to state a case, under the proviso to section 69(1) of the Ordinance. On 14 September 1987, the Clerk to the Board of Review wrote to the Commissioner saying that he had been instructed by the Chairman of the Board to require him to prepare a draft of the case stated and to have the same agreed by the solicitors acting for the Taxpayer so that it could be submitted to the Board for signature. For reasons into which it is not now necessary to go, problems arose about the content of the case stated and there was considerable correspondence between the parties. Eventually, on 18 April 1988 there was another meeting of the Board, constituted as it had been at the original hearing, which was held at the Board's request 'for the purpose of giving the Commissioner an opportunity of satisfying us that there is a question of law for the opinion of the High Court in this proposed appeal'. This passage comes from an 18-page written 'Ruling' prepared by the Board and dated 18 May 1988. In that document the Board referred to the problems that had arisen and to all the correspondence and gave a full explanation as to why it declined to state a case.

On 11 August 1988 Judge Cruden, sitting as a Deputy Judge of the High Court, gave leave to the Commissioner to apply for judicial review. The principal relief sought was for an order of mandamus directing the Board to state a case for the opinion of the High Court, and the questions of law raised were formulated in the manner set out in the Commissioner's application in writing dated 9 September 1987 asking the Board to state a case.

The judicial review hearing came before Barnett, J on 12 and 13 December 1988 and he gave a reserved decision on 23 December refusing the relief sought. On 6 March 1989, the Commissioner filed notice of appeal against Barnett, J's decision to this Court.

Happily, before the appeal was fully opened before us, as between the Commissioner and the Board, a compromise was reached. The appeal was withdrawn on terms, and thereupon dismissed by consent.

The purpose of this judgment is to discuss one matter which arose as a result of observations we made at the beginning of the hearing because we were aware of certain criticism that had been expressed in legal circles about remarks made by Sir Alan Huggins, V-P in Chinachem Investment Co Ltd v Commissioner of Inland Revenue, Civil Appeal No. 116

of 1986, 3 April 1987 (unreported). My Lord Clough, JA and I were also members of the Court. This is what Sir Alan Huggins said at pages 1 and 2 of the transcript:

> 'There was much discussion before us and before the judge as to the form of the Case Stated and the procedure for settling it. It has never ceased to amaze me how much argument this simple and straightforward process engenders. A properly drafted Case Stated is the most satisfactory process of all for deciding a question of law, for it concentrates attention on the essentials of the case, but it does require those concerned to marshall and state with precision the issues, the facts (and, where necessary, the evidence), the arguments and, finally, the conclusions attacked. Criticism was directed at the Board of Review for failing to produce an acceptable case. In my view that criticism was almost entirely misdirected. Whatever may be the present practice in England, the established practice in Hong Kong is that where parties are professionally represented they shall draft the Case Stated and submit it to the tribunal. The reason is obvious: the parties know better than anyone else what points they wish to take on the appeal, what findings of fact they wish to contend are relevant to those points and what arguments they advanced. The tribunal has the final responsibility for stating the Case and is not bound by the draft submitted to it. It can, therefore, after consulting the parties, alter the draft if it is inaccurate or incomplete. Even if the drafting were to be done by the tribunal itself, it would be the duty of the parties to apply for any necessary amendment. As I have often said before, there may be cases where it is impossible adequately to state the Case without annexing one or more documents, but such cases are few and far between. The documents may even include a transcript of evidence, but that is to be avoided if possible, because such a transcript inevitably contains unessential matter which it is the object of the process to exclude. Thus, where the issue on appeal is whether there was any evidence to support a finding of fact, a transcript of all the evidence may be a necessary annexure, but a transcript is not to be annexed where what is required is a statement of the facts found or assumed or where with proper diligence a precis of the material evidence can be included in the Case Stated itself. I appreciate that in the present case it is urged that the facts should have been found and not assumed, but that is a different matter (which I shall deal with in an appropriate part of the judgment) involving a criticism of the Board's determination and not of the Case Stated.
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> The Case as ultimately stated included no less than 513 pages, amongst which were the Commissioner's determination and copies of some law reports. On any view those were not documents which it was proper to annex. In the event, as was to be anticipated, only about a score of the pages of exhibits were even referred to on the appeal.'

We raised the matter because we were concerned lest the practice suggested by Sir Alan Huggins, and adopted here, had contributed in any way to the difficulties encountered by the parties in agreeing the contents of the case stated, and to the very long delay that had ensued since the Board had made its decision in August 1987. We invited submissions as to whether this Court should re-consider the matter and perhaps direct that the English practice be followed in future. Mr Gardiner, QC of the English Bar, confirmed that the following paragraph of Atkin's Court Forms (Vol 34, 1988 issue) at page 125 correctly sets out the current English practice:

> '42. Drafting the case. It is almost invariable practice for the case to be drafted by the Commissioner or their clerk. Before it is signed it is sent to each of the parties in turn to read and to suggest any amendment.
>
> In considering amendments, each party should make sure that the facts upon which his contentions rely are clearly set out as findings. Each party should review the evidence given, to ascertain the extent to which it was accepted by the Commissioners and to discover any omissions, and make sure the contentions have been fully and properly expressed, both as to fact and law.
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> To avoid delay, the draft case is usually sent only once to each party (first to the winner before the tribunal) and a time limit of four to eight weeks is usually imposed for its return.
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> The Commissioners need not accept any suggested amendment as they are solely responsible for stating the case.'

Mr Denis Chang, QC, who appeared for the Board, assured us that the practice adopted in the instant case (as we have seen, of inviting the Commissioner to prepare a draft of the case stated for it to be agreed by the solicitors for the Taxpayer for submission to the Board) was entirely satisfactory and that so far as the Board of Review were concerned they did not seek any re-consideration by this Court of the practice approved by Sir Alan Huggins in the Chinachem case. The resources at the disposal of the Board would not permit them invariably to prepare the first draft.

However, we were asked to emphasise, as Sir Alan Huggins had pointed out, that the final responsibility for stating the case is that of the Board which is not bound by any draft submitted to it. This we do, and at the same time we express the view that the Board must be free to draft the case stated themselves before sending it to the parties for comment if they find it convenient in a particular case to do so.

Mr Chang also asked us expressly to approve the Board's practice of annexing a copy of their determination to the case stated to save setting out all the facts again in the case stated itself. While we think that it is right to allow a certain measure of flexibility and

discretion to the Board as to the precise manner in which they state the case, we would stress that the case stated itself must set out the facts found by the Board if the Board's written determination has merely summarised the evidence led before it without saying whether particular evidence is accepted or rejected. The facts found by the Board must clearly appear. All that we feel it necessary to say is that there is no need to duplicate this essential duty on the part of the Board.

When Counsel for the Commissioner, Mr Feenstra, and Mr Chang announced the terms upon which the appeal was being withdrawn, we were told that neither of the parties they represented sought an order for costs against the other. However, Mr Gardiner, on behalf of the second respondent, the Taxpayer, submitted that this Court should make an order for the costs of the appeal in its favour. Mr Feenstra objected, submitting that now that the Board had agree to state a case it would have been quite improper for him to proceed with the appeal, and that in the circumstances it would not be just to make a costs order in favour of the Taxpayer.

We can see no possible ground for denying the Taxpayer its costs. There is no suggestion that the Taxpayer was not a proper party to this appeal. There is nothing in the material that was opened to us before the appeal was dismissed by consent to suggest that the Taxpayer behaved improperly at any time, or acted unreasonably. It seems to us that as the matter now stands it would not be fair to make any order other than that the appellant should pay the second respondent the costs of the appeal, and we so order.

Mr Peter Feenstra & Miss V Patel (Crown Solicitor) for the Appellant

Mr Denis Chang, QC & Mr Johnny Mok (Allen & Overy) for the first Respondent

Mr John Gardiner, QC & Mr J Swaine (Woo, Kwan, Lee & Lo) for the second Respondent