Case No. D10/16

Practice and procedure – case remitted back from the Court of First Instance – whether the Board has jurisdiction to conduct hearing *de novo* or take further evidence – no such jurisdiction existed for the Board – section 69(5) of the Inland Revenue Ordinance ('IRO')

Panel: Lo Pui Yin (chairman), Corinne Marie D'Almada Remedios and Fong Sui Yi Andrea.

Date of hearing: 22 March 2016.
Date of decision: 15 June 2016.

On allowing the Taxpayer's appeal against the Board's decision, the Court of First Instance held that the Board erred in treating the representations of the Taxpayer's representatives in the correspondence with the Inland Revenue Department as agreed facts or unchallenged evidence, and relying on the same; and in concluding that the Taxpayer could only have intended to purchase the property in question as a trading stock based on the evidence before it. The Court of First Instance remitted the case back to the Board pursuant to section 69(5) of the IRO to determine the Taxpayer's true intention. The parties disputed on whether, on such remitter, the Board had any jurisdiction to conduct a hearing *de novo*, or to take further evidence on the intention of the Taxpayer. If such jurisdiction existed, the parties further disputed whether discretion ought to be exercised in favour of the Taxpayer to allow it to adduce new evidence.

Held:

1. The wording of section 69(5) of the IRO does not allow the Board to conduct a hearing *de novo* or take further evidence on a case remitted back from the Court of First Instance, as the Board shall, in those circumstances, revise the assessment as the opinion of the Court of First Instance may require (Yau Wah Yau v Commissioner of Inland Revenue (No 2) [2007] 1 HKC 417; Commissioner of Inland Revenue v Board of Review and Indosuez W I Carr Securities Ltd (CACV 57/2006, 27 April 2007) considered).

2. Even if the Board had such jurisdiction, discretion ought not be exercised in favour of the Taxpayer to allow it to adduce new evidence. The errors committed by the Board, as identified by the Court of First Instance, did not require the Board to take or consider any further evidence. The Taxpayer did not argue before the Court of First Instance that the Board failed to obtain further evidence on the Taxpayer's intention.

3. It was not permissible for the Taxpayer to argue that it should be allowed to adduce new evidence as a matter of natural justice. The Taxpayer never argued that the Board was under any fundamental mistake of fact. Further, it was the Taxpayer's representatives who confirmed the he decided not to give evidence as a witness, when he appeared before the Board at the last hearing. Further, the rules of natural justice could not operate independently of section 69(5) of the IRO.

Additional evidence not admitted.

Cases referred to:

R v Deputy Industrial Injuries Commissioner ex p Moore [1965] 1 All ER 81
R (Chaudhuri) v General Medical Council [2015] EWHC 6621 (Admin)
Commissioner of Inland Revenue v Hang Seng Bank Ltd (1989) 2 HKTC 614
Yau Wah Yau v Commissioner of Inland Revenue (No 2) [2007] 1 HKC 417
Commissioner of Inland Revenue v Board of Review and Indosuez W I Carr Securities Ltd (CACV 57/2006, 27 April 2007)

Ivan Cheung, Counsel, instructed by Messrs K H Lam & Co, for the Appellant.
Paul Leung, Counsel, instructed by the Department of Justice, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. (a) By a Judgment dated 14 October 2015 in HCIA 1/2015, the Court of First Instance (G Lam J) held, in an appeal by way of case stated against the Decision of this Board dated 10 October 2014 in the appeal by the Taxpayer, Company A, that this Board erred in law in relying on the Taxpayer's representatives' assertions or representations which were not properly adduced as evidence.

(b) The Court of First Instance also answered 'No' to the question of whether as a matter of law and based on the evidence adduced before this Board, the true and only reasonable conclusion is that the Taxpayer purchased Property B as a trading stock and that this Board erred in law in concluding that Property B was purchased by the Taxpayer as a capital asset ('Question 2'); and 'No' to the question of whether, as a corollary from the answers to the above questions and as a matter of law, the true and only reasonable

conclusion in respect of the Taxpayer's claim for rebuilding allowance in respect of Property B is that it should be disallowed ('Question 3').

(c) In coming to the answer 'No' to Question 2, the Court of First Instance reasoned as follows:

'23. In any event, having considered the documentary evidence, it seems to me the question of the taxpayer's intention has to be one for the Board. So far as circumstantial evidence is concerned, Mr Cheung pointed to the fact, among others, that (i) [Property B] was purchased subject to tenancy; (ii) under the law applicable at the time there was protection of the tenure of the tenant, subject to payment of market rent; (iii) the taxpayer obtained a mortgage loan on terms which penalised and discouraged early repayment; and (iv) the taxpayer actually took the assignment of the property and paid all stamp duty and legal costs before entering into an agreement to sell the property. These matters, he submitted, tend to show an intention to hold the property on a long-term basis as investment, rather than as trading stock.

24. But not only was there circumstantial evidence of the taxpayer's intention, there was actually a copy of the minutes of the meeting of the board of directors of the taxpayer dated 25 January 1997 which stated it was resolved that the company "shall purchase the property … as an investment property …". This was included in the material before the Board as Appendix E to the Deputy Commissioner's determination and was, as I understand Mr Leung's submission, a document properly to be treated as admissible documentary evidence. As far as I understand the Commissioner's position, there is no suggestion that it was anything other than a genuine document created at the time. It is arguable – and I need put it no higher than that – that the phrase "investment property" would suggest that the property was purchased as capital asset rather than trading stock. As such, the document, albeit created by the taxpayer's own directors, could, in my view, be regarded as evidence of the intention of the taxpayer at the time. What weight should be put on it is a question open to debate, but within the bounds of rationality, weight is of course a question for the Board as the tribunal of fact.

25. On the basis of the evidence properly adduced before the Board, I am unable to say that no reasonable Board of Review properly directing itself could possibly come to the conclusion

> that [Property B] was purchased and then held by the taxpayer as a capital asset rather than trading stock. I shall accordingly answer Question 2 in the negative.'

(d) The Court of First Instance made an Order pursuant to section 69(5) of the Inland Revenue Ordinance (Chapter 112) that the case be remitted to this Board with the opinion of the Court of First Instance on the above questions of law stated by this Board in the case expressed in the Judgment.

2. The parties then corresponded with this Board on how to proceed with the remitted case in accordance with the Order of the Court of First Instance. The Taxpayer's legal representatives wrote to ask that this Board should hold a new hearing to consider the Taxpayer's Appeal and that at the new hearing, Mr C, the Taxpayer's representative, would give evidence on oath and lodge further documents in support of the appeal. The Department of Justice wrote on behalf of the Revenue to object to the request of the Taxpayer, which the department considered to be a request, in essence, for a re-hearing of the appeal, and asked that this Board should revise the assessment as the opinion of the Court of First Instance may require, without allowing any further evidence to be adduced or any re-hearing at all.

3. This Board considered that an oral hearing must be held for the purpose of this Board revising the assessment as the opinion of the Court of First Instance may require and asked the parties to agree on the list of issues that this Board should consider at the hearing. However, the parties were unable to reach agreement on the list of issues and each of them wrote separately to propose a list of issues instead. Having considered the issues raised by the parties, this Board considered that the oral hearing should first resolve the questions of whether this Board has power to receive additional evidence (be it oral or documentary evidence) where the appeal is remitted to it with the opinion of the Court of First Instance in general; and whether in the Taxpayer's Appeal, this Board has power to receive additional evidence in light of the particular opinion of the Court of First Instance. In the event that this Board found that it did have such power, this Board would have to consider whether it should be exercised in favour of the Taxpayer.

4. This Board directed that the oral hearing would take place on 22 March 2016 and requested written submissions to be provided before the hearing.

The Submissions

5. The Taxpayer was legally represented at the hearing by Mr Ivan Cheung of counsel. The Revenue was also legally represented at the hearing by Mr Paul Leung of counsel.

6. Mr Cheung for the Taxpayer submitted that:

(a) This Board has no jurisdiction to hear *de novo* or to hold a further hearing on the facts where the case is remitted by the Court of First

Instance to it with the opinion of the Court of First Instance expressed in the judgment on the questions of law in the stated case. This is spelt out in section 69(5) of the Inland Revenue Ordinance, which reads: 'Where a case is so remitted by the court, the Board shall revise the assessment as the opinion of the court may require.'

(b) However, Mr Cheung refers to the Court of First Instance's supervisory jurisdiction over the Board of Review's conduct of appeals to ensure that the appeal proceedings are fair and lawful. Mr Cheung then submitted that this Board should, in order to ensure fairness in the conduct of the proceedings, allow the Taxpayer to have the opportunity to give evidence (be it oral or documentary evidence) in the particular circumstances of its Appeal. Mr Cheung referred to the transcript of the hearing of this Board on 17 February 2014 and submitted that at the hearing, both the Taxpayer's representative attending and this Board misunderstood that this Board could receive the representations of the Taxpayer's representatives as evidence and that now, in light of this material error in the decision-making process of this Board that the Court of First Instance had identified, this Board should correct it by allowing the Taxpayer the opportunity to give evidence. Mr Cheung submitted that if this Board did not allow the Taxpayer to adduce evidence where the case had been remitted, there would be procedural impropriety or denial of natural justice. Mr Cheung referred to R v Deputy Industrial Injuries Commissioner ex p Moore [1965] 1 All ER 81, Eng CA at 95F-H (per Lord Diplock) and R (Chaudhuri) v General Medical Council [2015] EWHC 6621 (Admin).

7. Mr Leung for the Revenue submitted that:

(a) This Board is duty bound under section 69(5) of the Inland Revenue Ordinance to revise or correct the assessment in question by applying the opinion of the Court of First Instance on the questions of law arising on the appeal by case stated, that is, the principles of law clarified by the Court of First Instance. It is only if the application of the correct principles of law requires additional evidence to be heard or received will this Board be in a position to consider whether new evidence should be allowed to be adduced.

(b) Mr Leung referred to Yau Wah Yau v Commissioner of Inland Revenue (No 2) [2007] 1 HKC 417, where Le Pichon JA for the Court of Appeal stated in paragraph 5 that '*[it] is clear that the statutory provision do not confer any general power to remit the case to the Board for rehearing de novo*' and also made reference to the earlier case of Commissioner of Inland Revenue v Hang Seng Bank Ltd (1989) 2 HKTC 614 where Cons VP stated that the court

'*have no power to remit for the Board to reconsider their findings on the facts. We have to take these as the Board has found them. We may only interfere if the findings are not justified by the evidence*'. Mr Leung also referred to Commissioner of Inland Revenue v Board of Review and Indosuez W I Carr Securities Ltd (CACV 57/2006, 27 April 2007), where the Court of Appeal also emphasized that the Board of Review's power in respect of a remitted case is to revise the assessment as the opinion of the court may require.

(c) Mr Leung also submitted that in respect of the Taxpayer's Appeal, this Board does not have the power to receive additional evidence in light of the particular opinion of the Court of First Instance. Mr Leung referred to the Judgment of the Court of First Instance and submitted that the opinion of the Court plainly requires revision of the assessment by applying the correct legal principle on the treatment of the representations made by the Taxpayer's representatives. The Court of First Instance's opinion does not require or involve this Board taking and considering any additional evidence. Also, the remitted case is by no means a re-hearing of the Taxpayer's Appeal, so there is no question of allowing the Taxpayer to adduce further evidence 'in the present appeal' at all.

(d) Mr Leung further pointed to section 69(1) of the Inland Revenue Ordinance and submitted that if this Board at this juncture allows the Taxpayer to adduce new evidence, then the express open words in section 69(1) that the decision of this Board shall be final would be contradicted. Neither the Ordinance nor the common law allows the Taxpayer to appeal against the Revenue's assessment heard by this Board for a second time by way of a back door.

(e) Responding to Mr Cheung's submissions, Mr Leung referred to the transcript of the hearing on 17 February 2014 and submitted that the transcript did not show that Mr C's decision not to give oral evidence at that hearing was due to his belief or understanding, now put forward by Mr Cheung, that he believed he could rely on the information that the Taxpayer had already provided to the Revenue. Mr Leung also submitted that Mr C's confirmation at the hearing of the reliance on the Notice of Appeal and the various letters of reply of the Taxpayer's tax representatives did not support the alleged belief or understanding that he could use the representations and assertions as evidence. The confirmation was made not in his capacity as a witness but rather in his capacity as the Taxpayer's representative at the appeal hearing. Mr Leung read the transcript as showing that Mr C made an informed decision not to give oral evidence as a witness, and instead, chose to rely on the assertions and representations in the Notice of Appeal, the various letters and other documents in support of the Taxpayer's Appeal. Mr Leung

lastly emphasized that it was not the duty of this Board to provide legal advice to either party, including on what evidence the Taxpayer would need to discharge the burden of proof in the appeal. He added that during the hearing in 2014, the Revenue's representative had submitted on the insufficiency of evidence on several aspects of the Taxpayer's Appeal.

(f) Mr Leung further made these points: (i) This Board does not have jurisdiction or power to attempt to cure any alleged procedural irregularity of the hearing on 17 February 2014 at the present stage, as there has not been any successful appeal in respect of any such alleged irregularity to the Court of First Instance by way of case stated; (ii) This Board's error in the decision-making process was after the hearing on 17 February 2014 and should not affect the validity of that hearing. It was incorrect to say that the Taxpayer's failure to give evidence was a result of the error in the decision-making process of this Board in reaching its Decision of 10 October 2014; (iii) It is common ground that there is no allegation of any mistake of fact, so the Chaudhuri case, which referred to the public law principle of a public authority having the power to correct its decisions based on a fundamental mistake of fact, was irrelevant.

Discussion

8. Section 69(5) of the Inland Revenue Ordinance, part of which has been set out in paragraph 6(a) above, provides the statutory framework within which this Board shall operate where a case is remitted by the Court of First Instance to this Board with the opinion of the Court thereon. This Board *shall revise* the assessment as the opinion of the Court may require. Mr Cheung for the Taxpayer accepted that the wording of section 69(5) does not allow this Board to conduct a hearing *de novo* or take further evidence. This Board considers that Mr Cheung's position was realistic and was in line with this Board's understanding of the effect of section 69(5) both from its language and in light of the Court of Appeal authorities of Yau Wah Yau (No 2) (above) and Indosuez W I Carr (above) cited by the parties before this Board.

9. Mr Cheung submitted that this Board should, notwithstanding section 69(5) of the Inland Revenue Ordinance, allow the Taxpayer to adduce oral and documentary evidence when this Board considers the remitted case. Mr Cheung contended that this Board could and should do so to ensure fairness to the Taxpayer and to revisit and correct its Decision in the Taxpayer's Appeal on the basis that the Decision was vitiated by a fundamental mistake of fact.

10. This Board has considered Mr Cheung's submissions on whether in the circumstances of the Taxpayer's case, it should exercise its discretion (if any) to permit the Taxpayer to adduce further evidence but is unable to accept them. In so far as the Taxpayer now asserts that there was a procedural impropriety either at the hearing of 17 February 2014 or otherwise in the process of reaching the Decision in the Taxpayer's

Appeal, that should have been raised at the level of the Court of First Instance either by applying to this Board to state an additional question of law in the appeal to the Court or by applying for leave to apply for judicial review to invoke the supervisory jurisdiction of the Court. In so far as the Taxpayer now asserts that this Board should revisit its Decision of 10 October 2014 on the basis that there was a fundamental mistake of fact in that Decision, the Taxpayer could have made that application soon after the handing down of that Decision. Now that the Court of First Instance has, by its Judgment of 14 October 2015, ordered that this Board shall revise the assessment in accordance with the opinion of the Court expressed in that Judgment, this Board's present jurisdiction and function in respect of the Taxpayer's Appeal is governed by and subject to both section 69(5) of the Inland Revenue Ordinance and the opinion of the Court in that Judgment. While this Board remains under a public law duty to ensure fairness in the proceedings, this duty is one that is to be performed in the context of this Board's present jurisdiction and function as prescribed by both the statutory provision and the Court's opinion. As this Board has held in paragraph 8 above, section 69(5) does not allow this Board to conduct a hearing *de novo* or take further evidence.

11. As to the public law principle to correct a previous decision based on a fundamental mistake of fact, this Board observes that firstly, the Taxpayer has neither raised nor specified the fundamental mistake of fact in its submissions; secondly, on a fair reading of the transcript of the hearing of 17 February 2014, this Board could not possibly be said to be labouring under a fundamental mistake of fact at all since the Taxpayer's representative, Mr C, had confirmed before this Board in no uncertain terms that he decided not to give evidence as a witness; and thirdly, this Board cannot possibly exercise this public law principle now in conformity with and concomitant with its present jurisdiction and function in respect of the Taxpayer's Appeal, which, as noted in the preceding paragraph, is governed by and subject to both section 69(5) of the Inland Revenue Ordinance and the opinion of the Court of First Instance in its Judgment of 14 October 2015. This Board therefore concludes that the Taxpayer is not able to invoke the said public law principle before this Board now.

12. In any event, even if this Board had the discretion contended for by the Taxpayer to take further evidence, this Board would decline to exercise such a discretion in the circumstances of the Taxpayer's case.

13. This Board has considered the Court of First Instance's Judgment of 14 October 2015. The opinion of the Court in that Judgment does not require this Board taking and considering any additional evidence. The Court held that this Board erred in treating representations that had been made by the Taxpayer's tax representatives in letters to the Revenue as agreed facts or effectively unchallenged evidence, when those matters were in fact contentious (paragraph 18), so that this Board erred in relying, to a material extent, on matters that were not properly adduced as evidence (paragraph 20); and expressed the opinion that on the documentary evidence, it was for this Board to consider both the copy of the minutes of the meeting of the board of directors of the Taxpayer dated 25 January 1997 and the circumstantial evidence to reach a conclusion, as the tribunal of fact, on the question of the Taxpayer's intention (paragraphs 23 and 24, which are quoted above).

14. As the Court of First Instance had indicated in paragraph 24 of its Judgment (quoted above), there was before this Board a copy of the minutes of the meeting of the board of directors of the Taxpayer dated 25 January 1997 which stated that it was resolved that the Taxpayer 'shall purchase the property … as an investment property …'. The Taxpayer, as the Court of First Instance had indicated in the same paragraph, could rely on the said minutes as evidence of the intention of the Taxpayer at the time.

Decision and Further Directions

15. This Board determines that, for the reasons set out above, it has no authority to take and consider any additional evidence when it revises the assessment in the Taxpayer's case accordance with the opinion of the Court of First Instance in its Judgment of 14 October 2015 in HCIA 1/2015 on appeal by case stated from this Board's Decision in the Taxpayer's Appeal of 10 October 2014. This Board also considers that, even if this Board had the discretion contended for by the Taxpayer to take further evidence, this Board would decline to exercise such a discretion in the circumstances of the Taxpayer's case.

16. This Board has scheduled the next oral hearing in the Taxpayer's case to take place on 25 and 26 July 2016. In light of the determination above, it is not necessary to reserve two full days for the next oral hearing. Also, it may be necessary to revise the timetable for the filing and service of written submissions. Therefore, this Board directs that: (a) The next oral hearing shall take place at 9:30 am on 25 July 2016 (with the whole day reserved); (b) The Taxpayer shall file and serve its written submission on how this Board should revise the assessment on or before 18 July 2016 and the Revenue shall file and serve its written submission on the same on or before 22 July 2016; and (c) The parties have liberty to apply to this Board for additional or alternative directions, save that this Board considers that the direction in (a) on the fixing and duration of the next oral hearing has specified a 'milestone date/event' and any application to vacate or otherwise vary the terms of the next oral hearing would require justification on special grounds.