Case No. D1/16

Case stated – abuse of process – sections 14-17, 69(1) and Part IV of the Inland Revenue Ordinance

Panel: Albert T da Rosa, Jr. (chairman), Chan Yue Chow and Lo Pui Yin.

Date of hearing: Stated case, no hearing.
Date of decision: 8 April 2016.

The Appellant was dissatisfied with the Board's decision and by an application together with a draft case applied to the Board to state a case to the Court of First Instance. The application stated a single question of law raised for the opinion of the Court of First Instance : 'Did the Board of Review err in law in concluding, upon the facts found by them, that, for the purposes of Part IV of Ordinance, within the assessment of the Taxpayer's assessable profits, the Taxpayer's expenditure on Overburden Costs, during each of the years of assessment 2002/03 to 2007/08, was not deductible revenue expenditure because the Overburden Costs were capital in nature?' Being challenged, the Appellant in its reply added an alternative point saying : '… if the Board does not agree with the question of law as originally formulated in our application to state a case to the Court of First Instance and our submissions as outlined above, we invite the Board to state a case based on the questions of law outlined on page 2 of this letter …'

Held:

1. In the stated case as drafted, there is no challenge to any finding of primary facts. If there had been, there was no reference to any passage of agreed facts or notes of evidence or transcript to particularise the challenge. It is not sufficient to annex our Decision for such purpose. Only our findings on primary facts and conclusions from them are relevant for the Court of First Instance. The Appellant is not entitled to abuse the process and burden the Court of First Instance to decipher at the time of hearing its case from annexure of irrelevant materials without properly identifying the issues for the Court. It is the function of this Board to vet the draft stated case for such purposes.

2. The alternative challenge (i) is apparently based on the wrongful assumption that we have found as 'facts' what were in fact the Appellant's 'contentions', and (ii) did not set out the contentions of law of each party upon each of the issues referred for the opinion of the Court and it therefore suffers from embarrassing opacity.

3. We are not satisfied that there is any prospect of success.

Application dismissed.

Cases referred to:

Chinachem Investment Co Ltd v Commissioner of Inland Revenue [1987] HKCA 295
The Attorney General v Leung Chi-kin [1974] HKLR 269
Commissioner of Inland Revenue v Inland Revenue Board of Review and Another [1989] 2 HKLR 40
Honorcan Ltd v The Inland Revenue Board of Review [2010] 5 HKLRD 378
Same Fast Limited v Inland Revenue Board of Review (2007-08) IRBRD, Vol 22, 321
Davies v Shell Co of China Ltd (1951) 32 TC 133

Decision:

Introduction

1. On 31 December 2015 this Board delivered its decision ('the Decision') on the present appeal. The appellant, Company A ('the Appellant') is dissatisfied with our Decision and by an application ('the Application') together with a draft case ('the Draft Case') applied on 29 January 2016 to this Board to state a case to the Court of First Instance.

2. In the 3-page 7-paragraph Draft Case, the Appellant:

2.1. In paragraph 1 thereof recited the case history;

2.2. In paragraph 2 thereof annexed this Board's decision;

2.3. In paragraph 3 thereof annexed the Agreed Facts;

2.4. In paragraph 4 thereof referred to the grounds of appeal as described in paragraph 9 of the Decision;

2.5. In paragraphs 5 and 6 thereof annexed the Appellant's and the Respondent's respective written submissions; and

2.6. In paragraph 7 thereof stated a single question of law raised for the opinion of the Court of First Instance as follows:

'Did the Board of Review err in law in concluding, upon the

> facts found by them, that, for the purposes of Part IV of Ordinance, within the assessment of the Taxpayer's assessable profits, the Taxpayer's expenditure on Overburden Costs, during each of the years of assessment 2002/03 to 2007/08, was not deductible revenue expenditure because the Overburden Costs were capital in nature?'

3. This Board asked for submission from the parties. Initially the Respondent requested for clarification over the meaning of 'within the assessment of the Taxpayer's assessable profits' in the draft question of law and objected to the annexure of the parties' submissions. In the Appellant's reply filed on 23 March 2016 ('the Reply'), the Appellant provided the clarification and indicated that they had no strong views regarding the annexing of the parties' submissions and would leave this to the Board to decide.

4. The Respondent's submission was filed on 1 March 2016 ('the Respondent's Submission') which in essence stated that

> '… it is necessary for the [Appellant] to actually identify the error of law in, and challenge he makes to, the Board's Decision (and not simply put in a "pro forma" so-called "question of law"). Otherwise, the application to state a case becomes nothing more than filling in a standard form, and the Board is unable to carry out its function of scrutinising the proposed case stated.'

5. In the Reply, the material parts are as follows:

5.1. The Appellant was adamant that it is right and said:

> 'With all due respect to [the counsel for the Respondent], we suggest that there is nothing improper in the <u>form</u> of our proposed question of law -- which follows the fairly-standard formula for appeals concerning the question of whether expenditure is capital or revenue in nature. A question of whether expenditure is capital or revenue in nature <u>is</u> a question of law e.g. <u>Wharf Properties Ltd v Commission of Inland Revenue</u> [1977] HKLRD 252 per Lord Hoffman at 255D and <u>Beauchamp v F.W. Woolworth plc</u> [1990] 1 A.C. 478 per Lord Templeman at 491A-B and 491C-492G'. (original emphasis)

5.2. The Appellant added an alternative point saying :

> 'In the alternative, if the Board does not agree with the question of law as originally formulated in our application to state a case to the Court of First Instance and our submissions as outlined above, we invite the Board to state a case based on the questions of law outlined on page 2 of this letter, items 1-3. If the Board adopts this alternative approach we respectfully

request the opportunity to further clarify and elaborate on those grounds of appeal.'

6. On page 2 of the Reply regarding the said 'items 1-3', the Appellant wrote:

'On appeal, the [Appellant's] Counsel would contend that the question of law arises from:

(1) The Board's misunderstanding of some of the authorities which were cited to them, in particular: (i) concerning the guidance to be derived from cases with analogous or similar facts; (ii) the assistance to be gleaned from the Commonwealth decisions; and (iii) the non-applicability of the "rough" guide in British Insulated & Helby Cables.

(2) The Board's misapplications of the requirements of sections 14-17 of the Inland Revenue Ordinance, Cap. 112 (the "Ordinance") to the facts which the Board has found and in particular the consequences in law of **their findings of fact that**:

(a) The business of the Taxpayer is quarrying and its gross receipts derive from its sale of minerals and aggregates recovered from their quarrying operations (the "Minerals").

(b) It is an integral and unavoidable feature of that business that, for each layer of recoverable and saleable Minerals that the Taxpayer recovers, it first has to uncover and remove the overburden above the Minerals.

(c) The removal of overburden over each "strip" of recoverable Minerals only facilitates the recovery of Minerals from that underlying "strip" -- so that once the benefit for that strip is exhausted, new overburden needs to be removed to enable the next "strip" to be quarried.

(3) The Board's **failure to conclude** that: (a) since the costs of removing the overburden (the "Overburden Costs") are an incidental expense to recovering the Minerals that always has to be incurred in order to produce the Taxpayer's assessable profits prima facie the Overburden Costs are revenue expenditure i.e. a necessary cost within the business operations that produce the assessable profits; (b) such recurrent preliminary expenditure within a company's business operations provides no enduring asset or benefit to the Taxpayer; and (c) since the Overburden Costs are recurrent expenses which always have to be incurred as a normal cost of producing the Taxpayer's assessable profits, sections 14-17 of the Ordinance

> require them to be included within the ascertainment of the Taxpayer's assessable profits.' (Emphasis added in bold)

7. In other words, the Appellant's primary stance is that it is not prepared to state these matters in any precision in its draft case but will leave these to submissions at the hearing before the Court of First Instance.

8. The alternative stance is that it is up to this Board to draft the case stated to somehow reflect the Appellant's alternative points.

9. Thus, the only remaining issue is with the question of whether the errors of law have been stated with sufficient clarity as required for this case stated application.

10. Neither party asked for further oral hearing or further submission.

The Requirement of a Stated Case

Generally

11. Under section 69(1) of Inland Revenue Ordinance ('IRO'), the Appellant or the Commissioner of Inland Revenue may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance.

12. In Chinachem Investment Co Ltd v Commissioner of Inland Revenue [1987] HKCA 295 Sir Alan Huggins, VP said

> '*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.*' (Emphasis added in bold)

13. In The Attorney General v Leung Chi-kin [1974] HKLR 269, Huggins J delivering the decision of the Full Court said at page 272 sets out the general guideline for the form and content of a stated case as follows:

> '*The basic requirements of a case stated are that it should be* ***complete in itself*** *and should* ***not have any annexure unless it is essential*** *to the decision of the appeal that such annexure should be before the Court. In particular the magistrate's judgment should not normally be exhibited and it is not desirable as a general rule, although it may not always be wrong, for the notes of evidence to be annexed even if the Court is asked to decide whether there was evidence on which the magistrate could properly come to his conclusion: Hickton v. Hodgson (1914) 78 J.P. 93. The case stated should contain in numbered paragraphs*

(a) ***the material findings of fact or, where appropriate, a statement that no finding was made upon an issue which is alleged to be material.*** *The evidence should not be set out unless it is the appellant's contention that the magistrate ruled wrongly that there was or was not a case to answer or that there was no evidence to support one or more of the findings of fact: Mills v. Boddy (1950) 94 Sol. J. 371. The facts should include "the primary facts based upon [the magistrate's] estimation of the truthfulness or otherwise of the witnesses who appeared before him and any facts deduced by him from the primary facts as so found": Attorney General v. Munro-Smith 1961 H.K.L.R. 209, 211;*

(b) ***the contentions of law*** *of each party* ***upon each of the issues*** *referred for the opinion of the Court;*

(c) *a statement of the decision of the magistrate on those issues. Normally extensive quotations from the judgment will be unnecessary and should therefore be avoided;*

(d) *the questions the Court is asked to answer. They should be stated clearly and concisely and care should be taken to ensure that the questions are not wider than is warranted by the facts. A case stated is not to be used as a device for obtaining the opinion of the Court upon questions which did not form the basic of the magistrate's decision, and, even where a point did form part of the basis of his decision, if it was not taken at the trial the Court will not allow it to be argued on appeal unless it is one which no evidence could alter: Kates v. Jeffery 1914 3 K.B. 160."* (Emphasis added in bold)

14. It is clear from the Aspiration case **[see** CIR v Inland Revenue Board of Review and Another [1989] 2 HKLR 40 (commonly referred to as the Aspiration case)], that:

14.1. It is incumbent on an applicant for a case stated to identify a question of law which is proper for the CFI to consider. It is not for the Board to frame questions for an applicant. The reason is obvious: the parties know better than anyone else what points they wish to take on the appeal. A satisfactory question has to be identified so as to trigger the preparation of the case. **[at 48J and 47I]**

14.2. The questions the Court is asked to answer '*should be stated clearly and concisely and care should be taken to ensure that the questions are not wider than is warranted by the facts*'. **[at 48E]**

14.3. An applicant for a case stated may not rely on a question of law which is imprecise or ambiguous. **[at 50G]**

14.4. The Board is not to be treated as a mere cipher. **[at 54H]**

14.5. It is wholly impermissible to go beating about the evidential undergrowth in the hope of flushing out some useful pieces of evidence that support an applicant's view, in total disregard of settled law that the Board's findings of primary fact, in so far as there is any evidence to support them, are sacrosanct. **[at 58F]**

Qualitative Assessment

15. In Honorcan Ltd v The Inland Revenue Board of Review [2010] 5 HKLRD 378, Fok J (as he then was) held that the Board is required to apply a qualitative assessment to the proposed questions of law and is duty bound to decline to state a case in the situations described at paragraph 50 of the judgement when his Lordship said

> '*50. ... In my judgement, the Board is duty bound to decline to state a case if the question of law proposed to be stated is not a proper one, as the authorities have consistently held. A question proposed to be stated may, it seems to me, be improper for various reasons, as illustrated in the cases discussed above: it may be irrelevant or premature; it may be academic to the outcome of the appeal; it may be embarrassing; it may be plainly and obviously unarguable.*'

16. One of the cases referred to was Same Fast Limited v Inland Revenue Board of Review (2007-08) IRBRD, Vol 22, 321 where Reyes J said at paragraph 9

> '*As a general remark, I am bound to say that I find the questions to be embarrassing as a whole. Simply on account of their wordiness and opacity, Same Fast's questions do not appear to me at all appropriate for a case stated.*'

Discussions

17. In the stated case as drafted, there is no challenge to any finding of primary facts. If there had been, there was no reference to any passage of agreed facts or notes of evidence or transcript to particularise the challenge.

18. Accepting, as the Appellant contends, that 'A question of whether expenditure is capital or revenue in nature is a question of law e.g. Wharf Properties Ltd v Commission of Inland Revenue [1977] HKLRD 252 per Lord Hoffman at 255D and Beauchamp v F.W. Woolworth plc [1990] 1 A.C. 478 per Lord Templeman at 491A-B and 491C-492G', what is challenged may perhaps be the conclusions of this Board from the primary facts whether as a matter of law the expenditure in the present case was capital or revenue in nature.

19. One of those cases referred to with approval by Lord Hoffmann in the Wharf Properties case was Davies v Shell Co of China Ltd (1951) 32 TC 133, 151, where Jenkins LJ said:

> '*I think it is recognised that these questions between capital and income, trading profits or no trading profits, are questions which, though they may depend no doubt to a very great extent on the particular facts of each case, do involve* ***a conclusion of law to be drawn from those facts*** *…*'

20. In the Aspiration case, Barnett J said in paragraph 51:

> '*51. It seems to me clear that an applicant for a case stated must distinguish between matters of fact and law …. If a finding of fact is attacked, the case will have to identify the evidence relied on.* ***If an inference or conclusion from primary facts found is attacked, the case will recite the facts found and not evidence.***'

21. It is not sufficient to annex our Decision for such purpose. Only our findings on primary facts and conclusions from them are relevant for the Court of First Instance. The Appellant is not entitled to abuse the process and burden the Court of First Instance to decipher at the time of hearing its case from annexure of irrelevant materials without properly identifying the issues for the Court. It is the function of this Board to vet the draft stated case for such purpose.

22. Even if one is to try to make sense of the alternative stance as set out in the Reply one is still faced with embarrassing opacity.

23. The alternative challenge contained in 'item 2' (or item (2)) and 'item 3' (or item (3)) of page 2 of the Reply is apparently based on the wrongful assumption that we have found as 'facts' what were contained in Item 2 (or item (2)) of page 2 of the Reply of the Appellant as set out in paragraph 6 herein. We made no such finding. If anything, those alleged 'facts' were that in fact the Appellant did make those 'contentions' at various stages of its correspondence with the Respondent.

24. We are not satisfied that there is any prospect of success.

25. In so far as the alternative challenge contained in 'item 1' (or item (1)) of page 2 of the Reply is concerned, it did not set out the contentions of law of each party upon each of the issues referred for the opinion of the Court and likewise suffers from embarrassing opacity.

Disposition of the Case

26. In the result, we dismiss the application of the Appellant to state a case for the opinion of the Court of First Instance.