Case No. D18/16

Case stated – time limit – no power to state a case out of time – question of law – the Board should refuse to state a case unless with proper questions of law – section 69(1) of the Inland Revenue Ordinance ('IRO')

Panel: Chow Wai Shun (chairman), Leung Wai Keung Richard and Ben K F Wong.

Date of hearing: Stated case, no hearing.
Date of decision: 18 July 2016.

The Board dismissed the Appellant's appeal by a decision dated 13 October 2015. On 2 November 2015, the Appellant applied to the Board to state a case for the opinion of the Court of First Instance under section 69(1) of the IRO, but he did not formulate or pose any question on which the case should be stated. It was only in reply to the Respondent's submissions that the Appellant identified 4 questions on which the Board should state a case. By then, it was more than 1 month since the Board's decision.

Held:

1. Under section 69(1) of the Ordinance, an application requiring the Board to state a case must be made in writing within 1 month, together with the questions on which the case should be stated. There is no power for the Board to extend the time limit. Since the Appellant only put forward the proposed questions in writing after 1 month has expired, the application must be dismissed (D10/14, (2014-15) IRBRD, vol 29, 564 followed).

2. The question on which a case is proposed to be stated must be one of law. An applicant must not rely on a question of law which is imprecise or ambiguous and which gives the Board no clear idea of what materials must be marshalled in their case (CIR v Inland Revenue Board of Review [1989] 2 HKLR 40; Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 281 considered). The Board has a duty to scrutinize the question, and decline to state a case if the question is not a proper one (Honorcan Ltd v Inland Revenue Board of Review [2010] 5 HKLRD 378; Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456 applied).

3. The questions formulated by the Appellant are not proper questions, and are far from comprehensible. The first 3 questions referred to a

company of which the Appellant was the sole proprietor, so they were irrelevant to the Appellant's salaries tax assessment, which was the basis of the decision. The fourth question was based on sections 70 and 79 of the Ordinance, which the Board ruled were irrelevant to the decision. The Appellant failed to show how these sections related to any issue of the appeal.

Application dismissed.

Cases referred to:

D10/14, (2014-15) IRBRD, vol 29, 564
Commissioner of Inland Revenue v Inland Revenue Board of Review and another [1989] 2 HKLR 40
Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275
Honorcan Ltd v Inland Revenue Board of Review [2010] 5 HKLRD 378
Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456

Decision:

1. The original appeal by the Appellant involves two cases. By a Decision of this Board dated 13 October 2015 ('the Decision'), we dismissed the appeal for which the Appellant is now applying for both cases stated. He indicated his preference to have two separate decisions for his application.

2. The second case which the Decision deals with involves the Appellant's appeal against the determination of the Deputy Commissioner of Inland Revenue dated 23 March 2015 on the Appellant's objections against the Salaries Tax Assessments raised on him for the years of assessment 2011/12 and 2012/13. A copy of the Decision is annexed and marked herein as 'Annexure A'.

3. Save where the context otherwise requires, the same terms and expressions as defined in the Decision will be used and adopted in the following paragraphs.

4. By a letter dated 2 November 2015, the Appellant applied to this Board to state a case for the opinion of the Court of First Instance pursuant to section 69(1) of the Inland Revenue Ordinance ('IRO') regarding the Decision. The provision reads:

> '*69. (1) The decision of the Board shall be final:*
>
> *Provided that either the appellant or the Commissioner 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. Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, together with a fee of the amount specified in Part 2 of Schedule 5, within 1 month of the date of the Board's decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, shall be the date of the communication by which the decision is notified to him.'*

5. Pursuant to the usual directions of this Board, the Respondent made submissions to the Board on 8 December 2015, commenting on the Appellant's application. We agree with the Respondent's observations. In his initial application, the Appellant failed to formulate or pose any question, let alone a question of law.

6. Specifically, so far as this second case is concerned:

(a) The Appellant stated in paragraph 1 that Company N, a business under the sole proprietorship of the Appellant, was another appellant in this appeal and was entitled to have its loss for the year of assessment 2012/13 as computed by the Assessor revised under section 70A of the IRO.

(b) In paragraphs 2 and 7, the Appellant explained why he withdrew from personal assessments in the years of assessment 2011/12 and 2012/13. He made reference to sections 70 and 79 of the IRO for the former year and section 70A (as outlined in paragraph 1 of the application as above) for the latter.

(c) The Appellant then stated in paragraph 3 that profits tax and personal assessment were separate matters governed by different parts of the IRO and concluded in paragraph 4 that personal assessment did not affect the making of a profit tax assessment. He made reference to sections 41(1), 42 (generally and specifically 42(1) and 42(2)(b)), 64(7)(c) and 70.

(d) In paragraphs 5 and 6, the Appellant commented on the treatment and computation of the amount of loss sustained by him in Company N particularly with reference to the sale of a Brand R car. He made reference to section 70A of the IRO and section 7 of the Business Registration Ordinance, Chapter 310.

7. In his reply to the Respondent's submissions the Appellant added a paragraph 9 with seven purported questions of law, of which questions 1 to 4 (paragraphs 9.1 to 9.4) related to the years of assessment in question. He did not, however, attempt to address the issue of whether he had identified or raised any question of law in his initial

application. In the circumstances, we gave leave to the Respondent to comment on the Appellant's reply and allowed the Appellant to have the final words, if he preferred. The Respondent made further submissions but the Appellant did not add anything further.

8. The Respondent referred us to D10/14, (2014-15) IRBRD, vol 29, 564, in which the taxpayer applied to the Board to state a case but the Board found that the application contained no question and no question had been framed or identified. The Board further pointed out that there was no provision for extension of the one-month time limit laid down by the proviso to section 69(1) of the IRO. It concluded by dismissing the application.

9. Applying D10/14, this application must therefore also be dismissed. This would remain to be the case even though in his reply the Appellant raised certain questions. Those questions were raised out of time. As will be seen below, even if there might have already been any question of law either in his initial application or his reply, none can be a proper question.

10. With regard to the years of assessment in question, the Appellant put forward the following purported questions of law:

> '9.1/. Whether the Board erred in law in coming to the view that the Assessment of Loss issued to [Company N]… Year of Assessment 2012/13 of 18 Jun 2014 Losses $150,116.00 that it contains an error or omission, Appellant has no statutory right to object for the purpose of section 70A.
>
> 9.2/. Whether on the facts found that the appeal of [Company N]… must be incorporated with Personal Assessment, the Board erred in law in holding that the Appellant – [Company N] was not entitled to request IRD to correct an error of assessment of [Company N]…
>
> 9.3/. Whether the Board erred in law in setting aside the Determination in respect of the assessment issued pursuant to [Company N]… 2012/13's assessment and whether such part of the Determination should be restored.
>
> 9.4/. Whether the Board erred in law in coming to the view that the assessment of 2011/12 that Appellant… not entitled (sic) to refund the overpaid $11,400 according to section 79 and agreed IRD to entitle in issuing the additional assessment no [X-XXXXXX-XX-X] for salary tax of 97/98 should be final under section 70 as it was settled and agreed in the District Court of Hong Kong under Action No. XXXXX of XXXX.'

11. With reference to the other authorities cited by the Respondent, over which the Appellant raised no dispute, we find the following legal principles relevant.

12. In the judgment of Barnett J in CIR v Inland Revenue Board of Review & Anor [1989] 2 HKLR 40 (also known as the Aspiration case):

> '*The final conclusion [of the Board] may be attacked in three principal ways. First, it can be impugned upon the basis that the Board has misdirected itself, for example, upon the burden of proof, or by misinterpretation of a statute. Second, an inference or inferences or the final conclusion may be attacked upon the basis that the primary facts do not admit of an inference drawn from them, or that the primary facts or inferences, or a combination, do not admit of the final conclusion. Third, one or more findings of primary fact may be attacked upon the basis that there was no evidence upon which they could be found. Alternatively, it may be contended that the Board should have made findings of other relevant facts.*' (at 57F-H)
>
> '*After reviewing the authorities and carefully considering the arguments which have been addressed to me, I am satisfied of the following matters:*
>
> *1. An applicant for a case stated must identify a question of law which it is proper for the High Court to consider.*
>
> *2. The Board of Review is under a statutory duty to state a case in respect of that question of law.*
>
> *3. The Board has a power to scrutinize the question of law to ensure that it is one which it is proper for the court to consider.*
>
> *4. If the Board is of the view that the point of law is not proper, it may decline to state a case.*
>
> 5. *If an applicant wishes to attack findings of primary fact, he must identify those findings.*' (at 57H-58A)

13. Further, according to the Aspiration case, the questions of law '*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), and an applicant for a case stated may not '*rely on a question of law which is imprecise or ambiguous and which gives the Board no clear idea of what materials must be marshalled in their case*' (at 50G).

14. In Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275, it was held that this Board, as a tribunal of facts, should have the jurisdiction to decide: (a) the extent to which a piece of evidence should be accepted or rejected; and (b) the use to which the evidence which has been accepted by the Board should be put (at 281H). It was further held that this Board should decline a request to state a case unless the applicant can show that a proper question of law can be identified (at 283B).

15. A proper question of law is one which is not just a question of law and

relates to the decision sought to be appealed against, but also an arguable question and would not be an abuse of process for such a question to be submitted to the Court of First Instance for determination. Fok J (as he then was) in Honorcan Ltd v Inland Revenue Board of Review [2010] 5 HKLRD 378 held that:

(a) '*The question here is whether the Board was correct in holding that section 69(1) of the Ordinance required it to apply a qualitative assessment to the proposed questions of law which the applicant sought to have referred to the Court for its opinion and, if so, whether the Board correctly applied the relevant test in reaching the conclusion that the proposed questions of law were not proper ones for the opinion of the Court.*' (paragraph 34)

(b) '*As will be apparent from the cases cited above, it has not been held that the right of appeal under section 69(1) of the Ordinance is unqualified and absolute.*' (paragraph 49)

(c) '*In my judgment, 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.*' (paragraph 50)

(d) '*If the Board did not have a duty to decline to state a case where a party sought to require it to state a case on a wholly unarguable question of law, there would inevitably be a risk of frivolous appeals being pursued in the Court of First Instance by way of the case stated procedure. I do not discern any intention in section 69(1) of the Ordinance that this should be the position.*' (paragraph 53)

16. *Honorcan* was applied in Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456. Indeed, these principles have been invariably followed and applied by this Board in many instances. As a result, even if the proposed questions are questions of law, it does not automatically make them proper questions for the Court of First Instance to consider. We see it our duty to ensure that they are proper questions of law and our power to scrutinize the proposed questions cannot be disputed.

17. With these principles in mind and having considered the arguments and authorities put forward by both sides, we do not consider any of the proposed questions of law for stating a case. Before setting out the analysis, we raise a general observation that indeed most, if not all, of the purported questions are far from comprehensible.

Paragraphs 9.1 to 9.3

18. These purported questions related to loss computation issued in respect of Company N, the sole proprietorship business of the Appellant, for the year of assessment 2012/13 and the Appellant's application for Personal Assessment.

19. This Board explained why loss computed in respect of Company N could not be made relevant under paragraphs 25 and 26 of the Decision. As a matter of fact, the Appellant (and his wife) did not opt for personal assessment for those relevant years of assessment and the Decision was made with regard to Salaries Tax Assessments raised on the Appellant. Consequentially, Company N could not be a relevant party to this appeal; neither could its loss computation be of any relevance. Therefore, no proper question of law can be formulated out of the Decision by involving Company N or its loss computation.

Paragraph 9.4

20. This related to a tax refund claim and the set-off of it against the assessment for the year of assessment 2011/12.

21. This Board made a ruling that both sections 70 and 79 did not relate to any of the issues of the appeal and so were irrelevant (paragraphs 8(d) and 8(e) of the Decision). Furthermore, the Appellant failed to show how these sections related to any issue of this appeal. As a result, this cannot be a proper question either.

Conclusion

22. For the reasons and analysis set out above, we dismiss the Appellant's application with regard to the years of assessment 2011/12 and 2012/13.

Annexure A
(D15/15)

BOARD OF REVIEW

Appeal by Mr Q

(Date of Hearing: 5 August 2015)

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D E C I S I O N

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(Editor’s note: D15/15 is available in this Volume as Annexure A of D17/16, and therefore is not reproduced here.)