Case No. D10/13

Case stated – application to state a case – Commissioner failing to make payment within 1 month of the Decision – whether the Board had jurisdiction to state a case as requested – whether the Board had jurisdiction to extend time – sections 63, 66, 69, 82B and Part 2 of Schedule 5 of the Inland Revenue Ordinance ('IRO').

Panel: Albert T da Rosa, Jr (chairman), Wendy Wan Yee Ng and Amy Wong Fung King.

Date of hearing: Stated case, no hearing.
Date of decision: 8 July 2013.

On 26 October 2012, the Board dismissed all but two of the grounds of appeal of the appellant ('Decision'). The Commissioner was dissatisfied with part of the Decision relating to unrealised profits and applied to state a case to the Court of First Instance.

Under the application to state a case, the Commissioner also agreed to pay the fee required under section 69 and Part 2 of Schedule 5 of IRO, but did not indicate when or how that would be done. Such payment remained outstanding after 1 month from the date of the Decision until 18 December 2012, when the Commissioner paid the prescribed fee after the matter was raised by the Board with the Commissioner.

Held:

Delivery of fee under section 69 of IRO

1. It was not the act of delivery but the effective delivery that was required to take place at the same time under section 69, which only required fee to be delivered together with the application at some point in time prior to the expiration of the 1 month period. The fee would have been delivered if an instrument generally accepted for payment was delivered and honoured in due course. Such instrument would include a valid promissory note or a cheque or a bill of exchange as defined in the Bills of Exchange Ordinance. However, a vague promise to pay at some undetermined future time was not a generally accepted mode of payment.

2. The payment requirement under section 69 was not merely directory but mandatory. (Regina v Inspector of Taxes, Ex parte Clarke [1974] 1 QB 220, Petch v Gurney (Inspector of Taxes) [1994] 3 All ER 731, R v Weir [2001] 2 All ER 216, D16/07, (2007-08) IRBRD, vol 22, 454, D3/91, IRBRD, vol 5,

537, D98/98, IRBRD, vol 13, 482 and Re Merck Sharp & Dohme Ltd [2002] 1 HKLRD 820 considered)

Extension of time

3. When the power to extend the time limit was not conferred under section 69, the Board would not have any jurisdiction to do so. (R v Weir [2001] 2 All ER 216, Petch v Gurney (Inspector of Taxes) [1994] 3 All ER 731, Chan Min Ching (t/a Chan Siu Wah Herbalist Clinic) v Commissioner of Inland Revenue [1999] 2 HKLRD 586 considered)

Obiter

4. In the event that there was discretion vested in the Board and necessary for the Board to consider the exercise of discretion even where the requirement was merely directory, the Board would have exercised the discretion in favour of the Commissioner to extend time up to the date of payment of the fee.

Application dismissed.

Cases referred to:

HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574
Regina v Inspector of Taxes, Ex parte Clarke [1974] 1 QB 220
Petch v Gurney (Inspector of Taxes) [1994] 3 All ER 731
R v Weir [2001] 2 All ER 216
D16/07, (2007-08) IRBRD, vol 22, 454
D3/91, IRBRD, vol 5, 537
D98/98, IRBRD, vol 13, 482
Re Merck Sharp & Dohme Ltd [2002] 1 HKLRD
Chan Min Ching (t/a Chan Siu Wah Herbalist Clinic) v Commissioner of Inland Revenue [1999] 2 HKLRD 586

Decision:

Introduction

1. On 26 October 2012 this Board delivered its decision on the appeal from which the present application arose. This Board dismissed all but two of the grounds of appeal of the Respondent/Appellant (hereinafter called 'the Appellant'). The Applicant/Respondent (hereinafter called 'Commissioner') is dissatisfied with that part of our decision in so far as it

relates to the question of unrealised profits of the Appellant and applied on 23 November 2012 to this Board to state a case to the Court of First Instance ('the Application') on the following question of law:

> ' Whether the Board of Review has erred in finding that unrealised profits of the Appellant (as referred to in paragraphs 43 and 63 of the Board's Decision dated 26 October 2012) were not assessable to profits tax under the Inland Revenue Ordinance (Cap 112).'

2. The Commissioner also stated in the Application 'We agree to pay the necessary fee for the application.' However, there was no indication as to when or how that would be done.

3. The payment remained outstanding after 1 month from the date of the 26 October 2012 decision.

4. On 13 December 2012 this Board raised the following matter with the Commissioner:

> ' Given that the fee required under section 69 of the Inland Revenue Ordinance (Chapter 112) has not been paid within 1 month of the Board's decision, [the Commissioner] shall make written submission with basis on :-
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> 1. whether the Board has jurisdiction to state a case as requested ; and/or
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> 2. whether the board has jurisdiction to extend time and if so the reasons why the extension of time should or should not be made.'

5. The Commissioner paid the prescribed fee of HK$770 on 18 December 2012 which was received by the Clerk's office without prejudice to the question of whether the payment was validly made within time.

6. At the directions of this Board, the following submissions were made by the parties:

> 6.1. the Commissioner's submission filed on 8 January 2013 ('Commissioner Submission');
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> 6.2. the Appellant's submission filed on 31 January 2013 ('the Appellant's Submission'); and
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> 6.3. the Commissioner's reply filed on 25 February 2013 ('the Reply').

7. References to section or section numbers in this decision are references to sections or section numbers in the Inland Revenue Ordinance (Chapter 112) ('the Ordinance') unless otherwise stated.

Section 69(1)

8. Section 69(1) of the Ordinance provides as follows:

> ' *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*'. (emphasis added)

9. Part 2 of Schedule 5 of the Ordinance provides that the 'Fee payable for application requiring the Board of Review to state a case' is $770 ('the specified fee').

Statutory Interpretation

10. The Application turns on the proper interpretation of section 69(1) of the Ordinance.

11. As Sir Anthony Mason NPJ pointed out in HKSAR v Lam Kwong Wai[1]:

> ' *The modern approach to statutory interpretation insists that context and purpose be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity may be thought to arise (Medical Council of Hong Kong v Chow Siu Shek (2000) 3 HKCFAR 144 at 154B-C; K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd (1985) 157 CLR 309 at 315 per Mason J (dissenting, but not on this point); CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384). Nevertheless it is generally accepted that the principles of common law interpretation do not allow a court to attribute to a statutory provision a meaning which the language, understood in the light of its context and the statutory purpose, is incapable of bearing (R v. A (No.2) [2002] 1 AC 45 at*

[1] (2006) 9 HKCFAR 574 at paragraph 63. Reiterated by Li CJ in HKSAR v Cheung Kwun Yin (2009) 12 HKCFAR 568 at paragraphs 12 to 13.

67G-68H, per Lord Steyn). A court may, of course, imply words into the statute, so long as the court in doing so, is giving effect to the legislative intention as ascertained on a proper application of the interpretative process. What a court cannot do is to read words into a statute in order to bring about a result which does not accord with the legislative intention properly ascertained.'

' … Delivered with …fee …within 1 month'

12. The first question to consider is what is required when section 69(1) requires the ' …*it* [the application] *is delivered with …fee …within 1 month*'.

13. The Appellant contends that actual payment must accompany the application side by side.

14. The Commissioner contends

14.1. that it does not require the actual payment of the specified fee to be made literally side by side with the lodging of an application for a case stated as otherwise, an application lodged earlier coupled with a subsequent payment within time would not do;

14.2. that a promise to pay is sufficient to satisfy the requirement of delivery with the requisite fee because it covers both 'a fee actually paid' and a 'fee payable' and that '(the latter of which are the precise words used by the drafters of the Ordinance in Part 2 of Schedule 5)';

14.3. that were it otherwise, absurd results could arise if cheque accompanying the application within time subsequently bounced.

15. We are of the view as follows:

15.1. It is not the act of delivery but the effect of delivery that is required to take place at the same time under section 69. Section 69 only requires fee to be delivered together with the application at some point in time prior to the expiration of the 1 month period. In other words, one takes stock of the position at the earliest time before the expiration of the 1 month period when the application and the fee are with the Board at the same time in considering whether it is delivered at the same time.

15.2. The use of the word 'payable' in Part 2 of Schedule 5 of the Ordinance is neither here nor there in so far as the meaning of section 69(1) is concerned. Part 2 of Schedule 5 describes the nature and amount of the fee 'to be' paid and delivered and must use the word 'payable' and that sense has no bearing on the fee at the time of the required delivery.

15.3. The fee would have been delivered as required under section 69 if an instrument generally accepted for payment is delivered and honoured in due course. Such instrument would include what amounts to a valid promissory note or a cheque or a bill of exchange as these instruments are defined in Bills of Exchange Ordinance (Chapter 19).

15.4. However, a vague promise to pay at some undeterminable future time which does not amount to such an instrument and is not a generally accepted mode of payment and therefore would not do.

Requirement mandatory or directory

16. We have considered whether any statutory provision or any judicial decision would require or guide us to decide in one way or the other as to whether the requirement under section 69 to deliver the fee within 1 month is mandatory or directory.

Statutory provision

17. The Commissioner referred this Board to section 63 of the Ordinance, which provides that:

> ' *No notice, assessment, certificate, or other proceeding purporting to be in accordance with the provisions of this Ordinance shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect, or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Ordinance, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding*'. (emphasis added)

18. The Commissioner submitted that, in the present case, the application on behalf of the Commissioner for a case stated (accompanied by a promise to pay the specified fee) constitutes a *'proceeding'* envisaged in section 63 which is 'in substance and effect in conformity with or according to the intent and meaning of the Ordinance'. The application (and the Board's jurisdiction to entertain the same) should therefore not be affected by the fact that payment was not made at the same time as the application or within the prescribed period, which, the Commissioner submits, can be classified as a *'mistake'*, *'defect'* and/or an *'omission'*.

19. The generic term '*other proceedings*' must be construed *ejusdem generis* with those specific terms of '*notices, assessment, certificate*' which precede them in section 63 in Part 10 of the Ordinance on Assessment and should not be construed to cover application for case stated in Part 11 of the Ordinance on Objections and Appeals.

20. Further, the general provision in section 63 should not be construed to override the specific provision in section 69(1) that 'Such application shall not be entertained unless…'.

21. Thus, we are of the view that section 63 of the Ordinance does not compel us to an interpretation that the payment requirement under section 69(1) is merely directory.

Judicial guidance

22. In Regina v Inspector of Taxes, Ex parte Clarke [1974] 1 QB 220 (applied by the Hong Kong Court in Li Kam Ming trading as Ming Kee Shipping Service Co v Commissioner of Inland Revenue (1990) 3 HKTC 419), Salmon LJ made the following observations at 227E:

> ' *The question whether a statutory provision is imperative and mandatory in the modern sense of that word or merely directory has arisen again and again in the courts. The principles upon which that question should be decided are well established. The difficulty arises, as always, in applying them to the particular statutory provision under consideration. The principle is laid down – and it has been stated and restated in many other cases – very happily by Lord Penzance in Howard v. Bodington (1877) 2 P.D. 203, 210-211:*
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> > *"There may be many provisions in Acts of Parliament which, although they are not strictly obeyed, yet do not appear to the court to be of that material importance to the subject matter to which they refer, as that the legislature could have intended that the non-observance of them should be followed by a total failure of the whole proceedings. On the other hand, there are some provisions in respect of which the court would take an opposite view, and would feel that they are matters which must be strictly obeyed, otherwise the whole proceedings that subsequently follow must come to an end. Now the question is, to which category does the provision in question in this case belong?"*
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> *Then Lord Penzance goes on to quote an extract from the speech of Lord Campbell L.C. in Liverpool Borough Bank v. Turner (1860) 30 L.J.Ch. 379, 380, 381, in which Lord Campbell said:*
>
> > *"No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed." '*

23. In discerning whether the legislature would have intended the statutory provisions in question to be directory or mandatory, courts in cases such as Clarke and Li Kam Ming had considered *inter alia* the '*material importance of* [the] *provision to the subject matter to which it refers'* (see eg Clarke at 228F per Lord Salmon) and compared the possible consequences of treating the provision as directory and those of treating it as mandatory (see eg Li Kam Ming at 424 to 425 per Barnett J).

24. This Board has also been referred to

24.1. Petch v Gurney (Inspector of Taxes) [1994] 3 All ER 731, which was concerned with the requirement for transmission of a case stated to the High Court within the statutory time limit; and

24.2. R v Weir [2001] 2 All ER 216, in which Petch was cited, and which was concerned with the statutory time limit for an application by the prosecutor to the House of Lords for leave to appeal.

Commissioner's submission

25. The Commissioner contends that in applying the aforesaid principles, the requirement for payment of the specified fee within the prescribed period under section 69(1) is of a directory nature, for the reasons set out below.

25.1. Firstly, the substantive requirement under section 69(1) is that an application for a case stated should be made within the prescribed period. Without the lodging of the application, the Board and the intended respondent would not be made aware of the applicant's intention to appeal within a reasonable time (set at 1 month under section 69(1)) after the Decision and the question of law proposed by the applicant. This requirement is therefore of material significance. In contrast, the payment of the specified fee is only a procedural step for the applicant to take that is subsidiary to the making of the application.

25.2. Secondly, the Board is invited to consider the serious consequence that would visit upon the applicant if the requirement for payment of the specified fee were treated as a mandatory one. The present case itself provides a good illustration of this: the application here was made on behalf of the Commissioner within the prescribed period, accompanied by a promise to pay the specified fee. However, because actual payment was made after the prescribed period, the Board has no jurisdiction at all to entertain the application and the Commissioner is thereby deprived of its right to appeal against the Decision altogether. Such consequence is drastic and out of proportion, and would cause serious prejudice to the applicant, which, in this instance, is the Commissioner.

Sections 66 and 82B analogy

26. We note that under each of sections 66 and 82B of the Ordinance on the right of appeal to the Board, the Ordinance provides that a taxpayer may

> ' … *within 1 month … give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by* … (various documents eg '*a copy of the commissioner's written determination together with a copy of the reason therefore and of the statement of facts and a statement of the grounds of appeal'* for section 66 cases, and four types of documents required in section 82B(1)(a) to (d) for section 82B cases).'

27. Similar arguments as advanced by the Commissioner in the present case on section 69 could be applicable for non-delivery of the Commissioner's determination or reasons or statement of fact in sections 66 and 82B cases.

28. However, in many cases, the Board has ruled that non-delivery of the documents required to be accompanying the notice of appeal would mean that the appeal to the Board could not be entertained unless the taxpayer comes under the specific situation in subsection (1A) for extension of time.

28.1. In Case No D16/07, (2007-08) IRBRD, vol 22, 454 the Board said

> ' *5. There is no material difference between section 66(1A) and section 82B(1A) on the Board's power to extend time. The time limit is within one month after:*
>
> *(a) the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefor and the statement of facts, or*
>
> *(b) the notice of assessment is given to him,*
>
> *as the case may be.*
>
> *6. Section 66(1) and section 82B(1) go on to provide that "no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by" the specified documents.*
>
> *7. There are three requirements for a notice of appeal to be entertained. The first is that it is given in writing. The second is that the written notice is given to the Clerk to the Board. The third is that the written notice is accompanied by the specified documents.*

> *8 ...*
>
> *9. We do not think that one can draw a distinction between the notice of appeal and the specified accompanying documents. Both are requirements for the entertainment of the notice of appeal.*
>
> *10. ...*
>
> *11. As the notice must be served on the Clerk within the one month time limit, the specified accompanying documents must also be served on the Clerk within the same time limit. If the written notice and the specified accompanying documents are not served on the Clerk within the one month time limit, the appeal is out of time.*
>
> *12. Our conclusion is in line with the relevant parts of the following Board decisions on the requirements of a valid notice of appeal:...'* (and referred to D48/05, (2005-06) IRBRD, vol 20, 638, D62/06, (2006-07) IRBRD, vol 21, 1154 and D2/07, (2007-08) IRBRD, vol 22, 219)

29. In other Board of Review cases, appeals to the Board of Review were denied where the appeal notices were 1 day late. (See D3/91, IRBRD, vol 5, 537 and D98/98, IRBRD, vol 13, 482)

30. The arguments presented in the Commissioner's submissions are not decisive in determining whether the fee requirement is mandatory or directory.

31. More illustrative is the application of the principles in Regina v Inspector of Taxes, Ex parte Clarke [1974] 1 QB 220 itself.

> 31.1. The case dealt with interpretation of section 64 of the Income Tax Act 1952, which makes provision for an appeal, either by the Crown or the taxpayer, to the High Court by way of case stated from any decision of the commissioners.
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> 31.2. The first two sub-sections of section 64 of the Income Tax Act 1952 read (at page 224):
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> > ' *(1) Immediately after the determination of an appeal by the general commissioners, or by the special commissioners, the appellant or the surveyor, if dissatisfied with the determination as being erroneous in point of law, may declare his dissatisfaction to the commissioners who heard the appeal.*

> *(2) The appellant or surveyor, as the case may be, having declared his dissatisfaction, may, within 21 days [or enlarged to 30 days by section 23 of Finance Act 1958 and paragraph 5 of Schedule 6 thereto.] after the determination, by notice in writing addressed to the clerk to the commissioners require the commissioners to state and sign a case for the opinion of the High Court thereon*' (emphasis added)

31.3. While the court was of the view that the 'immediate' requirement under was merely directory, the court said (at pages 228 to 229)

> ' *We have to consider the statutory provision contained in section 64(1) ..... I do not, however, intend to cast any doubt upon the necessity to give a notice in writing and to give it within 30 days after the determination requiring the commissioners to state and sign a case for the opinion of the High Court. That I think is a mandatory provision, ...but I am not deciding the point. ... This decision is equally important for the subject as it is for the Crown.*'

31.4. Indeed the 'immediate' requirement ruling was strictly *obiter*. Salmon LJ said (at page 227)

> ' *That case (referring to Grainger v Singer [1927] 2 KB 505) was different from the present in that the only point that arose there was, did the case reach the inspector or his agent on such-and-such a date, and did the inspector transmit it within seven days of receipt to the High Court? If the case was not transmitted to the High Court within seven days then the statutory provision was not complied with. If in the present case the law was that dissatisfaction must be expressed by the inspector* ***within x days*** *of the determination of the commissioners reaching him and he did not express dissatisfaction within that time there would be a breach of the statute; but in this case the statutory requirement, applying Fletcher Moulton L.J.'s principle, was, not that the dissatisfaction should be expressed within any specified time, but with all reasonable speed considering the circumstances of the case. For the reasons I have given it seems to me that the very special circumstances here lead to the conclusion that the notice of dissatisfaction was despatched with all reasonable speed. It follows that, taking that view, it may not be strictly necessary to decide the point as to whether the provision that the notice shall be given immediately is directory or mandatory. But in case I am wrong in the view I take about the notice of dissatisfaction having been despatched with all reasonable speed, and since the point as to whether the provision is mandatory or directly could be of considerable general importance, I think it right that I should as briefly as I can express my view about it.*' (emphasis added)

32. The approach of Millett LJ (as he then was) in Petch v Gurney (Inspector of Taxes) [1994] 3 All ER 731 provided us with a glimpse of a possible explanation which helped us to understand why Salmon LJ took the approach he did. Millett LJ said (at page 738)

> *' … The taxpayer's argument, therefore, comes to this – that the requirement that the case stated be transmitted to the High Court is mandatory; but the requirement that this be done within 30 days is not.*
>
> *This is not an easy proposition to accept. Where statute requires an act to be done in a particular manner, it may be possible to regard the requirement that the act be done as mandatory but the requirement that it be done in a particular manner as merely directory. In such a case the statutory requirement can be treated as substantially complied with if the act is done in a manner which is not less satisfactory having regard to the purpose of the legislature in imposing the requirement. But that is not the case with a stipulation as to time. If the only time limit which is prescribed is not obligatory, there is no time limit at all. Doing an act late is not the equivalent of doing it in time. That is why Grove J said in Barker v Palmer (1881) 8 QBD 9 at 10 – "provisions with respect to time are always obligatory, unless a power of extending the time is given to the court". This probably cannot be laid down as a universal rule, but in my judgement it must be the normal one. Unless the court is given a power to extend the time, or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether; and it cannot be dispensed with altogether unless the substantive requirement itself can be dispensed with.'* (emphasis added)

33. The passage from the second paragraph in the above quotation (that is paragraph 32 herein) has been cited with approval by Lord Bingham of Cornhill in R v Weir [2001] 2 All ER 216, a judgement of the House (at page 222) and by Kwan J (as she then was) in Re Merck Sharp & Dohme Ltd [2002] 1 HKLRD (at page 827 F to H[2]).

34. That leaves us to consider whether the substantive requirement of payment of the fee can be dispensed with.

35. Hong Kong's tax system rests on efficiency. The requirement for the fee to accompany the application under section 69 applies to application by taxpayers as well as application by the Commissioner. If the requirement to pay the fee is not mandatory, the Board could be flooded with application to state cases and to dispense with payment by taxpayers. This is especially so as the application could be withdrawn with no cost

[2] The relevant rules which were considered by the Court of First Instance were subsequently held to be *ultra vires* when the case came before the Court of Final Appeal: see Re Merck Sharp & Dohme Ltd v Registrar of Patents (2002) 5 HKCFAR 604. However, this does not derogate from the correctness of the reasoning adopted by Kwan J for cases where the rule was *intra vires*.

consequences at any time before the Court is sized of the matter. If the fee payment is only dispensed with on application by the Commissioner there would be an outcry of unfairness. Where the payment is mandatory, the time limit for payment is mandatory. See paragraph 32 herein.

36. We therefore construe the fee requirement as mandatory.

Whether to extend time

No jurisdiction if mandatory

37. If the Legislature does not confer such a power to extend the time limit, even the House of Lords does not have such a power – please see R v Weir [2001] 2 All ER 216. Millet LJ's judgment in Petch was quoted and approved by the House of Lords (please see page 221g to 222g of the judgment of Weir).

38. The case of Chan Min Ching (t/a Chan Siu Wah Herbalist Clinic) v Commissioner of Inland Revenue [1999] 2 HKLRD 586 is also relevant.

38.1. There, the Court had to deal with section 82B (as section then stood with no sub-section (1A) and sub-section (1)) which read:

> ' *(1) Any person who has been assessed to additional tax may, within one month after notice of assessment is given to him, give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by (a) a copy of the notice of assessment; (b) a statement of the grounds of appeal; (c) ...; and (d) ....'*

38.2. The Honourable Madam Justice Yuen (as Yuen JA then was) ruled

> ' *4. The Board of Review, having heard her appeal, has raised the following issues on case stated:*
>
> *Question (1) : Whether the Board of Review has power to extend the time for giving Notice of Appeal under s. 82B of the Inland Revenue Ordinance.*
>
> *Question (2) : If the answer to Question (1) is yes, whether the Board has erred in law in refusing an application for extension of time by the Taxpayer.*
>
> *Question (3) : Whether the Board's decision based on the reasons given for dismissing the appeal is bad in law.*

> *5. On Question (1), it is, first, clear that the Board of Review is a creature of statute, so it has no inherent jurisdiction such as to extend time for appealing. Any powers that the Board of Review has must come from the statute, and so I look to the statute to see if there are any powers to extend time.'*

39. It has to be noted that the Legislature has not overlooked or forgotten about the matter of a power to extend time limit. In section 66(1A) of Part 11, the Board is conferred the power to extend the time to the taxpayer to lodge an appeal of the Commissioner's assessment to the Board. When a similar power to extend the time limit is not incorporated in section 69 of the same Part, it cannot possibly for the Commissioner to argue that the Legislature intended to confer such a power to the Board in respect of section 69(1).

40. This will be so even if the Board or the Clerk's Office had somehow previously done anything (as alleged by the commissioner without tendering the related evidence) which might have caused any person to believe that it was not necessary for the fee to accompany the application to state a case. The Board cannot clothe itself with jurisdiction where the law does not so provide.

Unnecessary if directory

41. In the event that we are wrong that the requirement for payment of the specified fee within the prescribed period under section 69(1) is only a directory requirement, then failure to fulfil its requirement would not affect the application. It is not necessary to extend time.

Exercise of discretion if empowered and required

42. However, in the event that we are wrong and somehow there is discretion vested in us and necessary for us to consider the exercise of the discretion even where the requirement is merely directory, we would have exercised the discretion in favour of the Commissioner to extend time up to the date of payment of the fee by the Commissioner.

Disposition of the Application

43. We therefore dismiss the application of the Commissioner to state a case for the opinion of the Court of First Instance.