Case No. D26/05

Case stated – threshold of arguability – what constitutes a proper question of law which can be included in a case stated – whether formulated questions were plainly and obviously unarguable.

Panel: Anthony Chan Kin Keung SC (chairman), Benjamin Chain and Ng Ching Wo.

Date of hearing: 6 October 2004.
Date of decision: 28 October 2004.

The taxpayer applied under section 69 of the Inland Revenue Ordinance ('IRO') to the Board to state a case on questions of law for the opinion of the Court of First Instance ('CFI').

The underlying dispute related to whether certain payments constituted rental refunds within the meaning of section 9(1A)(a) of the IRO.

The questions of law identified by the taxpayer were whether the Board erred in applying the test of true intention or in the use of CIR v Page 5 HKTC 683 as a relevant precedent.

The issues before the Board was what was the threshold of arguability which had to be satisfied to constitute a proper question of law to be included in a case stated, and whether on the facts, there was such a proper question.

Held:

1. The Board should not accede to a request to state a case unless the applicant can show that a proper question of law can be identified. This must be an arguable question of law which relates to the decision sought to be appealed against, and would not involve an abuse of process for it to be submitted to the CFI for determination. D98/99 (unpublished) applied.

2. A dissatisfied party has a right to appeal on a point of law under section 69. The Board hearing such an application should approach the matter with an open mind being aware of the fact that it may not be the best judge of whether its decision is wrong. On the other hand, the function of the Board is not simply to rubber stamp any application where a point of law can be formulated.

3. Accordingly, the Board may decline an application to state a case under section 69 in the event that the point of law before it is plainly and obviously unarguable. As both questions put forward by the taxpayer were plainly unarguable, the application to state a case was dismissed.

Appeal dismissed.

Cases referred to:

B/R 98/99 (unpublished)
D65/88, IRBRD, vol 4, 375
CIR v IR Board of Review and Aspiration Land Investment Ltd, HC, (1988) 2 HKTC 575
CIR v IR Board of Review and Aspiration Land Investment Ltd, CA, (1989) 3 HKTC 223
CIR v Page, 5 HKTC 683
Edward Chow Kwong Fai v IR Board of Review HCAL 47/2004

Lai Wing Man and Tsui Siu Fong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is the Taxpayer' s application under section 69 of the Inland Revenue Ordinance, Chapter 112 ('IRO') to state a case on questions of law for the opinion of the Court of First Instance.

2. Two questions of law have been identified by the Taxpayer in respect of this application, namely:

(i) Whether the Broad has erred in conducting the 'Test of True Intention' in deciding on my case.

(ii) Whether the Broad has erred in using the authority of CIR v Page HKTC 683 (The Cited Case) as a precedent case in deciding on my case.

The law

3. In a recent Ruling of the Board of Review, B/R 98/99 (Decision dated 22 July 2004, unpublished), it was held at pages11-12 that:

> *'This Board should not accede to a request to state a case unless the applicant can show that a proper question of law can be identified, see* ***Aust-Key Co Ltd v Commissioner of Inland Revenue*** *[2001] 2 HKLRD 275. …*
>
> *In our view, a proper question of law must be one which (a) is a question of law, (b) relates to the decision sought to be appealed against, (c) is arguable and (d) would not be an abuse of process for such a question to be submitted to the Court of First Instance for determination.'*

We agree fully.

The threshold of arguability

4. Assuming that a question of law is before us, what is the threshold of arguability which has to be satisfied to constitute a proper question of law?

5. We examine this issue of law from the basics. A dissatisfied party has a right to appeal on a point of law pursuant to section 69 of the IRO. The Board before which an application under section 69 is brought would approach the matter with open mind being aware of the fact that it may not be the best judge of whether its decision is wrong –

> *'An application made by a dissatisfied party under section 69(1) should obviously not be viewed too narrowly; so long as a question of law can be identified, the Board's duty is clearly to stated a case. ...*
>
> *We have given this matter anxious consideration, realising that we are not the best judges of what constitutes error in the course of our determination of the tax appeal. Plainly, if there is any possibility that, in the course of our determination, we have made errors of law, the matter should proceed to the High Court.'* – see D65/88(A), IRBRD, vol 4, 375 at pages 376 and 381.

6. On the other hand, plainly the function of this Board under section 69 is not simply to rubber stamp any application where a point of law can be formulated. Hence the requirement that such a point has to be proper, which involves meeting the requirement that it is arguable.

7. We find some assistance from the authority of CIR v IR Board of Review and Aspiration Land Investment Ltd, HC, (1988) 2 HKTC 575. The judgment of Barnett J referred to, inter alia, two older English authorities cited to the court by Mr Chang QC:

> *'Where the question raised is one of law, but the question has been decided by the Board in accordance with a previous binding decision of an appellate court, the Board should decline to state a case; see* ***R v Shiel*** *(1900) 82 LT 587. And where the question raised is one of law, but is obviously a bad point, a case should not be stated; see* ***R v Special Commissioners of Income Tax, (In Re G Fletcher)*** *(1891) 3 Tax Cases 289.'* [page 590].

8. Mr Justice Barnett went on to hold '*the cases cited by Mr Chang to be good for the principle that the Board is not to be treated as a mere cipher'* [page 591]. The learned Judge further held that:

> *'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. …'* [page 595].

9. That case subsequently went on appeal which was settled before the appeal was fully opened [see CIR v IR Board of Review and Aspiration Land Investment Ltd, CA, (1989) 3 HKTC 223].

10. Bearing in mind the aforesaid, we take the view that the threshold for an appellant to satisfy is a low one in that the Board may decline an application under section 69 in the event that the point of law before it is **plainly and obviously** unarguable. This is the test applied by Hong Kong court in applications to strike out pleadings and is familiar to legal practitioners of this jurisdiction.

Determination

11. It is convenient to deal firstly with the second question. It was submitted to us by the Taxpayer at the hearing that the authority of CIR v Page 5 HKTC 683 had no application at all to his case. Such contention is plainly wrong. There can be no doubt that Page is the guiding authority for most if not all disputes under section 9(1A)(a) of the IRO.

12. Can Page be distinguished as suggested in the Taxpayer's letter to this Board dated 10 September 2004 ('the letter')? Contrary to the contention of the Taxpayer, we do not see that the existence of a '"housing allowance policy" applied by Club A (the Taxpayer's employer at the material times) in favour of its staff of grade B and above for tax purposes' [see paragraph 23 of this Board's Decision dated 19 May 2004 ('the Decision')] can distinguish this case from the application of the principles adumbrated in Page. According to Page, to test whether Club A did refund all or part of the rent paid by the Taxpayer we had to ascertain the true intention of Club A and the Taxpayer at the time when the payment was made [see paragraphs 37-8 of the Decision]. No two cases are identical on facts. The 'housing allowance policy' is simply a factual feature which did not exist in Page. It provides no true distinction.

13. The second question may be a question of law, but we take view that it is obviously a bad point.

14. Without any criticism of the Taxpayer, who is not a lawyer, the first question is not properly formulated as a point of law. It was observed by Hartmann J recently in Edward Chow Kwong Fai v IR Board of Review HCAL 47/2004 that *'… it is often difficult to differentiate – and the courts must constantly struggle with the issue – between what are correctly issues of law and what are correctly issues of fact.'*. We certainly agree with the learned Judge.

15. With the Taxpayer being unrepresented, it befalls upon us to do the best we can to formulate the point of law for him bearing in mind his submissions, in particular those contained in the letter. With that in mind, we believe that the point of law which calls for consideration can be formulated, subject to fine tuning, as follows:

> *'Whether on the facts found by the Board of Review, Club A did refund all or part of the rent paid by the Taxpayer within the meaning of S.9(1A)(a) of the Ordinance.'.*

16. However, we are of the view that in light of the factual findings of this Board and the applicable law (Page), such question is plainly not arguable.

17. This Board has found, inter alia, that the Taxpayer was entitled to his 'take home pay' regardless of whether he was renting any property; the renting of property by him was merely incidental; he received his take home pay in its entirety at the end of each month and was free to spend it as he liked; and the production of rental documents to Club A was for tax filing purposes [see paragraphs 39-40 of the Decision]. Given these findings, we do not see how it can conceivably be said that **at the time when the relevant payments were made** to the Taxpayer by Club A, the **true intention** was that the moneys were rental refund.

18. For completeness, in response to questions from a member of this Board, the Taxpayer has confirmed that it is not his intention to challenge the correctness of the decision of Page.

19. For these reasons, we dismiss this application.