Case No. D42/91(A)

Case stated – procedure – form and content of case stated – section 69 of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman).

Date of hearing: 31 July 1992.
Date of decision: 24 August 1992.

Following a decision of the Board of Review the taxpayer gave notice to the Board requiring the Board to state a case under section 69 of the Inland Revenue Ordinance. By agreement of the parties counsel for the taxpayer and the Commissioner appeared before the Chairman of the Board which heard the appeal and made representations as to the form and content of the case stated.

The main question was whether or not the questions which the taxpayer wished the Board to ask were questions of law coming within the ambit of section 69 and if so whether the entire transcript of the proceedings should be annexed thereto.

The Chairman ruled that the taxpayer was entitled to challenge findings of facts as being perverse but could only do so in relation to specific findings of fact and not at large. To enable the court to decide whether or not there was any evidence on which a particular fact was found it was necessary in this case that the High Court should have available to it the entire transcript of the proceedings.

Cases referred to:

Chinachem Investment Co Ltd v Commissioner of Inland Revenue, Civil Appeal No. 116 of 1986 (unreported)

Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Ltd, Civil Appeal No. 32 of 1986 (unreported)

Barrie Barlow, of Counsel for the Commissioner of Inland Revenue.
John J Swaine, QC instructed by Messrs Woo, Kwan, Lee & Lo for the Taxpayer.

RULING

1. This ruling relates to an application by the Taxpayer for a case stated under section 69 of the Inland Revenue Ordinance. Section 69 provides ‘the decision of the Board

shall be final' and goes on with a proviso to say that either party may make application for a case stated 'on a question of law' for the opinion of the High Court.

2. By letter dated 4 September 1992 the solicitors for the Taxpayer applied to the Board of Review for a case to be stated under section 69 in the following terms:

'Pursuant to section 69 of the Inland Revenue Ordinance, we hereby make application, on behalf of our client [The Taxpayer], requiring the Board of Review to state a case on the following questions of law for the opinion of the High Court:

(1) Whether, as a matter of law, it was open to the Board of Review to hold that the profits tax assessments under appeal were correct.

(2) Whether, as a matter of law, the Board of Review was correct in finding that the acquisition and liquidation of the loan portfolio by [The Taxpayer] was in the nature of business and/or constituted the carrying on of a trade and/or was an adventure in the nature of trade.

(3) Whether, as a matter of law, the Board of Review was correct in finding that the acquisition and liquidation of the loan portfolio by [The Taxpayer] was not a capital transaction.'

3. On instructions from the Chairman of the Board which heard this appeal and in reply to a request on behalf of the Taxpayer for a copy of the transcript of the proceedings the Clerk wrote to the solicitors for the Taxpayer and indicated that there might be a problem with regard to asking the High Court for its opinion on the so-called questions of law because of the way in which the questions had been framed. The Clerk wrote by letter dated 28 October 1991 in the following terms:

> 'Further to my letter of 21 October 1991, this matter has been referred to the Chairman. I have been instructed to inform you that the Chairman has some doubt as to whether or not the 3 questions on which you wish the Board to state a case are questions of law. The Chairman has requested a copy of your draft case stated so that consideration can be given to this point. The facts found by the Board and the reasons for its decision are fully set out in the written decision delivered by the Board. While the Chairman does not wish in any way to impede your client taking this matter on appeal to the High Court, he cannot see the relevance of the transcript of the hearing in the preparation of a case stated on a question of law.
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> If there is any point requiring clarification which could be assisted by reference to the transcript, the Chairman will be pleased to consider the matter after he has a draft case stated to which he can refer.'

4. In the usual way and upon receipt of the request for a case stated the Clerk to the Board of Review requested the Taxpayer to prepare a draft of a case stated and have the

same approved by the Commissioner. The parties were unable to reach agreement with regard to the form and content of the case stated. The Chairman then proposed that the parties appear before him to make representations which they duly did on Friday, 31 July 1992. Having heard the parties the Chairman now makes this ruling.

5. Section 69 of the Inland Revenue Ordinance gives the Taxpayer a right to require the Board to state a case on a question of law and the Board has an obligation so to do. The Board has no statutory right or power to require the parties to draft a case stated but this is a convenient and accepted method for all concerned to proceed if the parties are agreeable so to do. The procedure has the approval of the High Court in a number of cases and in particular of Sir Alan Huggins, v.-p. in Chinachem Investment Co Ltd v Commissioner of Inland Revenue, Civil Appeal No. 116 of 1986, 3 April 1987 (unreported) where he said:

> '… 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.'

6. As a result of current practice and procedure a very simple form of case stated has evolved in Hong Kong. It is customary for Boards of Review to issue a detailed decision which sets out the facts found, a summary of submissions made, and a reasoned decision based on the facts found. Unless one or both of the parties request the Board to find additional facts, which would be quite rare, the case stated normally sets out verbatim the facts as found by the Board and the decision of the Board. Usually the parties draft their own submissions because the Board's summary is often not all encompassing. This leaves only the questions of law to be formulated and set out in the case.

7. In the instant case before me the parties have prepared a draft case stated which follows the now standard form in Hong Kong but have been unable to agree on the questions of law and consequent thereon whether or not certain documents including all or part of the transcript of the proceedings should be attached to the case stated.

8. In a nutshell the bone of contention between the parties is whether or not the Taxpayer is asking legitimate questions of law or whether the Taxpayer is trying to have the appeal re-heard in toto by the High Court.

9. The problem arising in this case is uncommon. Sometimes an aggrieved party would like to have the appeal re-heard in toto if it feels that the Board has found factual matters contrary to its wishes or submissions. Obviously this is not permitted under section 69, but the border line between what is fact and what is law is often blurred, especially when one comes to look at secondary as opposed to primary facts.

10. Prior to appearing before me the respective counsel for the two parties had worked hard and had been able to reach agreement on many of the points in issue. It was

tabled before me a revised question of law which was acceptable to both parties. This question which in my opinion is totally proper and correct reads as follows:

> '… whether as a matter of law and on the facts properly found by us we were correct in concluding that the acquisition and liquidation of the loan portfolio by STC was in the nature of business and/or constituted the carrying on of a trade and/or was an adventure in the nature of trade and was not a capital transaction.'

The word 'properly' was inserted to take into account whatever the High Court may decide on the further questions relating to the facts (paragraph 12 below).

11. Counsel for the Taxpayer tabled a further question to which Counsel for the Commissioner objected and which read as follows:

> 'Whether, as a matter of law, we ought to have found on the evidence that the Taxpayer's primary intention and/or motive was not to profit but to enable B Limited to sell its capital investment in B Bank and whether, as a matter of law, if and insofar as the following findings are contradictory of the above proposition, there was any evidence upon which we could properly find that:
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> (a) When the Taxpayer acquired the portfolio of bad and doubtful loans, it did so with the intention that it would realise the same as quickly as possible on the best terms for itself that it could;
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> (b) When the Taxpayer acquired the bad and doubtful loans, it did so with the hope and expectation that it would be able to realise the same at a substantial profit after taking into account the guarantees and the substantial discount which was given on the value as appearing in the books of B Bank.'

12. The bone of contention relates to the first part of this further question or its preamble. Counsel for the Commissioner conceded that (a) and (b) were questions of law which could be put to the High Court and this is the view which I myself take. It is not for me as the Chairman of the Board which heard the case to comment if one of the parties feels that a factual finding of the Board was perverse. This is a matter for a judge in a High Court to decide. As a matter of law any appellant is entitled to allege that a Board has acted perversely. However with due respect the preamble goes far beyond this and is in reality an attempt to have the appeal tried de novo before the High Court based on documentary as opposed to viva voce evidence. This is precisely what section 69 attempts to prohibit. A judge of the High Court cannot be asked at large to decide whether or not the decision of the Board was right or wrong based 'on the evidence'. The question which the Board had to decide in this case was whether a profit or gain was correctly assessed to profits tax or whether it should be exempt from profits tax because it arose from the sale or realisation of a capital asset. The Taxpayer can ask the High Court to consider whether the Board erred in law in reaching its decision on the facts found by it and the Taxpayer can challenge one or

more specific facts found by the Board on the ground that the Board acted perversely, but the Taxpayer cannot go further as it has sought to do in the preamble to these two questions.

13. Having decided what are the correct questions of law which this tribunal can ask the High Court to answer on behalf of the Taxpayer it is now possible to address the question of whether or not all or any of the evidence before the Board can or should be provided to the High Court. In ordinary circumstances it would be both inappropriate and improper for a Board of Review to send to a judge of the High Court a case stated together with all or part of the evidence before the Board. It is for the Board to decide the facts and in answering a question of law a judge in the High Court must base his decision upon the facts found by the Board and not on all or any part of the evidence before the Board. However this is not a normal question of law. Two findings of fact have been challenged by the Taxpayer as being perverse. This is a matter of law which the Taxpayer is entitled to raise. When appearing before me Counsel for both parties referred to the well-known Aspiration case when it first came before Barnett J. reported at [1989] 2 HKLR 40 and subsequently before the Court of Appeal, Civil Appeal No. 32 of 1989, unreported. In view of the importance of the judgement of Fuad, v.-p. in the Court of Appeal and the fact that this decision is apparently unreported I attach a copy thereof to this ruling.

14. It seems clear to me that a judge in a High Court cannot possibly decide whether or not there is any evidence on which this Board could have found the facts which are challenged by the Taxpayer unless he has before him all of the evidence which was before this Board. Indeed Counsel for the Commissioner conceded that if the Taxpayer did insist on asking such questions then the Board would have no alternative but to lay before the High court all of the relevant evidence. Counsel for the Commissioner requested that if such evidence were laid before the High Court in the form of a transcript of the proceedings there should be included the entire transcript including the opening address of Counsel for the Taxpayer in which he set out a summary of the evidence which he would be adducing and on which he would be relying.

15. In this case we are fortunate to have available a verbatim transcript of the entire proceedings backed up by two sets of tape recordings and the notes which Counsel on either side took. We also have available, if necessary, the notes which I myself took as Chairman.

16. At the conclusion of the hearing before me I directed that the case stated should now be finalised by the Board in accordance with the foregoing ruling and should be accompanied by the entirety of the transcript of the proceedings and the evidence before the Board. The questions to be asked will be as follows:

> ‘The questions of law for the opinion of the High Court are:
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> (1) Whether there was any evidence before the Board on which it could find as a fact, as it did in fact 11 of its decision that when [The Taxpayer] acquired the portfolio of bad and doubtful loans, it did so with the intention that it would realise the same as quickly as possible on the best terms for itself that it could;

(2) Whether there was any evidence before the Board on which it could find as a fact, as it did in fact 15 of its decision that when [The Taxpayer] acquired the bad and doubtful loans, it did with the hope and expectation that it would be able to realise the same at a substantial profit after taking into account the guarantees and the substantial discount which was given on the value as appearing in the books of the Bank;

(3) Whether as a matter of law and on the facts properly found by it, the Board was correct in concluding that the acquisition and liquidation of the loan portfolio by [The Taxpayer] was in the nature of business and/or constituted the carrying on of a trade and/or was an adventure in the nature of trade and was not a capital transaction.'