Case No. D53/05

Case Stated – applicable principles – whether questions properly identified questions of law for the Court of First Instance ('CFI') to consider – whether questions re-opened findings of fact made by the Board.

Panel: Patrick Fung Pak Tung SC (chairman), Gordon Kwong Che Keung and Herbert Tsoi Hak Kong.

Stated Case, No hearing.
Date of decision: 20 October 2005.

On 13 July 2005, the Board delivered its decision in B/R 136/04. On 10 August 2005, the taxpayer applied under section 69(1) of the Inland Revenue Ordinance ('IRO') for a case stated for the opinion of the the CFI. The taxpayer identified five proposed questions of law which it intended to submit to the CFI for determination.

The issue before the Board was whether any of the proposed questions were proper questions for the CFI to adjudicate upon. The precise formulation of the proposed questions appear in the judgment.

Held:

1. The following principles are relevant to an application for a case stated: -

   (a) An applicant for a case stated must identify a question of law which is proper for the CFI to consider.

   (b) The Board is under a statutory duty to state a case in respect of that question of law.

   (c) The Board has a power to scrutinize the question of law to ensure that it is one which is proper for the court to consider.

   (d) Unless there is no evidence to support a finding of primary fact, or unless the primary facts cannot support an inference found by the Board, whether the onus of proof is discharged is a question of degree which depends on the

evaluation by the Board as a tribunal of fact. To impugn the Board's evaluation would be to undermine the whole purpose of the Board as a fact-finding tribunal.

(e) The court would interfere with an inference drawn from primary facts or with a conclusion drawn from a combination of primary facts and inference, if the true and only reasonable inference or conclusion was not the one reached by the Board. Where the primary facts themselves were disputed, it is necessary for the applicant to demonstrate that there was simply no evidence to support such findings.

Commissioner of Inland Revenue v Inland Revenue Board of Review [1989] 2 HKLR 40 applied.

2. Further, the extent to which a piece of evidence should be accepted or rejected, and if accepted, the use to which such evidence should be put, are matters falling within the Board's jurisdiction and maters for it to decide. Aust-Key Co. Ltd. v Commissioner of Inland Revenue [2001] 2 HKLRD 275 followed.

3. On this application, the Board held that the proposed questions sought to improperly re-open findings of fact determined by the Board (Questions 1, 2 & 3), were without merit as being contradictory to the position of the taxpayer at the hearing (Question 4), or were too general and imprecise to amount to a proper question (Question 5).

4. Accordingly, the application for a case stated was dismissed.

Application dismissed.

Cases referred to:

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

Decision on application for case stated:

1. We delivered our decision in this matter on 13 July 2005 under the reference 'B/R 136/04'.

2. By a Notice to the Clerk to the Board dated 10 August 2005, the solicitors acting for the Taxpayer expressed dissatisfaction with our said decision as being erroneous in point of law. They further applied pursuant to section 69(1) of the Inland Revenue Ordinance Chapter 112 ('IRO') for the Board to state a case for the opinion of the Court of First Instance ('the CFI'). In Appendix A to the said Notice, they set out five 'Questions of Law for the Opinion of the Court of First Instance of the High Court'. We shall deal with them below.

3. By a letter dated 25 August 2005, the representative of the Commissioner responded to the application by the Taxpayer. The Taxpayer whether by itself or its lawyers has not responded to the same.

The law

4. Section 69(1) of the IRO provides as follows :

> *'69. Appeals to the Court of First Instance*
>
> *(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 $640, 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. Guidance on the law and practice of stating a case pursuant to section 69(1) of the IRO has been provided by the courts. The classic case is that decided by Barnett J in Commissioner of Inland Revenue v Inland Revenue Board of Review and Another [1989] 2 HKLR 40. For present purposes, the following guidelines laid down in that case are relevant:

(i) An applicant for a case stated had to identify a question of law which it was proper for the CFI to consider.

(ii) The Board of Review is under a statutory duty to state a case in respect of that question of law.

(iii) 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.

(iv) If the Board is of the view that the point of law is not proper, it may decline to state a case.

(v) Unless there is no evidence to support a finding of primary fact, or unless the primary facts cannot support an inference found by the Board, whether the onus of proof is discharged is a question of degree which depends upon the evaluation by the Board as a tribunal of fact. To impugn the Board' s evaluation would be to undermine the whole purpose of the Board as a fact-finding tribunal.

(vi) The court would interfere with an inference drawn from primary facts or with a conclusion drawn from a combination of primary facts and inference, if the true and only reasonable inference or conclusion was not the one reached by the Board. Where the primary facts themselves were disputed, it was necessary for the applicant to demonstrate that there was simply no evidence to support such findings.

6. In the case of Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275, Chung J ruled that certain questions put to the CFI by the Board of Review were not proper questions of law. They in fact amounted to a challenge on the findings of fact by the Board of Review.

The questions of law proposed by the Taxpayer

7. We now come to deal with the five questions of law proposed by the Taxpayer.

8. We begin with the 5th question which reads as follows:

'5. Whether on the whole the undisputed evidence before the Board and the primary facts as found the Board erred in law in concluding that the Property was purchased not as a long term investment but for trading.'

9. In the case decided by Barnett J referred to above, the third question proposed by the applicant was in the following terms:

'(iii) Whether on the whole of the evidence before the Board the only proper conclusion was that the sum of $344,825,190 received by Aspiration Land Investment Ltd. was profit changeable to tax in accordance with s. 14 of the Inland Revenue Ordinance?'

Barnett J decided that an applicant could not rely on a question of law which was imprecise or ambiguous and which gave the Board no clear idea of what material was to be marshalled in support of the applicant's case. He rules that the third question was not a proper question of law. As it stood, that question required the Board to annex the whole of the evidence to the case stated. He also held that, on the authorities, the Board only needed to give a general indication of the evidence relied on in reaching any finding of primary fact. If the Board were able to indicate the existence of such evidence, that was the end of the matter. The court was not permitted to re-valuate that, or any other evidence, to see whether it might have made a different finding.

10. We are of the view that the 5th question in the present case is similar to the third question in Barnett J's case. It is too general and ambiguous. It would require the Board to annex the whole of the evidence to the case stated. We do not think that it is a proper question of law for the opinion of the CFI.

11. We now deal with the 4th question which reads as follows:

> '4. Whether the Board misdirected itself in law in imposing on the Appellant an unjustified and grossly excessive burden of proof per Paragraphs 27 and 37 of the decision of the Board made on 13th June 2005 having regard to the facts that the Appellant was not in a position to state the full facts surrounding the acquisition and sale of those properties not owned by it, that the Appellant was not representing [Company A]; that the Board imposed a burden of proof on [Company A] which was not a party at the hearing of the Board; and that the Appellant was given an impossible task to take up the burden of proof of [Company A] as required by the Board in the circumstances.'

12. We are astonished to find the Taxpayer making this point when it was the case of the Taxpayer on the appeal that not only the position of the Taxpayer, that is, Company B, the registered owner of the Property, must be looked at but that of the parent company, Company A, as well. There was no dispute that the other properties in the same building were all acquired by Company A through vehicles which were its wholly-owned subsidiaries. There can be no dispute that members of the board of Company A who controlled the property-holding vehicles would have been able to give evidence as to the circumstances of the purchase and sale of the other properties.

13. In the circumstances, we do not think that the 4th question is a proper question to be put to the CFI.

14. We now deal with the 1st question which reads as follows:

> '1. Whether the Board misdirected itself in law in failing to hold, on the evidence before it, that a settled intention to hold [the Property] for long-term investment could and did exist even if the intention to use any part of the Property as the Appellant's headquarters was not proven to be sufficiently definite so long as the Property was acquired as a long-term investment with the intention to hold for rental income the Property or such parts thereof as were not actually used as company's headquarter or otherwise for self-use.'

15. We take the view that this question seeks to re-open the factual issues determined upon by the Board. As indicated in paragraph 20 of our said decision, we considered all the evidence and the submissions of the parties (some of which were expressly set out in the said decision and some not) and came to our findings of fact. Such findings are final and cannot be challenged under the guise of a question of law for the CFI. See also the holdings by Barnett J referred to in paragraph 5 (v) and (vi) above.

16. We now deal with the 2nd question which is in two parts. It reads as follows:

> '2. Further, whether the Board misdirected itself in law in failing to give any or any proper consideration to the essentially unchallenged evidence that there was a reason (consistent with the 16th and 19th Floors of [Building C] and the Property having all been acquired for long-term investment) for the Appellant for not appealing against the determination of the Commissioner of Inland Revenue made on 4th January 2005 confirming the profits tax assessment issued against [Company D] in respect of the profits arising out of the disposition of the 19th Floor in December 1993 or against the Board's decision in respect of the assessment regarding the profits arising out of the sale of the 16th Floor by [Company E] in March 1995.
>
> or in the alternative, whether the Board misdirected itself in law in giving undue consideration to the profits tax assessments in respect of the profits arising out of the sales of the 16th Floor and 19th Floor of the same building as the Property in 1995 and 1993 respectively which belonged to other companies, while ignoring the Appellant's case and the nature and circumstances of its holding the Property and subsequent sale of the same in 1997 was and is different.'

17. In relation to the first part of the 2nd question, two points are to be noted:

(i) It is incorrect to suggest that there was no appeal in respect of the profits tax assessments in relation to both the 16th Floor and the 19th Floor. In fact, there was no appeal only in relation to the 19th Floor and there was an appeal in relation to the 16th Floor which appeal was dismissed. See paragraphs 8 and 9 of our said decision.

(ii) In our said decision, we did not place any or any significant weight on the fact that there was no appeal in relation to the 19th Floor and the dismissal of the appeal in relation to the 16th Floor. In paragraph 27 of our said decision, we merely adverted to the point that the sale and purchase of the 16th and 19th Floors had both been found to be subject to profits tax. Whether there was an appeal or not and the reasons behind any decision to appeal or not to appeal are totally irrelevant.

18. As regards the second part of the 2nd question, the same reasoning applies as in relation to the 1st question. It is an attempt to re-open the decision on facts by the Board.

19. In the circumstances, we do not think that the 2nd question is a proper question for the CFI.

20. We now deal with the 3rd question which reads as follows:

'3. Further or alternatively, whether the Board in any event in law in failing to give any or any proper consideration to all the circumstances relevant to the decision to sell the Property, including in particular the extraordinary and sharp rise in property values which yielded a profit far out of proportion to the rental yield of the Property.'

21. We take the view that the nature of this question is the same as the 5th question. It is too general and seeks to re-open the decision on facts by the Board. We do not think that this is a proper question to be put to the CFI.

22. Overall, on all the questions, it is appropriate to remind oneself of the words of Chung J in the Aust-Key Co Ltd case (supra) at page 281 G – H:

' There is no complaint that the Board' s finding is irrational or perverse and I do not consider any such complaint can be validly made. As a tribunal of fact:

(a) the extent to which a piece of evidence should be accepted;
(b) the extent to which a piece of evidence should be rejected;
(c) the use to which the evidence which has been accepted by the Board should be put;

are all the matters falling within the Board' s jurisdiction and are matters for it to decide.'

There is certainly no complaint in the present case that our finding is irrational or perverse.

Conclusion

23. In the result, we dismiss the application of the Taxpayer to state a case for the opinion of the CFI.