Case No. D63/06

Case stated – application for stating a case – proper question of law.

Panel: Anna Chow Suk Han (chairman), Chow Wai Shun and Alan Ng Man Sang.

Stated Case, No hearing.
Date of decision: 4 December 2006.

The Appellant applied to the Board to state a case on questions of law for the opinion of the Court of First Instance. There were five amended questions of law.

Question 1 stated that the Board could not reasonably have decided on certain findings and the Representatives quoted two relevant paragraphs of the Board' s decision.

Question 2 asked two alternative questions both based on the Board apparently finding that Mainland Entities and Company B were working for the appellant.

Question 3 asked whether the Board erred in applying the totality of facts test in concluding whether the profits did not come from certain cities.

Question 4 asked whether the Board erred in coming to a conclusion that the profits in question were sourced entirely in Hong Kong.

Question 5 asked whether the Board erred in deciding the case by applying the ruling of Case No D20/02 as the only principle in determining the question of apportionment.

Held:

1. Question 1 was too general and imprecise. It is undesirable to effectively require the Board to annex the whole of the evidence to the case stated. Further, to impugn the Board' s evaluation would be to undermine the whole purpose of the Board as a fact-finding tribunal. (CIR v IRB of R & Anr applied)

2. None of the alternative questions in question 2 are proper questions of law as they were posed on a basis contrary to the Board' s findings of facts. The Board did not find Mainland Entities or Company B were working for the appellant.

3. Question 3 is not a proper question of law as the Board did not apply the 'totality of facts' test alone and in fact applied tests other than the one cited in the question.

4. Question 4 is not a proper question of law as the Board's findings of facts were that the appellant did carry on some activities in Mainland China, being contrary to what the question posed. The word 'entirely' made the question more ambiguous and misleading.

5. Question 5 is not a proper question of law because at the hearing of the appeal, the point in question was raised and agreed by the parties and so the Board did not concern itself with the question. Furthermore, the Board did not indicate that in deciding the question, it only relied on the principle in the case cited in the question.

Application dismissed.

Cases referred to:

The Commissioner of Inland Revenue v Inland Revenue Board of Review and Another [1989] 2 HKLR 40
D20/02, IRBRD, vol 17, 487

Decision on application for case stated:

1. The Board delivered its decision in Case No B/R 60/04 ('the Decision') on 7 April 2005.

2. By a letter to the Clerk to the Board dated 5 May 2005, Messrs A, Certified Public Accountants, ('the Representatives') acting on behalf of the Appellant, made an application under section 69(1) of the Inland Revenue Ordinance ('IRO') requiring the Board to state a case on questions of law for the opinion of the Court of First Instance.

3. By a letter of 23 June 2005, the Representatives were requested by the Board to identify the questions which the Representatives contended were questions of law for the Court of First Instance to consider.

4. By a letter of 22 September 2005, the Representatives submitted four questions of law for the opinion of the Court of First Instance. The Representatives also raised the issue that unless the Board had stated the case for the opinion of the Court of First Instance, the

Commissioner of Inland Revenue should be refrained from taking part in the process of the preparation of the case to be stated for the opinion of the Court of First Instance.

5. By a letter of 17 March 2006, the Clerk to the Board under the directions of the Board requested the Representatives to re-submit the questions of law for the Board's consideration and the Representatives were also informed that the Board did not agree to their views on the procedure for stating a case pursuant to section 69(1) of the IRO, as stated in their letter of 22 September 2005. In support of the Board's view, the following passage of Sir Alan Huggins, V-P in Civil Appeal No 116 of 1986 as quoted by Barnet, J in the case of 'The Commissioner of Inland Revenue v Inland Revenue Board of Review and Another' [1989] 2 HKLR40, was also stated in the said letter:

> *'… Whatever may be the present practice in England, 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. The tribunal has the final responsibility for stating the Case and is not bound by the draft submitted to it. It can, therefore, after consulting the parties, alter the draft if it is inaccurate or incomplete. Even if the drafting were to be done by the tribunal itself, it would be the duty of the parties to apply for any necessary amendment. …'*

6. By a letter of 27 June 2006, the Representatives submitted amended questions of law for the opinion of the Court of First Instance and expressed their disagreement to the Board's views as stated in the letter of the Clerk to the Board of 17 March 2006. They took the view that the expression of 'parties' in the said quoted passage of Sir Alan Huggins should mean all the applicants of the application under section 69(1) of the IRO and not 'the potential respondents or some other persons' of the application.

7. The Board did not agree to the Representatives' view expressed in their said letter of 27 June 2006. Thus by a letter of 3 July 2006 the Representatives' proposed questions of law were sent to the Commissioner of Inland Revenue for his comments.

8. By a letter of 24 July 2006, the Department of Justice ('DOJ') for and on behalf of the Commissioner of Inland Revenue, commented on the Representatives' proposed questions of law.

9. By a letter of 31 July 2006, the Representatives were requested by the Board to submit their comments on the DOJ's comments on the proposed questions of law, if any.

10. By a letter of 21 August 2006, the Representatives submitted amended questions of law which are as follows:

'1. On the evidence before it the Board could not reasonably have decided as it did as follows:

a. (at paragraph 31 of the Board's decision)

"Likewise, we do not accept that the Taxpayer had attended local customers' enquiries in Mainland China in relation to the Taxpayer's retail business in Mainland China during the relevant period of time."

b. (at paragraph 34 of the Board's decision)

"Although the retail sales were negotiated and concluded in Mainland China, those activities were nonetheless activities of the Mainland Entities and [Company B] and not the activities of the Taxpayer. They are therefore not relevant to determine the source of profits in question. By the same token, the collection and remittance of the proceeds of sales were activities of the Mainland Entities and [Company B] and thus not relevant here."

2. <u>either</u>

Given the Taxpayer is an artificial person-whether the Board erred in law in deciding the relevant activities must exclude those of the Mainland Entities and [Company B] which worked for the Taxpayer in a chain of business activities/transactions from the trading in petrochemical products carried on by the Taxpayer, but not those done by employees in Hong Kong?

<u>or</u>

It is not in dispute that the Taxpayer is an artificial person – Whether the Board erred in law in considering only those activities which were carried out by its employees but failed to consider those which were carried out by the Mainland Entities and [Company B] in PRC bearing in mind that these companies also worked for the Taxpayer?

3. Whether on the application of a totality of facts test, the Board erred in law in concluding the profits in question did not arise from the trading in petrochemical products carried on by the Taxpayer in [City C] and [City D]?

4. Whether as a matter of law and on the facts found by it, the Board erred in concluding the profits in question did entirely source in Hong Kong?

5. Whether the Board erred in law in deciding the case by the application of the ruling of Case No.D20/02 as the only principle in determining the question of apportionment where there were binding precedent court decisions which show the contrary and have not been properly advanced to the Board for consideration at the time of hearing?'

11. 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.'

12. Barnet J in 'Commissioner of Inland Revenue v Inland Revenue Board of Review and Another' [1989] 2 HKLR 40, provided useful guidance on the law and practice of stating a case pursuant to section 69(1) of the IRO. The following guidelines have been laid down in that case:

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

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

(iii) The Board had a power to scrutinize the question of law to ensure that it was one which was proper for the court to consider;

(iv) If the Board was of the view that the point of law was not proper, it might decline to state a case;

(v) If an applicant wished to attack findings of primary fact, he had to identify those findings;

(vi) Only in the most exceptional circumstances would a complete transcript of the evidence, and the documents produced before the Board, be attached to or incorporated in the case stated; and

(vii) Both an applicant and the Board should be astute to use 'facts' and 'evidence' correctly.

13. Question 1 as posed by the Representatives is too general and imprecise. It does not give us a clear idea of what material must be marshalled in the Appellant's application. As it is, the question effectively requires the Board to annex the whole of the evidence to the case stated which as expressed by Barnet J, is undesirable. Also as held by Barnet J in the said case of 'Commissioner of Inland Revenue v Inland Revenue Board of Review and Another', to impugn the Board's evaluation would be to undermine the whole purpose of the Board as a fact-finding tribunal. Presently, the Representatives have not identified the findings of fact for which they claim there is no evidence or inferences which are unsupportable. Thus, the question is untenable.

14. Neither one of the alternate questions in question 2, is a proper question of law. The alternate questions are posed on the basis that the Mainland Entities and Company B were working for the Appellant, which basis is contrary to the Board's findings of facts. The Board did not find that the Mainland Entities or Company B were working for the Appellant. They found that they were not the Appellant's agents and the retail sales of petrochemical products by the Mainland Entities and Company B were their own activities and not the activities of the Appellant.

15. Question 3 is not a proper question of law because the Board, in reaching the conclusion of the appeal, did not apply the 'totality of facts' test alone. Apart from the application of the relevant statutory provisions of the IRO, the Board also applied other guiding principles in determining the locality of profits as established in other court cases. The other guiding principles were mentioned in the Decision.

16. Question 4 is not a proper question of law. It is the Board's findings of facts that the Appellant did carry out some activities in Mainland China. By adding the word 'entirely' to the question, the question becomes ambiguous and misleading.

17. Question 5 is not a proper question of law because at the hearing of the appeal, the question of apportionment was raised by the Board and it was then agreed by the parties that the Board needed not concern itself with that question. Had it not been for that agreement, the Board would require further evidence from the Appellant and also further submission of law by both parties on the issue. Furthermore, at no time did the Board indicate that in determining the question

of apportionment, the ruling of Case No D20/02, IRBRD, vol 17, 487 was the only principle it applied.