Case No. D75/05

Profits tax – practice & procedure –language of proceedings – whether proceedings ought to be conducted in Chinese or English – bias – recusal application – section 68(1A)(a) of the Inland Revenue Ordinance ('IRO') – whether appeal should be dismissed or withdrawn.

Panel: Kenneth Kwok Hing Wai SC (chairman), Lee Lai Lan and David Yip Sai On.

Dates of hearing: 15 and 16 December 2005.
Date of decision: 16 December 2005.
Date of reasons for decision: 10 March 2006.

The appellant appealed to the Board against a profits tax determination of the Deputy Commissioner of Inland Revenue. Over 600 pages of documents, including documents from the appellant's representatives, before the Board were in English.

After receipt of the Notice of Appeal, the Clerk to the Board asked the appellant to indicate the medium of communication preferred at the hearing of the appeal. In response, the appellant indicated that it preferred the hearing of the appeal to be conducted in Chinese. Then, upon the appellant's application for an adjournment, the Clerk to the Board informed the appellant that the original hearing would be re-scheduled and was to be heard in Chinese.

A day before the re-scheduled hearing, the Clerk wrote to the appellant's solicitors, with a direction from the Presiding Chairman inquiring why the hearing should be conducted in Chinese when practically all the documents were in English.

After hearing submissions from the appellant's counsel, the Board ruled that the hearing would be conducted in English and added that if any of the appellant's witnesses would give evidence in Chinese, the Clerk should be informed as soon as possible so that arrangements could be made for an interpreter.

Ultimately, counsel for the appellant indicated that he had received instructions from his client that it was not satisfied with the Board, not only on the matter of language but also on the Board's attitude in handling the proceedings. It was argued the Board was prejudiced, and the appellant's counsel requested that a new Board be constituted. The application for recusal was refused. Afterwards, the appellant's counsel indicated in view the Board's attitude that the appellant wished to withdraw the appeal.

Held:

1. On the issue of the language of the proceedings, the prime consideration was what was in the best interests of justice. On the facts, the Board made it clear that witnesses were free to give evidence in the language or dialect they preferred. However, given that most of the documents were in English, it was highly undesirable for the non-evidential part of the proceedings to be conducted in Chinese. There was no suggestion that the appellant's legal representatives were not proficient in English. D77/99 and D85/00 applied.

2. The Board refused the application for recusal on the basis that its ruling to change the language from Chinese to English did not indicate bias in any way.

3. Section 68(1A)(a) provides that an appellant may withdraw an appeal by notice in writing to the clerk to the Board at any time *before* the hearing of the appeal. Since the hearing of the appeal had already commenced, it was not possible for the appellant to withdraw the appeal. Given its clear indication not to proceed further, the appeal was dismissed rather than withdrawn.

Appeal dismissed.

Cases referred to:

D77/99, IRBRD, vol 14, 528
D85/00, IRBRD, vol 15, 742

Kenneth K M Ho Counsel instructed by Messrs Raymond T Y Chan, Victoria Chan & Co, Solicitors, for the taxpayer.
Paul Leung Counsel instructed by Department of Justice for the Commissioner of Inland Revenue.

Reasons for decision:

1. By his Determination dated 30 May 2005, the Deputy Commissioner of Inland Revenue:

(a) upheld the assessor's notice of refusal dated 21 August 2002 to correct the profits tax assessment for the year of assessment 1997/98 pursuant to section 70A of the Inland Revenue Ordinance, Chapter 112; and

(b) confirmed the profits tax assessment for the year of assessment 1997/98 under charge number 1-1033019-98-2, dated 18 August 1998, showing net assessable profits of $123,022 (after setting-off loss brought forward of $774,286) with tax payable of $18,268 (after giving effect to the Tax Exemption (1997 Tax Year) Order).

2. Messrs A, Certified Public Accountants, filed on behalf of the appellant profits tax returns completed in *English* declaring:

(a) for the year of assessment 1996/97 adjusted loss of $774,286; and

(b) for the year of assessment 1997/98 assessable profits of $897,308.

3. The assessor:

(a) issued to the appellant a statement of loss in *English* for the year of assessment 1996/97 showing adjusted loss for the year and carried forward of $774,286; and

(b) raised on the appellant a profits tax assessment in *English* for the year of assessment 1997/98 showing assessable profits of $897,308, and net assessable profits of $123,022 after setting off loss brought forward of $774,286. The tax payable of $20,298 was subsequently reduced to $18,268 by virtue of the Tax Exemption (1997 Tax Year) Order.

4. The appellant did not object to the assessment referred to in paragraph 3(b) above.

5. By letter dated 9 October 1998, the appellant wrote to the Inland Revenue Department asking for holding over of 1998/99 provisional profits tax and enclosed the provisional profits tax computation for the year of assessment 1998/99. Both the letter and the tax computation were in *English*.

6. By letter dated 27 July 1999, Messrs A wrote in *English* on behalf of the appellant applying under section 70A of the Ordinance for revision of the assessment referred to in paragraph 3(b) above.

7. On divers dates, the appellant wrote in *English* and advanced various contentions in support of its application under section 70A.

8. The assessor did not accept the appellant' s application and issued a notice of refusal in *English*.

9. By letter dated 18 September 2002, the appellant lodged an objection in *English* against the notice of refusal.

10. The Deputy Commissioner disagreed with the objection and issued his Determination (*16 pages*) in *English*. The appendices (*98 pages*) to the Determination were all in *English*.

11. By letter dated 24 June 2005, the appellant gave notice of appeal in writing in *English*. The grounds of appeal attached to the notice of appeal were also in *English*.

12. By letter dated 27 June 2005, the Clerk to the Board of Review wrote in *English* acknowledging receipt of the letter dated 24 June 2005 and asked the appellant to indicate in writing the medium of communication the appellant preferred at the hearing of its appeal.

13. By letter dated 29 June 2005, the appellant replied in *English* stating that:

> ' For the hearing of the appeal, we prefer it to be conducted in Cantonese. We would like to have the written correspondence in English.'

14. By letter dated 2 August 2005, the Clerk wrote to the appellant in *English* giving notice that the appeal was 'scheduled to be heard **in Chinese** on 14 September 2005'.

15. By letter dated 23 August 2005 written in *English*, Messrs Raymond T Y Chan, Victoria Chan & Co, solicitors for the appellant, served on the Clerk and the respondent:

(a) a 'Main Bundle' of *199 pages* of documents, statements and authorities (*about 6 pages of which were in Chinese* and *the rest were in English*); and

(b) an 'Appendices Bundle' of *431 pages* of documents (*about 6 pages of which were in Chinese* and *the rest were in English*).

16. By letter dated 2 September 2005 written in *English*, Messrs Raymond T Y Chan, Victoria Chan & Co wrote on behalf of the appellant to the Clerk stating that the consensus of the parties was that a 2-hour hearing would be inadequate for the hearing of the appeal and asked for the hearing scheduled on 14 September 2005 to be re-scheduled for a 2-day hearing.

17. By letter dated 8 September 2005, the Clerk wrote to Messrs Raymond T Y Chan, Victoria Chan & Co in *English* giving notice that the appeal was re-scheduled 'to be heard **in Chinese**' on 15 and 16 December 2005 before another panel of the Board.

18. By letter dated 6 December 2005 written in *English*, Messrs Raymond T Y Chan, Victoria Chan & Co served on the Clerk and the respondent a bundle of 'Supplementary Authorities' (*79 pages in English*).

19. By fax dated 14 December 2005, the Clerk wrote in *English* to Messrs Raymond T Y Chan, Victoria Chan & Co stating that:

> ' The presiding Chairman asked me to write to you the following directions:
>
> (a) the appellant shall supply the Board with a copy of the index of the documents in the appellant' s Appendices bundle with a description of each document, and not just a number; and
>
> (b) please explain why you have asked for the hearing to be conducted in Chinese when the appellant has sent the Board over 600 pages of documents in English and (practically) all document (*sic*) are in English.'

20. At the request of the presiding Chairman, the Clerk supplied the parties with a copy of:

(a) D77/99, IRBRD, vol 14, 528; and

(b) D85/00, IRBRD, vol 15, 742;

at the hearing of the appeal on 15 December 2005.

21. At the hearing of the appeal, the appellant was represented by Mr Kenneth K M Ho, counsel, on the instructions of Messrs Raymond T Y Chan, Victoria Chan & Co The respondent was represented by Mr Paul Leung, counsel, on the instructions of the Department of Justice.

22. Mr Kenneth K M Ho was given an opportunity to make submissions on why the hearing should be conducted in Chinese and whether the Board could and should change the language of the hearing to English. After Mr Kenneth K M Ho had gone on for a while, he was asked if he had anything further to say and he was told that if he had nothing further to say, the Board would make its decision.

23. Mr Kenneth K M Ho changed the topic. He replied in the affirmative and applied for an adjournment of the hearing on the ground of the respondent' s late submission of some annual reports of some companies. After Mr Kenneth K M Ho had gone on for a while, he was asked to tell us about the length of the adjournment sought. Mr Kenneth K M Ho said that he thought it was a day or two.

24. After hearing Mr Paul Leung' s submission for the respondent, we acceded to the application by Mr Kenneth K M Ho for an adjournment and adjourned the hearing to the following day, 16 December 2005, with 17 December 2005 and 19 December 2005 also reserved.

25. On language of the hearing of the appeal, we ruled that the hearing would be conducted in English and added that if any of the appellant's witnesses would give evidence in Chinese, the Clerk should be informed as soon as possible so that arrangements could be made for the attendance of an interpreter.

26. At the resumed hearing on 16 December 2005, Mr Kenneth K M Ho took the unusual course of standing on his feet (the practice at Board hearing is for parties and representatives to be seated) and directed what he said at the presiding Chairman. Mr Kenneth K M Ho said he wished to be heard on the language of proceedings. He was told that we had made a ruling and he could take the matter elsewhere if he did not like our ruling. Mr Kenneth K M Ho said his client wished some clarification from the Board and referred to the letter dated 8 September 2005 as the letter from 'your Clerk'. After going on for quite a while, the presiding Chairman told Mr Kenneth K M Ho that the presiding Chairman would give him five more minutes. Mr Kenneth K M Ho addressed us further and when he seemed to have finished, he was asked if he had finished and he replied in the affirmative. Mr Kenneth K M Ho was requested to sit down which he did.

27. The presiding Chairman stated on behalf of the Board words to the following effect:

> The Board was aware of this letter. What happened yesterday was that the Board gave Mr Ho a chance to address the Board as to why the language of the proceedings should not be changed into English. Mr Ho had his opportunity and made his submissions. The Board gave a ruling to change the language to English. The Board had made a ruling. If the parties are not happy, they can appeal or take it elsewhere. As far as reasons are concerned, originally they were intended to be given when the decision of the Board is given. If a party wishes to take it elsewhere, it may be necessary for the Board to do so at an earlier stage.

28. Mr Kenneth K M Ho then said that he had difficulties with witnesses and one of them would be out of town on business. When asked to give particulars of the unavailability of his witnesses, he asked if he could take instructions. After taking instructions, Mr Kenneth K M Ho changed the topic again without telling us expressly that he was changing the topic. Mr Kenneth K M Ho said he had received instructions from 'client' that the client was not satisfied with the Board, not only on the matter of language but also on the Board's attitude in handling the proceedings. Mr Kenneth K M Ho went on to say that his client was very disturbed, uncomfortable and felt that there was prejudice and asked that a 'new Board be constituted'.

29. After confirming with Mr Kenneth K M Ho that he had said everything he wished to say on the application that we recuse ourselves, and after hearing Mr Paul Leung for the respondent, we gave our ruling to the following effect:

> The allegation made is that the Board is prejudiced or biased against the appellant and the application is that we should recuse ourselves. So far, the Board has made two rulings. The first was to change the language of the proceedings from Chinese to English. The appellant may be unhappy but that is not a matter which indicates bias in any way. The second decision was in response to Mr Ho's application for an adjournment on the ground of the Revenue's late submission of documents. The Board has acceded to the application to the extent of adjourning until today, giving the parties a little more time to deal with the matter, which the Board considers sufficient. The Board sees no reason to recuse ourselves and we decline to do so.

30. Mr Kenneth K M Ho then asked for 'a very short adjournment' and in response to the question of how much time, he said '15 minutes'. We granted him the adjournment sought.

31. At the resumed hearing, Mr Kenneth K M Ho said words to the following effect:

> In view of the attitude of the Board in conducting the hearing between the 14th of December prior to the hearing and the 15th and 16th, that is yesterday and today's hearing, I am instructed now and I confirm to apply to the Board to withdraw the entire appeal under the case BR 26/05.

32. In response to the question from the presiding Chairman, Mr Kenneth K M Ho confirmed that he was withdrawing the appeal.

33. After hearing submission by Mr Kenneth K M Ho on whether an appeal could be withdrawn after the commencement of the hearing, we dismissed the appeal and said we would give our reasons in writing which we now do.

34. On the question of language of proceedings, our prime consideration was what was in the best interests of justice. We made it abundantly clear at the hearing on 15 December 2005 that witnesses were free to give evidence in the language or dialect they preferred. The appellant was represented by Mr Kenneth K M Ho, a barrister who obtained his professional qualification in England. There was no allegation by Mr Kenneth K M Ho that he was not proficient in the English language. It was also clear from the numerous letters written by the appellant in English that the appellant's officers were proficient in the English language. There was no question of prejudice to the appellant for the proceedings to be conducted in English and evidence to be given in the languages/dialects of the witnesses' choice.

35. In contrast, if the proceedings were to be conducted in Chinese, whenever reference was to be made at any time to any of the over 600 pages of documents in English submitted by the appellant, the speaker and all readers would have to make a mental translation of the documents from English to Chinese. It also meant that if we should give our Decision in Chinese, we would have to translate any passage which we might wish to quote from the documents from English to

Chinese. Mr Kenneth K M Ho spoke in Cantonese interposed with English words and expressions. If he should refer in English to the documents in English, then that would not be conducting the hearing in Chinese.

36. Mr Kenneth K M Ho told us that he had read D77/99 and D85/00 but he made no attempt to address us on any of them.

37. In D77/99, the Board said in paragraph 2 that:

> *'This is a case where the parties have submitted all the documents and conducted all the correspondence in English but preferred to have the hearing in a mixture of Cantonese and English as and when it suited them. Although the evidence was given in Cantonese, (except for some English names), the written submissions were in English supplemented by oral submissions in a mixture of Cantonese interposed with English words and expressions when the speaker was at a loss for the equivalent Chinese expressions. It certainly reduces the length of the hearing or perhaps the time for preparation. But it means extra difficulties and work for the Board. We give our decision in one and sometimes both languages, when we make reference to the earlier correspondence, the evidence or the submission, which are in a mixture of English or Chinese, inevitably, we have to do a lot of translation to convert these references into the language of the decision. If we merely include the reference in the language as it is used by the parties, the decision will look very odd and untidy with bits and pieces of the references and sometimes just an odd word in a different language. Naturally, the parties have to use English when quoting from precedents. But often the parties are not using English just for the law. They switch between languages as when it is convenient to them. This is not the first time when parties have adopted this approach for their convenience. This is not what is meant by being bilingual. It is extremely inconvenient for the Board and not healthy for the development of our jurisprudence. We understand that everyone has to adapt to the greater use of Chinese and teething problems are inevitable. But we hope that in future, parties will stick to one language save that English can be used for submissions on the law. They should ensure that the documents and correspondence are in the same language that they wish to adopt for the hearing, if not, translations should be provided. They should not expect the Board to do translation work for them.'*

38. In D85/00, the Board said in paragraphs 25 – 28 that:

> *'25. Before we part with this appeal, we must record our disquiet about the Taxpayer's request that the hearing be conducted in Cantonese. The*

request was made in the notice of appeal dated 8 May 2000. By letter dated 5 July 2000, the Clerk to the Board of Review gave notice of the hearing date and time, highlighting that the appeal would be heard in Chinese. None of us had anything to do with the decision to conduct the appeal in Chinese.

26. With the exception of TA1, TA2 and TA5 and a bundle of rent receipts, all the documents in this appeal are in English. This points to English being the more appropriate language for the appeal.

27. Moreover, what the representative did after requesting that the hearing be conducted in Cantonese and after having been advised that the appeal would be heard in Chinese was to submit a bundle dated 9 August 2000 called 'Summary appeal report (evidences and facts)'. The first 21 pages of that bundle were representations and submissions made by the representative in English. The rest of the bundle is a copy of thirteen documents, all in English. At the hearing of the appeal, the representative submitted a further bundle of documents, all in English, and a five-page document in English, prepared by the representative and called 'Summary of disagreement of the statements of fact with commissioner'.

28. A party who is unable or unwilling to write or submit in Chinese or prefers to write or submit in English should not ask for a hearing in Chinese. Conducting the appeal in English does not mean that evidence has to be given in English. Evidence may be given in Cantonese or any other dialect provided that early written notice is given to the Clerk so that she may be able to make arrangements for an interpreter.'

39. We agree with the passages quoted above.

40. We turn now to the withdrawal/dismissal point.

41. Section 68 (1A)(a) provides that 'at any time before the hearing of an appeal ... the appellant may withdraw the appeal by notice in writing addressed to the clerk to the Board'.

42. Since the hearing of the appeal had commenced, the appellant might not withdraw the appeal. In view of the appellant's clear indication that it was not proceeding with the appeal, we dismissed the appeal.