Case No. D76/06

Case stated – the role of the Commissioner – sections 66, 68 and 69 of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Chow Wai Shun and K L Alex Lau.

Date of hearing: 22 November 2006.
Date of decision: 8 January 2007.

A married couple's appeal to the Board was dismissed. The wife, through her representative Messrs A, wrote to the Board 'requiring the Board to state a case on the question of law for the opinion of the Court of First Instance'.

The letter from Messrs A did not contain any question of law that they sought to be stated and it was not copied to the Commissioner. The Clerk to the Board, as directed by the Chairman of the panel, replied to Messrs A and asked the latter to identify the question or questions which they contend were questions of law with their submission on why it was proper for the Court of First Instance to consider such question or questions. The reply was copied to both parties of the tax appeal before the Board (the husband and the wife) and the Commissioner. Messrs A wrote and enclosed seven 'Questions of law for the opinion of the Court of First Instance'. In the letter, they 'reiterate that [they] act only for [the wife] for this application' and said that they did not send copies of their correspondence to the Commissioner as they 'found that during the case stating process under s69(1) of the Inland Revenue Ordinance, [the Commissioner] should not be a party thereto … [the Commissioner] has no capacity and should be refrained from participating this process'. Messrs A further contended that if 'the Respondent' was employed to assist the Board to prepare the Case Stated, there would be 'an uncomfortable feeling to the public that the Case Stated itself is not independent enough' and 'anything impairing the independence of jurisdiction of this kind should be severely opposed by the Appellant'. Messrs A did not copy the letter and its enclosure to the Commissioner.

The Clerk wrote again and stated that 'the contention … that the other party to the tax appeal to the Board should not be a party to the process of appeal by way of case stated is a novel one. The Board is convening a hearing to hear submission from both parties on this issue'. A notice of hearing was subsequently sent to Messrs A and the Commissioner.

In subsequent correspondence between Messrs A and the Clerk, Messrs A contended that 'the CIR has [not] made application to the Board for a case stated [and] therefore the CIR is

not an Applicant' and that the scheduled hearing was 'not supported by law … it follows that any decision made therefrom should be ultra vires and should not be recognised' and informed the Board that they would not 'attend [the] hearing as directed on the grounds of ultra vires and costs saving unless [they] are provided with either a case authority or a statutory provision which allows the Board to do so'. Messrs A did not copy their letter to the Commissioner.

Held:

1. The purpose of convening a hearing is to give both parties to the appeal an opportunity to be heard and a chance to make oral submissions. The Board's practice of holding post-decision hearings as the Board sees fit in dealing with an application to state a case is a long standing one. It is not the Board's function to give advices to Messrs A. If they had considered any point of relevance and concern, they had the opportunity (which they chose to decline) of making oral submissions at the hearing.

2. The Aspiration case is authority for the proposition that an application for a case stated must identify a question of law which is proper for the Court of First Instance to consider; the Board is under a statutory duty to state a case in respect of that question of law; the Board has a power to scrutinise the question of law to ensure that it is one which is proper for the court to consider; and if the Board is of the view that the point of law is not proper, it may decline to state a case. Whether Messrs A wish to avail themselves of the opportunity to make submissions is a matter for them.

3. The practice of asking both parties to the tax appeal to agree the case stated was clearly approved by the Court of Appeal. The Board's practice of involving both parties to the tax appeal in the drafting and settling of the case stated is a long standing one, sanctioned and approved at least twice by the Court of Appeal. The Board rejected the contention by Messrs A that the Commissioner had no role to play.

Decision and Ruling on this application to state a case issued for compliance in 10 days.

Cases referred to:

Ng Nga Wo v Director of Health, unreported, HCAL 16 of 2006, 16 May 2006.
Commissioner of Inland Revenue v Inland Revenue Board of Review and another [1989] 2 HKC 66
Commissioner of Inland Revenue v Inland Revenue Board of Review and another

[1989] 2 HKLR 40
Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Ltd (1989) 3 HKTC 223
Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409
The Attorney General v Leung Chi-kin [1974] HKLR 269
Chinachem Investment Co Ltd v Commissioner of Inland Revenue, 2 HKTC 261
Edward Chow Kwong Fai v Inland Revenue Board of Review, HCAL 47/2004, [2004] 2 HKLRD 963

Taxpayer in absentia.
Winnie W Y Ho, Senior Government Counsel of Department of Justice and assisted by Lai Wing Man, senior assessor for the Commissioner of Inland Revenue.

Decision and ruling:

Introduction

1. On 10 October 2000, a married couple ('the couple') purchased a residential flat as joint tenants. On 22 December 2004, the assessor issued to the couple property tax assessments for 2001/02 to 2003/04. The couple indicated their desire to elect personal assessment for these years of assessment. The assessor disagreed. The couple objected. The Acting Deputy Commissioner of Inland Revenue determined the couple's objection against them. The couple appealed to the Board of Review. By a Decision, D45/06, dated 19 September 2006, we dismissed the couple's appeal and upheld the assessments as confirmed by the Acting Deputy Commissioner in his Determination.

The wife's application for a case stated

2. By letter dated 17 October 2006, Messrs A, certified public accountants, wrote on behalf of the wife to the Clerk of the Board of Review in these terms:

> '[THE WIFE]
> APPEAL TO THE BOARD OF REVIEW - D45/06
> PROPERTY TAX ASSESSMENTS 2001/02 TO 2003/04
>
> We refer to your letter of 19 September 2006 addressed to our above-named client and her husband ...

2. We act for [the wife] alone and on her behalf, we hereby formally make an application requiring the Board to state a case on the questions of law for the opinion of the Court of First Instance.

3. We enclose a cheque for HK$770 in respect of the fee for this application for your attention. Please acknowledge receipt accordingly.

4. We look forward to hearing from you.

Yours truly,'

Messrs A did not copy their letter to the Commissioner.

Ensuing correspondence

3. The Clerk replied to Messrs A by letter dated 18 October 2006 as follows:

'Your letter dated 17 October 2006 has been referred to the Chairman of the panel, Mr Kenneth KWOK Hing-wai, BBS, SC, for his consideration. He has requested me to send you this reply.

Please identify the question or questions which you contend are questions of law, with your submission on why it is proper for the Court of First Instance to consider such question or questions.

Please let me have your reply by 4:00 p.m. on 1 November 2006 (Wednesday). Your letter should be copied to the respondent, i.e. the Commissioner of Inland Revenue.'

The Clerk copied his letter to both parties to the tax appeal before the Board, that is, the couple and the Commissioner.

4. Messrs A wrote to the Clerk by letter dated 1 November 2006 in these terms (*written exactly as in the original*):

'Dear Sir,
[THE WIFE] V CIR

APPLICATION TO STATE A CASE TO THE COURT OF FIRST INSTANCE

DECISION - D45/06 DATED 19 SEPTEMBER 2006

> * We refer to your letter of 18 October 2006 and enclose a list of questions of law for the opinion of the Court of First Instance for the Board to state a case on them. We reiterate that we act only for [the wife] for this application for a case stated.
>
> You may notice that we did not send copies of our correspondence in this regard to the Commissioner of Inland Revenue as we found that during the case stating process under s69(1) of the Inland Revenue Ordinance, she should not be a party thereto. The Appeal procedure would merely commence after the Board formally issued the Case Stated to the Taxpayer in this respect and she should only be the Respondent upon the Taxpayer properly served the Notice of Appeal by Case Stated. Before then, she has no capacity and should be refrained from participating this process.
>
> We noted that the Ordinance did not prohibit the Board to retain the Respondent a person to assist the Board to prepare the Case Stated. But if the Respondent was employed as such, there would be an uncomfortable feeling to the public that the Case Stated itself is not independent enough as the Respondent, a party of the litigation, became also the party stating the Case for the Appeal. Anything impairing the independence of jurisdiction of this kind should be severely opposed by the Appellant.
>
> Yours truly,
>
> Encl.'

The enclosure is entitled 'Questions of law for the opinion of the Court of First Instance' and contains seven questions.

Messrs A did not copy their letter or the enclosure to the Commissioner.

5. By letter dated 3 November 2006, the Clerk wrote to Messrs A as follows:

> 'We refer to the letter dated 1 November 2006 from [Messrs A]. The contention by Messrs (*sic*) that the other party to the tax appeal to the Board should not be a party to the process of appeal by way of case stated is a novel one. The Board is convening a hearing to hear submission from both parties on this issue. A notice of hearing will be sent to both parties under different cover.'

This letter was copied to the couple and the Commissioner.

6. By another letter also dated 3 November 2006, the Clerk wrote to Messrs A and the Commissioner as follows:

> 'With reference to the above application, a hearing is scheduled to be held at the time and venue as follows:
>
> | Date | Time | Venue |
> |---|---|---|
> | Wednesday,
22 November 2006 | 2:15 p.m. to 5:00 p.m.
(Commencing 2:15 p.m.) | Board of Review Office,
Room 1003,
Tower Two, Lippo Centre,
89 Queensway,
Hong Kong |
>
> Should you intend to adduce documents in relation to the application, please prepare at least 6 copies of such paginated documents. Please send 1 copy to the other party and the remaining 5 copies to this office by 13 November 2006.
>
> For enquiries, please contact Mr Tony LEUNG at ...'

This letter was copied to the couple.

7. By letter dated 6 November 2006, Ms LaiWing-man, senior assessor (appeals), wrote to the Clerk as follows:

> 'I refer to the above application which has been scheduled for hearing on 22 November 2006. Notwithstanding the Board's direction in its letter dated 18 October 2006, the Commissioner has not received a copy of the Appellants' proposed question(s) of law and their submission on why it is proper for the Court of First Instance to consider such question(s).
>
> For the purposes of preparing for the coming hearing as the respondent, I would be grateful if you could let me have a copy of the question(s) of law proposed by the Appellants and their submission.'

She copied her letter to Messrs A.

8. By letter dated 8 November 2006, the Clerk wrote to the Commissioner as follows:

> 'I refer to the letter dated 6 November 2006 from Ms LAI Wing-man.
>
> By letter dated 17 October 2006, [Messrs A], acting for [the wife] alone, purported to apply for a case stated. No question of law was identified in the letter. If [Messrs A] chose to communicate with the Board without notice to the Commissioner, it is a matter for the Commissioner to decide whether to take up the matter with them or with relevant authorities of professional bodies.

> I replied to [Messrs A], by letter dated 18 October 2006, a copy of which was sent to both parties to the appeal. My letter ended with a direction that their reply should be copied to the Commissioner.
>
> By letter dated 1 November 2006 [Messrs A] sent a list of questions. In default of the Board's direction, they did not copy their letter to the Commissioner. They contended that the Commissioner "should not be a party" "during the case stating process under s69(1) of the Inland Revenue Ordinance".
>
> By letter dated 3 November 2006, I gave notice that the Board is convening a hearing to hear submission from both parties on their contention that the Commissioner should not be a party to the process of appeal by way of case stated.
>
> This hearing is confined to the issue whether the Commissioner should be excluded from the process of the application for a case stated. The Commissioner should write to [Messrs A] in the first instance. If they should persist in communicating with the Board on an ex parte basis, the Board will deal with the matter after the hearing on 22 November 2006.
>
> [Messrs A] are asked to identify cases (if any) where the Board dealt with an application to state a case on ex parte basis, deliberately excluding the other party to the tax appeal before the Board from the case stating process.'

This letter was copied to Messrs A.

9. By letter dated 8 November 2006, Ms Winnie W Y Ho, senior government counsel, wrote to the Clerk in these terms:

> 'We act for the Commissioner of Inland Revenue for the hearing scheduled for 22 November 2006.
>
> In accordance with your letter to [Messrs A] dated 18 October 2006, they were invited to identify questions of law to be stated in the case to the Court of First Instance by 1 November 2006 with a copy to our client. Our client has not received anything as at the time of writing. To enable us to prepare for the hearing, we should be grateful if you could please let us have a copy of the correspondence in relation to the questions of law as well as a copy of the letter from [Messrs A] to you dated 17 October 2006 if appropriate.'

This letter was copied to the Commissioner but does not purport to have been copied to the couple or Messrs A.

10. By letter dated 9 November 2006, Ms Winnie W Y Ho, wrote to the Clerk in these terms:

> 'We refer to our letter of 8 November 2006. We have since received from our client a copy of your letter to [Messrs A] dated 3 November 2006.
>
> It appears to us that the taxpayers are contending that the Commissioner of Inland Revenue should not be involved in the process of their application to have a case stated. Please kindly confirm if our understanding is correct in order that we could file our submissions and authorities on Monday 13 November 2006 as directed.'

This letter was copied to the Commissioner and Messrs A.

11. The Clerk faxed a copy of his letter dated 8 November 2006 to Ms Winnie W Y Ho.

12. Messrs A wrote to the Clerk by letter dated 13 November 2006 in these terms (*written exactly as in the original*):

> '[THE WIFE] (SOLE APPLICANT)
>
> APPEAL TO THE BOARD OF REVIEW - D45/06
>
> PROPERTY TAX ASSESSMENTS 2001/02 TO 2003/04
>
> We refer to your two letters of 3 November 2006 as well as your letter of 8 November 2006 to the Commissioner of Inland Revenue [' CIR'] copied to us and would like to make submissions in the following paragraphs.
>
> 2. On 17 October 2006, we made in writing with a cheque for the requisite fee an application on behalf of [the wife] alone requiring the Board to state a case on the questions of law for the opinion of the Court of First Instance [' the Court']. [The wife] is then the Applicant. This should then be the sole business between the Board and the Applicant for this application.
>
> 3. We did not notice from your correspondence that the CIR has made application to the Board for a case stated. Therefore, the CIR is not an Applicant.
>
> 4. Under s66(2) of the Inland Revenue Ordinance [' I RO'], the appellant shall at the same time as he gives notice of appeal to the Board serve on the Commissioner a copy of such notice and of the statement of the grounds of appeal. However, it only applies to an appeal to the Board. There is no similar provision for the application

under s69 with which the Board is currently requested to handle. Even a notification is not required by law. How it is possible to claim CIR a party to this process.

5. In *Edward Chow Kwong Fai v Inland Revenue Board of Review* (HCAL 47/2004), neither the CIR nor Department of Justice [' DoJ'] was invited to join the proceedings on case stated. This further shows that CIR is not a party at this stage. If there were any cases which overrode the said decision, please supply a copy of such case to us accordingly. Otherwise, the *Edward Chow Kwong Fai* case shall be the correct approach to follow. The application under s69 is the sole affair between the Applicant and the Inland Revenue Board of Review. Any parties which are not relevant at this stage must not be allowed to intrude.

6. We note that you have alleged in your letter of 8 November 2006 to the CIR that no question of law was identified in our letter of 17 October 2006. We have reviewed the IRO and found that there is no such a requirement similar to that of ' a statement of grounds of appeal' stipulated under s66(1) of the IRO for the questions of law to be submitted simultaneously in order to make the application valid.

7. We received on 20 October 2006 your letter dated 18 October 2006 requesting us to identify the questions which we contend are questions of law, with our submission on why it is proper for the Court of First Instance to consider such questions. We did not notice any message from you that our said application was either out of time or improper and not acceptable under the law. Such application to state a case shall therefore be valid and has fully complied with s69 of the IRO.

8. We, on 1 November 2006 before the deadline set in your letter of 18 October 2006, submitted a list of seven questions which we considered as proper questions of law for the opinion of the Court for the Board to state a case thereon. We consider these questions are self-explanatory and ready to the points so no further submission thereon needed to be made. From these questions, we expect that the Board will get (a) the points the Applicant wishes to take on the Appeal; (b) what fact the Applicant wishes to contend are relevant to those points: and (c) what arguments the Applicant will be advanced to the Court. Past experience in this connection tells us that where the Board does not get the points, it will direct for more information. Till now, we do not receive anything from you that the Board requires further explanations from us in this respect.

9. These procedures are accorded to what Sir Alan Huggins V-P said in the case of *Chinachem Investment Co. Ltd v. Commissioner of Inland Revenue*, CA No. 116/1986 as follows:

> "…where [*applicants*] are professionally represented, [*applicants*] shall draft the case stated and submit it to the tribunal. The reason is obvious: [*applicants*] know better than anyone else what points [*applicants*] wish to take on the appeal (lodged by Applicant), what finding of fact [*applicants*] wish to contend (i.e. it is of course not the respondent to contend) are relevant to those points and what arguments [*the applicants*] advanced…" (underlines and words in bracket added with party identified in [ ])

10. In your letter of 8 November 2006 to the CIR, you suggest to the CIR for a decision "to take up the matter with [Messrs A] or with the relevant authorities of professional bodies". We fail to see the rationale behind this allegation from which we have a strong feeling that you and the Board are working hand in hand with the CIR within a Government Department with full co-operation from both entities and on the same line of management instead of acting as a tribunal with an independent judiciary function. This is a matter of impartiality (of the Board) which is likely to be overwhelmed by your act. All our client's rights in this regard are hereby reserved.

11. We note in your short letter of 3 November 2006 that the contention by [Messrs A] that the other party to the tax appeal to the Board should not be a party to the process of appeal by way of case stated is a novel one.

12. First of all, at least to this case, this should not be novel. You should have a clear record that we have submitted same argument with supporting court cases in the case stated process in respect of Board of Review Decision D3/05.

13. Also, per obiter dictum Sir Alan Huggins V-P said in the case of CA No. 116/1986 cited above as follows:-

> "There was much discussion before us and before the judge as to the form of the Case Stated and the procedure for settling it. It has never ceased to amaze me how much argument this simple and straightforward process engenders ……………"

Definitely, it should not be a novel one.

14. Furthermore, under s69(3), it stipulates that at or before the time when the Applicant transmits the stated case to the Court, the Applicant shall send to the CIR a notice in writing of the fact that the case has been stated on her application and shall supply CIR with a copy of the stated case. This clearly indicates that CIR is not a party to the process of application for case stated otherwise she should be entitled to an original signed case stated direct from the Board instead of having a copy from the Applicant as such. Like the Court rules, judgments handed down by Courts will be

distributed simultaneously by the Registrar to all the parties but not restricted to the Applicants/Appellants.

15. Upon transmission of the stated case to the Court, CIR will then become a party that is the Respondent and since then, she returns to the arena for a judgment from the Court.

16. Under s69, the Board has the final and statutory responsibility for stating the case and the stated case shall set forth the facts and the decision of the Board. The Applicant shall transmit the case, when stated and signed, to the Court within 14 days after receiving the same. This is the only legal provision in this connection.

17. From the above it is unambiguous that the Board has the responsibility for stating the case and we have never disputed this point. However, we have not come to the stage of drafting case stated yet. Therefore, discussion on the drafting itself has of course not yet been commenced. Civil Appeal No. 32 of 1989 should be entirely of no relevance to the core issue of whether CIR is a party in the case stated process. It appears that the CIR is not clear where this application stands and that it is missing the point completely. Hence, the case does not enhance its position.

18. s68 provides detailed rules for a hearing by the Board under s66. We do not find any equivalent provision to support any post-decision hearing by the Board. Prior to the hearing fixed on 22 November 2006, we should be directed as to which provision under IRO or else which the Board adheres to for that hearing. Sir Alan Huggins V-P in CA No. 116/1986 as cited above stated that after the Board has made a decision under s69, 'the Court does not have power to order a re-hearing'. Likewise, the Board has no power to order any other hearings under s69 after the decision was given.

19. Whether CIR is a party in the case stating process bears no weight to the case stated application. If the Board regards CIR is a party, it has its own liberty to forward papers to CIR for comments. This in fact has been done by other Board of Review of different constituted members in other case on same situation. We find that there is no law to forbid the Board from doing so. Equally, there is no law to oblige us to release papers to CIR mandatory. It is a waste of time to discuss such matter that is totally meaningless and valueless. We have already sufficiently submitted our view on the independence and impartiality of the Board's behaviour and do not want to repeat further.

20. In hearing the Appeal, there is ample chance for any arguments be laid before the Court in any respects including why it is proper for the Court of First Instance to consider such questions and we do not find it necessary to make such an advance

argument at this stage. More important is that we are unaware of any legislation to support such advance argument or the jurisdiction governing such arguments themselves and the result of such arguments. In this area, even the Department of Justice [‘ DoJ’] in its letter dated 9 Novebmer 2006 to you feels suspicious and has to speculate the issue where there is no legal provisions provided for such a hearing.

21. Even with the Rules of High Court provided in the legislation, the jurisdiction of the Court in hearing the Appeal on case stated has still been specifically prescribed further in s69(4) to (7) as well as s69A of IRO. We have to follow the rules.

22. In the absence of law, with due respect we find that the hearing scheduled on 22 November 2006 is not supported by law. It follows that any decision made therefrom should be ultra vires and should not be recognized.

23. It is not of any importance to the Applicant on the issue as to whether CIR is a party to the process of case stated since the issue will not benefit the case stated itself except diminishing the impartiality of the Inland Revenue Board of Review.

24. From the above observations, you have notified CIR and involved her to support your team and to create a hearing on a question raised by you on which we are not interested in and find it not relevant to discuss. There is a question of fairness and justice. We feel that the hearing on 22 November 2006 which confined to the issue whether CIR should be excluded from the process of the application for a case stated is not helpful to the Board for the Case Stated itself and as such, we hereby inform you that we will not attend that hearing as directed on the grounds of ultra vires and costs saving unless we are provided with either a case authority or a statutory provision which allows the Board to do so.

25. If the Board found that it needs further assistance on top of the materials which have already been provided by the Applicant, the appropriate way is to seek independent legal opinion. Since CIR has already retained DoJ as her legal representatives, there would be conflict of interest if DoJ further engaged in briefing the same to the Board. Anything comes from DoJ must be regarded as submissions from the CIR as a third party in the Application. Any parties including the potential Respondent which are not relevant at this stage must not be allowed to intrude. We reiterate that we strongly object to the CIR to participate in drafting the case stated at this stage with a view to preserve the impartiality of the Board of Review.

26. In passing, we would like to take this opportunity to remind you that we act for the Applicant as tax representatives in accordance with the provisions of the IRO. For the sole benefit of a client, we must do our best to act faithfully upon the law, no matter how unhappy the Board of Review is or you are. If you find our way does not

buy yours, we advise that we have no alternative but to follow our professional integrity to act as such. With due respect, we have no intention to offend the Inland Revenue Board of Review. We just intend to argue on law point within IRO. We feel distressed on the wordings used in your letters. They are not only lack of justice and fairness but are biased with hatred and bitterness towards us including the taxpayers. All our rights in this regard are further reserved.

Yours truly,'

Messrs A did not copy their letter to the Commissioner or the Department of Justice.

13. By letter dated 15 November 2006, the Clerk wrote to Messrs A as follows:

'I acknowledge receipt of your letter dated 13 November 2006 and shall place the same before the Board as your submission for the hearing on 22 November 2006.'

This letter, but not the letter of Messrs A dated 13 November 2006, was copied to the couple, the Commissioner and the Department of Justice.

14. Messrs A wrote again to the Clerk by letter dated 16 November 2006 in these terms (*written exactly as in the original*):

'Dear Sir,

[THE WIFE] (SOLE APPLICANT)

APPEAL TO THE BOARD OF REVIEW - D45/06

PRPERTY TAX ASSESSMENTS 2001/02 TO 2003/04

We refer to your letter of 15 November 2006.

2. Even though we will not attend the hearing scheduled on 22 November 2006, as the Tax Representatives of the Applicant, we shall be grateful if you would advise us on the laws and procedures as requested in paragraph 18 of our letter dated 13 November 2006, of regulating that hearing and in particular:-

a. the onus of proof;

b. whether such hearing will be heard in camera;

c. inquiry powers;

d. power to summon person to attend;

e. order for costs; and

f. how and where the decision will be reported.

3. We look forward to receiving your immediate reply.

Yours truly,'

Messrs A did not copy their letter to the Commissioner or the Department of Justice.

15. Under cover of her letter dated 17 November 2006, Ms Winnie W Y Ho sent a copy of her submission for the hearing on 22 November 2006 to the Clerk. She copied her letter and her submission to the Commissioner and Messrs A.

16. Messrs A wrote to the Clerk by letter dated 20 November 2006 in these terms (*written exactly as in the original*):

'[THE WIFE] (SOLE APPLICANT)

APPEAL TO THE BAORD OF REVIEW - D45/06

PROPERTY TAX ASSESSMENTS 2001/02 TO 2003/04

Further to our letter of 16 November 2006, we have received a copy of letter of the Department of Justice ['DoJ'] dated 17 November 2006 enclosing a written submission to you.

We take this opportunity to bring out the correct interpretation of law on records in the following paragraphs.

A. The Senior Government Counsel has correctly pointed in paragraph 9 of her submission that there are no statutory provisions prescribing rules and procedures for a case stated application except s69 of the Inland Revenue Ordinance ['IRO']. This accords with our submission.

B. Paragraph 8 of her submission has also correctly stated that s69 provides 'the Court of First Instance ['the Court'] may cause a stated case to be sent back to the Board for amendment". This is in light of s69(4).

C. When the word "apply" used in law, it must refer to a statutory or written rule which usually prescribes the timing and procedure to be observed. Thus, when Sir Alan Huggins V-P said in the case of *Chinachem Investment Co. Ltd v. Commissioner of Inland Revenue [' CIR']* , CA No. 116/1986 that "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". This is again in light of s69(4).

D. s69(4) is stipulated after s69(3). It follows that once the Board has made the decision in the case stated under s69(2), the only method to amend the case stated is by way of application before the Court of First Instance under s69(4).

E. However, while it is at the stage before the stated case was signed and submitted to the Court, the only way if the Applicant wishes to do so, is to persuade the Board to amend the case but should not, as a matter of law, be applied to the Board for amendment. There is no such a law to support that kind of application.

F. We note that the Senior Government Counsel in paragraph 13 of her submission refers to the case of CIR v Inland Revenue Board of Review & anor [1989] 2 HKC 66 what Fuad VP said:

"…if they find it convenient in a particular case to do so."

G. The word "they" is not only referring to the Board but should also refer to the Applicant. That is to say when both the Board and the Applicant find it convenient. In this case, the Applicant does not find it convenient to do so.

H. Also "a particular case" means neither a global application nor in every single case.

I. It follows that her conclusion is totally out of feet and incorrect and is denied by the Applicant. CIR should not be a party in the process of the Case Stated.

Again, your prompt reply to our letter dated 16 November 2006 is appreciated.

Yours truly,'

Messrs A did not copy their letter to the Commissioner or the Department of Justice.

The issue for our decision and ruling

17. As stated in the Clerk's letters dated 3 November 2006 and 8 November 2006, the issue for our consideration at the hearing on 22 November 2006 is whether the Commissioner should be excluded from the process of the application for a case stated.

The hearing

18. The issue arises from the contention by Messrs A that the Commissioner should have no role to play. For reasons which will appear below, this is a novel contention. A contention is none the worse simply because it is novel. The purpose of convening a hearing is to give both parties to the appeal, that is, the taxpayer and the revenue, an opportunity to be heard and a chance to make oral submissions. Whether a taxpayer or the revenue wishes to avail herself of the opportunity is a matter for her and her advisers.

19. While others argue that the right to be heard carries with it the right to be heard orally, see for example Ng Nga Wo v Director of Health, unreported, HCAL16 of 2006, Chu J, 16 May 2006, Messrs A challenged the Board's decision to have a hearing.

20. The Board's practice of holding post-decision hearings as the Board sees fit in dealing with an application to state a case is a long standing one. It was referred to without disapproval in the Aspiration case, leading authority on the law and practice in respect of appeals by way of case stated from the Board. In Aspiration, the appeal was heard by the Board under the chairmanship of Mr Henry Litton QC (as he then was, now a non-permanent judge of the Court of Final Appeal). The Board allowed the appeal and annulled the assessment. The Commissioner applied to the Board to state a case. The Board held a hearing at the Board's request 'for the purpose of giving the Commissioner an opportunity of satisfying [the Board] that there is a question of law for the opinion of the High Court in this proposed appeal'. In Commissioner of Inland Revenue v Inland Revenue Board of Review and another [1989] 2 HKC 66, the post-decision hearing was recited by the Court of Appeal (at pages 67 – 68) without disapproval:

> *'The taxpayer gave notice of appeal on 23 August 1984 to the Board of Review constituted under s 65 of the Ordinance, in the manner, and within the time provided by s 66. There was a hearing before the Board of Review under the chairmanship of Mr Henry Litton QC on six days in July 1987. On 11 August 1987 the Board delivered its decision in writing. This was a fully reasoned decision running to some 30 pages, set out in 71 paragraphs. The Board allowed the appeal and annulled the assessment, in the exercise of its jurisdiction under s 68(8)(a) of the Ordinance.*
>
> *On 9 September 1987 the Commissioner made an application in writing requiring the Board to state a case, under the proviso to s 69(1) of the Ordinance. On 14 September 1987, the clerk to the Board of Review wrote to the Commissioner saying that he had been instructed by the Chairman of the*

Board to require him to prepare a draft of the case stated and to have the same agreed by the solicitors acting for the taxpayer so that it could be submitted to the Board for signature. For reasons into which it is not now necessary to go, problems arose about the content of the case stated and there was considerable correspondence between the parties. Eventually, on 18 April 1988 there was another meeting of the Board, constituted as it had been at the original hearing, which was held at the Board's request 'for the purpose of giving the Commissioner an opportunity of satisfying us that there is a question of law for the opinion of the High Court in this proposed appeal'. This passage comes from an 18-page written 'Ruling' prepared by the Board and dated 18 May 1988. In that document the Board referred to the problems that had arisen and to all the correspondence and gave a full explanation as to why it declined to state a case.'

Our Decision and Ruling

21. Section 69 of the Inland Revenue Ordinance, Chapter 112, provides that:

'(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 the amount specified in Part II of Schedule 5, 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. (Amended 49 of 1956 s. 50; 11 of 1985 s. 6; 4 of 1989 s. 4; 56 of 1993 s. 28; 12 of 2004 s. 15)

(1A) The Secretary for Financial Services and the Treasury may by order amend the amount specified in Part II of Schedule 5. (Added 12 of 2004 s. 15)

(2) The stated case shall set forth the facts and the decision of the Board, and the party requiring it shall transmit the case, when stated and signed, to the Court of First Instance within 14 days after receiving the same.

(3) At or before the time when he transmits the stated case to the Court of First Instance, the party requiring it shall send to the other party notice in writing of the fact that the case has been stated on his application and shall supply him with a copy of the stated case.

(4) Any judge of the Court of First Instance may cause a stated case to be sent back for amendment and thereupon the case shall be amended accordingly.

(5) Any judge of the Court of First Instance shall hear and determine any question of law arising on the stated case and may in accordance with the decision of the court upon such question confirm, reduce, increase or annul the assessment determined by the Board, or may remit the case to the Board with the opinion of the court thereon. Where a case is so remitted by the court, the Board shall revise the assessment as the opinion of the court may require.

(6) In any proceedings before the Court of First Instance under this section, the court may make such order in regard to costs in the Court of First Instance and in regard to the sum paid under subsection (1) as to the court may seem fit.

(7) Appeals from decisions of the Court of First Instance under this section shall be governed by the provisions of the High Court Ordinance (Cap 4), the Rules of the High Court (Cap 4 sub. leg. A), and the Orders and Rules governing appeals to the Court of Final Appeal. (Amended 92 of 1975 s. 58; 79 of 1995 s. 50)

(8) (Repealed 12 of 2004 s. 15)
(Amended 92 of 1975 s. 59; 25 of 1998 s. 2)'

22. The Aspiration case is authority for the proposition that an applicant for a case stated must identify a question of law which is proper for the then High Court, now Court of First Instance, to consider; the Board of Review is under a statutory duty to state a case in respect of that question of law; the Board has a power to scrutinise the question of law to ensure that it is one which is proper for the court to consider; and if the Board is of the view that the point of law is not proper, it may decline to state a case; per Barnett J in Commissioner of Inland Revenue v Inland Revenue Board of Review and another, [1989] 2 HKLR 40 at page 57 H - J {also reported in (1988) 2 HKTC 575}. See also Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Ltd (1989) 3 HKTC 223 and Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409 at page 417 I {also reported in (1990) 3 HKTC 395}.

23. There is a long line of cases applying the principles stated by Barnett J in the Aspiration case.

24. The letter dated 17 October 2006 from Messrs A did not identify any question of law, not to mention one which is proper for the Court of First Instance to consider. The Clerk's letter dated 18 October 2006 offered Messrs A an opportunity to identify the question or questions of law and to make submissions on why it is proper for the Court of First Instance to consider such question or questions. Whether Messrs A wish to avail themselves of the opportunity to make submissions is a matter for them. We have not reached the stage of the properness of the questions.

25. In processing an application to state a case, two questions arise. The first is who should prepare the first draft, assuming that there is a question of law which is proper for the Court of First Instance to consider. The second is the involvement, if any, on the part of the other party to the tax appeal to the Board.

26. The second issue is the issue before us.

27. The Attorney General v Leung Chi-kin [1974] HKLR 269 was an appeal from a magistrate by way of case stated. In the Full Court, Huggins J (as he then was) took the opportunity to remind magistrates and practitioners of what is required and to express the hope that what they said would be reported for future reference (at pages 271 – 272):

> *'Where it is appropriate the procedure of case stated is, when properly followed, the most satisfactory form of appeal there is, because it enables the appellate court to apply itself to the questions of law upon which its opinion is asked without being encumbered with irrelevant matter. Unfortunately there has over the years in Hong Kong been far too many cases in which this Court has had to complain of a lack of care in stating cases. In 1971 I had occasion to make such a complaint, saying that I hoped it would be the last time that it would be necessary to set out the principles relating to this subject. Those observations were not reported. We therefore take the opportunity to remind magistrates and practitioners of what is required and to express the hope that what we say will be reported for future reference.*
>
> *In the first place it must be remembered that although s.105 of the Magistrates Ordinance provides for an application to the magistrate to state and sign a case responsibility for the form in which the case comes before this Court rests ultimately upon the parties and their advisers, because under s.112 they can apply for an order of mandamus requiring the magistrate to amend a case stated so as to rectify any errors or deficiencies, whereupon the magistrate has an opportunity to explain his refusal to comply with a request to amend. For*

> *this reason, although it cannot be insisted upon, the better practice is that the magistrate should invite the parties to draft the case and submit it to him for consideration: see Cowlishaw v. Chalkley 1955 1 All E.R. 367. That is not to say that the magistrate is bound by an agreement of the parties and the Court will usually accept a statement of the magistrate where there is a contest as to what took place in the court below: May v. Beeley 1910 2 K.B. 722. However, apart from that ' if parties do agree a case it is rather a strong thing for justices not to adopt it' : per Lord Goddard, C.J. in Becker v. Purchase (1950) 66 T.L.R. (Part II) 788, 790. In particular it is for the appellant to decide what questions he wishes to raise upon the appeal and the only justification for altering draft questions presented by an appellant would be that they were not clear, that they misrepresented the magistrate's decision or (as here) that they included questions which the Court ought not to be asked to answer. Even if the magistrate drafts the Case himself it should be submitted to both parties for comment before it is signed, as this may avoid the necessity of an application for amendment: Cowlishaw v. Chalkley.'*

The Full Court clearly thought that the better course was for **both** parties, that is, the prosecution and the accused, to be involved in the drafting process.

28. In Chinachem Investment Co. Ltd v Commissioner of Inland Revenue, 2 HKTC 261, Macdougall J in the High Court concluded his judgment by saying that Leung Chi-kin contains helpful procedural guidance some of which is equally applicable to cases stated by the Board of Review (at page 303):

> *'I think it would be helpful if in future cases the Board adopted the procedures outlined in volume 34 of Atkins Court Forms 2nd edition at paragraphs 42 to 44 and forms 9 to 11 at pages 180 to 186 insofar as they are relevant to Hong Kong, and to para. A3.707 of Simons Taxes. The decision of the Full Court in The Attorney General v Leung Chi-kin [1974] HKLR 269, although it relates to cases stated under the Magistrates Ordinance, also contains helpful procedural guidance, some of which is equally applicable to cases stated by the Board of Review.'*

29. On appeal to the Court of Appeal, the Chinachem Investment case came before Sir Alan Huggins VP, Fuad and Clough JJA. The leading judgment was given by Sir Alan Huggins VP and this is what he said about the form of the case stated and the procedure for settling it (at pages. 303 – 304):

> *'There was much discussion before us and before the judge as to the form of the Case Stated and the procedure for settling it. It has never ceased to amaze me how much argument this simple and straight forward process engenders. A*

> *properly drafted Case Stated in the most satisfactory process of all for deciding a question of law, for it concentrates attention on the essentials of the case, but it does require those concerned to marshall and state with precision the issues, the facts (and, where necessary, the evidence), the arguments and, finally, the conclusions [attacked]. Criticism was directed at the Board of Review for failing to produce an acceptable case. In my view that criticism was almost entirely misdirected. 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.'*

In our view, when Sir Alan Huggins referred to 'the parties', he meant **both** parties to the tax appeal. This is the understanding of the legal profession and the courts (see the paragraph below). Moreover, if the learned judge had intended the process to be an *ex parte* one, he would have said so expressly.

30. In the Aspiration case, the Court of Appeal discussed remarks made by Sir Alan Huggins VP in the Chinachem Investment case after inviting submission on whether the Court should re-consider the practice of the parties agreeing the contents of the case stated. At pages 68, 69 and 70, Fuad VP said:

> *'The judicial review hearing came before Barnett, J. on 12th and 13th December 1988 and he gave a reserved decision on 23rd December refusing the relief sought. On 6th March 1989, the Commissioner filed Notice of Appeal against Barnett, J' s decision to this Court.*
>
> *Happily, before the appeal was fully opened before us, as between the Commissioner and the Board, a compromise was reached. The appeal was withdrawn on terms, and thereupon dismissed by consent.*
>
> *The purpose of this judgment is to discuss one matter which arose as a result of observations we made at the beginning of the hearing because we were aware of certain criticism that had been expressed in legal circles about remarks made by Sir Alan Huggins VP in Chinachem Investment Co. Ltd. v. Commissioner of Inland Revenue, (CA 116/86, 3 April 1987 unreported). Clough, J. A. and I*

were also members of the Court. This is what Sir Alan Huggins said at pp.1 and 2 of the transcript:

> *"There was much discussion before us and before the judge as to the form of the Case Stated and the procedure for settling it. It has never ceased to amaze me how much argument this simple and straightforward process engenders. A properly drafted Case Stated is the most satisfactory process of all for deciding a question of law, for it concentrates attention on the essentials of the case, but it does require those concerned to marshall and state with precision the issues, the facts (and, where necessary, the evidence), the arguments and, finally, the conclusions attacked. Criticism was directed at the Board of Review for failing to produce an acceptable case. In my view that criticism was almost entirely misdirected. 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. As I have often said before there may be cases where it is impossible adequately to state the Case without annexing one or more documents, but such cases are few and far between. The documents may even include a transcript of evidence, but that is to be avoided if possible, because such a transcript inevitably contains unessential matter which it is the object of the process to exclude. Thus, where the issue on appeal is whether there was any evidence to support a finding of fact, a transcript of all the evidence may be a necessary annexure, but a transcript is not to be annexed where what is required is a statement of the facts found or assumed or where with proper diligence a precis of the material evidence can be included in the Case Stated itself. I appreciate that in the present case it is urged that the facts should have been found and not assumed, but that is a different matter (which I shall deal with in an appropriate part of the judgment) involving a criticism of the Board's Determination and not of the Case Stated.*
>
> *The Case as ultimately stated included no less than 513 pages, amongst which were the Commissioner's Determination and copies of some law*

> *reports. On any view those were not documents which it was proper to annex. In the event, as was to be anticipated, only about a score of the pages of exhibits were even referred to on the appeal."*

We raised the matter because we were concerned lest the practice suggested by Sir Alan Huggins, and adopted here, had contributed in any way to the difficulties encountered by the parties in agreeing the contents of the case stated, and to the very long delay that had ensued since the Board had made its decision in August 1987. We invited submissions as to whether this Court should re-consider the matter and perhaps direct that the English practice be followed in future. Mr. Gardiner, Q.C. of the English Bar, confirmed that the following paragraph of Atkin's Court Forms (Vol. 34, 1988 issue) at p.125 correctly sets out the current English practice:

> *"**42. Drafting the case** It is almost invariable practice for the case to be drafted by the Commissioner or their clerk. Before it is signed it is sent to each of the parties in turn to read and to suggest any amendment.*
>
> *In considering amendments, each party should make sure that the facts upon which his contentions rely are clearly set out as findings. Each party should review the evidence given, to ascertain the extent to which it was accepted by the Commissioners and to discover any omissions, and make sure the contentions have been fully and properly expressed, both as to fact and law.*
>
> *To avoid delay, the draft case is usually sent only once to each party (first to the winner before the tribunal) and a time limit of four to eight weeks is usually imposed for its return.*
>
> *The Commissioners need not accept any suggested amendment as they are solely responsible for stating the case."*

Mr. Denis Chang QC, who appeared for the Board, assured us that the practice adopted in the instant case (as we have seen, of inviting the Commissioner to prepare a draft of the case stated for it to be, agreed by the solicitors for the taxpayer for submission to the Board) was entirely satisfactory and that so far as the Board of Review were concerned they did not seek any re-consideration by this Court of the practice approved by Sir Alan Huggins in the Chinachem case. The resources at the disposal of the Board would not permit them invariably to prepare the first draft.

> *However, we were asked to emphasize, as Sir Alan Huggins had pointed out, that the final responsibility for stating the case is that of the Board which is not bound by any draft submitted to it. This we do, and at the same time we express the view that the Board must be free to draft the case stated themselves before sending it to the parties for comment if they find it convenient in a particular case to do so.'*

The practice of asking both parties to the tax appeal to agree the case stated was clearly approved by the Court of Appeal. The practice is to involve both parties to the tax appeal in the drafting and settling of the case stated. Fuad VP emphasised that 'the Board must be free to draft the case stated themselves ... if they find it convenient in a particular case to do so'. The convenience is the convenience of the Board in relation to the question of who should prepare the first draft, not the convenience of one of the parties in relation to the question whether both parties should be involved in the drafting and settling of the case stated.

31. Messrs A alleged that in the Edward Chow Kwong Fai case, 'neither the CIR nor Department of Justice ('DoJ') was invited to join the proceedings on case stated' and contended that 'the Edward Chow Kwong Fai case shall be the correct approach to follow'. HCAL 47/2004, now reported in [2004] 2 HKLRD 963, is a judicial review case before the Court of First Instance, not a tax appeal. Whether the Commissioner was a party in the judicial review proceedings is a matter for the Court and has nothing to do with whether the Commissioner should be involved in the drafting and settling of the case stated. In view of the contention by Messrs A that 'the Edward Chow Kwong Fai case shall be the correct approach to follow', we took the exceptional course of consulting the Board's decision in that case declining to state a case. Both the taxpayer and the Commissioner were fully involved and made submissions to the Board on the taxpayer's application to state a case in that case. That is the correct approach according to Messrs A.

32. The Board's practice of involving both parties to the tax appeal in the drafting and settling of the case stated is a long standing one, sanctioned and approved at least twice by the Court of Appeal. We reject the contention by Messrs A that the Commissioner had no role to play.

33. As a result of the insistence by Messrs A that the Commissioner should play no part, none of their submissions had been copied to the Commissioner or her solicitors. Ms Winnie W Y Ho was greatly handicapped and prejudiced in that she had to make submissions without knowing what she was responding to.

34. The letter from Messrs A dated 16 November 2006 can be dealt with briefly. It is not the Board's function to give advices to Messrs A. If they had considered any point of relevance and concern, they had the opportunity (which they chose to decline) of making oral submissions at the hearing on 22 November 2006.

35. The Clerk's directions by letter dated 18 October 2006 is in line with practice and, more importantly, in line with authority. There is continuing default in complying with our direction that the questions of law, together with any submission which the wife might wish to make on the properness of the questions, should be served on the Commissioner. We do not intend to indulge Messrs A by forwarding their communications to the Commissioner when they chose to ignore our directions. Our directions are to be complied with.

36. We extend the time for compliance with those directions to 10 days after the date of this Decision and Ruling. Meanwhile, we will not process the application to state a case. In the event of continuing or further non-compliance with our directions, we will consider whether the application to state a case should be refused, whether on such grounds or otherwise.