

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D79/04

Profits tax – *locus standi* of a bankrupt taxpayer in pursuing an appeal – jurisdiction of the Board in dismissing the appeal for lack of *locus* – sections 66, 67, 68(2), 68(2B)(c) and 82A of the Inland Revenue Ordinance (‘IRO’) – sections 12(1), 34(3A), 58(1) and 61(b) of the Bankruptcy Ordinance – section 19 of the Interpretation of General Clauses Ordinance.

Panel: Anthony Chan Kin Keung SC (chairman), Winnie Kong Lai Wan and David Li Ka Fai.

Dates of hearing: 9 August and 28 October 2004.

Date of decision: 2 February 2005.

The taxpayer is the sole proprietor of a company. The Revenue assessed and estimated the profits of the business of the taxpayer. The taxpayer objected to the assessment. A determination was issued by the Commissioner. The taxpayer’s notice of appeal against the determination was received by the Board after the taxpayer was adjudged bankrupt.

This appeal raised two important issues, namely, (i) the *locus standi* of a bankrupt person in pursuing an appeal against a tax determination and (ii) whether and how the Board can deal with a challenge by the Revenue as to the competence of such a taxpayer in pursuing his appeal.

Held:

1. Being an undischarged bankrupt, the taxpayer did not have any *locus* in pursuing this appeal. The right to appeal against the determination was, upon his bankruptcy, vested in the Official Receiver (‘OR’). As there was no suggestion that the taxpayer was assessed to any penalty tax, coupled with a confirmation from the Commissioner that no penalty tax under section 82A of the IRO would be imposed on the taxpayer, the taxpayer did not have a ‘personal interest’ in the appeal in that he was ‘potentially subject to penalties or criminal sanctions’ in connection with the matters under appeal.
2. By the operation of law, the taxpayer’s estate was vested with the OR and the estate included the right to appeal under section 66 of the IRO. However, there is no provision in the IRO relating to the power of the Board to deal with an invalidly constituted appeal. The Board is a creature of the IRO and there is no question of

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any inherent jurisdiction. On the other hand, common sense dictates that an invalidly constituted appeal can simply be ignored by the Board.

Per Curiam

1. If the Board was required to decide whether or not the matter could be transferred to the Court of First Instance pursuant to section 67 of the IRO, it would hold that such a procedure is not a viable option. The reason being that the consent of the taxpayer was needed for the same and, given that the taxpayer had no *locus* in these matters, it was not within his gift to give the necessary consent.
2. The Board was confronted with a situation where the relevant legislation and subsidiary legislation did not contain any specific provision on the effect of bankruptcy on the progress of an appeal. It is of course a matter for the legislature whether there is any need to broaden the power of this Board to deal with, for example, abuse of process.

Appeal dismissed.

Cases referred to:

Koh Kee Suan v Ip Kay Lo [2001] 3 HKLRD 439
Choi Sze Fai v Pretty Full Development Ltd & Ors, unrep., HCA 10132/98
Chung Kau v The HK Housing Authority & Ors, unrep., CACV 122/03
Ahajot v Waller SpC 395, [2004] STC (SCD) 151

Paul Leung Counsel instructed by Department of Justice for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This appeal raises two important issues, namely, (i) the *locus standi* of a bankrupt person in pursuing an appeal against a tax determination made by the Commissioner of Inland Revenue ('CIR') against him and (ii) whether and how this Board can deal with a challenge by the Inland Revenue ('IR') as to the competence of such a taxpayer in pursuing his appeal.

Material facts

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2. We are not required to and we do not make any factual findings for purposes of this decision. However, this decision is made against a factual backdrop, which we summarize in this section.

3. At all material times, the Taxpayer was the proprietor of a metal trading company ('the Business'). The IR commenced an investigation on the Taxpayer's tax affairs in late 1995. The investigation revealed that besides running the Business, the Taxpayer had also received interest from lending money to some third parties. It was the IR's position that the Taxpayer did not keep proper records in respect of the Business. Between March 1996 and March 2003, the IR assessed the interest earned by the Taxpayer to tax and estimated the profits of the Business for the years of assessment 1989/90 to 1994/95 by means of assets betterment statement. The Taxpayer objected to the assessments. By a Determination issued on 31 July 2003 ('the Determination'), the Deputy CIR confirmed the assessments, subject to minor adjustments.

4. At the meantime, the Taxpayer was adjudged bankrupt on 7 February 2002. His notice of appeal against the Determination was received by this Board on 28 March 2004 (there was no issue taken before us as to the timing of the notice of appeal).

5. At the hearing before us on the 9 August 2004, Mr Raymond Tam, Senior Government Counsel, who appeared for the IR took a preliminary issue in respect of the *locus standi* of the Taxpayer in pursuing this appeal by reason of his bankruptcy. Correspondences from the Official Receiver ('OR'), which were undisputed, were put before us showing that there was no consent from OR that the Taxpayer should appear and conduct this appeal on behalf of his estate. Further, the OR suggested that even if the tax in question were reduced significantly, the Taxpayer 'still might not be able to settle his debts and bring in credits to the estate of his bankruptcy for the general benefit of creditors'.

6. Naturally, being unrepresented, the Taxpayer was unable to make any relevant submission before us on the legal issue raised by the IR. However, he voiced his grievance on the very lengthy investigation carried out by the IR and the financial burden on him in dealing with the same which led to his bankruptcy and the catastrophic consequences that followed. Further correspondences emanating from the OR, again not disputed, were adduced by the Taxpayer showing that the OR wanted to be put in funds for purposes of any costs which might be incurred in respect of this appeal before giving any consent to the Taxpayer in pursuing the same.

7. It befell upon this Board to carefully scrutinize the submissions advanced by Mr Tam. In short, whilst it appeared to us that there were, *prima facie*, merits in Mr Tam's application, we were concerned whether this Board had the power to dismiss this appeal summarily. Mr Tam was unable to persuade us that such power existed and eventually this appeal was adjourned *sine die* with liberty to restore so that the IR would consider whether to transfer the same to the Court of First Instance pursuant to Section 67 of the Inland Revenue Ordinance, Chapter 112 ('IRO').

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There could be no doubt that the High Court had all the necessary power to deal with any interlocutory matters.

8. This appeal was resumed on the 28 October 2004 and the IR had the benefit of representation by Mr Paul Leung, Counsel, who came before us very fully prepared on the interesting issues which we have to decide. On that day, the position of the OR remained unchanged. The OR had not been put in funds as required.

Locus Standi

9. We have no difficulty in accepting Mr Leung's submissions that the rights of an undischarged bankrupt were governed by the Bankruptcy Ordinance, Chapter 6 ('Cap 6'). The relevant provisions of Cap 6 were as follows:

Section 12(1)

'On the making of a bankruptcy order the Official Receiver shall be thereby constituted receiver of the property of the bankrupt, and thereafter, except as directed by this Ordinance, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, nor shall proceed with or commence any action or other legal proceedings, unless with leave of the court and on such terms as the court may impose.'

Section 58(1)

'Until a trustee is appointed the Official Receiver shall be the trustee for the purposes of this Ordinance, and immediately on a debtor being adjudged bankrupt the property of the bankrupt shall vest in the trustee.'

Section 61(b)

'The trustee may, with the permission of the creditors' committee, do all or any of the following things – ... bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt.'

10. Upon a person being adjudged bankrupt, the OR became the receiver of his property. Thus the bankrupt would be divested of and ceased to have any interest in either his assets or liabilities.

11. In Koh Kee Suan v Ip Kay Lo [2001] 3 HKLRD 439, the Court of Appeal had to deal with the rights of appeal of a bankrupt and observed, at page 441D, that:

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‘As explained by Hoffmann LJ in the case of Heath v Tang ..., in the same way as the bankrupt is not able to pursue an action to recover a debt or damages for the benefit of his estate he would not be entitled to appeal against an order which was enforceable only against his estate.

That decision was cited with approval by the High Court of Australia in the case of Cummings v Claremont Petroleum NL (1996) 185 CLR 124. As was pointed out by Dawson and Toohey JJ in that case, ..., if the appeal succeeds, nothing will come into the hands of the trustee which can be applied in the administration of the bankruptcy. Of course, the success of an appeal would mean that a substantial judgment would cease to be a debt provable in the bankruptcy. As far as this case is concerned that would mean that a greater dividend would be payable to the remaining creditors than would otherwise be the case. But this still does not affect the fact that the judgment under appeal is a monetary judgment and, being a liability, the interest in that judgment belongs to the creditors.’

The Court of Appeal went on to hold that any right of appeal in that action was vested as part of the bankrupt’s estate in the OR as trustee for the creditors.

12. The position was clear. All rights of action concerning the property comprised in a bankrupt’s estate passed on bankruptcy onto the trustee. If the bankrupt alone brought an action upon such a right, it might be dismissed as frivolous or vexatious – see Choi Sze Fai v Pretty Full Development Ltd & Ors, unrep, HCA 10132/98 at paragraph 3.

13. This position was subject to one qualification. A bankrupt retained the right, without any interference from the OR as trustee in bankruptcy, to bring or continue any proceedings (including appeal) relating to claims which were personal to him. ‘Personal’ claims meant claims which related to the bankrupt’s body, mind or character without immediate reference to his rights of property. Such claims therefore included claims for damages for personal injuries and defamation – see Chung Kau v The HK Housing Authority & Ors, unrep, CACV 122/03, paragraphs 7-9.

14. Mr Leung had, very fairly, also drawn our attention to a recent Special Commissioner’s decision of the UK – Ahajot v Waller SpC 395, [2004] STC (SCD) 151. In that case, like here, the tribunal had to decide whether, by operation of the law of bankruptcy, the taxpayer no longer had any right to pursue his appeals. One of the arguments made on behalf of the taxpayer was of particular interest. It was argued that the taxpayer had a ‘personal interest’ in the appeals in that he was ‘potentially subject to penalties or criminal sanctions’ in connection with the matters under appeal. That argument was rejected for two reasons, namely, (i) there was no penalty assessed on the taxpayer and the issue was therefore hypothetical and (ii) under the revenue

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statute of UK, such penalties would be provable in bankruptcy with the consequence that the taxpayer was released from any such debts by the discharge of his bankruptcy [paragraphs 32-34].

15. Mr Leung reminded us that in Hong Kong a debt owed to the Government in respect of a fine or monetary penalty imposed under an ordinance was NOT provable in bankruptcy – section 34(3A) of Cap 6. In the premises, the second of the two reasons set out above was inapplicable.

16. However, we are of the view that the first of the said reasons (there was no suggestion that the Taxpayer was assessed to any penalty tax) coupled with a confirmation from the CIR dated 30 July 2004 that no penalty tax under section 82A of the IRO would be imposed on the Taxpayer is sufficient to dispose of any suggestion that the Taxpayer had a personal interest in this appeal.

17. For the reasons which have been set out above, we have no doubt that, being an undischarged bankrupt, the Taxpayer did not have any *locus* in pursuing this appeal. The right to appeal against the Determination was, upon his bankruptcy, vested in the OR who, understandably, had decided not to take these matters any further.

Dismissal of the appeal

18. Can this Board dismiss this appeal for lack of *locus* on the part of the Taxpayer? The answer turns upon an examination of the jurisdiction of this Board.

19. It was accepted by Mr Leung that the IRO provided no express provision whereby this Board could dispose of this appeal summarily on the ground of lack of *locus standi*. However, Mr Leung argued that we did have the power to dismiss this appeal via three routes. Firstly, under section 68(2) of the IRO, ‘an appellant shall attend at the meeting of the Board at which the appeal is heard in person or by an authorized representative’. Further, under section 68(2B)(c), ‘if the appellant fails to attend the meeting of the Board either in person or by his authorized representative the Board may ... (c) dismiss the appeal’. It was submitted that since the Taxpayer did not have *locus*, there was neither an appellant (which should be the OR) nor his authorized representative before us and we should exercise our power under section 68(2B)(c) to dismiss this appeal.

20. It was conceded that such an application of sections 68(2) and (2B) involved a liberal interpretation. Mr Leung submitted that such an interpretation would attain the object of the IRO. We were reminded of the provisions of section 19 of the Interpretation of General Clauses Ordinance (Chapter 1) as well as the common law on statutory interpretation.

21. We accept that the ‘appellant’ provided under the said sections must be one who had the legal capacity or right to pursue the appeal in question. By reason of our holding that the Taxpayer had no *locus* in respect of this appeal and the position adopted by the OR in these matters, we are driven to the conclusion that this appeal must be dismissed.

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22. The second route advocated by Mr Leung was that given the lack of *locus* on the part of the Taxpayer, there was no one prosecuting the appeal before us and the appeal must fail. It is not clear to us what statutory underpinning there was for this submission. In any case, on proper analysis, this submission cannot be distinguished from or add anything to the 'first route' and we are not attracted by the same.

23. Thirdly, it was submitted that this appeal was not validly constituted by reason of the fact that the Taxpayer was already adjudged bankrupt on the day the notice of appeal was lodged with this Board.

24. Pursuant to section 66 of the IRO, the right to appeal was vested in 'any person ... who had validly objected to an assessment ...'. There was no issue before us that the Taxpayer had validly objected to the assessments in question and those objections were made prior to his bankruptcy.

25. Who in those circumstances had the right to 'give notice of appeal' under section 66? To hold that the OR had the right to lodge the notice of appeal may appear to ignore the requirement that the appellant must have validly objected to the assessment. On the other hand, for the reasons which have already been set out above, the Taxpayer had lost his *locus* upon his bankruptcy and it seems illogical that he should continue to enjoy the right to appeal under section 66. Further, it would not be satisfactory to require that the Taxpayer should lodge the appeal on behalf of the OR, because there might be problems with his cooperation.

26. We believe that the answer rests with the operation of law that upon bankruptcy the Taxpayer's estate was vested with the OR and the estate included the right to appeal under section 66 and we interpret the section accordingly. However, there remains a problem as to what is in our power to deal with an invalidly constituted appeal. There is no provision in the IRO which caters for this scenario. This Board is a creature of the IRO and there is no question of any inherent jurisdiction. On the other hand, common sense dictates that an invalidly constituted appeal can simply be ignored by this Board.

27. The above analysis demonstrates the inadequacy in the power given to this Board. It is of course a matter for the legislature whether there is any need to broaden the power of this Board to deal with, for example, abuse of process.

28. For completeness, we wish to mention two further points briefly. Firstly, in respect of the possibility of a transfer to the Court of First Instance under section 67 of the IRO, we have been informed by Mr Leung that such a procedure was not a viable option. The reason being that the consent of the Taxpayer was needed for same and, given that the Taxpayer had no *locus* in these matters, it was not within his gift to give the necessary consent. By reason of the view taken by us

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as stated above, it is unnecessary for us to make any ruling on this point. If we were required to do so, we would agree with the submission made by Mr Leung.

29. Secondly, it is of interest to note that, like us, the Special Commissioner in Ahajot (supra) was confronted with a situation where the relevant legislation and subsidiary legislation did not contain any specific provision on the effect of bankruptcy on the progress of an appeal. The appeals before the Special Commissioner were dismissed by reason of, inter alia, the lack of *locus* on the part of the appellant. However, it is not clear from that decision what was the statutory power (assuming that the Special Commissioner did not have any inherent jurisdiction) whereby the Special Commissioner was able to do so.

30. Last but not least, we are grateful to the assistance rendered to us by Mr Leung.

Conclusion

31. In the premises, we dismiss this appeal and confirm the Determination.