Case No. D80/02

Property tax – whether rental income derived from the leasing of car-parking spaces in the common area of a housing estate subject to property tax – should all owners be named – uncertainty over the identities of co-owners – whether owners of non-residential units liable – sections 5(1), 5B(2), 51, 56A, 59(2)(b), 63 and 68(8) of the Inland Revenue Ordinance ('IRO').

Panel: Anthony Ho Yiu Wah (chairman), Jiang Zhaodong and David Lam Tai Wai.

Dates of hearing: 19, 20 March and 9 April 2002.
Date of decision: 7 November 2002.

The Housing Estate is a building complex which contains 1,488 residential units, a podium with commercial units and car-parking spaces as well as Government accommodation areas. The number and numbering of the car parks had changed over the years. From September 1988 onwards, Service Company E, as manager of the Housing Estate, let out certain car-parking spaces located in the estate common areas on monthly and hourly bases and derived rental income therefrom. Car-parking spaces were licensed on monthly and hourly bases. A floating parking arrangement was adopted whereby no specific car-parking space was designated to any monthly and hourly licensee.

In the estate management accounts, the rental income was recorded as 'Other Income of Common Area'. The rental income together with management fees collected from the owners and other income from estate management were used to pay the estate management expenses. In relation to the exact identities of all the owners of the Housing Estate, numerous changes had taken place during the relevant tax period. It was unable to give a collective breakdown of which owner had been an owner for any given period. Under the DMC previous owners are not entitled to share in the accumulated fund.

Rates demand notes were issued for all material years of assessment on the car parks. Property tax returns for the years of assessment 1988/89 to 1993/94 inclusive in respect of rental income derived from the leasing of car-parking spaces situated at the Housing Estate were issued to Mr A, one of the 1,488 residential unit owners, and all other owners of the Housing Estate (collectively 'the Appellant'). A Mr F who described himself as the precedent owner completed the property tax returns. In part A of the returns regarding details of owners, the words 'all owners of [the Housing Estate]' were inserted.

Held:

1. From Mr A's assignment and the Housing Estate's DMC, it is beyond dispute that Mr A is an owner or rather a co-owner of the car-parking spaces in question and therefore section 56A would be applicable. The Board did not accept the contention that for section 56A to apply, there must be an instrument naming all persons who are or were co-owners of the car-parking spaces in question.

2. Any owner, whether he or she owns a residential unit or a commercial unit, should be chargeable to property tax if he or she rents out his or her car park.

3. There must be certainty in taxation and that no person is liable to tax unless he is clearly identified by the law to be taxable. The uncertainty over the identity of owners other than Mr A would not undermine the validity of the assessments nor would it exonerate the liability of Mr A who was clearly and correctly identified in the assessments. The purported hardship of the aforesaid ruling on Mr A would not have any relevance and could not affect the construction of section 56A.

4. The Board is of the view that even if a more liberal or equitable construction of tax statutes is permitted in certain cases so as not to lead to a gravely unjust or absurd result, this is not a case where equity should interfere as Mr A had not demonstrated to the Board's satisfaction that there would be gross unfairness and grave hardship on him as a result of the Board's ruling that section 56A is applicable and he is liable for the property tax assessments raised.

5. In the present case there was no such thing as 'correct' car park numbers since the delineation and numberings of the parking spaces had been changed by the owners a number of times. It was the failure of the Appellant to provide the required information which led to the 'vague' description in the assessment for the year of assessment 1993/94. In any event, when read in the context of the correspondence between the Inland Revenue Department ('IRD') and the Appellant and the assessments of the previous years of assessment, the intent and purpose of this assessment for the year of assessment 1993/94 was clear. The Appellant was charged property tax in respect of the non-government owned car-parking spaces of the Housing Estate. The Appellant had not been prejudiced by this purported 'incorrect' or 'vague' description of the car-parking spaces.

Appeal remitted to the Commissioner for re-assessment.

Cases referred to:

Wing Tai Development Co Limited v CIR (1979) HKTC 1115
Baylis v Gregory (1987) 3 WLR 667
Fleming (HM Inspector of Taxes) v London Produce Co Ltd 44 TC 582
CIR v Chan Tin Chu (1966) 1 HKTC 284
Hochstrasser v Mayes 38 TC 673
Partington v Attorney General (1869) LR 4 HL 100
Cape Brandy Syndicate v IRC [1921] 1 KB 64
Commissioner of Inland Revenue v National Mutual Centre (HK) Ltd [1997] 3 HKC 180
Hong Kong Flour Mills Limited v Commissioner of Inland Revenue [2002] 2 HKLR 121

Nelson Miu Counsel instructed by Department of Justice for the Commissioner of Inland Revenue.
Ho Chi Ming Counsel instructed by Messrs Winston Chu & Co for the taxpayer.

Decision:

Background

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 26 July 2000 that Mr A and all other owners of the Housing Estate (collectively 'the Appellant') should be chargeable to property tax for the years of assessment 1988/89, 1989/90, 1990/91, 1992/93 and 1993/94 in respect of rental income derived from the leasing of car-parking spaces situated at the Housing Estate.

2. The Housing Estate is a building complex erected on XXX, Road B in District C. It contains 1,488 residential units, a podium with commercial units and car-parking spaces as well as Government accommodation areas. Mr A is one of the 1,488 residential unit owners. It was not known why he was chosen to be the owner specifically named in the relevant property tax returns and the subsequent property tax assessments ('the Assessments'). Most probably, he was chosen at random.

3. In the notice of appeal against the Commissioner's determination dated 18 August 2000 and the notice of additional grounds filed in July 2001, the Appellant raised a total of 12 grounds of appeal. A close scrutiny of these grounds of appeal revealed that there were five main issues before us:

(a) Were the Assessments issued by the IRD void for uncertainty in that such Assessments failed to completely or correctly identify the car-parking spaces purported to be charged with property tax?

(b) Were the Assessments issued by the IRD void for uncertainty in that such Assessments failed to identify all the persons proposed to be charged?

(c) Is section 56A of the IRO which provides any one or more joint owners or co-owners shall be answerable for doing all such acts, matters and things as would be required to be done by a sole owner applicable to this case and if so, would point (b) above become entirely irrelevant?

(d) Assuming that section 56A of the IRO does apply in the present case, would there be enormous hardship and grave injustice on Mr A (who was singled out at random) and if so, should we and can we intervene?

(e) Were the Assessments excessive by including income from Government owned car-parking spaces?

The facts

4. The parties have filed a statement of agreed facts particulars of which are set out in paragraphs 5 to 18 below. We find them as facts.

5. By a private treaty grant dated 15 May 1985, the Hong Kong Government agreed to grant a piece of land known as District C inland lot number YYY to Company D for a term of 75 years, renewable for a further 75 years. The grant contains general and special conditions. Special condition number (41) of the grant provides that: 'A maximum of 150 spaces may be provided within the lot in addition to (the 20 Government parking spaces) to be provided under Special Condition No. (9)(a)(iii) hereof, to the satisfaction of the (Director of Lands) for the parking of private motor vehicles belonging to the occupiers of residential accommodation built as part of the Non-Industrial Development only and for no other purpose whatsoever.'

6. The Housing Estate is a development erected on the aforesaid District C inland lot number YYY. According to the building plans approved by the Building Authority, it contains, inter alia, six blocks of residential buildings with 1,488 flats in total and a five-level complex with a number of car-parking spaces at level two. According to the amended car parking layout plan dated 22 March 1988 registered with the Land Registry, there were 45 car-parking spaces distributed at level two as follows:

	Car-parking space number	**Number**
Government car park	4 to 9, 11 to 16 and 25 to 31	19
Residential loading and unloading bay	1 to 3, 10 and 17 to 24	12

Commercial/Retail loading and unloading bay	32 to 44	13
Car park for the disabled	45	1
		45

7. Pursuant to a deed of mutual covenants ('the DMC') dated 26 May 1988 entered into between Company D and the first purchaser of a residential unit, Company D was appointed as the manager to manage and maintain the non-industrial development of the estate.

8. By an agreement also dated 26 May 1988, Service Company E was appointed by Company D with effect from the date of issue of the occupation permit to undertake the management of the non-industrial development of the estate as provided in the DMC and Service Company E has since that date been and still is the manager of the Housing Estate.

9. On divers dates, the 45 car-parking spaces at level two were delineated, re-designated and renumbered. Further, additional car-parking spaces were created.

10. From September 1988 onwards, Service Company E, as manager, let out certain car-parking spaces at the said level two on monthly and hourly bases and derived rental income therefrom.

11. In the estate management accounts, the aforesaid rental income was recorded as 'Other Income of Common Area'.

12. The rental income from the car-parking spaces together with management fees collected from the owners and other income from estate management were used to pay the estate management expenses and as at 31 December 1993, the estate management accounts had an accumulated surplus fund of $1,758,519. Previous owners are not entitled to share in the accumulated fund as under the DMC, it is provided that 'any person ceasing to be an owner shall cease to have any interest in the funds held by the manager'.

13. Property tax returns for the years of assessment 1988/89, 1989/90, 1990/91, 1992/93 and 1993/94 were issued to Mr A and all other owners of XXX, Road B, the Housing Estate in respect of carports 1 to 3, 17 to 24A, 32 to 34A, 42 to 44A, 46 to 53, 55 to 59 and motor cycle parking spaces 1 to 2.

14. A Mr F, who described himself as the precedent owner, completed the aforesaid property tax returns. In part A of the returns regarding details of owners, the words 'all owners of [the Housing Estate]' were inserted. The returns showed the assessable value to be 'Nil'.

15. On divers dates, the assessor, pursuant to section 59(2)(b) of the IRO, raised the following property tax assessments:

Year of assessment	**1988/89**	**1989/90**	**1990/91**	**1992/93**	**1993/94**

	$	$	$	$	$
Net assessable value	38,320	96,000	96,000	560,000	1,464,000
Tax payable thereon	5,939	14,400	14,400	84,000	219,600

16. Objections were lodged against the aforesaid assessments.

17. Car-parking spaces were licensed on monthly and hourly bases. A floating parking arrangement was adopted for both monthly and hourly letting. That is, no specific car-parking space was designated to any monthly and hourly licensee and each car park user could park his car at any car-parking space which was offered for licensing.

18. Rental income received from the letting of car-parking spaces at level two as stipulated in paragraph 10 above was as follows:

Year of assessment	**1989/90**	**1990/91**	**1992/93**	**1993/94**
	$	$	$	$
Monthly letting	266,200	495,200	729,650	964,350
Hourly letting	531,045	764,955	974,054	977,351
Total rental income	797,245	1,260,155	1,703,704	1,941,701
Less: Rates paid	43,658	19,397	36,350	29,187
Net rental income	753,587	1,240,758	1,667,354	1,912,514

19. In addition to the above facts, the following 'facts' were included in the Appellant's opening submission and were not disputed and we find them as facts.

20. Notices of assessment and demand for property tax were issued to '[Mr A] & all Other Owners of [XXX, Road B, the Housing Estate]' in relation to certain numbered carports specified in the notices (which were the same as the car parks described in the rates demand notes (see paragraph 22 below)) for all the relevant years of assessment except 1993/94. In the case of the year of assessment 1993/94, the notice of assessment and demand for property tax was issued to '[Mr A] and Other Owners of the Private Car-parking Spaces in [the Housing Estate] in relation to 'Private Car Parking Spaces in [the Housing Estate]'.

21. Rates demand notes were issued for all material years of assessment on car parks at level two showing the following numbers:

1 to 9
11 to 23
23A, 24, 24A, 25 to 32
32A, 33, 33A, 34, 34A
42 to 44, 44A
46 to 53

55 to 59

Total number of above car parks = 55
Motor cycle number 1 and number 2
It is unknown how these numberings of the car parks came by.

22. The IRD issued property tax demand notes from the years of assessment 1988/89 to 1992/93 on the car parks as described in the rates demands notes except car parks 4 to 9, 11 to 16 and 25 to 31 which were the original numbers of the Government car parks.

Presumably, the IRD issued assessments on the basis of the information of the Rating and Valuation Department.

The IRD assessed 36 car parks and two motor cycle spaces.

Car park numbered	**Number of car parks**
1 to 3	3
17 to 24A	10
32 to 34A	6
42 to 44A	4
46 to 53	8
55 to 59	5
Sub-total	**36**
Motor cycle 1 and 2	**2**
Total	**36 + 2 MCs**

The number of 36 can be reconciled with the number per rates demand as follows:

55 - government car parks 19 = 36

23. The car park for the disabled, originally numbered 45, was assigned to Property Agency E on 16 July 1990 ('Car Park E').

24. As from 1 January 1990, 12 of the Government car parks were licensed by the Government to Service Company E, presumably as agent for the owners of the Housing Estate for monthly and hourly parking. These car parks were numbered 4 to 9 and 11 to 16.

25. Owners of the Housing Estate comprised of:

(a) Owners of residential units

(b) Owners of commercial units

(c) Government

(d) Company D

(e) Property Agency E

Each owner is entitled to a number of undivided shares of the lot and was therefore entitled to the same number of undivided shares in the estate common area.

26. If the private car-parking spaces were part of the estate common area, they would be owned by owners of the following units in the Housing Estate as tenants-in-common:

> 1,488 residential units, commercial units, Company D, the Government and Property Agency E.

The evidence

27. At the hearing before the Board, the Appellant was represented by Counsel, Mr Ho Chi-ming, and the Respondent was represented by Counsel, Mr Nelson Miu. Written statements of Mr G, Ms H and Mr A have been submitted. Mr G and Ms H gave evidence for the Appellant and were cross-examined by the Respondent's Counsel.

28. Mr G is an administrative officer of Service Company E and the appointed manager of the Housing Estate since September 1996. The important parts of the testimony of Mr G can be summarized as follows:

(a) In or about 1996, he took over the management duties from one Mr I, the former estate officer, who had since left employment with Service Company E. His testimony was based on Service Company E's records and information supplied by Mr I.

(b) He gave an explanation of the location, ownership and nature of the car-parking facilities within the Housing Estate comprising of parking spaces on level two and one parking space on level one.

(c) He produced a number of plans showing that there had been changes in the delineation and numberings of the parking spaces since the date of the DMC. He refused to express any view whether the changes in delineation or designation of the parking spaces could only have been carried out by Service

Company E or with the approval of Service Company E on the ground that such changes took place before he joined Service Company E.

(d) Apart from the Government accommodation parking (with 19 parking spaces) and Car Park E, the remaining car-parking spaces were located in estate common areas and therefore enjoyed by all owners of the Housing Estate including the Government, commercial owners, residential owners and Company D (and Property Agency E).

(e) 12 car parks had been licensed from the Government for monthly and hourly parking and income therefrom was included in the income of the common areas in the estate management accounts of the Housing Estate.

(f) Rates demand notes have been issued to car parks numbered 1 to 3, 17 to 24A, 32 to 34A, 42 to 44A, 46 to 53, 55 to 59 and MCs 1 and 2. All rates were paid by auto-pay. No rates demands had been issued and no rates had been paid for car parks numbered 10, 35 to 41, 45 and 54 and he did not know the reason therefor.

(g) It was put to him that a fair and logical way of handling the car park letting would be to collect the licence fees, set aside a portion to pay property tax and pay over the balance to the owners or put into the pool for meeting management expenses. He (that is, Mr G the witness) disagreed and stated that in his view, the manager should simply receive the money and hand over to the owners and it was for the owners to decide how to use the money and to handle tax payments, if required.

(h) Income raised from the car parks was put into the management fee and included in the income and expenditure of the management account. It was just like collecting a management fee to be used as expenditure in estate management. He did not consider it as additional income and never reported to the IRD.

(i) Property tax returns were sent to 'Mr [A] & all Other Owners of [XXX, Road B, the Housing Estate] c/o [Service Company E]'. They were completed by a Mr F as precedent owner. Mr F also completed the 'Details of Owners' section of the returns with the description 'All Owners of [the Housing Estate]' and appointed Services Company E as authorized representative. He (that is, Mr G the witness) did not know why Mr F completed the returns instead of Mr A as the returns were dated 1995 (which was before Mr G became manager of the Housing Estate). (The Appellant's Counsel, however, informed the Board that when the returns were sent to the management office, nobody knew

who Mr A was and so it was signed by Mr F who apparently was an owner well known to the management office. Over a number of years, the management office succeeded in locating Mr A who was and is an owner of a unit in the Housing Estate).

(j) In relation to the exact identities of all the owners of the Housing Estate, numerous changes had taken place during the relevant tax period. He was unable however to give a collective breakdown of which owner had been an owner for any given period because when ownership changes occurred, many did not inform the manager promptly or at all. He opined that it would be an expensive and time consuming process to obtain complete ownership information by conducting land searches against each and every flat in the Housing Estate for all the relevant years of assessment. Even then, he would not be able to ascertain the forwarding addresses of those owners who have sold and moved out.

(k) He has been manager of the Housing Estate for a number of years. Each year he would prepare a budget as well as the estate management account. He would estimate the management expenses and would deduct therefrom the estimated car park rental income and then compute the amount of management fee to be collected from each owner which would result in a small surplus to be brought over to the reserved account for subsequent years and he believed that previous managers were operating in a similar fashion and he did not inherit a deficit account when he assumed management duties in 1996.

29. Ms H is an estate assistant of Service Company E designated to assist in the management of the Housing Estate. Her duties consisted of the handling of the monthly licensing of the car parks of the Housing Estate, collection of the receipts from monthly and hourly parking and other miscellaneous duties. The important parts of the testimony of Ms H can be summarized as follows:

(a) She prepared the standard monthly licences for signature by the monthly licensees and the monthly licence fees were collected by her.

(b) Some car parks were licensed out for monthly parking whereas others were for hourly parking.

(c) The number and numbering of the car parks had changed over the years. She could not recall all the changes that took place.

(d) The Government had licensed 12 car parks to Service Company E for licensing out, these 12 car parks were included in the pool of car parks for

monthly and hourly parking. As to the seven remaining Government car parks, they together with Car Park E (for the disabled) were marked as 'Reserved Car Parks' and would not be available for parking by the licensees.

(e) At all material times, she collected and banked all receipts from monthly and hourly parking of all the car parks at the Housing Estate (which included the 12 car parks licensed from the Government) and prepared schedules of rental income. The schedules of rental income supplied by Service Company E to the IRD were also prepared by her and such income included income from the 12 car parks licensed from the Government.

The law

30. Section 5(1) of the IRO provides that property tax shall be charged on every person being the owner of any land or buildings or land and buildings on its net assessable value. Section 5B(2) further defines assessable value as the consideration in money or money's worth, payable in that year to, or to the order of, or for the benefit of, the owners in respect of the right to use of that land or/and buildings. 'Owners' is defined in section 2 to include, inter alia, 'a beneficial owner'.

31. A taxpayer had a duty under section 51 of the IRO to file (true and accurate) tax returns. Each tax return has a 'Declaration' box in which the taxpayer (or their representative) warrants that 'the information given in this return and in any documents attached is true, correct and complete'.

32. Section 51(5) of the IRO provides that:

'(5) A return, statement, or form purporting to be furnished under this Ordinance by or on behalf of any person shall for all purposes be deemed to have been furnished by that person or by his authority, as the case may be, unless the contrary is proved, and any person signing any such return, statement, or form shall be deemed to be cognizant of all matters therein.'

33. Section 56A of the IRO provides:

'(1) Where 2 or more persons are joint owners or owners in common of any land or buildings or land and buildings, any of those persons appearing from any deed, conveyance, judgment or other instrument in writing registered in the Land Registry under the Land Registration Ordinance (Cap.128) to be such an owner shall be answerable for doing all such acts, matters and things as would be required to be done under the

provisions of this Ordinance by a sole owner. (Amended 56 of 1992 s.20; 8 of 1993 s.2)

(2) Nothing in subsection (1) shall relieve any person of any obligation under this Ordinance or affect any right and obligation of joint owners or owners in common as between themselves.

(3) Where any person pays property tax under subsection (1) and that person is not, apart from that subsection, liable to that tax or part of it, that person may recover from any other person that tax or part of it to which that other person, apart from that subsection, is liable under this Ordinance.'

34. Section 63 of the IRO provides that:

'*No notice, assessment, certificate, or other proceeding purporting to be in accordance with the provisions of this Ordinance shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect, or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Ordinance, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.'*

35. The following authorities were cited to us by the Appellant's Counsel in support of his contention that the IRD bears the initial burden of proof that the properties in question were subject to property tax and that the persons charged were the owners of such properties and thus liable to property tax and that in the present case the mistakes, defects or omissions in the notices of assessment create uncertainties as to which persons were being assessed as well as uncertainties as to what properties were being assessed and that these mistakes, defects or omissions cannot be cured by section 63 of the IRO.

(a) Wing Tai Development Co Limited v CIR (1979) HKTC 1115

(b) Baylis v Gregory (1987) 3 WLR 667

(c) Fleming (HM Inspector of Taxes) v London Produce Co Ltd 44 TC 582

(d) CIR v Chan Tin Chu (1966) 1 HKTC 284

36. In Wing Tai Development Co Limited v CIR (1979) HKTC 1115, Roberts CJ stated (at page 1138):

> '*It is necessary to consider the burdens of proof which arise at different stages of taxation proceedings.*
>
> *The first burden is that which lies upon the revenue to show that payments or receipts of the kind in question fall within the sphere of taxation and are properly exigible.*
>
> *This might perhaps be usefully described as the preliminary burden. If it is not satisfied, no other issues arise.*
>
> *As to this it is useful to cite the following passage from the judgment of Lord Simonds in Hochstrasser v Mayes [38 Tax Cases 673 at 706]:*
>
> *"It is for the Crown, seeking to tax the subject, to prove that the tax is exigible, not for the subject to prove that his case falls within exceptions which are not expressed in the Statute but arbitrarily inferred from it."*'

37. In Baylis v Gregory (1987) 3 WLR 667, it was held that an incorrect assessment issued by the Commissioner for the year 1974-75 rather than 1975-76 was incapable of being corrected under section 114 of the Taxes Management Act 1970 (which is the British equivalent to section 63 of our IRO), and Slade LJ (at page 696) concurred with the general observation made by Megarry J in Fleming v London Produce Co Ltd 44 TC 582 (which judgment primarily concerned the statutory predecessor of section 114) that section 114 does not provide a cure for 'gross' errors.

38. In Fleming v London Produce Co Ltd 44 TC 582, in a judgment primarily concerned with the statutory predecessor of section 114 of the Taxes Management Act 1970, Megarry J states (at page 597):

> '*However apt these provisions might be for minor deviations such as mis-spellings of names, slight inaccuracies in the descriptions of sources of income and the like, they could not, it is said, rescue assessments based on categorical departures in which names or sources of income were wholly misdescribed: and "Agents" could by no feat of forensic dexterity be made to appear as merely a minor variation of "Meat Salesmen".*'
>
> '*I would be slow to accept that (these provisions) provide an impervious cover for gross errors.*'

39. In CIR v Chan Tin Chu (1966) 1 HKTC 284, an assessment was issued by an Assistant Commissioner. Subsequently the IRO was amended removing the power of an Assistant Commissioner not specially authorized by the Commissioner to issue assessment. The said

amendment has retrospective effect. Pickering DJ declared the assessment to be invalid and ruled that section 63 could not cure the defect. Pickering DJ stated (at pages 295 to 296):

> '*Assessments to tax are serious matters. They affect virtually every person assessed and the legislature has very properly circumscribed the class of persons who may make assessments. Once we step outside that class where is the line to be drawn? If it be said that an assistant commissioner not generally or specifically authorized to do so can make a valid assessment, then why not the next senior grade of official? And if this official why not a senior clerk? And if a senior clerk why not a junior clerk? The questions could be pushed to absurdity but nobody would suggest that an assessment made mischievously by the office boy or maliciously by a stranger gaining access to the offices of the Commissioner and to blank forms of assessment could be saved as to its validity by Section 63. I am satisfied that once the line drawn by the legislature in this respect is overstepped, we are dealing with a matter of substance and not of form and in my view Section 63 of the principal Ordinance cannot avail the plaintiff.*'

40. We also find guidance from the following authorities which support the proposition that there is no equity about a tax and if the wording of the tax legislation is clear, a taxpayer is liable notwithstanding that the legislation will cause hardship.

(a) '*If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statue what is called an equitable construction, certainly such a construction is not admissible in a taxing statute.*' Partington v Attorney General (1869) LR 4 HL 100 at 122.

(b) '*It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.*' Cape Brandy Syndicate v IRC [1921] 1 KB 64.

41. In Commissioner of Inland Revenue v National Mutual Centre (HK) Ltd [1997] 3 HKC 180 at 191 and in Hong Kong Flour Mills Limited v Commissioner of Inland Revenue [2002] 2 HKLR 121 at 127, in construing respectively section 16(1)(a) and section 63 of the IRO, the

High Court has invoked assistance of the foregoing dicta respectively of Cape Brandy Syndicate v IRC and Partington v Attorney General.

Analysis of the case

42. In the notice of appeal dated 18 August 2000 and notice of additional grounds filed in July 2001, the Appellant raised a total of 12 grounds of appeal. We will deal with each of these grounds of appeal in the course of our analysis of the case set out below.

43. Ground number 1

This is merely a statement that the owners of the Housing Estate are not liable to property tax for the years of assessment 1988/89, 1989/90, 1990/91, 1991/92, 1992/93 and 1993/94 in respect of the rental income from the private car-parking spaces. We will deal with this at the conclusion of our analysis of the case.

44. Ground numbers 2 and 3

At the hearing before us, the Appellant's Counsel indicated that the Appellant is not pursuing these two grounds and hence we will not deal with these two grounds except to mention that these were the principal grounds of objection raised by the Appellant when the objection was put before the Commissioner for determination.

45. Ground number 4

(a) It is the contention of the Appellant that none of the owners of the Housing Estate is or was identified by any deed, conveyance, judgment or other instrument in writing to be an owner of the private car-parking spaces and therefore section 56A of the IRO would have no application to them.

(b) We do not agree with the aforesaid contention of the Appellant for the following reasons:

(i) Mr A is and has been an owner of a unit of the Housing Estate by virtue of an assignment dated 30 May 1988 registered in the Land Registry by memorial number 1 ('Mr A's Assignment'). The aforesaid unit of the Housing Estate was assigned to Mr A subject to and with the benefit of a deed of mutual covenant dated 26 May 1988 registered in the Land Registry by memorial number 2 ('the Housing Estate's DMC').

(ii) The Housing Estate's DMC sets out the definitions of 'Common Areas', 'Estate Common Areas', and 'Residential Common Areas'

and provides that each of the owners shall have the full and free right (in common with the manager and all other owners) to use the estate common areas.

(iii) From Mr A's Assignment and the Housing Estate's DMC and from the evidence of Mr G that all car-parking spaces at the Housing Estate (with the exception of the 19 Government parking spaces and Car Park E) were located in the estate common areas (see paragraph 28(d) above), it is beyond dispute that Mr A is an owner or rather a co-owner of the car-parking spaces in question and his ownership or co-ownership was identified by virtue of Mr A's Assignment and the Housing Estate's DMC which are written documents registered in the Land Registry and therefore section 56A of the IRO would be applicable. We do not accept the contention of the Appellant's Counsel that for section 56A to apply, there must be an instrument naming all persons who are or were co-owners of the car-parking spaces in question.

46. Ground number 5

(a) It is the contention of the Appellant that the assessments were invalid because the IRD only intended to impose the relevant property tax on residential owners but the relevant notices of assessment were issued to Mr A and all other owners of the Housing Estate and some of these other owners are or were owners of non-residential units.

(b) We do not agree that property tax should only be imposed on residential owners. Any owner, whether he or she owns a residential unit or a commercial unit, should be chargeable to property tax if he or she rents out his or her car park. Hence, we do not accept that this ground of appeal put forward by the Appellant has any merit at all.

47. Ground number 6

(a) It is the contention of the Appellant that the Assessments which are the subject matter of this appeal are void as being issued to the wrong persons or class of persons or issued to a class of taxpayers which is too vague or imprecise to be capable of being identified with certainty.

(b) In support of this ground of appeal, the Appellant's Counsel put forward forcefully a number of arguments:

(i) A large class of persons (over 1,400 persons) is involved whose identities kept changing. There has been numerous transfers of ownership during the material time. It is extremely difficult and time consuming, if not impossible, to trace each and every owner during the material time and the period of ownership of each. It is expected that many of the owners who have sold their units are now untraceable.

(ii) Property tax is a personal liability, it is not a burden which 'touches and concerns' the land. It does not pass from the former owner who is liable to a subsequent owner. It is wrong to go after the present owners for the property in question. But practically, it is impossible to identify all co-owners during the relevant period and to attribute to each of them the amount of tax owed.

(iii) A taxpayer must be precisely identified in a notice of assessment before he can be subject to tax. In the case of ambiguity, the law must rule in favour of the taxpayer.

(iv) If (which is not accepted by the Appellant) section 56A of the IRO permits an assessment of property tax to be issued on say, Mr A, it would be inequitable to require Mr A to pay the full amount of the tax and shift the burden on him to identify his co-owners and to recover the tax due from his co-owners some of whom are now untraceable.

(v) It could not be the intention of the legislature to tax an uncertain class of taxpayers. There must be certainty of the incidence of taxation. The problem of collection highlights the uncertainty of the charge of the assessments in question.

(c) We agree whole-heartedly with the proposition that there must be certainty in taxation and that no person is liable to tax unless he is clearly identified by the law to be taxable. We do not, however, agree with the Appellant's contention that the Assessments are void as being issued to the wrong persons or class of persons or issued to a class of taxpayers which is too vague or imprecise to be capable of being identified with certainty. In this case, Mr A is clearly an owner or rather a co-owner of the car-parking spaces in question and he together with the 1,000 plus co-owners at the material time clearly fell within the ambit of section 56A of the IRO (see paragraph 45(b)(iii) above). Following the principles enunciated in Partington v Attorney General and Cape Brandy Syndicate v IRC (see paragraph 40(a) and (b) above), we can only come to the ruling that the uncertainty over the identity of the other owners (that is, owners other than Mr A) would not undermine the validity of the

Assessments nor would it exonerate the liability of Mr A who was clearly and correctly identified in the Assessments. Furthermore, following the said principles, the purported hardship of the aforesaid ruling on Mr A would not have any relevance and could not affect the construction of section 56A.

(d) Having ruled that the purported hardship on Mr A has no relevance in the present case, it should not have been necessary for us to deal with the various well articulated arguments on the subject urged upon us by the Appellant's Counsel. But in case we were wrong in our construction of section 56A of the IRO and if the Appellant was right in arguing that a more liberal approach should be adopted that would not lead to an unjust or absurd result, we will, in a subsequent section of this decision (see paragraphs 50 to 56 below), address the issue of hardship on Mr A if he is required to pay the full amount of the tax, leaving him with the task of identifying and recovering a due proportion thereof from his co-owners.

48. Ground numbers 7, 8, 9, 10, 11 and 12

(a) It is the contention of the Appellant that the Assessments which are the subject matter of this appeal are void due to incorrect or vague description of the properties in respect of which property tax was charged with some of the car parks never existed, the number of car parks actually let out exceeded those mentioned in the Assessments, and some were car parks solely owned by the Hong Kong Government which was exempted from paying property tax and in the case of the assessment for the year of assessment 1993/94 , the property was simply described as 'Private Car Parking Spaces in [the Housing Estate]' without defining what is meant by the term.

(b) We agree with the Respondent's Counsel that the 'property' certainly existed. The car-parking spaces which gave rise to the rental income sought to be charged to property tax existed at all material times. It was the description or the numberings of the car-parking spaces that might not have been totally accurate. We do not agree that the Assessments which are the subject matter of this appeal were void due to the 'incorrect' or 'vague' description of the properties in question for the following reasons:

(i) In the present case, there was no such thing as 'correct' car park numbers since the delineation and numberings of the parking spaces had been changed by the owners (possibly with the assistance of the estate manager to implement the changes) a number of times.

(ii) The descriptions of the car-parking spaces now complained by the Appellant as being 'incorrect' or 'vague' have appeared in the relevant assessments and correspondence going back to 1995 and it was only in the notice of additional grounds filed in July 2001 that the Appellant sought to rely on this 'incorrect' or 'vague' description as a ground for setting aside the Assessments.

(iii) The Appellant had not been prejudiced by this purported 'incorrect' or 'vague' description of the car-parking spaces as it was well understood by all concerned that the IRD sought to charge property tax in respect of the non-government owned car-parking spaces on level two of the Housing Estate which at one time bore the numbers appearing on the tax returns and the correspondence.

(iv) In the case of the assessment for the year of assessment 1993/94, the property assessed was described as 'Private Car Parking Spaces in [the Housing Estate]', a term which could be construed to mean parking spaces for private cars and therefore includes the Government car parks. From the documents submitted to the Board, we noted the IRD had used this new property description because the owners had notified the IRD on 14 April 1999 of renumbering of the car parks but despite requests by the IRD, failed to provide further information on the particulars of the parking spaces added nor how the new numberings would reconcile with the old numberings. So, it was the failure of the Appellant to provide the required information which led to this 'vague' description in the assessment for the year of assessment 1993/94. In any event, when read in the context of the correspondence between the IRD and the Appellant and the assessments of the previous years of assessment, the intent and purpose of this assessment for the year of assessment 1993/94 was clear, the Appellant was charged property tax in respect of the non-government owned car-parking spaces on level two of the Housing Estate just like previous years of assessment.

49. Ground numbers 12 and 13

(a) It is the contention of the Appellant that the rental income used in the computation of the net assessable values included income from the 12 Government car parks and therefore even if the Assessments are not void, they are excessive.

(b) From the evidence of both Mr G and Ms H (see paragraphs 28(e) and 29(e) above), it is apparent that Service Company E in reporting to the IRD the

income from the car-parking spaces did include income derived from the 12 car-parking spaces licensed from the Government. This over-reporting of income is a ground for seeking a reduction but the Appellant cannot rely on his own mistake or the mistake of his agent to claim that the Assessments were thereby rendered invalid.

(c) Under section 68(8) of the IRO, the Board may reduce the assessment or remit the assessment back to the Commissioner if satisfied that a mistake had been made. The Respondent's Counsel had indicated to us that the Commissioner would not object to reducing the subject assessments on provision of satisfactory evidence that income had been over-reported. In this case, since we do not have the details of the over-reported income nor are we experts in the field of tax computation, remitting the Assessments back to the Commissioner is the more appropriate course of action and is the action which we propose to take.

Hardship on Mr A?

50. The Appellant's Counsel has tried to impress on us the gross unfairness and the grave hardship on Mr A if he were required to pay the full amount of tax. It was suggested that this would leave Mr A with the very difficult (if not impossible) task of identifying and tracing each and every owner during the material times and the period of ownership of each and to identify the amount of tax due by each owner. It was further suggested that probably it was impossible for Mr A to pay the amount of tax in question.

51. We appreciate the efforts made by the Appellant's Counsel to portray Mr A as a helpless individual victimized by the bureaucratic machinery of taxation. But the overall impression we had from the way the Assessments were contested and the appeal was conducted was that it was not a one-man battle between Mr A and the IRD. It was a proxy war, a war fought by the owners of the Housing Estate represented by the owners committee with the able and professional assistance of the estate manager against the IRD and Mr A was really no more than a proxy of the owners.

52. We also note that throughout the years commencing from the date of issue of the property tax returns in 1995 to the hearing of this appeal, Mr A did not find it necessary to adopt self-protection measures from his co-owners. No protest had been made by him to the IRD that some other owners (for example, the chairman and other members of the owners committee) instead of or additional to himself should be named in the relevant tax returns and/or assessments. Instead, Mr A had allowed Mr F to complete and sign the tax returns and handle the subsequent correspondence with the IRD and eventually the appeal proceedings. Although Mr Ho (the Appellant's Counsel) tried to impress on us the financial plight of Mr A who purportedly would be unable to recoup imbursements from his co-owners (some of whom cannot be identified or traced),

Mr Ho did not contemplate that there could be conflict of interests problems and continued to act for Mr A and all other owners of the Housing Estate (some of whom cannot be identified or traced).

53. We are of the view that Mr A's financial plight in this case is imaginary rather than real. We do not believe that it would be necessary for Mr A to go to each of the 1,000 plus owners to ask for reimbursements. In reality, he only needs to go to the owners committee and we do not believe that having fought the proxy war on behalf of the owners and lost, the owners committee would leave Mr A out in the cold to face the consequences all by himself. It was also suggested that the management funds could not be used to settle the property tax because part of the property tax burden should be borne by previous owners who had sold their units in the Housing Estate and it is provided in the DMC that 'any person ceasing to be an owner shall cease to have any interest in the funds held by the manager' (see paragraph 12 above).

54. Whilst we agree that the IRD has no right to attach the management funds if Mr A was unable to satisfy the property tax levied on him, we do not believe that if the owners committee makes a decision to use the management fund to pay the property tax charged, any fair-minded owner would challenge such a decision. It might well be that a small portion of this tax should strictly speaking be borne by previous owners who have ceased to have any interest in the management funds but taking into account the historical background of this case, namely, if the estate manager did not have the misconception that property tax was exempt by virtue of the mutuality rule (one of the original grounds of appeal abandoned by the Appellant's Counsel at the hearing) the property tax would have been paid out of the car park rental for the relevant years of assessment and settled by auto-pay in the same manner as rates were settled (see paragraph 28(f) above). Payment of the property tax out of the management funds now would not be '<u>inequitable</u>' to the present owners. As at 31 December 1993, the estate management accounts had an accumulated surplus fund of $1,758,519. The present owners would not need to make contributions to meet the payment of property tax. It is true that the reserve fund in the estate management accounts would be reduced by such payment which effectively means that the inheritance of the present owners from the previous owners would be reduced. But the reduction would only be to the same extent as if the estate manager had paid the property tax out of the car park rental for the relevant years which the estate manager should have done in the first place.

55. It is not in our place to and we do not intend to offer advice to Mr A as to what he should do to recoup reimbursements from his co-owners. Suffice it to mention that the owners committee and the estate manager had been very creative and proactive throughout the past years in the operation of the 'car-parking business'. Not only did they put to good and profitable use the non-government car-parking spaces, they even managed to increase the car park pool and income therefrom by licensing from the Government 12 car-parking spaces. If the large number of owners involved do not present an insurmountable problem to the leasing out of the car parks by the owners committee and the estate manager, similarly, the large number of owners involved should not impede the owners committee and the estate manager from proposing and implementing an arrangement for payment of property tax (including overdue property tax).

56. By reason of the aforesaid, we are of the view that even if a more liberal or equitable construction of tax statutes is permitted in certain cases so as not to lead to a gravely unjust or absurd result, this is not a case where equity should interfere as Mr A had not demonstrated to our satisfaction that there would be gross unfairness and grave hardship on him as a result of our ruling that section 56A of the IRO is applicable and he is liable for the property tax assessments raised.

Conclusion

57. For the reasons given in the body of this decision, we are of the view that the owners of the Housing Estate (including Mr A) are liable for the property tax assessed and we uphold the validity of the property tax assessments issued by the IRD for the years of assessment 1988/89, 1989/90, 1990/91, 1992/93 and 1993/94 in respect of rental income derived from the leasing of car-parking spaces situated at the Housing Estate. However, we are satisfied that the income had been over-reported. We therefore remit the Assessments back to the Commissioner pursuant to section 68(8) of the IRO and order that there shall be liberty to apply.