Case No. D5/12

Property tax – appeal – stated case – legal principles of stated case – whether question of law identified by applicant is arguable and proper for the High Court to consider – sections 5, 5B and 69(1) of the Inland Revenue Ordinance ('the IRO'). [Decision in Chinese]

Panel: Albert T da Rosa, Jr (chairman), Chan Yue Chow and Kong Chi How Johnson.

Stated Case, No hearing.
Date of decision: 8 May 2012.

The Board of Review ('the Board') made a Decision in respect of the Applicant's case ('the Decision'). The Applicant did not agree with the Decision, and applied to the Board to state the case to the Court of First Instance.

As summarized by the Respondent, the following four points were raised by the Applicant in the stated case: (1) assessable value should be ascertained in accordance with section 5B of the IRO, and it was incorrect to calculate assessable value by deducting deductible items from rental income; (2) if assessable value was ascertained by the consideration paid in using the property, then the assessable value in respect of the same property should be the same, whether the owner was responsible for paying rate, government rent, management fee and air-conditioning charges etc; (3) where the owner was responsible for paying rate, government rent, management fee and air-conditioning charges etc, payment of those items was made by the tenant on a 'user-pay' basis to the owner (who then paid those items on behalf of the tenant) and should not affect the amount of assessable value; (4) the authorities raised by the Board did not require the Commissioner to calculate assessable value in accordance with section 5B of the IRO, and were therefore inapplicable to the present case.

Further, the Applicant also stated that the Board had 'relentlessly covered the mistakes committed by the Commissioner', and would 'disclose the matter' at the right moment so that certain government departments and persons 'can hardly absolve themselves of all blame'.

Held:

Principles for case stated

1. Under section 69(1) of the IRO, the appellant or the Commissioner might make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. The relevant principles could be summarized as follows: (1) the applicant must identify a question of law which was proper for the High Court to consider; (2) the Board was under a statutory duty to state a case in respect of that question of law; (3) the Board had a power to scrutinize the question of law to ensure that it was one which was proper for the Court to consider; (4) if the Board was of the view that the point of law was not proper, it might decline to state a case; (5) if the applicant (whether the taxpayer or the Commissioner) was dissatisfied with the Board's refusal to state a case, it was up to the applicant to decide whether to take further action. (Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Limited (1988) 2 HKTC 575 and Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275 considered)

2. It was not enough for the applicant to raise doubt in respect of a question of law on the Board's decision. The Board had to consider whether the applicant's doubt constituted a question which was arguable and proper for the High Court to consider. (D26/05, IRBRD (2005-06), vol 20, 174 considered)

Applicant's Point One

3. The 'assessable value' displayed on the Notice of Assessment of Property Tax referred to the 'assessable value' after deducting payment of rate by the owner. The way it was expressed in the notice might cause misunderstanding to the Applicant. However, and in any event, the 'net assessable value' stated in the determination of the Deputy Commissioner was calculated in accordance with the IRO. Therefore, the point raised by the Applicant did not constitute an arguable question of law.

Applicant's Point Two

4. The Applicant's statement was only his pure assumption and had no legal basis. In fact, the Applicant's assumption was made on the basis that 'the assessable value was ascertained by the consideration paid through using the property'. Obviously, such point was made on the basis of section 5B(2) of the IRO, but the Applicant did not consider that 'consideration' thereunder included any consideration payable in respect of the provision of any services or benefits connected with or related to the right of use (under section 5B(6) of the IRO). The relevant amount of payment had been found as 'consideration' by the Board in the Decision, and had to be calculated as 'assessable value'. The issue was not whether any third party had provided services, but whether the tenant had paid (or was required to pay under the

lease) the relevant payments. As a result, the point raised by the Applicant did not constitute an arguable question of law.

Applicant's Point Three

5. Under the Decision, the Board had already found as a matter of fact that all the tenancy agreements clearly stated that the property was leased to the tenant at a specific monthly rent, and there was no 'user-pay' item included. The terms of the relevant tenancy agreements also clearly stated that the Applicant was responsible for the management fee and air-conditioning charges, and these payments were not made by the Applicant on behalf of the tenant. This was a finding of fact. The Board's decision on this aspect was final and did not constitute any question of law. In any event, the Applicant also stated his stance in writing that the issue of 'user-pay' did not form the legal basis of his appeal.

Applicant's Point Four

6. The Applicant's contention that the authorities relied on by the Board was not applicable to his case was clearly contrary to facts. The authorities mentioned in the Board's decision were decisions made in respect of taxpayers' appeal and case stated under the IRO. Therefore, the point raised by the Applicant did not constitute an arguable question of law.

Other matter

7. The Applicant had misunderstood the procedures and purpose of appeal. The Board would only assess the evidence and arguments objectively, and its decision would not be affected by any political consideration or threats.

Application refused.

Cases referred to:

Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Limited (1988) 2 HKTC 575
Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275
D26/05, IRBRD (2005-06), vol 20, 174

案件编号 D5/12

物业税 – 评税上诉 – 呈述案件 – 呈述案件的法律原则 – 上诉人提出的法律问题是否构成可争辩的幷合乎提交高等法院审议的问题 – 《税务条例》（以下称「《税例》」）第5、5B及69(1)条

委员会：Albert T da Rosa, Jr（主席）、陈雨舟及江智蛟

此呈述案件申请幷无举行聆讯
裁决日期：2012年5月8日

税务上诉委员会（以下称「委员会」）就上诉人的案件作出裁决（以下称「该裁决」）。上诉人不同意该裁决，幷向委员会提出申请，要求委员会向高等法院原讼庭呈述案件。

根据答辩人所归纳，申请人在呈述案件中共提出四个论点：(1) 应评税值应按《税例》第 5B 条来确定，他认为应评税值以租金收入减可扣除项目的计算方法是不正确的。(2) 如按物业的使用而付出的代价来确定应评税值，同一物业在全包（即由业主支付差饷，地租，管理费，冷气费等）或非全包的情况下，应评税值应相同。(3) 全包的意思是租客支付租金时按物业的使用权加上其他费用一幷交给业主，该等费用是租客用者自付，再由业主代租客支付给予管理公司，不应影响就物业使用权而付出的代价。(4) 委员会所提的案例没有要求税务局按《税例》第 5B 条规管计算应评税值，与本案不同，因此不适用。

此外，上诉人亦声称委员会「全力包庇税务局犯错」，幷称在情况适合下会「将事件公开」，令某些政府部门及人士「难辞其咎」。

裁决：

呈述案件的原则

1. 根据《税例》第 69(1)条规定，上诉人或税务局局长可提出申请，要求委员会就某法律问题呈述案件，以取得原讼法庭的意见。有关原则可归纳如下：(1) 提出呈述案件申请的申请人必须认明合乎提交高等法院审议的法律问题。(2) 委员会有法定的责任就有关的法律问题向高等法院呈述案件。(3) 委员会有权详细查验申请人提出的法律问题，以确保有关问题属于合乎提交高等法院审议的法律问题。(4) 如委员会认为申

请人提出的问题不合乎提交高等法院审议，委员会可拒绝呈述案件。(5)如申请人（不论是纳税人或税务局）不满意委员会的决定，当由申请人就是否采取进一步行动自行作出抉择（参考 Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Limited (1988) 2 HKTC 575 及 Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275）。

2. 申请人对于委员会的裁决在法律观点上有质疑是不足够的。委员会仍然需要考虑申请人的质疑是否构成可争辩的并合乎提交高等法院审议的问题（参考 D26/05, IRBRD (2005-06), vol 20, 174）。

上诉人第一论点

3. 物业税评税通知书所显示的「应评税值」是指扣除业主所缴交的差饷后的「应评税值」。通知书上的表达方式可能令申请人有所误解。可是无论如何，在税务局副局长发出的决定书所述的事实中的「应评税净值」仍是根据《税例》所规定的方法计算。因此，申请人提出的论点并不构成任何可争辩的法律问题。

上诉人第二论点

4. 申请人的有关陈述只是他纯粹的假设，并没有任何法理依据。事实上，申请人是基于「如按物业的使用而付出的代价来确定应评税值」这论点作出该假设。显然地，这论点是根据《税例》第 5B(2)条提出，但申请人却没有考虑该条中所述的「代价」包括在提供与使用权有关连的服务或利益方面须付出的任何代价（根据《税例》第 5B(6)条）。而有关金额已被委员会在决定书中裁定为「代价」，须被计入「应评税值」。问题并不在于任何第三方有或没有提供服务，而在承租人是否向业主（或在租约内须为业主）支付金额。因此，申请人提出的论点并不构成任何可争辩的法律问题。

上诉人第三论点

5. 委员会在决定书中已裁定所有租约均清楚订明物业是以每月指定的租金款额租予租客，当中并没有任何「代收代支」的款项，而有关租约的条款列明管理费及冷气费是由申请人负责支付，并非是他代租客支付的款项。这是一项事实的裁决，委员会的这项决定乃最终裁决，不构成任何的法律问题。无论如何，申请人在书面上亦表明其立场说代收代支的问题并非其上诉的法律理据。

上诉人第四论点

6. 申请人声称委员会所提的案例不适用于他的个案明显与事实不符。在决定书中提及的委员会案例是按《税例》就有关纳税人所作的上诉及呈述案件申请作出裁决。因此，申请人提出的论点并不构成任何可争辩的法律问题。

其他事项

7. 申请人误解了整个上诉程序及目的。委员会只会客观评估证据和论据，并不会受到政治考虑或其他威胁的影响。

申请驳回。

参考案例：

Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Limited (1988) 2 HKTC 575
Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275
D26/05, IRBRD (2005-06), vol 20, 174

决 定 书：

引言

1. 本委员会于 2010 年 9 月 12 日就本案件作出裁决。上诉人（以下称「申请人」）不同意该裁决并于 2011 年 10 月 10 日向本委员会提出申请（以下称「该呈述案件申请」），要求本委员会向高等法院原讼庭呈述案件。

2. 按本委员会要求双方于下列日期提交书面陈词：

2.1. 申请人 2011 年 11 月 11 日提交书面陈词（以下称「第一次书面陈词」）并提交呈述案件草稿（以下称「该草稿」）

2.2. 答辩人 2011 年 12 月 12 日提交针对呈述案件草稿的回应信件（以下称「该答辩人回应」）

2.3. 申请人 2012 年 1 月 13 日提交对答辩人信件的回复（以下称「第二次书面陈词」）

有关法律

3. 根据《税务条例》（以下简称「《税例》」）第 69(1)条规定，上诉人或税务局局长可提出申请，要求委员会就某法律问题呈述案件，以取得原讼法庭的意见。

4. Barnett 法官在 Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Limited （1988） 2 HKTC 575 案中就有关呈述案件这课题定下了下述原则：

> 4.1. 提出呈述案件申请的申请人必须认明合乎提交高等法院审议的法律问题。
>
> 4.2. 税务上诉委员会有法定的责任就有关的法律问题[向高等法院]呈述案件。
>
> 4.3. 税务上诉委员会有权详细查验[申请人]提出的法律问题，以确保有关问题属于合乎提交高等法院审议的法律问题。
>
> 4.4. 如税务上诉委员会认为[申请人]提出的问题不合乎提交高等法院审议，上诉委员会可拒绝呈述案件。
>
> 以下是所节录的判词的英文原文：
>
> '*An applicant for a Case Stated must identify a question of law which it is proper for the High Court 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 scrutinize the question of law to ensure that it is one which it is proper for the court to consider.*
>
> *If the Board is of the view that the point of law is not proper, it may decline to state a case.*'

5. CHUNG 法官在 Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275 案中指出：

> 「*当上诉委员会被要求作出呈述案件，但（申请人对裁决的质疑）并不涉及合乎高等法院审议的法律问题，上诉委员会应拒绝呈述案件。如申请人（不论是纳税人或税务局）不满意上诉委员会的决定，当由申请人就是否采取进一步行动自行作出抉择。*」

以下是所节录的判词的英文原文：

> ' *The proper course for the Board to take when it is asked to state a case but which involves no proper question of law is to decline the request. If the applicant (whether the taxpayer or the Revenue) is dissatisfied with the Board's refusal to state a case, it is up to the applicant to decide whether to take further action (and if so, what action to take).*'

6. 申请人对于本委员会的裁决在法律观点上有质疑是不足够的。本委员会仍然须要考虑申请人的质疑是否构成可争辩的幷合乎提交高等法院审议的问题。

7. 上诉委员会在另一宗个案 D26/05, IRBRD (2005-06), vol 20, 174 驳回呈述案件申请时指出如申请人提出的所谓法律问题是很清楚地及很明显地不构成可争辩的问题的话(the point of law is plainly and obviously unarguable)，委员会可拒绝呈述案件。

个案的实况

8. 申请人在该呈述案件申请，第一次书面陈词及该草稿中，均没有清楚指出他拟向原讼法院取得意见的法律问题。

9. 答辩人恰当地就申请人呈述案件中申请人不满本委员会裁决书而提出的论点归纳为四个论点。申请人在第二次书面陈词中只是重复他以前的论点。

第一论点

10. 申请人的第一论点是：应评税值应按《税例》第 5B 条来确定，他认为应评税值以租金收入减可扣除项目的计算方法是不正确的。

11. 在第二次书面陈词内申请人重申「物业税计算表示的应评税值是错的。按《税例》第 5 条，税务局应先确定应评税值才可减差饷，现在税务局却将租金总额作应评税值，如说这是扣除差饷后的应评税值，为何物业税刻计算表上写着应评税值？实际上扣除差饷后便不是应评税值。应评税值按第 5B 条所指，是物业的使用权而付出的代价。如硬说物业税计算表上的应评税值其实是扣除差饷后的应评税值，那么请列明未扣除差饷前的应评税值，如应评税值搞错，应评税净值必定跟差错，所以税务局副局长的应评税净值是错的，是违反税例规定，这就是法律问题。（请看清楚我 7/11/11 的信件(1)段和回顾聆讯会的辩论）」

12. 申请人在本委员会聆讯会中已有提及以上第**錯誤! 找不到參照來源。**段及第 11 段的论点。（见决定书第 15.5 段。）物业税评税通知书第二页所显示的「应评税值」是指扣除业主所缴交的差饷后的「应评税值」。通知书上的表达方式可能令申请人有所误解，可

是，无论在物业税计算表上的表达方式如何，在税务局副局长于 2011 年 1 月 12 日发出的决定书第 1(11)段所述的事实中的「应评税净值」仍是根据《税例》所规定的方法计算。因此，申请人提出的论点并不构成任何可争辩的法律问题。

第二论点

13. 申请人的第二论点是：如按物业的使用而付出的代价来确定应评税值，同一物业在全包（即由业主支付差饷，地租，管理费，冷气费等）或非全包（即由租客支付差饷，地租，管理费，冷气费等）的情况下，应评税值应相同。在第二次书面陈词他还问「从前我将用乜都唔包方式，同样是由管理公司提供管理服务，为何税务局不将管理费加入租金内计算应评税值？」

14. 申请人在第二论点的陈述只是他纯粹的假设，并没有任何法理依据。事实上，申请人是基于「如按物业的使用而付出的代价来确定应评税值」这论点作出该假设。显然地，这论点是根据《税例》第 5B(2)条而提出的，但申请人并没有考虑该条中所述的「代价」根据《税例》第 5B(6)条包括在提供与使用权有关连的服务或利益方面须付出的任何代价。在决定书第 15.5 段本委员会裁定「... 租客就享用物业管理及冷气服务而支付的金额，属《税例》第 5B(6)条界定的『代价』，须被计入『应评税值』」。问题并不在于任何第三方有或没有提供服务，而在承租人是否向业主支付金额或在租约内须为业主而支付金额。

15. 委员会已在决定书表示第 5B(6)条适用于本个案，并裁定租客就享用物业管理及冷气服务而支付的金额，属该条界定的「代价」，须被计入「应评税值」（见决定书第 15.5 段）。

16. 因此，申请人提出的论点并不构成任何可争辩的法律问题。

第三论点

17. 申请人的第三论点是：全包的意思是租客支付租金时按物业的使用权加上其他费用一并交给业主，该等费用是租客用者自付，再由业主代租客支付给予管理公司，不应影响就物业使用权而付出的代价。

18. 就申请人提出的第三论点，本委员会在决定书中已裁定所有租约均清楚订明物业是以每月指定的租金款额租予租客，当中并没有任何「代收代支」的款项，而有关租约的条款列明管理费及冷气费是由申请人负责支付，并非是他代租客支付的款项（见决定书第 15.3 段）。

19. 这是一项事实裁决，按《税例》第 69(1)条，委员会的这项决定乃最终裁决，不构成任何的法律问题。

20. 无论如何，申请人在第二次书面陈词已经表明说「事实上，我向委员会上诉的法律理据是...，而非代收代支问题，...」而重申第二论点。

第四论点

21. 申请人的观点是：委员会所提的案例没有要求税务局按《税例》第 5B 条规管计算应评税值，与本案不同，因此不适用。

22. 在第四论点中，申请人声称本委员会所提的案例不适用于他的个案，因该等案例没有要求税务局按《税例》第 5B 条计算应评税值。申请人的声称明显与事实不符。在决定书中提及的委员会案例 D20/08 及 D44/08，是按《税例》（包括第 5 及 5B 条）就有关纳税人所作出的上诉及呈述案件申请作出裁决。因此，申请人提出的论点并不构成任何可争辩的法律问题。

其他事项

23. 该申请人

23.1. 在该草稿内声称「由始至终委员会都在关埋门的情况下全力包庇税务局犯错，我在此敦促委员会撤销所谓讼费，或是不会交这些未经法庭裁定的费用的，如强行在我银行户口掠取，一旦我胜诉，定必追究责任及赔偿。勒取讼费无法阻止我上诉或将事情公开的决心。」

23.2. 在第二次书面陈词声称「声明：应评税值争拗已拖延多年，我不会无期等候。香港现正踏入选举年，是爆料最佳时机，只要我认为情况适合，便会将事件公开，不会预先通知。当事件爆煲时，税务局，委员会，某些高官，某议员连同特首均难辞其咎。事件涉及公众利益，请妥善处理。」

24. 令人遗憾的是该申请人误解了整个上诉程序及目的。委员会只会客观评估向我们提出的证据和论据，并不会受到政治考虑或其他威胁的影响。

25. 上诉人明知他的论点已在他本人先前的上诉案中（见决定书第 13 及 14 段）被否决仍然坚持这样进行本上诉及呈述案件申请实属浪费委员会及税局资源。

案件处置

26. 基于上述原因，本委员会认为申请人在法律观点上对于委员会的裁决所提出的质疑，并不构成可争辩的问题，亦因此不构成任何合乎提交高等法院审议的法律问题。本委员会因此驳回申请人的呈述案件申请。