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

案件編號 D5/12

物業稅-評稅上訴-呈述案件-呈述案件的法律原則-上訴人提出的法律問題是否構成可爭辯的並合乎提交高等法院審議的問題-《稅務條例》(以下稱「《稅例》」) 第5、5B及69(1)條

委員會: Albert T da Rosa, Jr (主席)、陳雨舟及江智蛟

此呈述案件申請並無舉行聆訊 裁決日期:2012年5月8日

稅務上訴委員會(以下稱「委員會」)就上訴人的案件作出裁決(以下稱「該 裁決」)。上訴人不同意該裁決,並向委員會提出申請,要求委員會向高等法院原 訟庭呈述案件。

根據答辯人所歸納,申請人在呈述案件中共提出四個論點:(1)應評稅值應按《稅例》第5B條來確定,他認為應評稅值以租金收入減可扣除項目的計算方法是不正確的。(2)如按物業的使用而付出的代價來確定應評稅值,同一物業在全包(即由業主支付差餉,地租,管理費,冷氣費等)或非全包的情況下,應評稅值應相同。(3)全包的意思是租客支付租金時按物業的使用權加上其他費用一併交給業主,該等費用是租客用者自付,再由業主代租客支付給予管理公司,不應影響就物業使用權而付出的代價。(4)委員會所提的案例沒有要求稅務局按《稅例》第5B條規管計算應評稅值,與本案不同,因此不適用。

此外,上訴人亦聲稱委員會「全力包庇稅務局犯錯」,並稱在情況適合下會「將事件公開」,令某些政府部門及人士「難辭其咎」。

裁決:

呈述案件的原則

1. 根據《稅例》第69(1)條規定,上訴人或稅務局局長可提出申請,要求委員會就某法律問題呈述案件,以取得原訟法庭的意見。有關原則可歸納如下:(1)提出呈述案件申請的申請人必須認明合乎提交高等法院審議的法律問題。(2)委員會有法定的責任就有關的法律問題向高等法院呈述案件。(3)委員會有權詳細查驗申請人提出的法律問題,以確保有關問題屬於合乎提交高等法院審議的法律問題。(4)如委員會認為申

請人提出的問題不合乎提交高等法院審議,委員會可拒絕呈述案件。 (5) 如申請人(不論是納稅人或稅務局)不滿意委員會的決定,當由申請人就是否採取進一步行動自行作出抉擇(參考 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. 申請人對於委員會的裁決在法律觀點上有質疑是不足夠的。委員會仍然需要考慮申請人的質疑是否構成可爭辯的並合乎提交高等法院審議的問題 (參考 <u>D26/05</u>, IRBRD (2005-06), vol 20, 174)。

上訴人第一論點

3. 物業稅評稅通知書所顯示的「應評稅值」是指扣除業主所繳交的差餉後的「應評稅值」。通知書上的表達方式可能令申請人有所誤解。可是無論如何,在稅務局副局長發出的決定書所述的事實中的「應評稅淨值」仍是根據《稅例》所規定的方法計算。因此,申請人提出的論點並不構成任何可爭辯的法律問題。

上訴人第二論點

4. 申請人的有關陳述只是他純粹的假設,並沒有任何法理依據。事實上,申請人是基於「如按物業的使用而付出的代價來確定應評稅值」這論點作出該假設。顯然地,這論點是根據《稅例》第5B(2)條提出,但申請人卻沒有考慮該條中所述的「代價」包括在提供與使用權有關連的服務或利益方面須付出的任何代價(根據《稅例》第5B(6)條)。而有關金額已被委員會在決定書中裁定為「代價」,須被計入「應評稅值」。問題並不在於任何第三方有或沒有提供服務,而在承租人是否向業主(或在租約內須為業主)支付金額。因此,申請人提出的論點並不構成任何可爭辯的法律問題。

上訴人第三論點

5. 委員會在決定書中已裁定所有租約均清楚訂明物業是以每月指定的租金款額租予租客,當中並沒有任何「代收代支」的款項,而有關租約的條款列明管理費及冷氣費是由申請人負責支付,並非是他代租客支付的款項。這是一項事實的裁決,委員會的這項決定乃最終裁決,不構成任何的法律問題。無論如何,申請人在書面上亦表明其立場說代收代支的問題並非其上訴的法律理據。

上訴人第四論點

6. 申請人聲稱委員會所提的案例不適用於他的個案明顯與事實不符。在 決定書中提及的委員會案例是按《稅例》就有關納稅人所作的上訴及 呈述案件申請作出裁決。因此,申請人提出的論點並不構成任何可爭 辯的法律問題。

其他事項

7. 申請人誤解了整個上訴程序及目的。委員會只會客觀評估證據和論據,並不會受到政治考慮或其他威脅的影響。

申請駁回。

參考案例:

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

決定書:

引言

- 1. 本委員會於 2010 年 9 月 12 日就本案件作出裁決。上訴人 (以下稱「申請人」)不同意該裁決並於 2011 年 10 月 10 日向本委員會提出申請(以 下稱「該呈述案件申請」),要求本委員會向高等法院原訟庭呈述案件。
- 2. 按本委員會要求雙方於下列日期提交書面陳詞:
 - 2.1. 申請人 2011 年 11 月 11 日提交書面陳詞(以下稱「第一次書面陳詞」)並提交呈述案件草稿(以下稱「該草稿」)
 - 2.2. 答辯人 2011 年 12 月 12 日提交針對呈述案件草稿的回應信件(以下稱「該答辯人回應」)
 - 2.3. 申請人 2012 年 1 月 13 日提交對答辯人信件的回覆(以下稱「第二次書面陳詞」)

有關法律

- 3. 根據《稅務條例》(以下簡稱「《稅例》」)第69(1)條規定,上訴人或稅務 局局長可提出申請,要求委員會就某法律問題呈述案件,以取得原訟法庭的意見。
- 4. Barnett 法官在 <u>Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Limited</u> (1988) 2 HKTC 575 案中就有關呈述案件這課題定下了下述原則:
 - 4.1. 提出呈述案件申請的申請人必須認明合乎提交高等法院審議的法 律問題。
 - 4.2. 稅務上訴委員會有法定的責任就有關的法律問題[向高等法院]呈述 案件。
 - 4.3. 稅務上訴委員會有權詳細查驗[申請人]提出的法律問題,以確保有關問題屬於合乎提交高等法院審議的法律問題。
 - 4.4. 如稅務上訴委員會認為[申請人]提出的問題不合乎提交高等法院審議,上訴委員會可拒絕呈述案件。

以下是所節錄的判詞的英文原文:

'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 <u>Aust-Key Co Ltd v Commissioner of Inland Revenue</u> [2001] 2 HKLRD 275 案中指出:
 - 「當上訴委員會被要求作出呈述案件,但(申請人對裁決的質疑)並不涉及合乎高等法院審議的法律問題,上訴委員會應拒絕呈述案件。如申請人(不論是納稅人或稅務局)不滿意上訴委員會的決定,當由申請人就是否採取進一步行動自行作出抉擇。」

以下是所節錄的判詞的英文原文:

- '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. 申請人對於本委員會的裁決在法律觀點上有質疑是不足夠的。本委員會仍然須要考慮申請人的質疑是否構成可爭辯的並合乎提交高等法院審議的問題。
- 7. 上訴委員會在另一宗個案 $\underline{D26/05}$, IRBRD (2005-06), vol 20, 174 駁回呈述案件申請時指出如申請人提出的所謂法律問題是很清楚地及很明顯地不構成可爭辯的問題的話(the point of law is plainly and obviously unarguable),委員會可拒絕呈述案件。

個案的實況

- 8. 申請人在該呈述案件申請,第一次書面陳詞及該草稿中,均沒有清楚指 出他擬向原訟法院取得意見的法律問題。
- 9. 答辯人恰當地就申請人呈述案件中申請人不滿本委員會裁決書而提出的論點歸納為四個論點。申請人在第二次書面陳詞中只是重複他以前的論點。

第一論點

- 10. 申請人的第一論點是:應評稅值應按《稅例》第 5B 條來確定,他認為應評稅值以租金收入減可扣除項目的計算方法是不正確的。
- 11. 在第二次書面陳詞內申請人重申「物業稅計算表示的應評稅值是錯的。按《稅例》第 5 條,稅務局應先確定應評稅值才可減差餉,現在稅務局卻將租金總額作應評稅值,如說這是扣除差餉後的應評稅值,為何物業稅刻計算表上寫著應評稅值?實際上扣除差餉後便不是應評稅值。應評稅值按第 5B 條所指,是物業的使用權而付出的代價。如硬說物業稅計算表上的應評稅值其實是扣除差餉後的應評稅值,那麼請列明未扣除差餉前的應評稅值,如應評稅值搞錯,應評稅淨值必定跟差錯,所以稅務局副局長的應評稅淨值是錯的,是違反稅例規定,這就是法律問題。(請看清楚我 7/11/11 的信件(1)段和回顧聆訊會的辯論)」
- 12. 申請人在本委員會聆訊會中已有提及以上第10段及第11段的論點。 (見決定書第15.5段。)物業稅評稅通知書第二頁所顯示的「應評稅值」是指扣除 業主所繳交的差餉後的「應評稅值」。通知書上的表達方式可能令申請人有所誤解, 可是,無論在物業稅計算表上的表達方式如何,在稅務局副局長於2011年1月12

日發出的決定書第 1(11)段所述的事實中的「應評稅淨值」仍是根據《稅例》所規定的方法計算。因此,申請人提出的論點並不構成任何可爭辯的法律問題。

第二論點

- 13. 申請人的第二論點是:如按物業的使用而付出的代價來確定應評稅值,同一物業在全包(即由業主支付差餉,地租,管理費,冷氣費等)或非全包(即由租客支付差餉,地租,管理費,冷氣費等)的情況下,應評稅值應相同。在第二次書面陳詞他還問「從前我將用乜都唔包方式,同樣是由管理公司提供管理服務,為何稅務局不將管理費加入租金內計算應評稅值?」
- 14. 申請人在第二論點的陳述只是他純粹的假設,並沒有任何法理依據。事實上,申請人是基於「如按物業的使用而付出的代價來確定應評稅值」這論點作出該假設。顯然地,這論點是根據《稅例》第 5B(2)條而提出的,但申請人並沒有考慮該條中所述的「代價」根據《稅例》第 5B(6)條包括在提供與使用權有關連的服務或利益方面須付出的任何代價。在決定書第 15.5 段本委員會裁定「... 租客就享用物業管理及冷氣服務而支付的金額,屬《稅例》第 5B(6)條界定的『代價』,須被計入『應評稅值』」。問題並不在於任何第三方有或沒有提供服務,而在承租人是否向業主支付金額或在租約內須為業主而支付金額。
- 15. 委員會已在決定書表示第 5B(6)條適用於本個案,並裁定租客就享用物業管理及冷氣服務而支付的金額,屬該條界定的「代價」,須被計入「應評稅值」(見決定書第15.5段)。
- 16. 因此,申請人提出的論點並不構成任何可爭辯的法律問題。

第三論點

- 17. 申請人的第三論點是:全包的意思是租客支付租金時按物業的使用權加上其他費用一併交給業主,該等費用是租客用者自付,再由業主代租客支付給予管理公司,不應影響就物業使用權而付出的代價。
- 18. 就申請人提出的第三論點,本委員會在決定書中已裁定所有租約均清楚 訂明物業是以每月指定的租金款額租予租客,當中並沒有任何「代收代支」的款項, 而有關租約的條款列明管理費及冷氣費是由申請人負責支付,並非是他代租客支付 的款項(見決定書第15.3段)。
- 19. 這是一項事實裁決,按《稅例》第 69(1)條,委員會的這項決定乃最終裁決,不構成任何的法律問題。
- 20. 無論如何,申請人在第二次書面陳詞已經表明說「事實上,我向委員會上訴的法律理據是...,而非代收代支問題,...」而重申第二論點。

第四論點

- 21. 申請人的觀點是:委員會所提的案例沒有要求稅務局按《稅例》第 5B 條規管計算應評稅值,與本案不同,因此不適用。
- 22. 在第四論點中,申請人聲稱本委員會所提的案例不適用於他的個案,因該等案例沒有要求稅務局按《稅例》第 5B條計算應評稅值。申請人的聲稱明顯與事實不符。在決定書中提及的委員會案例 D20/08 及 D44/08,是按《稅例》(包括第 5 及 5B條)就有關納稅人所作出的上訴及呈述案件申請作出裁決。因此,申請人提出的論點並不構成任何可爭辯的法律問題。

其他事項

- 23. 該申請人
 - 23.1. 在該草稿內聲稱「由始至終委員會都在關埋門的情況下全力包庇稅 務局犯錯,我在此敦促委員會撤銷所謂訟費,或是不會交這些未經 法庭裁定的費用的,如強行在我銀行戶口掠取,一旦我勝訴,定必 追究責任及賠償。勒取訟費無法阻止我上訴或將事情公開的決心。」
 - 23.2. 在第二次書面陳詞聲稱「聲明:應評稅值爭拗已拖延多年,我不會無期等候。香港現正踏入選舉年,是爆料最佳時機,只要我認為情況適合,便會將事件公開,不會預先通知。當事件爆煲時,稅務局,委員會,某些高官,某議員連同特首均難辭其咎。事件涉及公眾利益,請妥善處理。」
- 24. 令人遺憾的是該申請人誤解了整個上訴程序及目的。委員會只會客觀評估向我們提出的證據和論據,並不會受到政治考慮或其他威脅的影響。
- 25. 上訴人明知他的論點已在他本人先前的上訴案中(見決定書第 13 及 14 段)被否決仍然堅持這樣進行本上訴及呈述案件申請實屬浪費委員會及稅局資源。

案件處置

26. 基於上述原因,本委員會認為申請人在法律觀點上對於委員會的裁決所提出的質疑,並不構成可爭辯的問題,亦因此不構成任何合乎提交高等法院審議的法律問題。本委員會因此駁回申請人的呈述案件申請。