Case No. D56/05

Stated case – state a case for the opinion of the Court of First Instance – sections 68(4) and 69(1) of the Inland Revenue Ordinance ('IRO') – state a case only limit to the question of law – the Board's reject or ignore part of the evidence did not mean that there was mistake on the question of law – the initiative to submit evidence and to call witness is on the parties of the trial – the Board would only act as a middleman. [Decision in Chinese]

Panel: Anthony Ho Yiu Wah (chairman), Fong Ho Yin and Karl Kwok Chi Leung.

Date of hearing: 23 September 2005. Date of decision: 2 November 2005.

The taxpayer disagreed with the decision of the Board and made an application under section 69(1) of the IRO to apply to state the case for the opinion of the Court of First Instance. In the present case, the Board decided that the money received by the taxpayer was not payment in lieu of notice or severance payment or compensation for the lost of the job, instead the money received by the taxpayer was part of the income received from his employment. Therefore it was subject to salaries tax.

The grounds of the application are as follow: (a) The Board rejected or ignored part of the evidence of the taxpayer in the hearing. (b) The Board has not considered that on the company's tax return for his employees, there was a remark that 'HK\$135,290.04 as compensation for loss of office'. (c) On the hearing or on any dates thereafter, the Board has failed to invite the staff of the company who was in charge of the employment meeting and the staff who was responsible to enter the record on the notice of income to the employees, to give evidence. That was unfair to the taxpayer.

Held:

- 1. Section 69(1) of the IRO required that the concerned application for a state should only limit to the question of law challenged by the applicant on to the decision of the Board (Commissioners 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 followed).
- 2. In the present case, the decision of the Board was made after the Board has

listened, analysed and assessed the evidence and the grounds submitted by both parties. On the process of analysis and assessment, the Board has the power and responsibility to evaluate all the evidence in the present case and to find the truth from it. Even if the applicant disagreed with the Board on his decision of not to accept or to ignore part of the evidence of the applicant, this did not mean that the applicant has the right to challenge the decision of the Board on the question of law.

3. In relation to the dispute on the Board in failing to call the staff of the company to give evidence, although the Board has the power to summon witness to give evidence, the common law trial proceedings practised in Hong Kong was adversarial system and not inquisitorial system. Under the system practised in Hong Kong, the parties of the trial should submit the evidence and the grounds favourable to them for the Board to decide. The initiative to submit legal grounds or to call witness was on the parties of the trial. Under normal circumstances, the Board would not actively summon any witness or investigate the case. Instead the Board was only acted as a role of a just middleman. Besides section 68(4) of the IRO clearly stated that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant. As a result, the applicant's argument that the Board has not called the staff of the company to give evidence was without any legal bases.

Appeal dismissed.

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

Taxpayer in absentia.

Chan Wai Yee and Lai Wing Man for the Commissioner of Inland Revenue.

案件編號 D56/05

呈述案件 - 向高等法院原訟法庭呈述案件 - 《稅務條例》第68(4)和69(1)條 - 呈述案件限於法律問題的質疑 - 委員會不接納或不重視部份證供並不表示法律問題上犯有錯誤 - 提出法律論據或傳召證人的主動權是屬於訴訟雙方 - 委員會扮演一個公正中間人的角色

委員會:何耀華(主席)、方浩然及郭志樑

聆訊日期:2005年9月23日 裁決日期:2005年11月2日

申請人不同意稅務上訴委員會的裁決並按《稅務條例》第69(1)條向委員會提出申請,要求委員會向高等法院原訟法庭呈述案件。在此案件中,本委員會裁決申請人所得到的一筆款項並不是代通知金,或遣散費,或失去受僱工作的補償,而是申請人因受僱工作而獲的入息的一部份,因此須予以課繳薪俸稅。

申請人提出的申請理由,歸納如下: (a) 委員會對申請人在聆訊時所作的部份口供拒絕接受或不予重視。(b) 委員會沒有考慮公司在呈交稅務局的僱員收入通知書上載有'HK\$135,290.04 as compensation for loss of office'這個附註。(c) 委員會在聆訊當日或事後沒有邀請當日主持聘用會的公司職員作供又沒有邀請負責填寫有關的僱員收入通知書的公司職員作供,對申請人不公平。

裁決:

- 1. 《稅務條例》第 69(1)條規定有關的呈述案件申請其範圍只限於申請人 對委員會的裁決提出法律問題的質疑(參考 <u>Commissioners of Inland</u> Revenue v Inland Revenue Board of Review and Aspiration Land Investment <u>Limited</u> (1988) 2 HKTC 575 和 <u>Aust-Key Co Ltd v Commissioner of Inland</u> <u>Revenue</u> [2001] 2 HKLRD 275)。
- 2. 在此個案中,本委員會在聆聽了雙方所提的證據及論據,作出分析與 評估後才作出有關裁決。在分析和評估的過程中,委員會有權責去衡

量本個案的所有證據。從中找出案情事實。或許申請人不滿意委員會 不接納或不重視他的部份證供,但這並不表示申請人有權因此質疑委 員會在法律問題上犯有錯誤。

3. 至於申請人不滿意委員會沒有傳召乙公司職員作供一事,雖然委員會有權力傳召證人作供,但在香港實行的普通法審訊程序是屬於辯論或對抗式(Adversarial System)的而不是調查式(Inquisitorial System)的。在香港實行的制度下,訴訟雙方須要各自提出對己方有利的證供和論據,然後由委員會裁決。提出什麼法律論據或傳召那些證人的主動權是屬於訴訟雙方的,委員會在一般情形下並不會主動傳召證人或參與案件調查而是扮演一個公正中間人的角色。而且《稅務條例》第68(4)條又清楚訂明「證明上訴所針對的評稅額過多或不正確的舉證責任,須由上訴人承擔」。故此申請人質疑委員會在這宗個案沒有傳召公司職員作供,在法律上是不成立的。

上訴駁回。

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

納稅人缺席聆訊。 陳慧儀及黎詠文代表稅務局局長出席聆訊。

裁決書:

- 1. 本委員會於2005年5月10日就本案件B/R 52/04作出裁決。上訴人甲先生(以下稱「申請人」)不同意該裁決並於2005年6月10日向委員會提出申請,要求委員會向高等法院原訟庭呈述案件。
- 2. 在此案件中,本委員會裁決申請人於1998/99課稅年度從其僱主乙公司所得到的一筆135,290元的款項並不是代通知金,或遣散費,或失去受僱工作的補償,而是申請人因受僱工作而獲得的入息的一部份,因此須予以課繳薪俸稅。
- 3. 為了使申請人有機會解釋他在申請書上所陳述的反對裁決的理由,本委員會安排了在2005年9月23日進行聆訊。聆訊通知書於2005年8月31日寄給申請人。

申請人於2005年9月16日去信委員會書記聲稱他屆時不在香港,並要求另行安排聆訊日期。委員會書記要求申請人提供文件顯示他的外遊行程或提供其他有關的離港及回港時間表等資料,但申請人拒絕提供。2005年9月20日,委員會書記書面通知申請人,他的延期聆訊申請將不獲批準,除非他願意提供有關的資料,使聆訊的再排期可以迅速進行。2005年9月22日委員會書記與申請人進行電話通話,申請人確認收到委員會書記的書面通知,但表明不會出席聆訊,亦沒有其他文件或資料呈交委員會支持他的呈述案件申請。

- 4. 申請人沒有出席2005年9月23日的聆訊。稅務局代表在聆訊時向本委員會表示反對申請人的呈述案件申請,理由已在稅務局致委員會書記2005年8月15日的函件內說明。
- 5. 申請人在其申請書內提出了七點反對裁決的理由,可歸納如下:
 - (a) 委員會對申請人在聆訊時所作的部份口供拒絕接受或不予重視,例如申請人聲稱他在受聘會面時,最關心是工作的穩定性,而乙公司的人事部職員當時曾安慰申請人雖然乙公司當時的名稱是丙公司,但機場發展是長遠的,因此工作是穩定的。
 - (b) 委員會沒有考慮申請人在聆訊時提出以下證據即乙公司在呈交稅 務局的僱員收入通知書上載有'HK\$135,290.04 as compensation for loss of office'這個附註。
 - (c) 委員會在聆訊當日或事後沒有邀請當日主持聘用會的乙公司職員 作供又沒有邀請負責填寫有關的僱員收入通知書的乙公司職員作 供,對申請人不公平。
- 6. 申請人的呈述案件申請是按《稅務條例》第69(1)條提出的。該69(1)條規 定有關的呈述案件申請其範圍只限於申請人對委員會的裁決提出法律問題的質疑。
- 7. 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:
 - '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. 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。
 - 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. 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:

- '1. An applicant for a Case Stated must identify a question of law which it is proper for the High Court to consider.
- 2. The Board of Review is under a statutory duty to state a case in respect of that question of law.
- 3. 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.
- 4. If the Board is of the view that the point of law is not proper, it may decline to state a case.'
- 8. 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 合乎提交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).'
- 9. 在此個案中,本委員會在聆聽了雙方所提的證據及論據,作出分析與評估後才作出有關裁決。在分析和評估的過程中,委員會有權責去衡量本個案的所有證據,從中找出案情事實。或許申請人不滿意委員會不接納或不重視他的部份證供,但這並不表示申請人有權因此質疑委員會在法律問題上犯有錯誤。
- 10. 至於申請人不滿意委員會沒有傳召乙公司職員作供一事,雖然委員會有權力傳召證人作供,但在香港實行的普通法審訊程序是屬於辯論或對抗式(Adversarial System)的而不是調查式(Inquisitorial System)的。在香港實行的制度下,訴訟雙方須要

各自提出對己方有利的證供和論據,然後由委員會裁決。提出什麼法律論據或傳召那些證人的主動權是屬於訴訟雙方的,委員會在一般情形下並不會主動傳召證人或參與案件調查而是扮演一個公正中間人的角色。而且《稅務條例》第68(4)條又清楚訂明「證明上訴所針對的評稅額過多或不正確的舉證責任,須由上訴人承擔」。故此申請人質疑委員會在這宗個案沒有傳召乙公司職員作供,在法律上是不成立的。

11. 基於上述原因,本委員認為申請人對於裁決的反對理由,並不涉及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。