

**(1) Harley Development Inc. and  
(2) Trillium Investment Limited**

*Appellants*

v.

**Commissioner of Inland Revenue**

*Respondent*

FROM

**THE COURT OF APPEAL OF HONG KONG**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,  
Delivered the 14th March 1996  
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*Present at the hearing:-*

Lord Keith of Kinkel  
Lord Jauncey of Tullichettle  
Lord Slynn of Hadley  
Lord Nicholls of Birkenhead  
Lord Steyn

*[Delivered by Lord Jauncey of Tullichettle]*

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This appeal arises out of an application for judicial review of decisions of an assessor of Inland Revenue to raise property tax assessments on two companies owning buildings in Hong Kong for four years of assessment.

The appellant companies, Harley Development Inc. ("Harley") and Trillium Investment Limited ("Trillium") are both members of the Hutchison Whampoa Group and were involved in implementing an agreement between that group and the Hong Kong and Shanghai Banking Corporation Group ("the Bank") in relation to the Bank's continued use of parts of China Building, Queen's Road Central, Hong Kong as the Bank's main branch office. Harley, which is a Panamanian company, obtained an assignment of the Crown lease of part of the building for a consideration of \$137 million and then granted an occupational underlease for thirty years to the Bank for a premium of \$119,875,000. Trillium, a Bahamian company, owned the leasehold interest in another part of the building which it had

been letting at an annual rent to the Bank. As a result of the above agreement a subsidiary company of the Hutchison Whampoa Group acquired the whole issued share capital of Trillium for \$63 million and Trillium granted an underlease for thirty years to the Bank for a premium of \$55,125,000. The transactions consequent upon the above agreement all took place on 1st and 2nd October 1985.

On 5th March 1992 after a good deal of correspondence between the parties the assessments to property tax on the two premiums of \$119,875,000 and \$55,125,000 were raised. Harley and Trillium sought judicial review of the assessor's decisions to raise the assessments on the ground that they were *ultra vires*. Mayo J. refused the application and his decision was affirmed by the Court of Appeal.

The appeal to the Board revolved around three questions relating to the exemption from property tax under section 5(2)(a) of the Inland Revenue Ordinance ("the Ordinance") available to corporations carrying on business in Hong Kong. The appellants' first proposition (issue A) was that they were exempt from property tax as a matter of law, from which it followed that the assessor had no power to raise assessments to that tax. Since a taxpayer cannot appeal against a nullity, judicial review was the only remedy available to them. The second and alternative proposition (issue B) was that the Inland Revenue Department ("IRD") had represented to them that they were exempt, that they had relied on such representations to their detriment and that accordingly it would be unfair now to permit the raising of assessments in breach of the representations. The third and consequential proposition (issue C) was that since it was agreed that issue B could only be raised in proceedings for judicial review it was more appropriate that both issues should be decided together by this procedure rather than that issue A be determined by the statutory appeals procedure, assuming that this was available, and issue B by judicial review.

#### Issue A.

In Hong Kong profits tax is chargeable for each year of assessment on the assessable profits from a trade, profession or business but excluding profits arising from the sale of capital assets (section 14 of the Ordinance). The letting or sub-letting by any corporation of premises is a business for the purposes of the Ordinance (section 2). Property tax is chargeable for each year of assessment on every person owning land or buildings on the net assessable value thereof which is defined as the consideration payable in the year for the right of use thereof (sections 5(1), 5(B)(2) of the Ordinance).

However, section 5(2)(a) provides for exempting corporations from property tax in certain circumstances:-

"Notwithstanding subsection (1), any corporation carrying on a trade, profession or business in Hong Kong shall, on application made in writing to the Commissioner and on proof of the facts to the satisfaction of the Commissioner, be entitled to exemption from the property tax for any year of assessment in respect of any land or buildings or land and buildings owned by the corporation where the corporation would be entitled under section 25 to a set-off of the property tax which, if exemption were not granted under this subsection, would be paid by the corporation: and the property shall be and remain exempted from property tax for each year of assessment in which the circumstances are such as to qualify the property for such exemption for that year."

Sub-section (c) of section 5(2) requires an exempted corporation to notify the Commissioner within thirty days "of any change in the ownership or use [of the land or buildings] or in any other circumstances affecting such exemption". Section 25 provides *inter alia*:-

"Where property tax is payable for any year of assessment under Part II in respect of any land or buildings owned by a person carrying on a trade, profession or business, any profits tax payable by such person in respect of that year of assessment shall be reduced by a sum not exceeding the amount of such property tax paid by him:

Provided that -

- (a) no reduction shall be allowed unless either the profits derived from such property are part of the profits of the trade, profession or business carried on by such person or the property is occupied or used by him for the purposes of producing profits in respect of which he is chargeable to tax under this Part:
- (b) if the amount of property tax paid for a year of assessment exceeds the profits tax payable, the amount so paid in excess shall be refunded in accordance with the provisions of section 79."

What is clearly demonstrated by a consideration of sections 5(2)(a) and 25 is that the former provision is purely administrative. The rights conferred upon a taxpayer by section 25 are unaffected by the provisions of section 5(2)(a). Thus a taxpayer who is entitled to a reduction in profits tax in any year of assessment to the extent that it has paid property tax will receive that reduction whether or not it has been granted

exemption under section 5(2)(a). What the latter provision does is simply to save the taxpayer making returns for two different taxes with consequential adjustments. The grant of exemption has no effect whatsoever on the gross amount of tax payable whether it be composed of profits tax alone or a combination of profits tax and property tax.

Section 59(1) imposes a duty on an assessor to assess every person who is, in his opinion, chargeable with tax under the Ordinance and section 59(3) provides *inter alia*:-

"(3) Where a person has not furnished a return and the assessor is of the opinion that such person is chargeable with tax, he may estimate the sum in respect of which such person is chargeable to tax and make an assessment accordingly, ..."

Since the appellants all along maintained that they were exempt and therefore under no liability to furnish property tax returns these two sub-sections would *prima facie* appear to warrant the making of the two assessments which are challenged.

Mr. Gardiner Q.C., for the appellants, however, argued that it was a condition precedent of an assessor performing his duty to assess under section 59(1) and (3) that he was of the opinion that the taxpayer was chargeable to tax. This was a question of law upon which he had erred in the present case inasmuch as the appellants were exempt, from which it followed that he could not have been of opinion that they were chargeable to tax and therefore his exercise of the power to assess under section 59(3) was *ultra vires*. Furthermore the statutory objection and appeals procedure did not permit of consideration of what was a nullity.

Section 64 of the Ordinance provides by sub-section (1) that any person aggrieved by an assessment may by notice in writing to the Commissioner object to the assessment. Sub-section (2) provides *inter alia*:-

"on receipt of a valid notice of objection under sub-section (1) the Commissioner shall consider the same and within a reasonable time may confirm, reduce, increase or annul the assessment objected to ..."

The Ordinance makes provision for an appeal from a decision of the Commissioner under section 64(2) to the Board of Review which is similarly empowered to confirm, reduce, increase or annul the assessment (section 68(8)).

Mr. Gardiner argued that neither the Commissioner nor the Board of Review had power to consider an assessment which had been made *ultra vires*. Such an assessment could only be challenged by way of judicial review. This argument fails for two reasons. In the first place the right of objection in section 64(1) is, validity of notice apart, unqualified and does not purport to restrict in any way the circumstances in which a taxpayer may be aggrieved by an assessment. Furthermore the use of the words "confirm, reduce, increase or annul" appear to cover every situation in which an assessment might be challenged. If the Commissioner thinks it is for the correct amount he confirms, if for too much he reduces, if for not enough he increases and if he considers that, for some reason or other which necessarily includes questions of *vires* it should not have been made at all, he annuls. The objection and appeals procedure is accordingly perfectly competent to deal with the type of challenge to the decisions to assess which Mr. Gardiner mounts.

In the second place even if judicial review were the only appropriate procedure for challenging null assessments it has not been shown that the decision to raise these assessments was so flawed in law as to amount to a nullity. In the year of assessment and thereafter neither of the appellants showed assessable profits in their tax returns. Mr. Gardiner argued that nevertheless there were profits derived from the properties and forming part of the profits of the business for the purposes of proviso (a) to section 25 from which it followed that they satisfied the requirements of that section for exemption. The fact that the profits in question were of a capital nature and accordingly outwith the charge to tax under section 14 was immaterial. Profits meant commercial profits not assessable profits and their existence satisfied the requirements of proviso (a) to section 25. Mr. Goldberg Q.C., for the respondent, submitted that the whole scheme of section 25 was that there should not be double taxation and that accordingly the section only applied where there were assessable profits which could be reduced by a set-off of property tax. In the absence of such profits section 25 had no application. Their Lordships do not find it necessary to decide which of these arguments is correct. Indeed for the purposes of judicial review it matters not whether the assessor's decision was wrong. What matters is whether it was so wrong that he could be said to have exceeded his jurisdiction in making it whereby it was a nullity. Mr. Gardiner's argument fails to demonstrate this inasmuch as a respectable argument can be advanced in support of the respondent's submissions. It follows that for this reason also the statutory appeals procedure is a competent method of challenge.

Issue B.

Since the facts material to each of the appellant companies were different it is necessary to deal with them separately.

Harley.

On 10th December 1986 IRD sent a property tax return form to Harley for 1985/86. On 14th March 1987 Harley replied making formal application for exemption from property tax and returning the form for cancellation. IRD did not acknowledge the application. In February 1988 IRD sent to Harley profits tax return forms for 1985/86 and 1986/87 which were returned within two weeks stating that the company was exempt from property tax. With these forms were sent Harley's accounts which showed the receipt of the premium from the Bank. This was the first occasion upon which the receipt of the premium had been brought to the notice of IRD. On 20th July 1988 IRD sent property tax return forms for 1987/88 to Harley who replied on 20th October 1988 stating that it was exempt. Further correspondence took place relating to profits tax and on 16th November 1989 IRD sent to Harley property tax return forms for the years 1985/86, 1986/87, 1987/88 and 1988/89. On 7th December 1989 Harley's solicitors replied stating that it was exempt and that the exemption had been accepted. On 21st May 1990 it was again stated on Harley's behalf that it was exempt from property tax. On 12th March 1991 IRD, by letter, contended that property tax was chargeable on the premium and on 5th March 1992 property tax assessments were raised for the years 1985/86, 1986/87, 1987/88 and 1988/89. The foregoing is a summary of communications passing between Harley and IRD relevant to property tax from 14th March 1987 to 5th March 1992. What is clear from a more detailed perusal of the correspondence referred to in argument is that at no time did IRD accept or even acknowledge Harley's assertions that it was exempt from property tax.

During the above period profits tax returns were completed by Harley. In relation to the assessment for 1985/86 Harley objected and asked for it to be annulled on the ground *inter alia* that the lease to the Bank amounted to the sale of a capital asset. This objection was accepted and the assessment was reduced to nil. At the same time assessments showing nil were issued by IRD for the years 1986/87, 1987/88 and 1988/89.

Mr. Gardiner argued that IRD's failure to assess and collect property tax as and when due together with its acceptance of Harley's chargeability to profits tax amounted to a representation that Harley was being treated as exempt from property tax. He went on to argue that Harley had acted to its detriment in reliance on this representation in three ways, namely:-

- (1) in approving statutory accounts on the basis that there was no liability to property tax;
- (2) in making profits tax returns on the basis of the claimed exemption thereby rendering themselves liable to statutory penalties for submitting incorrect returns; and
- (3) in refusing to complete property tax returns thereby rendering themselves liable to further statutory penalties.

Their Lordships consider that these submissions are ill-founded. In the first place IRD made no written representation to Harley about exemption from property tax. Indeed no reference to such an exemption appears in any of their letters or memoranda to Harley. On four occasions, namely 10th December 1986, 20th July 1988, 16th November 1989 and 3rd April 1990 IRD sent to Harley property tax return forms for completion. This is hardly consistent with a claim that the Commissioner was representing his satisfaction as to Harley's entitlement to exemption. The fact that nil assessments to profits tax were made cannot be taken as a representation that Harley was exempt from property tax, particularly when it is arguable that the condition for exemption in section 25 requires there to be assessable profits from which property tax may be deducted. The correspondence creates a strong impression that exemption from property tax was what Harley thought should be the position rather than what the IRD represented it to be.

In the second place, even if there were such a representation as Harley claims, it is very difficult to see why the three ways in which they had acted were to their detriment. Approval of the statutory accounts without making provision for property tax is not said to have laid them open to any penalty or indeed to have had any particular adverse consequences. The assessable profits were at all relevant times nil and no explanation was furnished as to how profits tax returns would have differed if there had been no exemption from property tax. In such circumstances any available relief from property tax would have been dealt with under section 25. Finally if Harley were in genuine dispute with IRD as to the liability to pay property tax it is almost inconceivable that a penalty would have been exacted under section 80(2)(a) or (d) given the opening words of the sub-section, namely, "Any person who without reasonable excuse ...".

#### Trillium.

On 8th October 1981 Trillium applied for exemption from property tax in relation to the relevant part of China Building stating that the use of the property was "let for rental income". In February 1983 exemption was granted with effect from 1982/83

and the obligation to notify IRD of any change of use of the property was brought to Trillium's attention. Trillium thereafter made profits tax returns correctly reflecting the annual rental received. In November 1985 IRD wrote to Trillium to ascertain whether the exemption was still applicable and seeking a declaration thereanent. Two months later the Bank replied stating that Trillium was under new ownership. In July 1986 Trillium made a profits tax return for the basis period 1st January 1985 to 30th September 1985 stating that it had remained dormant after selling the thirty year lease rights. In selecting a basis period of nine months rather than a year Trillium appear to have been operating the provisions of section 18D relative to cessation of business. Trillium thereafter made profits returns for the years 1986/87, 1987/88 and 1988/89 stating that it remained dormant. In September 1989 IRD sent to Trillium property tax return forms for the years 1985/86, 1986/87, 1987/88 and 1988/89. In October 1989 Trillium replied stating that it had been granted exemption. IRD replied in November 1989 stating that Trillium did not qualify for exemption as from 1st October 1985 when it became dormant because it then ceased to satisfy the requirements of section 25. Trillium replied stating that it considered that it remained exempt and suggesting that it was incorrect to have described itself as dormant. In April 1990 and 1991 IRD sent further property tax return forms to Trillium and on 5th March 1992 it raised assessments for the four years 1985/86, 1986/87, 1987/88 and 1988/89. It is obvious from this brief analysis of the relevant correspondence that at no time did IRD do anything to suggest to Trillium that it continued to qualify for exemption after 1st October 1985, indeed the reverse appears to have been the case. The change in Trillium's position from a business receiving an annual rental income for property to one which had granted a long underlease for a very substantial capital sum and then become dormant undoubtedly amounted to circumstances affecting its original exemption which should have been notified to the Commissioner in writing within thirty days of the events of 1st and 2nd October 1985. In fact no such formal notification appears to have been given. In these circumstances, as in the case of Harley, the appellants' arguments fail both on representation and on reliance.

To summarise the position of the two companies in relation to issue B: Harley applied for exemption but received no express grant thereof. Furthermore no such representations were made by IRD as would reasonably have led it to believe that IRD was treating it as exempt. Trillium who had been granted exemption in quite different circumstances erroneously assumed that exemption continued when their circumstances materially altered. IRD did nothing to justify this assumption. In *Reg v. Inland Revenue Commissioners, Ex parte Preston* [1985] A.C. 835 Lord Templeman at page 865F-G said:-



"The court can only intervene by judicial review to direct the commissioners to abstain from performing their statutory duties or from exercising their statutory powers if the court is satisfied that 'the unfairness' of which the applicant complains renders the insistence by the commissioners on performing their duties or exercising their powers an abuse of power by the commissioners."

For the reasons above referred to there can be no question of unfairness on the part of IRD such as to render their performance of their duties or the exercise of their powers under section 59 of the Ordinance an abuse of power.

#### Issue C.

Since issue B no longer arises it only remains to consider whether issue A can appropriately be decided by judicial review. In *Reg v. Inland Revenue Commissioners, Ex parte Preston* Lord Scarman at page 852C-D said:-

"My fourth proposition is that a remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."

This proposition was elaborated in *Inland Revenue Commissioners v. Aken* [1990] 1 W.L.R. 1374 by Fox L.J. in the following passage at 1380D:-

"In *In re Vandervell's Trusts* [1971] A.C. 912, 933, Viscount Dilhorne said:-

'but where the correctness of an assessment, and so the liability to pay income tax or surtax, is challenged, that can only, in my opinion, be decided by the special or general commissioners.'

I refer also to the speech of Lord Diplock in that case, at p. 944.

That then is the true principle applicable in these cases, namely, that the statutory machinery is exclusive machinery for an appeal from a notice of assessment. There is normally no other. However, I do not say there are no cases in which, exceptionally, a challenge by way of judicial review or otherwise to a decision of the revenue would be possible. There may be cases where, for example,

there has been some abuse of power or unfairness, which would justify the intervention of the court: see for example *Reg. v. Inland Revenue Commissioners Ex parte Preston* [1985] A.C. 835. But that is exceptional. Normally the statutory machinery under the Taxes Management Act 1970 is the exclusive machinery for challenge to an assessment by a taxpayer. In my judgment there is nothing in the present case which comes near to such impropriety by the revenue as to justify departure from the normal procedure."

There are other dicta of high authority to the same effect. Their Lordships consider that, where a statute lays down a comprehensive system of appeals procedure against administrative decisions, it will only be in exceptional circumstances, typically an abuse of power, that the courts will entertain an application for judicial review of a decision which has not been appealed. The two decisions in these appeals involve no unfairness and hence no abuse of power.

For all the foregoing reasons their Lordships will humbly advise Her Majesty that these appeals should be dismissed. The appellants must pay the respondent's costs before their Lordships' Board.