

Kinco Investment Holding Limited *(Applicant)*

and

Commissioner of Inland Revenue *(Respondent)*

Court of First Instance
(Constitutional and Administrative Law List No. 91 of 2009)

Hon Poon J in Court

Date of Hearing : 7 September 2010

Date of Judgment : 20 September 2010

Administrative and constitutional law – judicial review – application for review against the Commissioner’s decision ordering that the tax in dispute should be held over on condition that tax reserve certificate be bought under section 71(2) and (7) of the Inland Revenue Ordinance (Cap. 112).

1. The Applicant purchased a building, converted it into a guesthouse in 2003 and started operation in April 2004. Then, the Applicant sold this building in 2005 and made a significant gain. The Assessor assessed such gain on disposal to profits tax, which the Applicant objected. On 5 June 2009, the Assistant Commissioner ordered the tax be held over on the condition that the Applicant should purchase an equal amount of tax reserve certificate (“TRC”) by 19 June 2009 (“the 1st Decision”).
2. At a meeting held on 17 June 2009, the Applicant’s representative claimed for the first time that the Applicant had financial difficulties and repeated request for an unconditional holdover. The assessor rejected the request but indicated that the Applicant could provide banker’s undertakings for their consideration.

3. On 26 June 2009, the Applicant's solicitors informed the assessor that the Applicant considered obtaining a bank guarantee in lieu of purchase of the TRC not viable and requested for unconditional holdover of payment of tax. The assessor reiterated in a letter dated 30 June 2009 that the conditional stand-over granted to the Applicant upon the purchase of TRC was made in accordance with the Departmental Interpretation and Practice Notes No. 6 ("DIPN 6") and the request for granting unconditional holdover of payment of tax could not be acceded to (the 2nd Decision").
4. The Applicant applied for judicial review on the following grounds:
 - (a) The policy in paragraph 9 of DIPN 6 is "wrong in law, oppressive and unreasonable and unfair" because it does not allow unconditional holdover where a taxpayer has substantial merit although it is not immediately apparent that it can be allowed forthwith. It amounts to an abuse of discretion conferred under section 71(2) of the Inland Revenue Ordinance.
 - (b) The 1st and 2nd Decisions were so unfair as to amount to an abuse of power and/or was Wednesbury unreasonable, in the circumstances where the Commissioner refused/failed to consider the Applicant's financial situation (procedural unfairness).
 - (c) The Applicant would suffer an irrecoverable loss from the shortfall in interest in the purchase of the TRC or in bank charges by furnishing a bank guarantee to the IRD. On the other hand, the IRD suffers no loss if the tax was held over unconditionally as it was entitled to interest at judgment rate if the Applicant's objection failed.

Held:

- (1) The Applicant's contention is based on (a) a direct attack against the legality of the policy as set out in DIPN 6 and (b) the assertion that it has a very meritorious objection. Neither of them is sustainable.
- (2) It had been judicially observed that DIPN 6 sets out sensible criteria upon which the Commissioner can act in determining whether, and on what basis, to hold over tax in dispute in objection cases.

- (3) For in a judicial review, the court plays a limited supervisory role. It will not deal with the merits of the objection or appeal.
- (4) The Applicant's contentions that the Commissioner had not considered its financial circumstances were not supported by the facts of the case.
- (5) The approach that the Commissioner ought to have balanced the parties' convenience in deciding whether and on what terms a holdover should be granted has already been roundly rejected by the courts.

Application dismissed.

Ms Grace Chow, instructed by Messrs Chui & Lau, for the Applicant

Mr. Eugene Fung, instructed by Department of Justice, for the Respondent

Cases referred to in the judgment

Interasia Bag Manufacturers Ltd v CIR [2004] 3 HKLRD 881

Kam Kiu (Hong Kong) Ltd v CIR, HCAL 61/2009

Nam Tai Trading Co. Ltd v CIR [2006] 4 HKLRD 51

Re Chia Tai Conti-Hong Kong Ltd [2006] 2 HKLRD 449