

HONG KONG / JUDGMENT

RE DAVID JOHN LISTER GOY QC

COURT

Court of First Instance

DECIDED

29 March 2007

CASE / FILE NUMBER

HCMP439/2007

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bjbj G]vr HCMP 439/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 439 of 2007

IN THE MATTER of the Application of David John Lister Goy QC admission as a Barrister of the High Court of the Hong Kong Special Administrative Region IN THE MATTER of Section 27 of the Legal Practitioners Ordinance, Cap.159

Before : Hon Ma CJHC in Court Date of Hearing : 29 March 2007 Date of Judgment : 29 March 2007

J U D G M E N T

The Applicant seeks admission as a barrister to represent the appellant, ING Barings Securities (Hong Kong) Limited (BSHK) in an appeal before the Court of Final Appeal (FACV 19/2006). The appeal is listed to be heard on 3 and 4 2007. The subject matter of the appeal is again section 14 of the Inland Revenue Ordinance, Cap.

112. This time it concerns the profits of a financial institution (BSHK) deriving from payments received from its clients arising from the trading of securities on stock markets outside Hong Kong (mainly from Japan, Korea, Singapore, Malaysia, the Philippines and Indonesia). Broadly, the issue is whether the profits from these payments (arising from commissions, placements and marketing) are liable for profits tax. Clients of BSHK (whether from Hong Kong or outside) had placed orders to trade in securities listed in stock exchanges outside Hong Kong. The instructions to execute trades were given to BSHK in Hong Kong. The Commissioner of Inland Revenue assessed the profits arising from BSHK s involvement in these trades as being subject to profits tax. The Board of Review (on an appeal by the taxpayer, BSHK) agreed. The Board was not satisfied that BSHK had discharged the burden

on it under section 68(4) to prove that the Commissioner's assessment was excessive or incorrect. It found that BSHK's role went beyond what had been described as a mere booking role. In an appeal to the Court of First Instance by way of case stated, Barma J allowed the taxpayer's appeal. In a judgment dated 1 June 2005 (after a 6 day hearing), the Judge analyzed the applicable law and then applied it to the facts. It is fair to say that the Judge's analysis of the facts differed from that of the Board of Review, with the result that the original conclusion on whether the various payments were taxable, was reversed. The Commissioner appealed. Following a 2 day appeal, the Court of Appeal reversed the decision of the Judge. The Court of Appeal saw the main issue as follows The main issue before the Board had been what the Taxpayer had done to earn the profits it had classified as offshore income in its tax returns on the basis of which the assessments had been determined. In the judgment of Le Pichon JA (with which the other members of the court agreed), it was held that the Judge had failed to afford sufficient weight to the Board of Review's findings of fact. There was insufficient basis for the Judge to have overturned or ignored these findings. In arriving at their decision, the Court of Appeal appeared to have gone through the facts of the case as well. In addition, Le Pichon JA said this As the judge recognised, correctly in my view, the central question for the Board was to determine the acts or operations of the Taxpayer which produced those profits. However, as will become apparent, in the course of his judgment, the judge shifted his focus, lost sight of the central question and ended up adopting the approach which had been advocated by Mr Barlow and which he had professed to reject, namely by focussing on the transactions which produced the profit to the Taxpayer rather than the acts and operations of the Taxpayer itself which generated the profits. Following the decision of the Court of Appeal, BSHK has now appealed to the Court of Final Appeal and as just stated above, the hearing has been fixed for 3

2007. The respective Cases of the taxpayer and the Commissioner have been filed. There is no doubt that the appeal involves a substantial matter. It will be necessary for the Court of Final Appeal to go into the facts in order to determine just which side of the line (taxable or not under section
- 14) the case falls. On the materials before me, this will involve (as appears to be quite usual in cases of this kind) matters of degree. Afterall, two levels of court have arrived at quite opposite views. I do not regard it as necessarily a simple exercise nor has Mr Stewart Wong (who appears for the Hong Kong Bar Association) really so suggested. This is particularly so when the Court of Final Appeal has made it clear that there is no universal test to be applied when ascertaining the source of a profit. In *Kwong Mile Services Ltd v Commissioner of Inland Revenue* (2004) 7 HKCFAR 275, Bokhary PJ (with whose judgment the other judges of the court agreed) said at 283 F The situations in which the source of a profit has to be ascertained are too many and varied for a universal judge made test. Apart from the words of the statute themselves, the only constant is the need to grasp the reality of each case, focusing on effective causes without being distracted by antecedent or incidental matters. Quite how the passage in the judgment of Le Pichon JA, set out in paragraph REF _Ref163005536 \r \h above, ties in with what appears to be the broader approach adumbrated

in Kwong Mile, may be a legal issue in the Court of Final Appeal. In *Re Pannick QC* [2004] 1 HKLRD 950, at 956 7, the court elaborated on what is known as the CFA factor as being an independent factor that would usually weigh heavily in favour of admission where the matter before the Court of Final Appeal is a substantial one and one which overseas counsel would be able to make a significant contribution by reason of his expertise. This principle is not in dispute. In opposing the present application, Mr Stewart Wong submits that the appeal to the Court of Final Appeal will not involve any critical review of established cases on section

14. Rather, he says, the appeal will involve mainly issues of fact and the application of established principles to the facts. Assuming this to be so, I have nevertheless little doubt that the appeal is no less substantial merely because it concerns matters of fact. In *Re McGregor QC* [2003] 3 HKLRD 585, the court said at page G (paragraph In my judgment, the law is difficult and perhaps even more difficult is the application of the law to the facts. I have earlier mentioned that questions of degree are involved in the application of the law to the facts and it is this aspect that makes the Action particularly difficult and complex. This is a clear case in my view of the high desirability to have the benefit of specialist counsel experienced in this field. I have already gone into why the present appeal to the Court of Final Appeal is a substantial one. I ought also perhaps to add this : the judgment of the Court of Final Appeal will be an important one in setting out (or at least dealing with) the applicable factors to be taken into account in analyzing transactions and payments such as those involved in the appeal. I understand that the outcome of the appeal will be eagerly awaited by financial institutions in similar position to BSHK. The partner in charge of the appeal from the firm of solicitors acting on behalf of BSHK says this in his affirmation It is likely that the appeal in May 2007 will provide authoritative guidance to Hong Kong s financial services sector on the principles applicable to international financial institutions with regional head offices in Hong Kong. If the Commissioner s views are upheld by the CFA, then such international financial institutions with a Hong Kong regional office may be required to pay Hong Kong profits tax on their profits from securities traded in other jurisdictions. If so, then it is likely that many of these international financial institutions will re arrange their affairs. The guidance offered by the Court of Final Appeal in the present appeal will, I think, inevitably advance the relevant jurisprudence in this area in Hong Kong. Lastly, I will just briefly deal with two points As Mr Barlow (for the Applicant) has indicated, the pool of suitable leading counsel in Hong Kong for revenue matters remains relatively small. The solicitors for BSHK here made some inquiries as to the availability of some leading counsel but the responses were not encouraging. I do not think it can be a point of criticism in the present application that insufficient inquiries have been made. Secondly, a point was also made regarding the timing of the present application. The present Notice of Motion seeking admission is dated 6 March 2007 some two months before the relevant hearing. This morning, Mr Barlow has sought to explain the delay by saying that it was only when he was in the course of drafting the Appellant s Case to be lodged in the Court of Final Appeal when he realized (and it would appear he advised to this effect) that specialist

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