HCIA8/2009

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

INLAND REVENUE APPEAL NO. 8 OF 2009

BETWEEN

COMMISSIONER OF INLAND REVENUE Appellant

and

C G LIGHTING LIMITED Respondent

Before : Hon Fok J in Court
Date of Hearing : 15 April 2010
Date of Judgment : 3 May 2010

J U D G M E N T

Introduction

1. This is an appeal by way of case stated from a decision of the Board of Review ("the Board") dated 23 January 2009 ("the Decision").

2. At the hearing before the Board, CG Lighting Limited ("the Taxpayer") had appealed against a determination of the Commissioner of Inland Revenue ("the Commissioner") whereby its objections in respect of Additional Profits Tax Assessments

for the years of assessment 1998/99 to 2001/02 and Profits Tax Assessments for the years of assessment 2002/03 to 2004/05 were rejected.

3. The assessor had assessed tax upon the full amount of the Taxpayer's profits for those years of assessment, on the basis that the profits in question arose in Hong Kong. The Taxpayer had contended that tax should only be assessed on part of those profits, on the basis that the profits arose partly in Hong Kong and partly in the Mainland.

4. The Board allowed the Taxpayer's appeal on this issue and concluded that part of the Taxpayer's profits were sourced from outside Hong Kong and were therefore not chargeable to profits tax. The question as to the appropriate apportionment of the profits to be taxed was remitted by the Board to the Commissioner.

The facts

5. The Taxpayer is a private company, incorporated in Hong Kong in March 1992. Since incorporation, it has described its principal business activity as the "manufacturing of lighting fixtures". It does not have a Mainland business or tax registration.

6. In 1993, the Taxpayer had entered into a contract processing agreement with a third party manufacturer in the Mainland, on the basis of which the Inland Revenue Department ("IRD") initially agreed that only 50% of the Taxpayer's net profits from sales of the products so manufactured in the Mainland were chargeable to profits tax.

7. In about January 1994, after the manufacturing arrangements with the third party manufacturer referred to in the preceding paragraph became uneconomic, the PRC authorities permitted the Taxpayer to change its arrangements from being a contract processing enterprise to being a foreign investment enterprise undertaken through the Taxpayer's investment in a wholly-owned PRC subsidiary manufacturer which would take over the original third party manufacturer's factory premises and workers in order to become the factory manufacturing the Taxpayer's goods.

8. That wholly-owned subsidiary was CG Electrical (Shenzhen) Limited ("CGES"), which is a company incorporated in the Mainland carrying on a business of manufacturing lighting fixtures.

9. To facilitate the manufacturing process, the Taxpayer provided raw materials, technical know-how, management staff, production skills, computer software, product designs, skilled labour, training, supervision and manufacturing plant and machinery to CGES at no cost.

10. The documents supplied by the Taxpayer to the Commissioner in respect of its largest sale transaction in the year ended 31 July 2001 illustrated its mode of operation and

the Board found [1] that this transaction constituted a representative transaction of the Taxpayer's mode of operation during the relevant period.

11. The relevant parts of the Taxpayer's operation were thus found by the Board[2] to be as follows :

(1) The Taxpayer was responsible for the design, product testing and prototype production (such work being partly carried out in Hong Kong and partly at CGES in the Mainland).

(2) Purchases from third parties were concluded by the Taxpayer. Sales work orders and production orders were prepared in Hong Kong and faxed to its subsidiary, CGES.

(3) Raw materials necessary for the manufacture of finished products were purchased by the Taxpayer in Hong Kong and then transferred to its subsidiary in the Mainland according to the production schedule set in Hong Kong.

(4) Quality assurance engineers and production control staff from the Taxpayer would visit the subsidiary to train and update the subsidiary's staff.

(5) A number of senior management staff employed by the Taxpayer were stationed in the subsidiary to monitor and manage its operation.

(6) The subsidiary provided factory premises and labour for the production of lighting fixtures and in return for monthly processing fees paid by the Taxpayer. The amounts of processing fees were no greater than the subsidiary's operating costs and overheads.

12. Part of the documents supplied by the Taxpayer to the Commissioner in respect of the representative transaction were documents of CGES which suggested that the goods which it produced were sold to the Taxpayer. However, such a sale was disputed by the Taxpayer, which maintained that the documents (which the Board referred to as "the CGES documents") did not reflect the reality and were produced to satisfy the requirements of the Mainland authorities. The Board thus noted[3] that "the CGES documents take the centre stage in respect of the factual dispute in this appeal". It will be necessary to return to the Board's conclusion in respect of this factual dispute and the CGES documents in addressing the issues raised in this appeal.

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1 Decision §51.
2 Decision §52.
3 Decision §10.

The applicable legal principles identified by the Board

13. The Board set out the applicable law concerning the conditions to be satisfied before a person is chargeable to tax under s.14 of the Inland Revenue Ordinance (Cap.112) as identified in *CIR v Hang Seng Bank Ltd* [1991] 1 AC 306 at 318E-F (per Lord Bridge).

14. The Board recognised that the broad guiding principle is to ascertain what the taxpayer has done to earn the profits in question and where he has done it : *ibid.* at 323A as expanded upon in *CIR v HK-TVB International Ltd* [1992] 2 AC 397 at 407C-D and 409E (per Lord Jauncey).

15. The Board held, applying *CIR v Orion Caribbean Ltd* [1997] HKLRD 924 at 931F-G (per Lord Nolan), that the ascertainment of the actual source of income is a practical hard matter of fact and no simple, single legal test is determinative.

16. The Board noted that these principles were applied by the Court of Final Appeal in *Kwong Mile Services Ltd v CIR* (2004) 7 HKCFAR 275 at 283A-D (per Bokhary PJ) and *ING Baring Securities (Hong Kong) Ltd v CIR* (2007) 10 HKCFAR 417 at §6 (per Chan PJ), §37 (per Ribeiro PJ) and §§125-131 (per Lord Millett NPJ).

17. The Board held, applying *CIR v. Wardley Investment Services (HK) Ltd* (1992) 3 HKTC 703 at 729 (per Fuad VP) and *ING Baring Securities (Hong Kong) Ltd v CIR* (*supra.*) at §134 (per Lord Millett NPJ), that when ascertaining what were the operations which produced the relevant profits and where those operations took place, it is the operations of the taxpayer, and not those of the taxpayer's subsidiary or sub-contractor, which are the relevant consideration.

18. These principles identified by the Board[4] were not challenged by either the Commissioner or the Taxpayer in this appeal. Instead, the Questions posed in the Case Stated turn on the application of those principles to the facts of this case.

The Board's analysis

19. The Board identified the questions it had to address as being (i) what were the operations of the Taxpayer which produced the relevant profits, and (ii) where those operations took place[5].

20. In respect of the first question, the Board held that the profits in question did not arise from a trading operation as contended for by the Commissioner, since such a contention was premised upon the CGES documents and ignored a raft of materials produced by the Taxpayer to demonstrate otherwise[6].

4 Decision §§41-46.
5 Decision §49.
6 Decision §50.

21. The Board held that, whilst it rejected the suggestion that the Taxpayer was a trader of lighting fixtures (as contended by the Commissioner), it was equally wrong to characterise the Taxpayer's operation as one of manufacturing since CGES was the manufacturer[7].

22. The crux of the Board's conclusion on the relevant questions as to the source of the Taxpayer's profits is set out in paragraphs 56 to 59 of the Decision, where the Board stated :

> "56. Whilst the operation of the Taxpayer as summarised in para.52 above may be divided into stages, it would be wrong and quite unfair to do so in deciding the Taxpayer's source of profits. They were all an integral part of the operation which produced the profits. We bear in mind the principle that only the operations of the Taxpayer are to be considered (see para. 46 above) and therefore ignore the operation of CGES, which was confined to the manufacture of lighting fixtures. By the same token, we must have regard to the fact that part of the operation which gave rise to the profits of the Taxpayer was, e.g., the management by its staff of the production at CGES.
>
> 57. Further, we bear in mind [counsel for the Commissioner's] submission that the Taxpayer's profit-producing transactions are to be distinguished from activities antecedent or incidental to those transactions, citing to us the *dictum* of Ribeiro PJ in *ING Baring Securities (Hong Kong) Ltd v CIR*, para.38 :
>
> 'the focus is … on establishing the geographical location of the taxpayer's profit-producing transactions themselves as distinct from activities antecedent or incidental to those transactions. Such antecedent activities will often be commercially essential to the operations and profitability of the taxpayer's business, but they do not provide the legal test for ascertaining the geographical source of profits for the purposes of section 14.'
>
> 58. This is a case where the Taxpayer was a seller of lighting fixtures which it designed and participated in their productions (in the manner discussed above). In the case of *ING Baring* where the taxpayer was a service provider (securities trader), it might be relatively straightforward to identify the taxpayer's profit-producing transactions as the rendering of service to its clients. We believe that in the case, like here, where the operation is a multi-facet one, this Board must have regard to the practical commercial reality. Such reality dictates that the Taxpayer's participation in the production process was as much a part of its profit-producing transaction as the obtaining of a purchase order.

[7] Decision §54.

> 59. Plainly, part of the Taxpayer's profit-producing transactions was located in the Mainland and therefore its contention that part of its profits was sourced from outside Hong Kong and not chargeable to profits tax is correct."

The questions of law posed in the Case Stated

23. The questions stated by the Board for this court's opinion are:

> (1) Whether the Board erred in law in failing to focus only on the geographical location of the Taxpayer's profit-producing transactions themselves (namely the sale of goods).
>
> (2) Whether the Board erred in law in having regard to antecedent or incidental matters that are legally irrelevant (namely the activities of the Taxpayer's staff in CGES).
>
> (3) Whether the Board's conclusion that the source of the Taxpayer's profits was partly Hong Kong and partly outside Hong Kong is one which no reasonable tribunal properly directed could reach.

The Commissioner's contentions on appeal

24. The Commissioner submitted that, in order to determine the source of the taxpayer's profits, it is of critical importance to properly identify the profit-producing transactions and that these are only properly identified if the antecedent or incidental activities are excluded.

25. In support of this proposition the Commissioner relies on *Kwong Mile Services* at §12 per Bokhary PJ and *ING Baring* at §38 per Ribeiro PJ. In the former, Bokhary PJ emphasised :

> "Although very useful in many cases including the present one, the *Hang Seng Bank/HK-TVB* broad guiding principle is not meant to be a universal test for ascertaining the source of a profit. … 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."

And in the latter, Ribeiro PJ held :

> "In *Kwong Mile Services Ltd v Commissioner of Inland Revenue*, applying the abovementioned authorities, this Court noted the absence of a universal test but emphasised 'the need to grasp the reality of each case, focusing on effective

> causes without being distracted by antecedent or incidental matters.' The focus is therefore on establishing the geographical location of the taxpayer's profit-producing transactions themselves as distinct from activities antecedent or incidental to those transactions. Such antecedent activities will often be commercially essential to the operations and profitability of the taxpayer's business, but they do not provide the legal test for ascertaining the geographical source of profits for the purposes of s.14."

26. The Commissioner contended that the Taxpayer's mode of operation in the present case is "almost identical" to that of the taxpayer in *CIR v Datatronic* [2009] 4 HKLRD 756, a case decided by the Court of Appeal after the Board's Decision and with which, it was contended, the Decision is at odds.

27. The Commissioner also contended that the Decision is at odds with the Court of Final Appeal's decision in *Ngai Lik Electronics Co. Ltd v CIR* [2009] 5 HKLRD 334, another case decided after the Board's Decision.

28. In analysing the Taxpayer's profit-producing transactions in the present case, the Commissioner contended that the Board erred in that, in addition to the activities in the representative transaction as found by the Board, the Board also included the Taxpayer's participation in the production process of CGES as part of the Taxpayer's profit-producing transactions. In this regard, the Commissioner submitted that the activities arising out of the Taxpayer's participation or involvement in the production process of CGES was merely antecedent or incidental to the profit-producing transactions.

29. Based on the decisions in *ING Baring Securities*, *Datatronic* and *Ngai Lik Electronics*, the Commissioner submitted that the Taxpayer's profit-producing transactions should not include any activities arising out of the Taxpayer's participation or involvement in the production process of CGES. It was submitted that the Taxpayer's profit-producing transactions consisted simply of the following activities, namely:

(1) There were pre-order discussions between the Taxpayer and the customer, Home Depot USA, regarding the order.

(2) The Taxpayer informed CGES of the order.

(3) The Taxpayer purchased the raw materials and arranged for them to be delivered to CGES.

(4) The customer, through its agent (International Lighting Group Limited) placed the order with the Taxpayer through CG Lighting NA Limited ("CGNA"), a Hong Kong related company responsible for sales to the USA.

(5) The Taxpayer issued a production order to CGES.

(6) CGES sold the goods to the Taxpayer.

(7) The Taxpayer in turn sold the goods to the customer through CGNA.

(8) The customer paid the Taxpayer, through CGNA.

30. In short, the Commissioner submitted that the Taxpayer earned its profits by acquiring the finished products from CGES and selling them to its customers at a profit. Even if the Taxpayer's participation in CGES's production process might have been "commercially essential to the operations and profitability of the taxpayer's business … they do not provide the legal test for ascertaining the geographical source of profits for the purposes of s.14" : per Ribeiro PJ in *ING Baring Securities* at §38.

31. The Commissioner submitted that the representative transaction plainly included the sale of the finished goods by CGES to the Taxpayer: see §29(6) above. Accordingly, the Commissioner submitted that the Board found as a fact that the mode of transfer of the finished goods by CGES to the Taxpayer was by way of sale. This contention is contested by the Taxpayer and it will be necessary to return to resolve the issue of whether or not this was a finding made by the Board.

32. It was also submitted on behalf of the Commissioner that, in any event, the analyses in support of the appeal were not affected by whether or not the transfer of finished goods by CGES to the Taxpayer was by way of sale. The Commissioner contended that the arrangement between CGES and the Taxpayer was subject to a Processing/Subcontracting Agreement whereby CGES would receive a sub-contracting/processing fee from the Taxpayer in return for CGES's provision of sub-contracting services to the Taxpayer in relation to the manufacturing of the goods. Even if the finished goods were not sold by CGES to the Taxpayer, it remained the fact that the Taxpayer did not manufacture the finished goods and only had the goods transferred to it pursuant to the sub-contracting arrangements with CGES. Therefore, it was submitted, following the same analyses as set out above, the Taxpayer's profits-producing transactions were the acquisition of the finished goods and the on-selling of the same to its customers for profit, as in *Consco Trading Co. Ltd v CIR* [2004] 2 HKLRD 818 at §§44 to 46 (per Deputy High Court Judge To (as he then was)).

33. On the basis of these submissions, the Commissioner contended that the questions posed in the Case Stated should be answered in the affirmative.

The Taxpayer's contentions on appeal

34. The Taxpayer contended this was a straightforward appeal concerning the source of the profits in question, namely an identification of the business from which the subject profits arose and the identification of the geographical location of the operations of the Taxpayer in carrying on that business.

35. The Taxpayer submitted that the Board correctly addressed the relevant questions and correctly concluded that their findings of fact provided the answers to them.

36. It was contended, on behalf of the Taxpayer[8], that the Board found primary facts which required the inferences to be drawn that:

(1) The Taxpayer's business was the manufacturing of lighting fixtures for direct export sale;

(2) In that business, the Taxpayer engaged agents, including its wholly-owned PRC subsidiary, CGES, as a processing agent and a company referred to by the Board as FCCL, owned by the Taxpayer's Managing Director, as an office services and shipping agent;

(3) The business was carried on by the Taxpayer and its agents both in the PRC and in Hong Kong; and

(4) Hence, the IRD's assessments beyond 50% of the profits of the Taxpayer's business had to be annulled.

37. The Taxpayer submitted that the Board's findings of fact admitted of only one answer to the s.14 analysis which the Board was required to undertake, namely the source of the Taxpayer's profits was its business of manufacturing lighting fixtures for export, which business it carried on, with the assistance of agents, in the PRC and Hong Kong. Accordingly, the IRD's attempts to assess the Taxpayer for more than 50% of those profits were misguided.

38. As an alternative, the Taxpayer submitted that the Commissioner's appeal was inconsistent with the Board's findings as to the way in which the Taxpayer had drawn up its audited accounts.

39. It was, therefore, the submission of the Taxpayer that the questions posed in the Case Stated should be answered, in the negative, as follows :

(1) The Board correctly identified the geographical location of the Taxpayer's profit-producing transactions, viz. the design, manufacture, sale and delivery of lighting fixtures.

(2) In a business which comprises the design, manufacture and delivery of manufactured products, the making of the products to be sold cannot legitimately be characterised as "antecedent or incidental" activities.

[8] Respondent's Skeleton Arguments §5.3.

(3) The Board's conclusions on the source of the Taxpayer's profits were not perverse or *Wednesbury* unreasonable and the Board did correctly direct themselves upon the law.

Discussion

Did the Board find that the transaction involved a sale of the finished goods by CGES to the Taxpayer?

40. In its Decision at §3, the Board set out the contents of the Statement of Agreed Facts put forward by the parties for the purpose of the appeal to the Board. §3(9) recites that the first tax representatives of the Taxpayer provided details in respect of the largest sale transaction in the year ended 31 July 2001. The Board then listed, in sub-§§(a) to (n), the copies of the documents provided in respect of that transaction. The documents listed in §§3(9)(j) and (k) were respectively:

(1) a Shenzhen City Export Goods invoice dated 13 June 2001 showing that the Taxpayer was the purchaser of 4,608 desk lamps for a total amount of USD18,919; and

(2) a PRC Customer Declaration Form-Export dated 15 June 2001 in respect of 4,608 desk lamps (total amount USD18,919) with the nature of exemption stated as import processing, identifying the contract number as 2001.0018 and the destination as Hong Kong.

41. Relying on §§3(9)(j) and (k) of the Decision, the Commissioner sought to argue that the Board's findings of fact included a finding that CGES sold the finished goods to the Taxpayer[9].

42. In my judgment, this contention is not sustainable for the following reasons.

43. In §§3(9)(j) and (k), the Board was merely listing out the documents in respect of the largest sale transaction in the year ended 31 July 2001 and did not make any particular findings or reach any conclusions on the effect of those documents.

44. Instead, the Board identified the Commissioner's contention on the main dispute before it as being that the Taxpayer's profit-making activities consisted of purchasing goods from CGES and then re-selling them, i.e. trading activities in respect of goods purchased from CGES[10]. The Board noted[11] that this contention arose from the fact that the CGES documents suggested that the goods which CGES produced were indeed sold to the Taxpayer.

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9 Skeleton Submissions for the Commissioner §§6(6) and 40(1).
10 Decision §9.
11 Decision §10.

45. In examining this contention of the Commissioner, the Board considered the evidence of the Taxpayer's witnesses, one of which was its Managing Director, identified as Mr PG. His evidence included the following:

(1) The production process was run and controlled by the Taxpayer and CGES's role was confined to that of manufacturing the goods at the factory in the Mainland.

(2) There was no sale between CGES and the Taxpayer despite the existence of invoices on which CGES and the Taxpayer were stated to be, respectively, the seller and buyer.

(3) CGES's accounts were based on the documents which were prepared to meet the requirements of the Customs authority and did not therefore reflect the reality. CGES's accounts had to show a certain level of profitability to satisfy the Revenue authority of the Mainland (and the Board understood this to mean that CGES was expected to make a profit so that tax would be paid).

46. Mr PG was cross-examined on the documents, including those listed in §§3(9)(j) and (k), which showed that CGES was engaged in selling its products[12].

47. The Board assessed the oral and documentary evidence and concluded[13] that Mr PG was an honest witness and that his evidence was consistent with the contemporaneous documents of the Taxpayer, apart from the CGES documents. The Board also accepted the other two witnesses of the Taxpayer as truthful witnesses[14].

48. Crucially, on the issue of whether there was a sale of the goods produced by CGES to the Taxpayer, the Board concluded [15]:

> "Given this Board's acceptance of all the Taxpayer's witnesses as truthful, their evidence must be treated as supportive of one another. With respect to [counsel for the Commissioner], who has conducted his case with great skill and tenacity, his case is premised mainly, if not solely, on the CGES documents. Once this Board accepts that those documents do not reflect the reality of the situation ([counsel for the Commissioner] accepts that such a finding is open to this Board), much of the IR's resistance to this appeal falls away."

49. In my view, this is a clear finding of fact that, insofar as the CGES documents evidence a sale of the finished products by CGES to the Taxpayer, this is not the reality and

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12 Decision §20.
13 Decision §34.
14 Decision §37.
15 Decision §38.

that there was in fact no such sale. The Board must have had this clearly in mind in posing the issue it had to resolve[16] in respect of the CGES documents:

> "The divergence of the parties' cases springs from the fact that the documents of CGES suggest that the goods which it produced were indeed sold to the Taxpayer. However, as can be seen from the Statement of Agreed Facts, the Taxpayer has been maintaining that such documents do not reflect the reality and they were produced to satisfy the requirements of the Mainland authorities. Consequently, the CGES documents take the centre stage in respect of the factual dispute in this appeal."

50. I therefore have no hesitation in concluding that the Board made a clear finding of fact that there was no sale of the finished products by CGES to the Taxpayer. It will be necessary to consider below the relevance of this finding.

Is it a necessary inference of the Board's primary findings of fact that (a) the Taxpayer's business was the manufacture of lighting fixtures for sale and (b) in that business, the Taxpayer engaged agents, including CGES as a processing agent?

51. Although the Taxpayer's Skeleton Arguments initially sought to contend (in §5.3) that the Board found that the Taxpayer's business was the manufacturing of lighting fixtures for direct export sale and that, in that business, the Taxpayer engaged agents, including CGES as a processing agent, it was accepted by Mr Barrie Barlow SC, counsel for the Taxpayer, that this contention could not be sustained in its original form. Instead, he qualified that paragraph of the Taxpayer's Skeleton Argument by amending its introductory words to read "In summary, the Board found primary facts which require the inferences" there enumerated.

52. So far as the inference that the Taxpayer's business was the manufacturing of lighting fixtures for direct export sale, such an inference flies in the face of the conclusion that it was wrong to characterise the Taxpayer's operation as one of manufacturing[17]. The Board also recorded that the solicitor for the Taxpayer "expressly disavowed such a contention" and accepted that "CGES was the manufacturer".

53. In the light of that clear conclusion of the Board and the disavowal of a contrary conclusion by the Taxpayer's solicitor, I do not consider that the Board's findings of primary fact require the contrary inference to be drawn. Furthermore, the Board's conclusion that the Taxpayer was not the manufacturer is reinforced by reference to its description of the operation of CGES as being "confined to the manufacture of lighting fixtures"[18].

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16 Decision §10.
17 Decision §54.
18 Decision §56.

54. Turning to the question of agency, I am likewise of the opinion that this is not an inference that is justified on the basis that the argument is not open to the Taxpayer for the following reasons.

55. First, Mr Yu SC, leading counsel for the Commissioner contended that the issue of CGES acting as agent for the Taxpayer was not raised in the notice of appeal to the Board. Mr Barlow SC was not in a position to dispute this and I accept that the position was as contended by Mr Yu SC.

56. Secondly, Mr Yu SC submitted that the agency argument was not advanced by the Taxpayer's solicitor who appeared on its behalf before the Board. Again, Mr Barlow SC confirmed that Mr Clarke, the Taxpayer's solicitor in question, was not in a position to dispute this and I accept that the agency argument was not advanced before the Board.

57. Thirdly, I agree with Mr Yu SC that, if the agency argument had been advanced, questions would likely have been directed to the Taxpayer's witnesses on the issue of agency and this would have led to the Board making an express finding on that issue. I do not agree with Mr Barlow SC's submission that this would have been a question of law and that there would not have been cross-examination on it. Agency is a mixed question of fact and law and there is every reason to think that counsel for the Commissioner would have addressed questions on this issue to the Taxpayer's witnesses if the issue had been a live one. For example, questions as to whether the Taxpayer had a licence to carry out processing works in the PRC might have been relevant[19].

58. Fourthly, the Taxpayer did not ask the Board to frame a question in the Case Stated as to whether it should have found that, in manufacturing the lighting fixtures, CGES was acting as agent for the Taxpayer. As to this Mr Barlow SC submitted that this was not necessary since the Taxpayer won before the Board. As a fallback, he submitted that Question 3 in the Case Stated was wide enough to cover all questions of law, including whether it was appropriate to draw the inference of an agency relationship. However, the fact that the Taxpayer won before the Board does not excuse the framing of a question in the Case Stated if the Taxpayer considered it appropriate for the opinion of this Court, as is clear from the question formulated by the taxpayer in the *Datatronic* case (see §15(d)). And I do not consider that Question 3 is sufficient to enable the Taxpayer to raise this issue on the appeal before me in the circumstances of this case.

59. Finally, an inference of agency on the part of CGES would be wholly inconsistent with the Board's acceptance of the proposition of law that, in determining the source of the Taxpayer's profits, it should ignore the operation of CGES[20].

60. For these reasons, I conclude that neither of these inferences of fact is required to be drawn as contended by the Taxpayer.

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19 See *Datatronic per* Tang VP at §7, citing §10.16 of the Board of Review's decision in that case.

20 Decision §56.

The relevance of DIPN 21

61. On this appeal, the Taxpayer did not base its contentions on the provisions of the IRD's Departmental Interpretation and Practice Notes No.21 (Revised): Locality of Profits ("DIPN 21").

62. As the Board noted[21], in very simple terms, DIPN 21 records a concession by the IRD whereby, if a Hong Kong company has entered into certain arrangements with a Mainland manufacturing entity, it will be allowed a 50:50 apportionment of its profits as overseas profits.

63. Before the Board, it was accepted on behalf of the Taxpayer, however, that the IRD was entitled to depart from DIPN 21. Accordingly, the Board proceeded to "apply the relevant charging provisions and draw guidance from the considerable body of case law" and noted that it would not be necessary for the Board to consider the applicability of DIPN 21[22].

64. This approach was clearly correct. In *Datatronic*, Tang VP addressed DIPN 21 in his judgment at §19 in the following terms :

> "With respect, whether profits tax is payable is governed by s.14. Profits tax is payable in respect of profits which arose in or were derived from Hong Kong. If under s.14 no profits tax is payable DIPN 21 is irrelevant. We will deal with the effect of DIPN 21 if profits tax is otherwise payable under s.14."

65. And at §32 of his judgment, Tang VP said this :

> "The Commissioner submitted that DIPN 21 does not have the force of law and is not binding on the Board or the Court. We agree the charging [section] is s.14, and that DIPN 21 has no legal effect. In any event, DIPN 21 does not apply to import processing as opposed to contract processing. We do not believe one is entitled to stretch the concession. Also, this is not a case where for some administrative law reason effect should be given to DIPN 21. No such reason has been advanced."

66. In the circumstances, the provisions of DIPN 21 do not assist me in answering the Questions posed in the Case Stated.

The accounting treatment

67. It was submitted on behalf of the Taxpayer that its accounts were those of a manufacturing business as opposed to a trading business. Thus, reference was made to the extract from the Taxpayer's profit and loss account and tax computation for the year ended

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[21] Decision §6.
[22] Decision §7.

31 July 2004 in §3(18)(a) of the Decision, which showed that as against sales there were deducted, amongst other items, the purchases (said to be the cost of the raw materials) and the processing charge paid to CGES for assisting in the manufacturing.

68. Mr Barlow SC submitted that the Commissioner had not challenged those accounts as a matter of substance and, by reference to §3(19) of the Decision, pointed to the fact that, in raising the assessment for the year 2004/05, the assessor did not disallow or challenge the processing charge in principle but merely reduced it on the basis it was excessive.

69. Thus, it was submitted, first, that the business concerned was a business that incorporated the manufacturing of goods and the sale of manufactured goods and was unquestionably not a trading business. Secondly, it was submitted that these were not trading accounts : had they been such, there would have been a profit and loss analysis of the cost of stock and the receipts from the sale of that stock and it would have been necessary to identify the stock in hand at the beginning of the year and the closing stock at the end of the trading period.

70. In support of his contention that the accounting treatment was significant in the context of this appeal, Mr Barlow SC relied on the judgment of Lord Millett NPJ in *CIR v Secan Ltd* (2000) 3 HKCFAR 411 at 419B-E where he held:

> "Three sections of the Ordinance are relevant to these appeals. Section 14 imposes a charge to tax on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits therefrom 'as ascertained in accordance with this Part [of the Ordinance]'. Losses, of course, are merely the mirror image of profits, and must be ascertained for tax purposes in the like manner. Both profits and losses therefore must be ascertained in accordance with the ordinary principles of commercial accounting as modified to conform with the Ordinance. Where the taxpayer's financial statements are correctly drawn in accordance with the ordinary principles of commercial accounting and in conformity with the Ordinance, no further modifications are required or permitted."

71. *Secan* is, however, an authority dealing with a completely different subject matter, namely the capitalisation of interest in a taxpayer's accounts. It was not a case such as the present where there was a live issue as to the nature of the activity of the taxpayer.

72. As to the Taxpayer's accounts themselves, Mr Yu SC also submitted that the extract from the accounts referred to by Mr Barlow SC showed the opening stock and closing stock for the year and this was consistent with the accounts being those of a trader rather than manufacturer. Furthermore, Mr Yu SC submitted that, if these were a manufacturer's accounts, one would expect to see the cost of staff as an item of expenditure since the evidence before the Board was that CGES had 950 staff[23].

[23] Decision §14.

73. To this, Mr Barlow SC's response was that this cost was included within the processing charge paid to CGES for the manufacture of the products sold by the Taxpayer to its customers. Yet there was force, in my opinion, in Mr Yu SC's observation that it would make little difference, in terms of the accounting treatment, if, instead of being entered as a processing charge, the fee paid to CGES by the Taxpayer was described as the costs of purchase.

74. I do not consider that the answer to the Questions posed in the Case Stated can be answered by reference to the accounting treatment applied by the Taxpayer. In particular, it does not follow, in my opinion, that because the accounts were the basis on which tax was computed the Commissioner must have accepted the Taxpayer was a manufacturer, which is in effect the submission made on behalf of the Taxpayer.

Datatronic and Ngai Lik

75. As noted above, it was submitted on behalf of the Commissioner that the Decision is at odds with these two subsequently-decided higher authorities. It is therefore necessary to examine those cases to determine what points of principle they lay down.

76. In *CIR v Datatronic* [2009] 4 HKLRD 675, the Hong Kong taxpayer had a wholly-owned subsidiary which carried on business in the Mainland as a manufacturer of electronic products for export. Under agreements entered into between the taxpayer and the subsidiary, the taxpayer agreed to supply the raw materials to the subsidiary as well as provide various technical services including staff training, provision of know-how and quality control to the subsidiary at its factory in the Mainland. The subsidiary purchased the raw materials from, and sold the finished products to, the taxpayer in Hong Kong. The Commissioner assessed the taxpayer to profits tax on the basis it had entered into an import processing agreement with the subsidiary, with the subsidiary selling the finished products to the taxpayer on its own account, and the taxpayer's profits were earned from purchasing and reselling the finished products in Hong Kong. The taxpayer claimed its profits were not liable to profits tax since they did not arise in and were not derived from a source in Hong Kong. Alternatively, the taxpayer argued its profits should be apportioned on a 50:50 basis in accordance with the terms of DIPN 21.

77. The Board of Review upheld the taxpayer's appeal on the basis that, notwithstanding the subsidiary had entered into an import processing contract with the taxpayer, the taxpayer still carried on a manufacturing business and part of the profits from that business were sourced in the Mainland. The Court of First Instance agreed with the Board and held that, applying DIPN 21, the taxpayer's profits should be apportioned on a 50:50 basis.

78. The Court of Appeal unanimously allowed the Commissioner's appeal. In §20, Tang VP referred to the judgment of Ribeiro PJ in *ING Baring Securities (Hong Kong) Ltd v CIR* (*supra*) at §38, summarising the effect of the judgment of Bokhary PJ in *Kwong Mile*

Services Ltd v CIR (*supra*), on the importance of the proper identification of the profit-producing transactions without taking into account antecedent or incidental matters.

79. Tang VP agreed with the submissions of counsel for the Commissioner that the proper profit-producing transactions were the buying of goods from the manufacturer and then re-selling them at a profit (see §§21 and 23).

80. Tang VP identified the Board of Review's error in that case as being a failure to focus on the proper profit-producing transactions and its taking into account the taxpayer's antecedent or incidental activities carried out on the Mainland:

> "26. It was the failure on the part of the Board to concentrate on the profit-making transactions which resulted, with respect, in its wrong conclusion. The matter could be tested in this way. Suppose a company in Hong Kong sells raw material at cost to an unrelated factory in the Mainland so that they would be used by the unrelated factory to produce the product which, in turn, was sold to the Hong Kong company, which then sold the product in Hong Kong at a profit. Suppose the finished product was purchased by the Hong Kong company at $2 and then resold at $3, the profit of $1 would be attributable to its sale of the finished product in Hong Kong. Let us further suppose that to ensure the product's quality, the Hong Kong company not only supplied the raw materials at cost but had also posted a number of staff to the Mainland factory to provide technical or other assistance as may be necessary. We do not believe that would make any difference. Nor, for that matter, the fact that the Mainland factory happened to be a wholly-owned subsidiary of the Hong Kong company, and as such the Hong Kong company was able to procure the wholly-owned subsidiary to sell its products to the Hong Kong company at cost.
>
> …
>
> 29. With respect, the Board has confused the technical assistance provided by the taxpayer as the profit-producing transactions."

81. As to the true profit-generating transactions, Tang VP held :

> "35. The assessable profits were generated by the taxpayer selling the finished products bought from [the subsidiary]. The taxpayer did not make a profit manufacturing in the Mainland. It does not matter that it was able to have the products manufactured cheaply in the Mainland because its wholly-owned subsidiary could be procured to do it at a rate which would result in more profit being made by the taxpayer in Hong Kong. The manufacturing was done by [the subsidiary]. The Board has so found and that is substance not form. The taxpayer's activities in the

> Mainland were merely antecedent or incidental to the profit-generating activities.
>
> 36. [Counsel for the taxpayer] relied on the finding by the Board that the taxpayer was a manufacturer. But the essential findings by the Board was that [the subsidiary] was not the taxpayer's agent and that their manufacturing activities carried on by [the subsidiary] were not the activities of the taxpayer. Where, with respect, the Board has gone wrong, was to have failed to have proper regard to *Kwong Mile Services Ltd v Commissioner of Inland Revenue* and *ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue* when it mistook the taxpayer's antecedent or incidental activities as the 'profit-producing transactions'. The profit-producing transactions were the purchase from [the subsidiary] and subsequent sale by the taxpayer."

82. I agree with Mr Yu SC that the *ratio* of the Court of Appeal's judgment in *Datatronic* is this: where the profit-making transaction is a sale of goods in Hong Kong, any acts of the taxpayer participating in the manufacturing process of a non-agent third party are antecedent or incidental activities which should be disregarded in considering the source of the profits.

83. *Ngai Lik* concerned the anti-avoidance provisions in s.61A of the Inland Revenue Ordinance and did not therefore directly raise the question central to the appeal before me but, in discussing whether the Commissioner had correctly identified the relevant transaction and the tax benefit for the purpose of s.61A of the Ordinance, Ribeiro PJ made certain observations concerning the source and nature of the taxpayer's profits.

84. The facts in *Ngai Lik* were that the Hong Kong taxpayer was initially involved in the design, manufacture and trading of electronic audio products. In 1987 production was moved to factories in the Mainland. Following a group restructuring commencing in April 1991, three companies were incorporated in the BVI, namely DWE, NWP and SWL (the latter taking over the operations of another associated Hong Kong company SW(HK) in April 1993). Various agreements were entered into amongst DWE, NWP, SWL and the taxpayer in June 1992. After the restructuring, the taxpayer continued to deal with external customers who placed orders for production and delivery of the products. When the taxpayer received an order it placed production orders with DWE, which had design and manufacturing facilities in the Mainland. DWE sold the whole of its production to the taxpayer. The terms of the master agreement between the taxpayer and DWE provided for a maximum purchase price. But notwithstanding this agreement, the taxpayer simply recorded the quantities of the products purchased from DWE and its accounts department later decided the price on an annual basis. This transfer pricing policy was adopted in April 1993. While the taxpayer's turnover represented the group's turnover, the taxpayer's contribution to group profits dropped from 31% in 1991/92 to 7% in 1995/96. Insofar as the dealings between DWE and NWP and SWL were concerned, DWE received annual discounts over and above what were described as normal sales discounts.

85. The Commissioner decided that the arrangement involving DWE, NWP, SW(HK) and SWL and the inter-company transfer pricing operation was a transaction to which the anti-avoidance provisions of s.61A applied. The Commissioner raised additional assessments on the taxpayer for the period 1991/92 to 1995/96. The additional profits assessed amounted to 50% of the total profits shown in the accounts of DWE, NWP, SW(HK) and SWL for each of those years. The Board of Review and the lower courts upheld the additional assessments and the taxpayer appealed to the Court of Final Appeal, which allowed the appeal.

86. In his judgment, Ribeiro PJ identified three deficiencies regarding the transaction and tax benefits identified by the Commissioner. The second of these deficiencies, addressed at §§56 to 61 in his judgment, related to the reference to manufacturing profits in the identified tax benefit. The Commissioner had identified the tax benefit in terms of the effect of the scheme being "to reduce the amount of the profits (manufacturing and trading) of the taxpayer by the amounts allocated to DWE and through DEW to SW(HK), NWP and SWL". Ribeiro PJ found the reference to manufacturing profits puzzling (§56) and examined the question of whether the taxpayer had any manufacturing profits as a matter of substance in §§62 to 71.

87. Ribeiro PJ held :

> "64. It is not disputed that in 1987, the taxpayer moved its production to factories on the mainland. As we have seen, since the re-organisation, the manufacturing businesses were operated by DWE, SW(HK)/SWL and NWP in factories in Shenzhen and Dongguan in conjunction with mainland enterprises. The finished products were then sold by DWE to the taxpayer whose profits derived from on-selling those products to its own customers. It therefore cannot be in doubt that the relevant manufacturing processes took place outside of Hong Kong. Even if they were part of the taxpayer's own business, the profits deriving from those operations would not be chargeable to Hong Kong profits tax since they would have been sourced offshore. Moreover, it is clear that those operations and those profits were not those of the taxpayer, but of its fellow subsidiaries. Such profits did not fall within the s.14 charge to tax.
>
> 65. Why then does the Board formulate the Tax Benefit in terms of the taxpayer having manufacturing profits? An examination of its Decision shows that the Board's focus was on the taxpayer's activities in connection with sourcing raw materials for use by its fellow subsidiaries in the manufacturing process and in connection with other agency services provided. *I* shall refer to these activities as the 'sourcing and agency activities'.

> 66. The Board evidently thought that the taxpayer's involvement in the sourcing and agency activities meant that it continued to have a manufacturing business and that only half of the profits of such business should be treated as arising offshore. Thus, the Board equated the taxpayer's sourcing and agency activities with an 'involvement in manufacturing' …"

88. Ribeiro PJ concluded that the taxpayer's sourcing and agency activities were irrelevant, holding at §68:

> "I am, with respect, unable to see how any profits derived from the taxpayer's sourcing and agency activities can properly be described as manufacturing profits or used as a basis for treating part of the fellow subsidiaries' profits as the taxpayer's profits. The manufacturing operations of the former companies were obviously quite distinct from the taxpayer's sourcing and agency activities and were wholly conducted offshore. Even if the latter activities can be properly described as 'involving manufacturing' or as Reyes J puts it as 'manufacturing-related activities', they were at most ancillary and incidental to the offshore manufacturing operations which actually produced 'manufacturing profits' which arose only upon disposal of the manufactured goods. As was pointed out in this Court, such incidental activities do not provide the basis for locating profits in Hong Kong. The focus must be:
>
> … on establishing the geographical location of the taxpayer's profit-producing transactions themselves as distinct from activities antecedent or incidental to those transactions. Such antecedent activities will often be commercially essential to the operations and profitability of the taxpayer's business, but they do not provide the legal test for ascertaining the geographical source of profits for the purposes of s.14."

(The latter citation is from §38 of Ribeiro PJ's judgment in *ING Baring Securities*. Ribeiro PJ also cross-references the citation to *Kwong Mile Services Ltd v Commissioner of Inland Revenue* at p.283 (i.e. §§11-12.))

89. Ribeiro PJ therefore concluded at §71:

> "Accordingly, the various references by the Board and the courts below to manufacturing profits or profits from 'manufacturing-related activities' are wide of the mark. They cannot provide any foundation for the additional assessments and are irrelevant to the proper application of s.61A in the present case."

90. In my opinion, the material point of principle which emerges from the Court of Final Appeal's judgment in *Ngai Lik* is that the sourcing and agency activities of a Hong Kong business in respect of manufacturing performed by a third party outside Hong Kong

are at most ancillary or incidental to the offshore manufacturing operations and do not give rise to manufacturing profits.

91. I do not think that the Commissioner's reliance on *Datatronic* and *Ngai Lik* involves an impermissible approach, as Mr Barlow SC submitted, relying on *Revenue and Customs Commissioners v Banerjee* [2010] 1 WLR 800 per Henderson J at §37, of treating the facts of those cases as if they embodied propositions of law. The Commissioner's reliance on those cases was, as I understood it, limited to the principles of law identified at paragraphs 82 and 90 above.

What were the Taxpayer's profit-producing transactions and where were they undertaken?

92. As set out above, the Board rejected the suggestion that the Taxpayer was a trader of lighting fixtures but also rejected the characterisation of the Taxpayer's operation as one of manufacturing. At the same time, the Board, whilst disregarding the operation of CGES as the manufacturer, concluded that the Taxpayer participated in the production of the lighting fixtures in such a way that this was as much a part of its profit-producing transactions as the obtaining of a purchase order for the ultimate sale of the products to its customers.

93. I do not think it is necessarily helpful to focus on the characterisation of the Taxpayer as either a trader or manufacturer, for in one sense this is simply a labelling exercise and distracts from the real question required to be addressed by the broad guiding principle, namely the identification of the nature of the taxpayer's profit-producing transactions themselves.

94. Recognising the need to grasp the reality of each case and focusing on effective causes without being distracted by antecedent or incidental matters, the question in the present case is whether the relevant profit-producing transaction is the sale of the finished product by the Taxpayer to its customer or more than this? And if more than the mere sale of the finished product, is it legitimate to have regard to the activities of the Taxpayer in relation to the manufacture of the finished products, that manufacture admittedly being carried out by CGES and not the Taxpayer?

95. Two factors might be thought to suggest that the Taxpayer's profit-producing transactions involved more than the mere sale of the finished products. First, the Board found that there was no sale of the finished products by CGES to the Taxpayer. This finding arguably takes the present case out of the standard category of "import processing" arrangement whereby a Mainland entity purchases raw materials and sells finished goods for its own account. This was the arrangement which was found to have been entered into between the taxpayer and its subsidiary in *Datatronic*[24]. Secondly, the raw materials were purchased by the Taxpayer and supplied to CGES for it to process and assemble. This appears to place the case in the category of "contract processing" with which import

[24] See *per* Tang VP at §§21-23.

processing is distinguished: see per Tang VP in *Datatronic* at §8. However, these descriptions of import processing and contract processing activities appear to derive from DIPN 21, which, as I have noted above, is not relevant since the ultimate question depends on the application of s.14, the relevant charging provision.

96. At the same time, it is necessary to recognise that the Board in the present case found that CGES was the manufacturer and did not find that CGES was an agent of the Taxpayer in the production of the lighting fixtures. This is a material finding and is not affected by the fact that, because of the relationship between it and the Taxpayer, CGES only received a processing fee which was no greater than its operating costs and overheads.

97. Once it is accepted that the manufacturer of the lighting fixtures was CGES and not the Taxpayer and that CGES was not the agent of the Taxpayer in the manufacturing process, I do not see that it is possible to avoid the conclusion that the activities of the Taxpayer in relation to the manufacturing process itself are simply antecedent or incidental to the profit-producing transactions here.

98. I am therefore unable to accept the submission on behalf of the Taxpayer[25] that the source of its profits was its business of manufacturing lighting fixtures for export, which business it carried on, with the assistance of agents, in the PRC and Hong Kong.

99. It is pertinent to remind oneself that the court is required to consider not the operations which produced the profits in question but, more narrowly, the operations *of the taxpayer* which produced them: see per Lord Millett in *ING Baring Securities* at §133. In this sense, the activities of the Taxpayer in relation to design, product testing, prototype production, supply of raw materials, provision of plant and machinery to CGES and provision of training, updating and management of CGES's staff were not operations which produced the ultimate profits. Even if those activities could be described as "commercially essential to the operations and profitability of the taxpayer's business … they do not provide the legal test for ascertaining the geographical source of profits the purposes of s.14"[26].

100. Instead, the transactions which produced the profits for the Taxpayer were the sales of the finished products to its customers. Those sales were effected in Hong Kong and so the profits deriving from the sales are chargeable under s.14.

101. I am satisfied that, even though there was not a sale of the finished products by CGES to the Taxpayer, the fact remains that the Taxpayer did not manufacture the finished goods and only had them transferred to it pursuant to the sub-contracting arrangements between it and CGES. On analysis, I conclude that the profit-producing transactions of the Taxpayer consisted of the acquisition of the finished goods from CGES, for which the Taxpayer paid a processing fee under the Processing/Subcontracting Agreement in respect of the manufacture of the goods by CGES, and the on-selling of the same to its customers.

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25 Respondent's Skeleton Arguments, §5.7.

26 *Per* Ribeiro PJ in *ING Barings Securities* at §38.

102. I do not consider that this reasoning involves ignoring the cost structure of the Taxpayer, as submitted by Mr Barlow SC. The costs to the Taxpayer of acquiring the finished lighting products which it then sold to its customers are reflected in the processing fee paid by it to CGES. The fact that this processing fee was no greater than the operating costs and overheads of CGES would appear to be the result of a deliberate decision by the Taxpayer to structure the processing fee in this way. The fact that the manufacturer of the finished lighting products was its wholly-owned subsidiary is the reason why in practice the Taxpayer was able to achieve this. That, however, does not detract from the fact that the costs of acquiring the finished lighting products were taken into account in arriving at the profits earned by the Taxpayer from what I have concluded to be the profit-producing transactions in the present case, viz. the sales to the Taxpayer's customers.

103. Nor do I consider that this analysis involves isolating one part of the Taxpayer's business and treating it as the whole of the business, a submission which Mr Barlow SC made by reference to Pinson on Revenue Law (17th Ed.) §2-11A. As the Board held and the Taxpayer accepted, CGES was the manufacturer and so the Taxpayer did not manufacture the lighting products which it sold for a profit. This does not involve isolating one part of the Taxpayer's business but instead the analysis seeks to exclude an activity which was held to have been undertaken by a non-agent third party, i.e. CGES. This approach is consistent, in my judgment, with the decisions of the Court of Final Appeal in *Kwong Mile Services* and *ING Baring Securities*.

Are the cases of Datatronic and Ngai Lik distinguishable on their facts?

104. Significant to be Court of Appeal's decision in *Datatronic*, in my view, were the findings of fact that (i) the subsidiary manufactured the products which were sold to the taxpayer (§24), and (ii) the subsidiary was not the taxpayer's agent and that the subsidiary's manufacturing activities were not the taxpayer's activities (§36). As will be apparent, one of these factors is present in this case (factor (ii)) whilst the other factor is not (factor i)).

105. Similarly, in *Ngai Lik*, there was a finding of a sale of the electronic audio products by the co-subsidiary to the taxpayer.

106. I am satisfied that the absence of a finding that there was a sale by CGES to the Taxpayer does not provide a material distinguishing feature between the present case and *Datatronic* or *Ngai Lik* and that the principles to be derived from those cases (as identified in paragraphs 82 and 90 above) apply in this case.

107. I accept Mr Yu SC's submission that the presence of the processing agreement between CGES and the Taxpayer in the present case is sufficient to bring it within the reasoning in §26 of the judgment of Tang VP in *Datatronic*.

108. In my judgment, a finding that there was no contract of sale between CGES and the Taxpayer is not fatal to a conclusion that activities of the Taxpayer in relation to the manufacturing process, undertaken by CGES, a non-agent third party, are to be disregarded

as antecedent or incidental activities to the sales which were the profit-producing transactions in the present case.

Did the Board fall into error in respect of its treatment of the Taxpayer's participation in the production process?

109. It follows from my conclusion as to the nature of the profit-producing transactions in the present case that the Board was wrong to conclude, as it did, that the Taxpayer's participation in the production process was as much a part of its profit-producing transactions as the obtaining of a purchase order.

110. Having correctly held that it should ignore the operation of CGES and that the Taxpayer's profit-producing transactions are to be distinguished from activities antecedent or incidental to those transactions, I agree with the submission made on behalf of the Commissioner that the Board's treatment of the Taxpayer's antecedent or incidental activities was analogous to the erroneous approach criticised by the courts in *ING Baring Securities*[27], *Datatronic*[28] and *Ngai Lik*[29].

Conclusion on the questions posed in the Case Stated and costs

111. For the reasons set out above, I answer the Questions posed in the Case Stated in the affirmative.

112. Accordingly, I allow the appeal and make an order *nisi* that the Taxpayer pay the Commissioner's costs of the appeal, to be taxed if not agreed, with a certificate for two counsel.

(Joseph Fok)
Judge of the Court of First Instance
High Court

[27] *Per* Ribeiro PJ at §§45-56.
[28] *Per* Tang VP at §§29, 35 and 36.
[29] *Per* Ribeiro PJ at §§62 to 71.

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