FACV No. 20 of 2003

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 20 OF 2003 (CIVIL)
(ON APPEAL FROM CACV NO. 371 OF 2002)

BETWEEN

KWONG MILE SERVICES LIMITED (in members' voluntary winding-up) — Appellant

and

COMMISSIONER OF INLAND REVENUE — Respondent

Court: Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Sir Derek Cons NPJ and Sir Ivor Richardson NPJ
Date of Hearing: 29 June 2004
Date of Judgment: 8 July 2004

J U D G M E N T

Mr Justice Bokhary PJ:

1. This case involves a familiar issue arising in novel circumstances. The issue is the familiar one of whether profits accrued from a Hong Kong source. But those profits were earned in the following novel circumstances. Premises were being built outside Hong Kong. A Hong Kong company underwrote the pre-sale of the premises for at least a certain amount by a certain date. This company would be liable to the developer for any shortfall but entitled to any excess. It undertook the marketing in Hong Kong of the premises. And it asks the Court to treat this underwriting arrangement as not materially different for tax purposes from a purchase and resale by it of the premises.

2. Our law contemplates that the profits from a trade, profession or business carried on in Hong Kong may accrue from either a Hong Kong source (and be taxable here) or from a non-Hong Kong source (and not be taxable here). For a charge to Hong Kong profits tax to arise, it is not enough that there are profits from a trade, profession or business carried on in Hong Kong. It is also necessary that the profits arose in or were derived from Hong Kong. This is the effect of the legislation on Hong Kong profits tax. Such tax is chargeable under Part IV of the Inland Revenue Ordinance, Cap. 112. The general charging provision is s.14, which reads:

> " (1) Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.
>
> (2) In the case of -
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> (a) a corporation; and
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> (b) a corporation ("relevant corporation") to which a share of the assessable profits of a partnership is apportioned under section 22A and is charged in the partnership name under section 22,
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> profits tax shall be charged on the assessable profits of that corporation, or on that share of the assessable profits of that relevant corporation, as the case may be, at the rate specified in Schedule 8."

3. In *CIR v Hong Kong & Whampoa Dock Co. Ltd* (1960) 1 HKTC 85 the Full Court regarded the phrases "arising in" and "derived from" as synonymous. But in *CIR v Hang Seng Bank Ltd* (1989) 2 HKTC 614 Clough JA said (at p.640) that "derived from" has "a broader meaning importing the concept of immediate or mediate origin or source", and O'Connor J said (at p.652) that "derived from" has a "wider" meaning than "arising in". Cons VP (as Sir

Derek Cons NPJ then was) abstained from going into what (if any) difference there is between the two phrases.

4. This abstention was vindicated when the case reached the Privy Council (as *CIR v Hang Seng Bank Ltd* [1991] 1 AC 306). Delivering their Lordships' advice, Lord Bridge of Harwich said (at p.322 F-G) that "[w]hilst it may be that there is some marginal difference in the shades of meaning conveyed by the two phrases, their Lordships do not accept that it can possibly be sufficient to bear the weight sought to be put upon it in distinguishing" the Privy Council's decision in *Commissioner of Income Tax, Bombay Presidency and Aden v Chunilal B Mehta of Bombay* (1938) L.R. 65 Ind. App. 332. The situation in the present case is the same in that it does not call for a decision on what (if any) difference there is between the phrases "arising in" and "derived from" as used in s.14. It is not suggested that the result in the present case could turn on any such difference.

Assessment/objection/determination/appeals below

5. The Taxpayer is a company incorporated under the laws of Hong Kong. It is now in members' voluntary winding-up. For the four years of assessment 1992/93-1995/96 it was assessed to profits tax in the total sum of $6,860,124 on the profits in question ("the Profits"). It objected to this assessment, contending that the Profits had arisen in or were derived from the Mainland rather than Hong Kong. If so, the Profits would not be taxable here. Upon considering this objection, the Commissioner did not agree with it. He took the view that the Profits had indeed arisen in or were derived from Hong Kong. So he determined that the Profits are taxable here.

6. Dissatisfied with the Commissioner's determination, the Taxpayer appealed against it to the Board of Review which, by a 2:1 majority, accepted the Taxpayer's contention and allowed its appeal. A successful appeal by the Commissioner from the Board of Review to Deputy Judge Fung sitting in the Court of First Instance of the High Court (which I will refer to simply as the High Court) followed. And this was in turn followed by an unsuccessful appeal by the Taxpayer from the High Court to the Court of Appeal (Cheung and Ma JJA and Seagroatt J). Now, by leave of the Court of Appeal, the Taxpayer appeals to us.

Source of profits: broad guiding principle/no universal judge-made test

7. What was the source of the Profits? The circumstances in which the source of profits have to be determined are often complicated if not contrived. And I agree with the learned authors of *Halkyard, VanderWolk and Chow: Hong Kong Tax Law, Cases and Materials*, 3rd ed. (2001) who observe (at p.69) that "source is an easy concept to understand, but difficult to apply in practice". If I may say so, their valuable book lessens that difficulty. One of the cases they cite is *Nathan v Federal Commissioner of Taxation* (1918) 25 CLR 183. Delivering the judgment of the High Court of Australia in that case, Isaacs CJ said (at p.190) that "the ascertainment of the actual source of a given income is a practical, hard matter of fact". There is Privy Council authority

which conforms with that. Delivering the advice of the Privy Council in *Liquidator, Rhodesia Metals Ltd v Commissioner of Taxes* [1940] AC 774 at p.789, Lord Atkin said:

> "Their Lordships incline to the view quoted with approval from Mr Ingram's work on South African Income Tax Law by de Villiers J in his dissenting judgment: 'source means not a legal concept, but something which a practical man would regard as a real source of income', 'the ascertaining of the actual source is a practical hard matter of fact'."

In *CIR v Orion Caribbean Ltd* [1997] HKLRD 924, the Privy Council's last decision on our s.14, Lord Nolan, delivering their Lordship's advice, cited (at p.931F) that statement by Lord Atkin.

8. The word "hard" is not used in those cases to connote difficulty (although questions as to source can sometimes be difficult). It is used to mean hard-nosed in that expression's sense of being realistic. This is brought out in another decision of the High Court of Australia, namely *Federal Commissioner of Taxation v Mitchum* (1965) 113 CLR 401 where Barwick CJ said (at p.407) the matter of source is "judged as one of practical reality".

9. Judging the matter of source as one of practical reality does not involve disregarding the accurate legal analysis of transactions. The decision of the High Court of Australia in *Esquire Nominees Ltd v Federal Commissioner of Taxation* (1971-73) 129 CLR 177 was a successful appeal from Gibbs J (later Gibbs CJ) sitting on his own. Mr Robert Kotewall SC for the Taxpayer drew our attention to Gibbs J's statement at p.192 that the matter of source "is to be decided in accordance with the practical realities of the situation without giving undue weight to matters of form". But, as Mr Kotewall readily accepted when I so suggested, one has to turn to the next page to gain a proper appreciation of what Gibbs J had in mind when he said that. At p.193 Gibbs J expressed his agreement with what another member of the High Court of Australia, Rich J, said in *Tariff Reinsurances Ltd v Commissioner of Taxes (Victoria)* (1938) 59 CLR 194 at p.208 and repeated in *Federal Commissioner of Taxation v United Aircraft Corporation* (1943-44) 68 CLR 525 at p. 538, which is this:

> "We are frequently told, on the authority of judgments of this court, that such a question is 'a hard, practical matter of fact'. This means, I suppose, that every case must be decided on its own circumstances, and that screens, pretexts, devices and other unrealities, however fair may be the legal appearance which on first sight they bear, are not to stand in the way of the court charged with the duty of deciding these questions. But it does not mean that the question is one for a jury or that it is one for economists set free to disregard every legal relation and penetrate into the recesses of the causation of financial results, nor does it mean that the court is to treat contracts, agreements and other acts, matters and things existing in the law as having no significance."

10. It is, I think, appropriate to round off this aspect of the discussion by reverting to *Nathan's* case, and noting how Isaacs CJ introduced his famous statement, quoted above, that "the ascertainment of the actual source of a given income is a practical, hard matter of fact". As one sees at pp.189-190, he introduced that statement by pointing out that "[l]egal concepts must, of course, enter into the question when we have to consider to whom a given source belongs".

11. The ascertainment of the source of a profit is not hindered by technical rules, but is helped by the broad guiding principle that one looks to see what the taxpayer has done to earn the profit and where he has done it. This emerges from two oft-cited decisions of the Privy Council on our s.14, namely *CIR v Hang Seng Bank* [1991] 1 AC 306 and *CIR v HK-TVB International Ltd* [1992] 2 AC 307. Although s.14 has since been amended, the amendments do not affect the broad guiding principle which those two decisions combine to lay down. Delivering the advice in the *Hang Seng Bank* case, Lord Bridge of Harwich said (at p.323A) that "[t]he broad guiding principle, attested by many authorities, is that one looks to see what the taxpayer has done to earn the profit". And delivering the advice in the *HK-TVB* case, Lord Jauncey of Tullichettle expanded Lord Bridge's statement by adding (at p.407C) that one also looks at "where [the taxpayer] has done it". In the *Orion Caribbean* case Lord Nolan emphasised (at p.931F) that "[n]o simple, single, legal test can be employed" when ascertaining the source of a profit.

12. 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. Nor would trying to formulate such a test be wise. It is no exaggeration to describe formulating such a test as "probably an impossible task". We have seen it twice so described in the Appellate Division of the Supreme Court of South Africa - by Watermeyer CJ in *CIR v Lever Brothers & Unilever Ltd* (1946) 14 SATC 1 at p.13 and then by Centlivres CJ in *CIR v Epstein* 1954 (3) SA 689 at p.698 C. 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.

Primary facts found by Board of Review

13. Turning to what the Taxpayer has done to earn the Profits and where it has done it, one comes to an underwriting arrangement of an unusual nature. When people hear the word "underwriting" they automatically think of things like insurance or a public share offer. This underwriting arrangement did not involve anything of that kind.

14. The Taxpayer's printed case contains a reference to the statement in Jefferson P VanderWolk, *Determining the Locality of Profits after the Hang Seng Bank Case* (1992) 22 HKLJ 48 at p.57 that "[w]here the economic source of a profit is the making of a contract, as in the case of an underwriting profit of an insurance company, the source of the profit is located where the contract is entered into by the taxpayer." For this proposition, the learned author of this article cites

the *Tariff Reinsurances* case. There the profits in question were those of an English reinsurance company under a treaty of reinsurance entered into in London. Pursuant to this treaty the English reinsurance company reinsured a Victorian insurance company in respect of two-thirds of its risks to which the treaty applied. And it received two-thirds of the gross premiums received by the Victorian insurance company less certain deductions. Their Honours held that those profits were not profits earned in or derived from Victoria. As will be seen, the situation in the present case bears no resemblance to the situation in that case.

15. The primary facts found by the Board of Review may be summarised as follows.

16. On 2 May 1991 the Taxpayer was incorporated in Hong Kong for the purpose of entering into an underwriting arrangement with a Mainland developer by the name of South House Property Industry Co. Ltd ("the Developer"). This underwriting arrangement came to be embodied in a contract in Chinese signed by the Taxpayer and the Developer in the Mainland city of Guangzhou on 22 November 1991. At that time the Developer was in the course of developing a site in Guangzhou at 50 Tao Jin Lu by the erection thereon of a high-rise building complex named Regent House. Regent House was not completed until late 1994, but units in it were to be pre-sold.

17. The underwriting arrangement between the Taxpayer and the Developer related to the pre-sale of 122 flats in Regent House and 10 car parking spaces there. I will refer to these 122 flats and 10 car parking spaces as "the Property". Putting it simply, the Taxpayer underwrote the pre-sale of the Property by 30 June 1992 for a total sum of not less than $84,314,015. The figure of $84,314,015 is described in the contract between the Taxpayer and the Developer as "the total underwriting value of the Property" based on $6,877.1627 per square metre of construction area. The Taxpayer had to pay the Developer any shortfall but was entitled to any excess. In the result there was a considerable excess, and the Profits represent the net gain to the Taxpayer from such excess during the years of assessment 1992/93-1995/96.

18. Reverting to 1991 and continuing the story from then, it is time to introduce another company incorporated in Hong Kong, namely Canada Land Limited ("Canada Land"). The units comprising the Property were marketed in Hong Kong by the Taxpayer through Canada Land which, by a letter dated 23 November 1991, the Taxpayer had appointed its exclusive agent for the purpose. Those units were marketed and sold in Hong Kong from December 1991 to March 1992. In December 1993 Canada Land was appointed the project manager for the Regent House development. On 1 January 1994 Canada Land acquired control of the Taxpayer.

19. All but two of the purchasers of units in the Property were Hong Kong residents who paid in Hong Kong dollars. Apart from the instalments paid upon the signing of formal agreements for sale and purchase in Guangzhou, all the payments were made in Hong Kong. All of these purchases were effected by way of provisional sale and purchase agreements entered into in Hong Kong between the purchasers and the Developer as the vendor acting through Canada Land. The Board of Review rightly regarded these provisional sale and purchase agreements as legally binding,

as such agreements normally are in Hong Kong. So the sales were effected in Hong Kong before formal sale and purchase agreements were later executed in Guangzhou.

Reasoning of the majority in the Board of Review

20. The majority in the Board of Review concluded that the Profits arose in or were derived from the Mainland because that is where the Taxpayer assumed the risk to it under its underwriting arrangement with the Developer. They disclosed that they had come to this conclusion "only after much agony". And they indicated that if they "were to shift [their] focus [to] the place where the profits materialized (rather than the place of assumption of risk)", they would then conclude instead that the Profits arose in or were derived from Hong Kong.

Questions stated by the Board of Review

21. Two questions were stated by the Board of Review for the opinion of the High Court. These questions are formulated thus in the case stated by the Board of Review:

> "Whether, having regard to all the facts as found by the Board of Review, and on the true construction of Cap. 112 in particular s.14 thereof, the majority of the Board of Review:
>
> (a) was correct in law in holding that the profits of the Taxpayer arose in and derived from the assumption of an underwritten risk which was outside Hong Kong; and
>
> (b) erred in law in concluding that the more potent factor to give weight to in deciding the source of the Taxpayer's profits was the assumption of risk in China and not the marketing and sales activities (including the receipt of purchase price) by the Taxpayer in Hong Kong."

Answers given by the courts below

22. All the learned judges in the courts below answered the first question "No" and the second question "Yes".

Reasoning of the courts below

23. Deputy Judge Fung said:

> "The majority clearly recognized that the assumption of the risk in Guangzhou materialized into profits only because of the marketing activities in Hong Kong.

> Having so recognized the causal connection, the only reasonable conclusion is that the profit of underwriting arose in or derived from those activities in Hong Kong."

24. Giving the first judgment in the Court of Appeal, Cheung JA said that "[i]t was the operation of the taxpayer in Hong Kong which generated the profits". He obviously viewed that as the true and only reasonable conclusion. And that view, if right, would of itself - on the basis famously explained by Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at p.36 (of which I will say more in due course) - dictate the assumption that the conclusion reached by the majority in the Board of Review resulted from an error of law.

25. As it happens, however, Cheung JA felt able to specify the error made by the majority in the Board of Review. As to that, he said:

> "By relying on the underwriting contract and holding that the promotion and sale done by the taxpayer were irrelevant (the words they used were 'not directly relevant'), they had not really considered what the taxpayer had done and where it had done it to generate the profits. There is a clear error of law. In other words they had not applied the guiding principle at all."

26. The reasoning of Ma JA (as the present Chief Judge of the High Court then was) is similar although not identical to that of Cheung JA. Ma JA said:

> "In my view, although the majority decision did refer to both the *Hang Seng Bank* and *TVB* cases, the applicable principles were not applied or if they were, they were wrongly applied. The majority's focus was on the Underwriting Agreement having been made in Guangzhou and on analysis, the view taken by the majority was simply that without the Agreement, no profits would have been made. Yet, as the authorities demonstrate, this is not the criterion. The mere making of an agreement does not mean that this is the relevant activity carried out by the taxpayer that has earned the profits. Admittedly, it provides the opportunity for the profit to be made ..., but it is not (or not necessarily) the activity that earns the profits."

27. Having said that as to the non-application or misapplication of the *Hang Seng Bank/HK-TVB* broad guiding principle, Ma JA said that "[a]lternatively, the majority of the Board of Review took a view of the facts that cannot reasonably be supported." And he cited the decision of the Privy Council in *Richfield International Land and Investment Co. Ltd v CIR* [1989] STC 820 at p.824 f-h. There Lord Jauncey referred, in regard to appellate intervention in an appeal on law only, to Lord Brightman's speech in *Furniss v Dawson* [1984] AC 474 and to the advice of the Privy Council delivered by Lord Oliver of Aylmerton in *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue* [1986] STC 255.

28. The effect of what Lord Brightman said in *Furniss v Dawson* at pp.527-528 is that (i) in an appeal on law only the appellate court cannot substitute its own preferred inference for that drawn by the fact-finding tribunal if the primary facts justify alternative inferences of fact, but that (ii) the appellate court can and should interfere with an inference of fact drawn by the fact-finding tribunal which cannot be justified by the primary facts. In *Lim's* case, Lord Oliver said (at p.259) that "it is not for an appellate tribunal to substitute for the findings of the Special Commissioners what it thinks it would have found had it been hearing the original appeal but to see whether there was before the commissioners evidence on which they could properly and reasonably reach the conclusion that they did reach and whether, having regard to the facts found, their conclusions were consistent and intelligible."

29. Seagroatt J agreed with Cheung and Ma JJA, and added that the nature of the Taxpayer's business in Hong Kong in relation to the Property is "the straightforward common and garden one of property sale or estate agency [and that the] profits from that business arose in Hong Kong."

30. The majority in the Board of review did form a view as to what the Taxpayer had done to earn the Profits and where the Taxpayer had done it. So I do not think that it can be said that they have ignored the *Hang Seng Bank/HK-TVB* broad guiding principle. But that is of course not the end of the matter.

Basis of intervention in an appeal on law only

31. Appeals from the Board of Review to the courts lie only on questions of law. But intervention in an appeal on law only is not confined to instances in which it is apparent on the face of the record that the determination appealed against resulted from a specifically identifiable error of law. Just because there is no appeal on facts, it does not mean that the appellate court is precluded from detecting and correcting errors of law buried beneath conclusions ostensibly of fact. Sometimes, as Lord Radcliffe put it in *Edwards v Bairstow* at p.36, "the true and only reasonable conclusion contradicts" the determination appealed against. If so, the appellate court will assume that the determination resulted from an error of law. And that opens the way for the appellate court to intervene on the ground of an error of law.

32. Mr John Griffiths SC for the Commissioner placed reliance on - although not solely on - what Lord Millett said in his speech in *Runa Begum v Tower Hamlets LBC* [2003] 2 AC 430 at p.462G-H. There Lord Millett summarised the *Edwards v Bairstow* basis of appellate intervention in this way:

> "A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the

> court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law."

33. Mr Kotewall said that taking irrelevant factors into account and leaving relevant ones out of account are grounds for judicial review as explained by the English Court of Appeal in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 rather than grounds for appellate intervention on the *Edwards v Bairstow* basis. I can see Mr Kotewall's point. But, as it seems to me, taking irrelevant factors into account or leaving relevant ones out of account can lead a fact-finding tribunal so far astray as to reach a conclusion contrary to the true and only reasonable one.

34. Lord Radcliffe, having noted various ways of putting it, ultimately preferred to put it in terms of the determination appealed against being contradicted by the true and only reasonable conclusion. And I respectfully share that preference. But I of course acknowledge, as he did, that there are other ways of saying the same thing. To impugn a determination by saying that a contrary conclusion is the true and only reasonable one is in substance the same as saying that there was no evidence upon which the impugned determination could be reached. An observation to this effect appears in Viscount Simonds's speech in *Griffiths v J.P. Harrison (Watford) Ltd* [1963] AC 1 at pp.10-11. It is of course well-established that whether there is evidence upon which to find a fact is a question of law. The essence of the exercise was, if I may say so, neatly captured by Nourse J (as he then was) in *Cooper v C&J Clark Ltd* [1982] STC 335. Building on the reference in Lord Simon of Glaisdale's speech in *Ransom v Higgs* [1974] 1 WLR 1594 at p.1619 C-D to "a 'no-man's land' of fact and degree", Nourse J said (at p.341d) that the appellate court "can only interfere where the degree of fact is so inclined towards one frontier or the other as to lead it to believe that there is only one conclusion to which [the fact-finding tribunal] could reasonably have come."

35. Yet another way of putting it is to be found in the judgment of the English Court of Appeal in *Coker v Lord Chancellor* [2002] IRLR 80 delivered by Lord Phillips of Worth Matravers MR. At p.82 the Master of the Rolls said that an error of law can "consist in a finding of fact which is perverse".

36. Delivering the judgment of the Court of Appeal in *CIR v Magna Industrial Co Ltd* [1997] HKLRD 173, Litton VP (later Mr Justice Litton PJ) said at p.181D that "[t]he words 'profits arising in or derived from Hong Kong' in s.14 have a wide meaning and can accommodate a variety of situations in which it could not be said to be wrong to arrive at a conclusion one way or the other". Mr Kotewall is anxious that we bear that in mind. And I certainly do. Mr Griffiths, on the other hand, is anxious that we also bear in mind - as I certainly also do - what Lord Griffiths said in *Lee Ting-sang v Chung Chi-keung* [1990] 1 HKLR 764, an employees' compensation appeal from Hong Kong to the Privy Council. Delivering their Lordships' advice, Lord Griffiths said (at p.769F) that "an appellate court must not abdicate its responsibility and it is worth bearing in mind the words with which Lord Radcliffe concluded his speech in *Edwards v Bairstow* at pages 38

and 39." There Lord Radcliffe, dealing with the duty of appellate courts in appeals on law only, said:

> "Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts is inconsistent with the determination come to, to say so without more ado."

Mr Griffiths also drew our attention to Lord Nolan's speech in *R (Alconbury Ltd) v Environment Secretary* [2003] 2 AC 295 at p.323C-E where Lord Nolan cited *Edwards v Bairstow* "to illustrate the generosity with which the courts, including [the House of Lords], have interpreted their powers to review questions of law."

37. In an appeal on law only the appellate court must bear in mind what scope the circumstances provide for reasonable minds to differ as to the conclusion to be drawn from the primary facts found. If the fact-finding tribunal's conclusion is a reasonable one, the appellate court cannot disturb that conclusion even if its own preference is for a contrary conclusion. But if the appellate court regards the contrary conclusion as the true and only reasonable one, the appellate court is duty-bound to substitute the contrary conclusion for the one reached by the fact-finding tribunal. The correct approach for the appellate court is composed essentially of the foregoing three propositions. These propositions complement each other, although the understandable tendency is for those attacking the fact-finding tribunal's conclusion to stress the third one while those defending that conclusion stress the first two.

Owners/non-owners

38. Relying on the fact that the Taxpayer did not own the Property, Mr Griffiths drew our attention to what Lord Nolan said in the *Orion Caribbean* case at p.931B-C. There Lord Nolan said that Lord Bridge's reference in the *Hang Seng Bank* case to "property assets" in relation to the letting of property or the lending of money "may have been intended to refer simply to the exploitation of property or money *owned by the taxpayer*." (Emphasis supplied). To this Mr Kotewall said: (i) that what Lord Nolan said was *obiter*; (ii) that no authorities were cited by him on the point; (iii) that issues of the nature and necessity for such ownership did not arise for consideration in the *Orion Caribbean* case; and (iv) that the Privy Council had not been referred to cases like the *United Aircraft* and *Esquire Nominees* cases. I do not think - and I do not understand Lord Nolan to have said - that a taxpayer can never earn profits through the exploitation of property unless he is the owner. But I do think that whether the taxpayer is the owner of the property can be highly relevant to what he has to do to earn his profits. And an inaccurate understanding of what a taxpayer has done to earn his profits would be an impediment to a correct conclusion as to where he has done it.

39. Where the exploitation or participation in the exploitation of property - particularly immovable property - is concerned, I think that an owner would at least in general be better placed

than a non-owner to earn profits with relatively little exertion. An owner's relative passivity could provide considerable support for the conclusion that his profit was earned in the place where the property was situate even though what he did, such as it was, had been done elsewhere. Conversely, a non-owner's relatively high degree of activity could provide considerable support for the conclusion that his profit was earned in the place where he had been highly active even if that is not where the property was situate.

Taxpayer's argument

40. Mr Kotewall disavowed seeking to equate what happened in the present case with a purchase of the Property by the Taxpayer followed by a resale thereof by it. Nevertheless he argued that what happened in the present case was not materially different from such a purchase and resale. When asked if he contended that the Taxpayer had a finding to that effect by the majority in the Board of Review, Mr Kotewall accepted that they had not made any such finding, adding that the closest that they had come to doing so is what they said in paragraphs 60, 76 and 78(2) of the case stated. The essence of what is said in those three paragraphs can be gathered from the last sentence of paragraph 76, which reads:

> "There may have been a consideration of a straightforward purchase and resale, but at the end of the day, the manner in which the Taxpayer chose to realize its intention was the underwriting arrangement."

41. So Mr Kotewall is not in the position of simply defending the conclusion of the majority in the Board of Review as a conclusion which they reached at least reasonably. He is driven to the uncomfortable position of defending their conclusion by a route which they had expressly rejected and which contradicts the route taken by them. Mr Kotewall's argument also suffers from the difficulty that it treats as the same two things which are legally different. A purchase and resale arrangement would have involved the Taxpayer acquiring ownership of the Property. But the underwriting arrangement did not involve that. It did not involve a disposal of the Property by the Developer to the Taxpayer. The underwriting risk went to what the Property, owned by the Developer and not by the Taxpayer, would fetch when marketed. And such marketing was undertaken by the Taxpayer in Hong Kong. For the foregoing reasons, I am unable to accept Mr Kotewall's argument despite the customary ability with which he presented it.

Assumption of underwriting risk or marketing?

42. So the notion of a purchase and resale goes. And this leaves two things to consider. One is the assumption of an underwriting risk, and the other is marketing.

43. What the Taxpayer did in the Mainland was to assume an underwriting risk. But this was, as we have seen, an underwriting arrangement of an unusual kind. The assumption of this underwriting risk did not earn the Taxpayer any premium, fee or other payment. All that the

Taxpayer acquired by assuming this underwriting risk was an opportunity to earn the Profits by its exertions. What actually earned the Profits for the Taxpayer were its exertions in the form of its activities in marketing the Property. And those activities took place in Hong Kong. The source with which provisions like our s.14 is concerned is, I think, accurately described by Stephen J's phrase in the *Esquire Nominees* case at p.225, namely "a quite proximate source". For all these reasons, I respectfully share the view taken by all the learned judges in the courts below that the true and only reasonable conclusion to be drawn from the primary facts found by the Board of Review is that the Taxpayer earned the Profits by marketing the Property here. So the Profits arose in or were derived from Hong Kong, and are chargeable to Hong Kong profits tax.

Result

44. Accordingly I would dismiss the appeal with costs and a certificate for three counsel for the Commissioner (the parties having accepted at the hearing that costs should follow the event, and the Taxpayer having offered no opposition to the Commissioner's application for such a certificate).

Mr Justice Chan PJ:

45. I agree with the judgment of Mr Justice Bokhary PJ.

Mr Justice Ribeiro PJ:

46. I agree with the judgment of Mr Justice Bokhary PJ.

Sir Derek Cons NPJ:

47. I agree with the judgment of Mr Justice Bokhary PJ.

Sir Ivor Richardson NPJ:

48. I agree with the judgment of Mr Justice Bokhary PJ.

Mr Justice Bokhary PJ:

49. The Court unanimously dismisses the appeal with costs and a certificate for three counsel for the Commissioner.

(Kemal Bokhary)	(Patrick Chan)	(R.A.V. Ribeiro)
Permanent Judge	Permanent Judge	Permanent Judge

(Sir Derek Cons)	(Sir Ivor Richardson)
Non-Permanent Judge	Non-Permanent Judge

Representation:

Mr Robert G. Kotewall SC and Mr Chua Guan Hock SC (instructed by Messrs Fred Kan & Co.) for the appellant.

Mr John Griffiths SC, Mr Ambrose Ho SC and Mr Stewart K.M. Wong (instructed by the Department of Justice) for the respondent.