HCIA 1/2004

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

INLAND REVENUE APPEAL NO. 1 OF 2004

BETWEEN

THE COMMISSIONER OF INLAND REVENUE Appellant

and

COMMON EMPIRE LIMITED Respondent

Before: Deputy High Court Judge To in Court
Dates of Hearing: 27-28 June 2005 and 18 November 2005
Date of Decision: 17 January 2006

D E C I S I O N

Introduction

1. This is an appeal by the Commissioner of Inland Revenue (the "Commissioner") and a cross-appeal by Common Empire Limited (the "Taxpayer") by way of a case stated against the decision of the Board of Review (the "Board") in B/R 103/02 and D13/03 dated 10 May 2003

pursuant to section 69 of the Inland Revenue Ordinance (Cap 112). Two questions of law were posed for the opinion of this Court in the Commissioner's appeal and two questions were posed in the cross-appeal. At the hearing, counsel agreed to deal with the Commissioner's appeal and the hearing of the Taxpayer's cross-appeal be adjourned.

The background

2. The Taxpayer was incorporated in Hong Kong in December 1984. By two acquisitions in January 1990 and March 1991, the Taxpayer purchased some lots of agricultural land.

3. In May 1990, the Taxpayer sold two parcels of land acquired from the first acquisition, referred to in the Amended Case Stated as the "First Lots" and made a gain of $321,616. This gain was recorded in the accounts as an exceptional item and was not offered for assessment.

4. For the year ending 31 December 1996, the Taxpayer's accounts recorded a gain of $3,527,970 comprising of a gain of $37,053 from the sale of one lot of land acquired in the first acquisition (the "Second Lot") and a gain of $3,490,917 from the resumption by the Government of some of the land lots acquired in the second acquisition (the "Third Lots"). These gains were not offered for assessment.

5. In January 1998, the Taxpayer sold further lots of land (the "Fourth Lots") which gave rise to a gain of $15,479,734. This gain was not offered by the Taxpayer for assessment.

6. The assessor issued statements of loss to the Taxpayer in respect of the years of assessment from 1993/94 to 1998/99. The Taxpayer did not express any disagreement with these statements.

7. On 10 August 2000, the Commissioner issued a notice of assessment to the Taxpayer for the year of assessment 1998/99 showing a profits tax liability of $956,563. This tax liability was arrived at after setting-off the losses brought forward from the previous years against the gain from the disposal of the Fourth Lots.

8. Presumably the gains from the sale of the First Lots, the Second Lot and the Third Lots had come to the knowledge of an assessor, the Commissioner issued a revised statement of loss and additional profits tax assessment to the Taxpayer covering the years of assessment from 1996/97 to 1998/99 on 18 October 2000 which resulted in an additional profits tax liability of $564,476 for the year of assessment 1998/99 after assessing the gains from the disposal of the Second Lot and the Third Lots to profits tax.

9. By a letter dated 31 October 2001, the Taxpayer's tax advisers lodged a claim for correction of the tax return for the year of assessment 1996/97. The reason for the correction was that the resumption of the Third Lots took place in the financial year ending 31 December 1993 and hence the gains therefrom should be removed from the profits for the year of assessment 1996/97.

10. The assessor agreed to the correction and accepted that the gain of $3,490,917 derived from the resumption of the Third Lots accrued to the Taxpayer in the year of assessment 1993/94. The effect of the correction is that instead of making a loss of $2,175,763 for the year of assessment 1993/94 as shown in the statement of loss, the Taxpayer made profits of $1,315,154 by taking into account the resumption compensation which accrued in that year of assessment. As more than six years had since lapsed, the assessor accepted that by virtue of section 60 of the Inland Revenue Ordinance, no assessment to profits tax could be made in respect of those profits. A second effect of the correction is to set the statement of loss for the years of assessment from 1994/95 through to 1997/98 to zero. As a result, the assessor proposed to revise the statement of loss for the years 1993/94 to 1997/98 and the additional profits tax assessment for the year 1998/99 under section 60, which gives rise to a profits tax liability of $354,051. It is convenient to point out at this stage that there is no dispute that the assessor has power to assess the Taxpayer to additional tax for the year of assessment 1998/99. The contention between the parties is whether in so doing, the assessor can revise the statement of loss six years after the expiration of the particular year of assessment in respect of which it was incurred.

11. The original and the proposed revised additional assessments for the year 1998/99 were respectively confirmed and endorsed by a determination of the Deputy Commissioner, against which the Taxpayer appealed to the Board. The following two issues were raised at the hearing before the Board:

(1) whether the Fourth Lots were capital assets; and

(2) whether, in the absence of fraud, the Commissioner could revise the loss brought forward from more than six years back in raising the assessments for the year of assessment 1998/99.

The Board decided both issues in the negative, that is it decided against the Taxpayer on the first issue and against the Commissioner on the second issue.

The questions of law

12. The two questions posed for the opinion of the Court in the Commissioner's appeal are:

(1) whether the Board erred in law in holding that, in the absence of fraud, the assessor had no power to "re-open" a statement of loss issued by an assessor in

respect of any particular year of assessment after more than six years had elapsed since the expiration or end of that year of assessment?

(2) for the purpose of Question (1) above (and without prejudice to the generality thereof), whether the Board has erred in law in treating the computation of a taxpayer's profit or loss in any particular year as an "assessment" for the purpose of section 60 of the Ordinance?

13. It would be convenient to consider these questions in the reverse order. If the answer to Question (2) is in the negative, it must of necessity follow that the answer to Question (1) is also in the negative.

The applicable principles of statutory construction

14. A major issue in dispute between the parties is the proper approach to be adopted in construing section 60 of the Inland Revenue Ordinance. It is Mr Barlow's contention on behalf of the Taxpayer that the purposive approach should be adopted in construing the section, and adopting that approach the word "assessment" should be construed to include a statement of loss computed by an assessor for carrying forward purposes in connection with section 19C. Mr Ho SC and Mr Yin, counsel for the Commissioner, argued otherwise for the literal approach.

15. In construing a tax statute as in construing any other statute, the court must bear in mind the general principle that it is necessary to read all of the relevant provisions together and in the context of the whole statute as one purposive unit in its appropriate legal and social setting and to identify the interpretative considerations involved and to weigh and balance them in case they conflict: per Bokhary PJ in *The Medical Council of Hong Kong And David Chow Siu Shek* (2000) 3 HKCFAR 144 at 154.

16. The principles which specifically govern the construction of tax statutes were succinctly summarised by Lord Donovan, giving the majority judgment of the Judicial Committee of the Privy Council in *Thomas Mangin And Inland Revenue Commissioner* [1971] AC 739 at 746

> "These contentions pose the question of the true construction of section 108. Its history will be outlined presently; but it may be useful to recall at the outset some of the rules of interpretation which fall to be applied.
>
> First, the words are to be given their ordinary meaning. They are not to be given some other meaning simply because their object is to frustrate legitimate tax avoidance devices. As Turner J says in his (albeit dissenting) judgment in *Marx v Inland Revenue Commissioner* [1970] NZLR 182, 208, moral precepts are not applicable to the interpretation of revenue statutes.

> Secondly, "… one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used": per Rowlatt J in *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64, 71, approved by Viscount Simons LC in *Canadian Eagle Oil Co Ltd v The King* [1946] AC 119, 140.
>
> Thirdly, the object of the construction of a statute being to ascertain the will of the legislature it may be presumed that neither injustice nor absurdity was intended. If therefore a literal interpretation would produce such a result, and the language admits of an interpretation which would avoid it, then such an interpretation may be adopted.
>
> Fourthly, the history of an enactment and the reasons which led to its being passed may be used as an aid to its construction."

17. Interpretation of a statute is essentially ascertaining the intention of the legislature as expressed by the words used in the statute. If it is possible to ascertain the purpose of the legislature, the court shall give effect to that legislative purpose by applying such meaning to the words used in an enactment which those words are capable of having. The court may do so even to the extent of applying a strained meaning to the words used if the literal meaning is not in accordance with the legislative purpose. Thus, this purposive construction may only be adopted if the legislative purpose can be clearly discerned. Where, however, the court is unable to find the purpose of an enactment or is doubtful as to its purpose, the literal rule of interpretation prevails. The learned authors in *Bennion's Statutory Interpretation (4th Ed)* has the following comments in section 308 at 826:

> "It is apparent from the cases that there is often doubt about the legislative purpose. If the object sought to be achieved by Parliament in passing an Act is uncertain, this is bound to lead to uncertainty in the construction of the Act. The cause of such uncertainty in modern British Acts usually lies in the absence of any indication of the precise nature and extent of the mischief with which Parliament intended to deal. Our way is to state that the law shall be so, but not why it shall be so. This is because we legislate piecemeal; and the policy is not thoroughly and consistently thought out and applied. Where it is thought out on one matter, the way it is thought out may not fit the way it was thought out (perhaps some years earlier) in a neighbouring area. So the law presents a confused appearance …"

I agree with the above comments of the learned author.

18. There is no indication from the Ordinance the precise nature and extent of the mischief which the legislature intended to prevent by the Ordinance. The short title of the Inland Revenue Ordinance reads:

> "To impose a tax on property, earnings and profits."

This is all the guidance one can have from the Ordinance. In a general tax statute, of which the Inland Revenue Ordinance is one, it is difficult to discern any purpose other than to raise public revenue by a system of taxation which is applied consistently to those who are caught within the tax net, but not necessarily fairly to all subjects within the jurisdiction. What is important is consistency and not fairness. In the absence of clear indication of what was the legislative purpose, it is not appropriate for me to speculate or to subscribe to the Ordinance any particular purpose which the Ordinance was enacted to achieve. Other tax statutes may have an auxiliary purpose of achieving a re-distribution of wealth, social engineering or even restraint of trade. But that is certainly not the case with the Inland Revenue Ordinance. In the circumstances, I think the literal rule of interpretation must prevail. As will become apparent in the latter part of this judgment, having regard to the Inland Revenue Ordinance as a whole, it is not possible to adopt a purposive construction.

19. On the presumption against absurdity, it is clear from Lord Donovan's speech in *Owen Thomas Mangin And Inland Revenue Commissioner* that it can avoid an absurdity only if the language admits of such an interpretation. Any system of tax is a violation of the individual's right to property. While the court must bear in mind that there is no presumption as to tax when construing a tax statute, it must also bear in mind that there is no equity about a tax. The court must look fairly at the language used and apply the literal interpretation. If applying that rule of interpretation would produce a result which is absurd and one which is not, the court shall adopt the latter interpretation which would avoid that absurdity. This option is only available if the language admits of such an innocuous interpretation. But if the language does not admit of an interpretation which could avoid the absurdity, the court simply has no choice. It shall give effect to that literal interpretation however absurd or inequitable it may be to the person subject to tax as there is no equity about a tax. It is not for the court to re-write the statute giving it a just and equitable result which was not intended by the legislature.

The tax regime

20. Before turning to the questions posed by the Board, I shall first set out, in a nut-shell, the statutory tax regime under the Inland Revenue Ordinance. There are three heads of tax under the Ordinance: property tax, salaries tax and profits tax. These heads of tax and their computation are respectively provided for in Part II, III and IV of the Ordinance.

21. The charging section for property tax is section 5 of Part II, which provides that property tax shall be charged for each year of assessment at the standard rate on the net assessable

value of any land and building against its owner. The standard rate is the rate of tax as set out in Schedule 1. Assessable value is ascertained in accordance with section 5B, which is essentially the rent payable for the use of the land and/or building. Net assessable value is defined under section 5(1A) as the assessable value less the rates, if paid by the owner and an allowance for repairs and outgoings, which for the time being is fixed at 20% of the assessable value after deduction of any rates paid by the owner.

22. Salaries tax is charged under section 8 of Part III on every person in respect of his income arising in or derived from Hong Kong from any office or employment of profit for each year of assessment. Part III excludes certain income from the charge and makes provisions for ascertainment of income. The income accruing to a person from all sources in any year of assessment is his assessable income. This assessable income shall be adjusted in accordance with section 12 by deducting all outgoings and expenses wholly and necessarily incurred in the production of the assessable income, allowances calculated in accordance with Part VI in respect of capital expenditure on machinery or plant the use of which is essential to the production of the assessable income, self education expenses and other allowances as may be considered by the assessor as fair and reasonable and by adding the amount of any balancing charge directed to be made under Part VI. The assessable income so adjusted is the net assessable income. Salaries tax is charged at the rates specified in Schedule 2 on the net chargeable income of a person for each year of assessment which is arrived at by deducting from his net assessable income concessionary deductions such as charitable donations, home loan interest etc under Part IVA and his personal allowances under Part V. Where in any year of assessment the aggregate of the outgoings, expenses and allowances deductible exceed the amount of his assessable income, the amount of the excess shall be carried forward and set off against his net chargeable income in subsequent years of assessment, pursuant to section 12A.

23. Section 14 of Part IV is the charging section for profits tax. Under this charging section, what are subject to tax are a person' s assessable profits. Assessable profits is defined in section 2 to mean the profits in respect of which a person is chargeable to tax for the basis period for any year of assessment, calculated in accordance with the provisions of Part IV. Part IV contains provisions providing for valuation of trading stocks and what income is treated as receipts etc. Specifically, section 16 provides for how assessable profits are ascertained. Essentially, they are ascertained by deducting from the trading profits all outgoings and expenses provided for in the section, such as interests, rent, overseas tax paid, bad debts, cost of repairs etc and other payments under an approved retirement scheme, contributions to Mandatory Provident Fund Schemes for employees, expenditure on research and development and charitable donations under some other sections in Part IV. The profits so computed shall, if applicable, be subject to adjustment under section 18F by deducting the allowance for depreciation for plant and machineries and adding the balancing charge in accordance with provisions of Part VI.

24. If the computation and adjustment yields a negative figure, the result is a loss for profits tax purpose. There are no assessable profits to be taxed under the taxing section. But not

only that the person will not be required to pay any tax, he is entitled to tax concessions under the tax regime in that he may set off his loss against assessable profits in the subsequent years until the loss is fully set off. Any loss not so set off in the immediately following year shall be carried forward for set off in future years of assessment. These tax concessions are provided for in sections 19, 19C, 19CA and 19CB. If the exercise results in a positive figure, these are assessable profits which, after setting off against earlier losses if applicable, shall be subject to tax at the standard rate under section 14(1), i.e. the rate of tax as set out in Schedule 1.

25. It should be noted that the same rules apply in ascertainment of losses as in ascertainment of assessable profits. Firstly, section 19D provides that for the purposes of section 19C, the amount of loss incurred by a person chargeable to profits tax shall be computed in like manner and for such basis period as the assessable profits for that year of assessment would have been computed. Secondly, losses are subject to adjustment under section 19E in accordance with provisions in Part VI in the like manner as assessable profits are subject to adjustment under section 18F.

26. The common thread that runs through the process of determining the amount of tax in respect of the three heads of tax involves a two stage process:

(1) a process of computation of the amount in respect of which the person is chargeable to tax, i.e. the net assessable value of the property in the case of property tax, the net chargeable income in the case of salaries tax or the net assessable profits in the case of profits tax; and

(2) where the first process yields a positive figure, the application of the appropriate schedule rate of tax to that positive figure.

27. The taxing machinery is invoked by an assessor requiring a person by notice to furnish a tax return pursuant to section 51(1) of Part IX. In addition section 51(2) imposes on a person chargeable to tax for any year of assessment the duty to inform the Commissioner in writing that he is so chargeable to tax. Upon receipt of the return, an assessor may accept the return and make an assessment accordingly or if he does not accept the return, he may estimate the sum in respect of which the person is chargeable to tax and make an assessment accordingly pursuant to section 59(2). If a person has not furnished a return and an assessor is of the opinion that the person is chargeable to tax, he may estimate the sum in respect of which such person is chargeable to tax and make an assessment accordingly pursuant to section 59(3). If the accounts of the trade or business of the person have not been kept in a satisfactory form, an assessor may assess the profits on certain prescribed basis according to section 59(4). A person assessed becomes liable to tax when the Commissioner issues a notice of assessment to him pursuant to section 62. The same machinery is applicable to all the three heads of tax.

28. Where it appears to an assessor that for any year of assessment any person chargeable with tax has not been assessed or has been under-assessed, he may within that year of assessment or within six years after the expiration thereof make an additional assessment against that person under section 60. The person becomes liable to the additional tax when a notice of additional assessment is issued to him.

29. The above is a bird' s eye view of the local tax regime.

Question (2) – whether computation of profit or loss is an assessment

30. Having set out the tax regime under the Inland Revenue Ordinance, I now turn to consider Question (2). In fact, this Court had the opportunity of deciding a similar question in *The Commissioner of Inland Revenue and Yau Lai Man, Agnes trading as L M Yau & Company*, HCIA 3/2004. In that appeal, Yam J held that the Board erred in coming to the view that computation of loss amounted to an assessment for the purpose of sections 60 and 70 of the Inland Revenue Ordinance. However, Mr Barlow submitted that in that case, the taxpayer was unrepresented and the Court did not have the benefit of counsel' s argument based on the Privy Council decision in *Lloyds Bank Export Finance Ltd And Commissioner of Inland Revenue* [1991] 2 AC 427. He wished to persuade me to come to a contrary view. His submission is that an assessment is a process which embraces all possible results of a business' year of assessment, whether that result is a profit and therefore an assessable profit; or break-even or a trading loss which the Ordinance requires to be carried forward for setting off against future assessable profits. On the other hand, Mr Ho SC argued that an assessment means an assessment that a specified amount of tax will become due and payable.

31. The words "assess" and "assessment" are not defined in the Inland Revenue Ordinance. I shall construe these words in the context of the Ordinance bearing particularly in mind the tax regime under the Ordinance. I shall also draw on whatever assistance I can from the meaning given to these words by the Privy Council in *Lloyds Bank Export Finance Ltd* in the light of the New Zealand tax regime.

32. Section 62 provides a convenient starting point for construing the meaning of these words. This section imposes on the Commissioner a duty to give a notice of assessment and prescribes what the notice of assessment must contain. Section 62(1) provides as follows:

> "**62. Notice to be issued by Commissioner**
>
> (1) The Commissioner shall give a notice of assessment to each person who has been assessed stating the amount assessed, the amount of tax charged, and such due date for payment thereof as may be fixed by the Commissioner."

Under this section, the Commissioner shall give a notice of assessment to each person who has been assessed by an assessor stating the amount assessed, i.e. the amount in respect of which the person is chargeable to tax, the amount of tax charged and the due date for payment. It is implicit from the provisions in this section that an assessment must be an assessment with a positive amount of tax which is payable and shall be paid on or before the due date specified in the notice. The word "assessed" must mean assessed to tax, i.e. assessed with a tax liability.

33. Apart from section 62, section 59 also casts some light on the meaning of the words "assess" and "assessment". This section is in the following terms:

> "**59. Assessor to make assessments**
>
> (1) Every person who is in the opinion of an assessor chargeable with tax under this Ordinance ***shall be assessed by him*** as soon as may be after the expiration of the time limited by the notice requiring him to furnish a return under section 51(1):
>
> …
>
> (2) Where a person has furnished a return in accordance with the provisions of section 51 the assessor may either –
>
> (a) accept the return and ***make an assessment*** accordingly; or
>
> (b) if he does not accept the return, estimate the sum in respect of which such person is chargeable to tax and ***make an assessment*** accordingly.
>
> (3) Where a person has not furnished a return and the assessor is of the opinion that such person is chargeable with tax, he may estimate the sum in respect of which such person is chargeable to tax and ***make an assessment*** accordingly, but such assessment shall not affect the liability of such person to a penalty by reason of his failure or neglect to deliver a return.
>
> (4) In the case of profits from a trade or business, if accounts of such trade or business have not been kept in a satisfactory form, the assessor may ***assess the profits*** or income of such trade or business on the basis of the usual rate of net profit on the turnover of such trade or business, and the Board of Inland Revenue may prescribe the amounts of such usual rates of profits in particular classes of trade or business." (emphasis added)

34. Under section 59(1), an assessor is under a duty to assess a person for tax if he is of the opinion that the person is chargeable with tax under the Ordinance and the time limited by the notice requiring that person to furnish a return under section 51(1) has expired. Pursuant to section 59(2), in relation to a person who has furnished a return, if the assessor accepts the return, he may make an assessment accordingly under section 59(2)(a). If he does not accept the return, he may estimate the sum in respect of which such person is chargeable to tax and make an assessment accordingly under section 59(2)(b). Likewise, where a person has not furnished a return, the assessor may estimate the sum in respect of which that person is chargeable to tax and make an assessment accordingly under section 59(3). From these two subsections, it appears that a distinction is drawn between the process of determining the amount in respect of which a person is chargeable to tax and the process of making an assessment. In evaluating a return furnished, the assessor's duty is to verify if the amount in respect of which that person is chargeable to tax as reported and computed from the return is correct. If an assessor finds a return unacceptable or if no return has been furnished, he may estimate the amount in respect of which the person is chargeable to tax. This is a process which precedes the making of an assessment. Where a person has furnished a return showing a loss which is accepted by the assessor at the end of the evaluation process, the assessor does not make an assessment. The phrase "make an assessment accordingly" must mean to make an assessment according to whether there is an amount to which the appropriate rate of tax may be applied. If there is no such an amount, no assessment shall be made.

35. The above interpretation of section 59 ties in neatly with the tax regime in respect of the three heads of tax which I have set out earlier, i.e. the determination of a person's tax liability involves a two stage process:

(1) the determination of the net assessable value of a property subject to property tax, or the net chargeable income of a person subject to salaries tax or the assessable profits of a person subject to profits tax; and

(2) the application of the appropriate rate of tax to these values.

The first of these processes is the same as the first process of evaluating a tax return or estimating the amount in respect of which the person is chargeable to tax and the second process is the same as making an assessment. Thus making an assessment for the purpose of section 59 is the ascertainment of the amount in respect of which a person is chargeable to tax and the application of the appropriate rate of tax to that amount.

36. In the context of profits tax, the ascertainment of the amount in respect of which a person is chargeable to tax is the ascertainment of the assessable profits which involves ascertaining the profits of a trade or business in according with section 16 by deducting from the trading profits all outgoings and expenses provided for in section 16 and other sections in Part IV and then adjusting that figure in accordance with section 18F. If the first process results in a positive figure,

these are the assessable profits which after set off against earlier losses if applicable shall be subject to tax at standard rate. Then the assessor proceeds to the second process of making an assessment by applying the standard rate of tax to the assessable profits so ascertained. If the first process yields a negative figure, the result is a loss for tax purpose. There are no assessable profits to be taxed under section 14. The assessor does not have to proceed to the second stage of making an assessment for there are no assessable profits to which the standard rate of tax could be applied. There is no assessment and the Commissioner does not issue a notice of assessment pursuant to section 62. Instead, the assessor issues a statement of loss. This statement of loss is not issued pursuant to any provisions in the Inland Ordinance. It is only issued as a matter of administrative convenience for the purpose of advising the person of the loss which may be used for set off purpose in the subsequent years of assessment.

37. The above construction is further supported by section 59(1A), (1B) and (1C). These sections provide that if by electing personal assessment, a person is entitled to a refund of any property tax paid or will result in no liability to profits tax, the assessor is not obliged or shall not proceed to make an assessment for property tax or profits tax as the case may be. These subsections portrait the situation where after a process of evaluation an assessor arrives at a conclusion that the person is not liable to tax, the assessor shall not make an assessment. Thus the evaluation process, even though it may be described as an assessment in the ordinary sense of the word as suggested by Mr Barlow is not an assessment for the purpose of sections 59, 60 and 62 of the Inland Revenue Ordinance. Section 59(1A), (1B) and (1C) specifically prohibit an assessor from making or proceeding to make an assessment where the evaluation resulted in no property tax payable or assessable profits chargeable to profits tax. Furthermore, the words "assess" and "assessment" are not used in the Ordinance save in relation to ascertaining the amount of tax payable. In relation to estimating other values, words such as "ascertainment" or "computation" are used, for example, in relation to ascertaining the assessable value of land and building (section 5B), assessable income (section 11B), net chargeable income (section 12B) and chargeable profits (section 16); or computing the profits (section 15C) and loss (section 19D). This lends further support to the construction I give to these words. Thus, a statement of loss is not an assessment for the purpose of Parts IX and X of the Inland Revenue Ordinance.

38. According to The New Shorter Oxford Dictionary, "assess" means to fix the amount of (a tax, fine etc); or impose a fine or tax on (a person or community); or estimate officially the value of (property, income, etc) for taxation; or estimate the worth or extent of (something). Likewise, "assessment" means the determination of the amount of a tax, fine etc; official valuation of property, income, etc for the purpose of taxation; the amount of such a charge or valuation or evaluation, estimation; an estimate of worth, extent, etc. Thus, according to the ordinary usage, these words are used in the context of tax to mean to determine or a determination of a positive amount of tax payable and not whether tax may be payable. An assessment of no tax liability or an assessment of loss is not a meaning contemplated in the ordinary usage of the word.

39. From the above analysis, the only reasonable meaning which could be given to the word "assessment" for the purpose of section 59 and likewise sections 60 and 62 is that it is a process of ascertaining or computing the net assessable value of a property subject to property tax or the net chargeable income of a person subject to salaries tax or the assessable profits of a person subject to profits tax and the application of the appropriate rate of tax to that amount assessed to yield a positive amount of tax chargeable against the person assessed to tax. An ascertainment of loss which does not result in the application of the appropriate rate of tax to that loss is not an assessment within the meaning of the Ordinance. The word "assessment" is not capable of bearing the meaning submitted by Mr Barlow.

40. Mr Barlow further submitted that it is important to distinguish between an assessment which is a process of calculation or estimation of the trading result of a business in a year of assessment and a notice of assessment or statement of loss which is a notification of the conclusion reached from that process. In the light of the above analysis, I do not think it is open to construe that word as a mere process of computation which might show up a positive figure, a nil figure or a negative figure. If it were, where a person has no chargeable profits, the Commissioner would be under a duty to issue him a notice of assessment requiring him to pay no tax on a due date on which nothing is due. That is not permissible under section 62(1). It is also absurd.

41. Thus an assessment is to be distinguished from a mere computation of loss. The computation of loss may be a step towards making an assessment but no assessment would be made in respect of a loss in the year of assessment in which it was incurred except where it is available for set-off against the other profits or income of the taxpayer in that year when the loss would be brought into the assessment not as a loss per se but as part of the ascertainment of the taxpayer's assessable profits for that year.

42. The construction I found is also echoed in a number of Australian authorities. I do not have the benefit of any knowledge about the Australian tax regime. There may be no possible parallel between the more complex Australian tax regime and the relatively simple regime under our Ordinance. The following dicta are cited for the purpose of showing that the interpretation I give to the words "assess" and "assessment" is not unheard of and has been accepted in other jurisdiction.

43. In *The King v Deputy Federal Commissioner of Taxation (SA), ex parte Hooper* (1926) 37 CLR 368, Issacs J said at 373:

> "An 'assessment' is not a piece of paper : it is an official act or operation; it is the Commissioner's ascertainment, on consideration of all relevant circumstances, including sometimes in his own opinion, of the amount of tax chargeable to a given taxpayer. When he has completed his ascertainment of the amount, he sends by post a notification thereof called 'a notice of assessment.' … But neither the paper sent nor the notification it gives is the 'assessment'. This is and remains the act or operation of the Commissioner."

44. In *Batagol v The Commissioner of Taxation of the Commonwealth of Australia* [1963] 109 CLR 243, Kitto J said at 252:

> "… the definition of ' assessment' means, in my opinion, the completion of the process by which the provisions of the Act relating to liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case … nothing done in the Commissioner' s office can amount to more than steps which will form part of an assessment if, but only if, they lead to and are followed by the service of a notice of assessment."

45. In *Deputy Commissioner of Taxation v Sheehan* (1986) 18 ATR 194, Tadgell J said at 201:

> "The imposition of a liability is a necessary feature of an assessment under Part IV of the Act, and a nil assessment is an impossibility."

46. Mr Barlow relied heavily on the Privy Council decision in *Lloyds Bank Export Finance Ltd And Commissioner of Inland Revenue*, which is an appeal from New Zealand. That case had been considered by Yam J in *Yau Lai Man Agnes*. Yam J declined to follow the Privy Council' s interpretation of the word "assessment" on the basis that the relevant provisions under the New Zealand tax regime is fundamentally different from section 59(1) of our Inland Revenue Ordinance.

47. The facts in that case were broadly similar to those in the present case. The taxpayer in that case submitted returns for the income years 1976 and 1977 showing small profits, but owing to losses in previous years carried forward and set off, the commissioner made determinations that no tax was payable. More than four years later the commissioner assessed the taxpayer to income tax for the years 1976 and 1977. The taxpayer objected to the assessment on the ground that the commissioner was statute-barred from making the subsequent assessments.

48. Mr Barlow submitted that the statutory provisions in New Zealand are mostly analogous to those under our Inland Revenue Ordinance. Sections 19, 23, 25(1) and 29(1) of the New Zealand Income Tax Act 1976 provide as follows:

> "**19. Commissioner to make assessment –**
>
> From the returns made as aforesaid and from any other information in his possession the commissioner shall in and for every year, and from time to time and at any time thereafter as may be necessary, make assessments in respect

of every taxpayer of the amount on which tax is payable and of the amount of that tax.

23. Amendment of assessment –

(1) The commissioner may from time to time and at any time make all such alterations in or additions to an assessment as he thinks necessary in order to ensure the correctness thereof, notwithstanding that tax already assessed may have been paid.

(2) If any such alteration or addition has the effect of imposing any fresh liability or increasing any existing liability, notice thereof shall be given by the commissioner to the taxpayer attached.

25. Limitation of time for amendment of assessment –

(1) When any person has made returns and has been assessed for income tax for any year, it shall not be lawful for the commissioner to alter the assessment so as to increase the amount thereof after the expiration of four years from the end of the year in which the assessment was made.

29. Notice of assessment to taxpayer -

(1) As soon as conveniently may be after an assessment is made the commissioner shall cause notice of the assessment to be given to the taxpayer: provided …

- it shall not be necessary to set forth in the notice of the assessment any particulars other than particulars as to the amount of tax to be paid by the taxpayer or the amount of tax to be refunded, as the case may require.

49. Section 19 of the New Zealand Act is similar to our section 59, except that under our section 59, it is an assessor who makes the assessment. This is the point of distinction which Yam J relied on in distinguishing that case from the case before him. While section 29 of the New Zealand Act and section 62 of the Inland Revenue Ordinance provide that the commissioner shall give notice of assessment to the taxpayer, the assessor under the Inland Revenue Ordinance has no authority to give notice of assessment. For my part, I do not think the distinction has any significance.

50. Sections 23 and 25 of the New Zealand Act are analogous to section 60 of the Inland Revenue Ordinance, though under the Hong Kong tax regime the amendment is in the form of additional assessment and the limitation period is six years.

51. Mr Ho SC argued that section 29(1) of the New Zealand Act which envisages a tax refund enabled the Privy Council to decide that an assessment under section 19 of the New Zealand Act could be a negative assessment, i.e. a loss, which is a point of distinction from the Inland Revenue Ordinance. I think it is more probable that the refund must have arisen from payment of provisional tax as in the Hong Kong tax regime. I do not agree with Mr Ho SC's submission. Hence, I would not distinguish the decision in *Lloyds Bank Export Finance Ltd* on that basis.

52. Returning to the Privy Council decision in *Lloyds Bank Export Finance Ltd*, it was argued on behalf of the taxpayer that the word "assessment" meant the process of determining the income of a taxpayer, if any, of determining the allowance deductions or rebates and ascertaining thereby the balance of income, if any, upon which tax was payable. This process might show up a positive figure, a nil figure or a negative figure, but in each case an assessment had been made. On the other hand, the commissioner argued that section 19 of the New Zealand Act imposed on the commissioner the duty to make assessments in respect of every taxpayer of the amount on which tax is payable and the process of assessment had not taken place until some taxable income had been ascertained. The taxpayer and the commissioner respectively held a similar stand as the parties in this appeal. The Privy Council found for the taxpayer. The Privy Council drew support for its conclusion from sections 23(2) and 29(1) of the New Zealand Act. Lord Jauncey of Tullichettle delivering the speech of the Privy Council said at 435:

> "Some support for [the taxpayer's] argument is to be found in section 23(2) which, in the context of amendment of assessments, uses the words "imposing any fresh liability or increasing any existing liability." The reference to fresh liability suggests that the section contemplated an alteration which imposed liability to tax where none existed before. Further support for the argument is to be found in section 29(1) which clearly contemplates that a notice of assessment given after an assessment has been made shall in certain circumstances contain a statement of the amount of tax to be refunded. In this situation the assessment would necessarily have produced the result that not only was no tax payable by the taxpayer but that tax was repayable to him by the commissioner. If an assessment is made in such a situation it is difficult to see why it is not also made when no tax is payable without a refund."

Lord Jauncey continued at 437:

> "Their Lordships have no doubt that the arguments for the taxpayer are to be preferred and that the commissioner's statutory duties under section 19 in relation to a taxpayer's return extend not only to the production of a result which produces taxable income but also to results which produce a nil return or a loss. Any other construction would produce the anomalies and illogicalities already referred to."

53. In effect Lord Jauncey was saying that an assessment included an assessment which yielded no tax or one which resulted in a loss. Mr Barlow sought to argue that an assessor's statement of loss which creates no tax liability is, by the same reasoning, an assessment. Whether the reasoning of the Privy Council can be applied to the present case depends on whether the Hong Kong tax regime is similar to the New Zealand's in material respects.

54. I have set out the Hong Kong tax regime in paragraphs 20 to 29 and the relevant provisions above. I do not have the benefit of the complete New Zealand Income Tax Act to enable me to make a section to section comparison of the two tax regimes or to enable me to analyse the New Zealand tax regime in the way I analysed the Hong Kong tax regime in paragraphs 32 to 37 above. I do not have, in particular, the New Zealand equivalent of our section 59 as to how the New Zealand commissioner approaches the tax returns under the New Zealand tax regime to enable me to consider the meaning of the word "assessment" under the New Zealand regime. I would not go that far as Yam J did in rejecting the interpretation in *Lloyds Bank Export Finance Ltd* on the basis that the New Zealand Act is fundamentally different from section 59(1) of our Ordinance. But I am comfortable in reaching the same conclusion as he did by analysing sections 59, 60 and 62 in the light of the Hong Kong tax regime. I think on the basis of the Hong Kong tax regime and the statutory provisions and for the reasons I have given, I should not follow the Privy Council's interpretation of the word "assessment" in that case.

55. In my opinion, the word "assess" in the Inland Revenue Ordinance must be construed to mean assessed to tax and the word "assessment" for the purpose of sections 59, 60 and 62 must be construed to mean a process of ascertaining or computing the amount in respect of which a person is chargeable to tax, i.e. the net assessable value of a property subject to property tax or the net chargeable income of a person subject to salaries tax or the assessable profits of a person subject to profits tax and the application of the appropriate rate of tax to that value, which by definition under the tax regime must yield a positive amount of tax payable by the person assessed to tax. An ascertainment of loss which does not result in the application of the appropriate rate of tax to that loss cannot be an assessment within the meaning of the Ordinance.

56. Accordingly, the Board was in error to have treated the computation of a taxpayer's profit or loss in any particular year as an "assessment" for the purpose of section 60 of the Ordinance. I therefore answer Question (2) in the affirmative.

Question (1) – power to re-open a statement of loss after six years

57. The issue raised by Question (1) is whether, in the absence of fraud, the assessor had no power to "re-open" a statement of loss issued by an assessor in respect of any particular year of assessment after more than six years had elapsed since the expiration or end of that year of assessment.

58. What the assessor did as a result of the Taxpayer's correction on the amount of profits made for the year of assessment 1993/94 was to re-set the amount of loss carried forward to the subsequent years to zero, which resulted in a tax liability for the year of assessment 1998/99. The Commissioner then issued a notice of additional assessment pursuant to section 60 of the Ordinance. In finding against the Commissioner, the Board in essence held:

(1) that the nil balance of loss to be carried forward for the year of assessment 1993/94 was artificial, fictitious and mathematically wrong (paragraphs 34 and 36 of the Amended Case Stated);

(2) that there was no provision in the Inland Revenue Ordinance which empowered or required the Commissioner or an assessor to revisit a loss more than six years ago, i.e. in issuing the proposed additional assessment the Commissioner exceeded her powers under Part IX and X, in particular, section 60(1) and (2); and

(3) that the Commissioner's approach was contrary to the statutory scheme that in the absence of fraud there was finality in tax matters after six years.

59. Mr Barlow sought to support the decision of the Board on this issue on the basis that the Board rightly adopted a purposive construction and reached the conclusion that the Commissioner's attempts over six years after 1993/94 year of assessment to circumvent section 60 by substituting the original computation of loss with an assessor's "artificial, fictitious and mathematically wrong" nil balance was a course which was not authorised or permitted by the Ordinance and effectively prohibited by the Ordinance. For reasons as already explained in paragraphs 14 to 19, it was not open to the Board to adopt a purposive approach in construing the Inland Revenue Ordinance.

60. With respect to the Board, it was factually wrong about the nil balance attributed to the year of assessment 1993/94 and was inconsistent in its reasoning. In respect of the nil balance, the Board said in paragraphs 35 and 36 of the Amended Case Stated:

"35. Instead of assessing the Taxpayer on the correct net assessable profits of $1,315,154, or leaving the reported loss of $2,175,763 undisturbed, the Commissioner attributed a nil balance to the "loss carried forward" for the year of assessment 1993/94. …

36. To start with, the nil balance was artificial, fictitious, and mathematically wrong. The correct amount was $1,315,154."

It is clear that the Board acknowledged at paragraph 35 of its decision that the correct profits which should have been assessed was $1,315,154. That must necessarily mean there could not be any

loss to be carried forward and that the balance of loss to be carried forward should be revised to nil, provided that it was open to the assessor to revisit the statement of loss. I fail to see how revising the loss to be carried forward to nil could be said to be artificial, fictitious and mathematically wrong. This misunderstanding might not have led the Board to its conclusion, but it is appropriate that I should set it right for the purpose of determining this question.

61. The facts are that as a result of the correction raised by the Taxpayer, there were in fact assessable profits of $1,315,154 which should have been chargeable to tax in the year of assessment 1993/94 had an assessment been timeously raised. However, the Taxpayer had reported a loss. The Commissioner was not seeking to raise an assessment in respect of these assessable profits as she apparently accepted that she was not permitted to do so under section 60. The Taxpayer had benefited from the limiting provision of section 60 for the year of assessment 1993/94. However, as a result of the profits made, the true position was that there was no loss to be carried forward from 1993/94 into the subsequent years. Thus the assessor re-set the loss to be carried forward to zero or nil balance. Therefore, there was no loss to be set off against the profits of the subsequent years, which was what resulted in the additional assessment for the year of assessment 1998/99. That additional assessment was made within the six years period.

62. Having set out the true facts, I now turn to the Board' s second reason for its decision, i.e. the Commissioner exceeded her power under section 60 in issuing the notice of additional assessment. The assessor purported to make the additional assessment pursuant to section 60. The notice of additional assessment for the year of assessment 1998/99 was issued by the Commissioner in exercise of her power under sections 60 and 62. In holding that the Commissioner had exceeded her powers and in adopting the wrong approach, the Board held at paragraphs 37 to 39 of the Amended Case Stated as follows:

> "37. Further, the Commissioner asked the wrong question.
>
> 38. The question was not whether there was any provision in the Ordinance which prevented the assessor from taking a certain course. The correct question was whether there was a provision in the Ordinance which empowered or required the assessor to take such a course.
>
> 39. The power of the Commissioner and her assessors to assess was conferred by statute. Their work was by its nature quite intrusive. They probed into private matters of taxpayers and assessed them to tax. The Board was not aware of any inherent jurisdiction on the part of the Commissioner or her assessors and the Commissioner had not argued that there was any. The Commissioner had not been able to point to any provision in the Ordinance or any other ordinance empowering or requiring the Commissioner or an assessor to revisit a loss more than 6 years ago. In the Board' s decision, the Commissioner' s approach was neither authorised nor required by statute. It also exceeded the powers

> under [Part] IX and X of the Ordinance, including section 60(1) and (2) in particular."

It is clear from these paragraphs that in criticising the Commissioner's determination and approach, the Board's focus was on whether the Commissioner had power to revisit a statement of loss made within six years of a particular year of assessment in respect of which the statement of loss was made and not whether the Commissioner had power to make an additional assessment within six years of the year of assessment in respect of which the assessment was made.

63. However, as I have found that a statement of loss is not an assessment, the reasoning of the Board is premised on the erroneous assumption that the statement of loss is, like an assessment, something specifically provided for by the Inland Revenue Ordinance and hence its issuance and amendment has to be authorised by the Ordinance. This is plainly not the case in view of the conclusion I reached in respect of Question (2). The issue of a statement of loss is not to be confused with the decision on whether to allow or disallow a loss to be set-off against the assessable profits or the application of the appropriate rate of tax to the assessable profits so arrived at. The issue of a statement of loss at the end of the year in which the loss was claimed to have been sustained does not per se affect the taxpayer's liability to pay tax. It is not an assessment and the Commissioner is not under a duty to and does not issue a notice of such an assessment of loss. However, the decision on whether to allow or disallow a loss to be set-off against the assessable profits does affect the taxpayer's liability to pay tax but that decision is only part and parcel of the process of assessment and can only be taken at the point in time when the set-off can take place, i.e. in a year when assessment can be made in respect of assessable profits. Thus not until a loss carried forward was set off does it form part of an assessment. Once that occurred it may only be reviewed within the expiration of six years from the year of assessment pursuant to section 60. A similar conclusion was reached by Godfrey J (as he then was) in *Commissioner of Inland Revenue v Malaysian Airline System Bhd* [1992] 2 HKC 468 at 469:

> "Although an assessment has to be made of profits in order to arrive at the amount of profits tax payable by the taxpayer, there is no need, in a year in which the taxpayer makes a loss, to make any assessment of its loss for tax purposes. Those losses may be carried forward to future years …
>
> The position, therefore, was that the taxpayer had no right or need to challenge and did not challenge the loss calculations made by the assessor."

Thus, the practice of issuing statements of loss is a measure of administrative convenience which is not covered by any of the provisions in the Inland Revenue Ordinance. There is no need for the Commissioner to invoke any statutory power before such statements can be revised.

64. Having found on a true construction of the Ordinance that a statement of loss is not an assessment, the central issue raised by Question (1) is whether in the absence of fraud the revision

of the statements of loss for the year 1993/94 which resulted in a new figure of $354,051 as the additional tax payable for the year 1998/99 is within the Commissioner's power to make under section 60 to make an additional assessment. The provisions of section 60 are in the following terms:

> "**60. Additional assessments**
>
> (1) Where it appears to an assessor that for any year of assessment any person chargeable with tax has not been assessed or has been assessed at less than the proper amount, the assessor may, within the year of assessment or within 6 years after the expiration thereof, assess such person at the amount or additional amount at which according to his judgment such person ought to have been assessed, and the provisions of this Ordinance as to notice of assessment, appeal and other proceedings shall apply to such assessment or additional assessment and to the tax charged thereunder:
>
> Provided that –
>
> (b) where the non-assessment or under-assessment of any person for any year of assessment is due to fraud or wilful evasion, such assessment or additional assessment may be made at any time within 10 years after the expiration of that year of assessment.
>
> (2) Where it appears to an assessor that the whole or part of any tax repaid to a person (otherwise than in consequence of an assessment having been determined on objection or appeal) has been repaid by mistake, whether of fact or law, the assessor may, within the year of assessment to which the repayment relates was within 6 years after the expiration thereof, assess such person in the amount of tax so repaid by mistake, and the provisions of this Ordinance as to notice of assessment, objection, appeal and other proceedings shall apply to such assessment and to the tax charged thereunder.
>
> (3) No assessment shall be made under subsection (2) if the repayment was in fact made on the basis of, or in accordance with, the practice generally prevailing at the time when the repayment was made."

65. It is amply clear from section 60(1) that the Commissioner had power to issue the additional assessment within that year of assessment or within six years after the expiration of that year of assessment. Hence the additional assessment for 1998/99 was clearly made within the time

limit permitted by section 60. The issue of the notice of additional assessment falls well within her powers under sections 60 and 62.

66. Mr Barlow made the further argument that neither section 60 nor any other provision in the Ordinance permits the assessor to revise or amend or to substitute an assessment already made and the power to make an additional assessment under section 60 may only be exercised when making an additional assessment which is additional to a subsisting assessment and for an un-assessed balance of chargeable profits. Section 60 is cast in very wide terms. The power to make additional assessment may be invoked if it appears to the assessor that the person "has not been assessed or has been assessed at less than the proper amount." In my view, there is no justification to give the section the very restrictive interpretation argued by Mr Barlow.

67. The Board's third criticism of the Commissioner's decision is that the Commissioner's approach was contrary to the statutory scheme that, in the absence of fraud, there was finality in tax matters after six years. The Board held at paragraph 50 as follows:

> "Irrespective of whether there was a tax refund in this case and irrespective of whether section 60(2) covered a refund of provisional tax because of a mistaken acceptance of loss, the 6-year limit appeared in both subsections (1) and (2) of section 60. This took the Board to the point that not only was there no provision in the Ordinance empowering or requiring the Commissioner to re-open a statement of loss issued by an assessor in respect of a year of assessment more than 6 years ago, the Commissioner's approach was contrary to the statutory scheme that, in the absence of fraud, there was finality in tax matters after 6 years."

In view of my answer to Question (2) that a statement of loss is not an assessment and the conclusion reached in paragraphs 65 and 66 above that the Commissioner had power to issue the notice of additional assessment for the year of assessment 1998/99, there is no need for me to consider this criticism of the Board.

68. I shall, however, make a few observations. It is not entirely clear the basis on which the Board formed the view that there is a statutory scheme of finality in tax matters after six years. It appears from the above passage that the Board considered section 60 is the provision which limited the Commissioner's power to issue additional assessment in respect of a year of assessment more than six years from the expiry of the year of assessment and hence there is a scheme of finality after six years. In that connection, the Board's misapprehension that a statement of loss is an assessment contributed to its view about finality. It also appears from paragraphs 50 to 59 of the Amended Case Stated that this view was extrapolated by reference to a number of specific provisions limiting the scope of powers conferred on the Commissioner to six years and the duties imposed on the taxpayer to keep books for seven years.

69. Mr Ho SC submitted that section 60 is a facultative provision. It confers a power on an assessor to raise additional assessments although at the same time it delineates that power by limiting the exercise of that power to a period within six years of the expiration of the year of assessment in question. I agree with that view. A provision limiting the power of an assessor to make additional assessment outside the six years period and accordingly the Commissioner's power to issue notice of such additional assessment does not necessarily lead to the inference or conclusion that there is finality in tax matters under the tax regime.

70. The Board also relied on a taxpayer's duty to keep records of up to seven years and the taxpayer's onus under section 68(4) to prove that the assessment made against him is excessive as argument in support of its notion of finality in tax matters after six years. In my view, such argument is misconceived. There is no correlation between the period for which records must be kept and the period over which investigation into the affairs of the taxpayer may stretch. The duty to keep records of up to seven years does not prevent a taxpayer from keeping records beyond seven years. As rightly submitted by Mr Ho SC, arguments over whether a property is a capital asset or trading stock would necessarily require investigation into the circumstances surrounding its acquisition, which could have acquired more than six years ago. It certainly is in the taxpayer's interest to keep records until after the property has been disposed of and his tax liability in respect of it finalised, even if that involves keeping record beyond seven years. It is difficult to see how it would follow from the duty to keep record up to seven years would lead to the conclusion that the Commissioner should not be allowed to investigate into matters older than six years or that there is finality in tax matters after six years.

71. Lastly, it would be appropriate to mention section 70, which purported to provide for finality in assessments. The section provides as follows:

> "**70. Assessments or amended assessments to be final**
>
> Where no valid objection or appeal has been lodged within the time limited … against an assessment as regards the amount of the assessable income or profits or net assessable value assessed thereby, or where … the assessment as made or agreed to or determined on objection or appeal, as the case may be, shall be final and conclusive …
>
> Provided that nothing in this Part shall prevent an assessor from making an assessment or additional assessment for any year of assessment which does not involve re-opening any matter which has been determined on objection or appeal for the year."

It should be noted that under this section, only limited finality is conferred on the assessable income, assessable profits or net assessable value. These are the amount in respect of which a person is chargeable to tax. A statement of loss is not an amount in respect of which a person is chargeable

to tax. There is nothing to prevent an assessor from re-visiting a statement of loss six years after the expiry of the year of assessment in respect of which it was made. The proviso expressly permits an assessor to issue assessment or additional assessment so long as it does not involve re-opening any matter which has been determined on objection or appeal for the year. This proviso is inconsistent with the notion of finality in tax matters.

72. For reasons as expressed in paragraphs 65 and 66, I answer this question also in the affirmative.

Conclusion

73. In conclusion, I answer both Question (1) and Question (2) in the affirmative. Accordingly, I dismiss the Taxpayer' s appeal with costs to the Commissioner.

(Anthony To)
Deputy High Court Judge

Mr Ambrose Ho, SC and Mr Michael Yin, assigned by the Department of Justice for the Appellant

Mr Barrie Barlow, instructed by Messrs Pang & Associates, for the Respondent