HCIA 2/2006

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

INLAND REVENUE APPEAL NO. 2 OF 2006

BETWEEN

THE COMMISSIONER OF INLAND REVENUE Appellant

and

FRANCO TONG SUI LUN Respondent

Before: Deputy High Court Judge Carlson in Court
Date of Hearing: 11 December 2006
Date of Judgment (Handed Down): 20 December 2006

J U D G M E N T

Introduction

1. This is the Revenue's appeal by way of Case Stated from a decision of the Inland Revenue Board of Review ("the Board"), Mr Anthony Chan SC presiding, whereby it allowed the taxpayer's appeal against a determination, dated 26 July 2005, by the Deputy Commissioner of

Inland Revenue and set aside salaries tax assessments made by him for the years 2000/2001 and 2001/2002.

The Relevant Facts

2. I am told that this is an important case as to whether contingent liabilities by a taxpayer can be used to reduce taxable income for the purposes of salaries tax.

3. The matter comes about in this way. The taxpayer, Mr Franco Tong, was employed as a dealer's representative by Kingsway SW Securities Limited ("the employer") who are stockbrokers. The taxpayer started his employment on 2 January 2000, the terms of which were regulated by a letter of employment, which he had signed dated 26 November 1999. The relevant terms of this letter have been helpfully set out at paragraph 5 of the Case. All I need to do therefore is to briefly summarise his duties and the consequences of any breaches of those duties.

4. The taxpayer was required to observe the rules and regulations of his employer's dealer's manual in full and any costs incurred as a result of his failure to comply with those rules and regulations would be borne by him. Similarly, he was required to carry out the company's clients' dealing instructions carefully and accurately with the consequence that any error on his part in this regard would be borne by him. He was also required to observe and perform any other lawful directions reasonably imposed by his employer from time to time and to comply with all laws, regulations and statutory instruments which regulated the conduct of the securities industry in Hong Kong.

5. Parallel to these obligations the taxpayer also signed a letter of indemnity dated 26 November 1999 which is at paragraph 6 of the Case. In it he agreed to indemnify his employer against all "non-payments" which were expressed to include all settlement payments, interests (sic.), brokerage fees, commissions, stamp duty, levies and all other payments due to the employer from clients "handled or referred by" him.

6. His remuneration was largely commission based. He was paid a very small salary of $10,000 a month plus a commission being 50% of the commission earned by him on his transactions. The relative modesty of his basic salary is well illustrated by the fact that for the two relevant tax years he earned commissions of $1,496,295 and $1,276,866 respectively. With the $120,000 annual basic salary and other payments the taxpayer's total gross income in those two years was $1,676,225 and $1,378,866, these being the figures supplied to the Revenue by his employer in their tax return. Because the taxpayer had failed to submit his own tax return timeously the Revenue assessed him on an estimated basis of$1,676,225 for 2000/2001 with a payable tax of $251,433 and $1,673,321 for 2001/2002 with a payable tax of $250,998.

7. He objected to these assessments and lodged his tax return for these years. For 2000/2001 he agreed that his income was $1,676,225 but claimed an identical deduction in

respect of "Bad Debts" deducted from his income by his employer because of non-payment of fees due to his employer by the clients that he had dealt with on its behalf. His net income was therefore nil. For 2001/2002 he declared a gross income of $962,726 but sought to have deducted the sum of $866,726 on the same basis.

8. The Board has helpfully recounted how all of this came about from paragraphs 10 to 14 of the Case. Again, I only need to summarise the position. Because a number of the taxpayer's clients had failed to settle their outstanding accounts with his employer he was required to enter into three agreements in writing with them. The first two were dated 6 February 2001 and the other the 28 May 2001. The full terms of these agreements also appear in the Case. They set out in detail precisely what the taxpayer owed his employer as a result of his clients' failure to pay what they should have paid to the employer. Suffice it to observe that the amounts deducted by the employer by virtue of these so-called "Bad Debts" tallied with the taxpayers' tax return to the Revenue for these two years.

9. In order to get a better understanding of the position the Revenue wrote to the employer on 25 August 2005 [para. 15 of the Case] requiring to know the precise basis for the deductions with particular reference to what breaches of the company rules or statutory provisions the taxpayer had committed. The reply which came was not especially helpful because it did not respond to the specific enquires made by the Revenue but pointed out that under the first agreement of 6 February 2001 the taxpayer had agreed to indemnify the employer in respect of his clients' non-payment of their outstanding accounts which provided the basis for the deductions.

10. In the event, the Revenue declined to accept that the bad debts were deductible but it was willing to reduce its original assessments to reflect some other deductions, being a contribution to a MPF and some other allowances (see para. 16 of the Case). Its final assessment for 2000/2001 was a gross income of $1,676,216 with a net chargeable income of $1,508,216 following an allowable deduction upon which tax of $245,896 was said to be payable. For 2001/2002 it assessed a gross income of $1,378,866 reduced to $1,198,866 after permissible deductions upon which tax of $190,307 was said to be payable.

11. It is really of no moment but as the Case relates at paragraph 17, the Revenue had sought to make a slight increase on the tax payable for 2000/2001 by $2 on the basis that there had been a $9 understatement of income for that year. The tax payable for that year is said to be $245,898.

The Review before the Board

12. The Board was required to resolve two matters. Firstly, whether the re-payments made by the taxpayer to his employer under the Indemnity Agreements were deductible from his gross income for the purposes of calculating his liability for salaries tax and secondly, if such deductions were allowable, the precise quantum of such deductions. As I have already related the

Board held that such deductions were permissible with the result that the Deputy Commissioner's determination was set aside.

The Board's Reasoning

13. Its starting point, quite correctly, was S.12(1)(a) of the Inland Revenue Ordinance ("the Ordinance") which provides as follows:

> "*(1) In ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person —*
>
> *(a) All outgoings and expenses, other than expenses of a domestic or private and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income.*"

Its reasoning has been fully explained in paragraphs 23 to 64 of the Case. I will venture to provide a brief summary of the Board's conclusions which I will need to develop further when I consider the arguments addressed to me by Miss Tsui for the Revenue and Mr Chan for the taxpayer.

14. It seems to me that the Board was correct to have started by attempting to get a proper appreciation of the taxpayer's employment having regard to his obligations under the terms of his contract. It was particularly influenced, I think, by the fact that in order to earn a high level of commission on business transacted by him, 50%, the taxpayer was required to bear the risk of his clients not paying their outstanding accounts and being liable to indemnify his employer for such "Bad Debts", as they have been described. The assumption of that risk went hand-in-hand with an equal sharing of the payable commission with the employer. The Board described this as the two sides of the coin [page 54]. From this the Board felt able to say the following:

> "*It seemed to be illogical for the [Revenue] to contend that the [taxpayer] should be liable for tax on this high level of commission but at the same time refused any deduction when the risk had materialised. The Board was satisfied that the Bad Debts were necessarily incurred in the production of the [taxpayers] assessable income.*" (Para. 54)

It is this line of reasoning that went to inform the rest of the Board's approach to this case and its final outcome.

15. I can deal with the course of the argument before the Board when I turn to the appeal before me and which I now do subject to one important matter which had not arisen before the Board but which has been touched upon, albeit incidentally, before me, which is this. Miss Tsui in submitting that the Board had got it wrong in the way that it had analysed the situation has picked up

on a suggestion from me as to whether, in truth, given the terms of the taxpayer's employment, rather than being a contract of service which would make him an employee and thereby liable to salaries tax, this was in fact a contract for services making the taxpayer an independent contractor and thereby making him liable to profits tax only, under which, I would have thought, bad debts such as these would be allowable deductions in assessing net profits upon which tax would be levied.

16. This matter, quite rightly, has not been argued before me in any detailed way because it does not, of course, call for resolution but if that were in fact the correct basis for taxing this taxpayer this would answer the sympathy that one might feel for him in such circumstances where, if the Revenue's appeal were to succeed before me, he would in real money terms have had no net income for these years but, nevertheless, would be liable to pay substantial amounts of salaries tax. Without deciding this issue I am bound to say that there would be much force in any argument to the effect that the taxpayer was in fact engaged under a contract for services and therefore should have been paying profits tax rather than salaries tax. There is a perfectly respectable argument that can be mounted to the effect that this was, in substance, a profit-sharing arrangement between the taxpayer and the company. The company provided the infrastructure by which these trades would be executed on the stock exchange and the taxpayer, who would bring the clients, would make use of that infrastructure to execute the trades for the clients and for all of which he received half the commission and a small fixed monthly retainer, for which he was solely responsible for the risk of non-payment of accounts by the clients. It is this feature in particular that would strongly militate against an employer/employee relationship. One would rarely expect to find an employee, as opposed to an independent contractor, assume the complete risk of loss on a client's account. No doubt there are also features which may point to an employer/employee relationship but, as I say, without deciding the point the circumstances would tend to point away from such a relationship. All of this having been said these are all irrelevant considerations where I need to answer completely different questions to which I now turn.

The Test

17. In order to be deducted from assessable income, expenses (the indemnity payments in this case) must have been incurred in the production of the assessable income, equally they must have been wholly and exclusively incurred as well as necessarily incurred. There are therefore three hurdles to be cleared by the taxpayer. I will take each in turn. All of these requirements appear in S.12(1)(a) *supra*.

Incurred in the Production of the Assessable Income

18. I have been referred to a number of cases which point to the meaning of this expression. Each of them necessarily turned on their own facts and so I need to be careful to extract from them the appropriate principle rather than the way that this principle was applied to the facts of the particular case before the court which decided it. In *CIR v. Humphrey* (1970) 1

HKTC 451, a decision of the appellate Division of the Supreme Court of Hong Kong, the court held that the expression "in the production of assessable income" bore the same meaning as "in the performance of the duties of the office or employment" which is used in the English equivalent of the Hong Kong salaries tax legislation; per Blair-Kerr J, pages 466-467. This being so it is therefore of assistance to refer to the leading English case of *Ricketts v. Colquhoun* (1926) AC 1. Viscount Cave LC at page 4 remarked that in order that the expenses may be deductible, "they must be expenses which the holder of the office is necessarily obliged to incur — that is to say, obliged by the very fact that he holds the office and has to perform its duties — and that they must be incurred in — that is, in the course of — the performance of those duties. In circumscribing the matter in this way the House of Lords declined to allow the Recorder of Portsmouth, a distinguished practising Queen's Counsel of his day who lived in London, to deduct his travelling expenses to and from Portsmouth so that he may sit in Portsmouth to perform his duties as the Recorder. Lord Blanesburgh, at page 9, held that because he chose to live in London these were expenses purely personal to himself rather than money expended "wholly, exclusively and necessarily incurred in the performance of his judicial duties. They were therefore expenses to be defrayed out of the Recorder's stipend, but in no way essential to be incurred that he may earn it". In *Humbles v. Brooks*, 40 TC 500, a schoolmaster had sought to deduct fees for a series of weekend lectures that he had attended in order to improve his background knowledge. Ungoed-Thomas J held that these fees were not deductible. At page 502 he cited a number of authorities which bore on the meaning of expenses incurred "in the performance of the said duties" which serve to demonstrate the narrowness of the definition.

> "'*In the performance of the said duties' means in the course of their performance: see Viscount Cave's speech in Ricketts v. Colquhoun. It means 'in doing the work of the office, in doing the things which it is his duty to do while doing the work of the office': see Rowlatt, J's judgment in Nolder v. Walters, 15 T.C. 380 at page 387. It does not include qualifying initially to perform the duties of the office, or even keeping qualified to perform them: see Simpson v. Tate, 9 T.C. 314 at page 318, per Rowlatt, J. As Danckwerts, J, stated in Brown v. Bullock, 40 T.C., at page 6, it does not mean adding to the taxpayer's usefulness in performing his duties. The requirement of the employer that the expenditure shall be incurred does not, of itself, bring the expense within the Rule, nor does the absence of such a requirement exclude it from the application of the Rule: see the passage which I have already referred to from the judgment of Donovan, L.J., and Blackwell v. Mills, 26 T.C. 468, Griffiths v. Mockler, 35 T.C. 135, and Brown v. Bullock.*"

19. Miss Tsui has, I think, drawn attention to a very pertinent distinction between expenses incurred '**in**' the production of the assessable income and expenses '**for**' the production of the assessable income. In this regard it is useful to note the provisions of S.16(1) of the Ordinance which provides for the ascertainment of profits tax as opposed to salaries tax. If the taxpayer in this case had been engaged under a contract for services, as an independent contractor

rather than an employee, he would have come under this provision. Although this section also speaks of the deduction by the taxpayer of expenses "**in** the production of profits" there is no doubt that its effect in this section is different to that in S.12(1). Lord Nolan in *CIR v. Cosmotron Manufacturing Co. Ltd* (1997) HKLRD 1161 PC at 1167 referred to the speech of Lord Davy in *Strong & Co. of Romsey Ltd v. Woodifield* [1906] AC 448 at 453 where he said:

> "*I think that the payment of these damages was not money expended 'for the purposes of the trade'. These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade etc. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.*"

Whilst the meaning is the same, what is deductible under S.16(1) is not necessarily so under the more restricted effect of the same words in S.12(1). This is illustrated in *D102/03 18 IRBRD 952*, in which a doctor employed by the university claimed a deduction of her professional indemnity insurance. This was a requirement imposed on her by the University as a condition of permitting her to see patients at Hospital Authority hospitals in order to carry out clinical research which was a necessary part of her employment as an academic clinician and also because she had a limited private practice for which she was paid fees. The Board of Review allowed her to deduct part of the insurance premium as it related to her independent medical practice for which she was liable to profits tax. The Board observed at page 957 that where many salaried employees were now obliged by law to make payments of this sort it would be rare for them to receive any measure of tax relief, hence it refused to allow any portion of the premium to go against the assessment of salaries tax. It provided the following illustration at page 956:

> "*This is perhaps best illustrated by reference to a very recent Board of Review decision <u>D91/03</u> (unpublished) where a claim for deduction by an employed solicitor for mandatory professional indemnity insurance was disallowed on the ground that it was not incurred 'in the production of assessable income' but rather to put the solicitor in the position of earning assessable income. We note, in passing, that the same words 'in the production of assessable profits' are contained in section 16(1), yet the result in a profits tax context (in the case where the solicitor was a sole practitioner or a partner of a law firm as distinct from an employed solicitor) would surely be very different*."

20. Mr Tsui has drawn attention to these authorities to demonstrate, rightly in my judgment, that although the words in the two sections have the same meaning, the outcome would be different where the salaries tax regime is much more severe than it is in the case of profits tax. It is perhaps in this regard that it is useful to remember what Vaisey J said in *Lomax v Newton*, 34 TC at 561/562 in relation to the English equivalent of S.12(1):

> "*… the provisions of that rule are notoriously rigid narrow and restricted in their operation … it must be shown that the expenditure incurred was not only necessarily but wholly and exclusively incurred in the performance of the relevant official duties … The words are indeed stringent and exacting; compliance with each and every one of them is obligatory if the benefit of the rule is to be claimed successfully. They are, to my mind, deceptive words in the sense that when examined they are found to come to nearly nothing at all.*"

21. Unsurprisingly and quite rightly, the Board recognised at paragraph 28 of the Case that the deductions under salaries tax are considerably more restrictive than under the regime for profits tax.

22. This being the situation I now turn to consider whether these contingent liabilities under the indemnity agreement with the employer fall to be considered as expenses incurred **in** the production of the assessable income. [Emphasis provided]

23. One must start with a consideration of what the taxpayer was employed to do, which comes from his letter of employment. Put shortly, it was to execute trades from his clients through his employer which provided the means by which such trades went through the Stock Exchange's system and procedures for the buying and selling of securities. This being the case one must then look to see how the contingent liability of having to make good his clients' default on their account with his employer can be said to be an expense incurred in the production of his income.

24. Miss Tsui submits that being contingent liabilities these are 'expenses' which may or may not arise, depending on whether a client defaults or not, and in any event if they arise there will be a delay between the moment when a trade is executed for a client by the taxpayer, which gives rise to an obligation by his client to settle his account with the taxpayer's employer, and the time when that incurred liability will need to be settled by the client following which only then would this give rise to the taxpayer's obligation to indemnify his employer for non-payment of that liability should there be default by the client. Miss Tsui submits that the lack of contemporaneity between the earning of the assessable income and the liability to pay the indemnity falls foul of the necessity, as discussed in *Ricketts v. Colquhoun (ibid.)* that the expenses must be incurred in the course of the performance of the duties and not before or, as in this case, after its performance. This delay means that such an expense would not have been incurred in the performance of the duty.

25. Miss Tsui categorises these contingent liabilities as personal obligations arising out of the taxpayer's contract of employment with his employer and not referable to the performance of the duty. Akin therefore to the Recorder of Portsmouth's personal circumstances in living in London and having to incur travel expenses to perform his judicial duties in Portsmouth.

26. The Board's view, supported by Mr Chan, was that is quite impossible to divorce this contingent liability from the duties of the employment of effecting the trades for clients in the course of the taxpayer's employment. By virtue of entering into this employment he took its benefits (a high 50% rate of commission) whilst of necessity bearing its burdens, being the liability to indemnify the employer for his clients defaults if and when they occurred.

27. In my judgment, whilst this perfectly understandable and sympathetic interpretation sits entirely comfortably with a profits tax (S.16) situation it cannot, I am afraid, survive the S.12 salaries tax regime. It is completely alien to it. It I may respectfully say so the Board has failed to properly appreciate the very restrictive approach which the law requires in a salaries tax assessment. Whilst these expenses when they arose may have been incurred **for**, as opposed to **in**, the production of the assessable income, which in my judgment would pass muster under a profit tax assessment, what the law looks for in a salaries tax regime are expenses which are directly referable to the duty itself, the very tasks which the taxpayer is employed to do and not expenses which are personal to him arising, in this case, from his contract of employment. By way of simple illustration in this matter, if for example, the taxpayer had to provide and pay for his own telephone and telephone line or computer terminal without which he could not possibly carry out his duties I have no doubt that he would be entitled to say that such expenses should be properly deductible as expenses incurred in the production of the assessable income. The expenses contemplated by the section are strictly and only those referable to the activity of the employment itself as opposed to other personal contractual obligations which, although referable to the earning of his salary by the taxpayer and, as in this case, its very computation, are not expenses incurred in the performance of the taxpayers duty in doing the work required of that employment. It is this very narrow range of qualifying expenditure which, no doubt, prompted Vaisey J to make the remarks that he did in *Lomax v. Newton supra* [para. 20 of this judgment].

28. I therefore uphold Miss Tsui's submission in respect of this part of the three part exercise which I need to undertake. The taxpayer has fallen at the first of these three hurdles by failing to show that the expenditure was incurred in the performance of his duty and this would be sufficient to dispose of this appeal. Nevertheless, I ought to go on and consider the two remaining aspects which I am able to take more shortly.

Necessarily Incurred

29. In this regard the Board at paragraph 43 of the Case accepted, as it had to, that expenditure may be 'necessary' for the holder of an office without being necessary to him in the performance of that office. (See *Lomax v. Newton*, page 562 supra.

30. In *Brown v. Bullock* (1961) 30 TC 1 the English Court of Appeal accepted everything that Vaisey J had to say on this matter in *Lomax v. Newton*. In that case a bank manager in charge of the Pall Mall branch of the Midland Bank, located in an area of London where many gentleman's clubs are situated, had sought to deduct from his assessable income the

subscription fees for one club and part of his subscription for another, it being almost a condition of his employment that he join one of these clubs, in particular, so that he may entertain clients there and foster contacts. These subscriptions were held not to be properly deductible. Donovan LJ at page 10 put the matter succinctly in this way:

> *"Under Rule 7 of the Rules applicable to Schedule E the taxpayer must show that any expense he wishes to be deducted in arriving at his assessable emoluments was, inter alia, necessarily incurred in the performance of the duties of the office or employment. For the taxpayer here it is contended that that fact is proved by showing that the employer prescribed some duty for his own employee which involved the relevant expense. The General Commissioners seem to have accepted this contention, but in my view it is not correct. The test is not whether the employer imposes the expense but whether the duties do, in the sense that, irrespective of what the employer may prescribe, the duties cannot be performed without incurring the particular outlay. This result follows, in my opinion, from the decision of the House of Lords in Ricketts v. Colquhoun, 10 T.C. 118. Mr Monroe has conceded that, even if the Midland Bank did not request and expect the Appellant to join a club like the Devonshire Club, he could still perform his duties as bank manager; and that, if the test is the strictly objective one which I have sated, he must fail."*

31. This really is sufficient to dispose of the point. The indemnity obligations imposed on the taxpayer were imposed by his contract, they were not imposed by his duties in performing his employment. In my judgment the Board has strayed beyond the permissible narrow boundaries within which such expenditure can correctly be said to be necessarily incurred for the performance of these duties. And so at this hurdle as well the taxpayer must be taken to have fallen.

Wholly and Exclusively So Incurred

32. Whilst this is unquestionably one of the important statutory requirements to be complied with by a taxpayer wishing to get relief for expenditure, it seems to me that in this case once the taxpayer has failed to overcome the first hurdle, that the expenditure was not incurred in the performance of his duties as I have already found, it becomes unnecessary for me to give this aspect separate consideration particularly where I have also found that this expenditure cannot be said to have been necessarily incurred in the performance of his duties for the reasons which I have already given.

Appeal Allowed

33. For these reasons this appeal must be allowed and the Board' s decision will have to be set aside. I will therefore answer Questions 1 and 2 of the Case in the affirmative.

Harsh Consequences

34. One can immediately see that where the taxpayer's net income was nil that he must pay tax on the income before the deduction of the indemnity payments which, of course, will be seen as harsh and unfair, certainly from a layman's point of view. Nevertheless, it seems to me that this has not been caused by the salaries tax regime itself but by virtue of the fact that in this case the taxpayer perhaps did not pay sufficient attention or obtain advice as to whether, once these onerous indemnity provisions were being imposed on him, he was in fact an independent contractor rather than an employee, for the purposes of salaries tax. Because I have not been required to decide the point I have not had the benefit of full argument on this aspect but as I have already observed it strikes me that he would have a very respectable argument that he was engaged under a contract for services and therefore should have been taxed for profits under S.16(1) under which "Bad Debts" of this sort would have been validly deducted from his gross income. These comments, as I have already said, are entirely beside the point and have not in any way affected how I have approached the question under the salaries tax provisions in S. 12(1)(a). Ultimately, this is the contract that the taxpayer was prepared to sign up to and I am afraid that he will, on this occasion, have to bear its consequences.

Treatment of the Bad Debts

35. Because I have allowed the appeal this issue now becomes entirely academic. In the event of an appeal from my decision, I will briefly say how I would have found had I dismissed the Revenue's appeal.

36. The Board held that the Bad Debts which were repayable by the taxpayer to his employer were deductible in the respective years of assessment in accordance with the dates of the indemnity agreements that he was obliged to enter into and that any excessive deduction could be reversed in the following tax year.

37. The Revenue submits that if this is right then the taxpayer would be entitled to the deduction even before he made the repayment, which would not be right. Further, this relating to the second part of the question whether any excessive deduction would be reversed in the following tax year which is what the Board held could be done, the Revenue submits that there is simply no statutory mechanism under the salaries tax regime, as opposed to profit tax, where assessments can be reversed in subsequent years. Accordingly, Miss Tsui submits that the Board has erred on both of these aspects. It should have said that the deductions could only be credited in the tax year in which repayment was made to the employer under the three agreements.

38. Mr Chan submits that the Board was correct. He relies on paragraph 2-5150 of the Hong Kong Master Tax Guide 2004/2005 and 2006/2007 which says that an expense is deductible in the year that the obligation to pay, or a definite commitment to pay is established. Accordingly, it is not essential for the payment to be made in that tax year.

39. In this regard it seems to me that Miss Tsui is correct in her analysis. One needs to look at the moment of repayment and the claim for relief will come in the tax year of that repayment. This is reinforced, in my view by the fact that under salaries tax there is no mechanism for reversing a previous assessment, as frequently happens under profits tax. One needs to be guided by the statute in this regard and where there is no provision for such reversals none is possible or permissible. In such circumstances, the revenue would not allow a deduction of this sort under salaries tax, assuming it was one that could be lawfully deducted, until the taxpayer was able to show that he had actually made over the repayment. Accordingly, had I been put to it, I would have also held that Question 3(a) and (b) in the Case should be answered in the affirmative.

Costs

40. The appeal having been allowed the Revenue must have its costs paid by the taxpayer. This order will be an order *nisi* in the usual way.

(Ian Carlson)
Deputy High Court Judge

Jennifer Tsui, instructed by the Secretary for Justice, for the Appellant

Derek Chan, instructed by Messrs Hui & Lam, for the Respondent