CACV 202/2005

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

CIVIL APPEAL NO. 202 OF 2005
(ON APPEAL FROM HCIA NO. 1 OF 2003)

BETWEEN

Baring Securities (Hong Kong) Limited, presently known as
ING Baring Securities (Hong Kong) Limited
Appellant

and

The Commissioner of Inland Revenue Respondent

Before: Hon Rogers VP, Le Pichon JA and Stone J in Court
Date of Hearing: 6 – 7 June 2006
Date of Judgment: 7 June 2006
Date of Handing Down Reasons for Judgment: 20 June 2006

REASONS FOR JUDGMENT

Hon Rogers VP:

1. I agree with the judgment of Le Pichon JA.

Hon Le Pichon JA:

2. This was an appeal by the Commissioner of Inland Revenue ("the Commissioner") from the judgment dated 1 June 2005 of Barma J allowing an appeal by way of case stated brought by the Taxpayer, ING Barings Securities (Hong Kong) Ltd ("the Taxpayer"), against the decision of the Board of Review (Inland Revenue) dated 8 February 2002. At the conclusion of the appeal hearing, the Commissioner's appeal was allowed and the appeal by way of Case Stated from the Board was dismissed with written reasons to be handed down later which we now do.

Background

3. On 31 July 1997, the Commissioner made a determination whereby he

(i) confirmed the profits tax assessment on the Taxpayer's profits for the years of assessment 1990/1991, 1991/1992 and 1993/1994;

(ii) confirmed the additional profits tax assessment for the year of assessment 1990/1991;

(iii) increased the profits tax assessment for the year of assessment 1992/1993; and

(iv) reduced the profits tax assessment for the year of assessment 1994/1995.

4. The assessments in issue ("the assessments") related substantially to a period when the Taxpayer was a wholly owned subsidiary of The Baring Foundation and part of a sub-group of companies within Barings headed by Barings Securities Ltd ("BSL") which had offices in London, Geneva, Seoul, Taipei and Karachi. As is common knowledge, Barings collapsed in the mid-90s and Barings including the Taxpayer was taken over by the Internationale Nederlanden Groep NV ("ING") in March 1995. The takeover had no bearing on the assessments.

5. The Taxpayer's business was to undertake on behalf of clients of the Taxpayer and the sub-group of companies headed by BSL trading of securities listed on global stock exchanges. The Commissioner took the view that the profits in question were chargeable to Hong Kong tax, rejecting the Taxpayer's case that those profits were 'offshore Hong Kong' and not chargeable to Hong Kong tax.

6. For the hearing before the Board, the parties had agreed certain facts set out in a Statement of Agreed Facts, part of which was summarised in the Stated Case including the following:

"8. The Taxpayer was registered in Hong Kong as a dealer under the Securities Ordinance and its principal activity was to act as an agent in securities dealing.

9. In its 1990/91 to 1994/95 Profits Tax returns, the Taxpayer claimed that certain of its incomes were derived outside Hong Kong. The profits returned by the Taxpayer to the Revenue for assessment and the incomes claimed as offshore were as follows:-

	1990/91	1991/92	1992/93	1993/94	1994/95
Profits returned for assessment	32,957,451	13,839,658	75,305,049	127,438,074	27,678,658
Offshore incomes	26,086,970	40,966,000	33,480,000	40,351,435	25,255,605
Offshore sub-underwriting commission	156,379	2,539,423	8,994,129	---	---
Other offshore incomes *	---	---	6,841,946	---	---

* *A table showing the "other offshore incomes" for the year 1992-93 was separately attached as Appendix A of the Determination.*

10. The Taxpayer subsequently revised its offshore claims for the years 1990/91 to 1992/93. The revised figures were as follows:-

	90/91 $	91/92 $	92/93 $
Revised profits offered for assessment	4,259,368	22,317,988	74,775,178
Revised offshore incomes	70,985,000	60,465,000	68,054,000
Offshore sub-underwriting commission	156,379	---	---
Other offshore incomes	---	---	6,841,946

11. The Statement of Agreed Facts stated that the offshore incomes which were in dispute could be analyzed as follows:-

	1990/91 $000s	1991/92 $000s	1992/93 $000s	1993/94 $000s	1994/95 $000s
Placements	26,086	2,540	8,994	1,574	---
Commission	17,551	12,986	33,480	129,180	118,450
Marketing	86,986	80,745	69,782	27,012	91,200

Commission waivers	---	---	(1,659)	(1,421)	---
	130,623	96,271	110,597	156,345	209,650
Expenses	(59,638)	(35,806)	(42,543)	(114,850)	(184,678)
	70,985	60,465	68,054	41,495	24,972
Adjustments for expenses, depn. and rebuilding allowances	---	---	---	(1,143)	284
Offshore incomes	70,985	60,465	68,054	40,351	25,256

Detailed breakdowns of the offshore incomes were attached thereto as Appendices B to B4."

7. The main issue before the Board had been what the Taxpayer had done to earn the profits it had classified as offshore income in its tax returns on the basis of which the assessments had been determined. For 1990/91, 1991/92 and 1992/93, the Taxpayer had revised that income significantly as is clear from paragraphs 9 and 10 of the Stated Case reproduced in paragraph 6 above. The revision had the effect of doubling the aggregate offshore income for those 3 years. Further, that income had also been broken down by the Taxpayer into income from 'Placements', 'Commission' and 'Marketing'.

8. The Taxpayer's approach as to what profits attracted Hong Kong tax can be seen from paragraph 10 of the judgment below:

> "10. Essentially, in respect of each year of assessment, [the Taxpayer] offered up for assessment its profits derived from the execution of trades in securities on behalf of clients of the BSL sub-group on exchanges located in Hong Kong, regardless of the location of the client in question, and the country from which instructions to execute such trades came. On the other hand, all profits which [the Taxpayer] derived from trades in securities on behalf of clients of the BSL sub-group on exchanges outside Hong Kong were excluded, even if the client was located in Hong Kong, or instructions to execute such trades were given to [the Taxpayer] in Hong Kong."

The proposition put forward by the Taxpayer appeared to be that profits have an offshore source if they arise from trades executed offshore.

Findings of fact made by the Board

9. The Board made findings of fact which it set out in paragraphs 13 to 21 (inclusive) of the Stated Case. The facts concerning Agency Brokerage business conducted by the Taxpayer were set out under three headings in paragraph 17, namely, (A) Agency Brokerage Business of the

Group; (B) Operational Organisation of the Agency Brokerage Business of the Group; and (C) the Settlements Division. The judge summarised these at paragraph 12(1) to (7) of his judgment:

> "(1) BSL was one of the principal subsidiaries of Baring Brothers & Company Limited, which was at the head of the BSL sub-group. With the exception of one sub-subsidiary in Indonesia, PT Baring Securities Indonesia which was ultimately owned as to 80% by BSL and 20% by a local partner, all of the sub-subsidiaries in the Asia Pacific region which figure in this appeal were ultimately wholly-owned by BSL.
>
> (2) [The Taxpayer] was acquired so as to become part of the BSL sub-group in 1986. At that time, the BSL sub-group traded in the Hong Kong and Japanese equity markets. [The Taxpayer] obtained a licence to deal in securities in Hong Kong in about 1988 or 1989. During the period with which this appeal is concerned, licences were acquired by subsidiaries in other countries enabling them to trade on the Manila, Singapore and Jakarta stock exchanges.
>
> (3) The BSL sub-group's business was that of "agency brokerage", consisting of the execution of client trades on securities listed on major global stock exchanges.
>
> (4) This business could be functionally divided into three principal divisions (apart from Administration) - Research and Sales, Execution and Settlement.
>
> (5) Research and Sales were regarded as important parts of the business, which attracted and obtained business from institutional clients and fund managers which formed the bulk of the sub-group's clientele. The quality of research provided to such clients was a major factor in attracting their custom, and the BSL sub-group ranked very highly in respect of research on Asian securities markets. Research was undertaken by analysts based in the markets on which the securities which were the subject of such research was traded. Research publications were edited in London and printed in Singapore, and were distributed to clients by the sales department or sales desk of the various subsidiaries. The sales desk of the various subsidiaries received client orders for trading in securities and liaised with the clients regarding such orders. In general, sales desks in the various companies took orders from clients located in the country in which they operated, and passed on such orders through the chain of companies in the sub-group to the execution office.
>
> (6) The execution office was the office of the sub-group company in the execution location, and was the company which actually executed the client trade, if it

was licensed to operate on the local stock exchange. Where the sub-group company in the execution location did not have the requisite licence, execution would be carried out by a third party licensed dealer employed for this purpose. At the beginning of the period with which this appeal is concerned, the only locations in which sub-group companies had a licence to deal in securities were Hong Kong and Japan, but licences were obtained in the Philippines in late 1990, Indonesia in 1991 and Singapore in 1992. It was not clear whether licences were ever obtained to trade on stock markets in Korea and Taiwan.

(7) The settlements division dealt with confirmation of the client trade to the client, banking arrangements, custody of shares, delivery of shares. This was generally regarded as the least important of the three divisions, its location being determined by the location of the stock exchange on which the client trade was executed."

10. The remaining findings of the Board in paragraphs 18 to 21 of the Board's Decision by reference to which to third question of law in the Stated Case was raised were summarized in paragraph 12(8) to (10) of the judgment:

"(8) The Board observed that it did not have before it documentation which demonstrated the contractual relationship between a client and a particular sales desk, as the documentation started with the documentation generated once an order had been received. Subject to that, the Board found that the workflow in respect of a particular transaction commenced when the sales desk, having received the order from the client, passed the order on to [the Taxpayer] and/or the sub-group company in the execution location, and that this occurred either by orders being passed to [the Taxpayer] which in turn passed them on to the sub-group company in the execution location, or by orders being sent simultaneously to [the Taxpayer] and the sub-group company in the execution location. The relevant sub-group company in the execution location would then attend to the execution of the client trade, either itself (if licensed) or through a third party (if it was not).

(9) The Board then went on to state that it found that there was a material difference between the "commission" and "marketing" income, and that it was satisfied that the offshore profits of [the Taxpayer] were not profits of other group companies which were booked or re-invoiced to [the Taxpayer].

(10) Finally the board indicated that it had found that the role of [the Taxpayer] went beyond that of what it described as a mere "booking" role, describing [the Taxpayer] as something of a regional office of the sub-group in the Asia Pacific region, playing a role in the forwarding of client orders from the sales

desks where they were received to the execution office, housing some of the back office computer equipment, and having varying degrees of involvement in the execution of trades in foreign securities."

11. Based on the findings of fact set out above, the Board concluded that the Taxpayer had not demonstrated that the assessments were incorrect, not least because it felt itself unable to make express findings as to what the Taxpayer had done to earn the offshore profits on the evidence adduced. That is evident from its reasons set out in paragraph 22 of the Stated Case for concluding that the Taxpayer had not discharged its burden of proof:

"(i) The inability of (*sic*) clearly categorize the different types of income and the aggregation of the Marketing Income and the Commission Income in the evidence and submissions of the [Taxpayer];

(ii) The imprecision of the evidence and its generality;

(iii) The inability of the [Taxpayer] to relate the evidence adduced in the hearing (i) to the accounts of the [Taxpayer] and, more importantly, (ii) to the various figures in the disputed incomes."

12. The questions of law posed in paragraph 23 of the Stated Case were as follows:

"1) Whether the Board of Review erred in law by failing to apply the correct principles of law and, in particular, by failing to address the correctness or otherwise of the assessments by reference to the 3conditions (as was explained in CIR v. Hang Seng Bank Ltd. [1991] 1 AC 306 at 318 E-F) that must be satisfied before a charge to profits tax can arise?

2) Whether on the facts as found by the Board of Review, the Board of Review erred in law in failing to conclude that the off-shore profits concerned were not earned by activities undertaken in Hong Kong by the Taxpayer?

3) Whether upon the evidence before the Board of Review and in all the circumstances of the case the Board erred in law by making the following findings of fact:-

a) Paragraph 18 [of the Stated Case]: The findings as to the passage of client orders through the Taxpayer.

b) Paragraph 19 [of the Stated Case]: The findings that there was a material difference between the income described in the Board's

Decision as "*commission income*" and the income described in the Board's Decision as "*marketing income*".

c) Paragraph 20 [of the Stated Case]: The findings that the offshore profits were not profits of other Group companies which were "*booked*" or "*re-invoiced*" to the Taxpayer.

d) Paragraph 21 [of the Stated Case]: The findings concerning the role of the Taxpayer in group trading in the Asia Pacific region/time zone."

The judgment below

13. The judge dealt first with the second question posed in the Stated Case. He concluded that the relevant criteria for determining the source of the profits in question were the acts or operations of the Taxpayer which produced those profits. The judge rejected what counsel for the Taxpayer had submitted was the correct approach, namely, that the focus should be on the transactions which produced the profit to the Taxpayer whether they had been carried out by the Taxpayer or by others and on the place from which those profits in substance had arisen. The judge then went on to consider the correctness of the Board's conclusion that, given its findings of fact, it was not possible to conclude that the Taxpayer's operations had taken place offshore in respect of any of the three types of income involved in the appeal.

14. At paragraph 34 of the judgment, the judge appeared to undertake an exercise in identifying the payment flow of commission income which he considered could be derived from the table attached to the Decision bearing the description "Summary and Comments on Evidence on Workflow and Sample Trade Documents (Indonesia, Japan, Philippines, Malaysian/Singapore)" ("the summary"). He formed the view that that "the flow of payments" although not mentioned by the Board in its findings could properly be regarded as a finding of fact by the Board. Pausing here, it is reasonable to assume that where the judge subsequently referred to the findings of fact made by the Board, those findings would have included what the judge considered was "the flow of payments" finding.

15. As regards the nature of the "commission" income, based on the Board's findings of fact particularly those mentioned in paragraphs 18, 20 and 21 of the Stated Case, the judge concluded that the Taxpayer's main role in the agency brokerage business was to allow itself to be interposed in transactions between the ultimate clients and the execution office such that so far as the executing office was concerned, its client was the Taxpayer and it acted as the Taxpayer's agent in executing the trades on the local stock exchange in its country of operation. (Paragraph 37) He did not consider that the position of sales was as critical or that sales and research should be regarded as the operations from which the income of profits in substance arose. He therefore did not consider that the Board was justified in concluding that the failure to produce documentation evidence in the relationship with the client or the failure to provide a breakdown for details as to the

amount of income attributable to the countries or regions in which the clients would be found, or from which the orders giving rise to the commissions originated, that the Taxpayer had failed to discharge its onus of demonstrating that the assessment was incorrect or excessive. (Paragraphs 39 and 41) The judge went on to find that the relevant operation which in substance gave rise to the income in question was the execution of the trade in the relevant securities abroad and accepted the Taxpayer's submission that the operation of the Taxpayer giving rise to the income consisted in its permitting itself to be interposed between the client and the execution office, in order to facilitate the provision of the agency brokerage service. The judge was further of the view that that interposition necessarily occurred in the execution location, that is to say the country in which the trade was executed. (Paragraph 42)

16. Based on those matters, the judge concluded (at paragraph 44) that:

> "contrary to the Board's view, [the Taxpayer] had established, on at least a *prima facie* basis, that the assessments were wrong or excessive so far as the commission income is concerned."

17. The judge reached a similar view as regards "placement" income given the way in which it arose which he found to be net commission paid to the Taxpayer in respect of the execution of orders for the acquisition of new issues of securities to be listed on stock markets outside Hong Kong, in respect of which the Taxpayer permitted itself to be interposed between the client and the execution office and, again, concluded that, as regards 'placement' income, the Taxpayer had established, "on at least a *prima facie* basis" that the assessments were wrong or excessive. (Paragraphs 45 and 46)

18. As to "marketing" income, the judge agreed with the Board that it was different in nature from "commission" income in that it arose from various income sharing agreements entered into by the Taxpayer with other BSL sub-group companies, which formed part of the appendices to the Stated Case. In his view, such income was received for introduction of custom to the executing office rather than the Taxpayer permitting itself to be interposed in the relevant trades. (Paragraphs 47 and 48) He went on to say this (at paragraph 49):

> "Given that the introduction was to BSL subsidiaries in the execution location, for the purpose of executing trades of securities at that location, it seems to me that, on balance, the operation should be regarded as having taken place in the execution location. I therefore am of the view that this income, too, arose or was derived from outside Hong Kong …"

19. The judge therefore answered the first two questions posed in the affirmative and allowed the Taxpayer's appeal.

This appeal

20. The nub of the appeal was that the judge erred in failing to apply the principle laid down in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14. In that case, Lord Radcliffe addressed the question as to when it would be appropriate for an appellate court to intervene when dealing with an appeal by way of case stated. The duty of appellate courts in such appeals is clear: appellate intervention is required where the true and only reasonable conclusion from the evidence contradicts the tribunal's conclusion, in other words, where the tribunal's conclusion is 'perverse'. Thus, if the fact-finding tribunal's conclusion is a reasonable one, the appellate court cannot disturb that conclusion even if its own preference is for a contrary conclusion. See *Kwong Mile Service Ltd v Commissioner of Inland Revenue* (2004) 7 HKCFAR 275 at 289. It is certainly not part of the function of a judge sitting as an appellate tribunal on appeals by way of case stated to assume the role of the fact-finding tribunal and make his own findings of fact.

21. As noted above, the question the Board had to determine was what the Taxpayer had done to earn the profits it had classified as offshore income and it was incumbent upon the Taxpayer to adduce sufficient evidence to satisfy the Board that the source of the income in question was indeed "offshore". It is relevant to note that the Taxpayer's case presented on appeal to the Board was different from the case it (through its former tax representatives) had presented to the Commissioner. According to the Taxpayer, this was because "further and thorough investigations" had shown that many of the matters previously asserted as fact had been found to be "incorrect or unsustainable". In those circumstances, it was perhaps not that surprising that the Board looked particularly closely at the evidence.

22. In that connection, I would observe that the Decision ran to almost 50 single-spaced pages. Mr Barlow who appeared for the Taxpayer, was especially critical of the Board taking 19 months to produce it, suggesting that because of the inordinate length of time taken, the Board had "lost track of the evidence and the arguments (and even its own track of thought)". Whilst it would have been desirable had the Board been able to deliver the Decision sooner, it has to be borne in mind that the professionals who sit on Boards of Review do so on a part-time basis. In my view, the Decision was admirable in its comprehensiveness and its detailed analysis of the evidence adduced. It dealt painstakingly and meticulously with each piece of relevant evidence, making pertinent and probing observations which revealed the logic behind the Board's thinking and conclusions.

23. As the judge recognised, correctly in my view, the central question for the Board was to determine the acts or operations of the Taxpayer which produced those profits. However, as will become apparent, in the course of his judgment, the judge shifted his focus, lost sight of the central question and ended up adopting the approach which had been advocated by Mr Barlow and which he had professed to reject, namely by focussing on the transactions which produced the profit to the Taxpayer rather than the acts and operations of the Taxpayer itself which generated the profits.

24. The Board was not satisfied with the evidence adduced by the Taxpayer to explain what it had done to earn the profits. It concluded, *inter alia*, that crucial questions remained unanswered. Paragraph 75 of the Decision serves to illustrate the point:

> "Despite the [Taxpayer's] argument that research and sales were as important as execution of clients trades, the circumstances and documentation relevant to the creation of the sales and the entering into contractual obligations between the Group Contracting Party and clients were virtually ignored in the evidence. Due to the paucity of the evidence relating to what had transpired between the clients and the Group and the concentration of the evidence relating to execution and settlement, we have little idea of the relationship between the Group Contracting Party and its client and the relationship between various Group companies in the workflow relating to the receipt and passing on of client orders to the executing entity. We were not sure whether the Commission Income could be the commission paid by the client under an Agency Brokerage service provision contract or the commission paid to an executing entity or whether they were same. We were never sure to any degree whether the client was directed to pay the Client Commission to the Group Contracting Party which contracted with the client, to the Group company to which the sales desk of that client belonged or to the executing entity or the booking entity or to any other entity nominated by the Group. The suggested treatment of the Commission Income and the Market Income as the same type of income did not help in this regard."

When it was incumbent on the Taxpayer to satisfy the Board as to the source of its profits, could the Board realistically be faulted for wanting evidence to explain the contractual or other relationship giving rise to the Taxpayer's entitlement to the income? Put differently, assuming the Taxpayer was not the Group Contracting Party, even if the funds had been channelled from the client of the Group Contracting Party through it to the execution office situated offshore, why was it that part of those funds became the Taxpayer's income? What services had it performed to earn that income?

25. There was also the fact that the evidence adduced was general in nature and lacked precision, being directed to the Asian brokerage business as a whole. The Taxpayer was unable to relate that evidence to the production of the profits in dispute shown in the Taxpayer's accounts. Further, it was clear from the Board's findings that the Taxpayer was conducting a number of activities in Hong Kong which related directly to supporting trading outside Hong Kong. It stands to reason that the burden was on the Taxpayer to satisfy the Board that the profits were not or could not be attributable to those activities.

26. The exercise a judge is required to carry out on an appeal by way of case stated is to see whether the Board had gone wrong in law. If, given its findings of fact, the Board was entitled to say that the Taxpayer's case was not proved because it had failed to show that the profits had an offshore source, that is the end of the matter. Short of the Board's decision being perverse, or,

unless there was no evidence to support the conclusion reached, the judge may not substitute a contrary conclusion, much less interfere with the findings of fact.

27. Nowhere in his judgment did the judge state that the Board's conclusion was perverse given its findings of fact. Nowhere did he identify any error on the part of the Board. Without doing either or both of those things, it was not open to the judge to substitute his own views for that of the Board as he sought to do in paragraphs 37 to 42, 45, 47 to 49 of his judgment summarized in paragraphs 15 to 18 above.

28. In my view, the judge's approach was seriously flawed: not only did he not adopt the Board's findings of fact as a starting point, he appeared to assume the Board's fact-finding role. As already noted in paragraph 14 above, the judge appeared to make his own findings as regards "the flow of payments". In that connection, it is to be noted that the document relied on was nothing more than a summary of the evidence adduced by the Taxpayer as to the workflow in relation to the sample trade documents for the countries listed. Indeed, the Board's comments are dispersed throughout the summary and were not limited to a column specifically entitled "Notes/Comments". As an example, in relation to the payment and sharing of commission for Korea, the Board recorded this observation:

> "[w]e do not know if whether the brokerage fee and/or the commission mentioned by [Philip Snead] had anything to do with the Marketing Income or Commission Income under appeal. If they were related, how were they related?"

Given those comments, it is unclear what exactly the judge meant by treating "the flow of payments" as a finding and if he was not entitled to treat "the flow of payments" as a finding, it is impossible to say to what extent his conclusions based on the Board's findings would have been affected by that error. His finding concerning the 'interposition' of the Taxpayer in transactions between the ultimate client and the execution office is another example. Quite apart from the fact that he did not have the totality of the documentary evidence before him, nor did he have the benefit of hearing the witnesses, it was not his role sitting as an appellate tribunal on a case stated to make findings of fact.

29. The judge appeared to have overlooked the fact that the Taxpayer's task was not simply to establish "a *prima facie* case" that the assessments were wrong or excessive as regards commission and placement income. (See paragraphs 44 and 46) With respect, the question was not whether the Taxpayer had established a *prima facie* case. Rather, it had to satisfy the Board that the profits in question had an offshore source by adducing sufficient and relevant evidence. The question the judge should have addressed was whether, given its findings, it was open to the Board to take the view that the Taxpayer had failed to satisfy it that the profits in question had an offshore source.

Hon Stone J:

30. I agree with the judgment of Le Pichon JA. In deference to the argument, I would add a few words of my own.

31. In an attempt to get home on his contentions, Mr Barlow, who appeared for the Taxpayer, characterized the Decision of the Board of Review as "perverse in failing to decide the matter".

32. I am unable to agree. I take the view that, whilst regrettably delayed, in substance the Decision, and the work that went into it in terms of the detailed analysis of the evidence, was wholly estimable.

33. I also regard it as understandable that in terms of the evidence presented to it the Board of Review not only was unable to conclude that the Taxpayer had discharged the burden of proof which lay upon it, but was unable with any certainty to perceive precisely what it was that the Taxpayer had done in order to earn the profits classified in its tax returns as ' offshore income' .

34. In the circumstances perhaps it is unsurprising that this should be so. Miss Li SC on behalf of the Commissioner has referred the court to the correspondence containing the queries raised by the Revenue in this regard, and to the unsatisfactory and less than illuminating nature of the responses from the Taxpayer.

35. For my own part, notwithstanding Mr Barlow' s persuasive exposition, I confess that, without more, I found unhelpful the description of the Taxpayer' s ' interposition' in the relevant transactions, and in the lack of elucidation of the scope of such ' interposition' ; certainly I found it difficult to appreciate why it should be said that such ' interposition' should have taken place offshore in each of the locations, as the Taxpayer contended.

36. The considerable sums of money at issue in this case presumably did not descend on the Taxpayer like manna from heaven, but this court, much like the Board, was left none the wiser as to the activities of the Taxpayer which in fact had merited such largesse. It follows that I certainly cannot accept Mr Barlow's submission that there was only one answer that the Board could have come to on the material before it, and that in coming to the view that it did the Board wrongly was engaged in a search for "evidential perfection".

37. In any event, at the end of the day perhaps this does not greatly matter. As Le Pichon JA has emphasized, the proceedings below took the form of an appeal by way of case stated, and if the conclusion of the Board of Review, as the fact-finding tribunal, cannot be described as plainly unreasonable and contrary to the only reasonable conclusion available on the evidence – or indeed as ' perverse' , which was the position to which Mr Barlow ultimately was driven during the dialogue between bench and bar – then an appellate court cannot disturb that conclusion even if (and it

strikes me as a big 'if' in this case) it otherwise would have been minded to arrive at a contrary view.

38. Against this procedural background, which encompasses a fairly circumscribed discipline, it seems to me, with great respect, that the learned judge overstepped the role of the court upon an appeal by way of case stated and succumbed to the temptation to "travel to the evidence", to use Miss Li's evocative phrase, and to embark upon a reclassification of the facts and the substitution of his own conclusions as to the establishment of a 'prima facie case' notwithstanding, as Miss Li also pointed out, that he had not been privy to the entirety of the evidence placed before the Board of Review nor to the argument thereon, and in the process appears also to have overlooked that the crucial issue focussed not upon the transactions said to have produced the profits, but the nature of the onshore operations/actions of the Taxpayer which had served to generate such profits.

39. It seems to me that on the facts of this case it simply cannot be said that it was open to the learned judge to be satisfied that there was no evidential basis underpinning the Decision of the Board of Review, or that it was not open to the Board to come to the view that in the circumstances the Taxpayer had failed to discharge the burden which lay upon it of demonstrating that the assessment was excessive or incorrect.

40. In this context I accept the submission of Miss Li that 'incorrect' must include demonstrating by cogent evidence that the Taxpayer's operations/activities giving rise to the profits were conducted offshore, whereas in this case, as she has pointed out, the Taxpayer repeatedly had failed to answer pertinent questions from the Revenue, had made substantial changes to its tax returns increasing its 'offshore' profit claims, had repudiated the case put up by its former tax representatives, and had informed the Board that the evidence would show the true picture, only demonstrably to fail to adduce relevant evidence to show exactly what it was that the Taxpayer had done in order to earn the profits in question.

41. In my judgment the Board was fully entitled to act as it did, and to dismiss the Taxpayer's appeal on the ground that it had failed to discharge the burden of proof.

42. Looked at in this light, it is difficult to disagree with Miss Li's further submission that, were the position to be otherwise, it would be open to a taxpayer to adduce evidence irrelevant to the source of its profits or to address evidence to the wrong legal test, and thereafter to assert that such evidence had had the effect of shifting the burden to the Commissioner to rebut the evidence adduced and to show what were the relevant taxable activities and where they took place. Were this to be the situation, said Miss Li, this would amount to an unacceptable 'taxpayer's charter', and cannot be the proper interpretation or effect of section 68(4) of the Inland Revenue Ordinance.

43. I agree. If the taxpayer fails to discharge the statutorily prescribed burden of proof, the taxpayer is bound to fail. Which in my view is what has happened in this case.

(Anthony Rogers)	(Doreen Le Pichon)	(William Stone)
Vice-President	Justice of Appeal	Judge of the Court of First Instance

Mr Barrie Barlow, instructed by Messrs Mallesons Stephen Jaques, for the Appellant/Respondent

Ms Gladys Li SC, instructed by Department of Justice, for the Respondent/Appellant