

Case No. D11/20

Profits tax – assessment – deductions – whether the taxpayer could deduct fees for property management service from the assessable profits – whether the taxpayer incurred a liability to pay such management fees – whether it was necessary to show that the taxpayer was legally obliged to pay such fees – sections 16, 17 of the Inland Revenue Ordinance (‘the Ordinance’)

Panel: Lo Pui Yin (chairman), Chan Wai Ho Alwin and Ha Suk Ling Shirley.

Dates of hearing: 17, 18 & 21 June 2019.

Date of decision: 30 November 2020.

The Taxpayer owned shops and office units in a building (‘the Property’), and received rental income therefrom. REIT K was a real estate investment trust (REIT) constituted by a trust deed, which was listed on the Stock Exchange of Hong Kong. The Property was an asset under REIT K. Under the trust deed, a manager (‘the Manager’) was appointed to assist the trustee to manage REIT K, and to observe the REIT Code and practice notes issued by the Securities and Futures Commission. Remuneration for the Manager, and its calculations, were set out in the trust deed. The Manager further delegated property management for the Property to a property manager (‘the Property Manager’).

From 2007/08 to 2015/16 years of assessment, the Taxpayer sought to deduct from the assessable profits money it said to have paid the Manager and the Property Manager for their respective services provided to the Property. The Assessor rejected the Taxpayer’s claims for deduction in relation to the money paid to the Manager and Property Manager. After reviewing representations from the Taxpayer, she then agreed that the money paid to the Property Manager could be deducted from the assessable profits, but not for the sums to the Manager. The Taxpayer objected to the revised assessments, but the Deputy Commissioner confirmed the revised assessments in the Determination. The Taxpayer further appealed against the Determination.

The Taxpayer called evidence before the Board to show that the Taxpayer employed no staff. Rental income was received, and expenditure paid, on the Taxpayer’s behalf by a treasury company. Each month, entries would be made in the accounts of the treasury company for payment of service fees to the Manager and the Property Manager. The Taxpayer’s witnesses testified that the Manager provided business management service to the Taxpayer, like formulation of leasing strategies, determination of rental pricing, or development of asset enhancement plans.

The Taxpayer argued before the Board that it did pay the Manager’s fees. It was commercially necessary for the Taxpayer to have the Manager’s services. The Determination erred in concluding that it was the trustee, rather than the Taxpayer, that paid

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

the Manager's fees; and that antecedent legal liability for the Taxpayer to pay the Manager's fees was essential before deduction could be allowed. In any event, there was an implied contract for the Taxpayer to pay the Manager's fees as it freely accepted the service provided by the Manager.

Held:

1. The word 'incurred' under section 16 of the Ordinance includes the acceptance of a liability, as well as the meeting of that liability as and when it matures (Commissioner of Inland Revenue v Lo & Lo [1982] HKLR 503 applied). Commercial considerations were not wholly to be disregarded in identifying permitted deductions (Commissioner of Inland Revenue v Lo & Lo (a firm) [1984] 1 WLR 986 applied).
2. Since rental income of the Property received by the treasury company moved to REIT K's account with the treasury company; and such money was identical in amount to the Manager's fees that the Taxpayer said to have paid, the Taxpayer did pay the Manager's fees. The Manager's fees enabled the Taxpayer to conduct profit producing activities with the Property. Therefore, the Manager's fees were deductible in the computing of assessable profits in the relevant years of assessment.

Appeal allowed.

Cases referred to:

Kaifull Investments Limited v Commissioner of Inland Revenue [2012] 1 HKLRD 858
Browne v Dunn (1894) 6 R 47
Commissioner of Inland Revenue v Lo & Lo (a firm) [1984] 1 WLR 986
Commissioner of Inland Revenue v Lo & Lo [1982] HKLR 503

Stewart Wong SC and Julian Lam, Counsel, instructed by Woo Kwan Lee & Lo, for the Appellant.

Kenneth Kwok SC and Paul HM Leung, Counsel, instructed by the Department of Justice, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This Appeal was lodged by the Appellant/Taxpayer, Company A, against the Determination of the Deputy Commissioner of Inland Revenue dated 26 April 2018

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

revising the Additional Profits Tax Assessment for the years of assessment 2007/08 to 2012/13 and the Profits Tax Assessment for the years of assessment 2013/14 to 2015/16 but rejecting the Taxpayer's claim for the deduction of sums referred to in this Appeal as Manager's Fees in the computing of the assessable profits ('the Determination').

2. The Taxpayer's Notice of Appeal, which the Taxpayer lodged with the Clerk to the Board of Review through its legal representatives on 21 May 2018, was amended on 17 January 2019. These amended grounds of appeal concern the principal submission that the Manager's Fees were deductible under section 16(1) of the Inland Revenue Ordinance (Chapter 112) ('IRO').

3. This Board held the hearing of this Appeal on 17 June 2019, 18 June 2019 and 21 June 2019. The Taxpayer was represented by Stewart Wong SC leading Julian Lam. The Revenue was represented by Kenneth Kwok SC leading Paul HM Leung.

4. The parties to this Appeal have agreed to a Statement of Agreed Facts. This Board finds the facts stated in this Statement of Agreed Facts as facts. These facts are set out in the next section of this Decision.

5. The Taxpayer called three witnesses to give oral evidence. The Taxpayer referred to the documents submitted before this Board.

6. The Revenue did not call any oral evidence. The Revenue referred to documents submitted before this Board.

7. In the sections of this Decision that follow, this Board shall consider the Determination and the evidence placed before it by the parties to this Appeal and make findings of fact. Then this Board shall consider the submissions of the Taxpayer and the Revenue in the light of the facts found and determine this Appeal.

The Agreed Facts

8. The Taxpayer was incorporated as a private company in Hong Kong. It closed its accounts annually on 30 June. In the Profits Tax Returns for the years of assessment 2007/08 to 2015/16, the Taxpayer described its principal activity as property investment. Prior to September 2004, Company B was the Taxpayer's ultimate holding company. From September 2004 to December 2006, the Taxpayer's ultimate holding company was Company C. From September 2004 onwards, Company D has become the immediate holding company of the Taxpayer.

9. (a) At all relevant times, the Taxpayer was the registered owner of certain shops and offices of Building E, which was located at Address F. The units of Building E held by the Taxpayer are hereinafter referred to as the 'Property'.

(b) Rental income and related income from the Property have been the Taxpayer's only source of income since Building E was built.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

10. In the Profits Tax Return for the year of assessment 2006/07, the Taxpayer declared assessable profits of \$6,238,579. The Taxpayer's detailed profit and loss account for the year ended 30 June 2006 showed, among other things, the following particulars:

	\$	\$
Rental income		8,186,311
<u>Less:</u> Building administration fee	1,345,944	
Rental commission	42,968	
Other direct costs*	<u>539,205</u>	<u>1,928,117</u>
Gross profit		6,258,194
<u>Add:</u> Sundry income		<u>80</u>
		6,258,274
<u>Less:</u> Administrative expenses		<u>19,695</u>
Profit before taxation		<u><u>6,238,579</u></u>

*Other direct costs included rates, repairs and maintenance, advertising and promotion.

11. (a) REIT K is a real estate investment trust constituted by a trust deed (as amended from time to time) ('Trust Deed') entered into between Company G (as the settlor), Company H ('Manager') and Company J ('Trustee').
- (b) REIT K is and was at the material times listed on the Main Board of the Stock Exchange of Hong Kong Limited ('Stock Exchange'). It is a collective investment scheme constituted as a unit trust that invests primarily in income-producing real estate assets and uses the income to provide stable returns to its unit holders ('Holders'). REIT K is regulated by the Securities and Futures Ordinance (Chapter 571), the Code of Real Estate Investment Trust ('REIT Code') and Chapter 20 of the Listing Rules.
- (c) The Trustee indirectly holds shares in property holding special purpose vehicles (including the Taxpayer) which in turn own and hold real estate assets such as the Property to engage in rental business and derive rental income for distribution to the Holders. By virtue of the Trust Deed, the Trustee holds the assets of REIT K for the benefit of the Holders pari passu according to the number of units in REIT K ('Units') held by each Holder.
12. (a) The REIT Code together with the Practice Note(s) issued by the Securities and Futures Commission ('SFC') from time to time establishes guidelines for the authorization of a collective investment scheme which is a real estate investment trust.
- (b) GP9 of the REIT Code provides that 'Management fees shall be disclosed clearly in the offering document'.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (c) REIT K has been authorized by the SFC subject to certain conditions set out in the approval letter.
13. By a sale and purchase agreement, REIT K Holding Limited acquired the entire issued share capital of Company D, subject to the successful listing of the Units.
14. Before listing, a circular on the placing and offer of Units of REIT K ('Offering Circular') was issued.
15. (a) Clause A.4 of the Trust Deed provides that the Manager may delegate to any person the performance of any act or the exercise of any power to manage and administer the Authorised Investment (as defined in the Trust Deed) and the exercise of any of the rights, trusts and discretions granted to the Manager by the Trust Deed as it thinks fit.
- (b) By the Property Management Agreement ('PMA') entered into between the Manager and Company L ('Property Manager'), the latter was appointed to provide services solely and exclusively for the real estate assets ('Properties', which included the Property) of REIT K located in Hong Kong, subject to the overall management and supervision of the Manager.
16. The PMA was amended by several supplemental agreements.
17. REIT K commenced operation when the Properties were acquired and the Units were listed on the Stock Exchange. The Property became part of the property portfolio of REIT K.
18. The Manager and the Property Manager entered into a deed of ratification and accession. The Manager was incorporated in Hong Kong. The Manager and the Property Manager are both indirectly wholly-owned subsidiaries of Company M.
19. The Manager elected for the Base Fee and the Variable Fee (both terms as defined in the Trust Deed) be paid for the financial years ended 30 June 2010 to 2015 as follows:

Year ended 30 June	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>
In form of:						
- Cash	50%	0%	30%	50%	50%	50%
- Units	50%	100%	70%	50%	50%	50%

20. The Taxpayer furnished Profits Tax Returns for the years of assessment 2007/08 to 2015/16 together with its audited financial statements and tax computations for the years ended 30 June 2007 to 2015.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (a) In the Profits Tax Returns, the Taxpayer declared the following assessable profits:

<u>Years of assessment</u>	<u>Assessable profits (\$)</u>
2007/08	1,252,197
2008/09	982,908
2009/10	1,930,535
2010/11	1,328,562
2011/12	1,990,374
2012/13	4,433,406
2013/14	4,610,988
2014/15	6,538,934
2015/16	7,212,246

- (b) The reported assessable profits were arrived at after deducting, among other things, service fees to the Manager ('Manager's Fees') and to the Property Manager (comprised of fees and rental commission) ('Property Manager's Fees') as follows:

<u>Year of Assessment</u>	<u>Manager's Fees</u>	<u>Property Manager's Fees</u>		
		<u>Fees (A)</u>	<u>Rental commission (B)</u>	<u>(A)+(B)</u>
	\$	\$	\$	\$
2007/08	115,760	134,028	236,559	370,587
2008/09	1,366,735	310,807	266,727	577,534
2009/10	990,886	347,404	327,965	675,369
2010/11	1,092,122	336,654	260,049	596,703
2011/12	1,281,609	363,172	315,482	678,654
2012/13	1,365,071	407,080	254,098	661,178
2013/14	1,466,689	435,955	388,677	824,632
2014/15	1,609,766	490,438	337,359	827,797
2015/16	1,804,127	516,711	401,599	918,310

- (c) The Taxpayer's detailed income statements for the years ended 30 June 2007 to 2015 showed, among other things, the following particulars:

For the year ended on 30 June	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>
	\$	\$	\$	\$	\$	\$	\$	\$	\$
Rental & related income.	9,229,478	11,817,569	12,980,274	12,627,213	13,599,969	15,249,137	16,301,811	18,491,053	19,632,844
<u>Less: Direct costs</u>									
- Building administration fee	1,348,167	1,346,984	1,544,718	1,514,493	1,520,975	1,633,439	1,772,780	1,935,018	2,011,887
- Property Manager's Fees	370,587	577,534	675,369	596,703	678,654	661,178	824,632	827,797	918,310
- Rental commission to other	121,261	0	0	147,643	74,188	49,517	153,310	71,011	248,267
- Other direct costs.	<u>811,644</u>	<u>413,146</u>	<u>664,002</u>	<u>808,733</u>	<u>872,517</u>	<u>824,876</u>	<u>1,105,882</u>	<u>1,047,221</u>	<u>1,214,570</u>
	2,651,659	2,337,664	2,884,089	3,067,572	3,146,334	3,169,010	3,856,604	3,881,047	4,393,034
Gross profit	<u>6,577,819</u>	<u>9,479,905</u>	<u>10,096,185</u>	<u>9,559,641</u>	<u>10,453,635</u>	<u>12,080,127</u>	<u>12,445,207</u>	<u>14,610,006</u>	<u>15,239,810</u>

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

For the year ended on 30 June	2007	2008	2009	2010	2011	2012	2013	2014	2015
	\$	\$	\$	\$	\$	\$	\$	\$	\$
Administrative expenses									
- Others	119,101	144,366	159,355	147,495	145,715	176,199	177,846	413,125	192,496
- Manager's Fees	115,760	1,366,735	990,886	1,092,122	1,281,609	1,365,071	1,466,689	1,609,766	1,804,127
	<u>234,861</u>	<u>1,511,101</u>	<u>1,150,241</u>	<u>1,239,617</u>	<u>1,427,324</u>	<u>1,541,270</u>	<u>1,644,535</u>	<u>2,022,891</u>	<u>1,996,623</u>

21. (a) In accordance with the Profits Tax Returns, the assessor of the Revenue raised on the Taxpayer the following Profits Tax Assessments for the years of assessment 2007/08 to 2012/13:

Year of assessment	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13
	\$	\$	\$	\$	\$	\$
Assessable profits	1,252,197	982,908	1,930,535	1,328,562	1,990,374	4,433,406
Tax payable thereon	194,134	162,179	318,538	219,212	316,411	721,511

- (b) The Taxpayer did not object to the above assessments, which had become final and conclusive in terms of section 70 of the IRO.
22. (a) For the period from 21 December 2006 to 30 June 2015, the asset management fees (that is, the Manager's Fees comprising the Base Fee and the Variable Fee) payable to the Manager in relation to the Property were analysed as follows:

Year of Assessment	The Property's valuation as at 30.6 of each year [A]	Net Property Income [B]	Base Fee [A] x 0.4%	Variable Fee [B] x 3%	Asset management fees
	\$	\$	\$	\$	\$
2007/08	245,000,000	3,858,643	515,506	115,760	631,266
2008/09	277,000,000	9,479,905	1,108,000	284,397	1,392,397
2009/10	258,000,000	10,096,185	1,032,000	302,886	1,334,886
2010/11	302,000,000	9,559,641	1,208,000	286,789	1,494,789
2011/12	363,000,000	10,453,635	1,452,000	313,609	1,765,609
2012/13	376,000,000	12,080,127	1,504,000	362,404	1,866,404
2013/14	410,000,000	12,445,207	1,640,000	373,356	2,013,356
2014/15	439,300,000	14,610,006	1,757,200	438,300	2,195,500
2015/16	505,100,000	15,239,810	2,020,400	457,194	2,477,594

- (b) The above asset management fees were charged in the accounts of REIT K and the Taxpayer as follows:

	2007/08	2008/09	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
	\$	\$	\$	\$	\$	\$	\$	\$	\$
REIT K									
- Base Fee (1/3)	-	#541,169	344,000	402,267	484,000	501,333	546,667	585,734	673,467
The Taxpayer									
- Base Fee (2/3)	-	#1,082,338	688,000	805,333	968,000	1,002,667	1,093,333	1,171,466	1,346,933
- Variable Fee	115,760	284,397	302,886	286,789	313,609	362,404	373,356	438,300	457,194
The Manager's Fees	115,760	1,366,735	990,886	1,092,122	1,281,609	1,365,071	1,466,689	1,609,766	1,804,127

Including Base Fee adjustment for the period from 21 December 2006 to 30 June 2007

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

23. The assessor of the Revenue was of the view that the Manager's Fees and the Property Manager's Fees should not be deductible in computing the Taxpayer's assessable profits. She therefore raised on the Taxpayer the following Additional Profits Tax Assessments for the years of assessment 2007/08 to 2012/13 and Profits Tax Assessments for the years of assessment 2013/14 to 2015/16 to disallow both fees:

(a) Additional Profits Tax Assessments for the years of assessment 2007/08 to 2012/13

	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>	<u>2012/13</u>
	\$	\$	\$	\$	\$	\$
Amounts disallowed						
- Manager's Fees	115,760	1,366,735	990,886	1,092,122	1,281,609	1,365,071
- Property Manager's Fees	<u>370,587</u>	<u>577,534</u>	<u>675,369</u>	<u>596,703</u>	<u>678,654</u>	<u>661,178</u>
Additional Assessable Profits	<u>486,347</u>	<u>1,944,269</u>	<u>1,666,255</u>	<u>1,688,825</u>	<u>1,960,263</u>	<u>2,026,249</u>
Tax Payable thereon	<u>85,111</u>	<u>320,805</u>	<u>274,932</u>	<u>278,656</u>	<u>323,444</u>	<u>334,332</u>

(b) Profits Tax Assessments for the years of assessment 2013/14 to 2015/16

Year of assessment	<u>2013/14</u>	<u>2014/15</u>	<u>2015/16</u>
	\$	\$	\$
Profits per return	4,610,988	6,538,934	7,212,246
<u>Add: Manager's Fees</u>	1,466,689	1,609,766	1,804,127
Property Manager's Fees	<u>824,632</u>	<u>827,797</u>	<u>918,310</u>
Assessable profits	<u>6,902,309</u>	<u>8,976,497</u>	<u>9,934,683</u>
Tax payable thereon	<u>1,128,880</u>	<u>1,461,122</u>	<u>1,619,222</u>

24. The Taxpayer objected to the above assessments on the grounds that:

- (a) The amounts assessed were excessive and/or wrong in fact and/or in law.
- (b) The Manager's Fees and the Property Manager's Fees claimed by the Taxpayer should be allowed for deduction under section 16 of the IRO and not disallowed under section 17 of the IRO.

25. Having further reviewed the available information, the assessor of the Revenue accepted that the Property Manager's Fees were deductible. Accordingly, the Additional Profits Tax Assessments for the years of assessment 2007/08 to 2012/13 and the Profits Tax Assessments for the years of assessment 2013/14 to 2015/16 should be revised to disallow the Manager's Fees as follows:

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

(a) *Years of assessment 2007/08 to 2012/13 (additional)*

	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>	<u>2010/11</u>	<u>2011/12</u>	<u>2012/13</u>
	\$	\$	\$	\$	\$	\$
Additional assessable profits	<u>115,760</u>	<u>1,366,735</u>	<u>990,886</u>	<u>1,092,122</u>	<u>1,281,609</u>	<u>1,365,071</u>
Tax payable thereon	<u>20,258</u>	<u>225,512</u>	<u>163,496</u>	<u>180,200</u>	<u>211,466</u>	<u>225,237</u>

(b) *Years of assessment 2013/14 to 2015/16*

	<u>2013/14</u>	<u>2014/15</u>	<u>2015/16</u>
	\$	\$	\$
Profits per return	4,610,988	6,538,934	7,212,246
<u>Add: Manager's Fees</u>	<u>1,466,689</u>	<u>1,609,766</u>	<u>1,804,127</u>
Assessable profits	<u>6,077,677</u>	<u>8,148,700</u>	<u>9,016,373</u>
Tax payable thereon	<u>992,816</u>	<u>1,324,535</u>	<u>1,467,701</u>

The Deputy Commissioner's Determination

26. The Deputy Commissioner of Inland Revenue considered the Taxpayer's objection in his Determination dated 26 April 2018. Having noted the assessor of the Revenue's acceptance that the Property Manager's Fees were deductible, the Deputy Commissioner determined whether the Taxpayer should be entitled to deduct the Manager's Fees in computing its chargeable profits for the years of assessment 2007/08 to 2015/16.

27. The Deputy Commissioner rejected the Taxpayer's objection regarding the deductibility of the Manager's Fees for these reasons:

- (1) The Deputy Commissioner summarized the Taxpayer's claims in the objection in the following terms: During the relevant years of assessment, the Manager rendered services to it for the production of its chargeable profits. The Taxpayer paid the Manager's Fees via Company N and REIT K as it had been provided in the Trust Deed that asset management fees payable to the Manager were to be paid out of the Deposited Property (i.e. the Property in the present case), which in effect meant by the Property Companies (i.e. the Taxpayer in the present case) out of their rental income given that REIT K was a trust and not a legal entity itself. Besides, by accepting the services rendered by the Manager and knowing the Manager expected to be paid, the Taxpayer came under a legal obligation to pay the Manager for the services. As there was sufficient nexus between the Manager's Fees and the production of the Taxpayer's chargeable profits, the Manager's Fees should be deductible under section 16(1) of the IRO even if the Taxpayer had not pre-existing legal or contractual obligation to pay it.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (2) The Deputy Commissioner was of the view that the Manager's Fees were not incurred by the Taxpayer and that they were not incurred in the production of the Taxpayer's chargeable profits. The Deputy Commissioner referred to the following matters below.
- (3) Although the Taxpayer was a special purpose vehicle of REIT K, they were separate and distinct. The Taxpayer had never been a party to the Trust Deed. The terms and conditions of the Trust Deed were binding on the Trustee, the Manager and the Holders. Clause B.4(a) of the Trust Deed provided that the Trustee had the fiduciary duty to hold the Deposited Property on trust for the benefit of the Holders, and to oversee the activities of the Manager. According to clause C.1(a), the Manager was entitled to receive remuneration, which would be paid out of the Deposited Property. 'Deposited Property' was defined in the Trust Deed as all the assets of REIT K, including but not limited to those held through Special Purpose Vehicles ('SPVs'). It was plain from the above provisions of the Trust Deed that the Trustee who held the Deposited Property on trust for the benefit of the Holders had the legal obligation to pay the asset management fees to the Manager out of the Deposited Property. Given the fact that the special purpose vehicles were obliged to distribute to REIT K all of their income attributable to REIT K, the Trustee had the necessary funding to pay the Manager.
- (4) Pursuant to the Trust Deed, the Manager managed REIT K and the Deposited Property and issued debit notes to the Trustee demanding the payment of asset management fees. The asset management fees incurred by REIT K were settled by the Trustee by issuance of Units and payment of cash. All these were consistent with the contractual relationship as illustrated in the diagrams in the Offering Circular.
- (5) There should be no dispute that REIT K may incur expenses under the Trust Deed. Reference was made to clause A.7 of the Trust Deed in this regard. It followed that the asset management fees paid out of the Deposited Property in accordance with the Trust Deed should also be recognized as an expense of REIT K.
- (6) The Trust Deed did not provide that the Taxpayer had an obligation to pay the Manager. There was no evidence that the Trustee and the Taxpayer had entered into a recharge agreement in respect of the Manager's Fees or a ratification agreement with the Manager similar to those concerning the Property Manager's Fees. In the absence of such an agreement, there was no formal legal basis for the Trustee to charge the Taxpayer the Manager's Fees on its own. If the Manager's Fees were to be borne by the Taxpayer, it should have been expressly stated in the Offering Circular as in the case of the Property Manager's Fees.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (7) The Trust Deed and the REIT Code made it apparent that the Manager was appointed by the Trustee to manage and operate REIT K and to comply with the REIT Code for the benefit of REIT K as a whole. The Manager's services in respect of the Taxpayer (a special purpose vehicle) and the Property (the assets held by such special purpose vehicle) were part and parcel of its duties and power to manage and operate REIT K and to comply with the REIT Code. If not being a special purpose vehicle of REIT K, it was inconceivable that the Taxpayer, being a property holding company, would need a two-tier operation structure, including the appointment of the Manager which was a licensed entity under the SFO, to manage it and the Property and to supervise the Property Manager.
- (8) The Manager was properly remunerated by the Trustee in accordance with the Trust Deed. Any enrichment to the Taxpayer was not at the expense of the Manager. If the Manager was the claimant, one of the factors for a restitutionary claim was not satisfied. There was no evidence that the alleged acceptance of the Manager's services by the Taxpayer would give rise to an obligation to pay the Manager's Fees under the law of restitution.
- (9) The asset management fees fell within the responsibility of the Trustee, who oversaw the activities of the Manager and were incurred for the sole interests of the Holders. The Taxpayer was not obliged to make payment of the Manager's Fees. The Taxpayer had not adduced any evidence to show that it had paid via Company N to REIT K the portion of the Manager's Fees which was settled by the Trustee by issuing the Units. Even if payment was made by the Taxpayer via Company N to REIT K in respect of the portion of the Manager's Fees which were settled by cash, it could be a loan or distribution of the Taxpayer's income under clause D.7 of the Trust Deed and was not an expense or outgoing of the Taxpayer incurred in production of its chargeable profits and thus did not qualify as deduction under section 16(1).

28. The Deputy Commissioner endorsed the revised tax computation put forward by the Assessor of the Revenue, which allowed the deduction of the Property Manager's Fees.

29. The Deputy Commissioner therefore rejected the Taxpayer's objection and revised the Additional Profits Tax Assessment for the years of assessment 2017/08 to 2012/13 and the Profits Tax Assessment for the years of assessment 2013/14 to 2015/16 in the manner put forward by the assessor of the Revenue stated in paragraph 25 above.

The Testimonies on behalf of the Taxpayer

30. The Taxpayer's case is that the Taxpayer was and is a commercial landlord. The Taxpayer had no staff. All of the Taxpayer's operations conducted to earn its profits, on which it paid Profits Tax in each of the relevant years of assessment, were run by, among others, the Manager. The Taxpayer actually paid the Manager's Fees (both the Base Fee and the Variable Fee) in the relevant basis periods. The Taxpayer made the payments out of the rental receipts that Company N held on the Taxpayer's behalf. They were not paid by the Trustee out of dividends declared and paid over by the Taxpayer and its holding companies. They were in substance and reality paid by the Taxpayer and not paid by the Trustee on its own account. The Manager's Fees payments were made for the services the Manager rendered to its business and were incurred in the production of and for the purpose of producing the Taxpayer's profits. The Taxpayer's Amended Grounds of Appeal will be discussed below.

31. The Taxpayer called Mr P, Ms Q and Mr R to explain the services the Manager rendered to the Taxpayer. Ms Q, particularly, explained the mechanism of the payment of the Manager's Fees.

32. Mr Kwok for the Revenue indicated at the outset of the hearing before this Board that the witness statements of the Taxpayer's witnesses should state only statements of facts which the witness was capable of giving evidence on from his own personal knowledge, and should not include hearsay, opinion (unless such opinion was relevant), arguments or submissions, but the witness statements of the Taxpayer's witnesses contravened all of the above requirements. Mr Wong for the Taxpayer also indicated that strict rules of evidence did not apply in a hearing before this Board. Hearsay evidence was admissible even in legal proceedings; the matter was one of weight. This Board recognizes Mr Kwok's observation and agrees that the witness statements of the Taxpayer's witnesses have included matters of opinion, argument and submission. This Board has read the witness statements with the approach of identifying and considering the evidence on facts that each witness was capable of giving from his or her own personal knowledge.

Mr P

33. Mr P was Position S of Department T of the Manager. He had over 25 years of experience in leasing and property management. Prior to joining the Manager in 2010, he was Position U of the Property Manager.

34. Mr P stated that Department T was one of the 6 departments of the Manager. He, as the head of Department T, reported directly to Mr R, Position V of the Manager.

35. Mr P stated that as Position S of Department T, he was broadly responsible for:

- (1) Managerial decision making to maximize the operating performance of the properties in REIT K, held through SPVs such as the Taxpayer, and the properties included the Property.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (2) Overseeing the operational aspects of the properties in REIT K, including strategic asset planning, marketing, leasing and tenancy management, property maintenance and oversight of delegates; and
- (3) Developing and executing asset improvement aspects of the properties in REIT K.

36. Mr P stated that Department T had at the relevant time 3 managers and 1 officer and their major responsibilities were:

- (1) Asset management: monitoring leasing performance, preparing and executing asset enhancement proposals, coordinating marketing and promotional matters of the properties, as well as participating in acquisition and disposal of properties.
- (2) Project management: coordinating and overseeing asset enhancement projects, and monitoring technical services provided to the properties.
- (3) Property management: monitoring property management aspects, including cost control, of each property.
- (4) Legal administration: monitoring tenancy administration for each property and handling of legal actions with tenants on behalf of property owners.

37. Mr P described the services that the Taxpayer required as a commercial landlord of the Property. He stated that like other commercial landlords in Hong Kong, there were two aspects of work necessary for the Taxpayer to carry on its business, so that it could earn and produce rental income. The first aspect involved ground-level operations including day-to-day works such as building management, repairs and maintenance, lease negotiations, rental collection and other routine administration works. The second aspect was comprised of the business management services including (but not limited to): (1) Decision-making on core activities of the property including formulation of leasing strategies for the Property, determination of rental pricing, approval on each leasing transaction, development of asset enhancement plans and major management matters; (2) Driving the financial performance and asset value of the Property; (3) Supervising delegates (including the Property Manager and other contractors or consultants) to ensure satisfactory performance of all ground level operations. Mr P stated that from his experience and long career with commercial landlords, both aspects were necessary for the business operations of a commercial landlord. Usually a commercial landlord would undertake the second aspect of work by its senior management and the first aspect of work could be handled by their own employees or outsourced to a delegate. Under either arrangement, the first aspect of the work would still be under close supervision of the senior management of the commercial landlord, and the senior management would always be the key decision-makers.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

38. Mr P then explained that since the Taxpayer itself (like other SPVs in REIT K) had no employees, the two aspects of work necessary for the Taxpayer to carry on its business were performed by third party service providers on behalf of the Taxpayer via the two-tier management structure (i.e. by the Manager and the Property Manager). The ground level operations were outsourced to the Property Manager, which had its own office and separate operation teams. The Manager, on the other hand, carried out the business management, decision-making and supervision of delegates including the Property Manager.

39. Mr P further explained the relationship between the Manager and the Property Manager. The Manager delegated the ground level operations to the Property Manager under clause A.7 of the Trust Deed. There was also a property management agreement made between the Manager and the Property Manager under which the Manager appointed the Property Manager to operate, maintain, manage and market all the properties owned by REIT K solely and exclusively subject to the overall management and supervision of the Manager and upon the terms and conditions contained in that agreement. The Property Manager provided its services to the Taxpayer through two of its departments, one concerning leasing services and the other concerning the provision of building management and maintenance services, including monitoring the manager under the Deed of Mutual Covenant. Mr P stressed that without the decisions made and work done by the Manager in supervising and directing the Property Manager, the Property Manager would not be able to provide and implement the ground level leasing and property management services to the Property, and the production of the Taxpayer's profits would be critically affected.

40. Mr P furthermore explained the services rendered by Department T of the Manager to the Taxpayer and the Property. The Manager was responsible for making all business decisions on behalf of the Taxpayer in the business management and formulation of its operational strategies; this was said to be reflected in the annual business plan and budget setting out the parameters of its operations for an upcoming financial year, the managing of the leasing activities and marketing of the Property including the reviewing and approval of rental terms for every leasing application submitted by the Property Manager, and ensuring that the Property was adequately insured. The Manager was also responsible for driving the financial performance of the Taxpayer including the asset value of the Property. The Manager was also responsible for supervising and monitoring the delegates including the Property Manager. Mr P underlined that on the basis of his knowledge and experience, there were distinct services rendered by the Manager and the Property Manager without any duplication or overlap of duties and responsibilities.

41. The Revenue cross-examined Mr P.¹ In response to cross-examination, Mr P stated that his place of work was at Address W and Company X occupied the whole of that floor. The Property Manager occupied part of one floor of the same building.

Ms Q

42. Ms Q was Position Y of the Manager. She led Department Z of the Manager. She reported directly to Mr R. She was the most senior person who managed the financial and accounting affairs of the Taxpayer, as well as the financial affairs and accounting matters of Company N, a company set up to perform centralized treasury functions for REIT K.

43. Ms Q was responsible for supervising the overall financial and accounting management of REIT K, Company N, companies providing financial services to and holding domain names of REIT K, intermediate holdings companies as well as each of the property holding SPVs, including but not limited to financial reporting, taxation and cash flow management, monitoring of capital expenditure, reviewing of and making recommendation on financing matters and budget preparation.

44. Ms Q sought to explain three matters in her evidence. The first was the work that Department Z of the Manager and she performed in relation to the Taxpayer, one of the SPVs. The second was the payment mechanism of the Manager's Fees from the Taxpayer to the Manager, via Company N, for the services rendered to the Taxpayer by the Manager. The third was the flow of funds from the Taxpayer by way of dividend for onward distribution to the unit holders.

45. Ms Q stated that since none of the SPVs had any employees and staff, the Department Z of the Manager handled all their financial and accounting affairs under the ultimate supervision of Position V of the Manager, Mr R. The key services Department Z provided to the Taxpayer related to all aspects of the management of its financial and accounting affairs as a commercial landlord, with the key services including financial and management accounting, preparation and filing of all tax returns and other tax related matters for the Taxpayer, credit risk management, cash flow management, and monitoring payment of expenditures of the Taxpayer.

46. Ms Q stated that Company N acted as the group treasurer and performed all the treasury functions for REIT K, including the Taxpayer and all other SPVs. This

¹ Mr Kwok, for the Revenue, indicated, before he commenced the cross-examination, that he did not intend to cross-examine on every statement the Revenue disagreed with, and would only ask questions on matters which the Revenue would submit to be relevant at the end of the day. Mr Kwok added that it must not be assumed that because he had not asked any question, he accepted it as true and correct. In response, Mr Wong, for the Taxpayer, made the point that bearing in mind the authority of Kaifull Investments Limited v Commissioner of Inland Revenue [2012] 1 HKLRD 858, where the Court of First Instance applied the principle in Browne v Dunn (1894) 6 R 47 (HL) in relation to an appeal before the Board of Review, the Revenue should not be taken as being able to get away with asking questions that ought to have been asked in fairness, if in the end, the Revenue was to make points on some of the issues and matters raised by the witness.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

‘centralized treasury arrangement’ meant that Company N effectively acted as the ‘bank’ of all the SPVs comprising REIT K. Company N maintained a current account for each group company, which was analogous to that company’s ‘bank account’ at Company N. Thus a positive balance in Company N’s current account with the SPV represented a debt owed by Company N to that SPV. Any intra-group transfers of money would be recorded in the current accounts of the transferor and transferee with Company N and vice versa (i.e. Company N’s current accounts with the transferor and the transferee, and the transferor’s and the transferee’s current accounts with Company N, respectively) by making the necessary accounting entries (i.e. an adjustment in the balances of Company N’s current accounts with the transferor and the transferee) but no cash actually held in the bank would be transferred. Ms Q further stated that under this arrangement, none of the SPVs, including the Taxpayer, had any accounts with banks in Hong Kong. Company N itself held accounts with various banks in Hong Kong and these accounts ‘physically’ contained all the cash earned by the SPVs. The bank accounts Company N itself held were of two types: (i) collection accounts (for collection of rental income and deposits from tenants) and (ii) operating accounts (for payment of day to day ‘property operating expenses’). The signatories of the collection accounts are officers of the Trustee. The signatories of the operating accounts are various officers and staff of the Manager. Separately, the Trustee holds a bank account in its name but in the capacity as trustee of REIT K.

47. Ms Q stated that with respect to the payment of expenditures, as requested by the Trustee, payments must be made from the Trust’s bank account to the payee (with funds to be transferred from the collection accounts). No funds were paid directly from the collection accounts. However, for the convenience of day to day administration, with the consent of the Trustee, operating accounts were set up for the payment of property operating expenses and Ms Q described them as the equivalent of petty cash accounts. The Manager informed the Trustee of its projected expenses for each quarter (based on the annual budget of REIT K) and requested a transfer of the necessary funds from the collection accounts to the operating accounts. Ms Q stated that maintaining a separate bank account for the property operating expenses also made it easier for the Manager and the Trustee to monitor fund flows. Expenses not paid via the operating accounts included the Manager’s Fees, Trustee fee, filing fees for annual returns, property valuation fees, taxation service fees, audit fees, legal fees, business registration fees and profit tax, etc.

48. Ms Q stated that in relation to the Taxpayer, the rentals payable by the tenants of the Taxpayer’s Property were deposited into Company N’s collection accounts on behalf of the Taxpayer. The Taxpayer’s expenses were paid via Company N. Corresponding account entries were recorded in both the accounting ledgers of the Taxpayer and Company N to reflect the transactions.

49. Ms Q sought to outline how the Taxpayer’s share of the Manager’s Fees were paid by the Taxpayer by reference to the Taxpayer’s accounting records and cash movement. Ms Q stated that payment by the Taxpayer of its share of the Manager’s Fees was made by way of a transfer of funds from the Taxpayer’s current account with Company N to REIT K’s current account with Company N. This was recognized at the end of each month and then settled through a transfer on paper by way of effecting journal entries on the accounting records. There was no movement of cash in the bank at this stage. Then, for

the part of the Manager's Fees that the Manager elected to receive in cash, Company N would effect the payment on behalf of the Taxpayer by transferring the cash from the collection accounts to the trust account and afterwards, the Trustee acting as the trustee of REIT K would transfer the Manager's Fees to the Manager from the trust account by issuing a cheque. And, for the part of the Manager's Fees that the Manager elected to receive in units, after the payment was made by the Taxpayer by transfer of funds from the Taxpayer's current account with Company N to REIT K's current account with Company N, the Trustee, on behalf of REIT K, would issue the relevant number of units to the Manager. Actual payment to the Manager took place every quarter (in cash) or semi-annually (in units).

50. Ms Q also sought to set out why and how two-thirds of the Base Fee and all of the Variable Fee of the Manager's Fees were paid by the Taxpayer on its own account. Ms Q claimed that while the majority of the work done by the Manager was rendered for the specific and direct benefit of each of the SPVs concerned, there was a part of the Manager's work which related to the maintaining and promoting of REIT K as a whole. The expenses of the latter part of the Manager's work were not specifically attributable to the operations of the SPVs and should not be borne by the SPVs; they were paid by REIT K out of the dividends from the SPVs. Hence there was the sharing of the Manager's Base Fee between the SPVs (including the Taxpayer) and REIT K. On the other hand, the Variable Fee was an additional fee payable to the Manager based on the performance of the properties, and as such, the Variable Fee would be entirely attributable to the efforts of the Manager in providing services to the SPVs (including the Taxpayer) specifically, and so the Variable Fee was borne solely by the SPVs (including the Taxpayer).

51. Ms Q therefore claimed that her illustration of the cash movement and transaction flow showed that notwithstanding that the physical payments to the Manager were effected by the Trustee on behalf of REIT K, the ultimate source of the Taxpayer's share of the Manager's Fees was and had always been the Taxpayer from the rental receipts Company N held on its behalf. This was also recognized and recorded as such in the Taxpayer's (and all relevant entities') accounts, before the Taxpayer proceeded to declare dividends to its own immediate holding company, which was settled within the entities' current accounts with Company N.

52. Ms Q was cross-examined. Ms Q was first asked about the apportionment of the Base Fee and she replied that while the Trust Deed does not specify the proportion of the apportionment, it allows for one portion of the Base Fee to be allocated to the SPVs. She considered that the allocation of a portion of the Base Fee to the SPVs, using a 'he who uses it pays for it' approach, did not conflict with the spirit of the Trust Deed. The final decision on apportionment was made by Mr R, Position V of the Manager, in the first quarter of 2008. The apportionment was based on a time allocation basis of different departments of the Manager and how each department allocated the time spent on each property holding SPV. There was a review of the ratio in 2013. Ms Q accepted that she was unable to produce documents supporting her testimony that there was a 2008 review and that there was a 2013 review. Ms Q also accepted that in the first year of the years of assessment in question, namely 21 December 2006 to 30 June 2007, there was no agreed ratio yet for the apportionment of the Base Fee, but REIT K absorbed the whole of Base Fee, and no part of

the Base Fee was charged to any of the SPVs. Ms Q further accepted she did not know how the accounts was drawn up in the first years as she did not join REIT K until 2007. Ms Q furthermore stated that if one stood from September 2008, the relevant portion of the Base Fee for the first year had been rectified or corrected in the second year. Following that, the first year's Base Fee were charged on the SPVs.

53. Ms Q was asked about the 2008 review to fix the ratio of the apportionment of the Base Fee. Ms Q described that, after consulting with Position V of the Manager, she talked to the heads of the departments of the Manager in order to understand that, on a time-sharing basis, how much time was spent on the property holding companies and the properties. She did not consult anybody in the Taxpayer as there was nobody in the Taxpayer to consult. Ms Q stated that after the consultation, colleagues in her department prepared a computation, but because of the change in the computer system in 2012, that computation could not be found.

54. Ms Q was asked about payment of the Base Fee in cash. The payments in cash had to go through REIT K first because all the money for the Taxpayer was first put into Company N, which was like an in-house bank. As the Taxpayer only paid for a portion of the Base Fee with the remainder absorbed by REIT K, these two portions were combined together and paid in one go to the Manager.

55. Ms Q was asked about the 2013 review of the ratio of the apportionment of the Base Fee. Ms Q answered that this was initiated during a monthly meeting of Position V and all the heads of the departments of the Manager, including herself. There was nobody from the Taxpayer.

56. Ms Q was asked about the debit note the Manager issued to REIT K. Ms Q stated that the cash payment was made by cheque issued by the Trustee to the Manager. The debit note was made to the Trustee because the Manager provided services to REIT K and its relevant assets and the Trustee was the custodian of REIT K or of its assets. The Trustee was not only the trustee but also the custodian; it operated all bank accounts, apart from the operating accounts. Thus the debit note was issued to the Trustee for it to handle on behalf of REIT K.

Mr R

57. Mr R had been Position V and Position AA of the Manager since the inception of REIT K. He was in charge of the day-to-day operations and management of REIT K in these capacities. Prior to that, he was involved in the planning of the formation, holding and management structure, application for approval and listing of REIT K.

58. Mr R had been a director of the Taxpayer since the time when the Taxpayer was injected into, and became one of the assets comprising REIT K.

59. Mr R explained in his evidence the constitution of REIT K as a real estate investment trust authorized by the Securities and Futures Commission as a collective investment scheme. REIT K was the name of a portfolio of properties held by the Trustee

on trust. REIT K's business was to invest in real estate and lease them to generate recurrent rental income, and to acquire and dispose of real estate for such investment purposes. REIT K, the Manager and the SPVs were principally regulated by the Trust Deed, the Securities and Futures Ordinance (Chapter 577), the REIT Code, the applicable provisions of the Listing Rules of the Stock Exchange, the applicable provisions of the Takeovers Code, the compliance manual adopted by the Manager pursuant to the requirements under the REIT Code and the articles of association of the Manager and the companies owned and controlled by REIT K.

60. Mr R stated that the Taxpayer was one of REIT K's property holding SPVs. The Taxpayer at all material times owned the Property. The Taxpayer described its principal activity as property investment in its Profits Tax Returns for the years of assessment that are the subject of this Appeal and the audited financial statements for the years ended 30 June 2007 to 30 June 2015, and this continued to be the case.

61. Mr R stated that in accordance with the purpose of establishing REIT K, all of the SPVs that held properties, including the Taxpayer, held the properties on a long term basis to earn and produce rental income.

62. Mr R stated that the income generating real assets held by the SPVs predominantly made up the 'Deposited Property' referred to in the Offering Circular and the Trust Deed. Mr R, relying on the definition of 'Deposited Property' in the Trust Deed, stated that both the Taxpayer and the Property are each a 'Deposited Property'.

63. Mr R stated that REIT K had a 'two-tier management structure' comprising the Manager at one level and the Property Manager at the other level. This was disclosed in the Offering Circular and approved by the SFC when REIT K was listed. In broad terms, the 'two-tier management structure' separated the ground-level work necessary for the Taxpayer's operations (which was delegated by the Manager to the Property Manager) and the business management services necessary for the Taxpayer's operations (which was provided by the Manager). Mr R also stated that this 'two-tier management structure' was not a unique feature of REIT K and some other REITs listed on the Stock Exchange prior to the initial public offering of REIT K had a structure substantially the same as that of REIT K. The services provided by the Manager and the Property Manager did not cover the common areas and facilities of Building E but were related to the specific units held by the Taxpayer, i.e. the Property. The Manager also provided services rendered to REIT K as a whole.

64. Mr R stated that the Taxpayer did not have, and had never had, any employees. For the Taxpayer to hold, manage and operate the Property as commercial units to generate rental income, to service the shop and office tenants, and to sustain the growth in rental income, the Taxpayer required a wide range of services to be performed for its benefit. These services were provided by the Manager and the Property Manager. For the services rendered by the Manager for the benefit of the Taxpayer – which were required by the Taxpayer to earn and produce its profits and, indeed, to have any operations at all – the Taxpayer paid its share of the Manager's Fees. The Taxpayer's payment of its share of the Manager's Fees was approved by the directors of the Taxpayer and evidenced by the

minutes of its board meetings. Mr R exhibited copies of those minutes, and also minutes of the board meetings approving the audited financial statements for the year ended 30 June 2007 together with the relevant audited financial statements, which recorded the share of the Manager's Fees as a 'related party transaction'.

65. Mr R referred to the Offering Circular, the REIT Code and the Trust Deed to state the responsibilities of the Manager in relation to REIT K to state that a significant part of the responsibilities of the Manager were comprised of work rendered directly for the benefit of the SPVs, including the Taxpayer. The Manager's functions were carried out by its six departments: (i) the Asset Management Department; (ii) the Financial and Accounting Department; (iii) the Investment and Investor Relations Department; (iv) the Corporate Services Department; (v) the Internal Audit Department; and (vi) the Compliance Department. Each department was headed by an executive officer who reported to Mr R. The departments were assigned with different functions, each providing distinct services to and for the benefit of REIT K and to each property holding SPV (including the Taxpayer) and its respective properties. Mr R provided a description of the departments.

66. Mr R stated that apart from the services provided by the various departments of the Manager, the Taxpayer also received company secretarial services from the relevant executive officer who assumed the role of Company Secretary of the Manager at that time. Mr R also stated that the Taxpayer benefited from his services rendered directly without support from the department heads, and he gave the example of the assistance given to the Taxpayer in relation to an attempt to acquire the remaining part of Building E from the other single owner in order to unify the title and ownership of the building.

67. Mr R stated that pursuant to clause C.1 of the Trust Deed, the Manager was entitled to receive remuneration for its services, which was to be paid out of the Deposited Property. Mr R also stated that his understanding of clause C.1 was that it was intended that payments for services rendered to a SPV or the property it owned were to be paid out by them out of their income as 'Deposited Property'. Mr R further stated that it was the intention and understanding of both the Manager and the Taxpayer (the directors of both knew of clause C.1 at all times) that when the Taxpayer received the services rendered by the Manager for it to operate and earn and produce its rental income, the Taxpayer would pay fees for such services, i.e. its share of the Manager's Fees, out of its own income. The Manager did so charge, and the directors of the Taxpayer did so approve, the payment for the services.

68. The two components of the Manager's Fees in dispute in this Appeal were the Base Fee and the Variable Fee. Mr R stated that the Manager's Base Fee and Variable Fee were disclosed in the Offering Circular which the SFC had approved. Mr R also stated that the Manager's Base Fee referable to the Property was shared between REIT K and the Taxpayer. The sharing basis was 1/3 borne by REIT K out of the dividends from the SPVs and 2/3 borne by the Taxpayer out of its own income. The Manager's Variable Fee was an additional fee payable to the Manager. The Manager's Variable Fee was based on the performance of the Property and was therefore entirely attributable to the efforts of the Manager in providing services to the Taxpayer specifically in respect of the Property, and so this fee was borne solely by the Taxpayer out of its own income.

69. Mr R stated that the Trustee did not manage REIT K or the Deposited Property; it acted as the custodian of REIT K. The Manager's services rendered directly and specifically for the benefit of the Taxpayer were not and had never been rendered to or for the benefit of the Trustee. The Trustee had no obligation, whether under the Trust Deed or otherwise, to pay the Manager for those services rendered directly to, and for the benefit of, the Taxpayer. Although the Trustee as trustee of REIT K facilitated the payment to the Manager, this did not mean that it paid the Manager for the services the Manager rendered to the SPV and its properties on the Trustee's own account. Instead, all payments from the Trust Account and units issued to the Manager were made by the Trustee as trustee of REIT K, and on behalf of REIT K and the SPVs. The funds for settlement of the Taxpayer's share of the Manager's Fees came from the Taxpayer via Company N out of its own revenues, and not by way of distribution of dividends or loan.

70. Mr R stated the Taxpayer's stance: The Manager's Fees were incurred by the Taxpayer in the production of its chargeable profits and therefore deductible for Profits Tax purposes. The Taxpayer understood and intended that, when receiving the services, it had to and would pay for them.

71. Mr R explained that in the first year of the years of assessment in question, namely 21 December 2006 to 30 June 2007, there was no Base Fee being charged to individual property companies including the Taxpayer. Later, in the first quarter of 2008, a manpower allocation was conducted to ascertain the allocation between the kinds of responsibilities of the Manager (namely those related to REIT K and those related to activities and operations to services rendered to the property companies), which led to the adjustment splitting the Base Fee into 1/3 charged to REIT K direct and 2/3 charged to individual property companies including the Taxpayer. The audited financial statements for the year ended 30 June 2008 thus had an item of reimbursement of the Manager's Fee to REIT K representing the Base Fee that was not charged in the previous financial year. Mr R also produced a set of manpower allocation sheets created in 2013 to study the manpower allocation between REIT and property and this led to the decision that the one-third/two-thirds split of manpower allocation was fair and reasonable.

72. Mr R was not cross-examined.

The Relevant Provisions of the IRO

73. Section 16(1) of the IRO provides that:

'(1) In ascertaining the profits in respect of which a person is chargeable to tax under this Part for any year of assessment there shall be deducted all outgoings and expenses to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of profits in respect of which he is chargeable to tax under this Part for any period, including -

(a) ...'.

Relevantly, section 17(1)(b) provides that:

- ‘(1) For the purpose of ascertaining profits in respect of which a person is chargeable to tax under this Part no deduction shall be allowed in respect of -*
- (a) ...*
- (b) subject to section 16AA, any disbursements or expenses not being money expended for the purpose of producing such profits*
- ...’.*

74. Section 66(3) of the IRO provides that save with the consent of the Board of Review and on such terms as the Board of Review may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given to the Board of Review in accordance with section 66(1). Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

Discussion

75. The Taxpayer’s Amended Grounds of Appeal, which this Board has given permission to amend, state that:

- (1) Each of the assessments appealed against was excessive and incorrect in so far as each of them disallowed the deduction of Manager’s Fees in ascertaining the profits in respect of which the Taxpayer was chargeable to tax under Part IV of the IRO.
- (2) In the basis period for each of the years of assessment in question, the Manager’s Fees were incurred by the Taxpayer for services rendered by the Manager to the Taxpayer in the production of profits in respect of which the Taxpayer was chargeable, and charged, to tax under Part IV of the IRO. As a matter of fact, it was the Taxpayer which paid the full amount of the Manager’s Fees, as payment for the services rendered by the Manager to it (and not as a loan or distribution as the Deputy Commissioner without any basis or evidence speculated), to and via the treasury of REIT K, and how the Manager, as the ultimate recipient, chose to receive the Manager’s Fees (wholly in cash or a combination of cash and Units) does not affect the fact that the Taxpayer did pay the full amount of the Manager’s Fees which were incurred in the production of its chargeable profits. The Deputy Commissioner erred in determining that the Manager’s Fees were not deductible under section 16(1) of the IRO in ascertaining the profits

in respect of which the Taxpayer was chargeable to tax under Part IV of the IRO for each of the years of assessment in question.

- (3) Without prejudice to the generality of (1) and/or (2) above, if and in so far as the Deputy Commissioner determined that for the Manager's Fees to be deductible, the Taxpayer must have had a legal obligation to pay the same, then he erred as a matter of law. There was and is no such requirement as a matter of law under section 16(1) of the IRO properly construed. By reason of the matters referred to in (2) above, the Manager's Fees fell within section 16(1) and were deductible thereunder.
- (4) Further or alternatively, and without prejudice to (1), (2) and/or (3) above, the Deputy Commissioner erred in determining that the Taxpayer had no legal obligation to pay the Manager's Fees for the services rendered by the Manager to the Taxpayer. As a matter of law, by freely accepting the asset management services rendered by the Manager and knowing that the Manager expected to be paid for such services, and/or knowing that under the Trust Deed the Manager's Fees were to be, and expected to be, paid by or out of the Taxpayer and the assets held by it, the Taxpayer had a legal obligation, under the law of restitution or the principles of unjust enrichment, to pay for the services rendered, because if it did not pay, the Court would compel it to do so on the grounds of free acceptance or failure of consideration.
- (4A) Further or alternatively, and without prejudice to (1), (2), (3) and/or (4) above, in the circumstances set out in (2) and/or (4) above, the Manager and the Taxpayer must have understood and intended there to be a legally binding arrangement between them that the Taxpayer would pay the Manager for the services that the Taxpayer had accepted. There was thereby an implied contract between the Taxpayer and the Manager pursuant to which the Taxpayer had a legal obligation to pay for the services rendered.
- (5) Further or alternatively, and without prejudice to (1), (2), (3), (4) and/or (4A) above, the Deputy Commissioner erred in determining that the Trustee had the legal obligation to pay the Manager's Fees to the Manager under the provisions of the Trust Deed properly constructed. In any event, even if the Trustee had such an obligation, for reasons stated in (4) and/or (4A) above, the Taxpayer had a legal obligation to pay the Trustee and/or the Manager for the services rendered.

Submissions

76. Mr Wong, for the Taxpayer, outlined the Taxpayer's case in his submissions. The Taxpayer's case can be summarized as follows:

- (1) The Taxpayer was a company which is commercial landlord holding the Property.
- (2) The Manager and the Property Manager performed work for the Taxpayer and the Taxpayer paid the Manager and the Property Manager for the services provided.
- (3) It was commercially necessary for the Taxpayer to have the services of the Manager and the Property Manager. Without such services, the Taxpayer could not function and earn any profits.
- (4) The Board of Directors of the Taxpayer authorized the payment of the Manager's Fees.
- (5) The auditor of the Taxpayer confirmed in the financial statements of the Taxpayer that those financial statements which included the income and expenditure statement as showing the true and fair view of the profits of the Taxpayer.
- (6) The management accounts of the Taxpayer were commercially properly prepared accounts.
- (7) The Taxpayer did pay the Manager the Manager's Fees. The evidence of Ms Q was that the Manager's Fee payable by the Taxpayer to the Manager was in fact debited and therefore paid by the Taxpayer every month. Her evidence has explained how the Taxpayer had in fact paid the Manager's Fees every month for the month. The general ledger and vouchers produced are as real as the Taxpayer writing a cheque to Company N or the Manager. The Manager's Fees were paid during the previous period and not only in the subsequent period. As the company had actually paid out these expenses in the ordinary course of business, it would have been deducted in computing its profits. It would actually be wrong and incorrect not to deduct, in the preparation of the company's accounts, such an amount in the computation of its profits.
- (8) If this Board does not accept the contemporaneous documents as proving the actual payments, this Board would be questioning, in effect, the honesty and integrity of the professionals involved in the listed trust without basis. Such a matter ought to have been put at least to Ms Q or Mr R.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (9) Under section 16 of the IRO, deductibility does not depend on whether the Taxpayer had a legal liability to pay for the item proposed for deduction. Deductibility also does not depend on necessity, be it logically or commercially.
- (10) There is no allegation of any tax motive in the Taxpayer's case. No tax motive was proven in the Taxpayer's case.
- (11) The Revenue has no right to disallow a deduction on the basis that it is unreasonable.
- (12) The fact that the Taxpayer was a SPV that formed part of the structure of a trust that was REIT K (as constituted and regulated by the approval letter issued by the SFC, the Trust Deed, the Offering Circular and the REIT Code) did not affect the contentions above. The two-tier management structure, with the Manager and the Property Manager providing separate and distinct services, was common to REITs in Hong Kong; there was nothing unusual or special to REIT K. The relevant questions should be whether the Taxpayer did pay the Manager's fees and if it did, whether the payments were in the production of chargeable profits. Here, a SPV under REIT K was only required to pay for services it received or required for its own business. That was the case of the Taxpayer regarding the Manager's Fees.
- (13) All the conditions for deductibility under section 16 of the IRO are satisfied. 'Outgoings' incurred included an actual payment. 'Incurred' meant payment out. 'Assumption of liability without actual payment at the time' is an extension of the meaning of 'incurred', not the other way round. The payment out, because it was by the Taxpayer itself, was incurring of the outgoing by the Taxpayer. On the evidence, it is clear that the Taxpayer did actually pay out the Manager's Fees. The next condition to satisfy is the nexus between outgoings and expenses of the claimant and the production of chargeable profits, i.e. whether the payment or incurring of the outgoings and expenses was for the production of chargeable profits. As to this nexus, the Taxpayer has produced witnesses and contemporaneous documents (which included those prepared immediately after the year end, recording the fact that the Manager's Fee had been paid during the year and the amount) to show that the Taxpayer did receive and the Manager did provide services which the Taxpayer used and required, and actually used and benefited from, in the production of chargeable profits.
- (14) The real divide between the Taxpayer and the Revenue is whether actual payment, assuming that there was no antecedent legal liability for the Taxpayer to pay, is good enough for the purpose of section 16 of the IRO. The Taxpayer submits 'yes' because outgoings and

expenses incurred certainly and definitely include an actual payment out without the need for legal liability. Even entirely voluntary payment is deductible, provided that it is actually paid. In the Taxpayer's case, the Manager's Fees were actually paid. But even if legal liability is necessary, the cases on unjust enrichment would assist. The Taxpayer knew the quid pro quo for accepting and enjoying the services offered by the Manager in exchange for payments which they agreed year after year. There was free acceptance in the sense that the Taxpayer agreed to accept the services of the Manager, knowing that the Manager expected to be paid. There was certainly an implied contract by the conduct of the parties.

- (15) Regarding the apportionment of the Base Fee in the second year and the payment of the Base Fee for the first year in the second year, the Taxpayer's case is that the actual payment of that amount of the Base Fee happened in the second year, so the incurring of that sum, the two-thirds Base Fee for the first year, was actually made in the second year. The sum was incurred in the second year and the deduction was claimed in respect of that year. It is permissible to have a deduction of an amount in year two for the purpose of producing profits which are chargeable to tax in year one or, for that matter, year three.

77. Mr Kwok for the Revenue provided this Board with written and oral submissions, which can be summarized as follows:

- (1) The Hearing of this Appeal is a hearing de novo.
- (2) The Taxpayer has the burden of proof before this Board to show that the assessments appealed against are incorrect or excessive.
- (3) The Taxpayer's claim for deduction of the Manager's Fees fails because the Manager's Fees were not incurred by the Taxpayer or not shown to be incurred by the Taxpayer. This is a factual issue. There is no evidence on the date when and the persons by whom the Taxpayer incurred the Manager's Fees. Further and in any event, the objective or admitted facts and the contemporaneous documents contradicts the claim that the Taxpayer incurred the Manager's Fees.
- (4) The Taxpayer has to establish satisfaction of *all* the conditions prescribed under section 16(1) of the IRO before deduction of the item is permitted.
- (5) The first requirement under section 16(1) is that the taxpayer would have outgoing and expenses which is then qualified '... to the extent to which they are incurred during the basis period for that year of assessment'. This indicates a time limit that the incurring by the Taxpayer must happen during the basis period for the year in which

deduction is sought. Where there is a post-year-end ratification, that is not 'incurred during the basis period'. The example on this point is the charging of the Base Fee for the first year of assessment, the decision for which was made post-year-end. Even if that is incurring, it is not during the basis period.

- (6) The point throughout this Appeal is whether it was incurred by the Taxpayer and if so, when. The point is plainly a question of fact and must be proved by evidence. There is no express evidence of what the Taxpayer did and by whom. The documents and the conduct, as well as the Admitted Facts, are inconsistent with the Taxpayer having incurred Manager's Fees. Nothing in the scheme documents including the Trust Deed and the Property Manager Agreement show that the Taxpayer did an act which incurred liability. Rather what the management did was consistent only with the Taxpayer not having incurred liability. The statements in the Offering Circular related to 'non-deductible expenses' are never specific on what proportion of the Manager's Fee and for whom the expense(s) are non-deductible. The minutes of the Taxpayer that approved the payment of the Manager's Fees for all the years were post-year-end and therefore post-accounting. On each of the two occasions when the ratio for the Base Fee were considered, the Taxpayer was not present. The point concerning incurring the obligation has to do with what happened during the basis period, when the business was supposed to be done, and repeated year after year.
- (7) The Taxpayer's grounds of appeal are discussed. While the Ground 1 and Ground 2 contend that the Manager's Fees were deductible, Grounds 3 to 5 are problematic in that in an appeal to the Board of Review, which conducts a hearing de novo, whether the Deputy Commissioner erred is neither here nor there. In so far it is claimed in Ground 4 that if the Taxpayer did not pay the court would compel it do so on the grounds of free acceptance of failure of consideration, there was never any free acceptance as the Taxpayer did not take part in almost the whole process. And whether or not the court would compel the Taxpayer to pay the Manager, that is a matter between the two parties and has got nothing to do with taxation. The matter in Ground 4A cannot not be implied as that was repugnant to the undisputed facts.
- (8) The Taxpayer's contention that the Manager's Fees are deductible under section 16 of the IRO as the Taxpayer did actually pay the Manager's Fees to the Manager and the payments were for the production of chargeable profits is wrong. The qualifier in section 16 of 'incurred ... by such person' applies not only to expenses that had yet to be paid by a taxpayer but also to outgoings that had already been paid. In other words, to qualify for deduction, the sums that had

been paid must also have been incurred by the taxpayer in question during the basis period for the production of profits. The need for there to have been an ‘obligation to pay’ or ‘assumption of liability to pay’ on the part of the taxpayer is not dispensed with by the mere fact that the sums had already actually been paid.

- (9) The Taxpayer had not produced any authority to support the proposition that the Taxpayer incurred the Manager’s Fees. When a case was read for citation, one had to see the context in which a decision was made and whether it was relevant to the practice in issue in this Appeal. The Taxpayer had to point to a case which supported the proposition that it was not necessary to have incurrence by the Taxpayer or that certain matters showed incurrence. It was not good enough to point to production of profits.
- (10) Regarding the Taxpayer’s case of actual payment, the evidence before this Board is that the Taxpayer had nothing to do with cash payments. As far as payment by vouchers or through Company N is concerned, what is missing in the documents, when one considers that the Taxpayer had neither staff nor officers, is how the payment was made on paper month after month. The answer is not available in the documents.

Findings

78. This Board has found as facts the facts stated in the Statement of Agreed Facts set out in paragraphs 8 to 25 above.

79. This Board accepts the evidence of Ms Q. This Board considers that Ms Q has demonstrated in her evidence (including the documentary exhibits she referred to in her evidence) the monthly movement of sums within the centralised treasury arrangement of REIT K, namely, through effecting journal entries of a debit in the current account of the Taxpayer and of a credit in the current account of REIT K, both of which were managed by Company N. Ms Q has also demonstrated that by subsequent transactions, Company N would transfer from the collection account of REIT K to the trust account of REIT K a sum that represented the part of the Manager’s Fees that the Manager elected to receive in cash by making a bank transfer, and then the Trustee would transfer the same sum from the trust account of REIT K to the Manager by issuing a cheque; and that, regarding the part of the Manager’s Fees that the Manager elected to receive in units, the Trustee would issue the relevant number of units to the Manager.

80. On the basis of Ms Q’s evidence, what she has demonstrated through her evidence and the documentary exhibits she referred to in her evidence, and the documentary evidence including the Trust Deed and the Offering Circular, this Board finds that the funds that were moved every month from the Taxpayer to REIT K within REIT K’s treasury were identical in amount to and represented the Taxpayer’s share of the Manager’s Fees. Clause E.5(a) of the Trust Deed had envisaged the setting up of an entity whose primary purpose is

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

to perform treasury functions for REIT K. This Board finds Company N was established for the performing of treasury functions and has been managing the centralized treasury arrangement of REIT K externally by the collection account(s) with the bank(s) and internally by the current accounts of REIT K and the current accounts of the SPVs, including the Taxpayer. The fact that the Taxpayer had no bank account of its own and the fact that the Taxpayer was the landlord of the tenancy agreements of each of the units of the Property it owned meant that the rent that it was entitled to receive under the tenancy agreements had to be collected on its behalf and, given that this was done by way of a centralized treasury system, a current account had to be established to account for the rents and other receipts so collected. There is no dispute between parties in this Appeal of the amount of the Manager's Fees that the Manager received for each of years of assessment in question and of the share of the Manager's Fees attributed to the Taxpayer.

81. Mr Kwok for the Revenue had submitted that there was no evidence of payments made on paper by the Taxpayer. This Board has found that there was a monthly movement of funds from the Taxpayer to REIT K in an amount corresponding to the share of the Manager's Fees attributed to the Taxpayer. Although the Taxpayer had no staff of its own, the monthly movement of funds was performed by Company N as part of Company N's services for the Trustee and the property holding SPVs, including the Taxpayer. Whether the movements of such funds constituted payment by the Taxpayer of its share of the Manager's Fees is a matter that this Board is to consider below.

82. This Board also finds that by way of the subsequent transactions handled by Company N and the Trustee, the Manager's Fees were in fact paid by the Trustee to the Manager, who received them in cash and in units according to the Manager's election.

83. This Board recognizes that the Trust Deed provides in clause C.1 that the Manager 'shall be entitled to receive remuneration for its services as manager of REIT K under this clause C.1, which shall be paid out of the Deposited Property ...', and that the Trust Deed defines 'Deposited Property' in these terms: 'all the assets of REIT K for the time being held or deemed to be held (including but not limited to through SPVs) upon the trusts constituted by this Trust Deed, including all Authorised Investments, and interest arising on subscription monies from, or application monies for, the issuance of Units'. The Deputy Commissioner and Mr Kwok for the Revenue have relied on these clauses to show that it was the Trustee who had the legal obligation to pay the Manager's Fees for and on behalf of REIT K; and/or that in so far as the Taxpayer was concerned, the fact that it was not a party to the Trust Deed did not bind it in relation to the Manager's Fees.

84. However, this Board does not accept that the Trust Deed and its provisions (and what has been said to be absent in its provisions) effectively dispose of the present question on the fact of payment by the Taxpayer of a share of the Manager's Fees. Rather, this Board considers that the part of the Deposited Property that was and is the Property at Building E was and is owned by the Taxpayer. A payment that the Manager is said to be entitled to receive under the Trust Deed out of the Deposited Property must therefore come from the owners of the Deposited Property, which, in the case of the Property at Building E, was, at the relevant years of assessment, the Taxpayer. As it has been stated in paragraph 80 above, the Taxpayer, as landlord, was entitled to and did receive rent from its tenants.

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

The funds that were moved every month were funds that the Taxpayer parted with and received by REIT K, the Trustee of which then, having gathered all the shares, paid to the Manager as the Manager's Fees.

85. Accordingly, this Board finds that the combination of the two sets of transactions referred to in paragraphs 80 and 82 above meant that the Taxpayer did in fact pay out its share of the Manager's Fees. Further, this Board finds that the time and date of such payments to be the times each month when the Taxpayer's share of the Manager's Fees was recognized and settled by Company N by related entries in the current account of the Taxpayer and in the current account of REIT K denoting the transfer of funds from the Taxpayer to REIT K. And, in light of the monthly recognition and settlement that this Board accepts, those times were within the basis period of each of the relevant years of assessment.

86. This Board next considers the consequence of the finding that the Taxpayer did in fact pay out its share of the Manager's Fees. The first issue in this connection concerns whether the Taxpayer had incurred the Manager's Fees.

87. Both Mr Wong for the Taxpayer and Mr Kwok for the Revenue referred to the Privy Council opinion in Commissioner of Inland Revenue v Lo & Lo (a firm) [1984] 1 WLR 986 on deductions permitted under sections 16 and 17 of the IRO. Lord Brightman, giving the opinion for the Privy Council, stated at 991B-D that:

'Sections 16 and 17 provide exhaustively for deductions in the sense that permitted deductions are confined to outgoings and expenses incurred in the production of profits in respect of which tax is chargeable; that such permitted deductions expressly include those specified in (a) to (h) of section 16(1), and expressly exclude those in section 17. In the opinion of their Lordships commercial considerations are not wholly to be disregarded in the course of this process. They are relevant for the purpose of deciding what can properly be treated as "outgoings and expenses ... incurred during the basis period ... in the production of profits in respect of which ..." the taxpayer is chargeable to tax.

In construing section 16, weight must be given to the fact that deductions are not confined to sums actually paid by the taxpayer. Such sums would be covered by the "outgoings" standing alone. The contrast between "sums payable" in paragraph (a) and "rent paid" in paragraph (b) and the inclusion in paragraph (d) of "bad debts incurred" show clearly enough that the legislature was not thinking only of disbursements made during the basis period.'

Then, having considered the extent that section 16 was intended to 'travel' 'beyond mere disbursements' in the context of a retirement benefit payable at a future date, Lord Brightman stated at 992B that: *'"an expense incurred" is not confined to a disbursement, and must at least include a sum which there is an obligation to pay, that is to say an accrued liability which is undischarged.'*

88. Mr Wong for the Taxpayer also referred to the Court of Appeal's judgment in Commissioner of Inland Revenue v Lo & Lo [1982] HKLR 503, particularly the judgment of Cons JA (as he then was) where his Lordship not only considered the ordinary meaning of 'outgoing' and 'expense' at 510F-G to state that '*[taken] literally neither an "outgoing" nor an "expense" can be incurred until it is actually paid*', but also made the point that the word 'incurred' had '*a wider meaning than "laid out or expended", for it includes the acceptance of a liability as well as the meeting of that liability as and when it matures.*'

89. This Board has found that the Taxpayer did in fact pay out its share of the Manager's Fees. In light of the opinion of the Privy Council in Lo & Lo and the views of Cons JA in Lo & Lo (which this Board considers to be consistent with the opinion of the Privy Council), this Board is obliged to follow them and finds that the Taxpayer did incur the Manager's Fees during the basis period for each of the relevant years of assessment.

90. Both the Taxpayer and the Revenue recognize that the finding that the Taxpayer did incur the Manager's Fees during the basis period of each of the relevant years of assessment does not dispose of this Appeal. This is because as Mr Kwok for the Revenue has submitted, section 16 goes on to qualify 'expense incurred' by 'to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of [chargeable] profit.' Mr Wong for the Taxpayer has acknowledged that the Taxpayer has to establish also that the Manager's Fees were paid in and for the purpose of the production of its profits.

91. This Board has reviewed the evidence of Mr P, Ms Q and Mr R on the two-tier management structure of REIT K and the services that the Manager (or Company H) provided to REIT K and the SPVs of REIT K (including the Taxpayer) that held the Deposited Properties defined in the Trust Deed of REIT K by owning the respective part of them. This Board accepts that the Manager, through its officers and staff, did provide services to the Taxpayer during the basis period of each of the relevant years of assessment that enabled the Taxpayer, which hired no officer or staff of its own, to operate as a commercial landlord and conduct the business of leasing the Property at Building E that it held by ownership. Such services included those services that Mr P had stated in his evidence under paragraphs 37 to 40 above, those services that Ms Q had stated in her evidence under paragraphs 45 above, the company secretary services and the services of Mr R that Mr R had stated in his evidence in paragraph 66 above. This Board also accepts that all those services, provided by different departments of the Manager and Mr R himself, enabled the Taxpayer to conduct profit producing activities with the portfolio of units at Building E that constituted the Property during the basis period for each of the relevant years of assessment.

92. Accordingly, this Board finds that the Taxpayer paid its share of the Manager's Fees during the basis period for each of the relevant years of assessment in and for the purpose of the production of its profits.

93. Having considered the evidence before it, this Board holds that the Taxpayer has discharged the burden of proof to show that the Manager's Fees, stated in

(2021-22) VOLUME 36 INLAND REVENUE BOARD OF REVIEW DECISIONS

paragraph 20(b) above, were deductible in the computing of the assessable profits of the Taxpayer.

Decision

94. This Board determines that the Taxpayer has discharged the burden of proof it has under section 68(4) of the IRO to show that the Additional Profits Tax Assessment for the years of assessment 2007/08 to 2012/13 and the Profits Tax Assessment for the year of assessments 2013/14 to 2015/16 that the Deputy Commissioner of Inland Revenue revised by his Determination dated 26 April 2018 were excessive or incorrect. The Taxpayer's appeal is allowed. The additional assessments of Profits Tax and the assessment of Profits Tax mentioned above are further revised to allow for the deduction of the Manager's Fees, stated in paragraph 20(b) above, in respect of each of the relevant years of assessment.

95. There has been delay on the part of this Board in rendering this Decision. This Board apologizes for the delay.