Case No. D14/19

Profits tax – whether profits generated in Hong Kong – whether sales took place in Hong Kong – failure to respond to Commissioner's request for evidence on objection – whether the Board was properly seized of the appeal against a determination – section 14 and 70A of the Inland Revenue Ordinance ('the Ordinance')

Panel: William M F Wong SC (chairman), Robin Gregory D'Souza and Lau Yat Ji Vicci.

Date of hearing: 23 July 2018.
Date of decision: 11 October 2019.

The Appellant was a limited company incorporated in Hong Kong in December 2007. Its business activities were claimed to be trading and manufacturing of telecommunication appliances and audio conference products. When submitting the returns for the 2009/10 and 2010/11 years of assessment, the Appellant claimed its profits were generated offshore. The Commissioner asked the Appellant to provide evidence in support of its offshore claim since June 2012, but no reply was forthcoming. The assessor proceeded to raise Profits Tax Assessments without considering the Appellant's offshore claim in March 2016.

The Appellant objected to the assessor's assessments. The Deputy Commissioner requested for evidence in support of the Appellant's offshore claim. But by October 2017, no reply was received by the Deputy Commissioner. The Deputy Commissioner then proceeded to issue the Determination to uphold the assessments.

The Appellant appealed against the Determination. The Commissioner argued that the Appellant's notices of objection were invalid, as no evidence was ever tendered by the Appellant despite request. Hence, it was argued that the Board was not properly seized of the appeal.

Held:

1. An appeal before the Board is a *de novo* hearing. The Board has a duty to adjudicate whether the grounds of appeal is proved or not on the facts before it. Even though the Appellant's failure to provide any evidence as requested, allegedly because of administrative missteps, was inexcusable, the Deputy Commissioner did consider the Appellant's objection by treating it as valid, and issued the Determination. Hence, the Board should proceed to make its findings on facts. (D25/01, IRBRD, vol 16, 224; Sun Yau Investment Co Limited v The Commissioner of Inland Revenue (1984) 2 HKTC 17; D82/06, (2007-08) IRBRD, vol 22, 71 considered)

2. In the future, if an appellant, in objecting to an assessment, fails to supply evidence as requested by the Commissioner without good reasons, the Commissioner can treat to objection as an application under section 70A of the Ordinance.

3. Under section 14 of the Ordinance, profits arising in or derived from Hong Kong include all profits from business transacted in Hong Kong. The Appellant's financial statements show that it had significant trading with its overseas holding company and earned a profit from such trade. At least some of its customers were from Hong Kong. It incurred significant expenses in Hong Kong in generating profits. Payments were made through the Appellant, but not any other offshore agent or principal. As such, it is undeniable that profits were generated from sales that took place in Hong Kong. (CIR v HK-TVB International Limited [1992] 2 AC 397; ING Baring Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 417 followed; CIR v Magna Industrial Co Ltd [1997] HKLRD 1173 distinguished)

4. Furthermore, the Appellant has not put forward evidence to substantiate its claim that profits were generated offshore.

5. The Board disapproves the Appellant's conduct in failing to reply to the Commissioner in a timely manner and the lack of documentary evidence to support its allegation of offshore profits. It is right and proper to award the maximum costs against the Appellant.

Appeal dismissed and costs order in the amount of $25,000 imposed.

Cases referred to:

D25/01, IRBRD, vol 16, 224
Re Independent Steamship Co Ltd [1970] HKLR 160
Sun Yau Investment Co Limited v The Commissioner of Inland Revenue (1984) 2 HKTC 17
D82/06, (2007-08) IRBRD, vol 22, 71
Commissioner of Inland Revenue v HK-TVB International Limited [1992] 2 AC 397
ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2007) 10 HKCFAR 417
Commissioner of Inland Revenue v Magna Industrial Co Ltd [1997] HKLRD 173

Peter Guang Chen of Zhong Lun Law Firm, for the Appellant.
John Brewer, Counsel and Darren Mong, Counsel, instructed by Department of Justice, for the Commissioner of Inland Revenue.

Decision:

The Appeal

1. Company A ('the Appellant') appeals against the determination of the Deputy Commissioner of Inland Revenue dated 6 October 2017 which concerns its Profits Tax Assessments for the years of assessment 2009/10 and 2010/11 ('the Determination').

2. On 3 November 2017, the Appellant filed its Statement of the Grounds of Appeal under which the Appellant claimed that the 'trading profits generated by [the Appellant] during the Period was not arising in or derived from Hong Kong and hence such profits are not subject to Hong Kong Profits Tax, that is, the profits in question were offshore claim.'

3. From the Determination, it is undisputed that:

(1) The Appellant is a private company incorporated in Hong Kong in December 2007.

(2) The Appellant closed its first set of accounts on 30 June 2008. It then closed its accounts on 30 June 2009. During the year of assessment 2010/11, it changed its accounting year end date from 30 June to 31 December and closed its accounts on 31 December 2010.

(3) In the reports of the directors for the periods ended 30 June 2008, 30 June 2009 and 31 December 2010, the Appellant's principal activities were described as follows:

Period ended	Principal activities
30-06-2008 and 2009	Trading of various telecommunication appliances and audio conferencing products
31-12-2010	Manufacturing and trading of various audio conferencing and related products

(4) The directors of the Appellant were:

Name of director	Date of appointment	Date of resignation
Mr B	31-12-2007	-
Mr C	31-12-2007	15-05-2009
Mr D	15-05-2009	13-08-2011
Mr E	08-02-2010	-
Mr F	13-08-2011	-

(5) The Appellant's holding company was Company G ('the Holding

Company'), a company incorporated in Country H.

4. It is important to note that the Appellant's detailed income statements showed the following particulars:

	10-12-2007 – 30-06-2008	01-07-2008 – 30-06-2009	01-07-2009 – 31-12-2010
	USD	USD	USD
Turnover	-	2,154,290	6,265,092
Less: Cost of sales	-	1,434,713	3,878,819
Gross Profit	-	719,577	2,386,273
Less: Administrative expenses	98,717	400,964	516,184
Selling expenses	-	238,596	350,680
Profit / (Loss) for the year	(98,717)	80,017	1,519,409

5. In the letters enclosed with the Returns for the years of assessment 2009/10 and 2010/11, the Appellant, through PKF Tax and Business Consultants Limited ('the Former Representative'), put forward the following grounds in respect of its offshore claim:

(1) The Appellant's trading business activities, i.e. the negotiation, conclusion and execution of sales and purchase contracts, were conducted through the Holding Company in Country H.

(2) The Appellant's central management and control were exercised outside Hong Kong.

(3) The work performed by the Hong Kong office was limited to the post-sale technical support and the transport and quality review based on the instructions given by the Holding Company in Country H. These activities were purely antecedent, incidental and not instrumental in earning the trading profits generated outside Hong Kong.

(4) Pursuant to section 14(1) of the Inland Revenue Ordinance (Chapter 112) (the 'Ordinance' or the 'IRO'), the Appellant's profits were offshore in nature and should be exempt from payment of Hong Kong Profits Tax.

6. Naturally, the Assessor requested the Appellant to produce evidence to substantiate its offshore claim for the years of assessment 2009/10 and 2010/11. A letter dated 26 June 2012 was sent by the Inland Revenue Department (the 'Inland Revenue' or the 'IRD') to the Former Representative (the 'Letter'). The Assessor did not receive any reply to the Letter.

7. Accordingly, the Assessor raised on the Appellant the following Profits Tax Assessments for the years of assessment 2009/10 and 2010/11:

	2009/10	2010/11
	$	$
Assessable Profits	675,826	11,921,048
Tax Payable thereon	111,511	1,966,972

8. The Appellant, through RSM Tax Advisory (Hong Kong) Limited ('the Representative'), objected to the above assessments on the following grounds:

(a) The assessments were estimated and excessive.

(b) It was eligible to lodge offshore claim in Hong Kong.

9. In the notices of objections, it was stated that a reply to the Letter would be provided shortly. However, until the date of the Determination, despite requests, no information requested in the Letter were provided by the Appellant.

10. In the circumstances, it is not surprising that the assessments as set out in paragraph 7 above were confirmed by the Deputy Commissioner of the Inland Revenue. In the Determination, it is stated that:

> 'Despite requests, the Company did not provide any information to support its offshore claim. There is nothing showing that the Company's profits were not arising in or derived from Hong Kong. The Company's objections therefore fail. The Profits Tax Assessments for the years of assessment 2009/10 and 2010/11 are confirmed.'

Preliminary Issue

11. In both the Opening and Closing Submissions of the IRD, Mr Brewer, Counsel for the Commissioner, took the preliminary issue that the Appellant bears the burden of proving that the Assessments are excessive or incorrect under section 68(4) of the Ordinance. That, of course, is correct. Mr Brewer, however, went further and submitted in his written opening that:

> '19. It goes without saying that in each case the objections were received by the Commissioner within one month after the notices of assessment but the Board is invited to consider whether such objections stated grounds of objection with precision. If the Board holds that the notices of objection were *not* valid then as a matter of law and consequences the Board is not seized of the Appeal and the matter can proceed no further.
>
> 20. Appellant has at all times been represented in its tax affairs by professional accountants and solicitors. To permit Appellant the luxury of ignoring each and every request and reminder issued by the Commissioner in order that she may properly consider the offshore

claim identified in Appellant's profit tax returns would mean that any taxpayer could simply sit back and choose not to file any information requested by the IRD in order to substantiate its claim, await an assessment, still not file any information and then await a Determination – and only once a taxpayer seeks to exercise its statutory right of appeal before the Board need the taxpayer even begin to substantiate its offshore claim.

21. This kind of conduct operates to remove from the Commissioner's hands altogether the task of properly considering Appellant's offshore claim and purporting to place that responsibility before the Board instead. This cannot be right: the Board is an independent statutory body tasked with determining the facts in dispute as part of the appeal process and not some extended function of the IRD. The Board and the Court have previously castigated similar conduct and it is submitted that Appellant's case here should be treated no differently.' (IRBRD Case D25/01 at paragraphs 32, 36 & 39; Re Independent Steamship Co Ltd [1970] HKLR 160)

12. This Board agrees with Mr Brewer that it is completely unsatisfactory that the Appellant chose not to reply to the requests made by the IRD to substantiate its offshore claim.

13. In a letter dated 21 August 2018, solicitors for the Appellant submitted that:

'The Appellant first received the information request from the IRD in June 2012. At that time, the Appellant had changed its tax service provider from PKF Tax and Business Cons ("PFK") to RSM Nelson Wheeler Tax Advisory Limited ("RSM") and was not able to immediately retrieve tax information from PKF, who helped prepare tax filings for years 2009/10 and 2010/11. Later on, the Appellant and its tax service provider, RSM, continued to request for tax information from PFK and discussed over the phone and through emails as to a proper response to the IRD's information request. At a point in year 2014, the failure to obtain any information from PFK led the Appellant to reconsider whether to pursue offshore claims for years of assessment 2009/10 and 2010/11 because it required resources which were not available to the Appellant then to produce the information required by the IRD, as testified at the hearing on 23 July 2018 by the Appellant's CFO that the accounting system of the Appellant was inadequate.

Subsequently, the IRD issued tax assessments for year 2009/10 and 2010/11 in 2016 and 2017. The Appellant paid taxes in full for these two years after RSM lodged objection letters on behalf of the Appellant in hope to settle the disputes with the IRD when the requested information by the IRD was ready for submission. The bulk of the requested information was provided to the IRD in November 2017 by Zhong Lun Law Firm, the Appellant's tax

> representative of the Appeal, after the Appellant lodged an appeal against the IRD's final assessment. All outstanding information was furnished to the Board of Review and the IRD before the hearing on 23 July 2018.
>
> It was not the Appellant's intention to delay the response to the IRD. It was administrative missteps that led to the Appellant's prolonged response over the years. The Appellant acknowledged the mistake for not being able to provide sufficient information to the IRD in a timely manner. Nevertheless, the lack of sufficient information made available in front of the Commissioner should not constitute any reason of the Board of Review to not consider the Appellant's appeal.'

14. With respect, this Board takes the view that the reasons offered for delay to answer to the requests from the IRD are far from satisfactory. The mere fact that the Appellant had changed its tax service provider is not a good reason not to provide the requested documents. This Board also noted that indeed some of the documents required to prove the Appellant's offshore claim might well be within the custody, possession, power and control of the Holding Company in Country H to which the Appellant was perfectly in a good position to make requests to disclose the relevant documents to the IRD. In any event, a change of tax service provider is not a legitimate reason to refuse to answer to the requests by the IRD.

15. This Board also noticed that the Appellant could well have asked for extension of time from the IRD to provide the requested documents even indeed they encountered any difficulties in getting any relevant documents from its former tax service provider. However, complete silence from 26 June 2012 for a period about 4 years until responding to the IRD issued 2009/10 Assessment on 15 March 2016 is, in the Board's view, inexcusable. Such conduct is not to be condoned.

16. On 25 April 2017, the IRD reminded the Appellant to provide outstanding information requested since 26 June 2012 within 21 days.

17. On 6 October 2017, in light of the Appellant's failure to provide any information to support its offshore claim and with nothing to demonstrate profits were not arising or derived from Hong Kong, the Determination was duly issued.

18. Thereafter, on 3 November 2017, the Appellant issued its Notice of Appeal to this Board with the Statement of Grounds of Appeals.

19. On 9 November 2017, the IRD sought outstanding information from the Appellant.

20. On 23 November 2017 and 30 November 2017, the Appellant submitted further information to the IRD.

21. On 25 April 2018, the IRD further requested documents that were then still outstanding from the Appellant.

22. The above chronology demonstrates that it is totally inexcusable for the Appellant not to have replied to the IRD to substantiate its offshore claim with proper documentary evidence. As such, this Board agrees with Mr Brewer that the Determination cannot be faulted.

23. The Appellant submitted that this Board is a fact-finding body which has to hear all the evidence *de novo* and should assess the weight of the evidence before it, look at the evidence as a whole and consider the overall cumulative effects of the different facts presented to it and come to its own conclusion.

24. It is also submitted that:

> 'the Board of Review should exert its power to permit an appellant to argue the amount assessed was incorrect for reasons not initially advanced, even if those reasons involve entirely fresh grounds not considered by the Commissioner in the original assessment process. This is supported by an Australian case *Lighthouse Philatelics Pty Ltd v FCT* (1991) 22 ATR 707, which stated that "…the Tribunal or the Court has power to permit a taxpayer to argue that the taxable income and tax payable are incorrect and "excessive" for reasons not initially advanced, even if those reasons involve, as in the present case, entirely fresh grounds in substitution for the original grounds, or even if they require consideration of matters not considered by the Commissioner in the original assessment process.'

25. This Board is of the view that in the present case, there are no fresh grounds of objection as the only ground the Appellant relied on is its offshore claim. Nevertheless, it is true that the hearing before this Board is a *de novo* hearing. The Appellant has filed its Statement of Grounds of Appeal and documents in support. This Board's duty is to adjudicate whether on the facts before it, the ground as set out is proved or not.

26. In the present case, the Deputy Commissioner did proceed to issue the Determination after receipt of the notices of objection. It appears that the Deputy Commissioner did not consider the notices of objection as invalid, as presently contended. Paragraph 18 of the Commissioner's Opening Submissions reads:

> 'The principal question for the Board under this head is whether, notwithstanding the Commissioner's indulgence in continuing to entertain Appellant in issuing a Determination and thereafter receiving long-outstanding information, Appellant's notices of objection to the Assessments were in each case "valid".'

27. Mr Brewer also invited this Board to consider whether such objections stated grounds of objection with precision. This Board considers that it is perfectly legitimate for Mr Brewer to take this point. Nevertheless, the objection in this case is clear, the claim is that the profits were offshore profits and hence not subject to taxation in Hong Kong. There is no dispute that the Commissioner knew what were the objections and a

determination was issued. Adequacy of evidence is a different issue.

28. In D25/01, IRBRD, vol 16, 224, a case relied upon by Mr Brewer, the issue in that case was about the true interpretation of section 70A of the IRO. (See paragraph 31) The Board in that case was concerned with a factual situation where a taxpayer has not lodged any objection against an assessment pursuant to section 64(1) and then sought to rely on section 70A of the IRO. In Sun Yau Investment Co Limited v The Commissioner of Inland Revenue (1984) 2 HKTC 17, the taxpayer purported to lodge an objection against the assessment by letter but did not include with it any profits tax return or supporting audited accounts. The letter was not accepted by the Commissioner as a valid notice of objection because it was out of the one month time limit imposed by section 64 of the IRO. In the present case however, the Commissioner had treated all the notices of objection as valid and then proceeded to issue the Determination.

29. Similarly, in D82/06, (2007-08) IRBRD, vol 22, 71, a case also heavily relied on by Mr Brewer, paragraph 18 stated, *inter alia*, that:

> '*It is clear from the correspondence between the Appellant and IRD that all along IRD did not consider that the Appellant had made any objection to his salary tax assessments for the years 1998/99 to 2000/01. Rather, for those assessment years, IRD had merely treated the Appellant as having made an application under section 70A of IRO…*'

30. Hence, this Board is of the view that in view of the Determination, the information before this Board, the hearing before this Board being a *de novo* hearing, this Board should proceed to make its findings of facts on the evidence before it. This is not to say that the Appellant's conduct is to be condoned. This Board will make a proper costs order to reflect this Board's disapproval of such conduct and in future the Commissioner is entitled to treat the Appellant as having made an application under section 70A of the IRO.

Offshore Claim

Applicable Legal Principles

31. Section 14(1) of the IRO provides:

> '*Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.*'

32. The phrase '*profits arising in or derived from Hong Kong*' (於香港產生或得自香港的利潤) is defined in section 2 as follows:

'*"profits arising in or derived from Hong Kong" (於香港產生或得自香港的利潤) for the purposes of [Profits Tax] shall, without in any way limiting the meaning of the term, include all profits from business transacted in Hong Kong, whether directly or through an agent*'. (Emphasis added)

33. The general principles for the proper approach of the source of profit are well-settled and they are summarized as follows:

(1) One looks to see what the taxpayer has done to earn the profit in question and where the taxpayer has done it (CIR v HK-TVB International Limited [1992] 2 AC 397, at 407C-D, per Lord Jauncey);

(2) The proper approach is to ascertain what were the operations which produced the relevant profits and where those operations took place (CIR v HK-TVB International Limited, *Supra*, at 409E, per Lord Jauncey);

(3) The source of profits is a hard practical matter of fact to be judged as a practical reality. It is not a technical matter but a commercial one (ING Baring Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 417, at paragraph 131, per Lord Millett NPJ);

(4) The Court should consider, not of the operations which produced the profits in question, but more narrowly of the operations of the taxpayer which produced them (ING Baring Securities (Hong Kong) Ltd v CIR, *Supra*, at paragraph 133, per Lord Millett NPJ);

(5) The profits in substance arise of the operation of a taxpayer in the place where the taxpayer's service is rendered or profit-making activities are carried on, and that (i) the operations in question must be the operations of the taxpayer, and (ii) the relevant operations do not comprise the whole of the taxpayer's operations but only those which produce the profit in question (ING Baring Securities (Hong Kong) Ltd v CIR, *Supra*, at paragraph 129, per Lord Millett NPJ);

(6) In the case of a group of companies, for tax purposes a business which is carried on in Hong Kong is the business of the company which carries it on and not of the group of which it is a member. The profits which are potentially chargeable to tax are the profits of the business of the company which carries it on; and the source of those profits must be attributed to the operations of the company which produced them and not to the operations of other members of the group (ING Baring Securities (Hong Kong) Ltd v CIR, at paragraph 134, per Lord Millett NPJ); and

(7) The focus of identifying the source of a taxpayer's profit is on establishing the geographical location of the taxpayer's profit-producing transactions themselves as distinct from activities antecedent or incidental to those transactions. Such antecedent activities will often be commercially essential to the operations and profitability of the taxpayer's business, but they do not provide the legal test for ascertaining the geographical source of profits for the purposes of section 14 of the IRO (ING Baring Securities (Hong Kong) Ltd v CIR, *Supra*, at paragraph 38, per Ribeiro PJ).

Factual Findings

34. This Board has duly considered the documentary evidence before it and the evidence of Mr E, Mr B and Mr J. This Board comes to the finding that the Appellant fails to discharge its burden of proof that it generated its profit offshore rather than from Hong Kong.

35. Mr Brewer is right that the Profit Tax Returns for 2009/10 and 2010/11 recorded the Appellant's principal business activity as 'trading of various telecommunication appliances and audio conferencing products'. Its balance sheet as at 30 June 2008 stated inventories in the sum of US$191,495. From the income statement for the year ended 30 June 2009, it is recorded that:

Turnover:	US$2,154,290
Cost of Sales:	US$1,434,713
Selling expenses:	US$ 238,596
Administrative expenses:	US$ 400,964

36. The selling expenses incurred were significant in the Years of Assessment and they included well over 50% of the Appellant's staff salaries and transportation costs. The staff costs increased from US$13,840 to US$97,139 between 30 June 2008 and 30 June 2009.

37. It is highly significant that in Note 14 of the Financial Statements for the year ended 30 June 2009, the relationship between the Holding Company and the Appellant is clearly stated.

	Year ended 30-06-2009	Incorporation to 30-06-2008
Sales of Goods	US$ 313,634	---
Purchase of goods	US$2,002,999	US$154,493
Management fee	US$ 266,771	US$ 45,016

38. It is clear to this Board that the Appellant entered into trading with the Holding Company and earned profits.

39. The management fee of US$266,771 was paid by the Appellant to the Holding Company to help the Appellant discharge some business functions. It is stated in

audited financial statements for the year of assessment 2009/10 that:

> 'The management fee was paid to the holding company for maintaining the Company's daily operation. Since the expense is incurred for the purpose of producing chargeable profits, it is tax deductible.'

40. The Appellant was, of course, entitled to contract out some of its daily operation to the Holding Company to which it paid a management fee and claimed tax deduction for such expenses. However, it does not mean that there was an agency relationship between the Appellant and the Holding Company. No contracts of agency were disclosed by the Appellant. None of the witnesses deposed of any agency relationship.

41. The selling expenses included substantial sums of rental expenses, salaries and other benefits, transportation costs. Mr Brewer rightly reminded this Board that there is no evidence that the Appellant occupied any premises overseas or employed staff overseas. The Appellant entered into tenancy agreements with landlords in Hong Kong in respect of premises in District K and District L and those expenses were recorded as part of the selling expenses.

42. There was a substantial increase in staff costs between the financial year ended 30 June 2009 (US$97,139) and the period from 1 July 2009 to 31 December 2010 (US$154,414). The Appellant employed 4 local employees, being warehouse manager, technical support supervisor, technical support representative and quality assurance engineer. Under cross-examination, Mr J stated that he did visit certain of the Appellant's Hong Kong customers (a local law firm and the Hong Kong SAR Government) to address the after-sales and warranty issues. Mr Brewer is right that it is undeniable that the Appellant sold products to Hong Kong customers and earned a profit. Such profits were obviously generated from sales that took place in Hong Kong.

43. This Board also agrees with Mr Brewer that:

(1) Terms of the Appellant's actual purchase orders prove that it was the Appellant's qua principal, and not the Holding Company that was the purchasing entity of the products supplied by Company M and Company N;

(2) It was the Appellant and not the Holding Company which settled the cost of its purchases from its own US$ bank account with Bank P in Hong Kong;

(3) There is no evidence that turnover from sales made in the 2009 and 2010 transactions were received by any entity other than the Appellant. The turnovers were recorded in the Appellant's sales ledgers.

(4) The Appellant's 2009 and 2010 audited financial statements both recorded a significant sum of 'selling expenses', a large portion of

> which comprised of Hong Kong salaries, premises and transportation costs.

44. It is also important that from all the documentary evidence and testimony, the Appellant purchased and sold goods of substantial value to and from the Holding Company as a trading entity. Documentary evidence included sample purchases of finished goods from Company M, resales of the very same finished goods to Company Q, purchases of finished goods from Company N, and resale of the very same finished goods to the Holding Company.

45. Mr Brewer submitted that even if this Board is persuaded that the Appellant's purchases and sales orders were somehow executed outside Hong Kong, there is no evidence that such activity was anything other than perfunctory or requiring any real negotiation. It is also plain that significant additional and commercially necessary activity was performed in Hong Kong without which the Appellant's purchases and sales could not have been completed successfully. This Board agrees.

46. Fundamentally, from the Appellant's own records, it shows that there were significant trading between the Appellant and the Holding Company. That itself is crucial. It matters not that the decisions to purchase or sell were made outside Hong Kong. A director of a company could well conclude a contract on behalf of the company when he or she was overseas, that act by itself does not make the profits generated therefrom offshore profits. The Board looks at all the circumstances of the evidence before it.

47. The Appellant's sales ledgers demonstrate that it was the Appellant which issued purchase orders to Company M and Company N and paid the costs of goods purchased, also that it was the Appellant which issued sales order acknowledgements to and received payment from customers such as Company Q for products sold by the Appellant and invoiced by the Appellant.

48. The Appellant relied on the case of CIR v Magna Industrial Co Ltd [1997] HKLRD 173. However, each case must be decided on its own facts. Litton VP (as he then was) at page 181E said:

> '*The exceptional feature in this case is that the sales of essentially low-value products, in large numbers, were effected overseas by a network of independent contractors, resident in their own regions, who nevertheless had authority to bind the taxpayer to specific orders. Stocks of the entire range of products were maintained by the distributors who, as far as the taxpayer was concerned, were the buyers.*'

49. The Appellant's main contention is that the sales and purchase decisions were made in Country H and hence the profits were generated overseas. The Board takes the views that the analysis is not so simplistic. The Board has to take into account all the evidence before it, including the substantial trading between the Appellant and the Holding Company.

50. Further, all the other functions are not merely insignificant and ancillary as the Appellant submitted. They were important to the generation of profits in Hong Kong.

51. Importantly, this Board takes into consideration that the main contention of the Appellant is not supported by any documentary evidence like board minutes of the Holding Company. Insofar as the oral testimony which contradicts the audited financial statements and documentary evidence, this Board rejects the same including the evidence of Mr E.

52. Mr Brewer suggested the lack of documentary evidence might well be due to the intention to avoid paying Country H tax. There is no evidence that Country H tax was paid for the activities that the Appellant is claiming to have operated in Country H. This Board does not find it necessary to decide on such speculation. What is significant is that there is no documentary evidence to support that all decisions relating to creation of the Appellant's profits were made overseas.

Disposition

53. For the reasons stated above, the Appellant's appeal is dismissed with costs.

54. As far as costs is concerned, this Board considers it right and proper to award costs in the sum of HK$25,000 being the maximum that this Board can award against the Appellant. This is to reflect the conduct on the part of the Appellant in failing to reply to the IRD in a timely manner and the lack of documentary evidence to support its allegation that its profits were generated overseas.

55. Finally, it remains for this Board to thank parties for their helpful assistance rendered to this Board.