Case No. D22/17

Profits tax – whether interest received from loan advanced taxable – whether the Taxpayer carried on a business in Hong Kong – whether there was reasonable cause to extend the time for appeal – sections 14(1), 15(1)(f) and 66(1)(a) of the Inland Revenue Ordinance ('IRO')

Panel: Lo Pui Yin (chairman), Ha Suk Ling Shirley and Kenny Z Lin.

Date of hearing: 22 November 2017.
Date of decision: 22 December 2017.

The Taxpayer was a company incorporated in Hong Kong, with Hong Kong resident shareholders. In 2003, it agreed to subscribe for shares in another company, and as part of the same agreement, it also agreed to extend a loan to that company. In 2006, the Taxpayer agreed to advance another loan to that company. The loan transactions were executed through bank accounts maintained with banks in Hong Kong. Both loan agreements were said to be governed by Hong Kong law. The Taxpayer claimed that the loans were advanced in the Mainland, for investment of properties by the recipient company there. Interest was reported to be received by the Taxpayers on the loans in the 2010/11 and 2011/12 years of assessment, but the Taxpayer treated them as offshore interest income.

The Assessor raised revised 2010/11 and 2011/12 profits tax assessments by including the interest income as assessable profits. The Deputy Commissioner confirmed the revised assessments, stating that the loans were financed by loans obtained from the Taxpayer's shareholders and loans owed to the Taxpayer. This was treated as strong indicators of the Taxpayer carrying on a business. The Deputy Commissioner concluded that the source of the interest income was in Hong Kong.

The Deputy Commissioner sent his Determination to the Taxpayer and its tax representative by registered post at their respective addresses on 5 July 2017. Post Office record showed that the registered post was successfully delivered at the Taxpayer's address on 7 July 2017. However, the registered post was not successfully delivered at the tax representative's address, as the tax representative was then out of Hong Kong. The postal packet for the tax representative was returned as unclaimed on 1 August 2017. On 2 August 2017, the Determination was sent to the tax representative's address by ordinary post, which was received on 5 August 2017. The tax representative wrote to the Board on 7 August 2017 to ask for extension of time to lodge an appeal against the Determination. The tax representative gave notice of appeal to the Board on 15 August 2017.

Held:

1. The tax representative having accepted that the notice of appeal was given outside the 1 month period provided by section 66(1)(a) of the IRO, it was for the Taxpayer to give evidence to show any reasonable cause for the delay, as it could not be prevented from giving the notice within time by illness or absence from Hong Kong. As the Taxpayer did not put forward any evidence, and it was plainly insufficient for the tax representative to make assertions for it, there was no reasonable cause to extend the time for lodging the notice of appeal.

2. In any event, the Taxpayer could not rely on communication difficulties with its tax representative, the incompetence and/or the negligence of the tax representative to argue that it was prevented from lodging the notice of appeal within the statutory time limit (Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687; D176/98, IRBRD, vol 14, 58 followed; D51/11, (2012-13) IRBRD, vol 27, 76; D21/14 (2015-16) IRBRD, vol 30, 123 considered). Therefore, the application for extension of time to lodge the notice of appeal should be refused.

3. As to the substantive merits of the appeal, since the Taxpayer did not argue that the interest income was not derived from Hong Kong, it was correct for the Deputy Commissioner to conclude that the Taxpayer carried on a business in Hong Kong. The Taxpayer put its assets to gainful use by lending them to another company, and the interest derived represented the gains from such use. Hence, section 15(1)(f) of the IRO deemed the interest income to be derived from a business carried on in Hong Kong (American Leaf Blending Co Sdn Bhd v Director of Inland Revenue [1979] AC 676 (PC) at 683-684; Commissioner of Inland Revenue v Bartica Investment Ltd (1996) 4 HKTC 129 at 158-159, 162; D44/04, IRBRD, vol 19, 367 followed). The Taxpayer did not adduce any evidence to contradict the prima facie conclusion, and could not simply rely on the tax representative to assert on the background and circumstances of the loan agreements.

4. The Taxpayer could overcome the prima facie position under section 15(1)(f) of the IRO by arguing that the loans were in the nature of investment, and the interest payments were in the nature of dividends, as the debtor company had the freedom to decide when the loans and interest would be repaid. The loan agreements had specific terms defining interest calculation, the interest rate, the repayment arrangement, and the provision for enhanced rate of interest in default. The Taxpayer was not deprived of the means to require performance according to the loan agreements under the law of contract of Hong Kong (Chitty on Contracts, Volume 1 General Principles (32nd Ed, 2015), paragraphs 21-014, 21-055 considered).

Appeal dismissed.

Cases referred to:

Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
D176/98, IRBRD, vol 14, 58
D3/91, IRBRD, vol 5, 537
D51/11, (2012-13) IRBRD, vol 27, 76
D21/14, (2015-16) IRBRD, vol 30, 123
American Leaf Blending Co Sdn Bhd v Director of Inland Revenue [1979] AC 676 (PC)
Commissioner of Inland Revenue v Bartica Investment Ltd (1996) 4 HKTC 129
D44/04, IRBRD, vol 19, 367
Chitty on Contracts, Volume 1 General Principles (32nd Ed, 2015)

Tai Sheung Yan, Certified Public Accountant (Practising), for the Appellant.
Chan Wai Lin and Lai Ming Yee, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Taxpayer, Company A, objected to the Profits Tax Assessments for the years of assessment 2010/11 and 2011/12 raised on it by the Assessor of the Revenue. The Deputy Commissioner of Inland Revenue made a Determination dated 5 July 2017 rejecting the Taxpayer's objections, and confirming the Profits Tax Assessments for the years of assessment 2010/11 and 2011/12.

2. The Deputy Commissioner of Inland Revenue's Determination was sent to the Taxpayer's address in Tokwawan together with a covering letter dated 5 July 2017. The covering letter stated that the law allows the Taxpayer to appeal against the Determination to the Board of Review, described in broad terms the relevant legislation, section 66 of the Inland Revenue Ordinance (Chapter 112), and enclosed a copy of the full text of section 66. A copy of the covering letter and its enclosures were also sent to Messrs Tai Sheung Yan, Certified Public Accountant (Practising).

3. The Office of the Clerk to the Board of Review received on 7 August 2017 through 'by hand' delivery a letter dated 7 August 2017 of Messrs Tai Sheung Yan, Certified Public Accountant (Practising). The material parts of this letter state:

> 'I am the authorized tax representative to handle the objection for the [Taxpayer].

> Please refer to the attached covering letter from the Commissioner of Inland Revenue Department, which although dated 5 July 2017, was redirected to me only on 2 August 2017 and received by me on 5 August 2017.
>
> In support of my application I attached herewith my electronic air ticket and the boarding passes dated 4 July and 24 July showing that I was absence from Hong Kong during 4 July to 25 July 2017 and came back to Hong Kong after 7.15 pm on 25 July 2017.
>
> In the circumstances I should be most grateful if you would kindly extend the appeal period to within one month after the date of redirection of the Commissioner's written determination.'

4. The Clerk to the Board of Review sent a letter dated 9 August 2017 marked 'URGENT' to Messrs Tai Sheung Yan, Certified Public Accountant (Practising). The Clerk referred to section 66(1) of the Inland Revenue Ordinance and the stipulation therein that 'any person who wishes to appeal to the Board should file a written notice of appeal, together with **a copy of the Commissioner's determination and a statement of grounds of appeal, within one month from the date of the Commissioner's determination**. As a matter of practice, any appeal filed beyond the one-month period would be treated as a late appeal and that an application for an extension of time under section 66(1A) of the IRO will be considered by the Board **at the hearing**. If the Board accepts the appellant's reasons for being late in lodging an appeal, it will proceed to hear the merits of his/her appeal in the usual way either on the same day as appropriate, or on the other date(s) to be fixed later on' (bolded text in the original). The substantive part of this letter ended with: 'As such, please forthwith ensure compliance with section 66(1) of the IRO should you intend to lodge an appeal with this Board.'

5. The Office of the Clerk to the Board of Review received on 10 August 2017 a letter of Messrs Tai Sheung Yan, Certified Public Accountant (Practising), which purported to give notice of appeal against the Deputy Commissioner of Inland Revenue's Determination on behalf of the Taxpayer, enclosing a statement of the grounds of appeal and a copy of the Deputy Commissioner's Determination (which included the statement of facts upon which his Determination was arrived at and the reasons for his Determination).

6. The Office of the Clerk to the Board of Review received on 29 August 2017 a letter from a Senior Assessor (Appeals) of the Inland Revenue Department ('the Revenue') stating that '[according] to the information provided by Hongkong Post, the registered packet sent to the Appellant was delivered on 7 July 2017. However, the registered packet sent to the Representative was returned to the Revenue. On 2 August 2017, the Revenue redirected the returned Determination to the Representative by original mail.' Postal records were attached. The Senior Assessor (Appeals) expressed the view that the notice of appeal dated 10 August 2017 was given outside the statutory 1 month period under section 66(1) of the Inland Revenue Ordinance; suggested that the Board of Review may wish to consider whether the Taxpayer should be granted an extension of

time to appeal under section 66(1A) of the Ordinance; and asked the Board of Review to consider including the issue of late appeal in the hearing of the Taxpayer's appeal.

7. The Clerk to the Board of Review requested the Taxpayer to provide a letter of authorization for Messrs Tai Sheung Yan, Certified Public Accountant (Practising) to act for it as its authorized tax representative in its proposed appeal. The Office of the Clerk to the Board of Review received on 22 September 2017 a letter of the Taxpayer dated 19 September 2017 apparently signed and sealed by one of its authorized signatories authorizing Messrs Tai Sheung Yan, Certified Public Accountant (Practising) to act for it as its authorized tax representative in this matter.

8. Messrs Tai Sheung Yan, Certified Public Accountant (Practising), also wrote on 22 September 2017 to respond to the letter of the Senior Assessor (Appeals) of the Revenue dated 29 August 2017, pointing out that in the Taxpayer's case, the Revenue's Assessor sent all enquiries directly to him in the capacity of the Taxpayer's tax representative; that the Taxpayer took as granted that he should have automatically dealt with the registered mail from the Revenue containing the Deputy Commissioner's Determination as a copy of it was also sent to him for necessary action; that the Taxpayer was in fact ignorant of the appeal and did not know the procedure to do so; that the Senior Assessor (Appeals) should have recommended to the Board of Review to allow the late appeal if she was of the opinion that he had the same right as the Taxpayer in connection with the appeal against the Determination, as otherwise, there was no purpose nor any use to the Taxpayer and him for the redirection. Mr Tai also referred to his application for extension of time for the appeal made on 7 August 2017 and his submission of the appeal papers without any delay on 15 August 2017 as indications of his sincerity. Mr Tai further referred to the absence of any communication from the Revenue to him since 13 August 2016 and claimed that had the responsible Senior Assessor of the Revenue sent him the statement of facts for his agreement or informed him that the objection would be submitted for the Commissioner's determination, he should have notified her the period of his absence from Hong Kong. Mr Tai concluded that the Board of Review should allow the late appeal.

9. The Clerk to the Board of Review issued the notice of hearing in the Taxpayer's appeal indicating that the Board of Review would, at the beginning of the hearing, hear the Taxpayer's reasons for being late in lodging the appeal.

10. On 22 November 2017, the Taxpayer was represented by Mr Tai of Messrs Tai Sheung Yan, Certified Public Accountant (Practising), the authorized tax representative of the Taxpayer. Mr Tai gave evidence under affirmation and he was cross-examined by the Revenue's representative. Mr Tai did not call any other witness to give oral evidence. Prior to the hearing, Mr Tai had furnished this Board and the Revenue with a set of documents and correspondence.

11. The Revenue, represented by Ms Chan, Acting Senior Assessor of the Revenue, did not call any witness to give oral evidence but it provided this Board and the Taxpayer a bundle of documents, including correspondence between the Revenue and the Hongkong Post regarding the posting of the Deputy Commissioner's Determination and

correspondence between the Revenue and Taxpayer's tax representative regarding the assessments of Profits Tax in the years of assessment 2010/11 and 2011/12.

Whether the Taxpayer's Appeal is out of time and Whether Extension of Time should be granted

12. Having heard the evidence of Mr Tai concerning the events between 5 July 2017 and 15 August 2017 and considered the documents the Revenue has obtained from the Hongkong Post (the provenance of which were not disputed by Mr Tai), this Board makes the following findings of fact:

(a) On 5 July 2017, the Revenue sent by registered post the Deputy Commissioner of Inland Revenue's Determination to the Taxpayer's address in Tokwawan together with a covering letter dated 5 July 2017. On the same date, the Revenue sent by registered post a copy of the Deputy Commissioner's Determination to the address of Messrs Tai Sheung Yan, Certified Public Accountant (Practising) together with a copy of the same covering letter dated 5 July 2017.

(b) The postal packet sent by the Revenue to the Taxpayer's address was delivered on 7 July 2017 at the Taxpayer's address in Tokwawan. Receipt of the postal packet was acknowledged by someone affixing a circular stamp containing, among others, the English words 'XXX XX' on the label kept by the Hongkong Post.

(c) The postal packet sent by the Revenue to the address of Messrs Tai Sheung Yan, Certified Public Accountant (Practising) was delivered on that address by Hongkong Post without success on 7 July 2017. The postman left a card in the letter box relating to that address requesting the addressee to collect the postal packet within the next 14 days. Eventually, the Hongkong Post returned the postal packet to the Revenue as unclaimed mail and the relevant division of the Revenue received it on 1 August 2017.

(d) In the meantime, Mr Tai of Messrs Tai Sheung Yan, Certified Public Accountant (Practising) was travelling with his wife outside Hong Kong between 4 July 2017 and 25 July 2017. Mr Tai had used his home address as the correspondence address of his accountant practice. As a result, there was no one to receive the postal packet sent by the Revenue to the address of Messrs Tai Sheung Yan, Certified Public Accountant (Practising) when it was delivered by Hongkong Post. By the time Mr Tai returned to Hong Kong, the time period stated in the card left by the postman for collection of the postal packet had expired.

(e) The Revenue posted on 2 August 2017 by ordinary post a copy of the Deputy Commissioner's Determination to the address of Messrs

Tai Sheung Yan, Certified Public Accountant (Practising), together with a copy of the same covering letter of 5 July 2017 that had the words "Redirected on" printed in bold and a date stamp of 2 August 2017 next to those words.

(f) Mr Tai of Messrs Tai Sheung Yan, Certified Public Accountant (Practising) received the redirected packet referred to in (e) above on 5 August 2017. He wrote on 7 August 2017 to the Clerk to the Board of Review asking for extension of time to appeal against the Deputy Commissioner's Determination and this letter was received by the Office of the Clerk to the Board of Review on 7 August 2017.

(g) In the light of the letter of the Clerk to the Board of Review dated 9 August 2017, Mr Tai of Messrs Tai Sheung Yan, Certified Public Accountant (Practising) prepared the notice of appeal and statement of the grounds of appeal and they were lodged with the Office of the Clerk to the Board of Review together with the copies of the requisite documents on 15 August 2017.

13. Section 66(1)(a) of the Inland Revenue Ordinance provides: '*Any person (hereinafter referred to as the appellant) who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within (a) 1 month after the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefor and the statement of facts … either himself or by his authorized representative give notice of appeal to the Board …*'.

14. Mr Tai, attending the hearing of the Taxpayer's appeal on behalf of the Taxpayer, accepted that the notice of appeal was given outside the 1 month period provided for in section 66(1)(a) of the Inland Revenue Ordinance.

15. Ms Chan for the Revenue submitted to this Board that the 1 month period provided for in section 66(1)(a) of the Inland Revenue Ordinance began to run on 8 July 2017 after the Deputy Commissioner of Inland Revenue's Determination was duly served on the Tokwawan address of the Taxpayer on 7 July 2017. This 1 month period expired on 7 August 2017. Accordingly, the notice of appeal that the Office of the Clerk to the Board of Review received on 15 August 2017 was received 8 days after the expiry of the statutory time period. Therefore the Taxpayer's notice of appeal was out of time under section 66(1)(a).

16. On the basis of the above findings of fact, and having considered the submissions of the parties, this Board finds that the Taxpayer's appeal was out of time and requires extension of time from this Board under section 66(1A) of the Ordinance.

17. This Board now turns to the question of whether the Taxpayer has satisfied any of the criteria in section 66(1A) of the Inland Revenue Ordinance that would entitle this Board to exercise its discretion under this sub-section to extend time for the giving of notice of appeal.

18. Section 66(1A) of the Inland Revenue Ordinance provides:

> '*(1A) If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1). '*

19. Mr Tai submitted that:

- The system of tax representative should be acknowledged, bearing in mind that the Commissioner of Inland Revenue has allowed tax representatives to deal with the affairs of taxpayers on their behalves including lodging an objection, lodging an appeal, and replying to enquiries as if they are the taxpayers themselves and that section 66(1) of the Inland Revenue Ordinance provides that authorized representatives of taxpayers can lodge the notice of appeal on behalf of taxpayers. Assessors of the Revenue have very often sent their enquiries to the tax representatives for their reply without copying them to the taxpayers.

- The Taxpayer had relied on Messrs Tai Sheung Yan, Certified Public Accountant (Practising) to act on its behalf in all tax matters. The Assessor of the Revenue sent all the enquiries to Mr Tai without copying them to the Taxpayer. Based on the past experience and Mr Tai's satisfactory performance of services for all its tax affairs, the Taxpayer took it for granted that he would have dealt with the Deputy Commissioner of Inland Revenue's Determination as a copy of it was also sent to him. The Taxpayer had furnished information and documents to Mr Tai whenever he requested it to do so. In fact, the Taxpayer is ignorant of this Appeal and does not know the procedure to do so.

- All along the Revenue had given the Taxpayer the wrong impression. This had led to the Taxpayer relying on its tax representative. If the Revenue considered that the tax representative should not be relied upon to do things on behalf of the taxpayer, then the Revenue should not have given taxpayers such a wrong impression.

- There was no explanation as to why the Deputy Commissioner's Determination was redirected to Mr Tai only on 2 August 2017. If it were redirected to him earlier, he would have sufficient time to lodge the appeal in time.

- The redirection of the Deputy Commissioner's Determination to Mr Tai served to allow the tax representative to lodge the appeal. It would not have been necessary to redirect it to him if the Revenue considered that so long as the Determination was received by the Taxpayer, there would be no reasonable cause for the Taxpayer to lodge its appeal late even though the copy sent to the tax representative was undelivered. But the Revenue failed to note that it would take at least 2 days for the Hongkong Post to deliver the mail to him.

- There was no more communication between Mr Tai and the Revenue since 13 August 2016. The Senior Assessor of the Revenue had not sent him the statement of facts for agreement nor informed him that the objection would be submitted for the Commissioner's determination at any time after 13 August 2016 and before 7 July 2017.

- If the copy of the Determination were sent to Mr Tai by ordinary mail, it would have been put into the letter box and he would have been able to retrieve it on time to be able to lodge the appeal in time for the Taxpayer.

- By the time Mr Tai found the card left by the postman, the collection period had already expired on 21 July 2017.

- By the time Mr Tai received the Determination in the mail on 5 August 2017, there was far from sufficient time to lodge the appeal on behalf of the Taxpayer. He had to study the whole case first because the grounds of appeal had to be prepared carefully, as the Taxpayer may not rely on additional grounds of appeal without the permission of the Board of Review, and the preparation of the appeal papers was complicated to him since he seldom attended before the Board of Review. It was not a simple matter like copying the grounds of objection; additional facts and arguments had to be provided.

- The Taxpayer's case was distinguishable from the cases the Revenue cited. In the present case, the tax representative was out of Hong Kong and the tax representative was neither incompetent nor negligent.

- The Revenue should bear the responsibility for the difficulties encountered in lodging the appeal in time for the Taxpayer.

- Mr Tai had asked for extension of time immediately on 7 August 2017. As soon as he was advised by the Clerk to the Board of Review that he should submit the late appeal, he prepared the late

appeal immediately and lodged the late appeal on 15 August 2017 to show sincerity.

20. In Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687, the Court of Appeal endorsed the interpretation the Board of Review gave to the expression 'prevented' in section 66(1A) of the Inland Revenue Ordinance in D176/98, IRBRD, vol 14, 58 that this expression should best be understood in terms of the taxpayer being 'unable to' comply with section 66(1) of the Ordinance. This understanding imposes a higher threshold than a mere excuse. In D176/98 (above), which the Court of Appeal quoted in Chow Kwong Fai v Commissioner of Inland Revenue (above), the word 'prevented' was said to be 'opposed to a situation when an appellant is able to give notice but failed to do so'.

21. The Appellant Taxpayer is a company incorporated in Hong Kong and has a registered or correspondence address in Hong Kong. In the light of these matters, it is doubtful whether the Taxpayer could ever be absent from Hong Kong or be prevented by absence from Hong Kong from giving notice of appeal. This Board is of the opinion that realistically, in seeking extension of time, the Taxpayer, being a company incorporated in Hong Kong with a registered or correspondence address in Hong Kong, cannot rely on 'illness' or 'absence from Hong Kong' as grounds for being prevented from giving notice of appeal in accordance with section 66(1)(a) of the Inland Revenue Ordinance. The Taxpayer has to satisfy this Board that it was prevented by a 'reasonable cause' from giving notice of appeal in accordance with section 66(1)(a) and that it is appropriate in the circumstances for this Board to exercise its power under section 66A(1) to extend time.

22. The Taxpayer's claim for extension of time relied on it being prevented by the absence of its tax representative from Hong Kong at the material time, notwithstanding that it was served with the Deputy Commissioner of Inland Revenue's Determination. The Revenue has produced documents from Hongkong Post indicating that the Revenue's registered mail containing the Deputy Commissioner's Determination was delivered to and received by someone at the Tokwawan address of the Taxpayer. There was no evidence from the Taxpayer and those managing or otherwise in control of it on what action (if any) the Taxpayer had taken in relation to the Deputy Commissioner's Determination and no explanations for any such action or lack of action. It was plainly insufficient for Mr Tai to assert on behalf of the Taxpayer that the Taxpayer had relied on Mr Tai in all tax matters. Accordingly, this Board is not satisfied that *the Taxpayer (as appellant)* was prevented from giving notice of appeal in compliance with section 66(1) of the Inland Revenue Ordinance.

23. This Board also accepts the Revenue's submissions that: (1) It is the Taxpayer's responsibility to arrange its own affairs; (2) While the system of tax representative allows a taxpayer to authorize another person to assist him in communicating with the Revenue and dealing in tax matters, this system is never intended to provide a taxpayer an opportunity to shift his obligations or liabilities through the appointment of a representative, and then relying on failure or omission of the representative to excuse himself from the consequences of not complying with the obligations or the liabilities; and (3) There was nothing in the evidence before this Board

to show that the Taxpayer was prevented or unable, through its directors, to give a notice of appeal itself or instruct Mr Tai to give a notice for it.

24. In respect of the criterion of 'prevented by other reasonable cause', this Board accepts the Revenue's submissions that: (1) Time limits are imposed to be observed and so, a relatively short period of delay in lodging the notice of appeal cannot by itself constitute a reasonable cause for extension of time. Further justification must be provided; see D3/91, IRBRD, vol 5, 537; (2) The Taxpayer's tax representative, Mr Tai, is a practising accountant. It is incumbent upon Mr Tai to make arrangements to maintain connection with matters arising from his continuing practice during his travels. Any failure or omission on the part of Mr Tai in doing so belongs to the category of unilateral mistake and cannot possibly constitute reasonable cause preventing the lodging of a valid appeal; see Chow Kwong Fai v Commissioner of Inland Revenue (above) at paragraph 45; (3) The Taxpayer's reliance (and perhaps total reliance) on Mr Tai in the dealing of its tax affairs, which, as the events had turned out, could be characterized as misplaced. That this is so can be shown in light of Mr Tai's claimed justifications of "complicatedness of the matter" and lack of familiarity with the procedure of appeal for the time incurred to produce the notice of appeal and for the misstep in seeking extension of time on 7 August 2017 instead of lodging the notice of appeal together with the requisite documents on 7 August 2017. Similar situations had been considered by the Board of Review in D51/11, (2012-13) IRBRD, vol 27, 76 and D21/14, (2015-16) IRBRD vol 30, 123, where the Board of Review had held that communication difficulties between the taxpayer and his tax representative or the incompetence and/or negligence of the tax representative should also be characterized as unilateral mistake which did not constitute a reasonable cause preventing the lodging of a valid appeal; and (4) The various criticisms Mr Tai has made of the Revenue do not begin to justify reasonable cause for extension of time. It lies ill in the mouth for Mr Tai to suggest that the Revenue had given the Taxpayer the wrong impression since the Revenue had sent to the Taxpayer not only the Deputy Commissioner of Inland Revenue's Determination, but also the earlier letters deciding on the raising of the two Profits Tax assessments and expressing the view with reasons that the Taxpayer's objection should be withdrawn. Also, it appears that the Revenue sent the Deputy Commissioner's Determination again to Mr Tai on the next day after it received from Hongkong Post the registered packet returned to it as unclaimed mail.

25. For all the reasons above, this Board finds that the Taxpayer has failed to establish any of the criteria under section 66(1A) of the Inland Revenue Ordinance to give this Board jurisdiction to consider exercising its discretion under that sub-section to grant extension of time for it to give notice of appeal in compliance with section 66(1) of the Ordinance. In the light of what has been discussed above, this Board is also of the opinion that the Taxpayer's case is not one that it would exercise its discretion under section 66(1A) to grant extension of time even if one of the criteria under section 66(1A) was established. This Board therefore finds that the Taxpayer had not given a valid notice of appeal to the Board of Review in accordance with section 66(1) of the Ordinance and accordingly declines to entertain the Taxpayer's notice of appeal.

The Taxpayer's Substantive Appeal

26. Although this Board has found that the Taxpayer's appeal was not lodged in time and has declined to exercise its discretion under section 66(1A) of the Inland Revenue Ordinance to extend time, it will in the paragraphs that follow consider the merits of the Taxpayer's substantive appeal since there had been full argument on it at the hearing.

27. The Taxpayer's authorized tax representative and the Revenue have agreed on a Statement of Agreed Facts, which is substantially reproduced below:

(1) Company A [ie the Taxpayer] was incorporated as a private company in Hong Kong in 1984. At the relevant times, the Taxpayer's business address was Address B.

(2) (a) At the relevant times, the Taxpayer's directors were Mr C, his wife Ms D and their son, Mr E. They were residents in Hong Kong.

(b) The Taxpayer's authorized and paid up share capital was HK$10,000, divided into 1,000 shares of HK$10 each, and held by the following shareholders:

Name of shareholder	Number of share(s) held
Company F	998
Mr C	1
Ms D	1
Total:	1,000

(c) The Taxpayer's ultimate holding company was Company F, a company incorporated in Hong Kong. Company F also used the Tokwawan address as its business address. At all relevant times, Company F's authorized and paid-up share capital was HK$10,000, divided into 1,000 shares of HK$10 each, and held by the following shareholders:

Name of shareholder	Number of share(s) held
Mr C	999
Ms D	1
Total:	1,000

(d) The Taxpayer closed its accounts on 31 March every year.

(3) Company G was a company incorporated under the laws of the British Virgin Islands. At the relevant times, Company G had held investment in Mainland China.

(4) By a subscription agreement dated 17 November 2003 ('the Subscription Agreement'), the Taxpayer agreed to subscribe for 2,000 ordinary shares in Company G at a subscription fee of US$20,000. The Subscription Agreement contained, *inter alia*, the following terms:

(a) Contemporaneous to the signing of the Subscription Agreement, the Taxpayer should enter into a loan agreement to grant a loan facility of US$380,000 to Company G.

(b) The Taxpayer should deposit the subscription fee into one of the designated accounts on or before 28 November 2003 and such deposit would eventually be applied to complete the subscription transaction. For deposit in US$, the designated account was a specified Bank H account.

(5) By a loan agreement dated 17 November 2003 ('the 2003 Loan Agreement'), the Taxpayer agreed to lend and Company G agreed to borrow a loan of US$380,000 ('the 2003 Loan'). The 2003 Loan Agreement contained the following terms:

(a) The Taxpayer should deposit US$380,000, on or before 28 November 2003, into one of the accounts designated in the 2003 Loan Agreement, and those designated accounts included the Bank H account. Such deposit would eventually be applied as the 2003 Loan to complete the loan transaction.

(b) The 2003 Loan would carry interest at the rate of 16% per annum.

(c) Company G agreed to repay the 2003 Loan and interest accrued by 20 quarterly instalments of US$27,961.07 each and the first instalment should be made on 1 March 2005. In the event of failure by Company G to pay the 2003 Loan and interest thereon, it should pay interest on the amount from the date of default until the date of actual payment at the rate of 24% per annum.

(d) The 2003 Loan Agreement should be governed by and construed in accordance with the laws of the Hong Kong Special Administrative Region.

(6) By a letter dated 28 November 2003, Mr C instructed his banker in Country J to remit funds of US$400,000 by telegraphic transfer from an account held by him and his wife to the Bank H account with a message: 'Subscription fee and shareholders loan of [Company G]'.

(7) By a loan agreement dated 29 June 2006 ('the 2006 Loan Agreement'), the Taxpayer agreed to lend to Company G a loan of HK$2,000,000 ('the 2006 Loan'). The 2006 Loan Agreement contained, *inter alia*, the following terms:

(a) The Taxpayer should deposit HK$2,000,000 on or before 29 June 2006 to a specified bank account maintained by Company G with Bank K. Such deposit should eventually be applied as the 2006 Loan to complete the loan transaction.

(b) The 2006 Loan would carry interest at the rate of the aggregation of the best lending rate of Bank H for Hong Kong dollars plus 2% per annum.

(c) Company G might repay the 2006 Loan, in whole or in part at any time commencing on 31 December 2006. In any event, Company G should repay in full the Taxpayer the entirety or any outstanding balance of the 2006 Loan on or before 31 December 2009.

(d) The 2006 Loan Agreement should be governed by and construed in accordance with the laws of the Hong Kong Special Administrative Region.

(8) The 2003 Loan and the 2006 Loan were repaid during the period from 1 April 2012 to 31 March 2014.

(9) The Taxpayer filed its profits tax returns for the years of assessment 2003/04 to 2006/07 together with the audited financial statements for the years ended 31 March 2004 to 31 March 2007.

(a) In the reports of its directors, the Taxpayer described its principal business activities as follows:

Year of assessment	Principal business activities
2003/04	'not traded during the year'
2004/05 and 2005/06	'those of a money lender'
2006/07	'those of investment in China'

(b) The Taxpayer's balance sheets as at 31 March 2004 to 31 March 2007 showed, *inter alia*, the following:

(i) Since the year of assessment 2003/04, there were stated as 'Non-current assets', unlisted investment in Company G and amount due from Company G. The former had all along been recognized in the amount of HK$156,000.

The latter had been HK$2,964,000 between year of assessment 2003/04 and year of assessment 2005/06, and became HK$4,964,000 in the year of assessment 2006/07.

(ii) The current assets recognized had consisted mainly of amount due from Company F and amount due from a fellow subsidiary.

(iii) The net assets of the Taxpayer had all along been represented by share capital and the balance in the profit and loss account, which, in the event, consisted principally of retained profits.

(c) The notes to the Taxpayer's financial statements for the years of assessment 2003/04 and 2004/05 disclosed that the amount due from a fellow subsidiary of HK$5,472,845 was owed by Company L, a company incorporated and carried on business in Hong Kong.

(d) Company L was a company incorporated in Hong Kong. At all relevant times, Company L's authorized and paid-up share capital was HK$10,000 divided into 1,000 shares of HK$10 each, and held by the following shareholders:

Name of shareholder	Number of share(s) held
Company F	998
Mr C	1
Ms D	1
Total:	1,000

(10) The Taxpayer filed its profits tax returns for the year of assessment 2010/11 and 2011/12 with audited financial statements for the years ended 31 March 2011 and 31 March 2012 and profit tax computations.

(a) In the profits tax returns for the years of assessment 2010/11 and 2011/12, the Taxpayer reported adjusted losses, which were arrived at after adjusting, *inter alia*, offshore interest income (the Sums) as follows:

Year of assessment	Adjusted Loss	The Sums
	HK$	HK$
2010/11	(30,197)	2,064,353
2011/12	(17,440)	43,269

(b) In the tax computations for the years of assessment 2010/11 and 2011/12, the Taxpayer claimed that the provisions of credit of the loans to Company G, which gave rise to the Sums, were in the Mainland.

(c) The Taxpayer's income statements for years of assessment 2010/11 and 2011/12 showed the following particulars:

Year of assessment	2010/11	2011/12
	HK$	HK$
Interest income (ie the Sums)	2,064,353	43,269
Less: Administrative expenses		
Audit fee	(12,000)	(9,000)
Legal & professional fee	(6,380)	(6,380)
Local travelling	(9,757)	-
Postage and couriers	(1,260)	(1,260)
Bank & business registration charges	(800)	(800)
Profit/(loss) for the year	2,034,156	25,829

(d) The Taxpayer's statements of financial position for the years of assessment 2010/11 and 2011/12 showed, *inter alia*, the following:

(i) There were stated as 'Non-current assets', unlisted investment in Company G (at cost), and amount due from Company G. The former had all along been recognized in the amount of HK$156,000. The latter had been HK$4,964,000.

(ii) The current assets recognized had consisted of amount due from a fellow subsidiary and cash at banks.

(iii) The equity of the Taxpayer had consisted of share capital of HK$10,000 and its retained earnings.

(11) Based on the tax returns filed, the Assessor of the Revenue issued to the Taxpayer the following statements of loss for the years of assessment 2010/11 and 2011/12:

Year of assessment	2010/11	2011/12
	HK$	HK$
Reported loss for the year	(30,197)	(17,440)
Loss brought forward	(38,408)	(68,605)
	(68,605)	(86,045)

(12) In response to the Assessor's enquiries, Messrs Tai Sheung Yan Certified Public Accountant (Practising) put forward the following contentions on behalf of the Taxpayer:

(a) Upon a thorough review of the audited accounts of the Taxpayer for the past ten years, it was noted that all along the Taxpayer had not been carrying on any business in Hong Kong. Its only activity was holding of 5% shareholding in Company G as investment since 2003. Apart from the investment, loans were also lent to Company G for its investment of properties in Mainland China, from which interest income was received. As mere receipts of interest by a company did not constitute the carrying on of a business, the Taxpayer might not be in any way carrying on business in Hong Kong.

(b) The Taxpayer had not carried on any lending business. The shareholder's loans concerned were one of the conditions under the Subscription Agreement for subscription of shares in Company G. The principal business activities of a money lender declared by the Taxpayer in its profits tax returns and reports of directors were made by mistake only.

(c) The Taxpayer's reason for investing in Company G was for long term investment. Company G intended to purchase expensive properties in Mainland China for rental but capital contributions from shareholders alone were not sufficient to finance the intended purchase. As such, Company G had to raise additional funds. The Taxpayer's share subscription in Company G was conditional on the granting of the 2003 Loan and the 2006 Loan was unavoidable. Accordingly, loans from shareholders were the undividable part of the Taxpayer's investment in Company G. Under badges of trade, long term investments were not considered as business.

(d) Having concluded that investment holding of and loan advancements to Company G were not considered as 'business', the place where the 'business' was carrying on is irrelevant. Moreover both the investment and loans were held in Mainland China.

(e) As the investment decisions of the Taxpayer were made by Mr C, there was no formal meeting of directors with minutes recording the Taxpayer's decisions to effect the investment in Company G.

(f) In clause 8 of the 2003 Loan Agreement and clause 5 of the 2006 Loan Agreement, Company G's failure to perform its payment obligation or to observe any of the terms and conditions on payment were specifically excluded as events of default. This indicated that the 2003 Loan and the 2006 Loan were part of the Taxpayer's investment in Company G. The Taxpayer had no right to demand immediate payment even if Company G failed to perform its payment obligation. On the contrary, in clause 8.01(c) of the 2003 Loan Agreement and clause 5.01(c) of the 2006 Agreement, sale, disposal, nationalization or compulsory acquisition of the whole or any material part of the assets or revenues of Company G were defined as an event of default in the relevant loan agreements. This showed that the loans made to Company G by the Taxpayer were for the purpose or intention to maintain its investment in Company G (ie assets or revenues of Company G) for capital gain. The receipt of interest thereon was merely incidental to the lending of the loans as that of the dividend received from the investment.

(g) Cash at banks as at 31 March 2011 and 2012 was kept in the Taxpayer's bank account maintained with Bank K.

(h) A breakdown of interest received from Company G by the Taxpayer for the year of assessment 2010/11 was provided. This showed that the amount of interest received by the Taxpayer for the year, namely a total of HK$2,064,352.55, composed of interest in the sum of HK$1,540,022.55 from the 2003 Loan and interest in the sum of HK$524,330.00 from the 2006 Loan.

(13) The Assessor of the Revenue was of the view that the Sums should be chargeable to profits tax. By a letter dated 17 May 2016, he explained his views to the Taxpayer. He also raised on it 2010/11 and 2011/12 profits tax assessments to bring the Sums into assessment as follows:

Year of Assessment	2010/11	2011/12
	HK$	HK$
Loss per return	(30,197)	(17,440)
Add: The Sums	2,064,353	43,269
Assessable Profits	2,034,156	25,829
Less: Loss set off	(38,408)	
Net Assessable Profits	1,995,748	
Tax Payable thereon (after tax reduction)	329,298	1,065

28. (a) The Taxpayer objected to the assessments raised by the Assessor of the Revenue through Messrs Tai Sheung Yan Certified Public Accountant (Practising), contending that it had not carried on any business in Hong Kong and that the Sums should be offshore in nature and not chargeable to tax. Mr Tai relied on the contentions and documents he had previously supplied.

(b) The Deputy Commissioner of Inland Revenue made his Determination on the Taxpayer's objection on 5 July 2017. The Deputy Commissioner did not accept the Taxpayer's claim that it had not carried on any business in Hong Kong and instead found that the Taxpayer had carried on business in Hong Kong. In reaching this finding, the Deputy Commissioner referred to the financial statements of the Taxpayer and noted that the Taxpayer's subscription in Company G and the 2003 Loan were financed by loans obtained from the shareholders; and that the 2006 Loan was financed by repayment of loans owed by Company L. The Deputy Commissioner was of the view that the operations of borrowing and on-lending were strong indicators that the Taxpayer was carrying on a business. Also, the Deputy Commissioner read the breakdown of the interest income in 2010/11 to suggest that the operations of receiving interest income and discharging the debts from Company G went on continuously during that year; such 'repetition of acts' implied 'carrying on business'. Further, there was nothing to show that the Taxpayer carried on business outside Hong Kong, bearing in mind that it was incorporated in Hong Kong and all its directors resided in Hong Kong. The Deputy Commissioner then turned to the question of whether the interest derived from the loans to Company G, ie the Sums, should be chargeable to tax in Hong Kong. He rejected the Taxpayer's claim that the receipts of interest were merely incidental to the lending of the 2003 Loan and the 2006 Loan, like dividends received from an investment. Applying the 'provision of credit' test, and noting that the two bank accounts to which the Taxpayer was required under the 2003 Loan Agreement and the 2006 Loan Agreement to deposit funds that were then applied to complete the loan transaction respectively were maintained with banks in Hong Kong, the Deputy Commissioner reached the view that the funds from which the interest derived were provided to Company G in Hong Kong and concluded that the source of the interest income from Company G (ie the Sums) was in Hong Kong. Section 15(1)(f) of the Inland Revenue Ordinance, which deems to be chargeable to profits tax the interest derived from Hong Kong received by a corporation carried on business in Hong Kong, applied. The Deputy Commissioner thus found that the Sums were chargeable to profits tax in Hong Kong. The Deputy Commissioner accordingly determined that the Taxpayer's objection

failed and confirmed the Taxpayer's profits tax assessments for the years of assessment 2010/11 and 2011/12.

29. The Taxpayer's authorized tax representative, Mr Tai, confirmed with this Board at the hearing on 22 November 2017 that the Taxpayer relies in its appeal the grounds of appeal he submitted on behalf of the Taxpayer on 15 August 2017. Mr Tai also elaborated on those grounds when he gave evidence under affirmation and made his submissions and reply before this Board. The principal assertions in those grounds of appeal are: (1) The Taxpayer had not actually ever carried on any business in Hong Kong; (2) The investment holding of and loan advancements to Company G should not be considered as business; (3) The Taxpayer's intention for lending the loans was for investment and so the receipt of interest in respect of the loans was merely incidental to the lending of the loans as that of dividend received from investment, with the consequence that it was clearly shown that the Taxpayer has not actually ever carried on any lending business; and (4) The Deputy Commissioner's reasons for finding that the Taxpayer had carried on business in Hong Kong were rebutted by reference to the share subscription and the lending of the loans operations being for the investment of Mr C in Company G through the Taxpayer and not carrying on of a business by the Taxpayer, and to the consideration that in the light of the contention that the Taxpayer was not carrying on a business, the repeated receipts of interest income during the year 2010/11 were irrelevant as the interest incomes were not assessable in any way under section 15(1)(f) of the Inland Revenue Ordinance for a corporation not carrying on a business.

30. Section 14(1) of the Inland Revenue Ordinance provides:

> '*(1) 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.*'

31. Section 15(1)(f) of the Inland Revenue Ordinance provides:

> '*(1) For the purposes of this Ordinance, the sums described in the following paragraphs shall be deemed to be receipts arising in or derived from Hong Kong from a trade, profession or business carried on in Hong Kong-*
>
> *(f) sums received by or accrued to a corporation carrying on a trade, profession or business in Hong Kong by way of interest derived from Hong Kong*'.

32. This Board finds as facts that the parties have agreed in the Statement of Agreed Facts. In this connection, this Board also notes Mr Tai's observation when he confirmed on behalf of the Taxpayer the agreement of the facts in the Statement of Agreed

Facts that the particulars of the balance sheets referred to under (9)(b) of paragraph 27 above as 'net assets' included 'retained profits'.

33. This Board has heard and considered the testimony of Mr Tai, who was at most of the material times the auditor and tax representative of the Taxpayer. However, this Board is unable to give any weight to his testimony. Mr Tai was at different times forgetful, inconsistent and evasive in the course of his evidence. For example, Mr Tai gave three different versions on how the financial statements of the Taxpayer prepared in the name of his firm came to describe the principal business activities of the Taxpayer in some years of assessment as 'money lender' and other years some other business. These versions included the claim that the matter was done by Mr Tai's then joint venture's partner, the claim that the matter was done by Mr Tai's then joint venture's staff, and the claim that the matter was done by Mr Tai himself mistakenly. Also, Mr Tai claimed that he could not recall when he was first appointed the auditor of the Taxpayer, and then, insisted that the Taxpayer was already dormant at the time he was so appointed. Further, notwithstanding that he appeared to have been the auditor and tax representative of the Taxpayer for more than 10 years, he claimed that he had not seen the memorandum and articles of association of the Taxpayer until they were produced by the Revenue shortly before the hearing of this Appeal.

34. Although Mr Tai had purported to speak on Mr C's actions in relation to Company G, using the Taxpayer as a vehicle of his own investment in Company G, and on the background and circumstances of Company G's business at the times of the Taxpayer's subscription to Company G's shares and its loans to Company G, Mr Tai's words are not the good and sufficient substitute for the evidence of Mr C and the evidence of the directors of Company G respectively in any event. Moreover, Mr Tai had apparently contradicted this account in the course of his submissions when he stated that the subscription and the loans were the Taxpayer's investments.

35. Although Mr Tai had purported to speak on Company G's project in City M, Company G's approach in attracting investors in its project, the fact that Company G's shareholders were all natural persons and not corporations, and the fact that Company G distributed repayments of loans in the same ratio as that of the holding of shares by its lenders, Mr Tai's words are clearly not capable of substantiating the facts relating to this third party Company G.

36. As a result, this Board is unable to accept as facts what Mr Tai said of the activities or approach of the Taxpayer in various years in the absence of supporting evidence. This Board is also unable to accept as facts what Mr Tai said of Company G's approach in the raising of funds, the attracting of subscribers, and the repayment of borrowed monies.

37. Further, and it should have been a rather obvious point, what Mr Tai had sought to assert in the letters of his firm to the Revenue on behalf of the Taxpayer and in the statement of the grounds of appeal on behalf of the Taxpayer remain assertions unless the Revenue had agreed to them. It is clear to this Board that the Revenue has agreed only to the receiving of those letters containing the assertions in the Statement of Agreed Facts.

38. To discharge the Taxpayer's burden of establishing that the assessments in question were incorrect or excessive pursuant to section 68(4) of the Inland Revenue Ordinance, it is incumbent upon the Taxpayer to adduce evidence, including oral evidence of relevant witnesses, to establish facts not agreed upon and essential to its case in this Appeal.

39. Having considered the facts found in the Statement of Agreed Facts and the documents referred to in the Statement, as well as the sets of financial statements of the Taxpayer in the year ended 31 March 2005 and the year ended 31 March 2008 that this Board had allowed the Revenue to produce at the hearing after having them verified by Mr Tai, this Board finds that the Taxpayer has failed to discharge its burden to show that the assessments of Profits Tax raised on it for the years of assessment 2010/11 and 2011/12 were incorrect or excessive.

40. Having considered the Taxpayer's statement of the grounds of appeal and the submissions made on behalf of the Taxpayer and the Revenue, it appears to the Board that the critical issue in dispute between the Taxpayer and the Revenue in this Appeal is whether the Taxpayer carried on a business in Hong Kong at the material times.

41. This Board notes that the statement of the grounds of appeal has not sought to question whether the Sums, being sums received by the Taxpayer by way of interest, were 'interest derived from Hong Kong'. Therefore, notwithstanding the claim made in the tax computations for the years of assessment of 2010/11 and 2011/12 of the Taxpayer that the Sums were 'offshore interest income' and that 'the provision of credit of the loans to Company G, which gave rise to the Sums, were in the Mainland', this Board considers that the Taxpayer has not disputed in this Appeal the issue of the source of the interest income from Company G (ie the Sums) and the Deputy Commissioner of Inland Revenue's determination that the source of the Sums was in Hong Kong.

42. Mr Tai's submissions asserting that the Taxpayer did not carry on a business in Hong Kong at the material times can be summarized as follows:

(1) Mr Tai referred to the Subscription Agreement and the 2003 Loan Agreement and their terms in order to show that these two agreements were contemporaneous documents; that the completion of the subscription of shares in Company G was conditional upon the successful allotment of the shares of Company G and the successful raising of funds for Company G on or before a specified date; and the completion of the 2003 Loan was conditional upon the completion of the Subscription Agreement and the successful raising of funds for Company G.

(2) Mr Tai submitted that the Subscription Agreement and 2003 Loan Agreement showed that the 2003 Loan was a shareholder's loan and an important part of the Taxpayer's investment in Company G.

(3) Mr Tai referred to the budgeted statement annexed to the Subscription Agreement to make the point that the funds that Company G sought to raise in 2003 had all been committed and further loans from shareholders were unavoidable. He then referred to the 2006 Loan Agreement and submitted that the 2006 Loan was also a shareholder's loan and another important part of the Taxpayer's investment in Company G.

(4) Mr Tai submitted that the Taxpayer had a lot of retained earnings and had no need to seek outside loans when it subscribed to the shares of Company G and advanced the 2003 Loan to Company G. He submitted that the Taxpayer's investment holding and loan advancements in respect of Company G should not be considered as 'carrying on a business'.

(5) Mr Tai pointed to the terms of the 2003 Loan Agreement and the 2006 Loan Agreement. Particularly, he underlined the exclusion of non-performance or non-observance of the terms and obligations on making payments from being one of the events of default, which otherwise would carry the consequence of enabling the Taxpayer to declare that the relevant loan has become immediately due and payable without further demand. He submitted that these provisions show that the 2003 Loan and the 2006 Loan were part of the Taxpayer's investment in Company G; they were advanced to enhance the assets and revenues of the Taxpayer for capital gain.

(6) Mr Tai submitted that the receipt of interest from the 2003 Loan and the 2006 Loan 'is merely incidental to the lending of the loans as that of dividend from the investment'. He also highlighted the point that it was up to Company G to decide when the principal and/or the interest of the loans would be repaid. He pointed to the income set out in the financial statements of the Taxpayer to indicate that Company G had failed to observe the terms and conditions in the 2003 Loan Agreement and in the 2006 Loan Agreement on payment. Indeed, in respect of the 2003 Loan, the repayment was not in accordance with the terms and conditions in the 2003 Loan Agreement of 20 quarterly instalments; and in respect of the 2006 Loan, the repayment was not in accordance with the terms and conditions in the 2006 Loan Agreement providing for full repayment on or before 31 December 2009. He submitted that the Taxpayer's holding of the subscribed shares and the receiving of the interest from the two loans did not constitute carrying on of business; the Taxpayer was holding an investment and there was no trading income.

(7) Mr Tai contended that if the intention of the Taxpayer in advancing the 2003 Loan and the 2006 Loan had been for receipt of interest

income as short term trading income, it would have ensured that there were rights in the loan agreements to demand for immediate payment when the borrower failed to perform the obligation to pay or to observe the terms and conditions on payment. Thus the intention of the Taxpayer in advancing the two loans must be to support its investment in Company G for capital gain.

(8) Mr Tai emphasized verbally that the Taxpayer had not at all material times carried out any other lending transaction since 2014/15. He had not produced any evidence in support.

(9) Mr Tai referred to the ultimate control Mr C had at the material times of Company F, the Taxpayer and Company L through shareholding. He referred to the accepted points that the Taxpayer's subscription in Company G and the 2003 Loan were financed by loans obtained from the shareholders; and that the 2006 Loan was financed by repayment of loans owed by Company L. He submitted that the operations of these related companies and Mr C in relation to the making of the 2003 Loan and the 2006 Loan were not operation of borrowing and on-lending that the Deputy Commissioner of Inland Revenue had claimed. Rather, Mr Tai claimed, they were all for Mr C's investments in Company G through the Taxpayer and not for carrying on business by the Taxpayer. And the matter that the three companies were legally separate entities should not detract from his claim that the Taxpayer was Mr C's vehicle in the investment of Company G.

(10) Mr Tai submitted that the receipts of interest income in the year of assessment 2010/11 did not involve any transaction of business. The receipt of interest was 'mere passive acquiescence' and did not go beyond 'mere passive acquiescence'. There was in his opinion no continuous activity or repetition of receipts, and no continued decision-making by the Taxpayer. He referred to the breakdown provided to the Revenue and explained that the computations therein were separately calculated because of the way of the accrual of interest.

(11) Mr Tai submitted that it could not be right to refer to the objects of the Taxpayer in its Memorandum of Association to found a case of carrying on business. The objects were common in almost every memorandum of association of a company.

43. This Board is unable to accept any of the grounds or matters Mr Tai has put forward to say that the Taxpayer did not carry on a business in Hong Kong. As the Revenue has submitted, 'carrying on business' in the context of the Inland Revenue Ordinance has a wider meaning than that of 'trade'. Whether the Taxpayer was carrying on a business at the material times is a question of fact; see American Leaf Blending Co

Sdn Bhd v Director of Inland Revenue [1979] AC 676 (PC) at 683-684 (per Lord Diplock). Cheung J (as Cheung JA then was) had extracted from American Leaf (above) the principles on the determination of this question in Commissioner of Inland Revenue v Bartica Investment Ltd (1996) 4 HKTC 129 at 158-159, 162 and those principles are as follows:

> '*(1) Rent may constitute income from a source consisting of a business if they are receivable in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent.*
>
> *(2) The question whether the company was carrying on a business is one of fact.*
>
> *(3) The Privy Council would not endorse the view that every isolated act of a kind that is authorized by its memorandum if done by company necessarily constitutes the carrying on of a business.*
>
> *(4) Business is a wider concept than trade.*
>
> *(5) In the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business.*
>
> *(6) In contrast, in the case of a company incorporated for the purpose of making profits for its shareholders, any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business.*
>
> *(7) Where the gainful use to which a company's property is put is letting it out for rent, it is not easy to envisage circumstances that are likely to arise in practice which would displace the prima facie inference that in so doing it was carrying on a business.*
>
> *(8) The carrying on of business, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between.*
>
> *While ultimately it is a question of fact whether the taxpayer was carrying on business, the prima facie inference for a company incorporated for the purpose of making profits for its shareholders and put its assets to gainful use is that it is carrying on a business.*'

44. This Board accepts the Revenue's submission that the Taxpayer, a corporation incorporated in and operating from Hong Kong, put its assets to gainful use when it invested or applied its funds to subscribe the shares of Company G and to lend to Company G the 2003 Loan as a condition of the subscription, and then when it applied its

funds to lend to Company G the 2006 Loan. The gains from these uses of the Taxpayer's funds or resources were received in the form and nature of interest in the years of assessment of 2010/11 and 2011/12, which together formed the Sums. Thus the Sums are income that prima facie falls within section 15(1)(f) of the Inland Revenue Ordinance; see D44/04, IRBRD, vol 19, 367 at [27]-[28], [30]-[31].

45. This Board also accepts the Revenue's submission that since the 2003 Loan was financed by Mr C (a director of the Taxpayer) and the 2006 Loan was financed by Company L, the Taxpayer lent these two loans to Company G by borrowing from related parties. The borrowing and on-lending is indicative of repetitive acts in respect of the venture in Company G, and thus business activities.

46. Mr Tai has relied on the terms of the Subscription Agreement, the 2003 Loan Agreement and the 2006 Loan Agreement, particularly the exclusion of non-performance or non-observance of the terms and obligations on making payments from being one of the events of default, as well as the freedom that Company G had in deciding when the principal and/or the interest of the loans would be repaid, in his efforts to show that the loans were in the nature of investments and the interest payments were in the nature of dividends. This Board does not accept that these submissions overcome the prima facie application of section 15(1)(f) of the Inland Revenue Ordinance. This is because the 2003 Loan Agreement and the 2006 Loan Agreement have specific terms defining the interest calculation, the interest rate, the repayment arrangement, and the provision for enhanced rate of interest in default. These terms have to be observed when interest payment is made. Thus these two loan agreements had settled the return or the parameters of the return the Taxpayer would receive for the loans advanced to Company G, and such return, as the Revenue has submitted, was interest, not distribution of profits, and therefore could not be regarded as dividend. In any event, the Taxpayer is not deprived of the means to require performance of the payment related obligations and terms and conditions under the law of contract of Hong Kong; see Chitty on Contracts, Volume 1 General Principles (32nd Ed, 2015), paragraphs 21-014, 21-055. The terms and conditions in the 2003 Loan Agreement and the 2006 Loan Agreement, albeit favouring the borrower Company G, did not alter the nature of the advanced monies from being loans and the nature of the income derived from the borrower's performance of these agreements.

47. Mr Tai had made other submissions. Bearing in mind that Mr Tai had the liberty of putting forward evidence to substantiate his factual claims but had not done so, and also that his testimony is not to be given weight for the reasons set out above, this Board does not accept those submissions based on facts that were not within his personal knowledge or on factual premises that were not supported by other objective evidence before this Board. In any event, this Board has considered them and has not found any one of them to be good and sufficient in undermining the conclusion that this Board is prepared to draw if asked to do so in this Case: That the Taxpayer did carry on business in Hong Kong in the years of assessment of 2010/11 and 2011/12, with the consequence that the Sums fell chargeable to Profits Tax pursuant to sections 14 and 15(1)(f) of the Inland Revenue Ordinance.

48. Accordingly, this Board is of the view that, had it been necessary to determine this Appeal substantively, this Board would have dismissed this Appeal and confirmed the assessments the Deputy Commissioner of Inland Revenue had upheld in his Determination of 5 July 2017.

Conclusion

49. This Board finds that the Taxpayer's appeal was out of time. This Board also finds that the Taxpayer has failed to establish any of the criteria under section 66(1A) of the Inland Revenue Ordinance to enable this Board to exercise its discretion to grant extension of time. As a result, this Board declines to entertain the Taxpayer's notice of appeal.

50. This Board has also considered the merits of the Taxpayer's substantive appeal. This Board finds no merit in the grounds of appeal put forward on behalf of the Taxpayer and agrees with the Deputy Commissioner's Determination and his reasons for reaching his Determination. Had it been necessary to rule on the merits of the Taxpayer's substantive appeal, this Board would have dismissed the Taxpayer's appeal and confirmed the Taxpayer's profits tax assessment for the years of assessment 2010/11 and 2011/12 raised by the Assessor of the Revenue.