Case No. D26/15

Profits tax – wrong year of assessment – late application for amending the grounds of appeal – section 14(1), 15C, 16(1), 18D, 60(1), 63, 66(3) and 68(4) of the Inland Revenue Ordinance ('IRO')

Panel: Wong Kwai Huen (chairman), Ha Suk Ling Shirley and Richard Zimmern.

Dates of hearing: 3 to 6 and 9 November 2015.
Date of decision: 18 March 2016.

The six Appellants ('the Appellants') were the respective developers (or co-developers) of six Properties ('the Properties').

For the accounting year in which the occupation permit was issued and for each subsequent accounting year up to 30 June 2006, each of the Appellants' interest in each of the Properties was classified in its financial statements as completed properties for sale under current assets, and was valued at the lower of cost and net realisable value.

On 21 December 2006, upon acquisition by Company R, the Appellants changed their intention, ceased their trade of selling properties for profit, and the Properties were reclassified as investment properties under non-current assets in the respective financial statements. The revaluation gain of each of the Properties ('the Gain') was recognised in the income statement of each Appellant. In computing their profits for tax purposes, the Appellants deducted the Gain.

For the year of assessment 2007/08, each of the Appellants was assessed to profits tax on the Gain ('the Assessments').

The Appellants objected.

On 9 November 2015, the fourth day of the hearing, the Appellants made an application for amending their grounds of appeal ('the Application') in that the Assessments, all for the year of assessment 2007/08, cannot include a profit which, if it exists, arose on 21 December 2006, in the year of assessment 2006/07.

Held:

1. The Board grants its consent, if it is indeed needed, to re-amend the Appellants' Grounds of Appeal.

- Neither party spotted the wrong year point until the fourth day of the hearing.

- There was no mention of section 18D in the Assessments, Determinations or the correspondence.

- The failure to detect the significance of the basis period should be equally shared between the parties.

- The Respondent has accepted that 2007/08 is a wrong year.

- Whether less or no tax could be charged on the Appellants for the year 2006/07 is not an issue before the Board.

- What concerns the Board is the Assessments which are for the tax year 2007/08.

2. Identification of the year of assessment in which profits are taxable is fundamental to the process of charging profits tax and cannot be cured by section 63.

3. The Appellants have discharged their onus of proving that the Assessment are excessive or incorrect.

Appeal allowed.

Cases referred to:

D10/06, (2006-07) IRBRD, vol 21, 177
Wing Mou Construction Co Ltd (in liq) v Cosmic Insurance Corporation Ltd (unreported, HCCT 40/2001, 20 June 2002)
Guangzhou Green-Enhan Bio-Engineering v Green Power Health Products (unreported, HCA 4651/2002, 21 August 2004)
D1/03, IRBRD, vol 18, 286
D53/90, IRBRD, vol 5, 402
D3/07, (2007-08) IRBRD, vol 22, 226
Chan Wing Cheung Allan v Ho Shu Yee Susana (unreported, CACV 393/2004, 10 January 2005)
Hesson Development Ltd v Tang Ki Fan Tso (unreported, HCA 5584/1998, 30 September 2003)
Swain-Mason v Mills & Reeve [2011] 1 WLR 2735
Winford v Ricacorp Properties (unreported, HCA 2481/2008, 22 June 2010)
Star Industrial v Japan Home Centre (unreported, HCA 2294/2008, 21 December 2010)

CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd (No 3) (2015) 160 ConLR 73
Igal Dafni v CMA CGM SA [2013] 2 HKLRD 73
Siddell v Smith Cooper & Partners (A Firm) [1999] PNLR 511
Baylis v Gregory [1987] 3 WLR 660
John Mander Pension Trustees Ltd v Revenue & Customs [2012] SFTD 322
Hong Kong Flour Mills Ltd v Commissioner of Inland Revenue [2002] 2 HKLRD 121
Commissioner of Inland Revenue v Chan Tin Chu [1966] HKLR 468
Commissioner of Inland Revenue v Rico International Ltd (1965) 1 HKTC 229
Commissioner of Inland Revenue v Inland Revenue Board of Review [1989] 2 HKLR 40
Emerson Radio Corp v Commissioner of Inland Revenue [1999] 1 HKLRD 250
Zebra Industries (Orogenesis Nova) Ltd v Wah Tong Paper Products Group Ltd [2014]
Ketteman v Hensel Properties Ltd 1987
Hancock Shipping Co Ltd v Kawasaki Heavy Industries Ltd 1991
Arta Properties Ltd v Li Fu Yat Tso 1998
Smith v Retirement Benefits Fund Investment Trust (No.2) 1994

David Goldberg, Queen's Counsel and Stewart Wong, Senior Counsel, instructed by Messrs Woo Kwan Lee & Lo, for the Appellants.
David Goy, Queen's Counsel, Eugene Fung, Senior Counsel and Wilson Leung, Counsel, instructed by Department of Justice, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The six Appellants ('the Appellants') have objected to the Profits Tax Assessments for the year of assessment 2007/08 raised on them.

Agreed Facts

2. The parties had filed a Statement of Agreed Facts in respect of the original ten appellants. On the day before the appeal hearing, four appellants, namely, Company A, Company B, Company C and Company D withdrew their appeals.

3. The following are the agreed facts relevant to the Appellants:

The Taxpayers

(1) Each of the Appellants

(i) is a private company incorporated in Hong Kong on the following dates:

Taxpayer	Date of incorporation
Company E	December 1977
Company F	December 1985
Company G	November 1977
Company H	August 1988
Company J	January 1989
Company K	December 1992

(ii) the ultimate holding company of which was Company L or Company M or Company N, all of which were and are private companies held by family trusts of Mr P, the Chairman of the Company Q Group;

(iii) was acquired by the Company R in December 2006 and had been wholly owned by it since.

The Properties

(2) The Appellants were the respective developers (or co-developers) of the following Properties ('the Properties'):

Taxpayer	Property	Interest
Company E	Property S #	33.3%
Company F	Property T #	100%
Company G	Property U #	100%
Company H	Property V #	100%
Company J	Property W #	100%
Company K	Property X #	100%

# denotes a commercial building consisting of shops on the lower floors and offices on the upper floors. Shops and offices are collectively referred to as 'commercial units' herein.

(3) Company E developed Property S jointly with Company Y. By a Deed of Exchange dated 16 May 1998, Company E and Company Y became tenants-in-common holding 1/3 and 2/3 of the interest in Property S respectively.

(4) Company F developed Property T jointly with Company Z under a Redevelopment Agreement dated 10 March 1995, pursuant to which 4 shops and 95 office units were allocated to Company F.

(5) Company K developed Property X jointly with Company AA under a Redevelopment Agreement dated 26 June 1997, pursuant to which and a Deed of Exchange dated 3 July 1999 and a Deed of Mutual Covenant dated 3 July 1999, 3 shops and 33 office units were allocated to Company K.

(6) Company G, Company H and Company J were the sole developer of their respective Properties namely, Property U, Property V and Property W.

(7) Occupation permits for each of the Properties were issued on the following dates:

Property	Date of issue
Property S	22-05-1998
Property T	03-01-2000
Property U	04-04-1998
Property V	27-02-1998
Property W	24-02-1998
Property X	17-05-1999

The Financial Statements

(8) For each of the Appellants, for the accounting year in which the occupation permit was issued and for each subsequent accounting year (which all closed on 30 June) up to 30 June 2006, the Appellant's interest in the Property was classified in its financial statements as completed properties for sale under current assets, and was valued at the lower of cost and net realisable value.

(9) In the financial statements of each of the Appellants for the period ending 30 June 2007, the following statement ('the Statement') appears:

> 'During the year, the company has changed its principal activities from [property trading ([Company E] / [Company D]) / acquisition of properties for redevelopment ([Company F] / [Company G] / [Company J] / [Company K] / [Company B]) / holding of properties for sale ([Company H]) / property acquisition and development ([Company A]) / investment holding, sales of properties and leasing of properties for rental income ([Company C])] to property investment upon the company being effectively acquired by [Company R].'; and

'On 21 December 2006, the directors changed the intended use of the completed properties held for sale from "held for sale" to "held for investment". The directors considered the fair value of the properties was [...] as at 21 December 2006 with reference to the valuation as at 30 September 2006 conducted by [Company AB] under the method and assumptions as disclosed in note […]. Accordingly, the properties with fair value of [...] as at 21 December 2006 have been transferred to investment properties and revaluation gain of [...] was recognised in the income statement during the year ended 30 June 2007'.

(10) The interest in each of the Properties was reclassified as investment properties under non-current assets in the financial statement, and the revaluation gain of each was recognised in the income statement, of each Appellant for the period ending 30 June 2007 as per the Statement ('the Gain').

Taxpayer	Gain Recognized (HKD)
Company E	19,301,526
Company F	104,969,837
Company G	49,597,611
Company H	174,416,812
Company J	314,282,352
Company K	119,036,903

The Assessments

(11) Under various assessments, the Commissioner of Inland Revenue ('the Respondent') assessed each of the Appellants to profits tax on the Gain ('the Assessments'). Objections thereto were made by each of the Appellants, but the Assessments were affirmed by the Deputy Commissioner of Inland Revenue under the relevant determinations ('the Determinations'). The Appellants appeal to the Board of Review ('the Board') against the Assessments. The relevant dates of assessment, objection, determination and notice of appeal are:

Taxpayer	Date of Assessment	Date of Objection	Date of Determination	Date of Notice of Appeal
Company E	30-06-2010	22-07-2010	27-01-2012	22-02-2012
Company F	06-07-2010	22-07-2010	27-01-2012	22-02-2012
Company G	24-06-2010	14-07-2010	27-01-2012	22-02-2012
Company H	15-06-2010	12-07-2010	31-01-2012	22-02-2012
Company J	25-06-2010	14-07-2010	31-01-2012	22-02-2012
Company K	03-11-2008	19-11-2008	08-08-2013	22-08-2013

Background

4. In their accounts for the period ending 30 June 2007, the Appellants showed the Gain upon reclassification of completed properties for sale to 'investment properties'. In computing their profits for tax purposes, the Appellants deducted the Gain but the Respondent submits that no such deduction should be made.

5. The relevant charging provision in the Inland Revenue Ordinance ('IRO')[1] is section 14(1) which provides that:

> '*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*'.

6. Particular rules are contained in a number of sections as to the method of computing profits one of which is section 15C which provides as follows:

> '*Where a person ceases to carry on a trade or business in Hong Kong the trading stock of the trade or business at the date of cessation shall be valued for the purpose of computing the profits in respect of which that person is chargeable to tax under this Part as follows –*
>
> *(a) in the case of any such trading stock –*
>
> *(i) which is sold or transferred for valuable consideration to a person who carries on or intends to carry on a trade or business in Hong Kong; and*
>
> *(ii) the cost whereof may be deducted by the purchaser as an expense in computing the profits from such trade or business in respect of which such purchaser is chargeable to tax under this Part,*
>
> *the value thereof shall be taken to be the amount realized on the sale or the value of the consideration given for the transfer;*
>
> *(b) in the case of any other such trading stock, the value thereof shall be taken to be the amount which it would have realized if it had been sold in the open market at the date of cessation.*'

The Cessation Issues

[1] All sections mentioned in this decision refer to provisions in the IRO unless otherwise stated.

7. It is the Respondent's position that section 15C(b) requires the market value of stock to be taken account of on a discontinuance of trade and that this section applied on the reclassification of the Properties to investment properties. On this basis, the Gain must be included in the computation of profit and not excluded as the Appellants claim.

8. In the circumstances, the following issues arise:

(1) Issue 1 - Whether the Properties were 'trading stock' of trades carried on by the Appellants prior to the reclassification?

(2) Issue 2 - Whether such trades were discontinued upon the reclassification?

(3) Issue 3 - Whether section 15C(b) has the effect claimed by the Respondent?

9. The Respondent's case is that the Properties were initially developed by the Appellants with the principal intention of selling at a profit as trading stock. The Appellants were trading and the Properties were being held as trading stock. As indicated in the Appellants' audited accounts and tax computations, such an intention had not changed until they were acquired by Company R on 21 December 2006. It was on that day the Appellant changed their intention, ceased their trade of selling properties for profit, and the Properties were taken out of trading stock and became investments.

10. Accordingly, it is the Respondent's contention that the answers to the first two questions in Issues 1 and 2 above are in the positive. It follows that section 15C(b) applies to the Appellants i.e. the market value of stock should be taken account of on a discontinuance of trade. This was the position whether or not the Appellants had carried on a business after December 2006. What matters is that the Appellants did carry on a trade and that trade ceased on 21 December 2006. Section 15C(b) does not require there to be any actual sale of trading stock on a discontinuance before the subsection applies.

11. Since section 15C(b) applies to the Appellants, the Gain should not be deducted from the profits. As a result, section 14, which charges to tax profits 'as ascertained in accordance with this part' and section 15C being contained in the part in question, must be applied. The question in Issue 3 above should therefore also be in the positive.

The Appellants' Case

No Cessation

12. The Appellants' contention is that there was no cessation at all in this case regardless of how their activities are characterised and how their assets are classified. The

essential commercial activity of each appellant went on unchanged before and after 21 December 2006. At all material time, the Appellants were letting out rather than actively attempting to sell the Properties. Their actual business was letting while being willing to sell if an appropriate opportunity arose.

13. It is not necessary to decide whether the Appellants were carrying on a 'trade' or a 'business' and whether or not they had trading stock which had stopped being trading stock. Even if there were some trading aspects of the essential activity of the Appellants, such as their willingness to sell if an opportunity arose, it is still a business not a trade. The business continued in the same way both before and after the Appellants were incorporated into Company R.

14. It should also be noted that the Appellants' business which was being taxed up to 21 December 2006 was the same business which was being taxed after 21 December 2006. That is so whether it is called a business or a trade and because it is so, there cannot have been a cessation.

Change of Intention

15. It is the Appellants' case that intention to sell or to lease is not an intention to trade. In any event, an expression of intention cannot bring about a cessation of a trade or business. A cessation requires some radical disruption to a commercial activity which changes the very nature of what is happening. The Appellants therefore argue that nothing had changed when they became part of Company R. They continued to do the same thing as they had been doing before.

16. The Appellants further argue that there is no law to support the Respondent's proposition that a change of intention of the use of the Properties from being 'held for sale' to 'held for investment' is evidenced in the Statement. There is no case in which a change of intention on its own has caused a cessation or where a note in the accounts has been held to create a cessation.

Effect of Section 15C

17. The Appellants contend that section 14, which is the charging section, does not impose a tax charge on unrealized profits.

18. Section 15C provides that upon a cessation:

> '*…the trading stock of the trade or business at the date of cessation shall be valued for the purpose of computing the profits…*'

19. The Appellants' case is that section 15C means that trading stock must be valued 'for the purpose of computing the realized profits'. However, the valuation does not create a realized profit. It follows that section 15C cannot on its own cause a tax

charge to arise on a cessation when there is no sale of trading stock because it does not and cannot cause a realized profit to arise.

20. It is accepted by both parties that section 15C is not itself a charging provision but it is a rule to be applied in the determination of profits charged under section 14.

21. The Appellants therefore submit that section 15C does not impose a charge on unrealized profits and there have been no realized profits in these present cases.

Application for amending the Grounds of Appeal

22. On the 9 November 2015, the Appellants made an application for amending their grounds of appeal ('the Application') by adding a new ground in the following terms ('the New Ground'):

The Assessments are incapable of charging the profit allegedly arising from any cessation of the Appellants' trade because:

> (1) the Assessments are made by reference to a basis period ending on 30 June 2007;
>
> (2) the Assessments are made for 2007/08;
>
> (3) if there were indeed a cessation, the basis period would have ended on 21 December 2006;
>
> (4) if the basis period ended on 21 December 2006, any profits for that period would have been assessable for 2006/07, not 2007/08; and
>
> (5) the Assessments have, accordingly, been made on a basis which is inconsistent with the Respondent's arguments and for the wrong year and cannot be sustained.

Circumstances leading to the Application

23. On the fourth day of the hearing, the Respondent made submissions which mentioned the extent to which they were relying on section 18D of the IRO and the period, for which the computation of profits including amounts taxable under section 15C, was to be made. Section 18D provides (*inter alia*) that:

> '*…where … a person ceases to carry on a trade, profession or business in Hong Kong, the assessable profits from that source for the year of assessment in which the cessation occurs shall be computed on the amount of the profits therefrom ... during the period beginning on the day*

following the end of the basis period for the year preceding the year of assessment and ending on the date of cessation.'

24. The Appellants brought to the attention of the Board that the Respondent's submissions raised for the first time in their minds the question of whether the Assessments had been made for the right period. They submitted that the Respondent's arguments appeared to be inconsistent with the Assessments.

25. The Appellants pointed out that the Assessments were all for the year of assessment 2007/08 as stated in the Determinations, the tax returns and the Assessments themselves. They were made by reference to a basis period ending on 30 June 2007. That basis period ended in the year of assessment 2007/08 and the profits taxable for the year of assessment 2007/08 were the profits of that period. The Respondent's case was that those profits included the profits created by section 15C on a cessation.

26. Since it is the Respondent's case that a cessation of the Appellants' trade occurred on 21 December 2006, it follows that the basis period, by reference to which the Gain created by section 15C is taxable, ended on 21 December 2006.

27. According to the terms of section 18D, any notional gain created by section 15C forms part of the assessable profits for the year of assessment in which the cessation occurs. As a result, the year of assessment in which any such notional gain falls to be taxed should be 2006/07, not 2007/08.

28. The Appellants therefore contend that there is no cessation in the year of assessment 2007/08 and the profit claimed by the Respondent to exist and to be taxable, has been charged to tax for the wrong year. The Appellants submit that that is a fundamental error.

29. It is under these circumstances that the Appellants have applied to add the New Ground stating that the Assessments, all for the year of assessment 2007/08, cannot include a profit which, if it exists, arose on 21 December 2006, in the year of assessment 2006/07.

The 'Wrong Year Issues'

30. The Application has given rise to two issues:

(1) Whether leave should be given to the Appellants to re-amend their Grounds of Appeal; and if so;

(2) Whether the New Ground has the effect claimed by the Appellants.

The Respondent's Position on Leave to Re-amend Grounds of Appeal

<u>(i) Procedural Background</u>

31. The Respondent submits that there are clear reasons for the Board to refuse leave.

32. The Assessments were raised by the Respondent for the year of assessment on the basis that the taxable profits included the Gain arising on a reclassification of the properties from trading stock to investment.

33. Prior to the Determination, and as early as 2010, the Respondent made it clear that it was relying on section 15C. In correspondence, the parties had debated the applicability of the section. In each of the Determinations, which were handed down in January 2012, or in Company K's case, in August 2013 (see paragraph 3(11) above), the Respondent decided that section 15C(b) was applicable to the case and explicitly rejecting the Appellants' arguments to the contrary.

34. On 22 February 2012 (or 22 August 2013 in Company K's case), the Appellants appealed against the Determinations. They relied on a number of Grounds of Appeal which did not include any contention that, if any profits arose as a result of the applicability of section 15C(b), they arose in 2006/07, not in 2007/08.

35. As early as May 2014, the Appellants requested the Respondent to consent to the amendment of their Grounds of Appeal. Consent was given and application to amend was made and granted between June 2014 and October 2015. At none of these stages was there any hint that the Appellants would argue that the Assessments were for the wrong year.

36. Neither in the Applications' Skeleton Argument nor in their oral opening did the Appellants suggest that the assessments were for the wrong year.

<u>(ii) Legal Principles</u>

37. Section 66(3) of the IRO provides:

> '*Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).*'

38. The Respondent submits that by virtue of section 66(3), unless the Board gives leave or grants consent for the Grounds of Appeal to be re-amended, there is no basis for the Board to consider the Appellants' 'wrong year' argument. The issue simply does not arise; no matter how interesting or meritorious it may otherwise be.

39. In deciding whether to allow an amendment, the Board must exercise its discretion in a similar manner to how the courts normally exercise their discretion in

making court orders. The Respondent refers the Board to its decision D10/06 (at paragraphs 142-143) and submit that the following principles are particularly relevant:

(1) Whether an amendment should be granted is a matter for the tribunal's discretion. This involves consideration of factors such as the prejudice to the parties in the event an order is or is not made; the stage that the action has reached when the application is made; and any delay in making the application[2].

(2) Where prejudice is caused to the party not seeking the amendment, that would be an important factor weighing against the grant of leave[3].

(3) Even before the Civil Justice Reform, a tribunal would rarely grant an indulgence unless the party seeking the indulgence was able to provide a satisfactory explanation for why it should be granted.[4]

Therefore, in cases of late amendment, it is critical for the party seeking leave to give a satisfactory explanation for the delay. In fact, where the delay is unexplained, the tribunal cannot even begin to weigh up the other discretionary factors.[5]

(4) In the post-CJR era, there is an even greater concern about delay. There is a heightened emphasis that: (i) parties are expected to get their pleadings in order in good time; (ii) amendments may be refused for delay alone; and (iii) it is no longer sufficient for the amending party to say that 'there is no prejudice which cannot be compensated by costs.[6]

As pointed out by Lloyd LJ in Swain-Mason v Mills & Reeve [2011] 1 WLR 2735 at paragraph 72, a tribunal is, and should be, less ready to allow a very late amendment than it used to be in former times; and a 'heavy onus' lies on a party seeking to make a

[2] The Respondent refers to Wing Mou Construction Co Ltd (in liq) v Cosmic Insurance Corporation Ltd (unreported, HCCT 40/2001, 20 June 2002) at paragraph 15(5) per Ma J; and Guangzhou Green-Enhan Bio-Engineering v Green Power Health Products (unreported, HCA 4651/2002, 21 August 2004) at paragraph 14 per Lam J.

[3] In the Board of Review context, the Respondent refers to D1/03 at paragraph 27; D53/90 at paragraph 3.4; D3/07 at paragraph 43.

[4] Chan Wing Cheung Allan v Ho Shu Yee Susana (unreported, CACV 393/2004, 10 January 2005) at paragraph 9(4) per Ma CJHC.

[5] Hesson Development Ltd v Tang Ki Fan Tso (unreported, HCA 5584/1998, 30 September 2003) at paragraphs 5-7 per Chu J.

[6] The Respondent relies on Winford v Ricacorp Properties (unreported, HCA 2481/2008, 22 June 2010) at paragraphs 8-9 per DHCJ Carlson; Star Industrial v Japan Home Centre (unreported, HCA 2294/2008, 21 December 2010) at paragraphs 2 and 7 per DHCJ Carlson; and CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd (No 3) (2015) 160 ConLR 73, at paragraph 15 per Coulson J.

very late amendment to justify it, as regards his own position, that of the other parties to the litigation, and that of other litigants in other cases.

(5) There is a clear difference between allowing amendments that clarify the issue in dispute, and those that set up a new claim or defence for the first time. This difference is particularly important in respect of late amendments. An application made at trial that seeks to introduce a wholly new cause of action or defence at a late stage is more likely to cause prejudice, delay, and wastage of costs. The tribunal will not readily accede to such an application - especially when the new claim or defence could have been raised before the trial began.[7]

(6) Although the tribunal may take into account any prejudice caused to the amending party if the amendment were refused, this consideration carries little weight in situations where the applicant was in a position to raise the new point in question at an earlier time.

(iii) Delay and Absence of Explanation

40. The Respondent submits that in this appeal, the Appellants are seeking the Board's indulgence by making a very late application to amend their grounds of appeal when well before, and in any event by the time of, the Determinations, the Appellants were fully aware of:

(1) the year of assessment referred to by the Respondent;

(2) the Respondent's reliance on section 15C(b); and

(3) the Respondent's case that a cessation of trade occurred on 21 December 2006.

41. The Appellants had ample time to raise an argument that the assessments were for the wrong year. However, they did not do so until the fourth day of the hearing which was nearly 4 years after the Determinations.

42. Although the Appellants assert that they have not spotted the point until the fourth day of the hearing, this factor works against, rather than in favour of, the Appellants. Where a party fails to spot a point and apply for the requisite amendment until the eleventh hour, any negative consequences must be visited upon him, rather than on the other party.

[7] The Respondent cites Igal Dafni v CMA CGM SA [2013] 2 HKLRD 73, at paragraph 20 per Recorder Wong SC.

43. In view of the principles stated at paragraph 39 above, this delay weighs heavily against the grant of indulgence. The New Ground is not an amendment which merely clarifies the existing issues in dispute.

(iv) Prejudice to the Respondent

44. The Respondent contends that the question of amendment should be considered on the assumption that: (i) the Appellants have lost on their other grounds of appeal, but (ii) their 'wrong year' argument is correct.

45. According to the Respondent, if the 'wrong year' argument is unmeritorious anyway, the Board does not even have to decide the question of amendment. Conversely, if the Appellants win on their other grounds of appeal, then again it is unnecessary to decide on the amendment.

46. The Respondent asserts that there will be serious prejudice to the Respondent if the Board allows the Application.

47. Under section 60(1) of the IRO:

(1) The Respondent has the power to raise an additional assessment where 'for any year of assessment any person chargeable with tax has not been assessed or has been assessed at less than the proper amount'.

(2) The time limit for raising such additional assessment is 6 years after the end of the year of assessment in question.

48. The Respondent submits that had the Appellants raised the 'wrong year' argument earlier, the Respondent could easily have raised additional assessments for the year 2006/07 (*ex hypothesi*, the 'correct' year) pursuant to section 60(1). The Respondent could have done so at any time before 1 April 2013 (6 years after the end of the year of assessment 2006/07).

49. The Appellants would have had no answer to such additional assessments raised by the Respondent. However, the time limit under section 60(1) has now long expired and the Respondent can no longer raise additional assessments for the year of assessment 2006/07.

50. In the circumstances, the Respondent contends that it is prejudiced as a result of the point being taken at this very late stage. The alternative course that the Respondent could have adopted to assess profits that *ex hypothesi* are taxable profits is no longer open to him. If the amendment were allowed, the Appellants would gain an unfair and significant advantage by the point not having been raised until nearly 4 years after the Determinations.

51. The Respondent also refutes the Appellants' suggestion that prejudice in this context must be 'prejudice in the proceedings'. The Respondent submits that:

(1) There is nothing in the authorities cited at paragraph 39 above to support such limitation. On the contrary, prejudice in this context carries a flexible meaning. CIP Properties (supra) at paragraph 19(e) per Coulson is cited.

(2) D53/90 bears much similarity to the instant case. The Board at paragraphs 3.2 to 3.4 disallowed a proposed amendment - which related to a 'wrong year of assessment' argument - because the Revenue would be time-barred from taking responsive measures against the taxpayer:

> '*3.2 … de facto, [the taxpayer's] submission constituted an application to amend whereby the ground of appeal would be "in the alternative the receipts of $783,063 and $206,248 were income attributable to the year of assessment 1982/83 and not the years of assessment 1984/85 and 1985/86, respectively, and, accordingly, are not taxable as assessed".*
>
> *3.4 ... The Revenue objected on the grounds that although this matter has been under correspondence since June of 1987, at the latest, the first acknowledgement by the Taxpayer that the receipts were income was made during this hearing. Further the Revenue could not re-open a 1982/83 assessment because section 70 prevents this. This is not disputed by the Taxpayer.*
>
> *The Board is of the view that it would be inappropriate to allow an amendment at this late stage which would enable the Taxpayer by adopting an alternative approach, to call in aid the time bar imposed by section 70.*
>
> *Accordingly, the Board declines to exercise its discretion to allow the amendment.*'

(3) In D3/07, the Board also disallowed a proposed amendment because of potential prejudice to the Revenue. The Board similarly took into account the fact that the Revenue might be precluded by the six-year time limit under section 60 from taking responsive measures against the taxpayer.

52. Regarding the Appellants' contention that Company K is different from the other appellants because the relevant Determination was handed down in August 2013 instead of February 2012; hence no prejudice was caused as the time limit under section 60(1) had already expired by the time of the Determination, the Respondent submits that:

(1) There was no reason why Company K could not have raised the 'wrong year of assessment' prior to the handing down of the Determination. The Appellants were related companies, and it is evident (e.g. from the similarity in wording of the Appellants' letters) that their correspondence with the Respondent was handled by the same group of personnel.

(2) Alternatively and in any event, the amendment should at least be disallowed in the case of the other appellants. Contrary to the Appellants' contention, there is nothing anomalous in the Board coming to a different conclusion in respect of the Company K as compared to the other Appellants. Lateness is a relative concept, as emphasised in CIP v Galliford (supra) at paragraphs 18(b) and 19(a). One factor that will make a difference to the degree of lateness is the date on which the Determination was handed down. Hence, the Board may well come to divergent conclusions where the date of the Determination is different.

(v) Prejudice to the Appellants

53. Regarding the Appellants' argument that they would suffer prejudice if the amendment were disallowed because they would be deprived of a good argument, the Respondent submits that this factor will carry little weight where the tribunal's refusal is caused by the party's own failure to identify the point earlier. Any refusal by the Board would be caused by the Appellants' own failure in not raising the point earlier.

54. Further, had the Appellants taken the point earlier, the Respondent would have been able to make an unanswerable response in the form of additional assessments under section 60(1) (see paragraph 49 above). This means that the Appellants' argument is only a 'good' one because of the Appellants' own failure.

(vi) Whether the Appellants' New Ground arose out of the Respondent's closing submissions

55. The Respondent disagrees to the Appellants' argument that the wrong year point arose out of the Respondent's closing submission on the fourth day of the hearing, in which the Respondent referred to section 18D; hence there was no delay on the part of the Appellants. The Respondent asserts that it has long made clear its case that: (i) section 15C(b) is applicable; and (ii) the Appellants ceased their trade on 21 December 2006. The wrong year point could have been taken at any time after the parties started corresponding

on section 15C back in 2010. There was nothing special said in the Respondent's closing submissions without which the Appellants could not have made this point.

56. The taxpayer has the burden of proving to the Board that the assessment is incorrect or excessive under section 68(4) of the IRO. In circumstances where the Determinations expressly relied on section 15C(b) to uphold the assessments, it was incumbent on the Appellants to study the IRO to identify (and raise in good time) any arguments which could be used to refute the Respondent's reliance - including any argument based on section 18D. The Respondent did not have a duty of identifying potential arguments that could be used to undermine the Determinations.

(vii) General Demurrer

57. In response to the Appellants' contention that the Notices of Appeal contained a 'general demurrer' which might justify the argument that no amendment to the grounds of appeals was necessary, the Respondent contends that this is not the case. The general demurrer clearly relates to whether the Gain is subject to tax, not the year in which such tax charge arises.

58. In summary, the Respondent submits that the Board should not grant leave for the Appellants to re-amend their Grounds of Appeal. The burden is on the Appellants to show that it would be just to allow the amendment, taking into account the fact that the Respondent is deprived of taking a course of action which would have been a complete answer to the new point. Siddell v Smith Cooper & Partners (A Firm) [1999] PNLR 511, at 529D-E per Clarke LJ) is cited.

The Respondent's Position on the Effect of the New Ground

59. The Respondent submits that on the basis the Appellants would otherwise fail in their appeals, it accepts that the Gain should be taxed in the year 2006/07 not 2007/08. However, this defence is not good enough to defeat what is otherwise a valid claim to tax. It is because the difficulty is cured by section 63 of the IRO.

60. Section 63 provides as follows:

> '*No notice, assessment, certificate, or other proceeding purporting to be in accordance with the provisions of this Ordinance shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect, or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Ordinance, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.*'

61. The mistake in the present case is that the Gain should have been included in the assessments for 2006/07. Nevertheless, the Gain assessed (assuming that the

Appellants otherwise fail in their appeals) are properly taxable. In addition, the Assessments were made within the 6-year time limit that would have applied had they been made for 2006/07. Thus the Assessments are 'in substance and effect in conformity with' the Ordinance. In these circumstances, assessment in the wrong year should be ignored by virtue of section 63.

62. The Respondent further argues that the wrong year point is nothing but a technicality and unmeritorious. The Appellants have throughout understood the nature of the Respondent's case. There is no uncertainty as to the nature of the profit arising from the Gain sought to be taxed. Section 63 is designed to preclude technical arguments of the sort in question from being successful. It should be interpreted so that it has this effect.

63. Ultimately, the issue arising is whether an assessment that taxes a profit in the wrong year can be said to be 'in substance and effect in conformity with the Ordinance'. The Respondent contends that this can be said so long as the profit assessed is properly taxable. If the year of assessment is to be regarded as a matter of importance, its importance lies in requiring that an assessment is raised within six years of the relevant year. This was the position in the present case. Inclusion in the wrong year is, in these circumstances, a mere detail cured by section 63.

64. The Court of Appeal in the UK in Baylis v Gregory [1987] 3 WLR 660 said that a similar provision to section 63 could not justify an assessment for one fiscal year being treated as an assessment for another (see page 696 per Slade LJ). However, in John Mander Pension Trustees Ltd v Revenue & Customs [2012] SFTD 322, the First-tier Tribunal commented at paragraph 113 that:

> '*The reason for Slade LJ's decision [in Baylis v Gregory] was that section 113(3) [of the Tax Management Act 1970] requires an assessment to be in the form prescribed by HMRC and HMRC prescribes that the year of assessment be on the notice of assessment.*'

The Board is referred to Slade LJ's quote and reliance of section 113(3) at page 695B-E of Baylis v Gregory.

65. In Hong Kong, there is no similar provision to section 113(3) of the Tax Management Act 1970 ('TMA'). The year of assessment is not required to be stated in the notice of assessment under section 62 of the IRO.

66. The Respondent asserts that the approach of the Court of Appeal in Baylis v Gregory is not relevant. The Respondent does not claim that the 2007/08 assessment can be treated as one made for 2006/07, but rather that there is no bar to the Gain being treated as assessable in 2007/08. Further, the year of assessment is not required to be stated in the notice of assessment in Hong Kong as it is in the UK. In any event, even if the approach of the UK Court of Appeal in Baylis v Gregory is regarded as relevant it is not an approach that should be followed in Hong Kong. Of greater assistance in considering the effect of section 63 is what was said by Hartmann J in Hong Kong Flour Mills Ltd v CIR [2002] 2

HKLRD 121. Having considered the authorities (namely, Baylis v Gregory and CIR v Chan Tin Chu [1966] HKLR 468), Hartmann J said at paragraph 34:

> '*In neither case was an absolute test defined. In each case the nature and extent of the error had to be considered to determine whether it went to substance or was merely an error that went to form. In determining that issue, authorities suggest that one issue that may be considered is the likelihood of confusion arising from the error; another issue - sensibly in my view - may be whether the error can be described as gross.*'

67. In the present case, the Appellants recognized the Gain in their financial statements for the year ended 30 June 2007. The Assessments which taxed the Gain were issued on various dates from November 2008 to July 2010. These assessments were raised for 2007/08 by reference to profits arising in the accounting periods ending in that year in the same way as assessments had previously been raised. In these circumstances it is clear that the error was not gross. It was a technical point that neither party identified until the fourth day of the hearing.

68. After the Assessments were raised, the Appellants objected and appealed against them arguing that the Gain should not be taxable. The Respondent therefore asserts that no confusion has been caused to the Appellants.

69. In summary, the Respondent submits that on the premises that the Gain is taxable, it would be objectionable if the 'wrong year' point was effective to preclude the Gain which are properly taxable from being taxed. In these circumstances, section 63 applies so that the "wrong year" point has no effect.

The Appellants' Reply to the Respondent's Submissions on the 'Wrong Year Issues'

(i) 'Wrong Year Point' not put forward by the Appellants

70. The Appellants argue that it is the Respondent's own assertion that the right year was 2006/07 by the operation of section 18D. As mentioned in paragraph 59 above, the Respondent accepts that the Gain should be taxed in the year 2006/07 not 2007/08. Since this appeal concerns the Assessments relating to the year 2007/08, the Respondent has admitted that the Assessments are excessive and incorrect to the extent that they charge the notional gain under section 15C even if there have been cessations as claimed the Respondent.

71. The Appellants submit that the Board cannot pretend that it does not know that the Assessments are wrong, now that it is a fact admitted by the Respondent. The Appellants urge the Board not to uphold the Assessments for one procedural reason or another as it has no power or authority to do so. It is not a matter of procedure but of jurisdiction.

(ii) Jurisdiction

72. The Appellants assert that on an appeal to the Board against an assessment, the dispute which is resolved by the Board is the amount of the assessable income for the year in which the assessment is challenged.

73. If the Board knows that the assessable profits of 2007/08 are on a certain amount, it cannot uphold an assessment which is not a charge on that amount because it will not then be determining the amount of the assessable profits of the year, which is all that it is allowed to do.

74. It is the Appellants' contention that they are not seeking to raise an argument which might be right or wrong. There is no open issue of fact before the Board as to the question of whether 2007/08 is the right year or the wrong year. The Respondent raised the point that the Assessments were for the wrong year. There is now no live dispute as to the amount properly assessable for 2007/08: it cannot include the Gain whether or not there was a cessation. If the Board upholds an assessment for 2007/08 which includes the Gain, it will have knowingly upheld an assessment which is excessive or incorrect. It has no power to do that.

75. The point that the Assessments, all for 2007/08, before the Board are known and, indeed, admitted to be wrong is so fundamental that no procedural question can affect it. It does not matter how the Board came to know that the assessments for 2007/08 are wrong. Once it knows that that is so. It cannot proceed deliberately to uphold a wrong assessment. It is, indeed, *ultra vires* for the Respondent to seek to uphold an assessment for tax for a sum for 2007/08 when it has admitted, by his own argument, that the correct tax is not that sum.

76. Unlike other cases in which an appellant seeks to raise a point which was not originally in its notice of appeal, the Appellants in this case have not raised any point. The point now before the Board was raised by the Respondent itself. This is not a case in which the Appellants are seeking to rely on a ground of appeal not in their original notice of appeal: the point emerged from the Respondent's submissions and the Appellants now seek to rely on the admission by the Respondent that it has assessed the wrong year.

77. The Respondent has not explained how the Board can have jurisdiction to uphold an assessment known to be wrong. Accordingly, the Appellants are entitled to rely on, and the Board is under a duty to give effect to, its only legal consequence, namely that the Assessments are wrong.

(iii) Effects of the 'Wrong Year Issues' and Section 63

78. The Appellants refute the Respondent's submission that an assessment which charges tax in 2007/08 on income which is properly assessable for 2006/07 is, 'in substance and effect in conformity with the Ordinance'. The Appellants contend that these appeals are about assessments to profits tax, which are by section 14, chargeable 'for each year of assessment', a term defined in section 2(1). An assessor may serve any person with a notice requiring him to furnish a return specified by the Board of Inland Revenue for,

among other things, profits tax. In this case, at the relevant time the return form specified by the Board of Inland Revenue also specified the year of assessment for which the return was to be made. The Assessments were so made for the year of assessment of 2007/08 in accordance with section 59 or section 60. The importance of the year assessed to tax is further apparent from the terms of section 60, which provide a six-year time limit for the making of further assessments.

79. The statutory scheme outlined in paragraph 78 above makes it apparent that identification of the year of assessment in which a sum is taxable is fundamental to the imposition and operation of the charge to profits tax. It goes to the very root of the charge to tax.

80. The Appellants contend that the law is that the correct identification of the year of assessment is so fundamental that the assessor must get the year right. That was decided in Baylis v Gregory.

81. The Appellants further assert that the Respondent misrepresents the decision in John Mander Pension Trustees Ltd v Revenue & Customs. The passage which the Respondent quotes from that case appears under a heading which reads 'An assessment must be for the right year' and paragraph 114 of the decision (which follows the passage quoted by the Respondent) reads:

> '*HMRC do not dispute that an assessment must specify the correct year of assessment*'

82. The Appellants disagree that the need for the year of assessment to be correctly specified is derived from any special UK administrative requirement about forms. In fact, the Court of Appeal of England and Wales in Baylis v Gregory said:

> '*To sum up, however … neither section 114 nor any other statutory provision provides an escape route for the Revenue if they issue an assessment for the wrong fiscal year. This is something they must get right*'

The need to get the year right, held in that passage to exist, is general and overriding and is not in any way derived from the form filling provisions of section 113(3) of the TMA.

83. The Appellants submit that the proposition that there is in Hong Kong no provision equivalent to section 113(3) of the TMA is wrong. So far as returns are concerned, section 51AA(1)(a) and (b) is, in all respects, similar to section 113(3) of the TMA.

84. The Appellants also disagree that there is no absolute test as to when an error in an assessment can be remedied or not, and that the question is whether confusion has been caused to the taxpayer. The quote extracted by the Respondent from Hong Kong Flour Mills Ltd v CIR makes it clear that the 'confusion' test is just one issue which may

be considered. The crucial point to decide in each case under section 63 is whether the error goes to substance rather than to form: if it is the former, it is not curable under section 63.

85. According to the Appellants, there may be cases where the question of confusion to the taxpayer is relevant but getting the year of assessment wrong is not one of those cases. The year is, as Baylis decides (and which Hartmann J cited with approval in Hong Kong Flour Mills), something that must be got right.

86. The Appellants also contend that no questions of morality or fairness arise in this case. The IRO does not allow the Respondent to tax income which, if it exists at all, is assessable for 2006/07, for the year 2007/08.

(iv) Delay, Prejudice and Absence of Explanation

87. In response to the Respondent's contention that delay in raising the wrong year point should weigh against the ability of the Appellants to rely on the point, the Appellants argue that since it was the Respondent who raised the wrong year point, the questions of delay or prejudice are not relevant. The Appellants are able to reply on a point made by the Respondent itself without needing leave to do that.

88. The Appellants assert that the real claim of the Respondent is that no appellant can raise a point about the wrong year after the time limit for assessing the right year has expired.

89. In this case, the above claim means that the Appellants were only allowed to raise the wrong year point up to but not after 31 March 2013. If that was correct, Company K, which was assessed to tax after 31 March 2013, would never have been allowed to raise the point in response to the Determination on it, even if it sought to raise it in its original notice of appeal.

90. Since it must be wrong that Company K would not be allowed to raise the wrong year point, it can be seen that Company K could have raised the wrong year point after the time limit for assessing the right year had expired. It is apparent that there is no absolute rule precluding the raising of the wrong year point after the expiry of the time limit.

91. The Appellants refute the Respondent's argument that Company K could have raised the wrong year point before the time-bar prior to the handing down of the Determination on the ground that it was in the same group as the others and handled by the same team. That submission would mean that a taxpayer has the duty to point out to the Respondent any mistake it has made so that it can correct it within time.

92. It is the Appellant's contention that once the expiry of the right year time limit is seen not to be a bar to raising the wrong year point, there is no point at which, as a

matter of law, or of logic or of fairness or, indeed, of anything else, the Appellants are barred from raising the wrong year point.

93. On the assumption that the Appellants were not hiding the wrong year point from the Respondent until the time limit for the right year expired, but had spotted it on 1 April 2013 i.e. one day after the time limit, the question which arises is whether they would then have been allowed to raise it. At that time they would have been some 2½ years away from the hearing of their appeals. At the hearing, there would have been no surprises for the Respondent and it is inconceivable that permission to raise the point would not have been granted.

94. The Appellants also raise the question that if permission to argue the wrong year point would have been granted in relation to an application to amend in April 2013, then at what point an application would have been refused. The Appellants point out that it is not a case where further evidence was needed. Nor is it a case where legal research was necessary. The Appellants submits that the Respondent has not been in any way harmed by delay or been disadvantaged by anything the Appellants have done. Any prejudice is caused by the Respondent, not the Appellants.

95. The Appellants also refute the Respondent’s argument which effectively means that a point which shows that an assessment is for the wrong year may never be raised after the time limit for the right year has expired because the Respondent will be prejudiced by the late taking of the point out of time for assessing the right year. Likewise, the Appellants point out that it cannot be correct that a taxpayer carries the duty to point out errors made by the Respondent.

96. In order to demonstrate that any allegations of delay or prejudice are irrelevant in this case, the Appellants put forward a scenario that if the Board were to reject the Application and uphold the Assessments, it would have to find that there was a cessation of the Appellants’ trades on 21 December 2006. If the Appellants were then to ask for a case stated, at least one question of law arising from it would be whether the Assessments, all for 2007/08, were for the right year in view of the finding of a cessation on 21 December 2006 and the provisions in section 18D. Under section 69(5), a judge of the Court of First Instance (‘CFI’) would have the power, and indeed is under a duty, to hear and decide that question. This is so even if this question is not expressly stated in the case stated, as long as the question properly arises out of the findings and conclusions. The Appellants refer the Board to CIR v Rico International Ltd (1965) 1 HKTC 229, CIR v Inland Revenue Board of Review [1989] 2 HKLR 40 and Emerson Radio Corp v CIR [1999] 1 HKLRD 250.

97. The Appellants therefore submit that it is possible for the wrong year point to be raised for the first time after the Board hearing. Since that is so, it cannot possibly be the case that delay or prejudice at any time up to the hearing of an appeal in the CFI can possibly be relevant where a wrong year point arises.

98. Even if leave to amend to add the New Ground is required, the Appellants rely on the judgment of Recorder H Wong SC in Igal Dafni v CMA CGM SA [2013], in which it was held that 'the Court would generally allow amendments made for the purpose of determining the real question in controversy between the parties' and 'while amendment can be made at any stage of the proceedings, the later the stage, the more scrutiny the application will be subject to.'

99. The Appellants also refer the Board to the case: Zebra Industries (Orogenesis Nova) Ltd v Wah Tong Paper Products Group Ltd [2014] relating to the consideration for allowing amendments including delay in concluding the matters, any requirement for adjournment, costs and prejudice.

100. The Appellants contend that they did not raise the point earlier only because it was not spotted earlier. This was not due to any tactical manoeuvre, or hiding of important points until the last minute. If there had been a failure to spot the point, it was a failure shared by the Respondent who presumably was the person most familiar with the IRO.

101. The Appellants argue that there is no principle that, if a delay is not explained, then any amendment must be refused, except that late amendments ought to be considered with particular care. But this cannot derogate from the basic point that the matter is one for the discretion of the tribunal to be exercised to achieve overall justice. The Appellants refer to Chan Wing Cheung Allan v Ho Shu Yee Susana 2005, Hesson Development Ltd v Tang Ki Fan Tso 1998, and Ketteman v Hensel Properties Ltd 1987.

102. The Appellants draw the Board's attention to the fact that the only question before this Board is whether the Assessments, for 2007/08, on the Appellants are excessive or incorrect. Their tax position for 2006/07 is not before the Board and is irrelevant, and so is any allegation of prejudice regarding the Respondent's ability to collect more tax for that year. Any argument that the Respondent is prejudiced because they can now only collect less (or no) tax for 2007/08 because of this wrong year point cannot be relevant. The Appellants refer to Hancock Shipping Co Ltd v Kawasaki Heavy Industries Ltd 1991, Arta Properties Ltd v Li Fu Yat Tso 1998 and Smith v Retirement Benefits Fund Investment Trust (No.2) 1994.

Finding

Leave to Re-amend

103. There was considerable emphasis by both parties in their submissions and in referring to the cases which they put forward on the general principles of delay and prejudice relating to the raising of the wrong year point.

104. Based on the facts presented to the Board, it has no difficulties in accepting the Appellants' submission that they were not hiding the wrong year point until the eleventh hour as any kind of tactical manoeuvre. The Board is also satisfied that there

has been no bad faith on the part of the Appellants either. From the evidence before the Board, it is obvious that neither party spotted the wrong year point until the fourth day of the hearing. At all material time, both parties focussed their arguments over the effects of section 15C regarding cessation of a trade or business. The evidence shows that there was no mention of section 18D in the Assessments, Determinations or the correspondence. The failure to detect the significance of the basis period should be equally shared between the parties.

105. The Board is also satisfied that in these appeals, the proposed re-amendment to the Grounds of Appeal albeit brought up at a very late stage, did not require any adjournment of the hearing, calling of further evidence, delay in concluding the matter, lengthy legal research or wastage of costs. The Respondent has been given sufficient time to deliberate on the New Ground before making its final submissions.

106. It is no doubt of paramount importance that the Board must take particular care in considering whether to allow the Application; given that it was made almost towards the conclusion of the hearing. The later the application to amend, the greater the likelihood of prejudice to the other party. However, the Board will weigh up this delay factor against other considerations including the cause of and the circumstances leading to the late Application. At the end of the day, this is a matter for the discretion of the Board to be exercised to achieve overall justice.

107. In our analysis of the facts, delay and prejudice should not carry too much weight in our consideration of the Application. The Board finds that it would be unreasonable for it to hold that the Appellants should not be allowed to raise the wrong year point once the six-year time limit had been past. Equally, it cannot be right that a taxpayer should be expected to carry the duty to timely point out an error made by the Respondent or be barred if it *bona fide* failed to do so in a timely manner. Based on these findings, it will be difficult to decide at which point in time the Appellants should be barred from raising the wrong year point. It can be at any time between 1 April 2013 and the last day of the appeal hearing when any legal consequences of the wrong year point would remain the same.

108. The difficulty is more apparent in the Company K situation when the relevant Determination was handed down in August 2013 which was four months after the time limit. The Board does not accept the Respondent's argument that Company K could have also raised the wrong year point prior to the handing down of the Determination on the ground that it was a related company of the other Appellants. Nor does the Board consider it correct to treat the Company K appeal any differently from the other appeals given that they are all based substantially on the same facts and involved the same legal principles.

109. The Board also accepts the Appellants' contention that the Application is not a matter of procedure but of jurisdiction and the wrong year point is so fundamental that no procedural question can affect it. The Board agrees that there is now no open issue of fact before the Board as to the question of whether 2007/08 is the right year or wrong

year. The Respondent has accepted that it is a wrong year. The Board is now dealing only with an appeal against the Assessments for the tax year 2007/08. The Appellants are not seeking to rely on a ground of appeal not in their original notice of appeal. Instead, they are seeking to rely on the admission by the Respondent that it has assessed the Appellants for the wrong year.

110. As regards the Respondent's claim that they would suffer prejudice if the Application were allowed since less or no tax could be charged on the Appellants for the year 2006/07, the Board takes the view that any tax assessment for 2006/07 is not an issue before the Board. What concerns the Board is the Assessments which are for the tax year 2007/08.

111. In view of the above finding, the Board will grant its consent, if it is indeed needed, to re-amend the Appellants' Grounds of Appeal. The Application is therefore allowed.

Effects of the New Ground and Section 63

112. In the Board's analysis, there is no basis for the Respondent to claim that the New Ground is nothing but a technicality, and that section 63 is designed to preclude that sort of technical arguments.

113. There is little merit in the argument that the Assessments which were properly assessable for 2006/07 were 'in substance and effect in conformity with' the IRO. The Board also finds it difficult to accept the contention that the importance of the year of assessment lies in the requirement for the assessment to be raised within six years and inclusion in the wrong year is a mere detail cured by section 63.

114. Having regard to submissions advanced by both parties and the authorities cited, the Board is of the view that identification of the year of assessment in which profits are taxable is fundamental to the process of charging profits tax. The Board finds no reason not to follow the decision in Baylis v Gregory i.e. the year of assessment is something that must be got right, and in this respect the laws in the UK and Hong Kong are very similar.

115. The Board asks the same rhetorical question posed by the Appellants. That is:

> 'Can the taxing of profits of Year 2 in either Year 1 or Year 3 be something done (in the words of section 63) in substance and effect in conformity with the IRO?'

116. The answer to the above question is a resounding no.

117. The Board is now facing these appeals against the Assessments which are all for the tax year 2007/08. The Board is aware of the fact that that is the wrong year. It

does not matter how the Board got to know about this fact. In any event, if leave is required before the wrong year point can be advanced, leave is granted. The Board has also found that the wrong year point is very fundamental to the Assessments and cannot be cured by section 63. In the circumstances, the Board has no power or authority to do anything other than holding that the Assessments are excessive and incorrect.

Conclusion

118. For the reasons and analysis set out above, the Board finds that the Appellants have discharged their onus of proving that the Assessment are excessive or incorrect under section 68(4).

119. The finding of the Board is made solely on the basis that the Assessments are for the wrong year, a fact admitted by the Respondent, and that the Board has no power to uphold them. This finding has disposed of these appeals and the Board does not see any necessity in making any decision on the substantial appeals or the related cessation issue.

120. The Board wishes to take this opportunity of thanking the parties and their legal representatives for their assistance in this case.