Case No. D57/09

Property tax – management companies licensed common areas to licensees – assessment of property tax on common areas – assessment only against particular owners of common area but not others – whether appellants bound by their grounds of appeal – whether appellants liable as owners in common of the common areas – whether appellants properly singled out by the Revenue in property tax assessment – meaning of 'owner' – sections 2, 5, 5B, 56A, 66 and 68 of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Andrea S Y Fong and Susanna W Y Lee.

Date of hearing: 5 June 2009.
Date of decision: 9 March 2010.

The appellants were tenants-in-common of a shop ('the Shop') of a building ('the Building'). The ground floor (on which the Shop was situated) to 2nd floor of the Building was a shopping arcade ('the Arcade'), in which the use of certain common areas on the 1st and 2nd floors ('Licensed Areas') were licensed by the management companies to certain licensees. Assignment of the Shop to the appellants was subject to and with the benefit of the Deed of Mutual Covenant of the Building ('DMC') and the Sub-Deed of Mutual Covenant of the Arcade ('Sub-DMC'). Under the DMC, exclusive occupation of the 2nd floor was allotted to an owner. Under the Sub-DMC, the Arcade common areas were only common to the Arcade unit owners. Owners of units in the basement or above the Arcade were neither subject to nor had the benefits of the Sub-DMC.

The Revenue assessed the appellants, but not any of the management companies or other owners of the Arcade, to property tax for the Licensed Areas. The appellants objected to the assessment, such objections were rejected and the appellants appealed to the Board, contending, *inter alia*, that (i) the Commissioner was wrong to hold that the Licensed Areas formed part of the common areas; (ii) further or alternatively, the Commissioner was wrong to hold that the definition of 'owner' in the IRO referred to any one of the co-owners of the Arcade; (iii) further or alternatively, the Commissioner failed to take into account the DMC, the Sub-DMC, section 16 of the Building Management Ordinance and/or the Departmental Interpretation and Practice Note No. 14 in concluding the meaning or ambit of 'own'.

Held:

Onus of proof and the Board's function

1. Under the IRO, the appellants were, unless permitted by the Board, bound by the grounds of appeal which also restricted the scope of evidence to be

adduced before the Board. Application to amend the grounds of appeal should be sought fairly, squarely and unambiguously and notice in writing to the Clerk and the Commissioner should be given as soon as possible. Since none of the grounds of appeal raised the issue of burden of proof and there was no application to amend the grounds of appeal, the appellants were bound by them.

2. The approach formulated in the grounds of appeal was misconceived. Whether the Commissioner gave correct reasons for his determination was irrelevant. The Board considers the matter *de novo* to decide whether the assessment was shown to be incorrect or excessive. The onus of proof was on the appellants. (Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213; Wing Tai Development Co Ltd v CIR [1979] HKLR 642; Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433; and Shui On Credit Company Limited v Commissioner of Inland Revenue (2009/10) IRBRD, vol 24, 589 considered)

Common areas

3. The 2nd floor did not form part of the common area of the Building. There was also no evidence that any part of the 1st floor had been used for access and egress. The appellants failed to make out any factual basis that the Licensed Areas formed part of the common areas of the Building.

4. Further, having agreed the facts, the appellants were not open to challenge the fact that the Licensed Areas were situated in the common areas of the Arcade on the 1st and 2nd floors.

Chargeability of property tax

5. From the evidence, the appellants were owners in common of the land and of the Building (with other unit owners therein) as well as owners in common of the Arcade (with other unit owners therein).

6. Under the IRO, property tax was chargeable on 'every person' being owner of any land and buildings. By reason of their ownership of the Arcade common areas, the appellants were therefore chargeable to property tax.

7. Further, under the IRO the appellants as owners in common of the Arcade common areas were answerable for doing all such acts, matters and things as would be required to be done by a sole owner. The Revenue was permitted to single the appellants out for unfavourable treatment by assessing them alone to property tax. It was unrealistic for the Revenue to contend that they could sue each of the other hundreds of co-owners for contribution.

Appeal dismissed.

Cases referred to:

Jumbo King Limited v Faithful Properties Limited and others (1999) 2 HKCFAR 279
Hochstrasser v Mayes [1960] AC 376
Wing Tai Development Company Limited v CIR [1979] HKLR 642
China Map Limited v CIR (2008) 11 HKCFAR 486
Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213
Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433
Shui On Credit Company Limited v Commissioner of Inland Revenue (2009/10) IRBRD, vol 24, 589

Lorinda Lau Counsel instructed by Messrs Simon Ho & Co, Solicitors, for the taxpayers.
Jennifer Tsui Counsel instructed by William Liu , Government Counsel of the Department of Justice for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The appellants are tenants-in-common of a shop on the ground floor of a building. There is a shopping arcade on the ground, 1st and 2nd floors of the building.

2. The management companies of the arcade licensed a number of licensees to use certain common areas on the 1st and 2nd floors of the arcade.

3. The Revenue assessed the appellants, but not any of the management companies nor any other owner of any part of the arcade, to property tax based on the amounts of licence fees payable by the licensees to the management companies under the licence agreements.

4. The appellants felt exceptionally aggrieved by what seemed to them an arbitrary, capricious and unjust decision to single them out for discriminatory treatment.

5. Their objections were rejected by the Revenue and they now appeal to this Board.

The agreed facts

6. The parties agreed the facts in the 'Statement of Facts' and we find them as facts, see paragraphs 7 to 14 below.

7. The appellants had on 11 August 1994 become the owners holding a shop ('the Shop') on the ground floor of a building ('the Building') as tenants-in-common. The purchase price of the Shop was $3,600,000.

8. A shopping arcade ('the Arcade') is located on the ground to 2nd floors of the Building. The Shop is situated at the ground floor of the Arcade.

9. In accordance with the Second Schedule of the Sub-Deed of Mutual Covenant dated in November 1993 ... which was supplemental to the Deed of Mutual Covenant dated in May 1962 ..., the Arcade consisted of 134 shops (3 shops on the ground floor, 18 shops on the 1st floor and 113 shops on the 2nd floor); 1,018,188 undivided shares[1] (to which the Shop consisted of 250 shares.)

10. At the relevant time[s], ManagementCo1 and ManagementCo2 ([as] from September 2000) were successively appointed to manage the Arcade as the manager.

11. The following table is a summary of the licence agreements relating to certain common areas on 1/F and 2/F of the Arcade:

	Licensee	**Licensor**	**Date of Agreement**	**Term**	**Monthly Licence Fee**
(a)	Licensee1	ManagementCo1	[unknown]	1-2-1998 – 31-1-2000	$8,000
(b)	Licensee1	ManagementCo2	[unknown]	1-9-2000 – 31-8-2002	$8,000
(c)	Licensee2	ManagementCo2	[unknown]	1-9-2000 – 31-8-2002	$6,000 to $8,000
(d)	Licensee3	ManagementCo1	[undated]	1-4-1998 – 31-3-2000	$8,000
(e)	Licensee3	ManagementCo1	[unknown]	1-4-2000 – 31-8-2000	$6,000
(f)	Licensee3	ManagementCo2	[undated]	1-9-2000 – 31-8-2002	$8,000
(g)	Licensee4	ManagementCo1	29-8-1998	1-3-1998 – 28-2-2000	$8,000

[1] This is a sloppy draftsmanship. It says '1,018,188 undivided shares' but is silent on 'of what'. An undivided share for the purpose of a ground floor shop means 1/23,000th undivided share of and in 4/920th parts or shares of and in the land and the Building. An undivided share for the purpose of a first floor shop means 1/178,367th undivided share of and in 16/920th parts or shares of and in the land and the Building. An undivided share for the purpose of a second floor shop means 1/816,821th undivided share of and in 91/920th parts or shares of and in the land and the Building.

(h)	Licensee4	ManagementCo1	24-1-2000	1-3-2000 – 31-8-2000	$8,000
(i)	Licensee4	ManagementCo2	[undated]	1-9-2000 – 31-8-2002	$8,000

12. On 9 April 2006, 21 June 2007 and 30 March 2008, the appellants filed Notices of Objection ('the Objections') objecting against Property Tax Assessments[2] for the years of assessment 1999/2000 to 2001/02 (tax payable for the 3 periods are $32,640, $33,600 and $43,200 respectively). The net assessable value for the 3 periods are $217,600, $224,000 and $288,000 respectively.

13. On 4 February 2009, Deputy Commissioner of Inland Revenue handed down the Determination in writing and considered that the Objections of the appellants failed. The Property Tax Assessments for the 3 distinct periods have been revised to $31,844, $32,833 and $42,379 respectively. The net assessable value for the 3 periods have been revised to $212,296, $218,888 and $282,528 respectively.

14. On 3 March 2009, the appellants through their solicitors, Messrs Simon Ho & Co, filed Notice of Appeal and Statement of Facts and Grounds of Appeal.

The grounds of appeal

15. The appellants' grounds of appeal read as follows (written exactly as in the original):

> ' 17. The CMR[3] was wrong to hold that the License Areas formed party of the common areas and thus the Appellants should be chargeable to property tax in respect of the licencee fees paid by the [Licensees] for the Licensed Areas. From the Sub-Deed and Deed Supplemental, the common areas were beneficially owned by the 2nd Confirmor ... and then assigned to ... in 2004.
>
> 18. Further or in the alternative, even if the License Areas do form part of the common areas, which the Appellants do not agree, the CMR was wrong to hold that the definition of "owner" in Section 2 of the Inland Revenue Ordinance, Cap. 112 ["IRO"] and Section 56A of IRO, when read together or separately, refer to any one of the co-owners of the Arcade, thus the Appellants is liable to pay the alleged property tax. In concluding owners include the co-owners instead of the Arcade Manager in the material case, the CMR wrongly ignore the overall context of IRO. For example, section 7C of IRO stipulated that bad debts can be deducted in computing the assessable value. Given the Appellants, being 1 of 134 Shops' owners and not the party entering into various licence agreements with the [Licensees] nor the party get paid for the

[2] The property tax assessments were not identified in the 'Statement of Facts'.
[3] Defined to mean the Deputy Commissioner of Inland Revenue.

Licence Fees, would not be able to claim for [bad] debt adjustments as the Appellants did not have knowledge of the bad debt. The Appellants would not have knowledge of the sum of Licence Fees paid and is not in the position to report the sum or dispute the sum. The Appellants did not even know the sum of Licence Fees received or receivable for any material periods. It is therefore clear that the intention of the said provisions, in defining owner(s), could not include owner in the Arcade or any multistory buildings when Appellants are all but one of the co-owners. The example cited in section 56A in fact made in quite explicit that it referred to joint tenant or tenant-in-common (or the incorporate owners or their agent(s)).

"(1) In ascertaining the assessable value of any land or buildings or land and buildings under this Part for any year of assessment commencing on or after 1 April 1983, there shall be deducted any consideration in money or money's worth, payable or deemed to be payable on or after 1 April 1983 to, to the order of, or for the benefit of, the owner in respect of the right of use of that land or buildings or that land and buildings and proved to the satisfaction of the assessor to have become irrecoverable during that year of assessment."

See: Section 7C(1) of IRO

19. Further or in the alternative, even if the License Areas formed part of the common areas, which the Appellants do not agree, the CMR err in law in failing to take into considerations of the DMC, the Sub-Deed, section 16 of the Building Management Ordinance, Cap. 344 and/or the Departmental Interpretation and Practice Note No. 14 (Appendix 5) in concluding the meaning or ambit of own. Combining paragraphs 18 and 19 herein, the tax assessments should be made in the name of the Incorporated Owners of [the Building] and/or the agent of the owners' incorporation, namely [ManagementCo2].

"When the owners of a building have been incorporated under section 8, the rights, powers, privileges and duties of the owners in relation to the common parts of the building shall be exercised and performed by, and the liabilities of the owners in relation to the common parts of the building shall, subject to the provisions of this Ordinance, be enforceable against, the corporation to the exclusion of the owners, and accordingly-

(a) any notice, order or other document which relates to any of the common parts of the building may be served upon the corporation at its registered office; and

(b) any proceedings in the tribunal in respect of any of the common parts of the building may be brought and pursued by or against the corporation."

See: Section 16 Building Management Ordinance, Cap. 344

"43. However, when an owners' corporation is formed, section 16 of the Building Management Ordinance (Cap. 344) provides that the rights and duties of the owners relating to the common parts of the building shall be exercised and performed by the incorporated owners of the building. Therefore, the incorporated owner is required, on behalf of all the owners of the building, to report the income and pay the tax."

See: The Departmental Interpretation and Practice Note No. 14 (February 2005)

20. The CMR wrongly fail to appreciate that the case of the Appellants was different from the decision in Case No. D80/02 (Appendix **6**) concerning hardship which was founded on its own particular facts and, therefore err in law in holding that hardship has no relevance and could not affect the construction of section 56A thus would have no bearing in the Appellants' Objection. In reading the case, if the Appellants were able to show gross unfairness and grave hardship on him as a result of section 56A, IRO, the Appellants may not be held liable for the property tax assessed. In light of the situation, the Appellants had shown gross unfairness and grave hardship of the same.

See: Inland Revenue Board of Review Decisions No. D80/02'

The hearing

16. The appellants' list of authorities reads as follows (written exactly as in the original):

' 1. Departmental Interpretation and Practice Notes No. 14 (Revised) — February 2005

2. IRD B/R Decisions No.D80/02

3. IRD B/R Decisions No.27/98

4. The Annotated Ordinances of Hong Kong Inland Revenue Ordinance, Cap. 112 P.18

5. Incorporated Owners of Chungking

Mansion V Shamdasani Marhi HCA 1056 of 1988

6. Sections 2, 5, 7C, 56A, 68 of Inland Revenue Ordinance, Cap. 112

7. Sections 16 and 18 of Building Management Ordinance Cap.344'

17. Ms Jennifer Tsui, counsel instructed on behalf of the respondent, did not submit any list of authorities.

18. At the request of the Board, the appellants supplied the Board with copies of:

Jumbo King Limited v Faithful Properties Limited and others (1999) 2 HKCFAR 279

19. The appellants made further submissions on:

Hochstrasser v Mayes [1960] AC 376 at page 385

Wing Tai Development Company Limited v CIR [1979] HKLR 642 at page 646

20. Neither party called any witness.

Onus of proof and the Board's function

21. Section 66 of the Inland Revenue Ordinance, Chapter 112, provides that:

'*(1) 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 ... either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by a copy of the Commissioner's written determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal.*

...

(2) 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).'

22. Section 68(7) provides that:

> '*(7) At the hearing of the appeal the Board may, subject to the provisions of section 66(3), admit or reject any evidence adduced, whether oral or documentary, and the provisions of the Evidence Ordinance (Cap 8), relating to the admissibility of evidence shall not apply*'.

23. The appellants are bound by the grounds of appeal which also restrict the scope of evidence to be adduced before the Board[4]. Unless permitted by the Board under section 66(3), the appeal is confined to the original grounds of appeal[5]. Applications for the Board's consent to amend the grounds of appeal 'should be sought fairly, squarely and unambiguously'[6] and notice in writing to the Clerk and to the Commissioner should be given as soon as possible.

24. None of the grounds of appeal raises the issue of burden of proof and there is no application under section 66(3). The appellants are bound by the grounds in their notice of appeal.

25. Their approach as formulated in the grounds of appeal is misconceived. Whether the Commissioner gave correct reasons for his determination is a matter of historical interest. The Board considers the matter *de novo* to decide whether the assessment appealed against is shown by the taxpayer to be incorrect or excessive:

(1) Section 68(4) of the Inland Revenue Ordinance, Chapter 112, provides that:

> '*The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant*'.

(2) In Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213, Bokhary PJ referred in paragraphs 5 and 6 to counsel for the taxpayer's citation of Wing Tai Development Co Ltd v CIR [1979] HKLR 642 on section 68(4):

> '*5. Section 68(4) of the Inland Revenue Ordinance, Cap. 112, provides that "[t]he onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant". As to that, the Taxpayer points to the Court of Appeal's decision in Wing Tai Development Co. Ltd v. CIR [1979] HKLR 642. As one sees at p.646, the Crown argued that a taxpayer did not discharge its onus under s.68(4) merely by proving that an assessment was excessive, but had to prove the extent to which it was excessive. The assessment in that case proceeded on the basis that certain*

[4] Section 68(7).
[5] China Map Limited v CIR (2008) 11 HKCFAR 486 at paragraphs 9 & 10.
[6] China Map Limited v CIR (2008) 11 HKCFAR 486 at paragraphs 9 & 10.

shares which the taxpayer had sold on 4 or 6 April 1973 at an average price of $3.84 per share were worth $1.00 per share on 23 February 1973 which was the date of the agreement pursuant to which the shares were allotted to the taxpayer. If they were worth more than $1.00 per share on 23 February 1973, then the assessment would be excessive.

6. The Board of Review found that those shares were worth more than $1.00 per share on 23 February 1973, but nevertheless affirmed the assessment. Remitting the case to the Board of Review, the Court of Appeal held (at p.648) that the Board of Review were duty-bound to reach a finding as to the true value of the shares on 23 February 1973 "however difficult it might be to do so and however much it would be a matter of guesswork". In so holding, the Court of Appeal relied on what Danckwerts J did in Re Holt, dec'd, Holt v. IRC [1953] 1 WLR 1488, namely find the value of shares by (as he said at p.1502) making "the most intelligent guess" that he could.'

His Lordship stated at paragraph 50 that a taxpayer is not entitled to benefit from sparsity in evidence as it bears the burden of showing that the assessments are wrong:

'*50 In relation to dealings on the other foreign stock exchanges, the evidence is sparse. The Taxpayer is not in the position to benefit from such sparsity. After all, it bears the burden of showing that the assessments are wrong',* emphasis added.

It may be arguable that the Court of Final Appeal has confined Wing Tai Development to a decision on its own facts. However, as it is not necessary to decide this point, we leave the question open.

(3) In Real Estate Investments (NT) Limited v Commissioner of Inland Revenue, (2008) 11 HKCFAR 433, Bokhary and Chan PJJ said at paragraphs 32 – 35 that the notion of a shifting onus, is seldom if ever helpful and certainly it cannot shift the onus of proof from where section 68(4) places it:

'*32. ... It is natural and appropriate to strive to decide on something more satisfying than the onus of proof. And it should generally be possible to do so. But tax appeals do begin on the basis that, as s.68(4) of the Inland Revenue Ordinance provides, "[t]he onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant". And it is possible although rare for such an appeal to end – and be disposed of – on that basis.*

Accounting treatment only some evidence. Onus of proof not shifted

33. As noted above, the Property had been described in the Taxpayer's accounts from 1980 to 1995 as a fixed asset. It is argued on the Taxpayer's behalf as follows. Such accounting treatment gave rise to a prima facie case that the profits in question arose from the sale of a capital asset. Consequently, the onus of proof shifted so that the Revenue had to show by evidence that the assessments were correct.

34. That argument is misconceived. Consistency between a taxpayer's audited accounts and its stance does not go so far as to set up a prima facie case of that stance's correctness in law. Where a taxpayer's audited accounts are consistent with its stance, such consistency is some evidence in support of that stance. Even where accounting treatment amounts to strong evidence, it still falls to be considered together with the rest of the evidence adduced in the case.

35. As for the notion of a shifting onus, such a notion is seldom if ever helpful. Certainly it cannot shift the onus of proof from where s.68(4) of the Inland Revenue Ordinance places it, namely on a taxpayer who appeals against an assessment to show that it is excessive or incorrect.'

(4) In Shui On Credit Company Limited v Commissioner of Inland Revenue, (2009/10) IRBRD, vol 24, 589, Lord Walker NPJ said at paragraphs 29 and 30 that the Board's function is to consider the matter *de novo* and the appeal is an appeal *against* an assessment:

'29. As the Board correctly observed, by reference to the decisions in Mok Tsze Fung v CIR [1962] HKLR 258 and (after the amendment of s.64 of the IRO) CIR v. The Hong Kong Bottlers Ltd [1970] HKLR 581, the Commissioner's function, once objections had been made by the taxpayer, was to make a general review of the correctness of the assessment. In Mok Mills-Owens J said at pp274-275:

" His duty is to review and revise the assessment and this, in my view, requires him to perform an original and administrative, not an appellate and judicial, function of considering what the proper assessment should be. He acts de novo, putting himself in the place of the assessor, and forms, as it were, a second opinion in substitution for the opinion of the assessor."

> *30. Similarly the Board's function, on hearing an appeal under s.68, is to consider the matter de novo: CIR v. Board of Review ex parte Herald International Limited [1964] HKLR 224, 237. The taxpayer's appeal is from a determination (s.64(4)) but it is against an assessment (s.68(3) and (4)). The taxpayer's counsel drew attention to the fact that when Part XI was amended in 1965, the wording of s.68(4) was altered to refer to the onus of proving that the assessment was "excessive or incorrect" (rather than simply "excessive"). This, it was argued, showed that the amount of an assessment was no longer always the essential issue. Counsel for the Commissioner could not suggest any particular reason for the alteration, other than a general tidying-up of the language. Whatever the explanation, I am satisfied that the alteration was not intended, by what is sometimes called a side-wind, to make a major change in the scheme and effect of Part XI of the IRO.'*

Common areas for co-owners of the Building

26. Neither party furnished us with a copy of the assignment or assignments of a unit in the Building executed at about the same time as the execution of the Deed of Mutual Covenant referred to in paragraph 27 below.

27. The Deed of Mutual Covenant ('DMC') dated in May 1962 recited that the Building was a 18-storey building with a basement. Clauses 1 and 2 provided that:

> '1. Each of the parties hereto for himself and his executors administrators and assigns hereby grant unto each of the other parties hereto their or his respective executors administrators and assigns full right and privilege to hold and enjoy to the exclusion of the grantors the part of the said building set out in the Second Column of the First Schedule hereto opposite to the respective names of the grantees as set out in the First Column of the said First Schedule TO THE INTENT. that each of the parties hereto shall be entitled to the exclusive use occupation and enjoyment of the part of the said building so set out opposite to his name as aforesaid.
>
> 2. Each of the parties hereto shall have the right in common with the others of the parties hereto and all others having the like right to use for the purpose of access to and egress from the part of the said building so allotted to each of them the entrance hall lifts escalators staircases and landings in the said building and such of the passages therein as are not included in any part of the said building allotted to any party but only the owners of the main roofs of the said building shall have the right to use the same Provided that any person repairing maintaining or reinstating

> the water tanks on the roofs or the lifts shall have access to the roof for such purpose.'

The Second Column of the First Schedule provided that 3 shops on the ground floor were allotted to one owner; a unit on an upper floor was allotted to anther owner and (a) the Basement, (b) 107 shops on the ground floor, (c) 106 shops on the 1st floor, (d) 'The whole 2nd floor', (e) divers units on the upper floors and (f) the main roofs were allotted to yet another owner.

28. It is noteworthy that the whole of the 2nd floor was allotted to an owner. Such owner was entitled, as against anyone bound by the DMC, to the exclusive occupation of the whole of the 2nd floor. There is thus no question of any part of the 2nd floor forming part of the common area for the purpose of the Building.

29. Such owner was also allotted 106 shops on the 1st floor. We have not been told of the difference in wording for the purposes of the 1st and 2nd floors. However, there is no evidence about any part of the 1st floor being used for the purpose of access to and egress from any unit on the Basement or the floors above the 2nd floor. The appellants have therefore failed to prove that any part of the 1st floor formed part of the common areas for the purpose of the Building.

30. Thus, the appellants have failed to make out any factual basis for their grounds of appeal premised upon the licensed areas (which were on the 1st and 2nd floors) forming part of the common areas for the purpose of the Building.

Common areas for co-owners of the Arcade

31. The Sub-Deed of Mutual Covenant ('Sub-DMC') dated in November 1993 contained the following relevant provisions:

> ' "Arcade Common Areas" means all those parts of the Shopping Area which are shown on the plans annexed hereto and thereon coloured Yellow, as may from time to time be extended or varied in accordance with Clause 2 of Section IV of this Sub-Deed including but not limited to the common corridors, the lavatories for common use, the staircase and the escalators within the Shopping Arcade and the external walls of the Shopping Arcade (except the external wall facing ... Road)', Recital (2).
>
> ' "Owners" means the First Owner ... the Second Owner and any person or persons in whom for the time being the legal estate in any Undivided Share is vested and registered as such under the Land Registration Ordinance (Cap.128) including joint-tenants or tenants in common ...', Recital (2).
>
> ' "Shopping Arcade" means the said Premises as more particularly described in Part II of the First Schedule hereto ...', Recital (2).

> ' "Undivided Shares" means the respective equal and undivided parts or shares into which the Head Undivided Shares are subdivided and allocated to Units of the Shopping Arcade in manner as set out in the Second Schedule hereto (and "Undivided Share" shall be construed accordingly)', Recital (2).
>
> ' "Units" means all those Shops, Portions facing ... Road, units and parts of the Shopping Arcade other than the Arcade Common Areas and the Arcade Common Facilities (and "Unit" shall be construed accordingly)', Recital (2).
>
> ' The Owner of any Unit for the time being, his tenants, servants, agents and licensees (in common with all persons having the like right) shall have the full right and liberty to go pass or repass over and along and to use the Arcade Common Areas for all purposes connected with the proper use and enjoyment of the Unit he owns, subject always to this Sub-Deed', Section IV, clause 1.

32. It is clear that the definition of 'units' that the common areas under the Sub-DMC ('the Arcade common areas') are common only to the owners of a unit of the Arcade. The owner of a unit above or below the Arcade is neither subject to, nor has the benefits of, the Sub-DMC.

33. In accordance with standard practices adopted since the days when documents were photocopied in black and white and archived using microfilm, the plans used 'Y' to stand for 'yellow'. Certain areas on the 1st and 2nd floor plans attached to the Sub-DMC are marked 'Y'. As common areas under the Sub-DMC, they are co-owned by the owners of the units in the Arcade. As owners of the Shop, the appellants co-owned the Arcade common area with the other owners of the other units in the Arcade.

The assignment of the Shop to the appellants

34. The assignment of the Shop to the appellants assigned:

> (1) (a) all those 250 equal undivided 23,000th parts or shares of and in ALL THOSE 4 equal undivided 920th parts or shares of and in ALL THAT piece or parcel of ground[7] registered in the Land Registry as ... ; and
>
> (b) of and in ... the Building; and
>
> (2) TOGETHER with the sole and exclusive right and privilege to hold use occupy and enjoy ALL THAT [Shop];
>
> subject to and with the benefit of the DMC and subject also to and with the benefit of the Sub-DMC.

[7] Referred to in this Decision as 'the Land'.

35. The appellants are thus owners in common of the Land and of the Building. The other owners in common of the Building are the owners of the other units in the Building.

36. The appellants are also owners in common of the Arcade. The other owners in common of the Arcade are the owners of the other units in the Arcade.

Irrelevant further sub-DMC

37. The Deed Supplemental to the Sub-DMC is irrelevant as it was dated in January 2005 which was after the relevant years of assessment.

Chargeability to property tax

38. It is an agreed fact[8] that 'the licence agreements related to certain common areas on 1/F and 2/F of the Arcade'. It is not open to the appellants to challenge the fact that the licensed areas were in fact situated in the Arcade common area on the 1st and 2nd floors.

39. Section 2(1)[9] provides that:

> '*In this Ordinance, unless the context otherwise requires ... "owner" (擁有人) in respect of land or buildings or land and buildings, includes a person holding*

[8] See paragraph 11 above.

[9] Section 2(1) and (2) of the Inland Revenue (Amendment) (No. 2) Ordinance, Ord No. 4 of 2010, amends the definition of 'owner' and adds a definition of 'common parts' to read as follows:

'"owner" (擁有人), in respect of land or buildings or land and buildings, includes—

(a) a person holding the land or buildings or land and buildings directly from the Government;
(b) a beneficial owner;
(c) a tenant for life;
(d) a mortgagor;
(e) a mortgagee in possession;
(f) a person with adverse title to land receiving rent from buildings or other structures erected on that land;
(g) a person who is making payments to a co-operative society registered under the Co-operative Societies Ordinance (Cap. 33) for the purpose of the purchase of the land or buildings or land and buildings;
(h) a person who holds land or buildings or land and buildings subject to a ground rent or other annual charge;
(i) (in so far as common parts are concerned) a corporation registered under section 8 of the Building Management Ordinance (Cap. 344) or a person who, on the person's own behalf or on behalf of another person, receives any consideration, in money or money's worth, in respect of the right of use of any common parts solely or with another; and
(j) an executor of the estate of an owner'.

'"common parts" (公用部分), in relation to any land or buildings or land and buildings—

(a) means the whole of the land or buildings or land and buildings, except such parts as have been specified or designated in an instrument registered in the Land Registry as being for the exclusive use, occupation or enjoyment of an owner; and
(b) includes, unless so specified or designated in the instrument mentioned in paragraph (a), those parts of a building specified in Schedule 1 to the Building Management Ordinance (Cap. 344)'.

directly from the Government, a beneficial owner, a tenant for life, a mortgagor, a mortgagee in possession, a person with adverse title to land receiving rent from buildings or other structures erected on that land, a person who is making payments to a co-operative society registered under the Co-operative Societies Ordinance (Cap 33) for the purpose of the purchase thereof, and a person who holds land or buildings or land and buildings subject to a ground rent or other annual charge; and includes an executor of the estate of an owner'.

40. Section 5 provides that:

'*(1) Property tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person being the owner of any land or buildings or land and buildings wherever situate in Hong Kong and shall be computed at the standard rate on the net assessable value of such land or buildings or land and buildings for each such year.*

(1A) In subsection (1), "net assessable value" (應評稅淨值) means the assessable value of land or buildings or land and buildings, ascertained in accordance with section 5B ...'

41. Section 5B provides that:

'*(2) The assessable value of land or buildings or land and buildings for each year of assessment shall be the consideration, in money or money's worth, payable in that year to, to the order of, or for the benefit of, the owner in respect of the right of use of that land or buildings or land and buildings.'*

42. As property tax is chargeable under section 5 on 'every person' being the owner of any land and buildings, the appellants are chargeable to property tax by reason of their ownership of the Arcade common area which formed the subject matters of the licensed areas under the licence agreements.

43. The next question is whether the appellants are answerable for the other owners of the Arcade common area.

44. The Inland Revenue (Amendment) Ordinance 1983 was enacted in 1983. According to the Explanatory Memorandum to the Bill, the principal object of the Bill was to replace the then existing notional income basis for the assessment of property tax under the principal Ordinance to a system based on actual rents received. Subsidiary objects include improvement of the definition of 'owner' in the principal Ordinance.

45. Thus clause 2 'improve[d] the definition of "owner"' by adding 'a person holding directly from the Crown' and 'a mortgagor in possession' in the inclusive definition of 'owner'.

46. The Explanatory Memorandum went on to state that clause 16 'adds a new section 56A which provides for responsibility in the case of joint owners or co-owners'.

47. Section 56A now reads as follows:

> '*(1) Where 2 or more persons are joint owners or owners in common of any land or buildings or land and buildings, any of those persons appearing from any deed, conveyance, judgment or other instrument in writing registered in the Land Registry under the Land Registration Ordinance (Cap 128) to be such an owner shall be answerable for doing all such acts, matters and things as would be required to be done under the provisions of this Ordinance by a sole owner. (Amended 56 of 1992 s. 20; 8 of 1993 s. 2)*
>
> *(2) Nothing in subsection (1) shall relieve any person of any obligation under this Ordinance or affect any right and obligation of joint owners or owners in common as between themselves.*
>
> *(3) Where any person pays property tax under subsection (1) and that person is not, apart from that subsection, liable to that tax or part of it, that person may recover from any other person that tax or part of it to which that other person, apart from that subsection, is liable under this Ordinance.*
>
> *(Added 8 of 1983 s. 16)'*

48. On any reckoning, the appellants co-owned the Arcade common area. They were owners of the Arcade common area in common with the other co-owners. They were answerable under section 56A for doing all such acts, matters and things as would be required to be done under the provisions of the Ordinance by a sole owner. The Revenue is permitted by section 56A to single the appellants out for unfavourable treatment by assessing them alone to property tax. It is unrealistic for the Revenue to contend that they could sue each of the other hundreds of co-owners for contribution.

49. For completeness, we should add that the definition of 'owner' in section 2 does not assist the appellants who are effectively seeking to re-write the definition by replacing 'includes' by 'means'.

Disposition

50. For reasons given above, the appeal fails.

51. We dismiss the appeal and confirm the assessments appealed against.