

Case No. D6/19

Profits tax – source – agreement on facts – sections 2, 14, 16, 66, 68, 68AA, 70 and 70A of the Inland Revenue Ordinance

Costs – frivolous and vexatious – section 68(9) of the Inland Revenue Ordinance

Panel: Chui Pak Ming Norman (chairman), Shun Yan Edward Fan and Mun Lee Ming Catherine.

Dates of hearing: 28 to 30 November 2018.

Date of decision: 16 July 2019.

The taxpayer objected to the assessor's notice of refusal to correct the Profits Tax Assessments and Additional Profits Tax Assessment for diver years of assessment raised on her in respect of her sole-proprietorship business called Company B on the grounds that the profits of Company B were derived outside Hong Kong and should not be chargeable to profits tax. The objection by the taxpayer to a particular Profits Tax Assessment, the one for the assessment year 2006/07, was lodged some 11 months after its issuance on the grounds that the profits were earned offshore after she was so advised by her tax representative. The parties confirmed at the outset of the hearing that certain paragraphs of the Determination could form the agreed facts of the case. At the hearing, counsel for the taxpayer submitted that by virtue of the adoption by a witness for the taxpayer the facts and the schedules/documents referred to in the agreed facts, all the matters or allegations referred to therein would become undisputed facts of the case. The issues before the Board were whether the trading profits and commission incomes of Company B were sourced in Hong Kong; and even if the trading profits and commission incomes were decided as not sourced in Hong Kong, whether the Profits Tax Assessment had already become final and conclusive and were therefore not subject to appeal.

Held:

1. In considering the extent of the 'agreement on facts' the Board decided that the onus was on the taxpayer to provide relevant evidence to the Board and the lack of challenge on the part of the Respondent on the contents of the documents would not automatically make the contents of those documents as facts of the case and where those documents were relevant to the appeal, the Board would give such weight as appropriate after having considered the evidence and submissions made by the parties.
2. The Board found that the taxpayer's case contradicted with the contemporaneous documents and flew in the face of common sense. There

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was no sufficient or adequate credible evidence to persuade the Board that the profits and commission income of Company B were sourced or derived outside Hong Kong.

3. Although it was not necessary for the Board to deal with whether the Profits Tax Assessment for the assessment year 2006/07 had already become final and conclusive and were therefore not subject to appeal after the Board found that the profits for that assessment year were sourced in Hong Kong, the Board, for completeness of the decision, made the following findings: The taxpayer had elected in her tax return that the profits in the assessment year 2006/07 were taxable and she only changed her mind and objected to the assessment after being advised that she might claim that the profits were offshore and should not be taxable. It was apparently a deliberate act and a conscientious choice of the taxpayer. As such, the Board did not think that there was an error or inadvertent omission under section 70A and the Profits Tax Assessment should be final and not subjected to an appeal to the Board.
4. The evidence called by the taxpayer to support her claim were flimsy, vague and contradictory and suggested that the taxpayer knew very well that there were no good grounds to appeal. It was just a frivolous and vexatious exercise on the part of the taxpayer. The taxpayer was ordered to pay costs in the sum of \$25,000

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

Cases referred to:

Extramoney Ltd v Commissioner of Inland Revenue (1997) HKLRD 387
Kim Eng Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2007)
10 HKCFAR 213
Commissioner of Inland Revenue v Common Empire Ltd (No.2) (2007) 3
HKLRD 75
Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008)
11 HKCFAR 433
D19/09, (2009-10) IRBRD, vol 24, 483
D28/14, (2015-16) IRBRD, vol 30, 235
D2/16, (2016-17) IRBRD, vol 31, 316
D8/16, (2016-17) IRBRD, vol 31, 502
D14/08, (2008-09) IRBRD, vol 23, 244
D45/10, (2011-12) IRBRD, vol 26, 21
Commissioner of Inland Revenue v Hang Seng Bank Limited [1991] 1 AC 306
Commissioner of Inland Revenue v HK-TVB International Limited [1992] 2 AC
397
Commissioner of Inland Revenue v Magna Industrial Co Limited [1997] HKLRD
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Kwong Mile Services Limited v Commissioner of Inland Revenue [2004] 7 HKCFAR 275

ING Baring Securities (Hong Kong) Limited v Commissioner of Inland Revenue [2007] 10 HKCFAR 417

Commissioner of Inland Revenue v Datatronic Ltd [2009] 4 HKLRD 675

Commissioner of Inland Revenue v Li & Fung (Trading) Limited [2012] 3 HKLRD 8

Alexander Cheung, Counsel, instructed by Everbright Corporate Consultants Limited, for the Appellant.

Suen Sze Yick, Senior Government Counsel, Winnie W Y Ho, Senior Government Counsel, and Sky K Y Shum, Government Counsel, of the Department of Justice, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. By the letter of 3 May 2018, Madam A ('the Appellant') trading as Company B (through her tax representative Everbright Corporate Consultants Limited ('the Representative')) took out an appeal under section 66 of the Inland Revenue Ordinance (Chapter 112) ('the Ordinance') against the Deputy Commissioner's determination ('the Determination') made on 6 April 2018 on the following tax assessments and/or Additional Tax Assessment:

- (1) the Profits Tax Assessment for the year of assessment 2006/07;
- (2) the Additional Profits Tax Assessment for the year of assessment 2006/07;
- (3) the Profits Tax Assessment for the year of assessment 2007/08;
- (4) the Profits Tax Assessment for the year of assessment 2008/09; and
- (5) the Profits Tax Assessment for the year of assessment 2009/10.

2. By the Determination, the Deputy Commissioner confirmed the Profits Tax Assessments for the years of assessment 2006/07, 2007/08 and 2009/10; reduced the Additional Profits Tax Assessment for the year of assessment 2006/07; and increased the Profits Tax Assessment for the year of assessment 2008/09. In summary, the assessable profits under the Determination are as follows:

Assessment Year	2006/07	2006/07	2007/08	2008/09	2009/10
Tax Assessment	\$3,875,066		\$3,807,309	\$10,169,482	\$19,218,522
Additional Tax Assessment		\$2,681,962			

Grounds of Appeal

3. By the Grounds of Appeal filed by the Representative on 3 May 2018, the Appellant raised altogether seven grounds of appeal. Despite the Grounds of Appeal filed, Mr Alexander Cheung, counsel for the Appellant at the hearing held on 28 November 2018 confirmed and agreed that the key issue in this appeal was whether the profits derived by the Appellant in the relevant years of assessment from trading transactions and commission income were sourced in Hong Kong.

Agreed Facts of the Appeal

4. The parties confirmed at the outset of the hearing held on 28 November 2018 that paragraph (1) to (24) of the Determination formed the agreed facts of the case. Those paragraphs are reproduced in paragraphs 5 to 28 below as agreed facts of the Appeal.

5. Ms A, the Appellant objected to the Assessor's notice of refusal to correct the Profits Tax Assessment for the year of assessment 2006/07 issued to her, the Additional Profits Tax Assessment for the year of assessment 2006/07 and the Profits Tax Assessments for the years of assessment 2007/08 to 2009/10 raised on her in respect of her sole-proprietorship business called Company B. The Appellant claims that the profits of Company B were derived outside Hong Kong and should not be chargeable to Profits Tax.

6. (a) The Appellant was born in 1937.
(b) Mr C and Ms D are the Appellant's son and daughter respectively. Mr C was married in 2000 and his wife is Ms E.

7. (a) Company B commenced business on 1 September 1998. It closed its accounts on 31 December annually.
(b) Company B was described as an import and export trading firm. No offshore profits claim was made in respect of Company B for periods up to 31 December 2005.
(c) At the relevant times, the business address of Company B was Address F, a property jointly owned by the Appellant and Mr C.

8. Apart from Company B, the Appellant and her family members also carried on the following businesses in Hong Kong as sole proprietor:

<u>Name of sole proprietor</u>	<u>Name of business</u>	<u>Business address</u>	<u>Date of commencement</u>	<u>Date of cessation</u>
The Appellant	Company G	Address F	01-10-2001	01-10-2009
Mr C	Company H	Address L	02-08-2004	07-07-2011

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<u>Name of sole proprietor</u>	<u>Name of business</u>	<u>Business address</u>	<u>Date of commencement</u>	<u>Date of cessation</u>
Mr C	Company J	Address L	02-08-2004	07-07-2011
Ms D	Company K	Address L	11-08-2004	25-10-2006
Ms E			24-10-2006	10-08-2009

9. The Appellant and Mr C also operated the following enterprises in Mainland China ('the Mainland'):

<u>Date of incorporation</u>	<u>Name of enterprise</u>	<u>Address</u>	<u>Investor</u>	<u>Legal representative</u>	<u>Scope of business</u>
17-04-2003	Company M	Address P	The Appellant	Ms E	Manufacturing of apparel and sale of self-made products
30-04-2003	Company N	Address Q	Mr C	Ms E	Manufacturing / processing of apparel and sale of self-made products, and import and export

10. On divers dates, the Appellant filed her Tax Returns - Individuals for the years of assessment 2006/07 to 2009/10 together with the accounts of Company B for the years ended 31 December 2006 to 2009 and tax computations.

- (a) In the tax computation for the year of assessment 2006/07, assessable profits of \$5,595,583 were worked out. After setting off losses of \$1,720,517 brought forward, the Appellant offered net assessable profits of \$3,875,066 for assessment.
- (b) In the tax computations for the years of assessment 2007/08 to 2009/10, profits after taxation adjustments were as follows:

	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>
Adjusted Profits	<u>\$1,389,523</u>	<u>\$8,994,445</u>	<u>\$19,218,522</u>

The adjusted profits were claimed offshore for the following reasons:

- (i) The profit-generating operation was carried out in the Mainland as the contract of purchase and contract of sale were effected and negotiated outside Hong Kong.
- (ii) The Hong Kong office was responsible for arranging letters of credit ('L/Cs'), operating bank accounts, making and receiving payments, and maintaining accounting records.

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(c) In its profit and loss accounts, Company B disclosed the following details:

	<u>2006/07</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>
Year ended 31 December	2006	2007	2008	2009
	\$	\$	\$	\$
Sales	74,979,025	163,692,609	171,569,736	168,561,253
<u>Less: Cost of sales —</u>				
Purchase	56,270,430	145,270,645	154,145,383	143,372,150
China expenses	4,264,835	3,759,916	912,110	-
Representative office expenses	-	-	-	1,468,709
Gross profit	<u>14,443,760</u>	<u>14,662,048</u>	<u>16,512,243</u>	<u>23,720,394</u>
<u>Other revenue —</u>				
Bank interest income	80,983	94,050	6,756	2,347
Commission income	-	-	773,949	229,135
Quota income	-	-	2,038,901	648,009
Sundry income	4,413	569	131,610	2,028
	<u>85,396</u>	<u>94,619</u>	<u>2,951,216</u>	<u>881,519</u>
	<u>14,529,156</u>	<u>14,756,667</u>	<u>19,463,459</u>	<u>24,601,913</u>
<u>Less: Expenses —</u>				
Bank charges	276,875	375,410	257,717	192,933
Commission paid	4,031,893	7,117,501	4,654,066	2,063,422
Insurance	242,562	-	-	-
Quota charges	2,180,696	4,095,420	2,392,828	192,311
Staff messing and welfare	192,605	128,477	80,539	144,985
Staff salaries and allowance	861,700	860,000	1,080,000	1,200,000
Transportation	166,070	260,703	892,542	773,352
Other expenses	854,603	400,761	1,088,244	832,673
Total expenses	<u>8,807,004</u>	<u>13,238,272</u>	<u>10,445,936</u>	<u>5,399,676</u>
Profit before taxation	<u>5,722,152</u>	<u>1,518,395</u>	<u>9,017,523</u>	<u>19,202,237</u>

(d) Details of Company B's turnover were as follows:

	<u>2006/07</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>
	\$	\$	\$	\$
Sales	73,185,589	159,781,486	171,569,736	168,561,253
Commission income	1,793,436	1,716,011	773,949	229,135
Quota income	-	2,195,112	2,038,901	648,009
Total	<u>74,979,025</u>	<u>163,692,609</u>	<u>174,382,586</u>	<u>169,438,397</u>

(e) Details of the China expenses/ representative office expenses were as follows:

	<u>2006/07</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>
	\$	\$	\$	\$
Wages	1,281,611	1,338,645	522,824	676,063

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	<u>2006/07</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>
	\$	\$	\$	\$
Sample	1,223,438	1,191,451	-	62
Rental charges	479,733	246,272	88,399	47,926
Electricity and water	301,935	166,411	-	10,044
Postage and courier	120,808	198,423	71,335	227,019
Travelling	177,948	137,921	132,186	402,794
Others	<u>679,362</u>	<u>480,793</u>	<u>97,366</u>	<u>104,801</u>
Total [Fact (10)(c)]	<u>4,264,835</u>	<u>3,759,916</u>	<u>912,110</u>	<u>1,468,709</u>

(f) Details of commission expenses were as follows:

	<u>2006/07</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>
<u>Recipient</u>	\$	\$	\$	\$
Mr R	3,617,980	5,442,658	3,251,007	1,505,250
Others	<u>413,913</u>	<u>1,674,843</u>	<u>1,403,059</u>	<u>558,172</u>
Total [Fact (10)(c)]	<u>4,031,893</u>	<u>7,117,501</u>	<u>4,654,066</u>	<u>2,063,422</u>

(g) The Appellant elected for Personal Assessment for the year of assessment 2006/07.

11. (a) The Assessor raised on the Appellant the following Profits Tax Assessment for the year of assessment 2006/07:

	\$
Profits per computation [Fact (10)(a)]	5,595,583
<u>Less: Loss brought forward and set-off</u>	<u>1,720,517</u>
Net Assessable Profits	<u>3,875,066</u>

Note: Profits assessed were transferred to Personal Assessment and no tax was charged.

(b) The Appellant did not object to the assessment which then became final and conclusive under section 70 of the Ordinance.

12. In response to the Assessor's enquiries, the Appellant provided the following information and documents:

Establishment and business activity

(a) The principal business activity of Company B was export of garment overseas. The goods purchased and sold were mainly adult and children apparel.

- (b) The employees in Hong Kong—

<u>Name</u>	<u>Post title</u>
Mr C	Position AB
Ms E	Assistant to Position AB

- (c) Organization chart of Company B as at 26 March 2008 showing details of staff of the Hong Kong office and the representative offices ('ROs') in the Mainland.

Mode of operation

- (d) Apart from receiving payments from customers and letters, all other operations, including communication with customers and suppliers, were handled by the ROs established in the Mainland.
- (e) Company B's five largest customers, not related to the Appellant, were:

<u>Name</u>	<u>Location</u>
Company S1	Country T
Company S2	Country T
Company S3	Country T
Company S4	Country T
Company S5	Country T

- (f) No formal sales contracts were made with the customers. Sale transactions were negotiated by the staff of the ROs, Company M and Company N in the Mainland via telephone, fax and email.
- (g) Company B normally received orders from customers by fax or email, which would be confirmed or revised by the staff of the ROs, Company M and Company N in the Mainland.
- (h) Company B's five largest suppliers were:

<u>Name</u>	<u>Location</u>
Company M	The Mainland
Company N	The Mainland
Company U1	The Mainland
Company U2	The Mainland
Company U3	The Mainland

- (i) No formal purchase contracts were made with the suppliers. All the purchase transactions were negotiated and concluded via telephone, fax or email by the staff of the ROs in the Mainland. Two of Company B's suppliers in the Mainland were Company M

and Company N. For purchase orders lodged through Company M and Company N, the customers would contact them directly, and the purchase price would be set at around 90% to 92% of the sales amount. All other suppliers were Mainland entities unrelated to the Appellant.

- (j) After inspection by the quality control staff of the ROs, Company M or Company N, the goods were shipped at the ports nearby by the suppliers or foreign trade corporations (外貿公司) ('FTCs') directly to their destinations.
- (k) Customers usually settled their accounts by L/Cs, bills of exchange (即期付款交單) or telegraphic transfers ('T/Ts') with the bank accounts of Company B or its associates in Hong Kong.
- (l) Generally, payments would be made to the suppliers after receiving payments from customers.

13. The Appellant put forward the following arguments in support of her claim that the profits of Company B were offshore sourced and should be exempt from Profits Tax in Hong Kong:

- (a) The purchase and sale contracts were executed in the Mainland via telephone, fax and email.
- (b) The customers of Company B were not Hong Kong companies.
- (c) The suppliers of Company B were all Mainland entities.
- (d) The L/Cs and bills of exchange were generally prepared by the staff in the Mainland, which were then delivered to the banks in Hong Kong by courier services.

14. (a) In respect of the commission claimed to have been paid to Mr R for the year ended 31 December 2006, information and documents provided showed that all the commission was not paid to Mr R.

(b) The Appellant agreed not to claim deduction of insurance expenses for the year of assessment 2006/07 which appeared to be of private nature.

(c) The Assessor considered that the commission allegedly paid to Mr R was not deductible. She raised on the Appellant the following Additional Profits Tax Assessment for the year of assessment 2006/07:

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	\$
Insurance expenses withdrawn [Fact (10)(c)]	242,562
Commission to Mr R disallowed [Fact (10)(f)]	3,617,980
Additional Assessable Profits	<u>3,860,542</u>

Note: Profits assessed were transferred to Personal Assessment and no tax was charged.

15. The Representative, on behalf of the Appellant, objected to the above Additional Assessment on the following grounds:

- (a) All the profits of Company B were derived outside Hong Kong and should not be subject to Hong Kong Profits Tax.
- (b) The commission paid to Mr R should be deductible.

The Assessor also treated the notice of objection as an application for correction of the Profits Tax Assessment for the year of assessment 2006/07 [Fact (11)(a)] under section 70A(1) of the Ordinance.

16. In support of the offshore claim for the year of assessment 2006/07, the Appellant alleged the following:

- (a) Company B did not purchase goods from the Mainland entities. The Mainland entities only collected payments from customers through Company B. The payments were transferred back to the Mainland entities or their suppliers.
- (b) Company S1 only printed the Hong Kong registered address of Company B on its purchase order. In fact, the purchase order was placed directly to Company N and the staff responsible for contacting the customer was located in the Mainland, not in Hong Kong.
- (c) Company N collected payment from the customer through Company H in Hong Kong. So the invoice and packing list were issued by Company H and the L/C was opened in the name of Company H.
- (d) Apart from collecting payments from customers, there were no other business operations in Hong Kong.
- (e) As the payment term was FOB, the goods were delivered according to the customer's instructions. Company B was only responsible for delivering goods in the Mainland to the shipping agent designated by the customer. The agent arranged the goods to be exported from Hong Kong or the Mainland according to the instructions of the customer. Shipment of goods loaded in Hong

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Kong was arranged by the shipping agent and not by Company B. Company B was not responsible for the transportation cost from City V to Hong Kong.

17. In respect of the offshore claim, the Appellant provided the following information:

- (a) Offices of Company B allegedly established in Hong Kong and the Mainland:

<u>Office</u>	<u>Address</u>	<u>Number of employees</u>	<u>Remarks</u>
Hong Kong Office	Address F	2	-
City W1 Office	Address X1	7	Ceased in early 2010
City W2 Office	Address X2	7	Ceased in January 2007
City W3 Office	Address X3	6	Commenced in March 2007
City W4 Office	Address X4	28	Ceased in December 2007

- (b) Prior to March 2006, most of the payments from customers were collected by the FTCs through L/Cs. The FTCs would then transfer the receipts to Company M and Company N in Renminbi. Only a small portion of payments were collected by the businesses in Hong Kong by T/Ts.
- (c) Since March 2006, because of expansion of business and for the sake of security of capital flow, all payments from customers had been collected by the businesses in Hong Kong.
- (d) City W2 Office, City W1 Office, City W3 Office and City W4 Office did not have official business names. They also did not have business registration or tax registration in the Mainland. They were the ROs of Company M and Company N for facilitating communication with the suppliers and following-up the manufacturing process and quality control. Company M and Company N sent staff to the suppliers and they were stationed thereto on a long-term basis.
- (e) City W4 Office and City W1 Office earned profits from buying and selling of products while City W3 Office and City W2 Office earned commission.
- (f) The staff of the ROs had authority to accept and issue orders. They only had to obtain instructions or seek approval from Mr C if the transactions produced no profits or resulted in losses.
- (g) No contracts were entered into between Company B and the

suppliers. The sale price was confirmed by email or fax. After confirmation of the purchase prices, the staff of the ROs would add the mark-ups and then quoted prices to customers. After the customers accepted the quotations, they would issue purchase orders to the staff of the ROs, who then informed the suppliers and provided them with samples and packing instructions for production.

- (h) All the finance and shipping matters of Company B were handled by the shipping divisions of Company M and Company N. Company M and Company N would arrange the delivery of goods they manufactured as required by the shipping agent of customers.
- (i) If the payment method was T/T, the original copy of the bill of lading would be sent by post to Company M and Company N after dispatch of goods. The staff of Company M and Company N would then issue the invoice and packing list and send a copy of the bill of lading to the customer. Upon receipt of payment, the original bill of lading would be sent to the customer.
- (j) If the payment method was L/C at sight, the customer would be requested to open an L/C to Company B. Goods would then be delivered to the shipping agent designated by the customer. Upon receipt of the original bill of lading, documents would be filed to the banker in Hong Kong according to the terms of the L/C to collect payment.
- (k) All the invoices / packing lists prepared by Company M and Company N were issued in the name of the businesses in Hong Kong. If payments to suppliers were required to be made by T/Ts, the bank application forms would be sent to the banker in Hong Kong by post after approval was obtained from Ms E and other staff.

18. In respect of the commission income of Company B, the Appellant provided the following information and documents:

- (a) The commission income of Company B was derived from City W2 Office and City W3 Office. These two offices usually contacted the buyers in Country T by email or occasionally by telephone and fax.
- (b) The modes of operation of the two offices were slightly different:

City W2 Office

- (i) Company B translated the purchase order from the buyer from English to Chinese. It would then be passed together with the samples provided by the buyer to the supplier. The

supplier then provided the quotation to Company B, which would then pass the quotation to the buyer. After confirmation of sale price, the buyer would issue a purchase order to Company B, and Company B would forward it to the supplier.

- (ii) After confirmation, Company B would translate the purchase order and prepare a detailed purchase order in Chinese for the supplier. Company B would then request the supplier to provide samples for onward delivery to the buyer. After confirmation by the buyer, the supplier would start the production. Company B was responsible for monitoring the progress and quality. After production, Company B would send the shipping sample to the buyer for checking. Upon confirmation, the supplier would arrange delivery to the buyer.

City W3 Office

- (iii) Company B was not involved in quotations or orders. After confirmation of an order, the buyer would copy the purchase order to Company B. Company B was only responsible for sample approval and quality check.

- (c) Details of commission payers were as follows:

<u>Name of payer</u>	<u>Location</u>	<u>Responsible office</u>
Company S5	Country T	City W2 Office
Company Y	Country T	City W3 Office

- (d) Bases of commission charged by Company B were as follows:

<u>Office</u>	<u>On the buyer</u>	<u>On the supplier</u>
City W2 Office	2%	5% or 8%
City W3 Office	1% or 3%	-

- (e) Mr R shared 1/2 of the income and expenses in respect of the commission income derived by City W2 Office, and 1/3 of the income in respect of the commission income derived by City W3 Office while all the relevant expenses were borne by Company B.
- (f) The commission income should not be subject to Profits Tax in Hong Kong because all the operations were carried out in the Mainland and not in Hong Kong.

19. Based on the information provided by the Immigration Department, the Assessor computed the number of days spent by the Appellant, Mr C and Ms E in Hong Kong as follows:

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Year ended 31 December	2006	2007	2008	2009
The Appellant	6	112	284.5	345.5
Mr C	48.5	50	85.5	95
Ms E	91.5	63.5	117	102.5

20. In further correspondence with the Assessor, the Appellant provided the following information and documents in relation to the offshore claim:

- (a) Company B did not accept or issue purchase orders in Hong Kong. It only issued invoices to overseas customers according to the sale contracts already concluded by the related companies outside Hong Kong.
- (b) All the income of Company M and Company N was sales income. Company M and Company N collected payments from overseas customers through the bank accounts in Hong Kong. In 2006, since Company M and Company N had not yet exported directly, they had to export through the FTCs. The businesses in Hong Kong had to make payments to the FTCs first, which would then pay Company M and Company N accordingly.
- (c) Despite the fact that Company M and Company N held the licence for import and export, they did not export directly for the following two reasons:
 - (i) Quota

During 2006, there was quota restriction for garments exported to Country Z. Only a few large FTCs or exporters could obtain quota and they could only purchase quota from these big FTCs and exported in their names.
 - (ii) Tax rebate

During 2006, there were tax rebates of 13% for garments exported. Since the tax rebates were not released in a short time, cash flow problems might arise. As such, exports were effected through FTCs and tax rebates could be obtained more quickly.
- (d) Mr C and Ms E were the persons authorized to operate the bank accounts of Company B and its associates in Hong Kong while the shipping divisions of Company M and Company N actually carried out the banking transactions. The registered office in Hong Kong,

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i.e. Address F, was only used to receive correspondence from the banker, i.e. Bank AA.

- (e) Address F was the residential address of the Appellant, Mr C and Ms E in the year 2006. It was used for accommodation when they returned to Hong Kong. Since it was required to register an address for Company B, Address F was also used as the registered business address of the Hong Kong office. Apart from a telephone set and a fax machine, there were no other office facilities installed at Address F. Call forwarding service to the Mainland had been arranged. There were no persons working at Address F. During the year 2006, the Appellant, Mr C and Ms E were present in Hong Kong for personal matters only.
- (f) The Appellant set up different businesses in Hong Kong [Fact (8)] to collect payments from customers for different factories or ROs in the Mainland. For example, Company H was responsible for collecting payments for Company N and City W1 Office while Company J was responsible for collecting payments for Company M and City W4 Office. Another reason for setting up different businesses was that the customers of Company B usually received orders for goods from the same department store. Invoices were issued to the customers in names of different businesses to avoid unnecessary conflict arising from the keen competitions among those customers. During the year 2006, no invoice was issued in the name of Company B.
- (g) All businesses set up in Hong Kong, including Company B, Company H, Company J, were regarded as a single unit as they were all operated by the Appellant, Mr C and Ms E.
- (h) The Representative had wrongly prepared the tax computations for the years of assessment 2007/08 to 2009/10 in which it was stated that the Hong Kong office was responsible for arranging L/Cs, maintaining accounting records, operating bank accounts, and making and receiving payments [Fact (10)(b)(ii)]. Address F was only used to receive letters from Bank AA. All the banking documents were completed by the staff of Company M and Company N in the Mainland and they were sent to the banker in Hong Kong by courier services.

21. In respect of the commission claimed to have been paid to Mr R, the Appellant provided information and documents which showed that the commission was paid in the following manner:

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<u>Mode of payment</u>	<u>Beneficiary</u>	<u>2006/07</u> \$	<u>2007/08</u> \$
In cash	-	1,606,500	598,425
By cheque	Ms E or Ms D	606,850	-
By T/T	Ms D	226,050	-
Without supporting documents	-	-	<u>1,814,206</u>
		<u>2,439,400</u>	<u>2,412,631</u>
By T/T	Others	<u>1,178,580</u>	<u>3,030,027</u>
Total [Fact (10)(f)]		<u>3,617,980</u>	<u>5,442,658</u>

22. (a) Regarding the commission allegedly paid to Mr R, the Assessor considered that those paid in cash or paid in the name of Ms D or Ms E were not expenses incurred in the production of Company B's profits. The Assessor wrote to the Appellant and proposed that the Additional Profits Tax Assessment for the year of assessment 2006/07 be revised as follows:

	\$
Additional Assessable Profits previously assessed [Fact (14)(c)]	3,860,542
<u>Less: Commission to Mr R claimed [Fact (10)(f)]</u>	<u>3,617,980</u>
<u>Add: Commission to Mr R disallowed [Fact (21)]</u>	<u>2,439,400</u>
Revised Additional Assessable Profits	<u>2,681,962</u>

- (b) The Appellant accepted the above proposed adjustment made in relation to the commission expenses.
23. (a) The Assessor maintained her view that the profits of Company B were derived from Hong Kong and should be chargeable to Profits Tax.
- (b) The Assessor issued a notice of refusal under section 70A(2) of the Ordinance in reply to the Appellant's application [Fact (15)] to correct the Profits Tax Assessment for the year of assessment 2006/07.
- (c) At the same time, the Assessor raised on the Appellant the following Profits Tax Assessments for the years of assessment 2007/08 to 2009/10 in respect of Company B:

	<u>2007/08</u> \$	<u>2008/09</u> \$	<u>2009/10</u> \$
Profits not accepted as offshore in nature [Fact (10)(b)]	1,389,523	8,994,445	19,218,522
<u>Add: Commission to Mr R disallowed [Fact (21)]</u>	<u>2,412,631</u>	-	-
Deduction of prescribed fixed assets disallowed	<u>5,155</u>	-	-
Assessable Profits	<u>3,807,309</u>	<u>8,994,445</u>	<u>19,218,522</u>
Tax Payable thereon	<u>584,169*</u>	<u>1,349,166</u>	<u>2,882,778</u>

*After tax reduction

24. The Representative, on behalf of the Appellant, objected to the above notice of refusal [Fact (23)(b)] and assessments [Fact (23)(c)] on the grounds that all the profits of Company B were derived outside Hong Kong and should not be subject to Profits Tax. It claimed as follows:

- (a) The Hong Kong office was only responsible for keeping accounting documents, receiving letters from Bank AA and serving as the registered office for registration purpose according to the Companies Ordinance.
- (b) Company B only employed two Hong Kong employees, Mr C and Ms E. The Appellant had delegated all her power to Mr C for carrying out the business operations outside Hong Kong in the Mainland.
- (c) During the relevant years, Mr C and Ms E performed their duties in the Mainland. They had only spent a few days in Hong Kong for private purposes only.
- (d) All the customers of Company B were non-Hong Kong companies and the contracts were effected and negotiated outside Hong Kong.
- (e) The activities of the Hong Kong office were confined to collection of information in Hong Kong. The Hong Kong office was not involved in any sales, either in Hong Kong or elsewhere.

25. At the request of the Assessor, the Representative provided the following information and documents concerning the offshore claim for the years of assessment 2007/08 to 2009/10:

Establishment

- (a) The Appellant reached the age of 70 by 2007. She had retired by that time and all the businesses of Company B were handled by her son, Mr C.
- (b) A breakdown of the staff salaries and allowances claimed in the accounts of Company B as follows –

<u>Name</u>	<u>Post title</u>	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>
		\$	\$	\$
Mr C	Position AB	700,000	750,000	810,000
Ms E	Assistant to Position AB	<u>160,000</u>	<u>300,000</u>	<u>390,000</u>
	Total	<u>860,000</u>	<u>1,050,000</u>	<u>1,200,000</u>

- (c) Apart from Mr C and Ms E, Company B did not have any staff on its payroll in the Mainland.

Mode of operation

- (d) There was no material change in the mode of operation of Company B compared with the year ended 31 December 2006.
- (e) The sales invoices were issued in the name of Company B or its associates in Hong Kong as follows—

	<u>2007/08</u>	<u>2008/09</u>	<u>2009/10</u>
	\$	\$	\$
Invoice issued by Company B	-	7,590,934	65,719,495
Invoice issued by the associates	<u>163,692,609</u>	<u>163,978,802</u>	<u>102,841,758</u>
Total sales [Fact (10)(c)]	<u>163,692,609</u>	<u>171,569,736</u>	<u>168,561,253</u>

- (f) Company B only received and made payments through Bank AA in Hong Kong and did not have any other business activities. All the operations with the banker were carried out by the staff in the Mainland. Mr C was not required to handle any business matters while he was present in Hong Kong. He returned to Hong Kong for attending family matters, rest or medical consultations. He usually returned to Hong Kong during weekends.
- (g) A list showing the five largest customers with yearly sales to each customer.
- (h) A list showing the five largest suppliers showing yearly purchases from each supplier.

Role of Company N and Company M

- (i) Both Company N and Company M were suppliers of Company B.
- (j) Company N and Company M effectively operated with Company B as one entity. Purchase orders issued by Company B, as well as the fax and email correspondence, could not be provided because after confirmation of purchasing orders by the customers, production orders would be generated 'internally'.

26. The Representative provided copies of documents in respect of two representative transactions for the years ended 31 December 2008 and 2009:

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(a) For the year ended 31 December 2008

<u>Date</u>	<u>Document</u>
21-02-2008	Email correspondence between Ms AC of Company N and Mr AD/Mr AE of Company S5 concerning the new prices for 2008
04-04-2008	Purchase orders from Company S5 to Company N
28-05-2008 to 20-07-2008	Commercial invoices from Company AF to Company B, together with: (i) Mainland declaration forms showing export of goods from Company AF (ii) Textile Export Licence showing that the exporter was Company AF and the consignee was Company S5
19-06-2008	Email correspondence from Company N to Company S5 regarding testing reports of certain samples
15-07-2008	Email correspondence between Company N and the shipping agent in Hong Kong
18-07-2008	Email correspondence from Company S5 to Ms AC of Company N complaining the product quality
23-07-2008 31-07-2008	Invoices (nos. XXXXXXXXXX, XXXXXXXXXX-X) from Company K to Company S5 demanding total sales amount of US\$202,800.71, together with packing lists Bill of lading showing that the shipper was Company AF and the notifying party was Company S5
24-07-2008	Statement from Mr AG to Ms E requesting to arrange payment of US\$204,442.92 by T/T to Company AF for various invoices, including invoice no. XXXXXXXXXX
25-07-2008	Application for T/T of US\$204,442.92 to Company AF by Company J for payment of goods
27-08-2008	Credit advice from Bank AA to Company K showing receipt of US\$202,770.77 from Company S5 in respect of invoice nos. XXXXXXXXXX and XXXXXXXXXX less bank charges

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(b) For the year ended 31 December 2009

<u>Date</u>	<u>Document</u>
23-04-2009	Email correspondence from Mr AE of Company S5 to Ms AC of Company N enquiring the price for certain products
25-05-2009	Email correspondence from Ms AJ of Company S5 to Ms AC of Company N enclosing initial purchase orders
02-06-2009	Email correspondence between Ms AJ of Company S5 and Ms AC of Company N negotiating the prices
03-06-2009	Email correspondence between Company S5 and Company N showing placing of final purchase orders
10-06-2009	Confirmed product specifications and corresponding purchase orders from Company S5 to Company N
12-08-2009 to 21-08-2009	Province AK Export Goods Unify Invoices (nos. XXXXXXXXX, XXXXXXXXX, XXXXXXXXX, XXXXXXXXX, XXXXXXXXX, XXXXXXXXX) from Company N to Company B, together with Mainland declaration forms showing export of goods from Company N
19-08-2009 25-08-2009	Invoice (no. XXXXXXXXXX) from Company B to Company S5 demanding US\$264,643.56, and packing list Bill of lading showing that the shipper was Company N and the notifying party was Company S5
20-08-2009 27-08-2009	Email correspondence between Company N and the shipping agent in Hong Kong
24-08-2009	Statement from Mr AG to Ms E requesting to arrange payment of US\$330,167.88 by T/T to Company N for various invoices, including invoice no. XXXXXXXXXX
26-08-2009	Application for T/T of US\$330,167.88 to Company N by Company B for payment of goods
21-09-2009	Credit Advice from Bank AA to Company B showing receipt of US\$284,107.41 for invoice no. XXXXXXXXXX

27. In respect of the commission claimed to have been paid to Mr R for the years of assessment 2008/09 and 2009/10, the Appellant provided information and documents showing that the commission was paid in the following manner:

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	<u>2008/09</u>	<u>2009/10</u>
	\$	\$
In cash	56,800	-
Without supporting documents	<u>1,118,237</u>	<u>-</u>
	1,175,037	-
By T/T	<u>2,075,970</u>	<u>1,522,170</u>
Total	<u>3,251,007</u>	<u>1,522,170</u>

28. The Assessor maintains her view that the commission paid in cash or not supported by documents could not be allowed for deduction. She considers that the Profits Tax Assessment for the year of assessment 2008/09 should be revised as follows:

	\$
Profits previously assessed [Fact (23)(c)]	8,994,445
<u>Add: Commission to Mr R disallowed [Fact (27)]</u>	<u>1,175,037</u>
Revised Assessable Profits	<u>10,169,482</u>
Tax Payable thereon	<u>1,525,422</u>

Evidence called by the Appellant

29. Apart from the Appellant herself, the Appellant called three other witnesses, namely, Mr C, Ms E and Ms AL to support her appeal.

30. The Appellant signed and filed a witness statement made by her on 2 November 2018. However, in the course of giving evidence on 28 November 2018 she did not feel well to continue. Since Mr C had knowledge of the matters stated in her witness statement, upon application on the part of the Appellant and with no objection from the Respondent, the Board gave leave to Mr C to confirm the matters stated in her witness statement and he did so accordingly.

31. Mr C signed and filed a witness statement dated 6 November 2018. He confirmed with the Board that he understood the contents thereof which were true and correct to his best knowledge. Accordingly, his witness statement stood as evidence in chief and he stood before the Board for cross-examination by the Respondent's counsel.

32. The evidence presented by Mr C at the hearing is as follows:

- (a) Company B would (sic) set up office(s) at the suppliers' factories, with staff hired for liaising with overseas buyers, monitoring production, conducting quality control checks and ensuring that goods are shipped out to his customers promptly. The bulk of the business transactions of Company B were therefore conducted in cash in the PRC and the balance via its bank account(s) in Hong Kong.

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- (b) In April 2003, Company M and Company N were established in City W4 and City V respectively, to cater for the needs of different customers in terms of the type of garments produced and availability of suitably skilled workers for the kind of products. Not all order accepted would be manufactured by Company M and/or Company N in house, some would be sub-contracted out to other suppliers.
- (c) The staff at the ROs in the Mainland would handle communication with customers and suppliers. They have general authorities to enter into transaction on behalf of Company B except when those customer orders are going to be without profit or loss-making. To avoid unnecessary repetitions, he will adopt the facts stated and the schedules/documents referred to in the certain paragraphs of the Commissioner's Determination dated 6 April 2018.
- (d) There were only 2 customers (as far as commission income is concerned, the Board's emphasis) involved and the services were provided by the staff of the ROs in City W2 and City W3 respectively. He will (sic) adopt and without repeating the facts as stated in paragraph 14 of the Commissioner's Determination.
- (e) The Appellant, his mother retired back in Hong Kong in August 2007. Two of his children were receiving full time education in Hong Kong since 2007. His whole family have (sic) in essence relocated back to Hong Kong and were living in Address F.
- (f) In 2006 and 2007, he spent less than 60 days in Hong Kong, all were for domestic purposes. From 2008, he comes (sic) back regularly to Hong Kong over the weekends and public holidays to visit his family.

33. In the course of being cross-examined by the Respondent's counsel, Mr C stressed that all the transactions were made between the Mainland suppliers and the overseas customers in the Mainland. He repeatedly mentioned at the hearing that in reality there were no sales contracts and no purchase order confirmations between Company B and the overseas buyers; and Company B did not play any role in these transactions. He stressed that the role of Company B was limited to collect the payments for any transactions that actually happened (sic). He explained that the transactions happened (sic) actually between the Mainland suppliers and the overseas customers; and Company B collected the payment from the buyers and also paid money to the mainland entities. He confirmed that that was what Company B was involved. In terms of operation, Mr C stressed again that actually Company B did not play any role. He confirmed that Company B collected payments from overseas customers in Hong Kong for and on behalf of the Mainland suppliers and paid Reminbi to the Mainland suppliers in China. He told the Board that by doing so, the Mainland suppliers (principally, Company N and Company M) could keep some money in Hong Kong. This arrangement was deliberately arranged by him. However, he did not agree that such money amounted to profits belonged to the

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Mainland suppliers.

34. Mr C was referred by the Respondent's counsel to the documents relating to six sample transactions which were submitted by the Appellant's tax representatives to answer the queries raised by the Respondent in the course of dealing with the Appellant's tax returns for the relevant years. When he was confronted with the documents, he eventually agreed that the Mainland suppliers sold the goods to the FTCs first because the Mainland suppliers did not have but the FTCs had the export quotas which allowed the FTCs to ship the goods in question out of the Mainland to the overseas buyers.

35. Another benefit which Mr C claimed to have was that it could have a faster tax rebate if FTCs were engaged. He explained that by shipping goods out of the Mainland, the tax authority would rebate a certain amount of tax to the exporters. If the shipping was handled by the Mainland suppliers themselves, they had to wait for a long time before they received tax rebates.

36. Amongst other documents, Mr C was referred to the Customs Manifest submitted by City AM FTC and the Commercial Invoice issued by City AM FTC to Company B and the contract reference number 'XXXXXXXXXX' written on both documents. He was asked as far as this transaction was concerned, whether there should be a contract made between City AM FTC and Company B and if there was such a contract, he was asked to produce the contract for consideration. He replied that the goods in question were manufactured by them but for the sake of the quota, they provided City AM FTC with a 'reference number' only. He stressed that this 'reference number' was not important and not significant. He could not be sure whether there was such a contract but they needed to use the quota. In order to prepare the customs declarations documentation, they needed a 'reference number'. He repeatedly said that he was not involved in actual handling of the whole process so he was not clear whether they had contracts. However, for customs declaration purposes, they needed some documentation as far as he knew. Since he did not witness the execution of the contract in question, he was not sure about the contract matter.

37. Upon further cross-examination on the documents relating to the 6 transactions in question, Mr C testified that the 6 transactions in question were done between Company N and Company B first. Company N then used FTCs to export the goods in question to the customers of Company B.

38. The table indicated that there were 5 transactions in which the monies paid by Company N to the FTCs and the monies received by Company N were recorded. Although he told the Board earlier that those did not represent profits of Company N, upon confrontation with the table and the transactions recorded therein by the Respondent's counsel, Mr C eventually agreed with the Respondent's counsel that those represented profits of Company N which he said were left in Hong Kong. When he was asked whether Company N reported such profits to the Mainland tax authority, he explained that it did not report such profits because they were not yet wired back to Company N.

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39. According to Mr C, the payments made by the overseas buyers in settling the purchase price of the goods were not paid directly to the Mainland suppliers but to Company B. When Mr C was asked how and why the overseas buyers paid to Company B, Mr C referred the Board to an invoice issued under the name of Company B to Company S5. He told the Board that at the end of the invoice it was written that the beneficiary of the TT payment was Company B. He claimed it was the instruction given to the overseas buyer that the overseas buyer was to pay to Company B and not to the Mainland supplier. However, the invoice referred to by Mr C was issued in the name of Company B, not in the name of the Mainland supplier. Further, the instruction given at the end of the invoice was signed by Ms AL, an authorized signature of Company B. The invoice did not indicate that it had any connection with the Mainland supplier. Mr C was specifically asked to clarify why it was so. In his reply, he mentioned that on the first page of the invoice, there was an initial 'MF' under the 'Invoice No.' which meant Company N but he offered no other explanation.

40. Mr C agreed that Company N and Company M each had their own audited accounts. However, when he was referred to incomes respectively recorded in the audited accounts of Company N and Company M, Mr C replied that he was not sure about the figures as he was not the one who handled the accounting. When asked if he had read the audited reports in question before the auditors signed the same, he replied that he was not responsible for the audit matter. The responsible persons were his colleagues in the Mainland.

41. Mr C was also referred to the lists of clients of Company N and Company M which were supplied by the Appellant on 24 September 2010 to the IRD in response to IRD's enquiries dated 26 July 2010. The lists showed that Company N had 5 major customers which contributed about RMB 46.5 million income to it and that Company M had 23 major customers which contributed about RMB 40.8 million income to it. When Mr C was asked whether these customers (some of which were FTCs and none of them was an overseas customer) were the own customers of Company N and Company M, Mr C did not accept they were so. He explained that they were treated as customers only because they were involved as a matter of financing as they paid Reminbi to Company N and Company M.

42. Ms E signed and filed a witness statement dated 6 November 2018. Upon her confirmation that she understood the contents of her witness statement which was true and correct to her knowledge, her witness statement was adopted as her evidence in chief. She stood before the Board for cross-examination by the Respondent's counsel.

43. The evidence presented by Ms E at the hearing is as follows:

- (a) In 1999 and 2000, she established a garment factory in City W4 to produce garments for Country T customers of Company B. The factory was registered solely under her name because she was a local resident.
- (b) Mr C and she got married in 2000. She has since been assisting Mr

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C in the running of Company B and other companies of her family business, mainly their finance functions.

- (c) In April 2003, Company M and Company N were established in City W4 and in City V respectively. She moved with her elder daughter to City V to oversee the operations of Company N while Mr C spent most of his time in City W4 overseeing the operations of Company M and other representative offices located in different provinces.
- (d) In April 2006, Hong Kong immigration applications for herself and their elder daughter were approved. She came to Hong Kong for the immigration formalities and stayed in Hong Kong for about a month in the process. In addition to that, she spent about 2 months in Hong Kong in 2006, all were for domestic purposes, such as arranging for kindergarten admission in 2007 for her son and having immunization injections for her youngest daughter and hosting relatives visiting Hong Kong. They were living in Address F.
- (e) In August 2007, her mother-in-law retired and came back in Hong Kong for good. Herself and Mr C had to spend more time in China on their family businesses. As 2 of her children were receiving full-time education in Hong Kong in 2007, she had tried her best to come home visiting them if her works in China permitted. From 2008, her 3 children were all receiving full-time education in Hong Kong. As she stationed in Company N's office in City V, she had managed to spend weekends and public holidays with her family in Hong Kong.
- (f) She confirms that in all these years, she has never negotiated and concluded any business transaction on behalf of Company B in Hong Kong. While she was in Hong Kong, she might have approved a few remittance payments over phone and/or by fax or email, but she cannot recall the details now.

44. Ms E testified that she was the legal representatives of Company N and Company M which were set up in the Mainland. Both companies had their own accounts for taxation purposes. Ms E agreed that the major customers of Company N and Company M were the FTCs to which Company N and Company M sold the products.

45. When Ms E was referred to the four ROs, Ms E replied that those four ROs did not belong to Company N and/or Company M. They belonged to Company B. The staff working in the ROs were employees of Company B and their salaries were paid out of the account of Company B.

46. When she was confronted with the agreed facts that the four ROs did not have official names, no business registration or tax registration in China, Ms E changed

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her evidence and said that those staff were actually employed by the two factories, i.e. Company N and Company M in the Mainland but they performed duties for Company B because Company B did not have business registration in the Mainland.

47. Ms E was asked under what circumstances she would approve remittances when she was in Hong Kong (as stated in paragraph 7 of her witness statement) and why such remittances were necessary. In reply, Ms E confirmed that the remittances were for the purposes of settling the purchase prices of goods sold by Company N and Company M to Company B.

48. Ms E said that she was mainly responsible for the affairs of the factories and was the one to liaise with the municipal government agencies. She was also responsible for finance matters.

49. Ms E was also asked whether she knew there were certain surplus funds kept in Hong Kong as far as Company N and Company M were concerned. In response to the question, she replied that as far as Company N was concerned, Company N was paid in full by Company B in respect of the goods sold to Company B, so there would not be surplus left in Hong Kong.

50. In dealing with the commission earned by Company B, Ms E explained that Company B provided services to the oversea buyers to inspect the goods manufactured by other suppliers and the foreign customers would pay commission to Company B direct. She testified that as Company B had no employees in the Mainland, the services were provided by staff employed by Company N and Company M for and on behalf of Company B.

51. Ms AL signed and filed a witness statement for and on behalf of the Appellant on 2 November 2018. Upon her confirmation that she understood the contents of her witness statement which was true and correct to her best knowledge, her statement was adopted as evidence in chief and she stood for cross examination by the Respondent's counsel.

52. The evidence presented by Ms AL at the hearing is as follows:

- (a) In 1999, she joined Company B in City W4. She was responsible for the general office administration of the City W4 operation. In 2003, upon the establishment of Company N, she was transferred to Company N to act as personal assistance to Mr C, Position AH.
- (b) She was in charge of the finance function and the general office administration of Company N. The telephone line and fax line installed in Address F were forwarded to designated numbers in Company N office.
- (c) Since 2006, after she took over operations of Company B's bank accounts in Hong Kong, banking documents for the drawing down

of L/C's or remittance instructions could be prepared by herself and/or other colleagues working in the other offices. The transactions had to be authorized by either one of Madam A, Mr C and Ms E and then sent to the bank in Hong Kong directly by courier. She was responsible for liaising with the bank in Hong Kong for Company B. In fact, over the years, Company B has only one banker, Bank AA.

- (d) From her observations, the managers/officers-in-charge of each regional offices have the authority to negotiate and conclude contracts on behalf of Company B. It is only when the orders are without profit or loss-making that they need to seek the approval of Mr C.

53. The cross-examination on Ms AL was very short. She testified in the cross examination that she had never negotiated and concluded any contracts on behalf of Company B.

Relevant Provisions of the Inland Revenue Ordinance, Chapter 112

54. The provisions of the Ordinance which are relevant and applicable to this appeal are:

- (a) Section 2 – Interpretation
- (b) Section 14 – Charge of Profits Tax
- (c) Section 16 – Ascertainment of Chargeable Profits
- (d) Section 66 – Right of Appeal to the Board of Review
- (e) Section 68 – Hearing and Disposal of Appeals to the Board of Review
- (f) Section 68AA – Directions on Provision of Documents and Information
- (g) Section 70 – Assessments or Amended Assessments to be Final
- (h) Section 70A – Powers of Assessor to Correct Errors.

55. The Respondent submitted and relied on the following authorities:

- (a) Extramoney Ltd v CIR (1997) HKLRD 387
- (b) Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213

- (c) CIR v Common Empire Ltd (No.2) (2007) 3 HKLRD 75
- (d) Real Estate Investments (NT) Limited v CIR (2008) 11 HKCFAR 433
- (e) D19/09, (2009-10) IRBRD, vol 24, 483
- (f) D28/14, (2015-16) IRBRD, vol 30, 235
- (g) D2/16, (2016-17) IRBRD, vol 31, 316
- (h) D8/16, (2016-17) IRBRD, vol 31, 502
- (i) D14/08, (2008-09) IRBRD, vol 23, 244
- (j) D45/10, (2011-12) IRBRD, vol 26, 21

56. The Appellant submitted and relied on the following authorities:

- (a) CIR v Hang Seng Bank Limited [1991] 1 AC 306
- (b) CIR v HK-TVB International Limited [1992] 2 AC 397
- (c) CIR v Magna Industrial Co Limited [1997] HKLRD 173
- (d) Kwong Mile Services Limited v CIR [2004] 7 HKCFAR 275
- (e) ING Baring Securities (Hong Kong) Limited v CIR [2007] 10 HKCFAR 417
- (f) CIR v Datatronic Ltd [2009] 4 HKLRD 675
- (g) CIR v Li & Fung (Trading) Limited [2012] 3 HKLRD 8

Guiding Principles on source of Profits

57. Section 14 of the Ordinance provides that profits tax shall be charged for each year of assessment on every person carrying on a trade, profession or business in Hong Kong in respect his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business. In other words, only profits of a business carried on in Hong Kong which are sourced in Hong Kong are taxable. Section 2 of the Ordinance defines the phrase ‘profit arising in or derived from Hong Kong’ to include, without in any way limiting its meaning, all profits from business transacted in Hong Kong, whether directly or through an agent.

58. It is not disputed by the parties that in determining the source of profits,

the broad guiding principle is that ‘one looks to see what the taxpayer has done to earn the profits in question’¹ and where he has done it’². It is a question of fact depending on the nature of the transaction.

59. As per Bokhary PJ (as he then was) said, ‘the Hang Seng Bank/ HK-TVB broad guiding principle is not meant to be a universal test for ascertaining the source of a profit..... The situations in which the source of a profit has to be ascertained are too many and varied for a universal judge-made test. Apart from the words of the statute themselves, the only constant is the need to grasp the reality of each case, focusing on effective causes without being distracted by antecedent or incidental matters.’³

Source of Profits arising from commission income

60. As per Lord Millett NPJ in ING Baring⁴, ‘in considering the source of profits, however, it is not necessary for the taxpayer to establish that the transaction which produced the profit was carried out by him or his agent in the full legal sense. It is sufficient that it was carried out on his behalf and for his account by a person acting on his instructions. Nor does it matter whether the taxpayer was acting on his own account with a view to profit or for the account of a client in return for a commission.’

Burden of Proof

61. Section 68(4) of the Ordinance specifies that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

62. As noted by Deputy Judge To in Common Empire Limited⁵:

- (a) ‘The Commissioner has no burden of proving that the assessment is correct. Hence, the Board is not bound to make any finding of fact one way or the other. If the taxpayer fails to adduce any evidence to discharge his burden, or if his evidence is disbelieved, the appeal shall be resolved on burden of proof by dismissing the appeal and upholding the assessment.’⁶; and
- (b) ‘If the taxpayer calls no evidence on any disputed facts, or if he has given evidence but is not believed, the Board shall determine the appeal on the basis of the material before it, i.e. the Commissioner’s reasons for his determination and his statement of facts. Unless the Commissioner has misapplied the law, the assessment shall be upheld by the Board and the appeal dismissed.’⁷

¹ CIR v Hang Seng Bank Limited [1991] 1 AC 306 at page 323 A-C.

² CIR v HK-TVB International Ltd [1992] 2 AC 397 at page 407 C-D.

³ Kwong Mile Services Ltd v CIR [2004] 7 HKCFAR 275, paragraph 12 at page 283.

⁴ ING Baring Securities (Hong Kong) Limited v CIR [2007] 10 HKCFAR 417, paragraph 139 at page 467.

⁵ CIR v Common Empire Ltd (No. 2) (2007) 3 HKLRD 75, paragraph 32 at page 89.

⁶ Paragraph 32 at page 89.

⁷ Paragraph 31 at page 89.

63. In some decided cases, the Board consistently took the view that ‘*the Board may draw adverse inference against a taxpayer who is in the best position to provide such relevant information but has refused to do so in the witness box: see e.g. D45/10, (2011-12) IRBRD, vol 26, 21. In the latter circumstance, at the very least, this Board cannot attach much weight, if any, to the allegations and assertions of a taxpayer which are not tested by cross-examination. In other words, a taxpayer cannot expect this Board to act on his or her bare allegations.*’⁸

The Issues

64. The issues before the Board are, namely:

- (a) whether the trading profits of Company B in the years of assessments 2006/07, 2007/08, 2008/09 and 2009/10 were sourced in Hong Kong?
- (b) whether the commission incomes of Company B in the years of assessments 2006/07, 2007/08, 2008/09 and 2009/10 were gained in Hong Kong?
- (c) Even if the trading profits and commission incomes in the years of assessments 2006/07 were decided as not sourced in Hong Kong, whether the Profit Tax Assessment 2006/07 and the Additional Profits Tax Assessment 2006/07 have already become final and conclusive and are therefore not subject to appeal?

Analysis and Discussion

65. The Board first addresses an issue about the agreed facts raised by counsel for the Appellant. At the hearing, counsel for the Appellant submitted that by virtue of the adoption of the facts and the schedules/documents referred to in certain paragraphs of the Determination by Mr C in paragraph 7 of his witness statement, (namely, paragraphs 8, 12, 13, 16, 21 and 22), which forms part of the agreed facts of this Appeal (as reproduced at paragraphs 12, 16, 17, 20, 25 and 26 of this Decision), all the matters or allegations referred to in those paragraphs would become undisputed facts of the case and the Appellant has discharged her burden to prove them.

66. In paragraph 7 of Mr C’s witness statement, amongst others, Mr C said to avoid unnecessary repetitions, he will adopt the facts stated and the schedules/documents referred to in paragraphs 8, 12, 13, 16, 21 and 22 of the Determination. Mr C did not specify the purpose of such adoption except that adoption was to avoid unnecessary repetition.

67. Counsel for the Respondent disputed such contention. It is therefore

⁸ D8/16, (2016-17) IRBRD, vol 31, 502 at paragraph 19.

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necessary for the Board to consider what is extent of the ‘agreement on facts’ on paragraphs 12, 16, 17, 20, 25 and 26 of this Decision.

68. For discussion purpose, the Board used paragraph 12 of this Decision as an example. It stated that in response to the Assessor’s enquires, the Taxpayer (Appellant) provided certain information and documents referred thereto. The information and documents include (a) the establishment and business activity of Company B; (b) its employees in Hong Kong; (c) Organization chart of Company B as at 26 March 2008; (d) the mode of operation of Company B; (e) Company B’s five largest customers, not related to the Taxpayer (Appellant); (f) no formal sales contracts made with customers; (g) the manner of Company B receiving orders from overseas customers; (h) Company B’s five largest suppliers; (i) no formal purchase contracts made with the suppliers; (j) shipment of goods; and (k) settlement of accounts by overseas customers.

69. Clearly there was an act of the Appellant to provide certain information, documents and explanation to the Commissioner in response to his enquiry, and the documents and information submitted were those particularized in documents (a) to (k) referred to in the paragraph 12 of the Decision. The Board accepts the act of such provision of information and documents. However, the Board rejects the assertion that by virtue of agreeing the agreed facts, the parties are taken to have accepted the information and documents referred to in paragraphs 8, 12, 13, 16, 21 and 22 of the Determination.

70. If the Appellant wishes to prove the contents of the documents particularized in paragraph 12 of this Decision, the onus is on the Appellant to provide relevant evidence to the Board, which the Appellant failed to do so.

71. Although counsel for the Appellant tried his very best to persuade the Board that since the Respondent did not call any rebuttal evidence, the contents referred to in the said documents should be accepted as undisputed facts, the Board was not persuaded to do so. In the Board’s view, the lack of challenge on the part of the Respondent on the contents of those documents would not automatically make the contents of those documents as facts of the case.

72. In the circumstances, where those information and documents are relevant to this appeal, they will be considered by the Board which will give such weight as appropriate after having considered the evidence and submissions made by the parties in this appeal.

73. On the issue of transactions, Mr C in paragraph 7 of his witness statement said that the staff at the ROs in the Mainland would handle communication with customers and suppliers and they had general authorities to enter into transactions on behalf of Company B. Upon cross-examination, Mr C told the Board that the role of Company B was limited to collecting payments from overseas customers for the Mainland suppliers and paying Reminbi back to the Mainland suppliers and that Company B had no role in the transactions. However, his witness statement stated that Company B had a role in the transactions though the transactions were carried out in the Mainland. Apparently his

evidence at the hearing contradicts his witness statement.

74. In response to the Commissioner's enquiries of the tax returns, the Appellant offered the explanation to the Commissioner that no formal sales contracts were made with the overseas customers and no formal purchase contracts were made with the suppliers.⁹ However, the documents of the six sample transactions (comprising commercial invoices, declarations of export manifest or invoices) provided by the Appellant to the Commissioner in the course of enquiries of her tax returns, had contract numbers, reference numbers, invoices numbers etc. printed thereon. Again, his explanation is in contradiction with those documents.

75. When Mr C was cornered with the contract numbers referred to in customs declarations for export of goods submitted by the FTCs for export purposes, Mr C eventually agreed that certain documentation was required but as he did not personally handle the export, he did not know what kind of documentation was required. However, the Appellant did not see fit to call any of the responsible staff to give evidence or to produce the documents. It is quite obvious that Mr C failed to discharge the burden of providing the relevant documents to the Board for consideration. As a matter of fact, the Board feels that it is against any common or commercial practice that there were no written contracts made between the overseas buyers and the suppliers (whether Company B or the mainland supplier) for any goods ordered by the overseas buyers. After all, they were international trades. It is also against any common or commercial practice that there were no written contracts made between Company B and the Mainland suppliers. The Mainland suppliers were separate entities from Company B. They had their own accounts and they needed to have their own accounts audited. Likewise, it was also the case for the overseas customers. It is difficult to image that in the absence of documentation for overseas transactions, those enterprises, the Mainland suppliers or the overseas buyers, could handle their accounts properly and have their accounts and financial statements audited.

76. Company B's turnovers in each of the relevant financial years amounted to several ten-million Hong Kong Dollars. The trades were conducted with international customers. It is beyond any reasonable imagination that the international customers conducted their businesses with Company B or the Chinese entities without any formal contracts or purchase orders setting out the terms and conditions of the purchase.

77. Neither did the Board accept the claims that no formal purchase contracts were made with the suppliers of Company B. The claims that there were no formal contracts or purchase orders between Company B and its international customers or there were no formal contracts between Company B and its Mainland suppliers fly in the face of common sense.

78. As to the overseas payment, Mr C stressed that Company N and Company M purposely retained some monies in Hong Kong for future use. At first, he refused to accept that the monies retained were profits of transactions. When confronted with the

⁹ Paragraphs 12(f) and (i) of this Decision.

table, he eventually agreed that they were profits which belonged to the two companies. However, Company N and Company M did not report such profits to the Mainland tax authority because such monies had not been remitted back to the Mainland.

79. If there was any substance in Mr C's allegation, Mr C was saying that none of his family companies needed to pay any tax on any profits made in the transactions. As to Company B, it was his case that those were profits of Company N and Company M so Company B needed not pay any tax thereon. As to Company N and Company M, it was his case that though they kept profits (monies) in Hong Kong out of the transactions, both companies needed not report the tax as they had not been remitted back to the Mainland.

80. Mr C's argument could not be right. His account or explanation that the profits belonged to the Mainland suppliers contradicts the evidence of Ms E who was responsible for the financial matters concerning Company N and Company M and was their legal representatives. Ms AL said neither Company N nor Company M had any surplus or monies kept in Hong Kong. In this connection, Ms E gave evidence as to how the transactions were conducted. Insofar as Company N and Company M were concerned, Ms E said that both companies did not have any overseas customers, which tallied with their lists of clients respectively disclosed in their audited accounts. Their customers were mainly the FTCs. She explained that Company N and Company M sold goods to Company B and Company B paid them by way of remittance of RMB for the goods sold so both companies did not have surplus and monies kept in Hong Kong. On credibility, the Board prefers the evidence of Ms E to Mr C as her evidence is more in line with what was recorded in the contemporaneous documents.

81. The Board does not accept that Company B had any ROs in the Mainland. It was because it had no official business names. They also did not have business registration or tax registration in the Mainland. The so called ROs were the offices of Company M for facilitating communication with the suppliers and following-up the manufacturing process and quality control.¹⁰

82. The audited accounts of Company N and Company M confirmed that none of their customers were overseas customers. The audited reports contradict the claim of Mr C that Company N and Company M had direct dealings with the overseas customers. In fact, Ms E also confirmed that the major customers of Company N and Company M were the FTCs to which Company N and Company M sold the products and that Company N and Company M had no overseas customers.

83. On the basis of the sample documents provided and the evidence of Ms E, the only inference can be drawn by the Board is that Company B purchased goods from the Mainland entities or the FTCs in the Mainland which were sold to the overseas customers. The Mainland entities or FTCs issued invoices to Company B for payment and Company B would instruct the bank to settle the invoices of the Mainland entities or FTCs by T/Ts from Company B's account or the accounts of its associates in Hong Kong

¹⁰ Paragraph 17 of this Decision.

maintained with Bank AA. The sample documents also showed that Company B or the its associates in Hong Kong issued invoices to the overseas customers for payments of the goods sold to them. Company B received T/T payments from overseas customers through the bank accounts of Company B or its associates in Hong Kong maintained with Bank AA. According to the agreed facts¹¹, the Appellant confirmed that apart from the T/Ts, the customers would also settle the payments by L/Cs which were opened in favor of Company B or its associates in Hong Kong and Company B would also settle the accounts with the suppliers by L/Cs¹².

84. Mr C claimed that all the purchase orders were negotiated by staff save orders which were going to be without profit or loss-making. Mr C also claimed that he was not responsible for the shipping of the goods. Neither was he responsible for the accounts of Company B nor the Mainland entities. However, he called no evidence as to his role in the operations of Company B or the Mainland entities. It is not disputed that Mr C and Ms E both had a place of residence in Hong Kong. They were the authorized signatories to operate the bank accounts in Hong Kong¹³. For the period from 2006 to 2009 (4 years), Mr C stayed in Hong Kong on average 0.93 to 1.83 days each week. In the same period, Ms E stayed in Hong Kong on average 1.22 to 2.25 days each week.

85. It should be noted that the Appellant did not make any offshore claim in respect of Company B in her tax return for the assessment year of 2006/07. The tax computations for the years of assessment from 2007/08 to 2009/10 stated that Company B's Hong Kong office was responsible for arranging L/Cs, operating bank accounts, making and receiving payments and maintaining accounting records. However, in subsequent correspondence with the Commissioner, she alleged that Address F was only used to receive letters from Bank AA and all the banking documents were prepared in the Mainland and then sent to Bank AA in Hong Kong by courier services. No explanations were offered for such discrepancies. Except bare allegations, the Appellant failed to provide any evidence, not to say credible evidence, to substantiate that all the financial activities of Company B in the material periods were arranged in the Mainland as claimed.

86. Given the fact that Mr C and Ms E respectively were Position AB and assistant to Position AB of Company B, the only two senior staff of Company B, it is more probable than not that they operated the businesses of Company B while they were in Hong Kong, which included, but not limited to, the acceptance of purchase orders from overseas customers, the placing of manufacturing orders with the Mainland entities, the collection of payments from the overseas customers, the arrangement of settlement of the sale prices of the goods supplied by the Mainland entities and other financial activities of Company B.

87. Ms AL said in her witness statement that since 2006, she took over operations of Company B's bank accounts in Hong Kong. The Board has doubt about this as Company B could not employ staff in the Mainland and it had only two employees in

¹¹ Paragraphs 12(k), 16(c) and 17(j) of this Decision.

¹² Paragraph 13(d) of this Decision.

¹³ Paragraph 20(d) of this Decision.

Hong Kong. Even if Ms AL assisted in the preparation of L/Cs or remittance instructions, this does not preclude Mr C and Ms E from handling the banking transactions in Hong Kong personally.

88. As pointed out in paragraph 81 above, the ROs belonged to Company N and Company M. The staffs were employed by them. In other words, the ROs and the staff employed had nothing to do with Company B. Except bare allegations, there was no evidence, no matter oral or documentary evidence, showing that such staff solicited and negotiated with the overseas customers for purchase orders for and on behalf of Company B, even if such activities did happen. If such activities did happen, they were carried out by the Mainland entities which were entities separate from Company B. All of them had their own accounts. Such activities were not relevant in determining the source of profits of Company B.

89. The Appellant appears to contend that Company N or Company M or any of the ROs acted as agent of Company B to conclude contracts for and on behalf of Company B. Ms AL gave evidence that it was her observation that manager/office in charge of each ROs had the authority to negotiate and conclude contracts on behalf of Company B. However, her main duty was ‘the operation of Company B’s bank accounts in Hong Kong’. She was not responsible for such negotiations. In the absence of other credible evidence, her observation alone could not assist the Board very much. In addition, such contention is inconsistent with the Appellant’s another contention that it was Company N or Company M which entered into transactions with the overseas customers in their own capacity.

90. Regarding the commission income of Company B, Ms E confirmed that the staff of the ROs provided the inspection services in relation to goods manufactured by suppliers other than Company N and Company M for and on behalf of the overseas buyers. They paid 2% to 3% of the price of the goods as service charges to Company B. It should be noted that this is a bare assertion without any documentary support. According to the explanation given by the Appellant, the commission income of Company B was derived from City W2 Office and City W3 Office. These two offices usually contacted buyers in Country T by email or occasionally by telephone and fax¹⁴. If there was an agreement between Company B and the overseas buyers on the inspection services to be provided by Company B, no matter such agreement was made in Hong Kong or in the Mainland, one would expect that there should be some formal written agreement of provision of services setting the terms and conditions made between the overseas customers and Company B or City W2 Office and/or City W3 Office. One would also expect that there were invoices issued by Company B or the City W2 Office and/or City W3 Office to the overseas buyers. Regrettably, none of the aforesaid documents were produced by the Appellant for the Board’s consideration. The Board could not imagine that overseas buyers would pay a lot of commissions without any formal contracts made with the Mainland agents who provided the services. The Appellant simply failed to discharge her burden to prove the commission arrangement.

¹⁴ Paragraph 18 of this Decision.

91. There was no evidence that the inspection services provided by the staff of ROs had something to do with Company B as Company B had no staff, no business or tax registration or business address in the Mainland during the material time. By reason of the aforesaid and given the fact that the commission income involved was about 2.5% of the annual turnover of Company B, the Board tended to accept that the commission income was incidental to or part and parcel of the trading business of Company B.

Findings

92. For the reasons stated above, the Board rejects the stance of Mr C in this appeal.

93. By reason of the above analysis, there is no sufficient or adequate credible evidence to persuade the Board that (a) the profits of Company B were sourced or derived outside Hong Kong; (b) all the business activities of Company B were carried out in the Mainland by the Mainland entities, the Appellant, Mr C or Ms E; (c) the registered office of Company B in Hong Kong was only used for keeping accounting documents and receiving correspondence from Bank AA; and (d) there was the existence of any commission agreement made between the Appellant and the overseas customers; and (e) the commission income of Company B was sourced or derived outside Hong Kong.

94. Having carefully considered the evidence called by the Appellant, the documents and materials submitted in the B1 and R1 bundles and the agreed facts as well as the submissions of the parties, the Board comes to the following conclusions:

- (a) Company B carried on a trading business during the material periods in Hong Kong;
- (b) Company B earned its trading profits by bringing the complementary needs of the overseas customers and the Mainland suppliers and matching the purchase of the overseas customers with the sale of the Mainland suppliers in Hong Kong;
- (c) Company B maintained an account with Bank AA in Hong Kong, through which, Company B collected payments via T/Ts or L/Cs from overseas customers and made payments to the Mainland suppliers via T/Ts or L/Cs;
- (d) the businesses of Company B were operated by the Appellant, Mr C and Ms E while they were in Hong Kong;
- (e) the commission incomes derived by Company B for the assessment years under appeal were incidental or part and parcel of its trading business;
- (f) the profits of Company B in the assessment years under appeal were sourced in Hong Kong; and

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- (g) the Appellant failed to discharge the onus of proof under section 68(4) of the Ordinance that the assessments were excessive or incorrect.

95. Since the Board finds that the profits including the commission incomes of Company B for the assessment years under appeal were sourced in Hong Kong, the same should be chargeable to profits tax under section 14(1) of the Ordinance.

96. Although it is not necessary for the Board to deal with issue (c) specified in paragraph 64 of this Decision after the Board finds that the profits for the assessment years 2006/07 were sourced in Hong Kong, for completeness of the decision, the Board wishes to briefly address this issue.

97. The Appellant filed her tax return for the assessment year 2006/07 with the Commissioner on 5 October 2007 which did not claim any offshore profits allowance. The original Profits Tax Assessment for the year 2006/07 was issued to the Appellant on 6 December 2007. The Appellant through her tax representative objected to the said Profit Tax Assessment on 21 November 2008, some 11 months after its issuance on the grounds that the profits were earned offshore after she was so advised by her tax representative.

98. As the objection was not lodged within the statutory one-month objection period or the Appellant failed to give any explanation on why she failed to do so, the Assessor took the view that the original assessment should be regarded as final and conclusive in terms of section 70 of the Ordinance.

99. Under section 70A of the Ordinance, if within the period referred therein, it is established to the satisfaction of an assessor that the tax charged for that year of assessment is excessive by reason of an error or omission in any return or statement in respect thereof, or by reason of any arithmetical error or omission in the calculation of the amount of the net assessable value, assessable income or profits assessed or in the amount of the tax charged, the assessor shall correct such assessment.

100. The meaning of ‘error’ referred to in section 70A had been elaborated by P Chan J (as he was then) in *Extramoney*¹⁵, in which he said *‘for the purpose of section 70A, the meaning of “error” given in the Oxford English Dictionary (page 277) would be appropriate, that is “something incorrectly done through ignorance or inadvertence; a mistake”. I do not think that a deliberate act in the sense of a conscientious choice of one out of two more courses which subsequently turns out to be less than advantageous or which does not give the desired effect as previously hoped for can be regarded as an error within section 70A’.*

101. The Appellant elected that the profits in the assessment year 2006/07 were taxable in her tax return. After being advised that she might claim that the profits were offshore and should not be taxable, she changed her mind and objected to the assessment.

¹⁵ *Extramoney Limited v CIR* [1997] HKLRD 387 at A-B page 396.

Apparently, it was a deliberate act and a conscientious choice of the Appellant that the profits in the assessment year 2006/07 were taxable when she filed her return on 5 October 2007. As such, the Board does not think that there was an error or inadvertent omission under section 70A when she had another advantageous claim upon advice being rendered by her tax adviser. Accordingly, section 70A could not assist the Appellant and the Profit Tax Assessment of year 2006/07 should be final and not subjected to an appeal to the Board.

Conclusion and Disposition

102. For the above findings and reasons, the Board dismisses the appeal and confirms and upholds the assessments as stated in paragraph (17) of the Section '3 Reasons Therefor' of the Determination.

Costs

103. Under section 68(9) and Part 1 of Schedule 5 of the Ordinance, if the Appellant fails in her appeal, the Board may order the Appellant to pay as costs of the Board a sum not exceeding the amount of \$25,000.

104. As analyzed in the above, the evidence called by the Appellant to support her claim that the profits earned in the relevant assessment years being sourced outside Hong Kong were flimsy, vague and contradictory. As an example, it is hard for any reasonable man to believe that in international trades, there were no written contracts made between the overseas customers and Company B or the Mainland suppliers. Equally it is difficult to appreciate the allegations that there were no written contracts made between Company B and its Mainland suppliers.

105. There is abundant evidence that 'contract numbers' were referred to in the invoices, commercial invoices or the export manifest application forms or other documents in the document bundles. After being cornered with such documents, Mr C eventually accepted that there might be some documentation being submitted in support of application for the export permit. However, he evaded the question of production by saying that he was not responsible for handling the shipping of goods.

106. The total tax involved amounts to several million Hong Kong dollars. There is every temptation for the Appellant to take this Appeal even though her case is hopeless. In the Board's view, there is no reasonable prospect of success in the appeal. The evidence produced suggested that the Appellant knew very well that there were no good grounds to appeal. This is just a frivolous and vexatious exercise on the part of the Appellant.

107. In the circumstances, the Board feels it right to order and herein orders the Appellant to pay a sum of \$25,000 as costs of the Board which shall be added to the tax charged and recovered therewith pursuant to section 68(9) of the Ordinance.