Case No. D7/17

Profits tax – insurance agency business – whether payment received from non-contractual party for services rendered - sections 14, 68(9) and 80(2)(c) of the Inland Revenue Ordinance ('IRO')

Panel: Cissy K S Lam (chairman), Liu Kin Sing and Wu Pui Ching Teresa.

Date of hearing: 25 April 2017.
Date of decision: 19 June 2017.

The Appellant registered an insurance agency business and had two contracts (the Manager's Contract and the Agent's Contract) with Company C.

Company C was an indirect wholly-owned subsidiary of Company D. Company A held a substantial shareholding in Company D.

On 15 May 2007, Company A completed the sale of its entire shareholding in Company D and made a significant gain of approximately HK$2,596 million.

The issue in this appeal is whether the Sum of HK$30 million paid by Company A to the Appellant (in recognition of his loyalty and successful role as agency leader leading to the success and hence high valuation of Company D) on July 26, 2007 was part of the assessable profits arising in or derived from the Appellant's business.

Held:

1. There was no contract between the Appellant and Company A. Yet the Sum was paid for services rendered out of the Appellant's role as an insurance agent and an agency leader managing the agency force of the Company D group before the completion of the sale enabling Company A to complete the sale and make the substantial profit.

2. Without the services of the Appellant, the sale of the Company D group would not have completed, and for these services the Sum was paid as reward.

3. Appellant fails to prove and there is no evidence that the Sum was 'wholly unexpected'.

4. The Sum was assessable profits arising in or derived from the Appellant's business within the meaning of section 14 of the IRO.

Appeal dismissed and costs order in the amount of $5,000 imposed.

Cases referred to:

Commissioner of Inland Revenue v Crown Brilliance Ltd [2016] 3 HKC 140
D46/13, (2014-15) IRBRD, vol 29, 291
Aviation Fuel Supply Co v Commissioner of Lnland Revenue
Simpson v Reynolds [1975] 1 WLR 617
Murray v Goodhews [1978] 1 WLR 499

Appellant in person, accompanied by his tax representatives.
Paul H M Leung instructed by Department of Justice, for the Commissioner of Inland Revenue.

Decision:

1. The Appellant objected to the Additional Profits Tax Assessment and Additional Personal Assessment for the year of assessment 2007/08 raised on him ('the Additional Assessments')

2. By a Determination dated 30 August 2016 ('the Determination'), the Deputy Commissioner of Inland Revenue ('the Commissioner') rejected his objection and confirmed the Additional Assessments.

3. Dissatisfied with the Determination, the Appellant appealed to the Board of Review ('this Board') by Notice of Appeal dated 26 September 2016.

4. The central issue is whether a sum of HK$30 million ('the Sum') paid to the Appellant by Company A was part of his profits within the meaning of section 14 of the Inland Revenue Ordinance, Chapter 112 ('IRO') or whether it was a wholly unexpected gift.

The Facts

5. The Appellant attended the hearing with his tax representatives. He elected not to give evidence or to call any witness. We were left with the undisputed facts and the documentary evidence. Arguments exchanged between the Appellant's tax representative and the Assessor/Commissioner were not evidence (CIR v Crown Brilliance Ltd [2016] 3 HKC 140). On the basis of these materials, we find the facts as per paragraphs 6 to 32 below proved.

6. On 13 December 1989, the Appellant registered an insurance agency business in the name of 'Business B' ('the Business').

7. The Appellant had two contracts with Company C[1] both dated 19 July 2000, namely:

(1) The Agency General Manager's Contract ('the Manager's Contract'), by which the Appellant was appointed as Manager to recruit, train and supervise agents for Company C with effect from 21 July 2000.

(2) The Agent's Contract For Selling Long Term Insurance Business ('the Agent's Contract'), by which the Appellant was appointed as Agent of Company C with effect from 21 July 2000.

8. Both the Manager's Contract and Agent's Contract stated it was understood and agreed that there was no employer and employee relationship either expressed or implied between Company C and the Appellant and nothing in the agreements should be construed to create such relationship.

9. As at 31 December 2006, Company C was an indirect wholly-owned subsidiary of Company D[2].

10. In the directors' report of Company D for the year ended 31 December 2006, it was stated that:

> 'The principal activity of [Company D] is investment holding.
>
> The Group [i.e. Company D and its subsidiaries] is principally engaged in the provision of a range of whole life, endowment and unit-linked insurance products to individuals in Hong Kong as well as being engaged in asset management. The Group also provides a range of other related products, including term life, accident, medical and disability insurance, to individuals and employee groups, and general insurance products through agency arrangements. '

11. The annual report of Company D for the year ended 31 December 2006 disclosed that the Appellant was an Position E of the Group.

12. Company A[3] held a substantial shareholding in Company D.

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[1] Company C, a Territory F company registered in Hong Kong, was renamed as Company C1 in August 2007, Company C2 in July 2010 and Company C3 in July 2016. The company will be referred to as Company C herein irrespective of the name change.

[2] Company D, a company incorporated in Territory F had been listed on The Stock Exchange of Hong Kong Limited since 1999. On 6 August 2007, Company D was renamed as Company D1. Company D's listing was withdrawn on 15 August 2007. The company will be referred to as Company D herein irrespective of the name change.

[3] Company A, a company listed on the Singapore Exchange Securities Trading Limited, held certain shares in Company D's issued share capital as at 1 March 2007.

13. By a joint announcement on 1 March 2007, Company G[4] and Company D jointly announced that:

(1) Company G, Company A and Mr H[5] entered into a Share Purchase Agreement on 1 March 2007 ('Share Purchase Agreement') under which Company G agreed to acquire 431,110,742 shares of Company D for an aggregate consideration of some $ 3,500 million. The shares to be acquired from Company A, Mr H and other sellers represented approximately 50.48% of the issued share capital of Company D as at 27 February 2007 on a fully diluted basis.

(2) Completion of the Share Purchase Agreement was conditional upon satisfaction, or waiver, of the conditions precedent.

14. One of the conditions precedent was 'the No Material Adverse Impact Condition':

'(h) there being no breach of certain warranties contained in the Share Purchase Agreement which arises from the activities or omissions of the directors or senior management of the Group in relation to its business (but excluding any breach outside the control of such persons) and which, whether looking at such breaches singly or in aggregate, shall have a material adverse impact on the reputation of the Group taken as a whole and shall have a materially adverse recurring impact on the future profitability of the Group taken as a whole or shall have a material adverse effect on the net asset value of the Group taken as a whole, in each case when compared to the position of the Group as at 31 December 2006;'

15. By a joint announcement issued on 10 May 2007, Company G and Company D jointly announced, inter alia, that the conditions precedent to the Share Purchase Agreement other than the No Material Adverse Impact Condition were fulfilled on 9 May 2007. The No Material Adverse Impact Condition was one of the conditions precedent that was required to be satisfied simultaneously at the completion of the Share Purchase Agreement, which was scheduled to take place on or about 15 May 2007.

[4] Company G, a company incorporated in Country J, was a wholly owned subsidiary of Group K. Company G was a provider of insurance services to personal, business and institutional customers outside of Group K' home markets of Country J and Country L.

[5] Mr H, Position M of Company D and Position N of Company A, held options in respect of certain shares of Company D as at 1 March 2007. Further, certain shares in Company D's issued share capital were held under Trust P, a discretionary trust of which Mr H was a founder.

16. As at 31 March 2008, the Appellant was registered as insurance agent of the following insurers:

Appointing Insurer	Date of Registration
Company C	21 July 2000
Company Q	21 July 2000
Company R	8 November 2002
Company S	31 December 2007

17. By a Notification of Remuneration Paid To Persons Other Than Employees for the year ended 31 March 2008 ('IR56M') filed by Company C on 22 May 2008 in respect of the Appellant, Company C stated as follows:

(a) Capacity engaged:	Position T
(b) Period:	01-04-2007 to 31-03-2008
(c) Income particulars:	
Commission	$14,804,216
Others	3,604,000
	$18,408,216

18. The remuneration of $18,408,216 was paid to the Appellant for services rendered under the Manager's Contract and the Agent's Contract.

19. On 26 September 2008, the Appellant filed his Tax Return – Individuals for the year of assessment 2007/08 ('Tax Return') in which:

(1) He declared under 'Part 5 Profits Tax' Gross Income / Turnover of the Business as $18,408,216 and Assessable profits as $16,268,457.

(2) A Profit Tax Computation was enclosed which showed that among the list of expenses was 'Agents' welfare and prizes' in the sum of $776,827 which represented regular lunches and dinners with agents of his unit as well as regular prizes including trophy and bonus presented to outstanding agents.

(3) He declared that he did not have any income chargeable to Salaries Tax during the year.

20. By a letter dated 17 October 2008 ('the 2008 Letter'), the Appellant through Company U, informed the Inland Revenue Department ('IRD'), inter alia, that the Appellant had received the Sum, an ex-gratia payment, from Company A during the year of assessment 2007/08 and he did not consider the Sum a trading receipt and had not included it in the Tax Return.

21. Attached to the 2008 Letter was a copy of the letter dated 20 July 2007 issued by Mr H as Position N of Company A ('Mr H's Letter'). It read as follows:

> '… The sale of [Company D] to [Company G] has achieved a very high return for [Company A]…
>
> The Success of [Company D] is owed to its very loyal and capable management and agents. … Your role as agency leader has been particularly important as you gave your team great leadership and instilled a sense of loyalty to the company and a desire to see the company succeed. I recognize and appreciate that you excel in your role as agency leader not because it is your job but because you believe in your team and that their commitment to excellence will drive the company's success.
>
> Your dedication is something that is difficult to value in money terms. Nevertheless, [Company A] would like to extend to you an ex-gratis payment of HK$30 million, which will be credited to your bank account on July 26, 2007. We hope you will accept this as a token of our appreciation.'

22. On 7 November 2008, the Assessor raised on the Appellant Profits Tax, Property Tax and Personal Assessment for the year of assessment 2007/08 based on the Tax Return. The profits of $16,268,457 declared in the Tax Return was adopted.

23. By separate letters of 13 October 2011 to Company U and Company A, the Assessor sought further information on the Sum.

24. Mr X, Position Y of Company A, replied by letter of 11 November 2011 ('Mr X's Letter').

25. The questions raised by the Assessor and the corresponding replies of Mr X were as follows:

> '**(a) the relationship between [Company A] and [the Appellant] if any, with document in support;**'
>
> '(a) "There has never been any contractual relationship between [Company A] and [the Appellant]. [The Appellant] has never been an employee of [Company A]. He was an insurance agency leader in [Company D] group … We understand he was an agent who provided insurance agency service to the [Company D] group.'
>
> '**(b) the relationship between [Company A] and [Company D], if any, with document in support;**'
>
> '(b) [Company A] used to own approximately 47% of the shares of [Company D]. On 15 May 2007, [Company A] completed the sale of its entire shareholding in [Company D] to [Company G].'

‘**(c) the role played by [the Appellant] in the sale of [Company D];**’

‘(c) [The Appellant] was not contracted by [Company A] to sell [Company D] group. However, [the Appellant] played an important role because his agency was one of the largest agencies in [Company D] at the time of the sale and the retention of the agents in [the Appellant’s] team and the stability of his agency force helped in ensuring the success of the sale of [Company D] group. (See (d) and (e) below).’

‘**(d) the nature of [the Sum] and reasons and circumstances leading to the payment to him;**’

‘(d) “[Company A] made a significant gain of approximately HK$2,596 million on the sale of [Company D] group. The sale might not have been completed successfully without [the Appellant’s] concurrence. It is recognised that the agency force is a major asset of [Company D] group and that under [the Appellant’s] leadership, his substantial agency force remained stable and intact from the date of signing of the [Share Purchase Agreement] through to the Completion date, thereby ensuring one of the major factors which could have triggered [the No Material Adverse Impact Condition] did not happen.’

‘**(e) describe the services performed by [the Appellant] to [Company A];**’

‘(e) As mentioned in (c) above, [the Appellant] was not contracted by [Company A] to sell [Company D] group. Nonetheless, [Company A] recognises that the success of [Company D] and the extremely attractive valuation of [Company D] … is owed to its loyal and capable management and agents. In particular, [Company A] recognises that [the Appellant], as an agency leader, provided great leadership and instilled a sense of loyalty to [Company D] amongst the agents under his charge, without which many agents might have become concerned and destabilised by the impending sale of this business and might have elected to leave the [Company D] group. Accordingly, such an exodus would have constituted a breach of the Agreement and derailed the sale.’

‘**(f) the basis of calculation of [the Sum] and documentary evidence in support;**’

‘(f) The ex-gratia payment was not determined based on any prior-agreed formula. [Company A] made a gain of approximately HK$2.6 billion on the sale of [Company D] group and 1% thereof is approximately HK$26 million. This amount was rounded off to arrive at the sum of HK$30 million.’

> '**(g) the manner in which the sum was paid to [the Appellant] and supply documentary evidence to support that it was received by him.**'
>
> '(g) [Company A] arranged for [the Sum] to be credited to [the Appellant's] bank account on 26 July 2007. …'

26. Company U replied by letter of 4 January 2012 stating the facts and the legal arguments in support of the Appellant's case that the Sum was not chargeable under section 14 of the IRO.

27. The Assessor took the view that the Sum was a taxable income derived from the Business. On 12 January 2012, he raised on the Appellant the Additional Assessments, as a result of which the Appellant was required to pay an additional tax of $4.8 million.

28. The Appellant objected to the Additional Assessments and further correspondence ensued between the Assessor and Company U until July 2016.

29. Upon the Assessor's enquiries, Company C provided further information to the Assessor by letter of 19 January 2016 by Mr Z, Position AA of Company C ('Mr Z's Letter'), as follows:

(1) The number of agents, Position AB and Position AC supervised by the Appellant were as below:

As at	Agents	Position AB	Position AC
31-12-2006	622	1	5
01-03-2007	612	1	5
15-05-2007	674	1	8

(2) The Manager's Contract should be referred to for the Appellant's scope of work and duties in agency management.

(3) Company C could not find any documents relating to the appointment of the Appellant as Position E.

(4) The Manager's Contract and Agent's Contract were still in force and there was no amendment or new contract between Company C and the Appellant during the period from 1 January 2007 to 31 March 2008.

30. The agents, Position AB and Position AC referred to in Mr Z's Letter were part of the Appellant's agency force for the purposes of the Manager's Contract.

31. As per the Annual report 2006 of Company D, there were a total of 2,031 agents at year-end. Hence, on record, the Appellant had about 30% of Company D's agents under his supervision.

32. By the determination, the Additional Assessments were confirmed.

Grounds Of Appeal

33. By the Notice of Appeal, the Appellant raised the following grounds of appeal:

(1) The Additional Assessments were incorrect because the receipt of the Sum by the Appellant was not chargeable under section 14 of IRO on the Business for the year of assessment 2007/08. The Commissioner made the wrong conclusion which was inconsistent with documentation and he ignored some relevant evidence.

(2) The scope of the Business and receipts had been exhaustively agreed by the contracts with Company C (i) Clause 1.1 of the Agent's Contract: it is not an agreed term to perform anything relating to sale of shares; (ii) Clause III of the Manager's Contract: its profits consists of commission but do not include payment on extraordinary gain from selling shares; and (iii) Clause 6.9 of the Agent's Contract: Company C will notify IRD all the receipts from the Business as agency leader.

(3) The Commissioner misread Mr H's letter: (i) Mr H did not say the Sum was paid for the excellent service rendered in 2007/08; but indicated his appreciation of the Taxpayer, (ii) he did not say that the Sum was paid for the Business fulfilling conditions on selling shares; (iii) Company C did not regard the Sum as business payment in the IR56M; (iv) no evidence that Company C claimed it as an allowable business deduction [a fact known to IRD without denial]; (v) it was against commercial reality that (a) Company C did not claim such deduction (b) Company C was not liable for payment of service rendered as agency leader of Company C; (vi) the Sum was not calculated on the basis of any alleged service.

(4) The Commissioner had no evidence that the Business provided any service to Company A in 2007/08: (i) The Business was under no such obligation; no power and did not perform any asserted service to Company A including giving concurrence to the sale of shares or controlling stability of Company C's whole agency force as a condition for selling shares; (ii) such asserted role were not mentioned in Mr H's letter; (iii) Mr X's assertions on 11 November 2011 had not been proved by the company record of Company A.

(5) Both Mr H and Mr X did not say that the Sum was the payment for any alleged service rendered in 2007/08. The Commissioner did not ascertain from them the basic and relevant fact – whether the Sum

was a gift. Whereas the Sum had all the characteristics of a gift as opposed to a business receipt: (i) an isolated receipt; (ii) outside the terms of the contracts and agreed commission package; (iii) not expected to receive; (iv) no right to demand payment; and (v) without the extraordinary gain upon which the Sum was based, being its originating source, the Sum did not exist at all.

(6) The Sum was calculated on the extraordinary gain ascertained on 23 February 2007; it was determined and arose in 2006/07. The date of payment did not cause the profit to arise. The partial extractions of some public documents showing various dates are irrelevant to the determination of the Business' profits.

(7) The Commissioner wrongly relied on D46/13 because not all the known facts and disputes had been placed before and considered in D46/13.

(8) The Commissioner wrongly took advantage from any incomplete and ambiguous assertions obtained without supporting evidence; or placed the burden on the Business in respect of any relevant information not in its possession.

Relevant Provisions Of The IRO

34. Section 14(1) of the IRO 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 of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.*'

35. Section 80(2)(c) of the IRO provides that: '*Any person who without reasonable excuse - … (c) gives any incorrect information in relation to any matter or thing affecting his own lability (or the liability of any other person) to tax … commits an offence …*'

Our Decision

36. On the facts, it is clear to us that the Sum was assessable profits arising in or derived from the Appellant's Business within the meaning of section 14 of the IRO.

37. The sum was paid in the following circumstances:

(1) There was an impending sale of the Company D group by Company A to Company G, namely the Share Purchase Agreement.

(2) Agency force was a major asset of the Company D group, as in all insurance businesses. This was recognised by Mr X in his letter.

(3) The agency force formed part of the valuation of Company D – 'the extremely attractive valuation of [Company D] … is owed to its loyal and capable management and agents.'

(4) It was important to the successful sale of Company D that the agency force 'remained stable and intact from the date of signing of [the Share Purchase Agreement] through to the Completion date'.

(5) But that was precisely the time when the agency force could become unstable – 'many agents might have become concerned and destabilised by the impending sale of this business and might have elected to leave the [Company D] group. Accordingly, such an exodus would have constituted a breach of the Agreement and derailed the sales'.

(6) The Appellant had under his supervision about 30% of the agency force – 'his agency was one of the largest agencies in [Company D] at the time of the sale'.

(7) It was thus vital to the success of the sale that the Appellant remained dedicated and loyal and 'provided great leadership and instilled a sense of loyalty to [Company D] amongst the agents under his charge', 'thereby ensuring one of the major factors which could have triggered [the No Material Adverse Impact Condition] did not happen'.

(8) His role was so important that Mr X said 'The sale might not have been completed successfully without [the Appellant's] concurrence.'

(9) It was in recognition of the importance of the Appellant's role in the sale that the Sum was paid to him.

(10) The Sum was paid by Company A (not Company C) to the Appellant because in playing the important role in the sale, it enabled Company A (not Company C) to complete the sale and make the substantial profit.

38. Set in this background, it is easy to understand Mr H's Letter and Mr X's Letter. The Sum was voluntary in the sense that there was no contract between the Appellant and Company A for payment, but it was clearly paid for services rendered. The services were, in a nutshell, his remaining loyal and dedicated and ensuring that his team also remained loyal and dedicated despite the impending sale of the employing company. He was not merely doing his usual job, but he was doing the extra mile during the testing time before the completion of the sale and it was for this extra effort that he was paid. It clearly arose out of and derived from his role as an insurance agent and an agency leader managing the agency force of the Company D group.

39. We now turn to the individual grounds of appeal.

40. Ground 1: This is a general ground attacking the assessments. For reasons stated above, we find that the assessments were correct.

41. Ground 2: This speaks of 'scope of the Business', a phrase Company U adopted from the authority of Aviation Fuel Supply Co v CIR. Company U referred to that case in the course of correspondence with the Assessor. At the hearing, the Appellant and his tax representative did not take us to that case. Out of our own initiative, we asked Mr Leung for the Commissioner to supply us with that authority and explain its facts and findings. Having heard Mr Leung, we find that that case dealt with very different facts and is not a relevant authority for our present consideration.

42. In any event, we think paragraphs (c) and (e) of Mr X's Letter had already answered Ground 2. Although it was certainly not part of the job of the Appellant under his contracts with Company C to sell the shares of Company D group and he obviously played no part in the negotiation of the sale, nevertheless, he 'played an important role' in the sale for the reasons set out above and the services he provided fell within his scope of business as agent and agency leader.

43. Ground 3: Mr H's letter was but one of the many facts that need to be considered. It must be read together with all the other facts. It is wrong to treat Mr H's Letter as having an overriding effect.

44. When put in proper context, it is easy to see why Mr H emphasized the Appellant's loyalty, dedication, team leadership and excelling in his role as agency leader. These were not mere indications of his appreciation of the Appellant, but statements of the services rendered by the Appellant. Without these services, the sale would not have completed, and for these services the Sum was paid as reward.

45. Regarding the argument that Company C did not include the Sum in the IR56M or did not claim deduction in respect of the Sum (there is no evidence of the latter), since the Sum was paid by Company A, not Company C, there is little significance in this argument. As Company A is a company listed in Country AD, there is no evidence how Company A treated the Sum for fiscal purposes.

46. Ground 4: It is certainly arguable that services were provided to Company A given the very important role he played in ensuring the success of the sale. In any event, it matters not whether the services were strictly speaking provided to the Company D group and not Company A. It is the nature of the payment that is important, not the identity of the payer.

47. Insofar as the argument that Mr X's Letter contained mere assertions without proof by the company record of Company A, we reject this argument:

(1) Mr X wrote the letter in his capacity as Position Y of Company A

and he wrote the letter 'for and on behalf of' Company A. It was not his personal opinion. What was stated in the letter represented the stance of Company A.

(2) Mr X wrote the letter in reply to enquires from the Assessor. Under Section 80(2)(c) of the IRO, it is a criminal offence to give incorrect information.

(3) It was not necessary for the Commissioner to obtain the company record of Company A in order to reply on Mr X's Letter.

(4) If the Appellant wants to argue that Mr X's Letter cannot be relied on because it contained untrue or unreliable information, it is for the Appellant to demonstrate this. It is not enough to simply compare Mr X's letter to Mr H's Letter as if Mr H's Letter had an overriding effect, which it did not.

48. Ground 5: For the reasons set out above, we think Mr H's Letter and Mr X's Letter when read together made it very clear that the Sum was for services rendered and we reject the argument that it was a gift simpliciter.

49. The present case is distinguishable from Simpson v Reynolds [1975] 1 WLR 617, CA, which Mr Leung for the Commissioner in all fairness included in his list of authorities. The emphasis of the three appellate judges there was on the fact that the payment was 'to the great surprise of the taxpayer', 'purely voluntary', 'wholly unexpected'. 'out of the blue' and was paid because the payer was sorry that the business relationship had ended and there was no foreseeable prospect of its renewal [619D, 619G, 620A, 621B, 621G-H].

50. In the present appeal, there is no evidence that the Sum was 'wholly unexpected'. Mr X stated that the sale could not have been completed without the Appellant's 'concurrence'. The use of the word 'concurrence' implied positive agreement and participation on the part of the Appellant.

51. Further, it was the Appellant's duty to supply evidence as to what happened from the time the sale was agreed to the time of completion. What was the internal communication between the management and the agents and agency leaders like the Appellant? What was the measure the group took to stabilise the agency force? We need more evidence if the Appellant wish to persuade us that the Sum was wholly unexpected.

52. The Appellant in his submission sought to argue that if there were an agreement to pay the Sum, that agreement would have been put down in black and white. We do not agree with this postulation. There was an impending sale of the business. There was a No Material Adverse Impact Condition. The last thing Company A would want was for the Company D group to assume any further liability or for Company A to make any collateral agreements with agents and agency leaders working for the Company D group.

53. The present case is also distinguishable from Murray v Goodhews [1978] 1 WLR 499, CA. In that case, the payment was paid as '*compensation for the loss of a long established and valuable trading connection*' [509D]. It was '*in the nature of a testimonial, or solatium, which, although it recognises the value of past services, is not paid specifically in respect of any of those services, or of expected future services*' [507D]. It was '*not a payment for any commercial consideration or return, past or future*' [508B]. On the facts of that case, the payment was said to be receipt falling outside the fiscal net. On the other hand, that case also made it clear that reward for past services and compensation for loss of profits or loss of opportunity would have been caught (see Squatting Investment Co Ltd, Severne v Dadswell, Ensign Shipping v IRC and McGowan v Brown cited therein; see also Rolfe v Nagel [1981] 55 TC 585). In each case, it is a question of fact of the particular case. All relevant circumstances must be taken into account to ascertain the true nature of the receipt. These may include the purpose for which the payer makes the payment, but it is an inversion of the basic principle to treat the motive of the payer as the conclusive factor.

54. In the present case, the Sum was not merely a testimonial or solatium or compensation for loss of a business relationship, it was a payment for commercial consideration for valuable services rendered by the Appellant without which the sale would not have completed.

55. Both Simpson v Reynolds and Murray v Goodhews made it clear that: (1) A voluntary payment made without legal obligation does not per se elude the fiscal grasp [Simpson 619H, 621H]; (2) nor does payment made after the business relationship has ceased [Simpson 619H, 621H; Murray 503F, 504G]. Source of payment and identity of payee are not relevant considerations.

56. Ground 6: The Share Purchase Agreement was made on 1 March 2007. It is not clear to us why the Appellant argued that "the Sum was calculated on the extraordinary gain ascertained on 23 February 2007". We do not understand how the Appellant came up with the date 23 February 2007. In any event, given that the services rendered by the Appellant was to maintain the agency force up to the completion of the sale, we think the critical date should be completion of the sale, not the date when the sale was agreed. The Share Purchase Agreement was completed on 15 May 2007 and the Sum was paid to the Appellant's account on 26 July 2007. Both dates fell within the 2007/08 year of assessment.

57. Ground 7: We do not see how the Commissioner had erred in relying on the previous Board of Review decision in D46/13, given that all the material facts are the same in both cases. In any event, we reach our decision on the facts before us, independent of the decision in D46/13.

58. Ground 8: We accept the whole of Mr X's Letter and Mr Z's Letter as true and correct. They were both written pursuant to enquiries from the Assessor and Section 80(2)(c) of the IRO applied to both letters. If the Appellant considered that the facts stated in the letters were 'incomplete' or 'ambiguous', or unsupported, it was for the Appellant to

clarify with Company A and Company C respectively or to otherwise provide proof that the disputed parts were incorrect. This he failed to do.

Conclusion

59. By reason of the aforesaid, we find that the Sum was part of the assessable profits arising in or derived from the Appellant's business within the meaning of section 14 of the IRO. We confirm the Additional Assessments and dismiss the appeal.

60. Pursuant to section 68(9) of the IRO, we order the Appellant to pay as costs of the Board a sum of HK$5,000.