INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D111/03

Profits tax – whether profits arising in or derived from Hong Kong – goods manufactured in the mainland – whether concession under Inland Revenue Departmental Interpretation and Practice Note No 21 (DIPN21) applicable – whether companies within same group of companies can be treated as same entity.

Panel: Anna Chow Suk Han (chairman), Benny Kwok Kai Bun and Horace Wong Ho Ming.

Date of hearing: 16 December 2003.
Date of decision: 30 March 2004.

The taxpayer was a private company in Hong Kong. Its principal activity was trading of toys. The taxpayer purchased raw material and sold them to Company B which manufactured toy products in the mainland. The taxpayer then purchased the products from Company B with a mark-up.

It is not in dispute that the taxpayer and Company B belonged to the same group of companies.

Held:

1. The Board found there was no processing or assembly arrangement between the taxpayer and Company B. Neither did the taxpayer pay any processing fee to Company B. Thus, Company B's manufacturing activities could not be treated as those of the taxpayer (DIPN21 considered).

2. The Board did not accept that the taxpayer and Company B should be regarded as one entity. They were in form and substance separate and independent entities and distinct from each other. Thus, the taxpayer's profits were not derived from the manufacturing activities in the mainland (Yick Fung Estates Ltd v CIR; FCT v Spotless Services Ltd considered).

Appeal dismissed.

Cases referred to:

D163/01, IRBRD, vol 17, 286
Firestone Tire & Rubber Co of Canada v CIT [1942] 4 DLR 433
Yick Fung Estates Limited v CIR [2000] 1 HKC 588
FCT v Spotless Services Limited 96 ATR 5201
Adams v Cape Industries Ltd [1990] CH 433
Bank of Tokyo Ltd v Karoon [1987] AC 45

Eugene Fung Counsel instructed by Department of Justice for the Commissioner of Inland Revenue.
Hylas Chung Counsel instructed by Messrs Huen & Partners for the taxpayer.

Decision:

The appeal

1. Company A ('the Taxpayer') has objected to the additional profits tax assessments for the years of assessment 1996/97 and 1997/98 raised on it. The Taxpayer claims that part of its profits was derived from its manufacturing operations in the People's Republic of China ('PRC') and therefore, in accordance with the Inland Revenue Departmental Interpretation and Practice Note No 21 ('DIPN21'), it should be assessed on a 50% basis in respect of that part of the profits.

Preliminary issue

2. Before proceeding to hear the substantive issue, the Taxpayer's Counsel made an application to this Board for discovery of documents, namely (1) the invoices from Company B to the Taxpayer (2) the posting ledgers of the Taxpayer and (3) bank statements of the Taxpayer. He explained that all these documents were seized by the Revenue due to certain criminal charges involving the Taxpayer and that those documents would be able to support the Taxpayer's claim that the Taxpayer, Company C and Company B, all these three companies, were in fact at all material times, one economic entity. He asserted that these documents would show that the Taxpayer had control and was, in a way, the real owner of Company B. We were informed that the Taxpayer's files and documents were taken away by and were in possession of the Revenue after a raid. It came to light that there were two lists of the documents seized by the Revenue, a list of used documents and a list of unused documents. The used documents are documents which are being used and kept by the Revenue for the purpose of the criminal proceedings while the unused documents which are not required and, as confirmed by Counsel for the Taxpayer, had all been returned to the Taxpayer. Counsel for the Taxpayer subsequently also confirmed that the Taxpayer had already been supplied with the Taxpayer's posting ledgers and the bank books on the used list. However, what the Taxpayer needed were Company B's invoices, Company C's posting ledgers

and the Taxpayer's bank statements. These items were requested for notwithstanding the fact that they were not on the used list. Counsel made the application on the assumption that the Revenue must have these items since all documents and files of the Taxpayer had been seized by the Revenue.

3. Having considered the matter, the Board refused the Taxpayer's application for the following reasons. Firstly, all the documents on the unused list, including the Taxpayer's vouchers which the Taxpayer believed should be attached to Company B's invoices, had all been returned to the Taxpayer. If Company B's invoices, Company C's posting ledgers and the Taxpayer's bank statements were not among the returned documents, neither were they named on the used list. Since the Taxpayer was unable to identify the documents which it requested for on the used list, it would be difficult for us to grant an application to discover documents the whereabouts of which are unknown. Furthermore, by the very nature of the documents sought, we are not convinced by the Taxpayer's assertion that those outstanding documents would be able to establish its claim that the Taxpayer was in control and the real owner of Company B. The hearing of this appeal was originally scheduled to be heard in July 2003 and it had been adjourned twice. The Taxpayer did have ample time to prepare its case and to gather its evidence. Had those documents been of such importance to its case, the Taxpayer should have and could have obtained them directly from Company B and the relevant banks. For the above stated reasons, we find no justification to grant the application made by the Taxpayer's Counsel.

Substantive issue

The agreed background facts

4. The Taxpayer was incorporated as a private company in Hong Kong on 21 September 1993. At all relevant times:

(a) Its authorized, issued and fully paid capital has remained at $10,000.

(b) Its audited financial statements do not record any form of capital investment in any company or factory in the PRC.

(c) Its principal activity was described as 'trading of toy'.

(d) In its report of the directors for the financial years ended 31 March 1997 and 31 March 1998, its chairman made the following statement:

'No contract of significance to which the company was a party and in which a director had a material interest subsisted at the end of the year or at any time during the year.'

5. (a) At all relevant times, the Taxpayer and two other companies, namely Company C and Company D, have common directors as detailed below :

Name	Position in Company A	Position in Company C	Position in Company D
Mr E	Director	Director	Director
Mr F	Director	Director	Director
Mr G	Director	Director	Director
Mr H	Director	(not a director)	Director
Mr I	(not a director)	Director	not a director

(b) Among the companies themselves, however, they do not have any cross shareholdings.

6. The particulars of Company C are described below:

(a) Company C was incorporated in Hong Kong on 9 September 1988.

(b) In its report of the directors for the financial period/years ended 31 March 1990 to 31 March 1995, the chairman described the principal activities of the company in the following terms:

'The principal activity of the company during the year comprises of import of finished goods for re-export, export of raw material and providing agency service for a toy factory in [Province J], China.'

(c) In its report of the directors for the financial year ended 31 March 1996, the chairman described the principal activities of the company in the following terms:

'The principal activities of the company during the year were holding of properties for rental income, providing financial services to related companies and general trading.'

(d) In its report of the directors for the financial years ended 31 March 1997 and 31 March 1998, the chairman described the principal activities of the company in the following terms:

'The principal activities of the company during the year were holding of properties for rental income.'

(e) Company C filed its profits tax returns for the years of assessment 1993/94 to 1997/98 on the basis that all its profits were derived from Hong Kong. These

returns were accepted and assessed by the assessor. Company C did not lodge any objection against these profits tax assessments.

7. The particulars of Company D are described below:

(a) Company D was incorporated in Hong Kong on 6 October 1993.

(b) It was engaged in trading of various types of finished products purchased mainly from non-related suppliers. The types of products involved included but were not limited to gifts items and non-plastic toys.

8. (a) In mid 1990, Company B which is a foreign investment enterprise was set up in the PRC. Company C was named as the investor of Company B in the Certificate of Approval issued by PRC authority. Certificate of Approval (**外資企業批準書**), Business Permit (**營業執照**) and Tax Registration Certificate (**外商投資企業稅務登記證**) of Company B were issued by the relevant authorities in PRC respectively.

(b) At all relevant times, Company B did not carry on any business in Hong Kong. It did not apply for business registration in Hong Kong and it did not file any Hong Kong profits tax returns. It has been subject to tax in the PRC.

9. (a) The Taxpayer, in submitting the profits tax returns for the years of assessment 1994/95 to 1997/98, reported the following assessable profits:

Year of assessment	Basis period	Assessable profits	Date of the return signed
1994/95	1-6-1994 – 31-3-1995	$9,676	9-10-1995
1995/96	1-4-1995 – 31-3-1996	$601,831	18-9-1996
1996/97	1-4-1996 – 31-3-1997	$1,764,076	9-10-1997
1997/98	1-4-1997 – 31-3-1998	$114,172	26-9-1998

(b) In these returns, the Taxpayer did not claim any part of its profits was derived outside Hong Kong. Its returned profits were assessed to profits tax. The Taxpayer did not lodge any objection against these profits tax assessments which have become final and conclusive in terms of section 70 of the Inland Revenue Ordinance ('IRO').

The Taxpayer's case

10. Mr E, a director of the Taxpayer, gave evidence on behalf of the Taxpayer to the following effect. Company C was incorporated in 1988 and was engaged in the business of toy

manufacturing in the Mainland and trading of the manufactured goods in Hong Kong. According to its annual reports from 1990 to 1995, its principal activities comprised of import of finished goods for re-export, export of raw materials and provision of agency service for a toy factory in Province J, China. For 1996, its principal activities were holding of properties for rental income, providing financial services to related companies and general trading. For 1997 and 1998, the principal activity was holding of properties for rental income. In 1990, Company B was incorporated in the Mainland and carried on the business of manufacturing plastic and wooden toys. From 1990 onwards, Company C ceased to be a trading company but concentrated on the business of selling Company B's products. Company B was a foreign investment enterprise and was wholly owned by Company C which was named as the investor of Company B in the Certificate of Approval issued by the PRC authority. Company B did not carry on any business in Hong Kong and had been and still was subject to tax in the PRC. After the incorporation of Company B, Company C purchased raw plastic materials in Hong Kong for Company B and sold them to Company B at costs. Company B used these raw materials to manufacture toy products and sent them back to Company C for sale to overseas customers. Although Company B was wholly owed by Company C, Company B was a separate legal entity in the PRC. Thus all the transactions between them were accounted for on the books as arms-length transactions. Actually, no profits arose from these transactions for either of them. They were like internal transfer from a parent company to its subsidiary. In 1993, in the course of restructuring the companies, all the shareholders agreed to set up two new companies. Thus the Taxpayer was incorporated on 21 September 1993 and Company D on 6 October 1993. The Taxpayer was incorporated to take over the toy business operations of Company C. The Taxpayer's functions were the same as those performed by Company C previously. Its functions were (1) to purchase raw materials in Hong Kong, (2) to transfer raw materials to Company B for Company B's manufacturing process, and (3) to ship the finished toy products to overseas buyers. It took over the business of toy manufacturing and the sales and marketing activities from Company C. The Taxpayer was at all material times engaged in the business of manufacturing toys and its manufacturing arm was Company B in the PRC. Company C's business in trading of artificial flowers was transferred to Company D. By the beginning of 1996, Company C ceased all operational activities and its only material source of income was from property rental. Company B purchased raw materials solely from, and sold the manufactured toys solely to, Company C and subsequently the Taxpayer. Company C, the Taxpayer, Company D and Company B were respectively held by Mr F, Mr G, Mr I, and Mr E in equal shares and these companies essentially belonged to one and the same group.

11. Counsel for the Taxpayer submitted that admittedly in legal term the Taxpayer was a toy trading company but in substance, the Taxpayer, together with Company C and Company B as a group, was manufacturing toys in the PRC and selling them to overseas buyers in Hong Kong. He argued that the present case was not a case where the Taxpayer bought a finished product and sold it to a buyer with a mark-up, but this was a case where the Taxpayer bought raw materials in Hong Kong and sent them to Company B in China and upon receipt of an order from the Taxpayer, Company B manufactured the product and sent it back to the Taxpayer for sale. Thus, he contended that the Taxpayer was in fact a manufacturer with the manufacturing arm of Company B

in the PRC. Counsel also contended that although in form Company C and the Taxpayer were two different business entities, in substance, the Taxpayer was an agent or nominee of Company C as the Board had been told how Company C's business was transferred to the Taxpayer. In support of his contention, Counsel referred us to D163/01, IRBRD, vol 14, 286, Firestone Tire & Rubber Co of Canada v CIT [1942] 4 DLR 433, and Littlewood's 'The Uncertain Geographical Scope of Hong Kong Profits Tax and Possibility of Reform'. Finally, Counsel relied on his contention that this case was a case where substance overrode form. He contended that legally, Company C, the Taxpayer and Company B were separate entities but economically they were one. The reasons were that those companies had the same directors, the same shareholders and the same shareholdings among the same shareholders; Company B was wholly owned by Company C and Mr E also gave evidence that all machinery, equipment, business know-how and toy design were supplied by Company C and subsequently by the Taxpayer to Company B. He said that despite the legal set-up, Company B was viewed as a division of the Taxpayer and it was for administrative convenience and the legal requirements in the Mainland that Company B was formed as a separate entity. He put forward the cases of Yick Fung Estates Limited v CIR [2002] 1 HKC 588, and FCT v Spotless Services Limited 96 ATR 5201, and certain passages from Encyclopaedia of Hong Kong Taxation and Master Tax Guide to support his contention.

The Revenue's case

12. Counsel for the Revenue submitted that the issues in this appeal were:

(1) whether the Taxpayer can demonstrate that paragraphs 14 to 16 of DIPN21 apply to the facts of this case.

(2) whether the Taxpayer can rely on the 'substance over form' argument for an apportionment.

13. He asserted that in order to fall within paragraphs 14 to 16 of DIPN21, not only did the Taxpayer have to prove that it was a manufacturer, as opposed to a trader, at the material times, it must also establish that it manufactured goods partly in Hong Kong and partly outside Hong Kong. He argued that there was no evidence to show that the Taxpayer was at the material times carrying on business as a toy manufacturer in Hong Kong or that it manufactured goods outside Hong Kong. He said, as admitted by the Taxpayer, the manufacturing activities were carried out by Company B in the Mainland. However, there was no link between the manufacturing activities of Company B in the Mainland and the business of the Taxpayer. There was no processing or assembly arrangement between them. Also, Company B and the Taxpayer could not be treated as the same entity. To do so would ignore the separate legal personality between the two legal entities.

14. He further asserted that what the Taxpayer did was simply to sell the raw materials to Company B and to buy the finished products from Company B. The finished goods in fact and in law belonged to Company B. This was not a case where the Taxpayer provided raw materials to Company B for processing and then received the finished goods by paying a processing charge to

Company B. Company B in fact made a profit by selling the finished goods to the Taxpayer and paid tax thereon in the PRC. The facts in the present case were different from those of cases where an apportionment on a 50:50 basis under DIPN21 was allowed.

15. As to the 'substance over form' argument relied on by the Taxpayer, he contended that it was clear that Company B was in form and in substance a legal entity separate and distinct from the Taxpayer. There was no principle of law that companies within the same group should be treated as one. To demonstrate this point, passages from 'Adams v Cape Industries Ltd' [1990] CH 433 and 'Bank of Tokyo Ltd v Karoon' [1987] AC 45 were quoted. As to the authorities produced by the Taxpayer to support its case of 'substance over form', Counsel argued that they were not relevant to the present case. In the Firestone case, there was an express agreement governing the relationship between the two companies – a relationship of agency existed. It was a case of very different facts. As to Littlewood's article, it also referred to the Firestone case, and was not relevant to the present case. The Yick Fung case was about the relationship between section 18E and section 61A and the question of whether section 61A could override that particular provision. Section 61A was discussed at length. There were provided in section 61A several matters to which regards must be had one of which was 'form and substance of the transaction'. Consequently, the case was not establishing a general principle about substance over form. The discussion by the court was in the context of section 61A. The example was thus taken out of context. The Spotless case was an Australian case dealing with a scheme about tax avoidance – equivalent to our section 61 and section 61A. The case was about the application of a tax avoidance scheme. The present case was not a case dealing with a scheme. Thus, again the case was taken out of context. Also, the passage from 'Encyclopaedia of Hong Kong Taxation' quoted by Counsel for the Taxpayer was in discussion of section 61A which was about transactions designed to avoid liability of tax and yet this appeal did not involve a transaction under section 61A. The passage from 'Master Tax Guide' was about 'artificial or fictitious transactions' under section 61, whereas section 61 was not invoked in the present case. Hence, Counsel concluded that there was no basis whatsoever for the Taxpayer to treat the manufacturing activities of Company B as its own and the argument of 'substance over form' must be rejected.

16. As to the contention of the Taxpayer's Counsel that since the directors, the shareholders and the shareholdings in Company B, Company C and the Taxpayer were identical, the relationship between them was even better than that of a parent company and a subsidiary company. It was urged upon us that even if we were to accept that there was a close relationship between the Hong Kong and the Mainland companies, it did not follow that by virtue of that relationship or connection, there was an agency or nominee relationship between them.

Conclusion

17. The relevant charging provision for this case is section 14(1) of the IRO which provides as follows:

> '*Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) ascertained in accordance with this Part.*'

18. In order for a person to be chargeable to profits tax, three conditions must be satisfied:

(a) the person must carry on a trade, profession or business in Hong Kong;

(b) the profits to be charged must be from such trade, profession or business carried on by the person in Hong Kong; and

(c) the profits must be profits arising in or derived from Hong Kong.

19. When the first two conditions stated above are satisfied, liability to profits tax will arise if a person's profits arise in or are derived from Hong Kong. On the other hand, if a person's profits do not arise in nor are derived from Hong Kong, liability to profits tax will not arise.

20. In paragraphs 13 to 19 of DIPN21, the Revenue sets out the criteria for chargeability of manufacturing profits and also situations where manufacturing profits may be apportioned on a 50:50 basis.

21. The Taxpayer claims that its mode of operations was consistent with that described in paragraph 15 of DIPN21, save that the manufacturing activities were carried out by a foreign invested enterprise, Company B, in the Mainland instead of under a processing or assembly arrangement. However, it further claims that on the basis of the 'substance over form' argument, Company B was a division of the Taxpayer and its manufacturing activities should be counted as those of the Taxpayer and thus, the Taxpayer's profits in question may be apportioned on a 50:50 basis.

22. Paragraph 15 of DIPN21 reads as follows:

> ' A Hong Kong manufacturing business, which does not have a licence to carry on a business in the Mainland, may enter into a processing or assembly arrangement with a Mainland entity. Under these arrangements, the Mainland entity is responsible for processing, manufacturing or assembling the goods that are required to be exported to places outside the Mainland. The Mainland entity provides the factory premises, the land and labour. For this, it charges a processing fee and exports the completed goods to the Hong Kong manufacturing business. The Hong Kong manufacturing

> business normally provides the raw materials. It may also provide technical know-how, management, production skill, design, skilled labour, training and supervision for the locally recruited labour and the manufacturing plant and machinery. The design and technical know-how development are usually carried out in Hong Kong.'

23. The essential facts of this case are clear. There is not much in dispute over them. They are facts that the Taxpayer, Company C and Company B are separate and independent legal entities. The shareholders, the directors and the shareholdings among the shareholders in these companies are the same. The Taxpayer's principal activity had always been described by its accountants as 'trading of toys' in its reports and accounts. The Taxpayer purchased raw materials and sold them to Company B. The Taxpayer purchased the finished products from Company B with a mark-up. The manufacturing activities were carried out in the Mainland by Company B. There was no processing or assembly arrangement between the Taxpayer and Company B. The Taxpayer did not pay a processing fee to Company B. Company B was subject to and paid tax on its profits in the Mainland. These said facts were also admitted by the Taxpayer. Apart from selling its manufactured products to the Taxpayer, Company B had its own domestic customers as well as overseas customers. Plants and machineries were not recorded in the accounts of Company C nor those of the Taxpayer. Apart from bare assertion, there is no evidence to show that the Taxpayer was an agent or nominee of Company C.

24. The Taxpayer sold raw materials to Company B. The ownership of the raw materials then belonged to Company B. Company B manufactured toys with the raw materials in the Mainland. Company B sold the toys to the Taxpayer. Company B had other domestic and overseas customers. The ownership of the manufactured toys vested in Company B and not the Taxpayer. The Taxpayer and Company B are two separate legal entities. There was no processing or assembly arrangement between them. Company B's manufacturing activities cannot be treated as those of the Taxpayer. Thus, the Taxpayer cannot claim that part of its profits derived from the manufacturing process in the PRC. Unless the Taxpayer succeeds in its contention that 'substance overrides form' in this appeal, on the basis of the above finding of facts, we cannot conclude that the Taxpayer undertook any manufacturing activities within or outside Hong Kong or that Company B undertook manufacturing activities in the Mainland on behalf of the Taxpayer to allow an apportionment of the Taxpayer's profits tax. The Taxpayer's case hinges solely on the merit of its Counsel's legal argument on 'substance over form'.

25. Counsel for the Taxpayer referred us to the authorities such as the Yick Fung case, FC of T v Spotless Services Limited, the Encyclopaedia of Hong Kong Taxation and the Master Tax Guide in support of his contention that 'substance over form' should prevail in the present case.

26. The Yick Fung case involves a change of accounting date by the taxpayer and the questions of (1) whether in the year of change of accounting date, the Commissioner of Inland Revenue ('the Commissioner') was entitled to use a basis period of more than 12 months and (2)

whether the Commissioner was entitled to assess 21 months of profits in the year of assessment by virtue of section 61A of the IRO. Section 61A is an anti-tax avoidance provision which deals with transactions which have the effect of conferring tax benefits on a person. There are seven matters to which the section requires that regard must be had, one of which is 'the form and substance of the transaction'. Counsel for the Taxpayer referred us to the paragraph in that case which deals with 'the form and substance of the transaction' where it says, when applying an objective test, evidence of subjective intention could be admitted. He argued that in the present case, in applying an objective test, the Board should consider all the evidence to decide whether the three companies, Company C, the Taxpayer and Company B were formed for the purpose of a tax benefit or for other reasons. He asserted that the said companies were not incorporated for tax purpose but for administrative convenience and legal requirements in the Mainland. Thus, taking this into consideration he argued that while the three companies were legally separate and independent entities, they were economically and in substance under the same ownership, that is, Mr F, Mr E, Mr G and MR I.

27. 'FC of T v Spotless Services Limited' is an Australian case which deals with the question of whether the investment in question was a scheme to which part IV(A) applies. Part IV(A) is similar to section 61 and section 61A of the IRO. It was held in that case that part IV(A) did not apply to the investment in question because it could not objectively be said that the dominant purpose of the taxpayers in making the investment was to obtain a tax benefit when there was a rational commercial purpose for the investment.

28. We were referred to paragraph [18818] – '(b) the form and substance' in the Encyclopaedia of Hong Kong Taxation Volume 4, where it states that both the strict legal effect (the form) and also the commercial reality of the effect (the substance) are to be considered.

29. We were further referred to 'Master Tax Guide' 2002/03, 11th edition where it says, commercially realistic transactions or schemes will not be struck down under section 61. It referred to a case where the Board ruled that a commercially realistic corporate reorganization scheme with 'incidental' tax benefits could not be struck down by the anti-avoidance provisions of the IRO.

30. Counsel for the Taxpayer submitted that we must consider the background and the attendant circumstances of the present case as a whole and take into account the fact that the companies were set up not for tax benefits but for the ability to trade and manufacture effectively, and to take advantage of the low labour cost to manufacture in the Mainland.

31. Having carefully considered the submissions by both Counsel and the authorities cited by them, we reject the 'substance over form' argument proposed by Counsel for the Taxpayer. We do not accept that the above authorities cited by him are able to support the Taxpayer's case. We agree with Counsel for the Revenue that those authorities were taken out of context. The Yick Fung case and FCT v Spotless Services Limited were cases dealing with anti-tax avoidance provisions and the passages from the Encyclopaedia of Hong Kong Taxation and the Master Tax

Guide are also in discussion of anti-tax avoidance provisions. These authorities are not relevant to this appeal because the Revenue has not invoked the anti-tax avoidance provisions in the present case.

32. We also accept the submission by Counsel for the Revenue that there is no principle of law that two companies within the same group should be regarded as one. This view is found in both the cases of 'Adams -v- Cape Industries Limited' and 'Bank of Tokyo Limited v Karoon'. We acknowledge the facts that the Taxpayer, Company C and Company B had the same directors, the same shareholders and the same shareholdings among the same shareholders. Nonetheless, these facts do not render these companies in fact and in substance one and the same entity. These companies are in form and in substance separate and independent entities and distinct from each other. They kept their respective books and accounts. They filed their respective tax returns and bore their respective tax liabilities. Thus, Company B's manufacturing activities cannot be held as those of the Taxpayer and the Taxpayer's claim that part of its profits was derived from the manufacturing activities in the PRC has not been established. On the basis of the facts of the present case, an apportionment of the Taxpayer's profits tax on a 50:50 basis cannot be entertained. The Taxpayer's appeal must fail and is hereby dismissed.