INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D130/01

Salaries tax – whether certain amount was 'employment income' – interposition of different companies and the appellant – onus of proof on appeal rests on the appellant – the test to be applied – identify any commercial realism between different companies – whether the impugned transaction was 'unrealistic from a business point of view' or 'commercially unrealistic' – whether the sole or dominant purpose of effecting the interposition was to enable the appellant to obtain a tax benefit – wholly unmeritorious appeal – penalized in costs – sections 9A, 12(1)(a), 17(1)(a), 61, 61A, 68(4) and 68(9) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Thomas Mark Lea and Robert Michael Wilkinson.

Date of hearing: 9 November 2001.
Date of decision: 8 January 2002.

This was an appeal against additional salaries tax assessment raised on the appellant for the years of assessment 1992/93 to 1995/96. The appellant claimed that the income derived from Company A during the period from 1 April 1992 to 17 August 1995 was the income of Company B and should not be assessed as his employment income.

Held:

1. The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant (section 68(4)).

2. As regards section 61 of the IRO, which the Commissioner opined that it was applicable, the Board reminded itself of the observations made by Lord Diplock in Seramco Trustees v Income Tax Commissioner [1977] AC 287 at pages 297 to 298.

3. Lord Diplock considered whether the impugned transaction was ' unrealistic from a business point of view' .

4. In Commissioner of Inland Revenue v D H Rowe [1977] HKLR 436 at 441, Cons J considered whether the impugned transaction was ' commercially unrealistic' .

5. The appellant was the person designated under the contracts between Company A and Company B to be the person to do the work. There was no real role for Company B.

6. In view of the inability of the appellant's representative to identify any commercial realism between Company A and Company B, the appeal was doomed to failure.

7. The Board decided that it was commercially unrealistic to interpose Company B between the appellant and Company A. The interposition must be disregarded under section 61 and the appellant should be assessed accordingly.

8. As regards section 61A of the IRO, which the Commissioner opined that it was also applicable, attention should especially be drawn to subsections (1) and (3) thereof. Further, it is pertinent to note the speech of Rogers JA in Yick Fung Estates Limited v CIR [2000] 1 HKLRD 381 at page 399.

9. In ascertaining the net assessable income of a person for the purpose of salaries tax, only outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, which are 'wholly, exclusively and necessarily incurred in the production of the assessable income' may be deducted under section 12(1)(a) of the IRO. The test for deduction of expenses for profits tax is less stringent. Although there is the same exclusion for 'domestic or private expenses' [section 17(1)(a)], 'all outgoings and expenses to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of profits in respect of which he is chargeable to tax under this Part for any period' may be deducted under section 16(1). In practice, many deductions which are allowed for profits tax purposes will be disallowed for salaries tax purposes: see D47/00, IRBRD, vol 15, 422.

10. Factors (a), (b) and (c) of section 61A all pointed strongly to the conclusion that the appellant, who was one of the persons who entered into or effected the interposition, did so for the sole or dominant purpose of enabling himself to obtain a tax benefit.

11. Company B had no real role in the transaction. The appellant's representative had not been able to point to any.

12. Looking at the matters globally, the Board concluded that the sole or dominant purpose was the obtaining of a tax benefit. Section 61A was correctly invoked against the appellant.

13. The appellant had not discharged the onus under section 68(4) of proving that the assessment appealed against was excessive or incorrect.

14. The appellant had better things to do than to attend the hearing of this wholly unmeritorious appeal brought on his behalf. This appeal was an abuse of the process. Pursuant to section 68(9) of the IRO, the Board ordered the appellant to pay a sum of $5,000 as costs of the Board, which $5,000 shall be added to the tax charged and recovered therewith.

Appeal dismissed and a cost of $5,000 charged.

Cases referred to:

Seramco Trustees v Income Tax Commissioner [1977] AC 287
Commissioner of Inland Revenue v D H Howe [1977] HKLR 436
Yick Fung Estates Limited v CIR [2000] 1 HKLRD 381
D47/00, IRBRD, vol 15, 422

Ma Wai Fong for the Commissioner of Inland Revenue.
Taxpayer represented by his tax representative.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 1 August 2001 whereby:

(a) Additional salaries tax assessment for the year of assessment 1992/93 under charge number 8-7794431-93-5, dated 18 January 1999, showing additional net assessable income of $617,126 with additional tax payable thereon of $96,108 was confirmed.

(b) Additional salaries tax assessment for the year of assessment 1993/94 under charge number 9-2840092-94-1, dated 18 January 1999, showing additional net assessable income of $462,828 with additional tax payable thereon of $73,304 was confirmed.

(c) Additional salaries tax assessment for the year of assessment 1994/95 under charge number 9-2768290-95-9, dated 18 January 1999, showing additional net assessable income of $448,046 with additional tax payable thereon of $71,406 was confirmed.

(d) Additional salaries tax assessment for the year of assessment 1995/96 under charge number 9-3957949-96-7, dated 18 January 1999, showing additional net assessable income of $747,091 with additional tax payable thereon of $116,243 was confirmed.

The admitted facts

2. Based on the facts stated in the determination and admitted by the Appellant, we make the following findings of fact.

3. The Appellant had objected to the additional salaries tax assessments for the years of assessment 1992/93 to 1995/96 raised on him. The Appellant claimed that the income derived from Company A during the period from 1 April 1992 to 17 August 1995 was the income of Company B and should not be assessed as his employment income.

4. On divers dates, the Appellant filed his salaries tax returns/tax returns for the years of assessment 1992/93 to 1995/96 declaring the following particulars of employment and income:

Year of assessment	**Name of employer**	**Period of employment**	**Position**	**Salary**
				$
1992/93	Company B	1-4-1992 – 31-3-1993	Director	90,000
1993/94	Company B	1-4-1993 – 31-3-1994	Director	120,000
1994/95	Company B	1-4-1994 – 31-3-1995	Director	132,000
1995/96	Company B	1-4-1995 – 31-3-1996	Director	140,000

The Appellant also declared that rent-free quarters at Address C (' the Property') were provided by Company B to him for the year of assessment 1993/94.

5. In the employer' s returns of remuneration and pensions in respect of the Appellant for the years of assessment 1992/93, 1993/94, 1994/95 and 1995/96 submitted by Company B, Company B reported the same particulars of income. Company B also stated that it provided the Property as rent-free quarters to the Appellant for the years of assessment 1992/93 and 1993/94.

6. On divers dates, the assessor raised on the Appellant the following salaries tax assessments for the years of assessment 1992/93 to 1995/96:

Year of assessment	**1992/93**	**1993/94**	**1994/95**	**1995/96**
	$	$	$	$
Income from Company B	90,000	120,000	132,000	140,000
Add: Rental value	9,000	12,000	0	0
	99,000	132,000	132,000	140,000

Less: Basic allowance	46,000	56,000	72,000	79,000
Net chargeable income	53,000	76,000	60,000	61,000
Tax payable thereon	4,410	7,520	4,800	4,970

The Appellant did not object against these assessments.

7. (a) Company B was incorporated as a private company in Hong Kong on 14 April 1989. At all relevant times, the Appellant and his wife, Madam D, were the only directors of Company B. Also, they were the only shareholders of Company B holding shares in Company B as follows:

The Appellant	9,999 shares
Madam D	1 share

(b) According to the annual returns filed by Company B to the Registrar of Companies, the registered office address of Company B was as follows:

Filed on	**Registered office address**
21-2-1993 and 12-1-1994	The Property
9-5-1995 and 22-5-1996	Address E

8. (a) Company B closed its accounts on 31 March annually. The following income and expenditure were shown in the accounts of Company B for the years ended 31 March 1993, 1994, 1995 and 1996:

Year of assessment	**1992/93**	**1993/94**	**1994/95**	**1995/96**
Basis period	1-4-1992 to 31-3-1993	1-4-1993 to 31-3-1994	1-4-1994 to 31-3-1995	1-4-1995 to 31-3-1996
	$	$	$	$
Commission received	823,176	713,470	702,437	945,449
Less: Operating expenses				
Management fee	18,000	0	0	28,963
Director' s remuneration	90,000	120,000	180,000	178,799
Business registration fee	1,150	1,250	2,250	2,250
Telephone	15,867	8,355	15,790	50,134
Overseas telephone	4,107	5,140	6,175	0
Paging services	3,090	3,564	7,920	7,581
Rates	2,673	9,688	14,672	15,699
Audit fee	6,500	6,500	6,800	6,800
Donation	0	0	0	1,000
Legal fees	0	0	0	3,360
Medical fee	0	0	0	13,300

Electricity and water	4,640	5,215	3,483	7,110
Insurance	3,156	2,643	750	37,274
Motor vehicle expenses	63,863	56,158	51,773	159,921
Building management fee	3,960	4,620	28,920	0
Newspaper and periodical	6,314	7,165	6,376	0
Entertainment	90,921	82,151	100,673	100,618
Clothing	10,000	0	0	0
Overseas travelling expenses	0	0	30,598	0
Printing and stationery	1,760	1,300	1,821	400
Depreciation	42,092	37,374	42,967	34,853
Salaries and allowance	168,000	154,000	183,765	130,000
Cleaning	2,116	2,869	2,976	0
Hiring on vehicle	48,000	0	0	0
Hire purchase interest	0	0	6,753	0
Accountancy fee	2,500	2,500	3,000	3,600
Quarter expenses	18,542	23,691	348,500	352,105
Overdraft interest	1,769	1,451	4	14
Repairs and maintenance	7,941	1,220	7,538	10,452
Secretarial fee	560	665	360	0
Mortgage loan interest	194,430	173,138	84,292	0
Bank interest	0	0	0	19,901
Sundry expenses	0	0	0	929
Bank charges	395	0	0	0
	812,346	710,657	1,138,156	1,165,063
Profit/(Loss) before taxation	10,830	2,813	(435,719)	(219,614)

(b) During the four years ended 31 March 1996, Company B had acquired the following assets:

	Asset	**Year of acquisition**	**Cost**
			$
(a)	Mobile phone	1993/94	18,500
(b)	Pager	1994/95	1,388
(c)	Fax machine	1994/95	4,200
(d)	Motor vehicle	1994/95	170,000
(e)	Table	1995/96	2,400

(c) After making statutory and other adjustments, the following profits tax assessment and loss computation, as the case may be, were issued to Company B:

Year of assessment	**1992/93**	**1993/94**	**1994/95**	**1995/96**
	$	$	$	$
Assessable profits/(loss)	63,082	31,681	(440,676)	(134,173)
Tax payable thereon	11,039	5,544	Nil	Nil

(d) The Property was acquired and sold by Company B on 11 March 1992 and 8 April 1994 respectively.

9. (a) In the employer' s returns of remuneration of pensions in respect of Company B for the years of assessment 1992/93, 1993/94, 1994/95 and 1995/96 submitted by Company A, Company A reported the following particulars:

Year of assessment	**Period**	**Capacity in which employed**	**Commission/ Fees**
			$
1992/93	1-4-1992 – 31-3-1993	Salesman	823,176
1993/94	1-4-1993 – 31-3-1994	--	713,470
1994/95	1-4-1994 – 31-3-1995	--	508,046
1995/96	1-4-1995 – 31-3-1996	--	945,449

(b) On 14 November 1995, Company A filed an amended employer' s return of remuneration and pension in respect of Company B showing that commission/fees paid to Company B for the year ended 31 March 1995 was amended to $702,437.

10. In response to the assessor' s enquiry, Company A provided the assessor with a breakdown of the commission/fees paid by Company A to Company B for the services provided by the Appellant and another person (' Mr X') to Company A as follows:

Year of assessment	**1992/93**	**1993/94**	**1994/95**	**1995/96**
Year ended	31-3-1993	31-3-1994	31-3-1995	31-3-1996
	$	$	$	$
The Appellant	670,126	538,828	508,046	808,091
Mr X	153,050	174,642	194,391	137,358
Total	823,176	713,470	702,437	945,449

Company A also provided copies of four contracts entered into between Company A and Company B under which Company B was engaged as Company A' s central department manager and Company B agreed to authorise* the Appellant to be fully responsible for observing and performing the contracts covering the period from 1 January 1992 to 31 December 1995.

[* Both parties agreed at the hearing of the appeal that the correct translation should read ' appoint and send' instead of ' authorise' .]

11. The particulars of the four contracts referred to in paragraph 10 above were as follows:

Contract period
1-1-1992 – 31-12-1992
1-1-1993 – 31-12-1993
1-1-1994 – 31-12-1994
1-1-1995 – 31-12-1995

All the four contracts were signed by the Appellant for and on behalf of Company B. Save for the contract period and the service fee payable under each contract, the terms and conditions of engagement were the same. The contracts provided, inter alia, the following terms and conditions:

(a) Company B agreed to [appoint and send] the Appellant to be fully responsible for, observe and perform the contract.

(b) Company B was responsible for anything with regard to car dealership and other matters relating to Company A and its clients.

(c) Service hours were Monday to Saturday from 9:30 a.m. to 7:00 p.m.

(d) Company B was remunerated with fixed monthly service fees plus commission for motor vehicle transactions, a telephone allowance at a rate of $1,000 per month, and at the end of the year a special remuneration which was not less than one month' s service fees.

(e) Both parties could terminate the contract by giving one month' s notice or one month' s service fees.

(f) All labour and medical insurance of persons engaged by Company B would be paid for by Company A.

12. Upon review, the Commissioner was of the opinion that the interposition of Company B between the Appellant and Company A during the period from 1 April 1992 to 31 March 1996 was a scheme entered into or carried out for the sole or dominant purpose of enabling the Appellant to obtain a tax benefit. On 18 January 1999, the Commissioner raised on the Appellant under section 61A or 9A of the IRO the following additional salaries tax assessments:

Year of assessment	**1992/93**	**1993/94**	**1994/95**	**1995/96**
	$	$	$	$

Income from Company A [paragraph 10(a)]	670,126	538,828	508,046	808,091
Less: Income already assessed [paragraph 6]	53,000	76,000	60,000	61,000
Additional assessable income	617,126	462,828	448,046	747,091
Additional tax payable thereon	96,108	73,304	71,406	116,243

(Note: Basic allowance granted in original assessments was withdrawn because standard rate of tax became applicable)

13. Mr F, on behalf of the Appellant, objected to the additional salaries tax assessments in paragraph 11 in the following terms:

> ' ... My client' s income for the period from April 1,1992 to March 31,1995 from [Company B]. Had been returned and assessed. The revised total amounts stated in the additional assessments are not income of my client but those of [Company B].
>
> Before the operation of section 9A of the Inland Revenue Ordinance effective from August 18,1995 and without the force of retrospective effect, my client is a distinct perseon [*sic*] from [Company B]. And thus both in law and in equity is not liable for any income received by [Company B] from any source including those from [Company A]. As such there is legally no such thing as income received from [Company A] through [Company B].
>
> It is very obviously from the management agreements, made between [Company B] as the manager in one part and [Company A] being the other part as the principal, for the period from January 1,1992 to December 31,1995, copies of the agreements are enclosed for your reference, that my client is not a party to the contracts. From the agreements being valid and genuine commercial contracts both in substance and in form, [Company B], not my client, is the person required and obliged to render the services for and entitled to receive the fees from [Company A]. Therfore [*sic*] [Company B] is the sole person liable to pay tax for those incomes.
>
> I do not agree that section 61A is appropriate in the circumstances. My client' s gross income from his employer, [Company B], had been grossly returned to the revenue without operation of any avoidance schemes. It must be noted that before the operation of section 9A, the contracts between [Company B] and [Company A] are valid and enforceabe [*sic*]. Therefore your treating those income as that of my client' s in invoking section 61A is ultra vires. The additional assessments for the years of 1992/93 to 1994/95 are therefore null and void.

...

For the year of assessment 1995/96, income to [Company B] prior to the appointed date should be excluded. From an examination of the records of my client, I notice that part of the commissions received from [Company A] should be subjected to corporation tax. [Company B] engaged in the trade of buying and selling of motor cars. It paid the cost of the cars from its own resources and had the cars repaired on his own accounts and subsequently sold them to [Company A] at a profit. These profits were unfortunately labelled by [Company A] as commissions and returned to the revenue as commissions paid to [Company B]. As I understand, [Company A] kept separated records of such profits to [Company B]. [Company B] will request [Company A] to submit a breakdown of the commissions and the profits to the revenue as soon as possible.

In the meantime, please hold over part of the 1995/96 additional tax taking into account the exclusion of the income prior to August 18, 1995 and estimated 2/3 of the assessable income as genuine commissions liable to salaries tax.'

14. By letters dated 17 March 1999, 27 May 1999, and 9 February 2001, the assessor requested Mr F to provide further information and documents in support of the Appellant's objections. The assessor also asked Mr F to provide all the details and documents in relation to the buying and selling of motor cars allegedly engaged by Company B. As at the date of the determination, no reply to the assessor's letters had been received by the assessor.

15. The assessor had since ascertained that at the relevant time, Company A's Kowloon office was situated at Address E.

The appeal

16. The objection failed before the Commissioner.

17. By letter dated 31 August 2001, Mr F gave notice of appeal on behalf of the Appellant.

18. The Appellant absented himself from the hearing of the appeal. Only his representative, Mr F, attended.

19. The Respondent was represented by Miss Ma Wai-fong.

20. Neither party called any witness.

21. After Mr F had concluded his submission, we invited him to address us on costs. At the end of his submission on costs, we told the parties that we were not calling on the Respondent and that our decision would be given in writing.

Our decision

22. Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

23. The Commissioner was of the view that both sections 61 and 61A were applicable.

24. We will consider each in turn.

Section 61

25. Section 61 of the IRO provides that:

> ' *Where an assessor is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the person concerned shall be assessable accordingly.'*

26. We remind ourselves of the observations made by Lord Diplock, delivering the advice of the Privy Council in Seramco Trustees v Income Tax Commissioner [1977] AC 287 at pages 297 to 298:

> ' *It is only when the method used for dividend stripping involves a transaction which can properly be described as "artificial" or "fictitious" that it comes within the ambit of section 10(1). Whether it can properly be so described depends upon the terms of the particular transaction that is impugned and the circumstances in which it was made and carried out.*
>
> *"Artificial" is an adjective which is in general use in the English language. It is not a term of legal art; it is capable of bearing a variety of meanings according to the context in which it is used. In common with all three members of the Court of Appeal their Lordships reject the trustees' first contention that its use by the draftsman of the subsection is pleonastic, that is, a mere synonym for "fictitious". A fictitious transaction is one which those who are ostensibly the parties to it never intended should be carried out. "Artificial" as descriptive of a transaction is, in their Lordships' view a word of wider import. Where in a provision of a statute an ordinary English word is used, it is neither necessary*

> *nor wise for a court of construction to attempt to lay down in substitution for it, some paraphrase which would be of general application to all cases arising under the provision to be construed. Judicial exegesis should be confined to what is necessary for the decision of the particular case. Their Lordships will accordingly limit themselves to an examination of the shares agreement and the circumstances in which it was made and carried out, in order to see whether that particular transaction is properly described as "artificial" within the ordinary meaning of that word.'*

27. Lord Diplock considered whether the impugned transaction was ' unrealistic from a business point of view' (at page 294).

28. In Commissioner of Inland Revenue v D H Howe [1977] HKLR 436 at 441, Cons J (as he then was) considered whether the impugned transaction was ' commercially unrealistic' .

29. The Appellant was the person designated under the contracts between Company A and Company B to be the person to do the work. There was no real role for Company B.

30. We asked Mr F to identify the commercial realism of bringing Company B into the picture. After a long pause, Mr F replied to the effect that he could not spell that out and that he was not prepared for that question.

31. In view of the inability of Mr F to identify any commercial realism, the appeal was doomed to failure.

32. In our decision, it was commercially unrealistic to interpose Company B between the Appellant and Company A. The interposition must be disregarded under section 61 and the Appellant should be assessed accordingly.

Section 61A

33. Section 61A provides that:

> ' *(1) This section shall apply where any transaction has been entered into or effected after [14 March 1986] ... and that transaction has, or would have had but for this section, the effect of conferring a tax benefit on a person (in this section referred to as "the relevant person"), and, having regard to –*
>
> *(a) the manner in which the transaction was entered into or carried out;*
>
> *(b) the form and substance of the transaction;*

(c) the result in relation to the operation of this Ordinance that, but for this section, would have been achieved by the transaction;

(d) any change in the financial position of the relevant person that has resulted, will result, or may reasonably be expected to result, from the transaction;

(e) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant person, being a change that has resulted or may reasonably be expected to result from the transaction;

(f) whether the transaction has created rights or obligations which would not normally be created between persons dealing with each other at arm's length under a transaction of the kind in question; and

(g) the participation in the transaction of a corporation resident or carrying on business outside Hong Kong,

it would be concluded that the person, or one of the persons, who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person, either alone or in conjunction with other persons, to obtain a tax benefit.'

34. Subsection (3) provides that ' tax benefit' means '*the avoidance or postponement of the liability to pay tax or the reduction in the amount thereof*' and ' transaction' includes a '*transaction, operation or scheme*' .

35. As Rogers JA laid down in Yick Fung Estates Limited v CIR [2000] 1 HKLRD 381 at page 399:

' *... the tests set out in section 61A have to be applied objectively.*

There are seven matters (a) to (g) to which the section requires that regard must be had. On a clear construction of the subsection, the section would not be relevant or the subject matter of consideration unless there was a tax benefit, in other words, the avoidance or postponement of the liability to pay tax or the reduction in the amount thereof. In this case, it is said that there has been an avoidance of tax in respect of HK$108,327,586 profits or at any rate, there has been a reduction in the amount of tax that would otherwise have been payable. On that basis, the various matters at (a) to (g) have to be considered and if upon

that exercise, the conclusion would be arrived at that the person who entered into or carried out the transaction did so for the sole or dominant purpose of obtaining a tax benefit, the Assistant Commissioner may exercise one of the two powers set out in subsection (2).

In this Court, there was some discussion as to whether it is necessary for more than one item in matters (a) to (g) to indicate the sole or dominant purpose for it to be possible that that conclusion be arrived at. In my view, the posing of the question itself possibly indicates an erroneous approach to the section. Clearly, what must happen is that those matters must be considered and the strength or otherwise of the various resulting conclusions from considering those matters must be looked at globally. On the basis of that assessment, it must be decided whether the sole or dominant purpose was the obtaining of a tax benefit. It may be observed, for example, that one or other of the matters in (a) to (g) may be strongly or weakly suggestive of a purpose of obtaining a tax benefit or may be strongly or weakly suggestive of some other purpose. The Assistant Commissioner who undertakes such task has to use his own common sense and apply the results of his deliberations in respect of each matter and come to an overall conclusion.

... The Board approached the matter on the basis that the word "form" related to the legal effect or, as I would put it, the legal nature of the transaction and that the substance related to the practical or commercial end result of the transaction. In that respect, I would have no cause to disagree with the way in which this was put.'

36. In ascertaining the net assessable income of a person for the purpose of salaries tax, only outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, which are ' wholly, exclusively and necessarily incurred in the production of the assessable income' may be deducted under section 12(1)(a) of the IRO. The test for deduction of expenses for profits tax is less stringent. Although there is the same exclusion for ' domestic or private expenses' [section 17(1)(a)], ' all outgoings and expenses to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of profits in respect of which he is chargeable to tax under this Part for any period' may be deducted under section 16(1). In practice, many deductions which are allowed for profits tax purposes will be disallowed for salaries tax purposes, see D47/00, IRBRD, vol 15, 422.

37. Mr F accepted that section 16 was a ' lenient' provision on deductions and that very few could meet the requirement of ' wholly, exclusively and necessarily incurred in the production of the assessable income' .

38. By interposing Company B, what would have been the Appellant's salary had been presented to the Revenue as profits of Company B. The tax benefit to the Appellant lay in the much greater amounts of expenses which might lawfully be allowed. In practice and in fact, what had been claimed to be expenses of Company B were allowed by the Revenue as deductions in computing its assessable profits or loss.

39. Factors (a), (b) and (c) all point strongly to the conclusion that the Appellant, who was one of the persons who entered into or effected the interposition, did so for the sole or dominant purpose of enabling himself to obtain a tax benefit.

40. Company B had no real role in the transaction. Mr F had not been able to point to any.

41. The other factors are either inapplicable or at best marginally relevant.

42. Looking at the matters globally, our overall conclusion is that the sole or dominant purpose was the obtaining of a tax benefit.

43. In our decision, section 61A was correctly invoked against the Appellant.

44. This is another reason why the appeal must fail.

The Commissioner's advice to the Hong Kong Society of Accountants

45. In a meeting with the Hong Kong Society of Accountants, the Commissioner was recorded as having said the following:

> ' **Agenda Item A5 – Type I and Type II Service Company Arrangements**
>
> The Commissioner was requested to provide statistics of service company arrangements and to discuss the policy on the re-opening of cases. He provided the following statistics on service company arrangements –
>
> **Type 1 Cases** (Disguised employments)
>
> | | |
> |---|---|
> | Assessment raised | 28 |
> | Cases identified or under enquiry | 780 |
> | (section 61 or 61A) | |
>
> **Type II Cases** (Payment of inflated management fees)

Assessments raised	92
Cases identified or under enquiry	1300

For prior year assessments, the Commissioner advised that where both the profits tax return of the service company and the composite tax return of the individual had been assessed and the service company issue was not already under enquiry for those years, assessments will generally not be disturbed. Exceptionally, section 61A assessments will be raised where –

- salaries tax assessments have been raised on other individuals who have entered into service company arrangements with the same relevant person

- it subsequently becomes apparent as a result of "discovery" by the Department, that the individual concerned has deliberately withheld information, or provided inaccurate or misleading information on a service company relationship.

When asked about discovery, CIR confirmed that "discovery" is a matter of fact. If, when an assessment is raised, all relevant facts were available within IRD (even although the assessing officer may not have been aware of them) it would normally be accepted that discovery is not involved. On the other hand if, when the assessment was raised, the Department was not in possession of the full facts then the subsequent gathering of information could constitute discovery.

As regards the position of loss cases, the Commissioner confirmed they are considered to be "open" because there had not been any assessment. However, if the loss had been agreed and all the facts had been disclosed, there would be no reopening. The usual practice of "discovery" will apply and much will depend on the information contained in the return.'

46. By letter dated 28 April 1999, Mr F wrote to the Commissioner complaining about the assessments. By letter dated 14 July 1999, the Commissioner replied stating facts relied on in contending that the assessments had been issued properly. Mr F had neither responded to the reply from the Commissioner nor led any evidence disputing any of the facts put forward and relied on by the Commissioner. Mr F did not dispute that the Commissioner did not know about the existence of agreements made by Company A with companies such as Company B until November 1995; that the assessments were issued as a result of the discovery; and that other individuals had been assessed to salaries tax under section 61A. Moreover, two of the years were loss cases.

47. In our decision, Mr F had not begun to show how the meeting between the Commissioner and the Hong Kong Society of Accountants could possibly assist the Appellant in this appeal.

Disposition

48. The Appellant has not discharged the onus under section 68(4) of proving that any of the assessments appealed against is excessive or incorrect. We dismiss the appeal and confirm the assessments as confirmed by the Commissioner.

Costs order

49. As noted in a number of Board decisions, the discretion of the Board under section 68(9) to order an unsuccessful appellant to pay costs is not expressed to be restricted to appeals which are obviously unsustainable. The maximum sum was increased from $100 to $1,000 in 1985 and further increased to $5,000 in 1993. $5,000 represents only a small fraction of the costs of the Board in disposing of an appeal.

50. The Appellant had better things to do than to attend the hearing of this wholly unmeritorious appeal brought on his behalf. The assessments were issued under sections 9A and 61A, with a note by the Commissioner to this effect. By letter dated 14 July 1999, the Commissioner wrote explaining why the assessments were issued properly. The Commissioner gave his reasons for invoking sections 61 and 61A. We had given Mr F every opportunity, but he had not been able to point to any commercial realism, not having thought about it before. In our decision, this appeal is an abuse of the process. Pursuant to section 68(9) of the IRO, we order the Appellant to pay the sum of $5,000 as costs of the Board, which $5,000 shall be added to the tax charged and recovered therewith.