Case No. D14/09

Property tax – whether should be charged by profits tax instead – sections 2, 5(1), 5(2)(a), 14(1), 25 and 68(9) of Inland Revenue Ordinance ('IRO').

Panel: Chow Wai Shun (chairman), Ho Chi Wai and Lawrence Lai Wai Chung.

Date of hearing: 15 January 2009.
Date of decision: 22 May 2009.

The Appellant claimed that she should be assessed profits tax (under section 14 of the IRO), not property tax (under section 5 of the IRO), on her rental income received from the Property, which was acquired by her and registered in her own name. The Appellant's main contention was that her business was registered under the Business Registration Ordinance ('BRO') and henceforth was a corporation within the meaning of the IRO. She therefore claimed that any rental income she received from letting the Property was business income subject to profits tax.

Held:

1. The Appellant's case was not distinguishable from D122/02, IRBRD, vol 18, 135. The Board in D122/02 held, inter alia, that as the appellants were the owners of the properties receiving rental income, the charge on property tax was perfectly valid and should be charged unless the appellants could have made out a case of exemption under section 5(2)(a) of the IRO which is restricted to corporations. It was further held by the Board in that case that the definition of corporation focuses on how corporate personality can be acquired under the English law, that is, by acquiring a Royal Charter, promoting a special Act of Parliament (or a special Ordinance in Hong Kong), or by registration under the Companies Acts or the Companies Ordinance and since the appellants were not incorporated by any of those ways they were not a corporation for IRO purposes. The Board in that case also dismissed the contention that since the appellants were registered under the BRO they were a corporation.

2. Mere letting of property did not appear to have been considered trade or business (Lam Woo-shang v Commissioner of Inland Revenue (1961) 1 HKTC 123 considered). The threshold for carrying on business in the case of individuals leasing

premises, even though the premises were furnished and maintained and supervised, is relatively high and not easily satisfied (D86/99, IRBRD, vol 14, 581).

3. The facts must point to something more than a simple tenancy of the property for business to be found to be carried on (D3/81, IRBRD, vol 1, 394; Louis Kwan-nang Kwong, Carlos Kwok-nang Kwong v CIR 2 HKTC 541).

4. The BRO amends the law relating to the registration of *business* in Hong Kong (emphasis added) and 'business' as defined in section 2(1) of the BRO means 'any form of trade, commerce, craftsmanship, profession, calling or other activity carried on for the purpose of gain and also means a club'. A business registered under the BRO can be carried out by an individual, a body corporate or partnership or other body non-corporate. It has nothing to do with registration of companies. Business registration itself has nothing to do with acquiring any corporate personality. In this appeal, the Appellant herself was the registered owner of the Property. The form she used for applying business registration was the one filed by an individual. She ran the business by herself; she did not run it by a separate corporate vehicle. The Appellant's case that by registering a business under the BRO and by including in the business property investment she would be given a corporate personality for IRO purposes was just non-sensical and could not be right.

5. The Board was of the opinion that the appeal was frivolous and vexatious since similar arguments had been rejected in D122/02 and that the Appellant's criticism against D122/02 was not substantiated. Pursuant to section 68(9) of the IRO, the Board ordered 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.

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

Cases referred to:

D122/02, IRBRD, vol 18, 135
Lam Woo-shang v Commissioner of Inland Revenue (1961) 1 HKTC 123
D86/99, IRBRD, vol 14, 581
D3/81, IRBRD, vol 1, 394
Louis Kwan-nang Kwong, Carlos Kwok-nang Kwong v CIR 2 HKTC 541
IRC v Duke of Westminster [1936] AC 1
D12/93, IRBRD, vol 8, 147

Simon Y T Tsao of Messrs Simon Y T Tsao & Co for the taxpayer.
Yip Chi Yuen, Chan Man On and Yip Chi Chuen for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the determination of the Deputy Commissioner of Inland Revenue dated 28 April 2008 ('the Determination') whereby:

(1) Property tax assessment for the year of assessment 2005/06, dated 7 March 2007, showing net assessable value of $263,794 was confirmed.

(2) Profits tax assessment for the year of assessment 2005/06, dated 7 March 2007, showing assessable profits of $566,788 was reduced to assessable profits of $353,261.

(3) Additional personal assessment for the year of assessment 2005/06 under charge number x-xxxxxxx-xx-x, dated 29 January 2008, showing net chargeable income of $437,536 with additional tax payable thereon of $52,759 was reduced to net chargeable income of $285,760 with additional tax payable thereon of $22,404.

(4) Property tax assessment for the year of assessment 2006/07, dated 27 December 2007, showing net assessable value of $40,518 was confirmed.

(5) Profits tax assessment for the year of assessment 2006/07, dated 27 December 2007, showing assessable profits of $1,655,412 was confirmed.

(6) Personal assessment for the year of assessment 2006/07 under charge number x-xxxxxxx-xx-x, dated 27 December 2007, showing net chargeable income of $1,455,412 with tax payable thereon of $249,685 was confirmed.

2. The following facts as stated in the facts upon which the Determination was arrived at were not in dispute. We find the following facts relevant facts to this appeal:

(1) On 22 June 1995 the Appellant applied for a business registration certificate in respect of the following business:

(a) Name under which business was carried on : Company A (' the Company')

(b) Address of place of business : Address B

(c) Description and nature of business : Insurance

(d) Date commenced : 1 January 1995

(2) By an assignment dated 12 August 2004, the Appellant acquired a property at Address C (' the Property') at a consideration of $6,180,000.

(3) By a tenancy agreement dated 24 May 2005 (' the Tenancy Agreement', which was attached to the Determination as Appendix A), the Appellant let out the Property for a term of one year commencing from 7 July 2005 at a monthly rent of $38,800. Clause 10 of the Tenancy Agreement stated as follows:

'[The Appellant] shall pay the Property tax payable in respect of [the Property].'

(4) On divers dates, the Appellant filed Tax Returns - Individuals for the years of assessment 2005/06 and 2006/07 in which she declared, inter alia, the following particulars:

		2005/06	2006/07
(a)	Property tax Rental income	' include as part of business income'	
(b)	Profits tax in respect of the Company		
	(i) Assessable profits before deduction of charitable donation	$374,042 [see paragraph 2(5)]	$1,341,691 [see paragraph 2(5)]
	(ii) Approved charitable donation	$300	$1,300

(5) With regard to the business of the Company, the Appellant submitted accounts and proposed profits tax computations for the years of assessment 2005/06 and 2006/07 which showed, among other things, the following particulars:

	2005/06 $	2006/07 $
Agency commission	766,766	2,705,620
Less: Personal insurance	(15,537)	-
	751,229	2,705,620
Add: Rental income	349,200	77,600

Less: Interest expenses	(131,295)	(194,853)
Agency fees	(19,400)	-
Building management fees	(19,467)	(31,932)
Rates	(19,457)	(26,952)
Depreciation	(123,600)	(201,956)
	35,981	(378,093)
Less: General and administration expenses		
Accountancy fees	(3,000)	(4,200)
Business registration fees	(2,600)	(2,600)
Donation [paragraph 2 (4)(b)(ii)]	(300)	(1,300)
Entertainment	(409,599)	(1,208,606)
Licence fee and subscriptions	(300)	(300)
Office expenses	(2,500)	(3,100)
Mandatory provident fund	(12,000)	(12,000)
Motor car expenses	(29,433)	(17,698)
Postage	(844)	(935)
Printing and stationery	(1,711)	(11,099)
Rent for quarters in Shanghai	-	(88,623)
Staff costs	(64,287)	(172,000)
Telephone and communication	(12,200)	(9,748)
Training	(240)	(6,395)
Travelling expenses	(67,546)	(67,458)
	(606,561)	(1,606,062)
Profit before taxation	180,648	721,465
Add: Gifts and messing - private share 50%	195,773	557,730
Depreciation	123,600	201,956
Motor car expense - private share 50%	14,717	8,849
	334,090	768,535
Less: Commercial building allowance	(1) (132,720)	(1) (132,720)
Computer hardware	-	(7,920)
Depreciation allowance	(2) (7,976)	(2) (7,669)
	(140,696)	(148,309)

Assessable profits [paragraph 2(4)(b)(i)]	374,042	1,341,691

(1) Commercial building allowance was claimed in respect of the Property as follows:

	$
Cost of the Property	6,180,000
Building cost, say 50%	3,090,000
Add: Leasehold improvements	228,000
	3,318,000
Commercial building allowance @4%	132,720

(2) Depreciation allowance was computed as follows:

	Assets for the insurance business	Assets for the Property	Total allowance
	$	$	$
LaserJet printer	2,788	-	
1 lot of electrical appliances (3)	-	(3) 95,000	
Less: Initial allowance @ 60%	(1,673)	(57,000)	1,673
	1,115	38,000	
Less:			
Annual allowance for 2004/05 @20%	-	(7,600)	
Annual allowance for 2005/06 @20%	(223)	(6,080)	6,303
	892	24,320	7,976 *[for 2005/06]*
Add: Addition	3,862	-	
Less: Initial allowance @60%	(2,317)	-	2,317
	2,437	24,320	
Less:			
Annual allowance for 2006/07 @20%	(487)	(4,864)	5,351
Balance c/f	1,950	19,456	7,669 *[for 2005/06]*

(3) Assets were leased out to tenant with the Property. Depreciation allowance was claimed only for the year 2005/06 because the Property

was in self-use during the year 2004/05. The assets comprised the following items:

" 1 [Brand D xx-xx]
1 [Brand E] Amplifier
1 [Brand D yy-yy]
1 [Brand F zz-zz] "

(6) By a letter dated 20 December 2006, the Assessor requested the Appellant to provide certain information in relation to the entertainment expenses as claimed in the business accounts of the Company for the year of assessment 2005/06. Messrs Simon Y T Tsao & Co ('the Representative'), on behalf of the Appellant, applied for extension of time to reply. The Assessor approved the extension up to 9 February 2007.

(7) The Representative's undated reply was received by the Inland Revenue Department ('the Department') on 14 February 2007.

(8) The Assessor was not aware that a reply had been submitted. On the premise that no reply was received, on 7 March 2007, she raised, on the Appellant property tax and profits tax assessments for the year of assessment 2005/06 as follows:

(a) Property tax assessment

	$
Rental income [paragraph 2(5)]	349,200
Less: Rates paid [paragraph 2(5)]	(19,457)
Assessable value	329,743
Less: 20% deduction	(65,949)
Net assessable value	263,794
Tax payable thereon	42,207

(b) Profits tax assessment

	$	$
Profit as per account [$751,229 - $606,561] [paragraph 2(5)]		144,668
Add: Private share of motor car expense	14,717	
Entertainment	409,599	424,316
		568,984
Less: Depreciation allowance		(1,896)
		567,088

Less: Charitable donation [paragraph 2 (4)(b)(ii)]	(300)
Assessable profits	566,788
Tax payable thereon	90,686

(9) The Assessor noticed afterwards that the Representative had already submitted a reply (paragraph 2(7)) before she raised the assessments in paragraph 2(8) above. She issued a letter to the Appellant on 14 March 2007 informing her that the relevant property tax and profits tax assessments for the year 2005/06 were cancelled and the Department would consider issuing a fresh assessment after examination of the Representative's reply.

(10) Before the Assessor sent the letter of 14 March 2007 (paragraph 2(9)), it was not brought to her attention that the Representative had already lodged objection to the assessments in paragraph 2(8) by a letter of 12 March 2007. The Representative objected to the assessments on the ground that they were excessive.

(11) On 17 April 2007, the Assessor raised on the Appellant the following profits tax assessment and personal assessment for the year of assessment 2005/06:

(a) Profits tax assessment

	$
Assessable profits as per return [$374,042 [(paragraph 2(4)] - $300 [paragraph 2(4)])	373,742
Tax payable thereon	*

* No profits tax was demanded at the time of issue of the assessment due to the [Appellant' s] election of personal assessment.

(b) Personal assessment

	$
Assessable profits [see paragraph 2(11)(a)]	373,742
Less: Basic allowance	(100,000)
Net chargeable income	273,742
Tax payable thereon	(1) 43,948

(1) The tax payable was later reduced to $23,948 due to the granting of married person's allowance.

(12) Assessor was later of the opinion that the rental income should be assessed under property tax and raised on the Appellant property tax assessment, profits tax assessment and personal assessment for the year of assessment 2006/07 as follows:

(a) Property tax assessment

	$
Rental income [paragraph 2(5)]	77,600
Less: Rates paid [paragraph 2(5)]	(26,952)
Assessable value	50,648
Less: 20% deduction	(10,130)
Net assessable value	40,518
Tax payable thereon	*

* No property tax was demanded at the time of issue of the assessment due to the [Appellant' s] election of personal assessment.

(b) Profits tax assessment

	$
Assessable profits declared [paragraphs 2(4) & 2(5)]	1,341,691
Less: Rental income	(77,600)
Add: Interest expenses	194,853
Management fee	31,932
Rates	26,952
Commercial building allowance	132,720
Depreciation allowance	4,864
Assessable profits	1,655,412
Tax payable thereon	*

Assessor's Note: Rental income derived from solely owned property should be assessed to property tax.

* No profits tax was demanded at the time of issue of the assessment due to the [Appellant's] election of personal assessment.

(c) Personal assessment

	$
Net assessable value [paragraph 2(12)(a)]	40,518
Assessable profits [paragraph 2(12)(b)]	1,655,412
Total income	1,695,930

Less: Mortgage interest	(40,518)
	1,655,412
Less: Married person' s allowance	(200,000)
Net chargeable income	1,455,412
Tax payable thereon	249,865

(13) By a letter dated 9 January 2008, the Representative, on behalf of the Appellant, objected to the assessments in paragraph 2(12) on the ground that they were excessive and put forward the following contention:

' The assessor concerned had totally ignored what the Department had agreed in the last year of assessment 2005/2006 and added back the whole of property income and expenses.'

(14) (a) By a letter dated 17 January 2008, the Assessor tendered apology to the Appellant that it was not explained earlier about the assessment position for the year of assessment 2005/06 because the case was only reviewed when the 2006/07 assessment was prepared. The Assessor also explained to the Appellant that rental income of an individual should be assessed under property tax and invited her to consider withdrawing objection or providing the following information:

(i) a copy of the tenancy agreement;

(ii) how her letting activities could be regarded as carrying on a business;

(iii) how she acted differently from the ordinary individual landlord in letting out the Property;

(iv) whether she had provided any special services to the tenant. If so, supply the details with documentary evidence in support; and

(v) whether she had employed any employee to handle the tenancy and the tenants. If so, supply a copy of the employment contract and provide the particulars of the staff.

(b) The Assessor also proposed that for the year of assessment 2005/06, property tax assessment was to be raised and the profits tax assessment and additional personal assessment were to be amended as follows:

(i) Profits tax assessment

	$
Assessable profits declared [paragraph 2(4) & (5)]	374,042
Less: Rental income	(349,200)
Add: Interest expenses	131,295
Agency fees	19,400
Management fee	19,467
Rates	19,457
Commercial building allowance	132,720
Depreciation allowance	6,080
Assessable profits	353,261

(ii) Additional personal assessment

	$
Net assessable value	(1) 263,794
Assessable profits [paragraph 2(14)(b)(i)]	353,261
Total income	617,055
Less: Mortgage interest [paragraph 2(5)]	(131,295)
	485,760
Less: Married person' s allowance	(200,000)
Net chargeable income	285,760
Tax payable thereon	46,352
Less: Tax already charged [paragraph 2(11)(b)]	(23,948)
Additional tax payable	22,404

(1) ($349,200 [paragraph 2(5)] - $19,457 [paragraph 2(5)]) x (1-20%) = $263,794

(15) In reply to the Assessor's letter, the Representative declined to withdraw the objection and stated that taxpayers had basic right to minimize their tax bills and quoted the *Duke of Westminster's* case. The Representative reiterated that the letting of the Property was a business itself and did not necessitate any further justification. The Representative also stated that the matter had been discussed in D122/02, IRBRD, vol 18, 135 ('D122/02').

(16) The Representative also submitted copies of the Tenancy Agreement and the following documents:

(a) The Representative's letter dated 19 January 2005 to the Hong Kong Institute of Certified Public Accountants ('HKICPA') after the issue of D122/02.

(b) HKICPA's reply dated 15 April 2005 advising that there was a formal procedure to appeal against D122/02 and it was not appropriate for the HKICPA to get involved in any particular case.

(c) The Representative's letter dated 5 May 2005 to the Secretary of Justice after the HKICPA's reply.

(d) The Department of Justice's reply dated 25 May 2005 advising that they were not in a position to give comment.

(17) By letter dated 29 January 2008, the Assessor asked the Appellant to provide the remaining information as requested in paragraph 2(14)(a)(ii) to (v) and informed her that property tax assessment and additional personal assessment for the year of assessment 2005/06 would be issued under separate cover.

(18) As the Assessor was of the opinion that rental income derived from the Property should be assessed under property tax, she raised on the Appellant property tax assessment and additional personal assessment for the year of assessment 2005/06 as follows:

(a) Property tax assessment

	$
Rental income [paragraph 2(5)]	349,200
Less: Rates paid [paragraph 2(5)]	(19,457)
Assessable value	329,743
Less: 20% deduction	(65,949)
Net assessable value	263,794
Tax payable thereon	*

* No property tax was demanded at the time of issue of the assessment due to the [Appellant's] election of personal assessment.

(b) Additional personal assessment

	$
Net assessable value [paragraph 2(18)(a)]	263,794
Assessable profits [paragraph 2(11)]	373,742

Total income	637,536
Less: Mortgage interest	-
	637,536
Less: Married person's allowance	(200,000)
Net chargeable income	437,536
Tax payable thereon	76,707
Less: Tax already charged [paragraph 2(11)(b)]	(23,948)
Additional tax payable	52,759

(19) By a letter dated 1 February 2008, the Representative, on behalf of the Appellant, objected to the assessments in paragraph 2(18) and the profits tax assessment in paragraph 2(11)(a) above on the ground that the rental income should be assessable to profits tax rather than property tax. The Representative put forward the following contentions:

(a) ' We wish to draw your attention to ... the definition of business according to Section 2(1) : Business includes ... and the letting (or) subletting by any corporation to any person of any premises ... and Corporation means any company which is either incorporated or registered under any enactment or charter in force in Hong Kong or elsewhere but does not include a co-operative society or a trade union. This is the definition given under the Inland Revenue Ordinance and as an officer employed under [the Department], we can see no reason why you should argue on this point unless you believe you have the right to reject such discipline as the officers in [*D122/02*], the consequence of which is to declare Business Registration Ordinance not an enactment.'

(b) ' It is not a matter of difference in manner but whether the legal formality required by the Ordinance had been complied with. Please refer to [*D122/02*] and the comment by the [HKICPA].'

(c) ' Letting of property involved a receipt and specific payments with regard to renting. The same had no difference whether it is a corporation or individual but only the legal form which is required under the Ordinance.'

(d) ' It is irrelevant whether the activities chargeable require any specific employee.'

(20) The Assessor has obtained the following information from the business registration office in respect of the Company:

(a) The business registration office has no record that it has ever received any notification of change of business nature.

(b) The business is not a corporation.

(21) By letter dated 14 March 2008, the Representative further stated as follows:

(a) 'The decision as to whether cases be granted in tax disputes should consider the economy as a whole, not from the point of view whether tax monies can be maximized. We are now having another property boom. We had experienced the pain during recession, and the tax arrangement was to reduce tax burden of property owners. If you insisted that the relief be not available, then you should be reminded that there are still numerous owners and speculators in the market. The resultant of which you are familiar with: negative pledge property owners, bad debts in banking sector, low price in land auctions by the Government. It is the exit for property owners to minimize their losses during a crisis but you prefer to block the entrance in an unlawful manner.'

(b) 'The arrangement was not without consideration: the [Appellant] must take out a business registration certificate. If [the Department] consider that there was no business, [the Department] simply reject its registration, and it all comes under [the Department's] management. However, once [the Department] have issued the certificate, [the Department] should not ignore the rightful request from the [Appellant].'

The Representative also supplied a copy of the notification of change of business nature dated 6 March 2008 in which the new business nature of the Company was stated as 'INSURANCE AND PROPERTY INVESTMENT' and the change was stated to have occurred on 1 May 2005.

(22) The Assessor was then of the opinion that the profits tax assessment and additional personal assessment for the year of assessment 2005/06 be revised as follows:

(a) Profits tax assessment

	$
Assessable profits as per tax computation [paragraph 2(5)]	374,042
Less: Rental income	(349,200)
Add: Interest expenses	131,295

Agency fees	19,400
Management fee	19,467
Rates	19,457
Commercial building allowance	132,720
Depreciation allowance	6,080
Revised assessable profits	353,261

[paragraph 1(2)]

(b) Additional personal assessment

	$
Net assessable value [paragraph 2(8)(a)]	263,794
Assessable profits [paragraph 2(22)(a)]	353,261
Total income	617,055
Less: Mortgage interest [paragraph 2(5)]	(131,295)
	485,760
Less: Married person's allowance	(200,000)
Revised net chargeable income	285,760
Revised tax payable thereon	46,352
Less: Tax already charged [paragraph 2(11)(b)]	(23,948)
Revised additional tax payable	22,404

[paragraph 1(3)]

Grounds of appeal

3. The notice and the statement of grounds of appeal were prepared in Chinese and signed by the Appellant. We reproduce below, verbatim, the grounds of appeal in Chinese and translate them, hopefully without losing the essence, into English:

> '(1) **本人之稅務代表曾向香港會計師公會及律政[司]尋求有關安排的合法性，其結果是得到合法的認可。稅務局亦曾向該物業擁有人即本人發出過**2005/06**年度利得稅表，但本人**2006/07**年度之申請就被駁回，是否有漠視本人之稅務權益？**
>
> (2) **稅務局在**2005/06**本人第一次申請時已用利得稅評定物業收入，可見稅務局是有據可依以物業收入作為利得稅評定。**
>
> (3) **稅務局局長引用本人自**1995**年已用**[Company A]**作為保險收入申報之公司，但拒絕本人將物業收入以利得稅申報，是否不當及前後矛盾？**

(4) **有關稅務局局長不同意引用稅務條例中法團之定義，並以**BOR D122/02**中以英國公司條例強加於稅務條例是有張冠李戴之做法。局長不應該有任何主觀意見而應該審視該等安排是否合乎稅務條例所訂要求。**'

[(1) The Representative has enquired the HKICPA and the Department of Justice and was confirmed with the legality of the arrangement – that is to have rental income assessed for profits tax. Moreover, the Department has issued profits tax return to the Appellant, the owner of the Property, for the year of assessment 2005/06 but rejected the Appellant' s claim in relation to the year of assessment 2006/07. This amounts to a denial of the taxpayer' s rights of the Appellant, does it not?

(2) For the year of assessment 2005/06, the Appellant' s property income was made subject to profits tax assessment by the Department. This reflects that there must have been basis for doing so.

(3) The Respondent referred to the Company which the Appellant has been using since 1995 as the vehicle for reporting her insurance income but rejected her claim to have her property income assessed for profits tax. This is inappropriate and contradictory, is it not?

(4) That the Respondent chose to rely not on the definition of corporation under the Inland Revenue Ordinance (' IRO') but on D122/02 whereby the English company law is being imposed on the IRO is improper. The Respondent should not have imposed any subjective view but have regard to the requirements under the IRO.]

The hearing

4. The Appellant appointed the Representative to represent her in this appeal. As requested by the Appellant, the hearing was conducted in Cantonese.

5. We received the hearing bundle from the Respondent in advance of the hearing. In contrast, no bundle had been received from the Representative until the scheduled date. Mr Tsao explained that it took him much time to download some of the necessary documents from the internet and compile the bundles.

6. From our observation, Bundle A1 consists of 62 pages. More than half of those pages are indeed documents and correspondence in the ready possession of the Appellant and, we verily believe, the Representative; other mostly taken from the internet and the latest one, so far as we can observe from the date of the print-out appeared on the bottom right hand corner of the

document, is dated 9 January 2009 which consists of extracts taken from '**霍英東全傳**' ('The Biography of Henry Fok').

7. Bundle A2 consists of only 6 pages, covering two statutory provisions in the IRO in both Chinese (taken from the Bilingual Laws Information System on the internet, one of which was printed out on 7 November 2008 while the other's date is unknown) and English versions (taken from the loose-leaf edition). We note, however, that the case number on the covering page of Bundle A2 has been mistakenly stated. We further note from the content page that section 68 of the IRO is said to be on pages 1 and 2 of the bundle but the two pages contain section 60 instead.

8. Mr Tsao also said that documents in the bundles did not relate to the factual matters of the case but rather related to the arguments that he was going to put forward to us. With no objection from the Respondent we allowed Mr Tsao to refer to and rely on the two bundles A1 and A2.

9. The Appellant did not give any oral evidence at the hearing. The Respondent called no witness.

10. We asked Mr Tsao if he had prepared any written submission. He replied in the negative. The hearing was adjourned for lunch after Mr Tsao completed his oral submission and was resumed in the afternoon to receive the submission of the Respondent and Mr Tsao's reply.

Our analysis

11. In essence, the Appellant claimed that she should be assessed profits tax (under section 14 of the IRO), not property tax (under section 5 of the IRO), on her rental income received from the Property. The Representative contended that the Appellant's business was registered under the Business Registration Ordinance ('BRO') and henceforth was a corporation within the meaning of the IRO. Any rental income of the Appellant from letting the Property was, therefore, as contended by the Representative, business income subject to profits tax.

Relevant statutory provisions

12. Section 14(1) of the IRO provides:

> *'Subject to the provision of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate [a special, indeed lower, rate for corporations is set out in Schedule 8 to the IRO] 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…'*

'Business' is defined in section 2 of the IRO to include:

> *'… the letting or sub-letting by any corporation to any person of any premises or portion thereof, and the sub-letting by any other person of any premises or portion of any premises held by him under a lease or tenancy other than from the Government.'*

'Corporation' is also defined in section 2 of the IRO to mean:

> *'any company which is either incorporated or registered under any enactment or charter in force in Hong Kong or elsewhere but does not include a co-operative society or a trade union.'*

We shall refer to the BRO in the latter part of our decision.

13. Section 5(1) of the IRO sets out the charge for property tax.

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

14. Section 5(2)(a) provides an exemption from property tax for corporations.

> *'Notwithstanding subsection (1), any corporation carrying on a trade, profession or business in Hong Kong shall, on application made in writing to the Commissioner and on proof of the facts to the satisfaction of the Commissioner, be entitled to exemption from the property tax for any year of assessment in respect of any land or buildings or land and buildings owned by the corporation where the corporation would be entitled under section 25 to a set-off of the property tax which, if exemption were not granted under this subsection, would be paid by the corporation; and the property shall be and remain exempted from property tax for each year of assessment in which the circumstances are such as to qualify the property for such exemption for that year.*

15. Section 25 of the IRO provides for a deduction for both corporations and persons other than corporations.

> *'Where property tax is payable for any year of assessment under Part II in respect of any land or buildings owned by a person carrying on a trade,*

profession or business, any profits tax payable by such person in respect of that year of assessment shall be reduced by a sum not exceeding the amount of such property tax paid by him:

Provided that –

(a) no reduction shall be allowed unless either the profits derived from such property are part of the profits of the trade, profession or business carried on by such person or the property is occupied or used by him for the purposes of producing profits in respect of which he is chargeable to tax under this Part;

(b) if the amount of property tax paid for a year of assessment exceeds the profits tax payable, the amount so paid in excess shall be refunded…'

The first and fourth grounds of appeal and D122/02

16. D122/02 is a case directly on point. The appellants in D122/02, were husband and wife and partners contending that they were carrying on a business as defined under section 2 of the IRO by letting out two properties under their joint names. We note that they were also represented by the Representative who raised the same contention.

17. The appellants in D122/02 lost the case. In essence, the Board in D122/02 held, inter alia, that as the appellants were the owners of the properties receiving rental income, the charge on property tax was perfectly valid and should be charged unless the appellants could have made out a case of exemption under section 5(2)(a) of the IRO which is restricted to corporations. It was further held by the Board that the definition of corporation focuses on how corporate personality can be acquired under the English law, that is, by acquiring a Royal Charter, promoting a special Act of Parliament (or a special Ordinance in Hong Kong), or by registration under the Companies Acts or the Companies Ordinance and since the appellants were not incorporated by any of those ways they were not a corporation for IRO purposes. The Board also dismissed the contention that since the appellants were registered under the BRO they were a corporation.

18. We asked Mr Tsao on what basis we could reach a different conclusion in the present appeal. Mr Tsao submitted that on the facts more than one property was involved in D122/02 and a business registration certificate was retrospectively applied for whereas in this appeal only one property was involved but the Appellant had a business registration certificate before letting out the Property.

19. We do not see how these factual distinctions might help advance the Appellant's case. In Lam Woo-shang v Commissioner of Inland Revenue (1961) 1 HKTC 123, but for the then broader definition of 'business' which included 'the sub-letting by any person of any premises or

portion thereof rented by him' and the fact that the property in question was held under a then Crown lease, the appellant might not have succeeded since the mere letting of property, whether furnished or not and despite the extent of plurality in that case, did not appear to have been considered trade or business. In D86/99, IRBRD, vol 14, 581, it has been confirmed that the threshold for carrying on business in the case of individuals leasing premises, even though the premises were furnished and maintained and supervised, is relatively high and not easily satisfied.

20. In two cases where business was held to be carried on, the facts point to something more than a simple tenancy of the property. In D3/81, IRBRD, vol 1, 394, the taxpayer leased premises together with the benefit of the licence for operating a public dance hall in the premises. Similarly in Louis Kwan-nang Kwong, Carlos Kwok-nang Kwong v CIR 2 HKTC 541, the entire transaction included letting the premises together with the benefit of the licence to operate a public cinema there. We do not see the required additional element in this appeal.

21. So far as the business registration certificate of this appeal is concerned, it was first applied for in June 1995 and covered only the Appellant's insurance business already commenced on 1 January 1995. The business nature was said to have changed as from 1 May 2005 (before the first letting in question but after the acquisition of the Property) by way of a notification of change dated 6 March 2008 (after the objection to the assessment was launched). This is equally retrospective. We shall deal with the merit of the contention based on business registration in further detail below.

22. Mr Tsao also submitted, in unequivocal terms, that D122/02 was wrongly decided. In this regard, Mr Tsao first relied on two extracts: (a) from the PowerPoint handout from the IRD 60th Anniversary Celebration Exhibition and Seminars; and (b) from 'The Biography of Henry Fok'. He attempted to trace from there the legislative intent of the IRO with reference to the historical and social context of Hong Kong. The points Mr Tsao tried hard to put across, so far as we can see them, included the following:

(1) From the report of the Taxation Committee appointed in September 1946, the main objective of the imposition of a tax on incomes was to result in the most equitable distribution of taxation and some departures from general practice would be necessary. To achieve this objective, there should not be any differential treatment between limited companies and unlimited companies of individuals.

(2) Despite the Haddon-Cave's Tax Policy that, inter alia, tax laws should be adapted from time to time to make them consistent with changing commercial practices, there has not been any substantial legislative amendment to property tax after 1983.

(3) When property tax was first introduced, tenants paid a substantial amount of

> money as premium which was indeed paid to cover the landlord's costs in repair and renovation. Premium is now rarely charged which has reduced the investment return from leasing property to a minimal level. Something must be done to encourage people to continue letting out properties for others in demand.

23. These might well be very good points by themselves. However, they are all questions relating to policies, in taxation or otherwise, and legislative amendments, which are just outside the jurisdiction of this Board. This Board is a statutory body set up for the purposes of hearing tax appeals. We are here to apply the existing law, not to legislate any new law, nor to formulate any policy. We cannot determine a tax appeal on any of those points raised by Mr Tsao, which are not founded on the existing law but comments, if not criticism, on the current law.

24. The Appellant in her first ground of appeal alleged that both the HKICPA and the Department of Justice confirmed the legality of levying profits tax on rental income in her case. We have given due consideration to the correspondence included in the hearing bundle but cannot agree with the Appellant. We note from the reply of the HKICPA the following:

> ' As regards the decision of [this Board] in case D122/02, there is a formal procedure for a taxpayer who wishes to challenge a decision of [this Board] to appeal against that decision. The [Institute's Taxation Committee] considered that it would not be appropriate, therefore, for the Institute to seek to involve itself in the details of a particular case and it has no standing to do so.'

Apart from inviting the Representative to raise any general points of concern which the HKICPA may consider raising at their annual meeting with the Respondent, no reference has ever been made to the facts of this appeal.

25. The reply from the Department of Justice did not support the Appellant's claim either.

> ' Since the primary function of the Department of Justice is to provide legal advice only to the Government of the Hong Kong Special Administrative Region, we regret that we are not in a position to comment or advise on the matter [the Representative] raised.'

The Department of Justice further advised the Representative to contact the IRD direct if there may be any views concerning the IRD practices.

26. When we followed up by asking Mr Tsao why no further appeal had been lodged in respect of D122/02, he replied that it was not economically justified to do so. This might well be an informed decision of the taxpayer in D122/02 not to have pursued the case any further. We just hope that the Representative have duly advised the Appellant that in light of D122/02 which carries

at least a certain degree of persuasiveness to subsequent cases before this Board, she would face an uphill battle, if not an impossible mission, in this appeal.

27. The *Duke of Westminster's* case (*IRC v Duke of Westminster* [1936] AC 1) was mentioned to in both the Appellant's objection and during the hearing. However, no detailed submission has been put forward by Mr Tsao; nor did he include the case in the Appellant's hearing bundle. While every man is entitled to arrange his affairs so that the tax attaching under the appropriate legislation is less than otherwise it would be, whether and how, in this appeal, the rental income from the Property is charged still depends on the relevant charging provisions and is, generally, subject to any measure against tax avoidance. The entitlement is not without boundaries. So long as the assessment has been made properly in accordance with and in terms of the IRO on the basis of the given facts, the Appellant cannot be said to have been deprived of any of such entitlement.

28. In the last ground of appeal, the Appellant criticized the Board in D122/02 for their references to English company law in their analysis of the meaning of 'corporation'. In his submission, Mr Tsao raised the point of 'judicial independence' ('**司法獨立**'). We consider both points as totally misconceived by the Appellant and the Representative.

29. The definition of 'corporation' in section 2(1) of the IRO refers to, inter alia, 'any company which is either incorporated or registered under any enactment or charter in force in Hong Kong or elsewhere'. On this point, the Respondent referred us to two paragraphs of Volume 6(1): Companies and Corporations, Halsbury's Laws of Hong Kong, under which references to English law have been made in describing the nature of a corporation and defining the meaning of company and corporation. Since the English legal system and the Hong Kong's share the same origin and in fact it is beyond doubt that the Hong Kong company law has developed very much on the basis of its English counterpart, it is only natural to refer to English law whenever necessary and appropriate subject to peculiar local circumstances. When considering a company 'incorporated or registered under any enactment… in Hong Kong or elsewhere', references to both the Companies Ordinance in Hong Kong and the English Companies Act and hence the English company law are just proper. Indeed Mr Tsao in both D122/02 and this appeal formulated one of his contentions on the basis of business registration under the BRO. The two approaches are, in our view, analogous. We shall deal with the merit of Mr Tsao's approach below. In any event, this kind of 'cross-referencing' has nothing to do with the well-known doctrine of judicial independence.

30. Applying D122/02, which we concur with the reasoning of this Board as provided in the decision, to the facts of the present appeal, this appeal must fail. We do not see the need to repeat here the reasoning, which has been neatly set out in D122/02, except perhaps supplementing on the point whether an individual carrying on a business registered under the BRO, can be regarded as a 'corporation' for the purposes of the IRO.

31. The absurdities of the argument have been pointed out and illustrated in D122/02, in

particular, in paragraphs 36 and 37 of the decision. We would just add that the BRO amends the law relating to the registration of *business* in Hong Kong (emphasis added) and 'business' as defined in section 2(1) of the BRO means 'any form of trade, commerce, craftsmanship, profession, calling or other activity carried on for the purpose of gain and also means a club'. A business registered under the BRO can be carried out by an individual, a body corporate or partnership or other body non-corporate. This is also exactly how the forms for business registration, as exhibited in the Appellant's bundle (IRBR 55 – 57), are being categorized. It has nothing to do with registration of companies. Business registration itself has nothing to do with acquiring any corporate personality. In this appeal, the Appellant herself is the registered owner of the Property. The form she used for applying business registration is the one filed by an individual. She runs the business by herself; she does not run it by a separate corporate vehicle. The Appellant's case that by registering a business under the BRO and by including in the business property investment she would be given a corporate personality for IRO purposes is just non-sensical and cannot be right.

The second ground of appeal

32. This has been formulated around the inadvertent profits tax assessment for the year of assessment 2005/06 on the property income of the Appellant. The relevant facts leading and subsequent to the event have been set out in paragraphs 2(6) to 2(11) above. We note that confusion was caused to the Appellant for which the Assessor had apologized. Mr Yip repeated the apology for the incident in his written and oral submissions.

33. Mr Tsao referred us briefly to sections 60 and 82A of the IRO. Mr Yip referred us to D12/93, IRBRD, vol 8, 147. Mr Tsao, in his reply, made no further submission on this point nor address to D12/93.

34. We find no relevance of either section 60 or section 82A of the IRO as no additional assessment has ever been involved in this appeal. Instead, we find similar facts in this appeal to those in D12/93 and agree with Mr Yip that D12/93 is the case on point.

35. Applying D12/93, the original assessment as per paragraph 2(8) is a valid assessment and once an objection has been lodged it remains in force and effect until being annulled or revised under the objection procedure pursuant to section 64 of the IRO. Accordingly, the purported cancellation of the original assessment is void and the second assessment as per paragraph 2(11) has been incorrectly issued. Accordingly, the Respondent cannot be bound by the second assessment.

The third ground of appeal

36. The Appellant's third ground of appeal can be disposed of swiftly. We are concerned with the rental income from the Property. As seen above, such income is undoubtedly chargeable to property tax under the IRO. It could have been chargeable to profits tax if such leasing could be

considered business either generally or as defined under the IRO. The circumstances, however, do not support the existence of such a business for the purposes of the IRO. Without necessarily going into any detail, the analysis applicable to the income from the insurance business is just different. How the income from the insurance business has been taxed has no bearing on what tax is chargeable on the rental income and vice versa. The two are of different nature and should be separately considered.

Conclusion

37. From the above analysis, this appeal must be dismissed and all assessments stated in paragraph 1 are hereby confirmed.

Costs order

38. Since a costs order was made against the taxpayer in D122/02, we invited submissions from both parties on the matter of costs. Having considered the respective submissions and the circumstances of this appeal, we are of the opinion that this appeal is frivolous and vexatious since similar arguments had been rejected in D122/02 and that the Appellant's criticism against D122/02 was not substantiated. 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.