Case No. D154/01

Salaries tax – whether the service agreement was a scheme entered into to enable the appellant to obtain tax benefit – whether the service agreement was a form of disguised employment – sections 12(1)(a), 16(1), 61A(2) and 68 of the Inland Revenue Ordinance ('IRO') – onus of proof – frivolous and vexatious appeal – order to pay costs.

Panel: Kenneth Kwok Hing Wai SC (chairman), David Li Ka Fai and Donald Liu Tit Shing.

Dates of hearing: 14 and 15 December 2001.
Date of decision: 19 February 2002.

Company A was incorporated in Country C with the appellant and his wife as the shareholders since 1993. Company B, Company A and the appellant entered into a service agreement dated 27 July 1993 under which Company A agreed to make the services of the appellant available exclusively to Company B.

The Commissioner came to the view that the arrangement among Company A, Company B and the appellant pursuant to the service agreement was a scheme entered into for the sole or dominant purpose of enabling the appellant to obtain a tax benefit. The Commissioner further opined that it was a form of 'disguised employment' and raised under section 61A(2) of the IRO on the appellant the additional tax assessments.

The appellant objected to the additional salaries tax assessments for the years of assessment 1993/94 and 1994/95 raised on him. The appellant gave evidence on oath.

Held:

1. 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', '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 (Yick Fung Estates Limited v CIR [2000] 1 HKLRD 381 and D47/00, IRBRD, vol 15, 422 considered).

2. The Board considered that, by interposing Company A, what would have been the appellant's salary had been presented to the Revenue as business income of Company A. 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 A were allowed by the Revenue as deductions in computing its assessable profits or loss.

3. Having considered the evidence of the case, the Board came to the conclusion that the appellant, being 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. Company A had no real role in the transaction. Section 61A was correctly invoked against the appellant.

4. The Board rejected the appellant's contention that the normal onus of proof in an appeal to the Board of Review against an assessment arising from the use of section 61A was reversed and it was for the respondent to discharge it (Kum Hing Land Investment Co Ltd v CIR 1 HKTC 301 and Cheung Wah Keung v CIR, Inland Revenue Appeal No 3 of 2001, unreported considered).

5. The Board did not accept that the appellant had incurred any of the alleged consultancy fees and the consultancy fees was wholly, exclusively and necessarily incurred in the production of the assessable income. The appellant has not discharged the onus under section 68(4) of proving that any of the assessments appealed against is excessive or incorrect.

6. The Board further considered that this appeal was frivolous and vexatious. 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 a cost of $5,000 charged.

Cases referred to:

Yick Fung Estates Limited v CIR [2000] 1 HKLRD 381
D47/00, IRBRD, vol 15, 422
Kum Hing Land Investment Co Ltd v CIR 1 HKTC 301

Cheung Wah Keung v CIR, Inland Revenue Appeal No 3 of 2001, unreported
CIR v Malaysian Airline System Berhard 3 HKTC 775

Wong Kuen Fai for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 13 August 2001 whereby:

(a) The additional salaries tax assessment for the year of assessment 1993/94 under charge number 9-2853873-94-7 dated 23 March 1999, showing additional assessable income of $1,771,000 with tax payable thereon of $265,650 was reduced to additional assessable income of $1,578,500 with tax payable thereon of $236,775.

(b) Additional salaries tax assessment for the year of assessment 1994/95 under charge number 9-2783922-95-2 dated 23 March 1999, showing additional assessable income of $2,372,941 with tax payable thereon of $349,541 was reduced to additional assessable income of $2,033,635 with tax payable thereon of $298,645.

The admitted facts

2. The Appellant admitted the following facts stated in 'Facts upon which the Determination was arrived at' in the determination and we find them as facts.

3. The Appellant had objected to the additional salaries tax assessments for the years of assessment 1993/94 and 1994/95 raised on him. The Appellant claimed that the monthly fees paid to Company A by Company B should not be assessed to salaries tax as his income from an employment.

4. Company A was incorporated on 6 January 1992 in Country C under the International Business Companies Ordinance. Its name was changed on 18 June 1993 from Company D to Company A.

5. The Appellant and his wife, Mrs E, were the shareholders of Company A, each holding 50% of the issued share capital in the company since 29 March 1993.

6. According to the accounts of Company A covering the period from 6 January 1992 to 31 May 1995, the following persons and companies had been appointed as its directors:

Name of director	**Appointed on**	**Resigned on**
The Appellant	1-5-1992	1-3-1993
Mrs E	1-5-1992	1-3-1993
Company F	1-3-1993	30-12-1993
Company G	30-12-1993	-

7. In response to a request made by the tax representatives of Company A on 26 June 1995, the assessor issued a profits tax return for the year of assessment 1994/95 to Company A which was subsequently filed on 21 September 1995 accompanied by audited financial statements covering the period from 6 January 1992 (date of incorporation) to 31 May 1994.

8. Company B, Company A and the Appellant entered into a service agreement dated 27 July 1993 ('the Service Agreement') under which Company A agreed to make the services of the Appellant available exclusively to Company B.

9. In his tax returns for the years of assessment 1993/94 and 1994/95, the Appellant declared the below particulars:

	1993/94	**1994/95**
Employer:	Company A	Company A
Capacity employed:	General manager	General manager
Salary:	$240,000	$360,000
Period employed:	13-8-1993 to 31-3-1994	1-4-1994 to 31-3-1995
Period quarters provided:	13-8-1993 to 31-3-1994	1-4-1994 to 31-3-1995

10. On 4 March 1996, based on the Appellant's tax return for the year of assessment 1993/94, the assessor raised on him the following salaries tax assessment for the year of assessment 1993/94:

	$
Salary	240,000
Rental value of quarters	24,000
Assessable income	264,000
Tax payable thereon	39,600

Notes:

(a) Tax was computed at the standard rate and no personal allowances were given.

(b) The Appellant did not object against the salaries tax assessment for the year of assessment 1993/94.

11. On 23 January 1996, based on the Appellant's tax return for the year of assessment 1994/95, the assessor raised on him the following salaries tax assessment for the year of assessment 1994/95:

	$
Salary	360,000
Rental value of quarters	36,000
	396,000
Less: Basic allowance	72,000
Child allowances	40,000
Net chargeable income	284,000
Tax payable thereon	49,000

Notes:

(a) Tax was computed at progressive rate and personal allowances were given.

(b) The Appellant did not object against the salaries tax assessment for the year of assessment 1994/95.

12. In the accounts submitted, Company A recorded the below income and expenses:

	6-1-1992 – 31-5-1994	**1-6-1994 – 31-5-1995**
Income	$	$
Consultancy income from Company B	2,300,000	2,196,941
Income from Company H	-	720,000
Net exchange gain	74	-
	2,300,074	2,916,941
Less: Expenses		
Audit fee	12,000	12,000
Agency fee	27,500	-
Bank charges	780	90
Bank interest	-	20
Commission expenses	368,400	225,000
Consultancy fees (see paragraph 21, infra)	805,330	1,686,360
Depreciation	7,856	7,856
Director's fee	5,875	4,667
Donations	3,250	200
Entertainment	180,830	38,842
Insurance	13,537	15,841
Legal and professional fees	24,390	37,650
Local travelling	11,870	-

Medical expenses	1,962	4,731
Motor vehicle expenses	9,508	2,500
Newspapers and magazines	1,500	3,575
Office expenses	14,135	4,294
Overseas travelling	41,990	15,804
Postage and delivery	440	-
Printing and stationery	-	1,170
Registration fee	4,680	2,340
Repair and maintenance	-	5,530
Salaries	300,000	300,000
Staff quarter expenses	285,000	575,000
Stamp duty	1,653	-
Sundry expenses	4,291	1,640
Telecommunication	17,822	26,525
Utilities	15,949	12,571
	2,160,548	2,984,206
Profit/(Loss) for the year	139,526	(67,265)

Note: Company A received in the year ended 31 May 1995 a sum of $1,587,000 from Company B on termination of the Service Agreement. The sum was not included in the above as income.

13. Company A computed its assessable profits and adjusted loss, as the case may be, as follows:

	1994/95	**1995/96**
	$	$
Profit/(Loss) per accounts	139,526	(67,265)
Add: Adjustments	15,037	5,342
Assessable profits/(Adjusted loss)	154,563	(61,923)

14. On 31 May 1996, based on the assessable profits declared in the profits tax return for the year of assessment 1994/95, the assessor raised on Company A the following profits tax assessment for the year of assessment 1994/95:

	$
Profits per return	154,563
Tax payable thereon	25,502

Note: Company A did not object against the profits tax assessment for the year of assessment 1994/95.

15. On 25 July 1996, upon the failure by Company A to submit its profits tax return for the year of assessment 1995/96, the assessor raised on Company A under section 59(3) of the IRO the following profits tax assessment for the year of assessment 1995/96:

	$
Estimated assessable profits	180,000
Tax payable thereon	29,700

16. By a letter dated 23 August 1996, Accountants' Firm I objected on behalf of Company A against the estimated profits tax assessment for the year of assessment 1995/96 on the grounds that the assessment was estimated and excessive. There had been subsequent correspondence regarding the objection between the assessor and the tax representatives of Company A.

17. By a letter dated 19 November 1998, the assessor informed Accountants' Firm J (the Appellant's tax representatives then) that the estimated profits tax assessment for the year of assessment 1995/96 was cancelled. The assessor reminded Accountants' Firm J that the settlement was not to prejudice the review by the Inland Revenue Department ('IRD') of their client's chargeability under salaries tax.

18. Company B through its representatives, Accountants' Firm K, by a letter dated 28 December 1998 wrote to the assessor alleging the following (the following is written exactly as it stands in the original and we shall not punctuate it with '*sic*'):

(a) '[The Appellant] commenced to provide service to the Company on 1 August 1993. Before 1 August 1993, [the Appellant] acted as a consultant to the Company since June 1993 to August 1993.'

(b) '[The Appellant] ceased to provide service to the Company on 28 January 1995 (last paid day).'

(c) 'Before 1 August 1993, [Company A] acted as a consultant to the Company and received consultancy fee from the Company. After entering into the agreement, the Company appointed [Company A] and agreed to accept the services of [the Appellant] as a Group General Manager. The Company paid a monthly fee of HK$160,000 to [Company A] and also a fixed monthly fee of HK$70,000 for the provision by [Company A] of accommodation to [the Appellant] and his family.'

(d) 'Details of the remuneration paid for the period as requested are as follows:

Year of assessment	Consultancy fee	Administration fee	Compensation
	HK$	HK$	HK$
1993/94	195,000	1,840,000	
1994/95	-	2,656,941	1,587,000

As stated in point [(c)] above, [the Appellant] acted as a consultant to the Company before 1 August 1993. After 1 August 1993, the Company continued to accept the services of [the Appellant] under the title as Group General Manager. Please refer to the agreement Clauses 2 and 4 for details of [the Appellant's] duties.'

(e) 'Before 1 August 1993, [Company A's] office was located at [Address L]. After 1 August 1993, for the sake of improved efficiency and convenience, [the Appellant] made use of the Company's office and carried out his work at regular office hours.'

(f) 'As per Clause 4.1 and 4.2 in the agreement, [the Appellant] should devote the whole of his time, attention and skill to his duties owed to the Company through [Company A], in servicing the Company and its group of companies.'

(g) 'Through [Company A], [the Appellant] was required to attend work at regular hours and to observe the Company's rules and regulations as stated in the service agreement Clause 4.4.'

(h) 'The Company's board of directors had control over [the Appellant's] work activities through [Company A].'

(i) '[The Appellant] made use of the Company's office equipment and facilities. [Company A] does not employ assistant to provide service to the Company during the contract period.'

(j) '[The Appellant] incurred outgoing and expenses in the performance of his duties, within the confine of the agreement and hence could obtain reimbursement of the expenses from the Company in accordance with Clause 6.7 of the service agreement.'

(k) '[The Appellant] is entitled to annual leave and medical benefits.'

(l) 'Pre-approval from the Company was required for holiday taken by [the Appellant]. The Company's director was in charge of leave approval.'

(m) 'The consultancy fee and administration fee payment was made by cheque payable to [Company A].'

(n) 'After entering into the agreement, [the Appellant] was responsible through [Company A] to the Company's board of directors.'

(o) 'Please refer to Clause 8 for the circumstances under which termination of the service agreement would be made.'

(p) 'The Company at first entered into contract with [Company A] for the services required from the Company. As the services provided by [Company A] proved to be growing important to the Company, our client felt the need to strength on the coherence of [Company A] for the exclusive services to the Company and its group. So on a commercial point of view, it could be best to obtain the allegiance of [Company A] and its management through participation in the services provided. In doing so, the Company was to pay an administration fee to [Company A].'

(q) 'Compensation of HK$1,587,000

(i) There were disputes over matters of remuneration that might require settlement through court proceedings. To avoid litigation and save cost and time, the Company decided to early terminate the agreement with [Company A] and hence a lump sum payment of compensation was paid to [Company A].

(ii) Please refer to Clause 8.2 of the agreement for the basis of calculation of the compensation paid to [Company A].

(iii) Please refer to [point (q)(i)] above.

(iv) The amount was compromised through verbal agreement and mutual understanding on the basis as contained under Clause No. 8 in the agreement.'

19. The Commissioner, having reviewed the facts of the case, came to the view that the arrangement among Company A, Company B and the Appellant pursuant to the Service Agreement was a scheme entered into for the sole or dominant purpose of enabling the Appellant to obtain a tax benefit. The Commissioner further opined that it was a form of 'disguised employment'. On 23 March 1999, the Commissioner raised under section 61A(2) of the IRO on the Appellant the following additional salaries tax assessments:

(a) **Year of assessment – 1993/94 (Additional)**	$
Salary ($195,000 + $1,840,000) [paragraph 18(d)]	2,035,000
Less: Amount already assessed [paragraph 10]	264,000
Additional assessable income	1,771,000
Tax payable thereon	265,650

(b) **Year of assessment – 1994/95 (Additional)**	$
Salary [paragraph 18(d)]	2,656,941
Less: Amount already assessed [paragraph 11]	396,000
	2,260,941
Add: Allowances withdrawn (as standard rate applies)	112,000
Additional assessable income	2,372,941
Tax payable thereon	349,541

20. By a letter dated 21 April 1999, Accountants' Firm J objected on behalf of the Appellant against the additional salaries tax assessments for the years of assessment 1993/94 and 1994/95 on the following grounds:

(a) the arrangement among Company B, Company A and the Appellant was a commercial arrangement not for the sole or dominant purpose of obtaining a tax benefit;

(b) the section 61A additional assessments reopened a matter which had been determined on objection;

(c) the Appellant, if assessed under section 61A, should be assessed on the basis that certain benefits-in-kind had been given to him;

(d) the Appellant, if assessed under section 61A, should be allowed deduction of consultancy service expenses;

(e) the income included in the additional salaries tax assessment for the year of assessment 1993/94 was excessive; and

(f) the Commissioner did not validly exercise his power under section 61A as neither the Appellant nor Accountants' Firm J had been notified before the issue of the additional assessments.

21. In reply to the assessor's enquiries, Accountants' Firm J provided the following information about Company M, the alleged recipient of consultancy fees shown in the accounts of Company A (see paragraph 12). The following is written exactly as it stands in the original and we shall not punctuate it with '*sic*'.

(a) 'We attach herewith copies of the three fee notes in question covering the period 1 June 1994 to 31 January 1995.'

(b) 'No formal agreement has entered into between our client and [Company M].'

(c) 'The payee was [Company M], [Address N].'

(d) 'The details of the services rendered are as set out in the relevant invoices.'

(e) '[Company M] is a [Country O] resident company whose address in the period in question was:

[Address N]'

(f) 'This company was established by [the Appellant] and his wife, [Mrs E] whilst there were resident in [Country O] and was equally owned by [the Appellant and Mrs E]. [The Appellant and Mrs E] were also directors of [Company M]. During the period under review (when [the Appellant and Mrs E] were in Hong Kong) [Company M] employed three staff in their offices in [City P] who worked on a variety of projects including work for [Company A]. The services which were the subject of the consultancy fee paid by [Company A] were therefore undertaken in [Country O] by the three staff members based in [City P].'

22. The Appellant rented a house at District Q in Hong Kong as his residence at a monthly rent of $55,000 with effect from 1 January 1994.

23. In response to the assessor's enquiry, Company B, which had changed its name to Company R, by letter dated 18 July 2001 stated that owing to lapse of time, it could not provide the records showing the payment of consultancy fee of $195,000 [see paragraph 18(d)] to the Appellant.

24. Accountants' Firm J by letter dated 3 August 2001 forwarded their comments on a statement of facts issued by the assessor in connection with the Appellant's objections. Accountants' Firm J claimed that since the Appellant had given evidence against certain senior employees of Company B, the information, in particular, the alleged payment of consultancy fee of $195,000, provided by the representatives of Company B [see paragraph 18] was inaccurate. Accountants' Firm J further claimed that before entering into the Service Agreement with Company B in July 1993, he was employed by a company known as Company S (now known as Company H) to provide services to Company B. For the period up to 31 March 1993, he should be exempted from salaries tax in Hong Kong as he was resident in Country O. So, there was no reason for him to seek a tax advantage by entering into the Service Agreement. Should it be his

intent to obtain a tax advantage, he could simply continue his arrangement with Company H. The decision to use Company A was a commercial decision to separate the engagement of Company A with Company B from that of Company H and avoid any claim of conflict of interest.

The determination

25. The Commissioner gave the Appellant the benefit of doubt and excluded the consultancy fee of $195,000. He also treated the monthly accommodation allowance to the extent of $55,000 paid after 1 January 1994 as a refund of rent and not assessable, and assessed to tax a rental value computed in accordance with section 9(2) of the IRO, and charged the excess to salaries tax. Save as aforesaid, he upheld the two additional salaries tax assessments.

The appeal hearing

26. By letter dated 12 September 2001, Accountants' Firm J gave notice of appeal on behalf of the Appellant on the following grounds:

> '1. The Acting Commissioner has ignored the commercial aspects of the arrangement which he claims is subject to the provision of Section 61A of the Inland Revenue Ordinance ("IRO") and has incorrectly concluded that the arrangement under review was "entered into or carried out for the sole or dominant purpose of enabling [the Appellant] to obtain a tax benefit" under Section 61A IRO.
>
> 2. The Acting Commissioner has in issuing his determination reopened a matter which has already been determined on objection and therefore should not be reopened.
>
> 3. The Acting Commissioner is incorrect in his assertions that consultancy fees paid should not be allowed as deductions for Salaries Tax purposes. The Acting Commissioner claims that no evidence has been produced that the fees in question were allowable expenses. However these fees have already been the subject of detailed correspondence on a previous occasion and such evidence has already been referred to by [the Appellant] in his submissions to the Department.
>
> 4. The Acting Commissioner has relied upon facts presented on behalf of [Company B] which [the Appellant] has claimed are prejudiced. Despite this the Acting Commissioner has relied on these facts as being proved despite documentary evidence to the contrary which has been produced on behalf of the taxpayer. Certain facts on which the determination is based are therefore incorrect.

5. The Acting Commissioner is incorrect in reason (7) of the determination in his opinion that "having regard to the term of engagement contained in the service agreement at Appendix A ... the taxpayer rendered services to [Company B] as an employee of [Company B] rather than as a self-employed person." It has never been [the Appellant's] claim that he was a self-employed person and this opinion indicates a flaw in the Acting Commissioner's reasoning in this case.'

27. Ground 4 was less than helpful by alleging that 'certain facts on which the determination is based are therefore incorrect' without identifying any of the facts alleged to be incorrect.

28. Accountants' Firm J did not appear at the hearing of the appeal and the Appellant appeared in person. The Appellant gave evidence on oath. He made a submission along the lines of a written submission which had been prepared for him.

29. The Respondent was represented by Mr Wong Kuen-fai who did not call any oral witness. Mr Wong Kuen-fai gave an undertaking on behalf of the Respondent that in the event of our upholding the determination and the matter becoming final and conclusive under section 70, the profits tax assessment and loss computation (paragraph 13) issued to Company A would be revised to exclude the income from Company B as well as the related expenses.

Our decision

30. 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.

31. The Commissioner was of the view that section 61A was applicable. We do not know why both section 61 and section 61A were considered in some determinations but not in others, including this case in particular. Mr Wong Kuen-fai did not know why and he did not rely on section 61.

32. 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.'

33. 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'.

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

' *... the tests set out in s.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 sub-s.(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.'

35. 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.

36. By interposing Company A, what would have been the Appellant's salary had been presented to the Revenue as business income of Company A. 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 A were allowed by the Revenue as deductions in computing its assessable profits or loss.

37. 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.

38. Company A had no real role in the transaction. The Appellant had not been able to point to any apart from persisting in the contention made in the letter dated 3 August 2001 from Accountants' Firm J that:

> 'The decision to use [Company A] was a commercial decision to separate the engagement of [Company A] with [Company B] from that of [Company H] and avoid any claim of conflict of interest'.

The Appellant was confronted with invoices from Company S or Company H, approved and signed by the Appellant on behalf of Company B. The contention is demonstrably untrue and we reject it.

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

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

41. The Appellant cited a number of Board of Review decisions and the Commissioner's Departmental Interpretation and Practice Notes made and issued many years before Yick Fung Estates Limited v CIR. We derive no assistance from them and will not refer to any of them.

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

43. For the reasons we have given, the question of onus of proof does not arise in our decision on section 61A. Nevertheless, we shall deal briefly with the Appellant's contention that the normal onus of proof in an appeal to the Board of Review against an assessment arising from the use of section 61A is reversed and it is for the Respondent to discharge it. As at present advised, we reject it.

44. In Kum Hing Land Investment Co Ltd v CIR 1 HKTC 301, one of the questions for the consideration of Scholes J was '*whether, the said payment and receipt having been established, the onus of satisfying the Board that the Commissioner was wrong was discharged by the Company*' (at page 311). '*Mr Litton conceded that before the Board of Review the burden was on taxpayer to show that the application of section 61 was incorrect, but he submitted that the burden on the assessor was not to act capriciously, but to be*

satisfied as to the position' (page 316). Scholes J answered the question in the negative and added that the '*Company had to satisfy the Board that section 61 of the Inland Revenue Ordinance had been wrongly applied*' (page 321). The Appellant had not advanced any argument why the onus of proof in respect of section 61A should be different from section 61 and we see none.

45. In Cheung Wah Keung v CIR, Inland Revenue Appeal No 3 of 2001, unreported, 21 January 2002, Deputy Judge Poon answered the question 'Did the Board err in law in failing to impose on the Commissioner the burden of proving that a case had been made out for invoking section 61 and section 61A?' with a 'no'.

46. Accountants' Firm J's first ground of appeal therefore fails.

47. In our decision, the second ground also fails.

(a) The only determination that we are aware of is the determination which is under appeal to us.

(b) What happened on Company A's objection to the estimated profits tax assessment for the year of assessment 1995/96 was that the assessor cancelled the estimated profits tax assessment for the year of assessment 1995/96 (paragraph 17).

(c) The assessor reminded Accountants' Firm J that the settlement was not to prejudice the review by the IRD of their client's chargeability under salaries tax (paragraph 17).

(d) The assessor issued Company A with a statement of loss for the year of assessment 1995/96. The position is that a taxpayer has no right or need to challenge the loss calculations made by the assessor, per Godfrey J in CIR v Malaysian Airline System Berhard 3 HKTC 775 at page 795.

48. We turn now to the alleged consultancy fees under ground 3 of Accountants' Firm J's grounds of appeal. We do not accept that the Appellant has incurred any of the alleged consultancy fees. Further and in any event, we do not accept that any of the alleged consultancy fees was wholly, exclusively and necessarily incurred in the production of the assessable income.

(a) Mr Wong Kuen-fai drew our attention to the following qualification by Accountants' Firm J, certified public accountants, the auditors of Company A, to the financial statements for the year ended 31 May 1995:

'However, we were not provided with sufficient audit evidence to verify the consultancy fees of HK$1,686,360 incurred during the year. There were no other satisfactory audit procedures that we could adopt to obtain sufficient evidence to confirm the completeness and existence of the consultancy fee.'

(b) A sum in Country O currency (about $210,000) each month is alleged to have been paid from 1 June 1994 to 31 January 1995. During this 8-month period, Company A was earning about $230,000 a month. We do not for one moment believe that the Appellant incurred over 91% of his income by way of consultancy fee.

(c) When asked why Company A did not claim reimbursement of the alleged consultancy fee from Company B, the Appellant said:

'The only reason it would not be claimed would be that it was not an expense that was claimable. It was not something that was, it was not a claimable expense.'

49. We do not think it is necessary to deal with grounds 4 and 5. They are both immaterial and irrelevant. Mr Wong Kuen-fai has not relied on any of the matters referred to in those grounds.

Disposition

50. 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 reduced by the Commissioner.

Costs order

51. In our decision, this appeal is frivolous and vexatious. 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.