Case No. D21/10

Profits tax – allegation of capricious or dishonest act of Inland Revenue Department ('IRD') – deductibility of expenses claimed – artificial transactions – sole or dominant purpose to obtain a tax benefit – sections 16(1), 17(1)(a) and (b), 61, 61A , 68(4) and 68(9) of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Albert T da Rosa, Jr and Cissy King Sze Lam.

Dates of hearing: 24 February, 9, 10, 11, 23 March and 9, 13, 30 April 2010.
Date of decision: 24 August 2010.

The appellant in this appeal is Ms B, a registered physiotherapist. This appeal was heard at the same time as B/R 5/09 [Case No D22/10] in which the appellant is Dr A, a registered medical practitioner.

Ms B and Dr A were previously married until their divorce on 17 January 2008.

Company C is a private company incorporated in Hong Kong in 1987 controlled by Dr A and Ms B.

Ms B

On 26 September 1992, Ms B commenced her physiotherapy practice as a sole proprietress under the business name of Company D.

On 24 September 1998, Ms B in the capacity of the director of Company C applied for business registration of a branch under the name of Company D. The branch was reported to have ceased business on 31 August 2006.

Ms B objects to the followings:

<u>For the years of assessment 1995/96 to 1998/99</u>

The Assessor considered that Ms B had understated income and claimed expenses, which were of private and domestic in nature or not supported by documentary evidence. The Assessor raised on Ms B additional profits tax assessments in respect of Company D.

<u>For the year of assessment 1999/2000</u>

The Assessor considered that Ms B continued to carry on a sole proprietorship business in Hong Kong to practice physiotherapy under the name of Company D and raised on Ms B profits tax assessment in respect of her practice.

For the year of assessment 2000/01 to 2005/06

The Assistant Commissioner was of the view that the interposition of Company C between the patients and Ms B was both artificial and fictitious and was a transaction entered into for the sole or dominant purpose to obtain a tax benefit.

The income in respect of the physiotherapy practice, Company D, allegedly earned by Company C was treated as Ms B's professional income under her proprietorship business. Accordingly, the Assistant Commissioner raised on Ms B profits tax assessments in respect of Company D.

Ms B asserts that various assessors and IRD officers had been dishonest and capricious in the process which should nullify and void the assessments.

Dr A

Dr A commenced his medical practice as a sole proprietor on 26 April 1987.

On 19 April 1993, Dr A commenced another medical practice as a sole proprietor under the business name of 'Dr A'. The business was reported to have ceased on 1 December 2000.

On 20 December 2000, Dr A in the capacity of the manager of Company C applied for business registration of a branch under the name of Company K.

For the years of assessment 2001/02 to 2005/06

Dr A declared being engaged by Company C to provide medical consulting services under the name of Company K.

The Assistant Commissioner was of the view that the interposition of Company C between the patients and Dr A was both artificial and fictitious and was a transaction entered into for the sole or dominant purpose to obtain a tax benefit.

The income in respect of the medical practice allegedly received by Company C was treated as Dr A's professional income under his proprietorship business. Accordingly, the Assistant Commissioner raised on Dr A profits tax assessments.

Dr A objected. He also asserts that there had been dishonest and capricious acts of the assessors in the process which should nullify and void the assessments.

Held:

1. There had been no capricious or dishonest act of IRD.

    1.1 The remedy for any taxpayer who asserts that there has been an abuse of power or improprieties, lies in judicial review. The Board does not have the judicial review jurisdiction which is exclusively enjoyed by the High Court.

    1.2 If an assessor acted either capriciously or dishonestly which resulted in the assessment being incorrect or excessive, the Board can exercise its powers under section 68(8)(a) to reduce or even annul the relevant assessment.

    1.3 None of the allegations, grounds and submissions put forward by Dr A and Ms B were supported by any evidence that was before the Board.

2. The expenses claimed by Ms B for 1995/96 to 1998/99 are not deductible.

    2.1 Under sections 16 and 17, to be deductible, the expense in question must fall on the taxpayer as a trader and must be for the purpose of earning profits.

    2.2 Ms B failed to produce any credible evidence to show why each and every relevant expense is deductible such that the assessments for years 1995/96 to 1998/99 are incorrect or excessive.

3. The relevant transactions constitute artificial transactions and should be disregarded for the purpose of section 61 of the IRO.

    3.1 At the material times, the involvement of Company C in Dr A's medical practice/ Ms B's physiotherapy practice was completely unnecessary.

    3.2 The charging of substantial expenses of a private and domestic nature or not incurred in the production of chargeable profits as expenses of Company C demonstrates that the involvement of Company C is artificial.

    3.2 Dr A and Ms B have been providing their services directly to their respective patients. Dr A and Ms B have been correctly assessed on the basis that they were each carrying on their practice personally.

4. The sole or dominant purpose of Dr A's and Ms B's entering into the relevant transactions was to enable himself/herself to obtain a tax benefit within the meaning of section 61A of the IRO.

   4.1 The taxable income generated from Dr A's medical practice/Ms B's physiotherapy practice whether carried on in his/her own name or in the name of another branch company registered under Company C had always been the same income. Company C had no function in generating their income.

   4.2 By transferring his/ her fee income to Company C, Dr A/ Ms B transferred his/ her tax liability in respect of such income from himself/ herself to Company C with the result that Dr A had to pay but nominal tax/ Ms B did not have to pay any tax at all.

   4.3 As their personal expenditure was also transferred to Company C, after deducting such expenses and its accumulated loss, Company C was left with a very limited tax liability.

   4.4 Company C was a company controlled by Dr A and Ms B. They were not inhibited from enjoying the fruit of the income.

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

Cases referred to:

Shui On Credit Co Ltd v CIR [2010] 1 HKLRD 237
China Map Ltd v CIR (2008) 11 HKCFAR 486
Aspin v Estill [1987] STC 723
D12/93, (1993) IRBRD, vol 8, 147
D54/94, (1994) IRBRD, vol 9, 324
D69/94, (1995) IRBRD, vol 9, 386
D126/02, (2003) IRBRD, vol 18, 188
Mok Tsze Fung v CIR [1962] HKLR 258
Harley Development Inc v CIR (1996) 4 HKTC 91
Guthrie v Twickenham Film Studios Ltd [2002] STC 1374
Lam Siu Po v Commissioner of Police (2009) 4 HKLRD 575
Chan Hei Ling Helen v Medical Council of Hong Kong [2009] 4 HKLRD 174
Law Society of Hong Kong v Solicitor [2006] 1 HKLRD 49
Wong Tak Wai v Commissioner of Correctional Services (HCAL 64/2008, 31.8.2009, unreported) with Corrigendum
HKSAR v Lam Kwong Wai & Another (2006) HKCFAR 574
Tse Hung Hing v The Medical Council of Hong Kong & Ors [2010] 1 HKLRD 112

Yeung Chung Ming v Commissioner of Police (2008) 11 HKCFAR 513
Koon Wing Yee v Insider Dealing Tribunal (2008) HKCFAR 170
Wu Kit Ping v Administrative Appeals Board [2007] 4 HKLRD 849
Strong & Co v Woodifield [1906] AC 448
CIR v Cosmotron Manufacturing Co Ltd [1997] HKLRD 1161
CIR v Chu Fung Chee [2006] 2 HKLRD 718
D13/07, (2007-08) IRBRD, vol 22, 365
Seramco Ltd Superannuation Fund Trustees v Income Tax Commissioner [1977] AC 287
Cheung Wah Keung v CIR [2002] 3 HKLRD 773
D110/98, IRBRD, vol 13, 553
Ngai Lik Electronics Co Ltd v CIR [2009] 5 HKLRD 334
FCT v Peabody (1994) 181 CLR 359
FCT v Hart (2004) 217 CLR 216
CIR v Tai Hing Cotton Mill (Development) Ltd (2007) 10 HKCFAR 704
Yick Fung Estates Ltd v CIR [2001] 1 HKLRD 381
FCT v Spotless Services Ltd (1996) 186 CLR 404
Asia Master Limited v CIR (unreported, HCAL 114/05, 30.11.06)

Taxpayer was represented by her representative from 24 February to 23 March 2010 and thereafter appeared in person.
Eugene Fung Counsel instructed by Francis Kwan, Senior Government Counsel of the Department of Justice for the Commissioner of Inland Revenue.

Decision:

Introduction

1. On 16 December 2009, the Board gave directions in respect of this Appeal. It was ordered that this appeal would be heard at the same time as B/R 5/09. The Appellants in the two appeals are Dr A and Ms B. Dr A and Ms B were previously married. At all times until 10.10 a.m. on Day 4 (23 March 2010), Dr A had been acting on behalf of Ms B in this appeal. Thereafter, Ms B wished to act on her own behalf.

2. The facts, issues, submissions and the relevant Determinations are closely interwoven and connected and hence, the reasons for these appeals being heard at the same time.

3. Ms B appeals against the Determination dated 19 March 2009 whereby the Deputy Commissioner of the Inland Revenue ('the Deputy Commissioner') reduced her additional profits tax assessments for the years of assessments 1995/96 to 1998/99 and profits tax assessments for the year 1999/2000 to 2005/06.

4. Dr A appeals against the determination in his case on the same date, 19 March 2009, whereby the Deputy Commissioner reduced his profits tax assessments for the years of assessment 2001/02 to 2005/06.

The grounds of appeal

5. Ms B filed her grounds of appeal on 16 April 2009 and Dr A also filed his grounds on 16 April 2009. It can be seen from the grounds of appeal filed that these are almost identical. For the sake of completeness, we set out in full both statements of grounds of appeal:

> **Grounds of Appeal of Ms B**
>
> '…..
>
> a) In Mok Tsze Fung v CIR case – (Annex – cor of 2008-04-18, page 182 of enclosure) – "*So long as the assessor, or commissioner, does not act capriciously or dishonestly, his assessment, being made according to his judgment, cannot be disturbed*". There had been capricious, prejudiced and dishonest action from the IRD or it's representative during the execution of IRO that cast doubt on the opinions or facts alleged by the assessors in the determination, fairness of the amount of assessment itself (due to miscalculation of the figures) and the prejudiced attitude and action of the assessors by trying to hide facts unfavourable to the assessment with the end result of possibly misleading the tax payer (during the assessment process), and any third party subsequently in the BOR where onus of proof lies on tax payer.
>
> b) There is no reduction of the amount of tax payable where s61 is applicable.
>
> c) The change in financial position 'which has resulted, will result, or may reasonably be expected to result' to tax payer upon is that more tax is likely to be paid under [Company C] which s61A(d) & (e) is applicable, according to the letter from IRD to [Company C] on 2008-10-13 (Annex BOR 4)
>
> d) The transaction was neither artificial not fictitious and there wasn't any dominant purpose of the transaction to gain tax benefit as indicated in the allegations under s61 and s61A, based on the facts and circumstances surrounding the case. The reasons were already listed in my objection letter to IRD on 2008-10-12, 2007-07-24 and 2008-07-03. Further reasons and comments are listed below.
>
> (Unless otherwise stated those annex refer to tax payer's bundle)

System of Annex of tax payer's bundle

Annexes:

i) (Annex 1) = in serial number
ii) (Annex – Cor) = correspondence between IRD and tax payers in chronological order
iii) (Annex – IRO -1) = Annex about Inland Revenue Ordinance, DIPN, etc.
iv) Annex BOR -1 = Annex recently added for BOR

"Justice must not only be done, but should manifestly and undoubtedly be seen to be done" – R v Sussex Justices, Ex parte McCarthy [1924]. **Natural justice** demand that the assessors should act honestly and fairly to make assessment before the assessment can be brought to board of appeal, where onus of proof lies on tax payer. Tax payer is disadvantaged at BOR if assessor had acted irregularly during the assessment process. Evidence had accumulated that the assessors had exaggerated the income of taxpayer and ask taxpayer to retrospectively create written evidence to transfer [Company C] tax liability to another taxpayer without latter's knowledge, pay first and talk later approach by raising non-protective assessment disguised as protective, mis use of medical ordinance as a threat as if departmental policy to do so, hiding of interview notes unreasonably for a year despite privacy commission intervention, asking for settlement while simultaneously collecting information, etc are all evidence of prejudice.'

Grounds of Appeal of Dr A

'…..

a) In Mok Tsze Fung v CIR case – (Annex – cor of 2008-04-18, page 182 of enclosure) – "*So long as the assessor, or commissioner, does not act capriciously or dishonestly, his assessment, being made according to his judgment, cannot be disturbed*". There had been capricious, prejudiced and dishonest action from the IRD or it's representative during the execution of IRO that cast doubt on the opinion or facts alleged by the assessors, fairness of the amount of assessment itself (due to miscalculation of the figures) and the prejudiced attitude and action of the assessors by trying to hide facts unfavourable to the assessment with the end result of possibly misleading the tax payer (during the assessment process), and any third party subsequently in the BOR where onus of proof lies on tax payer.

b) There is no, or would be reduction of the amount of tax payable where s61 is applicable.

c) The change in financial position 'which has resulted, will result, or may reasonably be expected to result' to tax payer upon is that more tax is likely to be paid under [Company C] where s61A(d) & (e) is applicable, according to the assessor's 2008-10-13 letter to [Company C] (Annex BOR - 8)

d) The transaction was neither artificial not fictitious and there wasn't any dominant purpose of the transaction to gain tax benefit as indicated in the allegations under s61 and s61A, based on the facts and circumstances surrounding the case. The reasons were already listed in my objection letter to IRD on 2007-07-28, 2008-07-14. Further reasons and comments are listed below.

(Unless otherwise stated annex refer to tax payer's bundle)

System of Annex of tax payer's bundle

Annexes:

j) (Annex 1) = in serial number
v) (Annex – Cor) = correspondence between IRD and tax payers in chronological order
vi) (Annex – IRO -1) = Annex about Inland Revenue Ordinance, DIPN, etc.
vii) Annex BOR -1 = Annex recently added for BOR

Any government department, board of review, tribunal or court should always obey natural justice, apart from executing the relevant ordinance.'

Directions' hearings

6. Due to the various issues that were being canvassed by Ms B and Dr A and having regard to the various issues that were canvassed in the grounds of appeal, a directions' hearing was held on 16 December 2009 and a decision was handed down on 21 December 2009 (see Appendix A).

7. On 5 January 2010, as directed by the Board, the Clerk wrote to the Deputy Commissioner that if the Deputy Commissioner contended that section 61A of the Inland Revenue Ordinance (Chapter 112) ('IRO') is applicable, the Deputy Commissioner was requested to provide to Ms B and Dr A by 20 January 2010 particulars of a 'tax benefit' which the Commissioner seeks to challenge and the transaction which the Commissioner said has the effect of conferring the 'tax benefit' on Ms B and Dr A and the person or persons having the relevant dominant purpose.

8. On 20 January 2010, the Department of Justice on behalf of the Commissioner

responded as follows:

'…..

We refer to the letter dated 5 January 2010 from the Clerk to the Board of Review.

As the Commissioner contends that section 61A of the Inland Revenue Ordinance (Cap. 112) is applicable in these cases and pursuant to the direction of the Chairman of the hearing panel, we provide the particulars as follows:

(A) For [Mr A] (B/R 5/09)

(1)	Tax benefit	Reduction in the amount of [Mr A]'s liability to pay profits tax for the years of assessment 2001/02 to 2005/06 by an amount which is: (1) calculated by multiplying the relevant rate by that part of expenses which is not allowed to be deducted, or (2) represented by the following formula: Relevant rate x (expenses claimed as deduction – expenses allowed as deduction)
(2)	Transactions which had the effect of conferring the tax benefit on [Mr A]	The interposition of [Company C] between [Mr A] and his patients in the provision of [Mr A]'s medical services to the patients and the receipt of the service income for such services.
(3)	Persons having the relevant dominant purpose	[Mr A] and [Company C]

(B) For [Ms B] (B/R 6/09)

(1)	Tax benefit	Reduction in the amount of [Ms B]'s liability to pay profits tax for the years of assessment 1998/1999 to 2005/06 by an amount which is: (3) calculated by multiplying the relevant rate by that part of expenses which is not allowed to be deducted, or (4) represented by the following formula: Relevant rate x (expenses claimed as deduction – expenses allowed as deduction)
(2)	Transactions	The interposition of [Company C] between [Ms

	which had the effect of conferring the tax benefit on [Ms B]	B] and her clients in the provision of [Ms B]'s physiotherapy services to the clients and the receipt of the service income for such services.
(3)	Persons having the relevant dominant purpose	[Ms B] and [Company C]

…..'

9. On 24 February 2010, a further directions' hearing was heard in respect of this matter. At that hearing, six requests were made by Dr A on behalf of himself and Ms B namely, 1) summary disposal, 2) discovery of documents; 3) witness statements 4) summons for witness to appear for cross examination 5) inspection by the board of documents where claim for privilege has been made and 6) interrogatories. At that hearing, the Commissioner was represented by Counsel, Mr Eugene Fung ('Mr Fung'). The Board requested Mr Fung to review documents in the possession of the Inland Revenue Department ('IRD') which are relevant to this matter and to ensure that he was satisfied that full and frank disclosure and discovery of all relevant documents had been given to Dr A and Ms B. Dr A withdrew his application for summary dismissal. His other applications were left pending to be raised and dealt with at the main hearing if necessary.

Discovery

10. Before the hearing commenced and during the course of the hearing, further documents were provided to Dr A and Ms B. Numerous box files were provided. These files amounted to over 1,800 pages. During the course of the hearing, Mr Fung confirmed to the Board that he was satisfied that frank and full discovery had been given and that he had done his best to provide Dr A and Ms B with all the relevant materials that they had requested including all draft interview notes and believed that he had dealt with each of their respective requests.

Agreed facts

11. Pursuant to the decision made on 16 December 2009, the parties were asked to try and agree facts which would assist the Board in dealing with this matter. Unfortunately, the parties were not prepared to reach any agreement.

The issues

12. As can be seen from the grounds of appeal and having regard to the various submissions put forward to us by Mr Fung, the following four broad issues were needed to be addressed. They are as follows:

(1) Whether there had been any capricious, prejudiced and dishonest action on the part of the IRD.

(2) Whether the expenses claimed by Ms B for the years of assessment 1995/96 to 1998/99 (up to and including 30 September 1998) are deductible.

(3) Whether the relevant transaction constitutes an artificial transaction and should be disregarded for the purpose of section 61 of the IRO.

(4) Whether the sole or dominant purpose of Dr A and Ms B in entering into the relevant transaction was to enable himself/herself to obtain a tax benefit within the meaning of section 61A of the IRO.

The Taxpayers' documents

13. Dr A on behalf of himself and Ms B provided us with various bundles which included numerous documents, submissions and cases which he wished the Board to consider.

Background facts

14. Having regard to all the documents that we have had the opportunity to consider and review and after considering the evidence given by Dr A and Ms B, we have no difficulties in accepting the relevant background facts set out in the Determinations in respect of these appeals as facts. We now set them out as follows:

B/R 6 of 2009 – Ms B

(1) Ms B has objected to the additional profits tax assessments for the years of assessment 1995/96 to 1998/99 and the profits tax assessments for the years of assessment 1999/2000 to 2005/06 raised on her in respect of Company D.

(a) For the years of assessment 1995/96 to 1998/99, Ms B claimed that the assessments were inaccurate.

(b) For the years of assessment 1999/2000 to 2005/06, Ms B claimed that she did not carry on a sole proprietorship business in Hong Kong and should not be chargeable to profits tax.

(2) At all relevant times, Ms B was a registered physiotherapist under the Supplementary Medical Professions Ordinance. On 26 September 1992, Ms B commenced her physiotherapy practice as a sole proprietress at

Address E under the business name of Company D. The business was reported to have ceased on 24 September 1998.

(3) At all relevant times, Mr A and Ms B were husband and wife. They divorced on 17 January 2008 after having separated since 15 April 2005. The parents of Mr A are Mr F and Ms G.

(4) Company C is a private company incorporated in Hong Kong on 29 May 1987 with issued share capital of $2, divided into 2 ordinary shares of $1 each, before 10 January 2008. At all relevant times, Ms B and her then father-in-law, Mr F, were the only directors of Company C, while she and her then mother-in-law, Ms G, were the only shareholders of Company C. Details of Company C's directors and shareholders are as follows:

(a)

Directors	Appointed	Resigned
Ms B	21-7-1988	20-1-2008
Mr F	21-7-1988	(Note 1)
Mr A	19-12-2007	-
Ms G	19-12-2007	10-3-2008
Company H (Note 2)	10-3-2008	-

Note:

1. Mr F was not involved in the day-to-day operation of Company C. He passed away in early 2006 at the age of 83.

2. Company H is a private company incorporated in Hong Kong on 20 May 2005 with Mr A as the sole shareholder and director.

(b)

Shareholders	Period	No of shares held	
Ms B	25-7-1988 – 18-2-2008	1	
Ms G	25-7-1988 – 10-3-2008	1	
Mr A	Since 10-1-2008	9,998	Newly allotted on 10-1-2008
Mr A	Since 18-2-2008	1	Transferred from Ms B
Company H	Since 10-3-2008	1	Transferred from Ms G

(c) On 24 September 1998, Ms B in the capacity of the director of Company C applied for business registration of a branch under the name of Company D. In the application form, it was declared that the business address was Address J, the description and nature of business was 'Clinic' and the date commenced was '8 September

1998'. The branch was reported to have ceased business on 31 August 2006. Prior to this branch registration, Company C did not report any clinic business being carried on but declared the nature of business carried on as provision of management service.

(d) On 20 December 2000, Mr A in the capacity of the manager of Company C applied for business registration of a branch under the name of Company K. In the application form, it was declared that the business address was Address L, the description and nature of business was 'Health Centre' and the date commenced was '1 December 2000'. The branch was reported to have ceased business on 1 July 2005.

(e) On 10 September 2001, Company C acquired the Address L Property from Company M at a consideration of $1,210,000. No mortgage loan was obtained.

(f) Company C closed its accounts on 30 November annually.

(5) Prior to the year of assessment 1999/2000, Ms B reported in her Tax Returns – Individuals the profits derived from her physiotherapy practice under the name of Company D and offered them for assessment to profits tax.

(a) For the years of assessment 1995/96 to 1998/99, Ms B declared, among other things, the following assessable profits in respect of her physiotherapy practice, namely Company D, in her tax returns. The supporting profit and loss accounts showed particulars as follows:

Year of assessment	1995/96	1996/97	1997/98	1998/99
Year ended	30-4-1995	30-4-1996	30-4-1997	30-4-1998
	$	$	$	$
(i) Assessable profits	25,499	204,473	373,389	291,313
(ii) Profit and loss account				(Note)
Income	635,850	965,640	1,054,748	1,358,467
Less: Total expenses	(723,440)	(909,130)	(729,898)	(935,042)
Net profits/(loss) for the year	(87,590)	56,510	324,850	423,425

Note:

This profit and loss account covered the period from 1 May 1997 to 30 September 1998.

(b) In her tax return for the year of assessment 1998/99, Ms B declared, among other things, that Company D ceased business on 30 September 1998.

(6) For the years of assessment 1995/96 to 1997/98, the Assessor raised on Ms B profits tax assessments in respect of Company D in accordance with the assessable profits returned in Fact (5)(a)(i). For the year of assessment 1998/99, after including the profits for the period from 1 May 1998 to 30 September 1998 and making certain adjustments on depreciation allowances ('DA') and commercial building allowances ('CBA'), the Assessor raised on Ms B a profits tax assessment in respect of Company D with assessable profits of $418,896.

(7) Ms B did not object to the 1995/96 to 1998/99 profits tax assessments per Fact (6).

(8) In her tax returns for the years of assessment 1999/2000 to 2005/06, Ms B declared, among other things, that she did not have income chargeable to salaries tax nor carry on any sole proprietorship business during the years. Nor did she declare that she was provided with any place of residence by the employer or associated corporation during the years.

(9) Company C filed its profits tax returns, together with audited financial statements and tax computations, for the years of assessment 1996/97 to 2000/01, which showed, among other things, the following particulars:

	Year of assessment	1996/97	1997/98	1998/99	1999/2000	2000/01
	Year ended	30-11-1996	30-11-1997	30-11-1998	30-11-1999	30-11-2000
		$	$	$	$	$
(a)	Adjusted loss	(814,640)	(935,457)	(911,689)	(733,666)	(870,509)
	Assessable profits	Nil	Nil	Nil	Nil	Nil
	Statement of loss:					
	Loss brought forward	(973,904)	(1,788,544)	(2,724,001)	(3,635,690)	(4,369,356)
	Add: Loss for the year	(814,640)	(935,457)	(911,689)	(733,666)	(870,509)
	Loss carried forward	(1,788,544)	(2,724,001)	(3,635,690)	(4,369,356)	(5,239,865)
(b)	Profit and loss accounts					
	Sales	38,610	54,200	--	119,300	--
	Less: Cost of sales	(21,269)	(16,840)	--	(19,355)	--
		17,341	37,360	--	99,945	--
	Add: Rental income	280,800	280,800	280,800	155,400	122,400
	Professional fee received	--	--	297,185	986,219	827,036

Interest income	--	--	--	5,830	2,748
	298,141	318,160	577,985	1,247,394	952,184
Less: Total expenses	(1,154,013)	(1,266,809)	(1,514,101)	(2,003,233)	(1,824,818)
Loss for the year	(855,872)	(948,649)	(936,116)	(755,839)	(872,634)

Note: According to the notes to the financial statements, total expenses included:

Directors' remuneration					
- Fees	--	--	--	--	--
- Other emoluments	192,667	200,000	214,667*	1,082,632	966,122
	192,667	200,000	214,667*	1,082,632	966,122

* $961,330 as shown in the corresponding entry to the 1999/2000 financial statements.

(c) In the Reports of the Directors, Company C described its principal activities as follows:

Years of assessment 1996/97 and 1997/98
'trading of medical products and property investment'

Year of assessment 1998/99
'provision of physiotherapy treatment and property investment'

Year of assessment 1999/2000
'provision of physiotherapy treatment, trading of medical equipment and property investment'

Year of assessment 2000/01
'provision of physiotherapy treatment and property investment'

(d) In its notes to the financial statements for the years ended 30 November 1998, 1999 and 2000, Company C stated the business name as follows:

'The company carries on business is [sic] the name of [Company C] and [Company D].'

(10) Company C filed its profits tax returns, together with audited financial statements and tax computations, for the years of assessment 2001/02 to 2005/06, which showed, among other things, the following particulars:

	Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06
	Year ended	30-11-2001	30-11-2002	30-11-2003	30-11-2004	30-11-2005
		$	$	$	$	$
(a)	Assessable profits	361,458	474,970	491,772	550,679	104,811
	Less: Loss setoff	(361,458)	(474,970)	(491,772)	(550,679)	(104,811)
	Net assessable profits	Nil	Nil	Nil	Nil	Nil

Statement of loss:					
Loss brought forward	(5,239,865)	(4,878,407)	(4,403,437)	(3,911,665)	(3,360,986)
Less: Loss set off	361,458	474,970	491,772	550,679	104,811
Loss carried forward	(4,878,407)	(4,403,437)	(3,911,665)	(3,360,986)	(3,256,175)

(b) Profit and loss accounts

Consultation / Servicing fee (Note 1)	2,696,583	2,596,179	2,378,480	2,515,356	1,384,192
Less: Medicine / Drugs and laboratory charges	(184,738)	(174,087)	(177,407)	(203,952)	(150,126)
	2,511,845	2,422,092	2,201,073	2,311,404	1,234,066
Interest income	2,884	1,836	41	33	228
Sundry income	600	--	--	--	--
	2,515,329	2,423,928	2,201,114	2,311,437	1,234,294
Less: Total expenses (Note 2)	(2,200,934)	(2,009,208)	(1,733,280)	(1,720,696)	(1,103,542)
Net profit	314,395	414,720	467,834	590,741	130,752

Note:
1. See Fact (14) infra.
2. According to the note s to the financial statements, total expenses included:

Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06
Year ended	30-11-2001	30-11-2002	30-11-2003	30-11-2004	30-11-2005
	$	$	$	$	$
Directors' remuneration					
- Fees	--	--	--	--	--
- Other emoluments*	788,561	711,811	560,069	633,692	375,074
	788,561	711,811	560,069	633,692	375,074
*Being composed of:					
- Directors' remuneration/salary	216,000	216,000	204,000	198,000	115,500
- Directors' quarters	572,561	495,811	356,069	435,692	259,574
	788,561	711,811	560,069	633,692	375,074

(c) In the Reports of the Directors, Company C described its principal activities as follows:

Year of assessment 2001/02
'provision of physiotherapy treatment and operate of health centre'

Years of assessment 2002/03 and 2003/04
'provision of physiotherapy treatment and health centre operating'

Years of assessment 2004/05 & 2005/06
'sales of microcurrent equipment, provision of microcurrent treatment as a form of specialized physiotherapy treatment and operation of health centre'

(d) In its notes to the financial statements for the years of assessment 2001/02 to 2003/04, and also the Reports of the Directors for the years of assessment 2004/05 and 2005/06, Company C stated the business/trade name as follows:

'The company carries on business in/under the name of [Company D] and [Company K].'

(11) In its tax computations, Company C claimed DA, CBA and deduction of prescribed fixed assets ('PFA') in respect of capital expenditure incurred on the following assets:

Year of addition		$		CBA	Year of addition		$	DA pool	PFA
1998/99:	Decoration	121,513		4%	2003/04:	Nil			
1999/2000:	Cabinet	897							
	Lighting	660			2004/05:	Sofa	1,790		
	Mini Hi-Fi set	2,490				Projector & vega screen	9,830		
		4,047	20%			Mobile phone	3,786		
						Treadmill	6,240		
2000/01:	Decoration	94,571		4%		Printer	988		
	Bed	8,068				Mobile phone	1,995		
	Air-conditioner	31,520				Mobile phone	980		
	Refrigerator	3,390				Treatment head	3,290		
	Exhaust hood	1,278				Glass door	13,800		
		44,256	20%				42,699	20%	
	Motor vehicle	95,000	30%			Personal computer	8,490		
						Notebook	7,599		
2001/02:	The Address L Property (estimated construction cost)	605,000		4%			16,089		100%
	Television	2,880	20%						
					2005/06:	Sit up bench	2,000		
2002/03:	Nil					Printer	2,680		
							4,680	20%	

(12) Between 1998 and June 2005, save for Ms B and the following two junior

physiotherapists employed as her assistants, no other physiotherapist was engaged in the operation of Company D:

Name of employee	Employment period	Total salary
Ms N	1-9-2001 – 24-10-2001	$20,000
Ms P	10-12-2004 – 9-6-2005	$60,096

(13) In October 2001, the IRD commenced an investigation into the tax affairs of Company C and Ms B. Initially, the Assessor adopted the year of assessment 1998/99 for tax audit purposes.

(14) Upon request by the Assessor, Company C produced its accounting records. The consultation/servicing fee income of Company C [per Fact (10)(b)], as shown in its general ledgers in respect of professional fee/professional services income for the years ended 30 November 2001 to 2005, are extracted below:

Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06
Year ended	30-11-2001	30-11-2002	30-11-2003	30-11-2004	30-11-2005
	$	$	$	$	$
(a) Fee from Company D	1,144,403	1,328,990	1,230,864	1,262,084	646,998
(b) Fee from Company K	1,552,180	1,267,189	1,147,616	1,253,272	737,194
Total consultation / servicing fee	2,696,583	2,596,179	2,378,480	2,515,356	1,384,192

(15) (a) By letter dated 16 June 2004, the Assessor asked Ms B to supply in respect of Company D and Company C certain information and documents in support of some items of expenses claimed in their respective accounts for the year of assessment 1998/99.

(b) On 17 March 2005, Ms B gave replies to the Assessor's enquiries. Documentary evidence was submitted for some but not all of the expenses in question. Further, the Assessor observed that some of the expenses claimed were private in nature.

(16) Company C also supplied the following information or document for the year ended 30 November 1998:

(a) A breakdown of the rental, rates and management fee:

	Location of property	Total expenses	Usage
(i)	The Address L Property	$249,537.00	Subletting

(ii)	Address Q	336,391.21	Directors' quarters, working office of Company C and storage for equipment
(iii)	Address R	445,877.75	Directors' quarters, working office of Company C and storage for equipment
(iv)	Address J	55,898.25	Office of Company D
		$1,087,704.21	

(b) A tenancy agreement dated 11 April 1997 to the effect that Company C, as the tenant, leased the Address L Property from Company M, the landlord at a monthly rent of $16,800 (exclusive of rates and management fees) for a period of two and half years commencing from 1 May 1997.

(c) The rental income of $280,800, equivalent to $23,400 per month, was received from subletting the Address L Property and its contents to Mr A to make a profit. No subletting agreement was available.

(17) Ms B and Company C supplied, among other things, the following documents:

No.	Date	Document
1.	Undated	Copy of a Staff Contract between Company C, as employer, and Ms B, as employee, (signed by Ms B on her own behalf and on behalf of Company C) employing Ms B as 'Consultant' effective from 1 October 1998 at a basic monthly salary of $20,000 plus fringe benefits, namely the provision of staff quarters and payment for all utility expenses incurred in the quarters
2.	--	Copy of Ms B's business card, then in use as at 8 August 2005
3.	Undated	Copy of an employment letter between Ms S, as

		employee, and Ms B, as employer, by which the former was employed as 'Receptionist/Assistant'
4.	27-2-2003	Copy of a reference letter in respect of Ms S issued by Ms B under the name of Company D
5.	10-3-2003	Copy of an employment letter between Ms T, as employee, and Ms B, as employer, by which the former was employed as 'Clinic Receptionist/Assistant'
6.	Undated	Copy of an employment letter between Ms U, as employee, and Ms B under the name of Company D, as employer, by which the former was employed as 'Clinic Receptionist/Assistant' for the period from 1 January to 31 December 2005
7.	--	Copy of statements of the account no. XXX-XXXXXX-XXX ('the Bank Account') maintained by Company D with Bank V for the period from 1 December 2002 to 31 December 2003
8.	--	Ledger – Directors' current Account and Professional fee received Account of Company C for the years ended 30 November 1999, 2000 and 2001, and
9.	--	Sub-ledger – Directors' current Account and Professional services income Account of Company D for the years ended 30 November 2002 and 2003 (Note) [Note: For these 2 years, Company C also maintained in its ledger Directors' current account of Company C.]
10.	--	Ledger – 'C/A with [Ms B] and Professional services Account for the years ended 30 November 2004 and 2005 (Note) [Note: For these 2 years, Company C also maintained in its ledger Current account with Mr A.]
11.	--	Sample copies of Ms B's correspondence with Company W, the supplier of the micro-current equipment

Note:

From items 17(8) – 17(10) above, [the Assessor]observed that the following income of Company D was debited to the directors' current account and credited to the income account:

Year of assessment	Time of Dr./Cr. entry	Total amount Dr./Cr. for the year ($) (a)	Total professional fee for the year ($) [Facts (9) & (14)] (b)	[(a) / (b)] x 100%
1999/2000	At year end	496,120	986,219	50.3%
2000/01	At year end	432,140	827,036	52.2%
2001/02	At year end	947,448	1,144,403	82.7%
2002/03	At year end	1,037,034	1,328,990	78.0%
2003/04	At month end	398,750	1,230,864	32.3%
2004/05	At year end	560,273	1,262,084	44.3%
2005/06	At month end	422,462	646,998	65.2%

(18) In support of the claim for CBA in respect of the decoration expenses mentioned in Fact (11), Ms B provided the Assessor with receipts or invoice showing the following expenditure:

Year of assessment	Date of voucher	Recipient	Amount ($)	Annex
1998/99	11-8-1998	Company X	32,518	50^{-138}
	20-8-1998	Company Y	8,775	50^{-138}
	1-9-1998	Company X	52,029	50^{-138}
	16-9-1998	- ditto -	19,511	50^{-138}
	23-10-1998	- ditto -	20,000	50^{-138}
			132,833	
1999/2000	19-12-1998	Company X	28,816	50^{-135}
2000/01	28-6-2000	Company Z	12,500	50^{-139}
	24-9-2000	- ditto -	12,500	50^{-139}
			25,000	

(19) The Assessor considered that Ms B had understated income and claimed expenses, which were of private and domestic in nature or not supported by documentary evidence. On divers dates during the course of the tax audit, the Assessor raised on Ms B the following additional profits tax assessments in respect of Company D for the years of assessment 1995/96 to 1998/99:

Year of assessment	1995/96	1996/97	1997/98	1998/99
Additional assessable profits	$1,000,000	$200,000	$500,000	$500,000

Profits tax payable thereon	$30,000	$67,500

(20) Ms B objected to the additional profits tax assessments per Fact (19) on the grounds that they were inaccurate.

(21) For the year of assessment 1999/2000, the Assessor considered that Ms B continued to carry on a sole proprietorship business in Hong Kong to practice physiotherapy under the name of Company D. She therefore raised on Ms B the following profits tax assessment in respect of her practice:

Assessable profits	$700,000

(22) Ms B objected to the 1999/2000 profits tax assessment per Fact (21) on the ground that she did not carry on any sole proprietorship business under the name of Company D and that the assessment was excessive.

(23) The Assistant Commissioner was of the view that the interposition of Company C between the patients and Ms B was both artificial and fictitious and was a transaction entered into for the sole or dominant purpose to obtain a tax benefit. As the transaction was challenged under the authority of sections 61 and 61A of the IRO, the income in respect of the physiotherapy practice, Company D, allegedly earned by Company C was treated as Ms B's professional income under her proprietorship business. In the absence of a separate profit and loss account filed for Ms B's physiotherapy practice, the Assistant Commissioner computed Ms B's assessable profits by reference to the accounts of Company C with adjustments made to exclude the income and expenses which were not related to the physiotherapy practice as well as the private or domestic expenditure. Accordingly, on 15 September 2006, the Assistant Commissioner raised on Ms B the following profits tax assessments in respect of Company D for the years of assessment 2000/01 to 2005/06:

Year of assessment	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06
	$	$	$	$	$	$
Estimated assessable profits	500,000	800,000	1,000,000	900,000	1,000,000	1,000,000
Profits tax payable thereon		120,000	150,000	139,500	160,000	160,000

(24) By letter dated 27 September 2006, Ms B claimed that her sole proprietorship business under the name of Company D had ceased since September 1998 and that Company D was operated by Company C from September 1998 to June 2005. She further claimed that she had never operated any business under her own name during the years of

assessment 2000/01 to 2005/06 and hence had no income chargeable to profits tax for those years.

(25) By letter dated 12 October 2006, Ms B objected to the 2000/01 to 2005/06 profits tax assessments and put forward various contentions to support her claim that sections 61 and 61A of the IRO were not applicable to her case. In her objection letter, Ms B gave the following assertions to justify her reasons for incorporating Company D under Company C in 1998:

(a) '[Ms B] commenced her sole proprietorship business as a physiotherapist under the name of [Ms B – Company D] since 1992 at [the Address E Property]. The lease with the landlord was all along signed by [Company C]. However the rental was paid by [Company D] directly to the landlord. The aim of the arrangement was to protect [Ms B] from the liability to the landlord. [Company D] was started not directly under [Company C] because of the uncertainty of legislation about incorporation of physiotherapy practice. After resolving this doubt, the [Company D] was incorporated in 1998.'

(b) '[Ms B] was active in promoting business e.g. joining the 1994 physiotherapist trip to Beijing, attending the 1995 physiotherapist annual conference in HK Convention centre to promote the [concealed] physiotherapy equipment which is a revolutionary new tool for healing.'

(c) '[Ms B] was active in appearing in newspaper and journal to promote the equipment. [Company D] also put down advertisement in the 1996 Nov monthly magazine of [AA Club] … However there were comments that it may amount to canvassing or advertisement by [Ms B] with possible violation of the code of ethics of the professional body. Alternative ways of promotion of [Company D] business and selling of [Company C] physiotherapy equipment is needed such as advertisement/promotion by limited company. This added to the need for incorporation of physiotherapy practice.'

(d) 'After starting business in 1992, [Ms B] gradually learned that operating as a limited company often gives suppliers (equipment supplier) and customers a sense of confidence in a business. This is due to the fact that an incorporation can not disappear suddenly as a sole proprietor would. Even on the death of a director, the incorporation can always continue. Perpetual presence of the

incorporation can always inspire confidence to customers and suppliers …'

(e) 'Due to demolition of the [Address E Property] for redevelopment in 1998, [Ms B – Company D] was forced to move elsewhere under an intensely gloomy economic weather due to the Asian financial crisis.'

(f) '[Company C] is a limited company with [Ms B] as one of the shareholders all along (even before taking over [Ms B – Company D]) and one of the directors, it had acquired the sole dealership of a [concealed] physiotherapy equipment from USA and is starting vigorous promotion around the time of 1998, negotiating with [a statutory institution] for buying the physiotherapy equipment. [Company C] was also the tenant with the landlord ([concealed]) since 1992 to 1998, thus already providing a barrier to limit [Ms B's] personal liability to the landlord …'

(g) 'The potential to sell the equipment to the [statutory institution], private hospitals, private physiotherapist and patients is huge. In fact, [Ms B] has a vision to sell the machine to each household and expand the business to Mainland China. Since the equipment also can be used successfully for medical beauty purpose, the potential is even bigger … Investment into the budding medical beauty business looks promising at that time.'

(h) 'While using [Company D] as a place for demonstration of equipment, [Company D] also has to be protected from liability in case there is breakdown of the equipment sold or alleged misleading information given by [Company D] in promoting the product. In short as the sales is on the way, [Company D] will also have potential for lawsuits arising from the sales of equipment and incorporation will limit the personal liability of [Ms B].'

(i) 'As the deal with [the statutory institution] is near success around June 1998, a formal registered address by [Company C] at the prestigious [Address J] District (rather than the old registered address at [concealed] which is a 40 year old residential building, or borrowing an unregistered address in [Address L]) would boost up the image of [Company C] in selling physiotherapy equipment to different physiotherapists in public and private. This explained the need to incorporate [Company D] under [Company C].'

(j) 'Business turnover was rising before removal and there is actual need to hire another physiotherapist in the [Address J] Office so

that [Ms B] can be totally freed as the company's director to market the physiotherapy equipment, seeing the great potential of selling equipment compared with providing service. Thus incorporation posted an added advantage in hiring physiotherapist as employee and insulate the personal liability of [Ms B] from the business. For the existing receptionist, incorporation also can protect [Ms B] against any liability arising from employee compensation in case accident occurred to the receptionist. Liability as employer to the customers are also limited due to incorporation.'

(k) '[Company C] had been marketing the physiotherapy equipment to prospective buyers and communicating with the US manufacturer … Also by incorporating [Ms B – Company D], [Company C] (also partly owned by [Ms B]) will start to have regular income to provide a sound financial basis for fresh investment with the huge potential ahead. Otherwise great opportunity will be loss [sic] due to weakness in the financial status of [Company C] before 1998. …'

(l) 'Since incorporation of [Company D] under [Company C], the company had hired two physiotherapists to provide service to patients. Professional Indemnity Insurance while covering the hired physiotherapist provide no protection to the physiotherapist (PT) who acted as an employer. Sole proprietorship with unlimited liability in such situation is very dangerous. … Here comes the importance of incorporation with limited liability to the business owner and [Ms B] is freed of the time to promote the equipment and attend business trips.'

In the same letter, Ms B also made detailed representations to support her claim that sections 61 and 61A of the IRO were not applicable to her case.

(26) Also on 12 October 2006, Ms B provided the Assessor with detailed income statements of Company C for each of the years ended 30 November 2002 and 2003 showing a breakdown of its reported income and expenses into Head office, Branch (1) – Company K and Branch (2) – Company D.

(27) By letter dated 13 November 2006, the Senior Assessor explained to Ms B the reasons as to why sections 61 and 61A of the IRO were considered applicable to her case.

(28) On 26 July 2007, Ms B put forward her contentions under a declaration made on 25 July 2007 to support her claims.

(29) In response to the Assessor's enquiries, Bank V provided a Mandate for accounts for a sole proprietorship. The Mandate showed that Ms B as the sole proprietress of Company D applied for the Bank Account on 7 December 1992.

(30) In response to the Assessor's enquiry dated 7 September 2007, Company AB confirmed that as at 1 October 1997 Company D was already on the list of panel physiotherapists providing healthcare service to Company AB employees and their eligible dependants. Company AB further provided a copy of letter from Company AC to the panel doctors stating that Company D had resigned from the Company AB panel of physiotherapists as at 1 April 2004.

(31) In response to the Assessor's enquiry dated 6 September 2007, Bank V Insurance confirmed that Company D had been Bank V's panel physiotherapist since 24 April 1995.

(32) Company AD also provided the following documents:

	Date	Document
1.	--	A panel doctor list, amongst which is Company D
2.	1-12-2003	Agreements for Bank V Group Staff / Local
3.	25-11-2004	Staff Medical Benefits Scheme for years
4.	12-12-2005	2004, 2005 and 2006 ('the [Bank V] Agreements'), signed by Ms B for and on behalf of Company D

(33) In the Bank V Agreements, Ms B for and on behalf of Company D agreed, amongst others, to the following terms:

'[Ms B] agreed that [Company AE (Bank V's subsidiary)] shall not be responsible for paying any fees in relation to services rendered by any providers except the undersigned or at any clinics except [the Address J Property].'

'[Ms B] agreed that [Company AF (Bank V's subsidiary)] shall not be responsible for paying any fees in relation to services rendered by any providers except the undersigned or at any clinics except [the Address J Property].'

(34) On the basis of the ledgers of Company C, the Assessor has compiled for each of the years ended 30 November 1999 to 2005 a breakdown of its reported expenses into general expenses and expenses attributable to

Company D and Company K.

(35) For the years of assessment 1995/96 to 1997/98, based on the further information obtained, the Assessor now accepts that no adjustment to the income figures as reported in Fact (5)(a)(ii) for Company D is required. However, the Assessor maintains the view that part of the expenses claimed for Company D was not allowable, having regard to the audit findings for the year of assessment 1998/99 which show that some of the expenses were private in nature and some were not substantiated by supporting documents. The Assessor is now prepared to revise the 1995/96 to 1997/98 additional profits tax assessments raised on Ms B in respect of Company D as follows:

Year of assessment	1995/96	1996/97	1997/98
	$	$	$
Additional assessable profits	72,858	104,813	45,896
Tax payable thereon		15,722	6,196

(36) Based on the further information obtained, the Assistant Commissioner maintains the view that Ms B is properly assessed to profits tax personally in respect of the physiotherapy income of Company D since 1 October 1998. Having regard to the audit findings for the year of assessment 2003/04, she is now prepared to adjust the allowable expenses and revise the 1998/99 additional profits tax assessment and the 1999/2000 to 2005/06 profits tax assessments raised on Ms B in respect of Company D as follows:

(a) Year of assessment 1998/99

Additional assessable profits (Note)	$298,702

Note:

Disallowable expenses for 1-5-1997 to 30-9-1998	$ 72,448
Assessable profits for 1-10-1998 to 30-11-1998	226,254
	$298,702

(b)

Year of assessment	1999/2000	2000/01	2001/02	2002/03	2003/04	2004/05	2005/06
	$	$	$	$	$	$	$
Income [Facts (9)(b) & (14)(a)]	986,219	827,036	1,144,403	1,328,990	1,230,864	1,262,084	646,998
Less: Allowable							

deductions	(443,980)	(446,191)	(439,696)	(365,906)	(359,916)	(373,712)	(304,463)
Assessable profits	542,239	380,845	704,707	963,084	870,948	888,372	342,535
Tax payable thereon			105,706	144,462	134,996	142,139	54,805

(37) [In response to the Assessor's enquiries, Bank V provided the mandates for the accounts (the Account no.: XXX-XXXXXX-XXX and XXX-XXXXXX-XXX) maintained by Company D O/B Company C and Company K O/B Company C respectively. The mandates showed that Ms B was the sole authorized signatory to operate the former account whilst either Ms B or Mr A alone was the authorized signatory to operate the latter account. The other director of Company C, Mr F, was not the authorized signatory to operate either of the accounts.]

B/R 5 of 2009 – Dr A

(1) Mr A has objected to the profits tax assessments for the years of assessment 2001/02 to 2005/06 raised on him. Mr A claimed that he was employed as a salaried doctor and should not be chargeable to profits tax.

(2) At all relevant times, Mr A was a medical practitioner.

(a) He graduated with a medical degree in 1979 from the university and was registered as a medical practitioner under the Medical Registration Ordinance.

(b) On 26 April 1987, Mr A commenced his medical practice as a sole proprietor at Address AG under the business name of Dr A's Clinic. The business was reported to have ceased on 19 April 1993.

(c) On 19 April 1993, Mr A commenced another medical practice as a sole proprietor at the Address L Property under the business name of Dr A ('the Clinic'). The business was reported to have ceased on 1 December 2000.

(3) At all relevant times, Mr A and Ms B were husband and wife. They divorced on 17 January 2008 after having separated since 15 April 2005. The parents of Mr A are Mr F and Ms G.

(4) Company C is a private company incorporated in Hong Kong on 29 May 1987 with issued share capital of $2, divided into 2 ordinary shares of $1 each, before 10 January 2008. At all relevant times, Ms B and her then

father-in-law, Mr F, were the only directors of Company C, while she and her then mother-in-law, Ms G, were the only shareholders of Company C. Details of Company C's directors and shareholders are as follows:

(a)

Directors	Appointed	Resigned
Ms B	21-7-1988	20-1-2008
Mr F	21-7-1988	(Note)
Mr A	19-12-2007	-
Ms G	19-12-2007	10-3-2008
Company H (see Fact (5) infra)	10-3-2008	-

Note:
Mr F passed away in early 2006 at the age of 83.

(b)

Shareholders	Period	No of shares held	
Ms B	25-7-1988 – 18-2-2008	1	
Ms G	25-7-1988 – 10-3-2008	1	
Mr A	Since 10-1-2008	9,998	Newly allotted on 10-1-2008
Mr A	Since 18-2-2008	1	Transferred from Ms B
Company H	Since 10-3-2008	1	Transferred from Ms G

(c) On 24 September 1998, Ms B in the capacity of the director of Company C applied for business registration of a branch under the name of Company D. In the application form, it was declared that the business address was 'Address J', the description and nature of business was 'Clinic' and the date commenced was '8 September 1998'. The branch was reported to have ceased business on 31 August 2006. Prior to this branch registration, Company C did not report any clinic business being carried on but declared the nature of business carried on as provision of management service.

(d) On 20 December 2000, Mr A in the capacity of the manager of Company C applied for business registration of a branch under the name of Company K. In the application form, it was declared that the business address was 'Address L', the description and nature of business was 'Health Centre' and the date commenced was '1 December 2000'. The branch was reported to have ceased business on 1 July 2005.

(e) On 10 September 2001, Company C acquired the Address L Property from Company M at a consideration of $1,210,000. No mortgage loan was obtained. Prior to the acquisition, Company C leased the Address L Property from the landlord and sublet it to Mr A for use as the Clinic's business address.

(f) Company C closed its accounts on 30 November annually.

(5) On 18 July 2005, Mr A became the sole shareholder and was appointed as the only director of Company H, a private company incorporated in Hong Kong on 20 May 2005. Company H declared that it was engaged in providing health consultation.

(6) Prior to the year of assessment 2001/02, Mr A reported in his Tax Returns – Individuals the profits derived from his medical practice and offered them for assessment to profits tax. In respect of the years of assessment 1995/96 to 2000/01, Mr A declared, among other things, the following assessable profits in respect of the Clinic in his tax returns. The supporting profit and loss accounts showed particulars as follows:

	Year of assessment	1995/96	1996/97	1997/98	1998/99	1999/2000	2000/01	
	Year/*Period ended	30-4-1995	30-4-1996	30-4-1997	30-4-1998	30-4-1999	*30-11-2000	
		$	$	$	$	$	$	
(a)	Assessable profits	663,449	1,414,420	1,477,886	1,490,198	1,149,834	1,128,898	(Note 1)
(b)	Profits and loss account							
	Income	1,983,526	2,537,325	2,418,566	2,443,832	1,937,378	2,369,915	(Note 2)
	Less:							(Note 3)
	Total expenses	(1,348,528)	(1,146,581)	(922,160)	(907,232)	(778,980)	(1,092,426)	
	Net profit for the year	634,998	1,390,744	1,496,406	1,536,600	1,158,398	1,277,489	

Note – Re 2000/01:

	1-5-1999 to 30-4-2000 (i) $	1-5-2000 to 30-11-2000 (ii) $	1-.5-1999 to 30-11-2000 (i) + (ii) $
Note 1: Assessable profits	901,349	227,549	1,128,898
Note 2: Income	1,538,417	831,498	2,369,915
Note 3: Total expenses	629,109	463,317	1,092,426

(7) In his tax returns for the years of assessment 2001/02 to 2005/06, Mr A declared, among other things, the following particulars:

Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06
Salaries tax					

(a)	Income from Company C	$300,000	$300,000	$300,000	$300,000	$75,000
	Period of employment	1-4-01 – 31-3-02	1-4-02 – 31-3-03	1-4-03 – 31-3-04	1-4-04 – 31-3-05	1-4-05 – 30-6-05
	Capacity employed	Consultant	Consultant	Consultant	Consultant	Consultant

(b)	Income from Company H	$225,000
	Period of employment	1-7-05 – 31-3-06
	Capacity employed	Consultant
(c)	Place of residence provided by Company H	Address AH
	Period provided	1-7-05 – 31-3-06
	Rent paid by Company H	$297,000

Mr A also declared that he did not have any sole proprietorship businesses during each of these years.

(8) At all relevant times, save Mr A no other professional medical practitioner was engaged by Company C to provide medical consulting services under the name of Company K.

(9) Company C filed its profits tax returns, together with audited financial statements and tax computations, for the years of assessment 2001/02 to 2005/06, which showed, among other things, the following particulars:

	Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06
	Year ended	30-11-2001	30-11-2002	30-11-2003	30-11-2004	30-11-2005
		$	$	$	$	$
(a)	Assessable profits	361,458	474,970	491,772	550,679	104,811
	Less: Loss setoff	(361,458)	(474,970)	(491,772)	(550,679)	(104,811)
	Net assessable profits	Nil	Nil	Nil	Nil	Nil
	Statement of loss:					
	Loss brought forward	(5,239,865)	(4,878,407)	(4,403,437)	(3,911,665)	(3,360,986)
	Less: Loss set off	361,458	474,970	491,772	550,679	104,811
	Loss carried forward	(4,878,407)	(4,403,437)	(3,911,665)	(3,360,986)	(3,256,175)
(b)	Profit and loss accounts					
	Consultation / Servicing fee (Note 1)	2,696,583	2,596,179	2,378,480	2,515,356	1,384,192
	Less: Medicine / Drugs and laboratory charges	(184,738)	(174,087)	(177,407)	(203,952)	(150,126)

	2,511,845	2,422,092	2,201,073	2,311,404	1,234,066
Interest income	2,884	1,836	41	33	228
Sundry income	600	--	--	--	--
	2,515,329	2,423,928	2,201,114	2,311,437	1,234,294
Less: Total expenses (Note 2)	(2,200,934)	(2,009,208)	(1,733,280)	(1,720,696)	(1,103,542)
Net profit	314,395	414,720	467,834	590,741	130,752

Note:
1. See Fact (13) infra.
2. According to the notes to the financial statements, total expenses included:

Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06
Year ended	30-11-2001	30-11-2002	30-11-2003	30-11-2004	30-11-2005
	$	$	$	$	$
Directors' remuneration					
- Fees	--	--	--	--	--
- Other emoluments*	788,561	711,811	560,069	633,692	375,074
	788,561	711,811	560,069	633,692	375,074
* Being composed of:					
- Directors' remuneration/salary	216,000	216,000	204,000	198,000	115,500
- Directors' quarters	572,561	495,811	356,069	435,692	259,574
	788,561	711,811	560,069	633,692	375,074

(c) In the Reports of the Directors, Company C described its principal activities of Company C as follows:

Year of assessment 2001/02
'provision of physiotherapy treatment and operate of health centre'

Years of assessment 2002/03 and 2003/04
'provision of physiotherapy treatment and health centre operating'

Years of assessment 2004/05 & 2005/06
'sales of microcurrent equipment, provision of microcurrent treatment as a form of specialized physiotherapy treatment and operation of health centre'

(d) In its notes to the financial statements for the years of assessment 2001/02 to 2003/04, and also the Reports of the Directors for the years of assessment 2004/05 and 2005/06, Company C stated the business/trade name as follows:

'The company carries on business in/under the name of [Company D] and [Company K].'

(10) The Assessor raised on Mr A the following salaries tax assessments for

the years of assessment 2001/02 to 2005/06 in accordance with his tax returns [Fact (7)]:

Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06
	$	$	$	$	$
Assessable Income	300,000	300,000	300,000	300,000	300,000
Add: Rental value of quarters provided	--	--	--	--	22,500
	300,000	300,000	300,000	300,000	322,500
Less: Deduction and allowances	(288,000)	(288,000)	(280,000)	(272,000)	(291,000)
Net Chargeable Income	12,000	12,000	20,000	28,000	31,500
Tax payable thereon	120	240	400	560	720

(11) Mr A did not object to the 2001/02 to 2005/06 salaries tax assessments per Fact (10).

(12) The IRD has conducted an investigation into the tax affairs of Company C and Mr A.

(13) Upon request by the Assessor, Company C produced its accounting records. The consultation/servicing fee income of Company C [per Fact (9)(b)], as shown in its general ledgers in respect of professional fee/professional services income for the years ended 30 November 2001 to 2005, are extracted below:

Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06
Year ended	30-11-2001	30-11-2002	30-11-2003	30-11-2004	30-11-2005
	$	$	$	$	$
(a) Fee from Company D	1,144,403	1,328,990	1,230,864	1,262,084	646,998
(b) Fee from Company K	1,552,180	1,267,189	1,147,616	1,253,272	737,194
Total consultation/servicing fee	2,696,583	2,596,179	2,378,480	2,515,356	1,384,192

(14) Mr A and Company C supplied, among other things, the following documents:

No.	Date	Document
1.	1 June 1987	Copy of an employment agreement between Company C and Mr A appointing Mr A as 'General Manager' of Company C commencing on 1 June 1987 with remuneration in the form of salary and fringe benefits
2.	--	Copy of Mr A's business card – Manager of Company C

3.	14 January 2003	Copy of an employment contract between Company C, as the employer, and Mr A, as the employee, (signed by Mr A on his own behalf and on behalf of Company C) employing Mr A as 'Consultant' since 1 December 2000 with basic wages of $25,000 per month and main place of work at Company K
4.	--	Copy of Mr A's business card – Dr A of Company K
5.	--	Copy of Mr A's business card – Mr A, Health Consultant of Company K O/B Company C
6.	13 June 2003, 18 July 2003 & 8 August 2003	Claims settlement statements issued by Company AJ and addressed to '[Dr A]'
7.	--	Invoices from the suppliers of drugs and clinical products for the year ended 30 November 2003 and addressed to '[Dr A]' / '[Mr A']' at the Address L Property
8.	--	Ledger – 'Bank V' C/A of Company C for the years ended 30 November 2001, 2002, 2003, 2004 and 2005
9.	--	Ledger – Directors' Current Account and Professional fee received / Professional services income Account of Company C for the year ended 30 November 2001, 2002[(Note)] and 2003[(Note)] [Note: For these 2 years, Company C also maintained in its ledger Sub-ledger – Directors' current account of Company D.]
10.	--	Ledger – 'C/A with [Mr A]' and Professional services Account for the years ended 30 November 2004[(Note)] and 2005[(Note)] [Note: For these 2 years, Company C also maintained in its ledger Current account with Ms B.]

Note:

From items (14)9 and (14)10 above, the Assessor observed that the following income of the Relevant Business was debited to the directors' current account and credited to the income account:

Year of assessment	Time of Dr./Cr. entry	Total amount Dr./Cr. for the year ($) (a)	Total professional fee for the year ($) [Fact (13)] (b)	[(a) / (b)] x 100%
2001/02	At month end	1,035,495	1,552,180	100%
	At year end	516,685		
2002/03	At year end	997,266	1,267,189	78.6%
2003/04	At month end	1,023,638	1,147,616	89.1%
2004/05	At month end	782,193	1,253,272	62.4%
2005/06	At month end	371,987	737,194	50.4%

(15) In response to the Assessor's enquiries, Bank V provided statements of an account (Account no.: XXX-XXXXXX-XXX) maintained jointly by Mr A and Ms B with Bank V ('Account 2'), which showed that the drug expenses were paid out of this personal bank account. Bank V also provided the mandate, dated 3 December 2000, for Bank V Account 1 [Fact (14)] showing that Mr A and Ms B were the authorized signatories to operate the account and either signature was valid for the purpose.

(16) In response to the Assessor's enquiry, Association AK confirmed that Mr A was a member of Society AL for many years and that his membership status during the period from 1 August 2000 to 31 July 2007 was 'Private Practice – Low Risk'.

(17) In response to the Assessor's enquiries, Mr A stated the following:

(a) 'Services provided by [Company K] to clients included general body check up for clients, body weight control through psychotherapy, drug, dietary and exercise advice for obese or under weight clients, measures to maintain health such as sales of nutritional products and life style advices, cosmetic products such as skin and hair rejuvenation products and cosmetic procedures, apparatus for breast enlargement and products to maintain and correct men's health; treatment of ailments with nutritional products, drugs and acupuncture techniques, anti-aging therapy ... etc.'

(b) 'No copy of professional indemnity available.'

(18) The Assistant Commissioner was of the view that the interposition of Company C between the patients and Mr A was both artificial and fictitious and was a transaction entered into for the sole or dominant

purpose to obtain a tax benefit. As the transaction was challenged under the authority of sections 61 and 61A of the IRO, the income in respect of the medical practice allegedly received by Company C was treated as Mr A's professional income under his proprietorship business. In the absence of a separate profit and loss account filed for Mr A's medical practice, the Assistant Commissioner computed Mr A's assessable profits by reference to the accounts of Company C with adjustments made to exclude income and expenses which were not related to the medical practice as well as the private and domestic expenditure. Accordingly, on 31 May 2007, the Assistant Commissioner raised on Mr A the following profits tax assessments for the years of assessment 2001/02 to 2005/06:

Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06
	$	$	$	$	$
Estimated assessable profits	1,000,000	900,000	800,000	900,000	500,000
Profits tax payable thereon	150,000	135,000	124,000	144,000	80,000

(19) By letter dated 31 May 2007, the Assessor explained to Mr A the reasons as to why sections 61 and 61A of the IRO were considered applicable to his case. The Assessor also enclosed with the letter a detailed computation of the assessable profits for the years of assessment 2001/02 to 2005/06.

(20) By letter dated 28 June 2007, Mr A objected to the 2001/02 to 2005/06 assessments per Fact (18) and put forward various contentions to support his claim that sections 61 and 61A of the IRO were not applicable to his case. In his objection letter, Mr A, among other things, asserted the following:

(a) 'It is imperative that something has to be done to salvage the business as warned by a doctor in the [Association AK] forum … [A union] was just formed in 2000 to fight for the deteriorating business environment of doctors …'

(b) 'Thus the way out is not by providing more ordinary medical services as a GP in a clinic … but by opening up new channels of income not medically oriented through release of restriction from the Medical Council by opening up a health centre instead of a personal office. Medical check up can worth thousands of dollars each visit and is more lucrative than seeing patients with minor ailment. Other more lucrative markets were beauty business or body weight management schemes to be explored.'

(c) '… The incorporation of this [Company K] under [Company C] is a commercial realistic move also aimed to explore the advantages of an incorporation such as limiting the financial risk and personal liability in dealing with landlords, employee, suppliers or customers e.g. public liability ...'

(21) In response to the Assessor's enquiries, Hospital AM gave the following replies in its letter dated 21 July 2007:

(a) '[Mr A] is a visiting doctor in private practice with his own clinic. Our Hospital granted him the privilege to admit his patients to our Hospital for treatment. [Mr A] charged his patients for his professional services and we collected the doctor's fees from the patients according to his instructions. On receipt of payments from the patients, his fees were reimbursed to him monthly …'

(b) '[Mr A] was granted the admission privilege of patients as from 1 July 1987.'

(c) '[Mr A] attended to his patients in the wards or other facilities of our Hospital where his patients required hospital treatment. [Mr A] operated his own clinic at [the Address L Property].'

(d) 'Fees collected on behalf [Mr A] as from 1 April 2001 from his patients were paid to "[Company K]" by crossed cheques according to [Mr A's] instruction …'

(22) In response to the Assessor's enquiries, Company AC stated the following in its letters dated 7 June 2007 and 21 August 2007:

(a) '[Mr A] was an affiliate doctor to the [Dr AN] group and after the acquisition, he continued to be associated in that way with [Company AC];'

(b) 'Patients are referred to [Mr A] who was listed in a medical directory;'

(c) '[Mr A] did provide GP consultation service;'

(d) '[Mr A's] clinic address is [the Address L Property];'

(e) 'The exact date of [Mr A] because [sic] an affiliate doctor of our company estimated around 01 January 2000;'

(f) 'We have no any agreement with [Company K], just only

instructed by [Mr A] of the payment arrangement on 11 Feb 2002;'

(g) 'We are show "[Dr A]" in our panel list book instead of [Company K];'

(23) On the basis of the ledgers of Company C, the Assessor has compiled for each of the years ended 30 November 2001 to 2005 a breakdown of its reported expenses into general expenses and expenses attributable to Company D and Company K.

(24) Based on further information obtained, the Assistant Commissioner is prepared to adjust the allowable expenses and revise the profits tax assessments in Fact (18) as follows:

Year of assessment	2001/02	2002/03	2003/04	2004/05	2005/06
	$	$	$	$	$
Income [Fact (13)(b)]	1,552,180	1,267,189	1,147,616	1,253,272	737,194
Less: Medicine & laboratory charges [Fact (9)(b)]	(184,738)	(174,087)	(177,407)	(203,952)	(150,126)
	1,367,442	1,093,102	970,209	1,049,320	587,068
Less: Allowable deductions	(394,692)	(275,505)	(199,131)	(209,634)	(131,591)
Assessable profits	972,750	817,597	771,078	839,686	455,477
Tax payable thereon	145,912	122,639	119,517	134,349	72,876

(25) The Assessor examined the bank statements, cheque stubs and bank pay in slips/advices for Bank V Account 1, invoices from Company AJ [Fact (27)(a)(iii) , the ledger – Bank V Account 1 for the year ended 30 November 2003 [Fact (14)], the bank statements of Bank V Account 2 and the cheques from Company AJ deposited into Bank V Account 2. From these documents, the Assessor observed that: (a) income from Company AJ were made to Mr A by cheques which were deposited into the bank account (namely Bank V Account 2) maintained jointly by Mr A and his wife; and (b) around the dates of each of the deposits, a sum equivalent in amount to such income received from Company AJ was transferred from Bank V Account 2 to Company C's bank account (namely Bank V Account 1).

The evidence

A. Dr A

15. Dr A gave evidence before us.

16. He prepared a witness statement that ran to some 116 pages. When asked to

confirm that this witness statement was true and correct, he was somewhat hesitant. It was only after an adjournment and having re-read the witness statement, he was able to confirm that the contents were true and correct.

17. He started off his witness statement with the following words:

> ' ….. I observe as dishonest and capricious acts of the senior assessors who are in charge of the process, which may nullify and void the determination.'

18. The flavour of his witness statement can be seen from some of the various sub-headings:

(1) 'Multiple and repeated prejudiced acts during assessment unlikely to be due to honest mistakes'

(2) 'Explanation to assessment using "spin" language and intentionally excluding all opposite reasons'

(3) 'Explanatory material pretending to be negotiating material not to be presented to the court'

(4) 'Muffling the assessment process and role of the assistant commissioner'

(5) 'Evidence disclosed previous senior assessor had required [Ms B] to retrospectively create written but contestable evidence to transfer the company tax liability to me personally on 2006-03-09 behind my back'

(6) 'Muffling about the assessment and determination process as if it is an administrative secret'

(7) 'Admitting something which the senior assessor [concealed] wanted to hide all along since interview on 2007-10-26 – drafting of determination by assessors'

(8) 'Abuse of power by assessors not granted in IRO'

(9) 'Attempt to pervert the course of justice covered up by misinterpretation of ordinance'

(10) 'Conflicting multiple simultaneous roles of assessors during the assessment stage up to determination'

(11) 'Rule of law gradually prevailing rule by law'

(12) 'Draft SOF excluding many facts regarded as relevant by any normal

thinking person'

(13) 'Prejudiced refusal to discovery of relevant material evidence for BOR even after determination'

(14) 'Another prejudice, this time from the legal counsel, apparently without authorization, out of his own volition, to dissuade me from giving evidence'

(15) 'Repeated dishonesty of senior assessors who fled from explanation'

19. In short, Dr A when he gave evidence was fully aware as to the seriousness of the allegations that he raised with regard to the conduct of the assessors and the IRD. He maintained that in his view, they were dishonest and had acted improperly and what he described as being alleged misconduct. During the course of his evidence, he also asserted that the relevant IRD officers had also acted in what he called a capricious and dishonest way, he relied on the following what he termed 'alleged irregularity' as being on the part of the assessors:

(a) He asserted that the assessors had acted what he termed in an irregular fashion, that is, pay first and talk later. He asserted that they issued non-protective assessments which he alleged were disguised as protective and as such, were against the IRD's own policy pursuant to Departmental Interpretation and Practice Notes ('DIPN') No11 paragraph 19.

(b) He asserted in his evidence and in his submissions that the assessors 'seemingly intentional misuse of the medical ordinance as if a departmental policy to hint that taxpayer would have violated the medical ordinance if he was not running his own clinic'.

(c) He asserted that the assessors had 'asked another taxpayer [Company C] to retrospectively create written evidence to transfer the tax liability of [Company C] to taxpayer without taxpayer's knowledge as shown in the interview notes for 2006-03-09 … which was kept hidden for one year released only after privacy commission intervention etc'.

(d) He asserted that the Senior Assessor (Mr AT), was suddenly removed from his post after the chief assessor was alerted on 18 September 2007, three days before his own scheduled interview to explain the assessment.

(e) He asserted that the same assessor under the same file number was asking for further information to investigate the case but at the same time was asking for an interview to expedite settlement. He asserted that whilst still collecting information to investigate the case, this was what he

perceived as a conflict of interest.

(f) He asserted that as procedural fairness, the assessments for Company C should have been finalised first before any determinations were made in respect of this matter. During the course of his evidence, he also confirmed and asserted that many of the communications and correspondence written to him by the IRD were one-sided.

(g) He also asserted during his evidence that at an interview on 9 March 2006, Ms B was asked to retrospectively create evidence, threatened and asked to 'make up' documents and that the IRD were attempting to pervert the course of justice. Time and time again, not only during the course of his evidence but in the course of his final submissions, he stood by his allegations that the conduct of the relevant IRD officers who dealt with this matter were dishonest and as such, he takes the view that because of their improper conduct, high-handedness and capricious activities, this appeal should be summarily dismissed.

20. In his witness statement, he asserted that the incorporation of Company C in his view was done on a commercial basis. He said it was initially set up to market various machines that were sold to a statutory institution. He drew to our attention the fact that there was a machine for approximately $100,000 which was sold to the statutory institution. He was of the view that with the change in times he had to adapt and as such, there was what he called a contemporary changing pattern of health.

21. He felt that there was nothing wrong in incorporating a limited company to promote the equipment and to deal with his affairs. He took the view there were genuine factors and good commercial reasons for the incorporation and re-organisation by the use of Company C.

22. He felt that the salary which he obtained was a reasonable one. He concluded that the primary motivation for the incorporation of Company C was to re-organise his business and as such, he felt it was a legitimate and natural consequence for him to embark upon in response to the changing business pattern of a doctor's fight for survival what he turned to be a result of an increasingly adverse business environment.

23. Dr A was extensively cross-examined by Mr Fung.

24. We found his evidence to be self-serving, abrasive and unsatisfactory. When asked to show to the Board and to provide any evidence as to capricious acts by any of the IRD officers, he was not able to do so and indeed, he tried to assert that capricious in his view means sudden.

25. When cross-examined by Mr Fung with regard to various expenses incurred, he gave an incoherent and improbable answers vis-à-vis the category of expenses that were put

to him for example, overseas travelling expenses. When those expenses were clearly in respect of a trip for himself, his wife and his children, he could not give any coherent answer as to the reasons why these would be deductible.

26. In cross-examination, Mr Fung put to Dr A a schedule which sets out his tax liability before 2001 and after 2001. It was a fact that before 2001, a substantial sum of tax was being paid and thereafter, no tax liability fell upon his shoulders. He was not able to give any coherent comment or explanation.

B. Ms B

27. Ms B gave evidence before us. When asked to confirm whether her witness statement was true and correct, she advised us that this was not drafted by her but by Dr A and would require an opportunity to re-read it. Time was given for her to re-read and review her witness statement. After an adjournment, she indicated to us that she had re-considered and reviewed various matters set out in the witness statement. She therefore made various deletions and alterations. Thereafter, she was able to confirm that her witness statement was true and correct.

28. However, the opening words of her witness statement stated as follows:

> ' This is a declaration made about the facts, manner and circumstances prompting me to make a decision to – a) the incorporation of [Company D] in 1998, b) under [Company C] and what happened afterward and what I observed, as explained by my ex-spouse, as dishonest and capricious acts of the assessors during the process which should nullify and void the assessments.'

29. Thereafter, Ms B raises serious allegations against the various assessors and IRD officers. She asserts that they were dishonest and acted improperly.

30. Her witness statement, in short, repeats many of the various issues that were raised by Dr A. She also stated to us that she was advised by Dr A to operate her physiotherapy business under Company C in order what she termed to lessen any personal business risk.

31. She took the view that she was also wearing two hats, one selling clinical services to provide micro-current equipment and dealing with her cosmetic and beauty business and one as a physiotherapist.

32. She also stated that Company C hired various physiotherapists. She indicated to us the reason for using Company C was because she was afraid that unsupervised physiotherapists 'may break the neck of a patient with neck patient through force of manipulation …..'. Hence, she did not wish to be liable to pay millions of dollars to such a patient.

33. She also drew to our attention that the move from Address E was also a trigger for the restructuring of her business. She also took the view that there were concrete plans for her to expand her business under Company C. She emphasized to us that in her mind, there were bona fide reasons for the incorporation of her physiotherapy business under Company C. Hence, she asserts that the incorporation was neither artificial nor fictitious and she felt it was at arm's length and realistic having regard to the way in which she operated it.

34. She also gave evidence as to the various interviews she had with the IRD following the field audit that took place. She stated in her witness statement as follows:

> '111) I was told to be personally liable for the $974,000 and $1,378,000 because I was the director of [Company C], even though the restructuring of the business was initiated by my ex-spouse and I merely accepted his proposal, thinking that it must be good for us.'

35. In paragraph 114, she stated as follows:

> '114) …… He wanted to ask me to retrospectively prepare documents to expedite the case, otherwise I shall be liable personally for the tax of [Company C] as director of [Company C]. He seem to have no power basis to do so.'

36. During cross-examination by Mr Fung, Ms B stood by the words that she had previously used in her witness statement that it was her evidence that the IRD officers were dishonest and capricious. She also confirmed in her evidence that she adopted most of Dr A's views as to the way in which the assessors conducted themselves in respect of this matter.

37. Hence, she confirmed that she followed and supported his allegations.

38. In cross-examination, Mr Fung put to Ms B various expenses that she was claiming to be deducted as being true business expenses. For example, in one instance, Mr Fung put to her various expenses in the sum of HK$21,285 that were split to cover various lunches and dinners in social functions with her staff and clients at AA Club. When asked to give specific evidence as to who she entertained and how these were of benefit for her business, she could not do so. What she stated is as follows:

> 'A. Also, can I explain? Even though it is just me having a meal in [AA Club] doesn't mean that I can't claim the expenses, because I am meeting other members at that time. I just pay for my own meals, but I can talk to other members. [AA Club] is a very good networking place for me to meet other people. There are a lot of members playing tennis and they will get injuries and they would like to have my service. In fact, maybe you would be able to see my advertisement – I think I have included it in

this - the advertisement on [AA Club] about my service. Members seeing this advertisement do come to my clinic for treatment.'

39. She stated:

'I can't remember. The thing is, even though I am just having a meal by myself, I always meet other members, talk to them, networking with them, telling them that I am a physiotherapist. Maybe you don't know what I do? Can I explain a bit about my profession?'

40. During the course of her evidence, she handed to the Board a book of various comments made by patients who had attended her practice. She was trying to suggest that these were indicative of the fact that various expenses that she incurred should be deducted. Mr Fung also drew to her attention an email from Company AD to the IRD. There, it can be seen that these agreements were between Bank V and herself. She confirmed that this was correct. It was also put to her that it was she herself who was dealing with Bank V and not Company C. She confirmed that this indeed was the case.

41. On cross-examination, her attention was drawn to a contract between herself and Company C. This was headed 'Staff contract'. She confirmed that this was between Company C and signed by her. When asked to give an explanation as to why this was so, she indicated that it was her accountant, Ms AP, who suggested that this should be entered into and that she should obtain a salary of around $20,000.

42. She confirmed that this document would have been prepared around 2005. When asked whether or not the amount of $20,000 was suggested by her accountant, she confirmed that this was the case since she did not raise any questions. She also confirmed that the IRD was already investigating her affairs at that time. The following question was put to her:

'Q. And you were prepared to put your signatures on this document and, in fact, you produced this to the revenue?

A. Yes, that is very silly, I would say.

Q. So you think it was a mistake?

A. I don't know. She suggests me to do this. In fact, I don't know -- I am not too sure, but I don't know whether she got the idea or the impression from the IRD staff that it is better to have a staff contract, you had better pay some tax, something like that.

Q. You don't know what they knew at the time, right?

A. Yes, I don't know, but my accountant suggests. In fact, I can show you the e-mail that she e-mailed me this staff contract.

Q. Back to this amount of $20,000 per month. In fact, it was never paid, was it? You never received this amount from [Company C]? [Company C] never paid this amount to you, correct?

A. Well, maybe sometimes -- I mean it is not on a regular basis. As far as I remember, in around 1998, [Mr A], my ex, did discuss with me whether we should, you know, have a salary or not, but then he mentioned that I am actually having the quarter as my benefit so the quarter in fact is more than this amount. In that case, it seems to be not very appropriate for me having a quarter and on top having a salary. We didn't actually collect -- I mean [Company C] didn't actually give me salary.

Q. When you said "actually", did not actually give you salary, am I right to say that they never paid you any salary, you never received any salary from [Company C]? Yes or no, please?

A. I should say no. As I said, I have the benefit of the staff quarter, so there is no salary.

Q. No salary?

A. No. So it is very silly to have this contract, in fact, having my name signed on this.

Q. It in fact reinforces your position because in fact you never reported any salaries to the revenue and hence you never paid any salaries tax?

A. Yes.

Q. That is why I asked you that you can confirm you never received any salary from [Company C], that's right, isn't it?

A. Yes.

MS LAM: May I ask about [Dr A]? You are the director of [Company C]. Did [Company C] ever pay any salary to [Dr A]?

A. I think so. He is the manager. [Mr A] has been the manager of [Company C] so --

MS LAM: You don't know? You think so, but you don't know?

A. I'm not too sure. I have got to check.'

43. Mr Fung also put to Ms B a document which was a table which showed the fact that tax had been paid for the years 1996/97 to 1998/99 and thereafter, any tax liability was put as zero. She was asked to comment. She was not able to do so.

Interlocutory applications after commencement of the substantive hearing

44. After Ms B had given evidence, Dr A was asked whether or not he intends to close this case or whether there are any further evidence he intends to call. At that stage, he made a series of applications for the Board to issue witness summonses for various IRD officers to attend. At the hearing, after listening carefully to his requests and submissions in support and after hearing Mr Fung, we declined each and every application which Dr A made on behalf of himself and Ms B. We indicated to Dr A and Ms B and Mr Fung that we would give our reasons later. We now do so.

Applications made on 10 March 2010

45. As indicated above, Dr A made an application for the Board to summon the following persons:

(a) Ms AP (she was Ms B's former tax representative);
(b) Ms AQ, an IRD Assessor;
(c) Ms AR, an IRD Assessor; and
(d) Mr AS, the Assistant Commissioner.

He wished these particular persons to come and give evidence.

46. Section 68(6) of the IRO provides that the Board does have power 'to summon to attend at the hearing any person whom it may consider able to give evidence respecting the appeal and may examine him as a witness either on oath or otherwise'. Clearly, cogent and good reasons need to be given to the Board before we would consider issuing a summons especially after Dr A and Ms B have given evidence. Dr A indicated to us that the reason for wishing to call Ms AP was as follows:

> 'I want to know whether it is out of the accountant's own initiative or whether she has taken their advice. There is evidence that [Ms AP] has talked to the assessors.'

This clearly arose from Ms B's answer as quoted in paragraph 42 above (second answer).

47. Mr Fung in his submissions indicated that it was far too late for a summons to be issued and in any event, clear directions had previously been given by the Board as to filing of witness statements. He also submitted that there was no indication whether or not she was prepared to attend the hearing.

48. The allegations that Ms AP in advising Ms B to put down the figure of $20,000 in her retrospectively made employment contract got 'the idea or the impression from the IRD staff' was a downright conjecture. Our view was that the application was speculative and indeed it was now far too late for a summons to be issued. Hence, we declined the application.

49. In respect of the further application to summon various representatives of the IRD, Dr A again indicated that he felt that it was important for him to cross-examine these IRD officers having regard to the allegations he has raised. However, Mr Fung was going to call Mr AT, to give evidence and he has already filed a witness statement. Mr Fung objected to these applications on the ground that it was again far too late and that Dr A had not identified with any particularity the purpose and the need for these persons from the IRD to attend. He did not give any submissions as to what issues he wished to raise with them nor could he show how they could be relevant.

50. Again, we accept the submissions of Mr Fung that these attempts by Dr A to ask the Board to issue the summons were speculative and he had not given any cogent or good reasons as to why we should so issue various summonses.

51. We have previously given directions as to the procedure with regard to the calling of various witnesses. However, we are of the view that the attempt at this late stage by Dr A was improper, speculative and without substance. Hence, we rejected his application.

Applications made on 23 March 2010

52. On 23 March 2010 hearing (during the course of his cross-examination of Mr AT), Dr A made a further application by way of a letter dated 18 March 2010. He made the following further applications:

(1) An application for specific discovery of documents including the internal documents from the IRD and the draft Determinations;

(2) An application for summary disposal of the Appeals;

(3) A further application to summon Ms AP to appear as a witness.

53. Again, we listened carefully to various submissions put forward by Dr A. Mr Fung objected to each and every application. We said we would give reasons later on. We now do so:

(1) In respect of the application for specific discovery, we were of the view that the Commissioner had already given full and frank discovery of all relevant documents in respect of this matter. Indeed, they had provided

Dr A and Ms B with numerous documents, files, etc. for their review and consideration. Mr Fung also indicated that he had attended at the offices of the IRD, had gone through all the files and was able to advise us that in his view, there were no further relevant documents that were needed to be disclosed in respect of this matter. He submitted to us this was clearly a fishing expedition by Dr A and Ms B. We agree with this submission. With regard to the request for specific discovery to request for the draft Determinations, we accept the submission of Mr Fung that these are plainly irrelevant for the purposes of these Appeals. We agree with the submissions that there is nothing wrong with the Commissioner or Deputy Commissioner to seek assistance from his or her subordinates (namely the assessors) to assist in preparation of the Determinations. Indeed, it is obvious that in complex cases, clearly, there would be a series of draft determinations prepared by the IRD for the review of the Commissioner or Deputy Commissioner. It would not be right or proper for these draft determinations to be part of the discovery process. In any event, the Board's function is to examine the correctness of the assessment, not the determination and the burden of proof falls on Dr A and Ms B. As such, it does not really matter what was set out in the earlier draft determinations.

(2) With regard to the application for summary disposal of the Appeals, again, this was an improper application to be made. The hearing was ongoing and as such, there was no conceivable way in which the Board could have summarily disposed of these Appeals by dismissing these halfway through the hearing. Hence, this application was rejected.

(3) Dr A repeats his submissions for us to issue a summons for Ms AP to appear as a witness. We have already given reasons as to why we rejected his application and indeed, he did not put forward any new grounds for us to re-consider.

Applications made on 13 April 2010

54. Applications were made on 13 April 2010 (Day 6). The Board received an undated letter whereby Dr A and Ms B applied for:

(1) an adjournment/a stay of the substantive hearing; and

(2) specific discovery of the working manual of the assessors. This letter was written to the Board during the adjournment between 9 April 2010 and 13 April 2010.

55. We heard these applications on 13 April 2010 and after listening carefully to Dr A and Ms B (at that stage, Ms B was acting in person on her behalf), we rejected each and

every application. We indicated that we would give our reasons later. We now do so:

(1) In respect of the application to adjourn/stay the substantive of hearing, again, he did not put forward any cogent or convincing reasons as to why we should do so. Again, this was another speculative and improper application which Dr A made in respect of this matter. With regard to Dr A requesting written authorizations that were referred to by Mr AT in cross-examination, these already had been provided to Dr A and Ms B.

(2) In respect of the application for specific discovery of the working manual of the IRD, again, in our view, this was another speculative application and indeed there was no convincing or cogent reason put forward to us as to why disclosure of such manual would be relevant to the various issues that the Board would need to consider in the appeal before us.

56. Dr A also attempted to ask us to listen to a recording of a conversation that was taped by him between himself and Mr AV. Mr AV had previously worked at the IRD. Again, Mr Fung objected to the Board listening to such recording on the grounds that:

(1) Dr A and Ms B had already closed their cases and therefore, could not adduce any further evidence without re-opening and no such application had been made to re-open; and

(2) Dr A and Ms B had not demonstrated to us as to how this tape-recording could be relevant.

57. During the course of submissions, Dr A admitted that Mr AV was not aware that his conversation was being taped and then after giving this matter some further consideration, asked the Board to forget his application. However, we would observe that the attempts by Dr A to put forward to the Board a conversation with a former staff of the IRD was improper and again, indicative as to the way in which Dr A put forward speculative and unwarranted submissions in respect of this matter.

C. Mr AT on behalf of the Commissioner

58. In light of the various serious allegations being raised by Dr A and Ms B and having regard to the various applications made by Dr A and Ms B at the directions' hearings, Mr Fung called Mr AT. Mr AT is a Senior Assessor of the IRD. He was posted to the Field Audit Investigation Unit of the IRD on 8 February 2002 when he was an Assessor. In October 2005, he was promoted to the rank of Senior Assessor.

59. He told us that his duties include supervision of the conduct of field audit and investigation of tax audit cases and the enforcement of compliance of the provisions of the IRO. He confirmed that he was duly authorized by the IRD to make his witness statement and to respond to the allegations raised by Dr A and Ms B.

60. In February 2002, he indicated to us that he became involved as an Assessor in the tax audit of Company C, Ms B and Dr A. He supervised the audit of these cases until 18 September 2007 when he was transferred to another post within the Field Audit Investigation Unit of the IRD.

61. He told us that in any normal tax audit, the assessor would conduct interviews with the taxpayers, collect such information from them and other third parties that were relevant to the various issues that need to be dealt with. He also stated that he would consider various findings and information collected and try to see whether or not there was any possible basis for a settlement of a tax audit case.

62. He told us that the IRO relies on the relevant provisions under sections 65 and 66 to enable taxpayers to object and appeal in respect of any assessments which are raised and which they do not agree with. There is also the avenue open to the taxpayers to appeal to the Board of Review against any determinations.

63. He told us that in the handling of Dr A and Ms B's cases, he was of the view that all IRD officers had followed proper procedures and had not treated Dr A and Ms B differently to any other taxpayer.

64. His attention was drawn to the various serious allegations that were raised by Dr A as to the motives and integrity of the relevant IRD officers. He took the view that many of these allegations were vague and unsubstantiated. He confirmed to us and he categorically stated that all of these allegations were unfounded and none of the IRD officers acted dishonesty in any way during the tax audit or in the execution of their duties under the IRO.

65. In particular, he referred to an interview that took place on 9 March 2006 and to the allegations that had been raised that at that interview in that he asked Ms B to 'retrospectively create written evidence to transfer the tax liability of [Company C]' to Dr A personally without his knowledge. He told us that such allegations are completely wrong and without foundation.

66. On 9 March 2006, he and Ms AQ, the Acting Assessor and the Assistant Assessor, Ms AR interviewed Ms B who was the sole proprietor of Company D and a director of Company C. During the interview, he and Ms AQ explained to Ms B their findings based on the information collected and their views that the arrangement including her clinic under Company C was not commercially realistic. He also observed that at the time the clinic incomes were derived from sole proprietorship businesses, that is, Company D and Dr A's clinic respectively carried on by Ms B and Dr A but was reported as branch businesses of Company C for the purpose of obtaining a tax benefit for the set-off loss sustained by Company C and the relevant deductions of expenses (such as directors' quarters, etc.). He drew to our attention to paragraph 10 of the note of interview of 9 March 2006 which stated as follows:

> ' 10. Officer [AT] added that in case [Ms B] agreed to have her clinic incomes assessed under her sole proprietorship, she was required to confirm in writing that the incomes derived from [Company D] and the clinic of her separated husband be excluded from [Company C]. [Ms B] noted.'

67. He again indicated to us that if Ms B agreed with any of his observations, she should have confirmed her agreement in writing in her capacity as a director of Company C.

68. Mr AT categorically stated that at no time did he ever ask Ms B to 'retrospectively create written evidence to transfer the tax liability to [Company C]'.

69. His attention was also drawn that Dr A had alleged that his transfer of post on 18 September 2007 was to avoid a meeting which he suggested to be held on 21 September 2007 with them. He told us that this allegation again was unfounded. His transfer was just an ordinary transfer for an internal management purpose and had nothing to do with Dr A and Ms B's tax audit cases.

70. Mr AT commenced his evidence on 10 March 2010 in the late afternoon at approximately 4.20 p.m. Dr A commenced his cross-examination on 11 March 2010. He completed in the early afternoon of 13 March 2010. Hence, he was cross-examined for nearly 3 days by Dr A. We would mention that the cross-examination by Dr A was long-winded and peppered with numerous incomprehensible questions which neither the Board nor Mr Fung could understand let alone the witness.

71. We would also mention that Ms B also cross-examined Mr AT (for some 45 minutes or so).

72. Both Dr A and Ms B on repeated occasions put to Mr AT that the IRD had acted improperly, dishonestly and capriciously with the way in which they carried the tax audit and the way in which they dealt with their affairs.

73. Indeed, it is quite clear from the way in which Dr A conducted his cross-examination that he was trying to repeat many of his questions which were speculative, without foundation and indeed, were of a very general nature.

74. During the course of the evidence, Mr AT again clearly told the Board that in response to all the allegations being put that in his view and the view of the IRD that all the relevant assessments were properly issued and there was never any ulterior motives.

75. He confirmed that the estimated assessments issued to Ms B and Company C on 15 September 2006 were in his view correctly issued based on all the information collected. He also confirmed that the IRD had only received certain information from Company K from Dr A on 29 September 2006 and in his view, this information would not make any difference to 15 September 2006 assessments that were made.

76. In our view, having listened very carefully to Mr AT over the extensive time he spent before the Board under cross-examination by Dr A and Ms B, we have no hesitation in concluding that Mr AT was a convincing, honest and credible witness.

77. At no stage did Dr A or Ms B in their cross-examination cast any doubt upon the integrity of Mr AT and the relevant IRD officers.

78. We would note that although there were wide-spread allegations of dishonesty, capriciousness and improper motives, Dr A and Ms B could not put forward any substantive factual basis for raising such allegations. We have no hesitation in coming to the conclusions that these allegations were unfounded and in our view improper and had no substance to them. We would give the example of the allegation raised by Dr A in respect of the transfer of Mr AT in September 2007 to another department. Dr A took the view that there was an alleged misconduct and impropriety on behalf of the IRD by moving Mr AT to another department so that he would avoid having to confront Dr A at an intended interview. Dr A described this transfer was a 'capricious removal' in order to , what he termed, 'relieve his duty to explain his assessment'. In short, it was put to Mr AT that his transfer was for some ulterior motive, that is, having to avoid him having to explain the relevant assessments to Dr A and Ms B.

79. Mr AT clearly rebutted such unfounded, improper and unsubstantiated allegations. He told us that he had worked with the IRD for about 30 years and during his time, he has been transferred internally about 10 times according to the internal posting policy. Mr AT's post before the internal transfer made in September 2007 was with Section A7 of the Field Audit and Investigation Unit.

80. After his transfer, he was posted to Section B1 (the Review Section of the same Unit) (a position he still holds today). However, his duties were different before and after the transfer. His duties in Section B1 involved and still do the reviewing of preliminary audit and investigation cases, the overseeing of computer system and the supervision of the management system in the Unit. He also told us that when he wrote the letter on 4 September 2007 to Ms B suggesting an interview on 21 September 2007, he did not know that he was going to be transferred on 18 September 2007. Clearly, had he known that he was going to be transferred, he would never have written the letter in such a way. He would have arranged for another assessor to deal with this matter. Mr AT indicated to us that the reason why he did not attend the meeting with Dr A and Ms B on 26 October 2007 was because by that time, he had been transferred out of the section and was not allowed to be involved in any of his previous cases. He also told us that before the transfer, he was handling about 100 cases. He had to leave all of them behind after his transfer due to the relevant secrecy provision as set out in the IRO.

81. During Dr A's cross-examination in response to various questions put to him by the Board he stated as follows:

[Mr AT]

> 'A. Actually, I cannot say that his witness statement is untrue because I have to collect evidence and I am going to present all the evidence for the board to consider. It is actually not my part to say that he is making a false witness statement. I just present my multiple reasons behind causing me to suspect such motivation.'

82. Again, this is again indicative of the mind set of Dr A in the way in which he conducted this Appeal. It seems that Dr A and Ms B were making speculative and in our view, improper allegations.

83. We also have regard to the cross-examination of Mr AT by Ms B. Ms B in her cross-examination attempted to put to Mr AT that he had been dishonest. In short, Ms B put the following to Mr AT:

> ' BY MS B: [Mr AT], on April 9, 2010, a few days ago, you said that [Ms B] elects to have personal assessment. Do you remember you said something like that?
> A. I don't quite remember these words, election of personal assessment.
> Q. You said so?
> MS LAM: [Ms B], I don't remember that.
> CHAIRMAN: I don't remember that at all.
> MS B: I remember clearly he said that [Ms B] elects to have personal assessment.
> MS LAM: In what context did he say that, because I don't remember that either?'

84. In her closing submissions in writing, Ms B stated that Mr AT had lied when he said that she had elected for personal assessment. It is obviously clear from the evidence given that Mr AT indicated that he did not remember saying that Ms B did elect for personal assessment. In any event, if one has regard to the actual documents filed in this matter and in particular one has regard to Ms B's tax returns for the years 1995/96, 1997/98 and 1998/99, it can be seen by looking at these respective returns that Ms B did elect for personal assessment in her tax returns. Dr A in his relevant tax returns for the year 1995/96 through to 2003/04, he also elected for personal assessment.

85. Hence, it can be seen that Ms B in her written submissions and in her closing submissions before the Board again asserts that there has been dishonesty by Mr AT and attempts to show that he had lied when he gave his evidence, when quite clearly, this was not the case.

86. During the course of cross-examination of Mr AT by Dr A and Ms B, it was suggested that he was not authorized to provide a witness statement nor to give evidence! In re-examination, Mr Fung put various documents to him entitled 'Delegation of powers and

duties'. Mr AT was able to confirm to us that the documents showed where written authorizations by the Commissioner to delegate his or her powers and duties under section 3A(2) of the IRO to the officers in the department to deal with and carry out duties under the relevant sections of the IRO.

87. His attention was also drawn to the column that had the words 'Delegated officers' and 'assessor and SA'. He confirmed that 'SA' is senior assessor and in turn he was able to confirm that pursuant to this delegation, he had the relevant power and authority to deal with the various issues and matters in respect of the tax audit of Dr A and Ms B.

Discussion

A. The grounds of appeal

88. Section 68 of the IRO provides that any appeal which is brought by a taxpayer is against an assessment.

89. Section 68(4) of the IRO provides as follows:

> *'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

90. Hence, it is clear that taxpayers can only succeed if they discharged their burden of proof, that is, that the assessment appealed against is excessive or incorrect. See Shui On Credit Co Ltd v CIR [2010] 1 HKLRD 237 ('Shui On') where Lord Walker NPJ at paragraphs 29 and 30 said as follows:

> *'29. As the Board correctly observed, by reference to the decisions in Mok Tsze Fung v Commissioner of Inland Revenue [1962] HKLR 258 and (after the amendment of s.64 of the IRO) Commissioner of Inland Revenue v Hong Kong Bottlers Ltd [1970] HKLR 581, the Commissioner's function, once objections had been made by the Taxpayer, was to make a general review of the correctness of the assessment. In Mok Tsze Fung v Commissioner of Inland Revenue, Mills-Owens J said at pp.274-275:*
>
> > *His duty is to review and revise the assessment and this, in my view, requires him to perform an original and administrative, not an appellate and judicial, function of considering what the proper assessment should be. He acts de novo, putting himself in the place of the assessor, and forms, as it were, a second opinion in substitution for the opinion of the assessor.*
>
> *30. Similarly the Board's function, on hearing an appeal under s.68, is to consider the matter de novo: Commissioner of Inland Revenue v Board of*

> *Review, ex p Herald International Ltd [1964] HKLR 224, 237. The Taxpayer's appeal is from a determination (s.64(4)) but it is against an assessment (s.68(3) and 68(4)). The Taxpayer's counsel drew attention to the fact that when Pt.XI was amended in 1965, the wording of s.68(4) was altered to refer to the onus of proving that the assessment was "excessive or incorrect" (rather than simply "excessive"). This, it was argued, showed that the amount of an assessment was no longer always the essential issue. Counsel for the Commissioner could not suggest any particular reason for the alteration, other than a general tidying-up of the language. Whatever the explanation, I am satisfied that the alteration was not intended, by what is sometimes called a side-wind, to make a major change in the scheme and effect of Pt.XI of the IRO.'*

91. Section 66(3) of the IRO provides as follows:

> *'Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).'*

92. Therefore, we have no hesitation in concluding that Dr A and Ms B cannot without the consent of the Board raise any matters which are not set out in their respective grounds of appeal. In particular, we refer to China Map Ltd v CIR (2008) 11 HKCFAR 486. Therefore, we conclude that Dr A and Ms B can only argue those grounds of appeal that are set out which we have already identified in paragraph 5 above.

Issue 1 – Whether any capricious, prejudiced and dishonest action on the part of the IRD

93. Mr Fung's submissions to us were clear and unequivocal. He took the preliminary point that there are a series of well-established authorities which illustrate that the Board does not have the judicial review jurisdiction which is exclusively enjoyed by the High Court. In short, his submission is that we do not have the jurisdiction to deal with this particular issue that has been put forward by Dr A and Ms B. However, he also asserts that on behalf of the Commissioner, he does not want to be seen to be using this jurisdiction point (which he emphasized is a good one) as he puts it 'to shield off any of the Appellants' complaints'.

94. Mr Fung takes the view that it is the Board's function only to look at the facts and the IRO and in turn, to see whether the assessments have been properly made in accordance with the legislation.

95. He submits that we are not empowered to investigate any allegation by a taxpayer of an abuse of power by the IRD. He asserts that if Dr A and Ms B are of the view that there have been an abuse of powers or improper actions taken by the IRD, then their

remedy is by way of judicial review in the High Court. In support of his submission, he has drawn our attention to the following authorities:

(1) Aspin v Estill [1987] STC 723;
(2) D12/93, (1993) IRBRD, vol 8, 147;
(3) D54/94, (1994) IRBRD, vol 9, 324;
(4) D69/94, (1995) IRBRD, vol 9, 386;
(5) D126/02, (2003) IRBRD, vol 18, 188;
(6) Mok Tsze Fung v CIR [1962] HKLR 258 ('Mok Tsze Fung');
(7) Harley Development Inc v CIR (1996) 4 HKTC 91; and
(8) Guthrie v Twickenham Film Studios Ltd [2002] STC 1374.

96. Aspin v Estill [1987] STC 723 was a case where the taxpayer appealed against assessments under the relevant English legislation in respect of payments of social security retirement benefit by the US Federal Government. The taxpayer claimed that he had been wrongly advised by a tax office that various pension payments were not taxable and argued that the case should be remitted to the General Commissioners (the equivalent to the Board of Review) to investigate the facts behind this particular allegation. At 724, Sir John Donaldson MR stated as follows:

> '*The taxpayer says that in that situation he consulted the Birmingham Office of the Inland Revenue, I think by telephone, and talked to someone who said to be an expert on the taxation of foreign income. The taxpayer goes on to say that he was categorically assured that this income was not taxable and that on the basis of that assurance he resettled in this country.'*

97. At 725, Sir John Donaldson MR stated as follows:

> '*So we have this position. Assuming – again I stress the fact that it is an assumption – that the facts are as stated by the taxpayer, he has something of a grievance. Either, as he contended before the General Commissioners, he is not taxable on this pension, or, if, as they have held, he is taxable, he says that he has been led to make an irremediably wrong choice as a result of erroneous advice given by the Revenue.*
>
> .....
>
> *But that still leaves us with the problem of whether the General Commissioners and, on appeal, the learned judge, and, on appeal from him, this court, have any jurisdiction to investigate the facts underlying the allegation that erroneous advice was given and if so how we should deal with the matter.*
>
> *On that aspect counsel for the taxpayer has said that we should remit the matter to the General Commissioners to find the facts. That we could plainly do, but we should only do so if we are satisfied that the General Commissioners,*

having found the facts, could probably take them into account in deciding whether or not the taxpayer's appeal against his assessment should be allowed.'

98. At 725, Sir John Donaldson MR continued:

'The functions of General Commissioners is to look at the facts and statutes and see whether the assessment has been properly prepared in accordance with those statutes.'

99. At pages 726 and 727, the Master of the Rolls continued:

' ..... counsel for the taxpayer submitted that the General Commissioners could have considered whether, if the advice had been given, it was an abuse of power ..... to raise this assessment at all. This is a somewhat surprising submission bearing in mind that judicial review is a remedy which is only available in the High Court, and then only subject to leave. Although that particular passage in Lord Templeman's speech did provide some foundation for counsel's argument, I am bound to say that for my part I greeted it with surprise bordering on horror, because I did not believe that it was the intention of Parliament that the General Commissioners, worthy body though they are, should exercise a judicial review jurisdiction.

.....

In other words, the question of the lawfulness of the inspector making the assessment, whether in judicial review terms it was an abuse of power was one thing, and a matter only to be considered by the High Court. Whether, if he was right to make such an assessment, that was correct in terms of the statute was another and a matter for the Special Commissioners.

.....

My conclusion therefore is that, even if the General Commissioners were to find these facts, they could not found their decision upon them. That being so, they were right to set the evidence relating to those facts on one side and make no finding. If the taxpayer has a remedy – I am bound to say that at this time it is perhaps unlikely that he has, and at all events I would not be encouraging him to take such proceedings – it must lie in the judicial review route, subject to his getting leave, and, of course, subject to any facts which might emerge on an investigation of the facts if leave were granted.'

100. Therefore, it can be seen that the remedy for any taxpayer who asserts that there has been an abuse of power or improprieties, lies in judicial review.

101. This approach has been followed by various Board of Review decisions on numerous occasions.

102. In D12/93, (1993) IRBRD, vol 8, 147, there, the taxpayer appealed to the Board of Review, one of the grounds was that 'The CIR and the assessors to the case have been acting unreasonably, tardily, capriciously, whimsically, biasedly and without due care and skill. The assessments and determination made by them are therefore invalid'. It can be seen that this ground is somewhat similar to the various assertions that have been made to us by Dr A and Ms B. The Board of Review in that case again relied on Asprin v Estill and held that they had no jurisdiction to entertain such matters. The Board clearly stated as follows:

> *'17. We consider that the following principles are applicable to the three grounds of appeal:*
>
> *(1) Even though an act or decision of a public authority is wrong or lacking in jurisdiction, it subsists and remains fully effective unless and until it is set aside by a court or tribunal of competent jurisdiction (Halsbury's Laws of England, fourth edition, Reissue, vol 1(1), paragraph 26).*
>
> *(2) A tax assessment raised by the Revenue is an act or decision of a public authority, and may on proper grounds be set aside or annulled by the Commissioner under the section 64 objection procedure, or, on appeal, by the Board of Review under the section 68 appeal procedure, or on further appeal or appeals, by the High Court, the Court of Appeal, or the Privy Council, as the case may be. In our view, subject to (3) below, the Taxpayer is entitled to question the validity of the fresh assessment, and also the validity of the salaries tax return or any other related act or decision in so far as it is relevant to the question of validity of the fresh assessment.*
>
> *(3) (a) The function of the Board is to look at the facts and the Ordinance and decide whether the assessment has been made properly in accordance with the Ordinance or whether it is correct in terms of the Ordinance.*
>
> *(b) Whether on the facts alleged, it was an abuse of power by the Revenue to make the assessment, or whether the conduct of the assessor was lawful in making the assessment, is a matter only to be considered by the High Court, and a matter for which the only remedy available is by way of judicial review (Aspin v Estill [1987] STC 723 CA at 723 and 726).*
>
> *(c) Therefore, questions of validity which a taxpayer is entitled*

> *to raise before the Board of Review are confined to questions falling within (a) above.*
>
> .....
>
> *25. The adverbs used in Ground 3 are variations on the theme of an abuse of power or other unlawful conduct on the part of the Revenue which the Taxpayer contended had the effect of rendering the fresh assessment invalid. The preliminary question is whether we have the jurisdiction to entertain Ground 3. We think not.*
>
> .....
>
> *31. For all those reasons, we are of the view that in stating the principles in the Aspin case, Sir John Donaldson MR did not depart from any principles forming part of the ratio decidendi in the Preston case. Our conclusion therefore is that the principles stated in the Aspin case should be followed. It follows that we have no jurisdiction to entertain Ground 3 and that Ground 3 fails.'*

103. Therefore, it can be send that the Board was not prepared to entertain such submissions on the ground that they are of the view that they did not have jurisdiction to do so.

104. In D54/94, (1994) IRBRD, vol 9, 324, there, the taxpayer complained about the conduct of an IRD officer who had interviewed him on 9 August 1993. The Board said:

> *'10.1 For the above reasons, this appeal fails. But that is not the end of the matter. By his notice of appeal the Taxpayer made a complaint about the conduct of a Revenue officer who interviewed him on 9 August 1993. In the Board's view it has no jurisdiction over this complaint; if the Taxpayer has a remedy, it must lie in judicial review proceedings in the High Court. The complaint arose in this way. The Taxpayer was assessed 3 times for each of the 2 years in question in respect of his income from his employment in Hong Kong: in the original assessment for each year he was assessed in respect of (a) his wages less the United Kingdom tax deducted and (b) rental value; in the additional assessment for each year he was assessed in respect of (a) his wages without deducting the United Kingdom tax and (b) rental value; in his determination the Commissioner of Inland Revenue revised the additional assessments by incorporating the local living allowance. Briefly, the Taxpayer's allegation is this: on 9 August 1993, having arrived in Hong Kong to visit the Revenue, he was interviewed by a Revenue officer; after some discussion, the Taxpayer agreed to pay the tax payable under the original assessments; he was asked to return to the*

interviewer after payment of the tax to show the receipt and sign a form; when he returned to the interviewer, he was given the additional assessments and was informed that immigration had been requested to prevent his departure from Hong Kong until the tax payable under the additional assessments was paid.

10.2 It is not for the Board to say whether the allegation could ground an application for a judicial review. The function of the Board is to decide whether the subject assessment has been made properly in accordance with the IRO or whether it is correct in terms of the IRO (Aspin v Estill [1987] STC 723 CA; D12/93, IRBRD, vol 8, 147). In the Aspin case, Sir John Donaldson MR stated at pages 725-727:

> *"The function of the General Commissioners is to look at the facts and statutes and see whether the assessment has been properly prepared in accordance with those statutes ... In other words, the question of the lawfulness of the inspector making the assessment, whether in judicial review terms it was an abuse of power was one thing, and a matter only to be considered by the High Court. Whether, if he was right to make such an assessment, that was correct in terms of the statute was another and a matter for the Special Commissioners ... My conclusion therefore is that, even if the General Commissioners were to find these facts, they could not found their decision upon them. That being so, they were right to set the evidence relating to those facts on one side and make no finding. If the taxpayer has a remedy ... it must lie in the judicial review route, subject to any facts which might emerge on an investigation of the facts if leave were granted."*

Likewise, the proper course for the Board in the present case is to put the allegation on one side and make no investigation or finding.'

105. Again, in that case, the Board put the allegations to one side, took the view that they had no jurisdiction to investigate or come to any conclusions.

106. In D69/94, (1995) IRBRD, vol 9, 386, allegations were made by the taxpayer against various IRD officers concerning their conduct in respect of the making of various assessments. At paragraph 6 of the Board's decision, they stated as follows:

'6. Allegations were made by the Taxpayer against Revenue officers concerning their conduct in connection with the making of the assessments referred to in paragraph 3.7 above. It was alleged that in the course of the investigation it was hinted to him that whether or not he had made any profit, a penalty had to be imposed to cover the overheads of the Revenue and to satisfy the superiors. It was further alleged that he

> *was told that the Revenue officers had ways of 'making people pay' and that, unless he signed the agreement (see paragraph 3.6 above), the Revenue officers would make a 'bigger' assessment for one of the years in question. However, allegations of this nature are not for the Board to investigate; the remedy, if any, lies in the route of judicial review proceedings in the High Court. The function of the Board is to decide the question of whether the subject assessment is correct in terms of the IRO; it does not deal with allegations relating to the conduct of Revenue officers in making assessments (Aspin v Estill [1987] STC 723 CA; D12/93, IRBRD, vol 8, 147; D54/94, IRBRD, vol 9).'*

107. The Board in that case took the position that the allegations that were being raised were of such a nature that it was not proper or right for the Board to investigate. Again, they emphasized that any remedy lied in an application for judicial review.

108. In D126/02, (2003) IRBRD, vol 18, 188, the taxpayer appealed to the Board in respect of a salaries tax assessment. One of the arguments put forward was that it transpired that three colleagues of the taxpayer had also appealed to the Board on exactly the same issues and one of those appeals had been allowed by another Board. The issue was whether or not the Board should have regard to the principle of fairness in administrative law and whether it was open to the Board to set aside an otherwise valid and legal assessment on the basis that the taxpayer was not being treated fairly. Although the Board allowed the appeal, they made various observations. At paragraph 23, they stated as follows:

> '*It is thus unnecessary for us to consider further the question of whether this Board has any jurisdiction to set aside the assessment on the basis that to maintain the same would infringe the principle of fairness. We are inclined to accept the [Revenue's] argument on the authority of Aspin v Estill [1987] STC 723 that this Board, as a statutory body, does not have the review jurisdiction enjoyed exclusively by the High Court. Having said that, we trust that though it is beyond the Board's power to grant any relief in the nature of judicial review, the Commissioner would faithfully observe her duty to treat all taxpayers fair*ly.'

109. As can be seen, the Board came to the conclusion that they do not have the relevant jurisdiction to investigate these complaints and as such that jurisdiction relies exclusively on the High Court in respect of an application by way of judicial review. However, the Board also concluded that they would hope that the Commissioner would faithfully observe a duty to treat all taxpayers fairly. Of course, we echo such sentiments.

110. Dr A in his submissions on behalf of himself and Ms B suggested to the Board that we should rely on the Court of Final Appeal's decision in Lam Siu Po v Commissioner of Police (2009) 4 HKLRD 575 ('Lam Siu Po'). However, this was a case that where a police constable was convicted of a disciplinary charge and was compulsory retired with

various deferred benefits. He appealed to the Court of Final Appeal on the ground that the prohibition of legal representation under the relevant regulations of the Police (Disciplinary) Regulations (Chapter 232A) was unconstitutional and in turn, contrary to Article 10 of the Hong Kong Bill of Rights. His appeal was allowed by the Court of Final Appeal. None of the passages which our attention was drawn to by Dr A had any relevance to any of the issues that are before this Board. We have no hesitation in accepting the submission by Mr Fung that Lam Siu Po is irrelevant to the issues that we need to consider.

111. Dr A and Ms B drew our attention to sections 2 of section 6 of the Bill of Rights and the following authorities:

(1) Chan Hei Ling Helen v Medical Council of Hong Kong [2009] 4 HKLRD 174;
(2) Law Society of Hong Kong v Solicitor [2006] 1 HKLRD 49;
(3) Wong Tak Wai v Commissioner of Correctional Services (HCAL 64/2008, 31.8.2009, unreported) with Corrigendum;
(4) HKSAR v Lam Kwong Wai & Another (2006) HKCFAR 574;
(5) Tse Hung Hing v The Medical Council of Hong Kong & Ors [2010] 1 HKLRD 112;
(6) Yeung Chung Ming v Commissioner of Police (2008) 11 HKCFAR 513;
(7) Koon Wing Yee v Insider Dealing Tribunal (2008) HKCFAR 170; and
(8) Wu Kit Ping v Administrative Appeals Board [2007] 4 HKLRD 849.

112. Again, with respect to Dr A, none of these decisions supports his proposition that the Board has the jurisdiction to consider prejudicial and dishonest action on the part of the IRD as he alleges. Our system of taxation provides for a hearing de novo at the Board of Review level. No doubt in proceedings before us, we do have to assume jurisdiction over Bill of Rights issues to render a fair hearing. However, it would be too broad an interpretation of sections 2 of section 6 of the Bill of Rights to suggest that, notwithstanding our de novo hearing, it is for us to assume supervisory jurisdiction over all Bill of Right issues for all agencies involved in prior steps leading to a hearing before us.

113. Mr Fung very helpfully also drew our attention to Guthrie v Twickenham Film Studios Ltd [2002] STC 1374. In that case, the UK Revenue issued an assessment under section 30 of the Taxes Management Act 1970. The taxpayer appealed to the General Commissioners (equivalent of the Board of Review) who discharged the assessment. There, the General Commissioners thought that section 30 conferred a discretion on the Revenue and that the Revenue had in turn exercised that discretion wrongly. However, the Revenue appealed, after reviewing and considering the relevant authorities including Asprin v Estill, Lloyd J at paragraph 39 as follows:

> '*None of these cases seem to me to provide any basis for the suggestion that the line of cases from Aspin v Estill (Inspector of Taxes) [1987] STC 723 to Steibelt (Inspector of Taxes) v Paling [1999] STC 594 is no longer binding on me in holding that it is not open to General Commissioners to entertain a challenge to*

> *an assessment on grounds of public law, that the Revenue were acting unreasonably (in a Wednesbury sense) in raising the assessment at all. In my judgment those cases are unaffected by Pawlowski (Collector of Taxes) v Dunnington [1999] STC 550 and Wandsworth London Borough Council v Winder [1985] AC 461. Accordingly the commissioners were wrong to consider that they could either substitute their own view of the right way to exercise the discretion whether or not to raise an assessment under s 30(1), or to review the Revenue's decision on the grounds that it was unreasonable in the Wednesbury sense. The former is not open to anyone. The latter is only open to the Administrative Court.'*

114. The court concluded that any arguments as to whether or not the Revenue had been acting in an unreasonable way is clearly a matter to be dealt with by way of judicial review.

115. From the notice of appeal, Dr A and Ms B seems to assert that their first ground is premised on the statement of Mills-Owen J in Mok Tsze Fung where at pages 279 and 280, he said as follows:

> *'So long as the assessor, or Commissioner, does not act capriciously or dishonestly, his assessment, being made according to his judgment cannot be disturbed except upon the taxpayer bearing and discharging the onus of proof.'*

116. One must have regard to the context in which the statement of Mills-Owen J was made. Mok Tsze Fung was a case where an assessor was empowered to make a protective assessment under the then sections 59 and 60 of the IRO, and in turn, whether there was any evidence before the assessor to support the protective assessments in question. Mills-Owens J reviewed the inter-relationship sections 59 and 60 and in turn, where he considered the meaning of the phrases *'Where it appears to an assessor'* and *'according to his judgment'* in section 60. At page 279, Mills-Owen J said as follows:

> *'There is no requirement that the assessor shall first form a judgment and then translate it into an additional assessment. The formation of his judgment is an integral part of the making of his additional assessment. Nor is there any implication that the "judgment" will be one based upon precise, demonstrable facts. The inference is to the contrary by reason of the very use of the words "according to his judgment" and the words "Where it appears to an assessor", and, as I have previously indicated, by reason of the necessities of the case. ... One cannot escape the fact that the words "according to his judgment" are time-honoured words in income tax legislation. In the light of the authorities referred to by Crown Counsel, the expression "Where it appears to an assessor" is certainly no less strong than the English expression "If the surveyor discovers". The policy of the law is to force the taxpayer's hand. So long as the assessor, or Commissioner, does not act capriciously or*

> *dishonestly, his assessment, being made according to his judgment, cannot be disturbed except upon the taxpayer bearing and discharging the onus of proof.'*

117. Therefore, it can be seen that the statement by Mills-Owen J was made in context of how an assessor should issue an assessment *'according to his judgment'* under the relevant section.

118. Mr Fung quite fairly accepts that an assessor must obviously not act capriciously or dishonestly in issuing any assessment. Again, it is also further accepted that if an assessor acted either capriciously or dishonestly which resulted in the assessment being incorrect or excessive, the Board can undoubtedly exercise its powers under section 68(8)(a) of the IRO to reduce or even annul the relevant assessment. Hence, we accept the submission that an example would be that an assessor cannot just as Mr Fung points out in his submissions 'plugged a figure from thin air' and in turn, used this as the taxpayer's assessable profits in the profits tax assessment.

119. The allegations that have been raised by Dr A and Ms B are very serious. At the outset, we have no hesitation in concluding that these allegations are unfounded. Having carefully reviewed and listened to Dr A and Ms B and having regard to the evidence of Mr AT, we have concluded that none of the allegations, grounds and submissions put forward to us by Dr A and Ms B were supported by the evidence that was before the Board. We have also already commented upon the credibility of Dr A and Ms B and as such, we have rejected their evidence.

120. Dr A and Ms B were putting forward serious allegations against the IRD without any factual basis or particulars.

121. We now deal with the various allegations that Dr A and Ms B raised, we would comment as follows:

(1) Alleged 'pay first and talk later approach'

(a) Again, it was quite difficult to make out what Dr A and Ms B were asserting. In their respective grounds of appeal, they talked about the IRD acting irregularly because they adopted what they asserted to be 'pay first and talk later approach' and in turn, had disguised the assessments as protective assessments. However, clearly, this cannot be correct. We have accepted the evidence of Mr AT, it is clear that all relevant assessments were properly issued and there was no ulterior motive by the IRD. We also have no hesitation in concluding and accepting that the raising of assessments as an alternative head of charge was not improper and was in accordance with paragraph 20 of DIPN No11 which states as follows:

> '*Estimated assessments may be raised on a person under alternative heads of charge as a protective measure, based on the Assessor's judgment in respect of the information available to him. The practice of making alternative assessments in a situation where the Assessor may have insufficient information to do otherwise was endorsed by the court in Nina T.H. Wang v. CIR 3 HKTC 483 ...*'

(b) Hence, there was no evidence shown before the Board to make out this allegation.

(2) Alleged 'intentional misuse of Medical [Clinics] Ordinance'

The thrust of Dr A's allegations were that the assessor had intentionally misused the Medical Clinics Ordinance to hint that he may have violated or been in breach of the Medical Clinics Ordinance and the Medical Registration Ordinance. In our view, having regard to the evidence we have heard and having reviewed the relevant documents, it is clear that this allegation is again unfounded. We accept that the IRD was only trying to carry out its investigation into the tax affairs of Company C and its branch, Company K. The questions that were being raised regarding the registration under the relevant Ordinances were only raised by the IRD at the initial stage of the investigation. The IRD did not pursue this line of enquiry. We accept Mr Fung's submissions that this issue was only prolonged because Dr A kept on asking questions about the medical certificates in his correspondence. We reject Dr A's assertion that the IRD was hinting that the provisions of these Ordinances had been breached.

(3) Alleged request on the part of the assessors to retrospectively create written evidence to transfer tax liability

(a) Again, having reviewed the evidence and considered all maters, there was no evidence to support such an allegation. As we have previously pointed out in our decision, the relevant Notes of Interview stated as follows:

> 'Officer [AT] added that in case [Ms B] agreed to have her clinic incomes assessed under her sole proprietorship, she was required to confirm in writing that the incomes derived from [Company D] and the clinic of her separated husband be excluded from [Company C]. [Ms B] noted.'

(b) Nowhere is there any suggestion on the face of this paragraph to show that Ms B was asked to retrospectively create written

evidence to transfer the tax liability of Company C to Dr A. Of course, one also should put this paragraph into its correct context and when Mr AT gave evidence in his witness statement, he said as follows:

> ' On 9 March 2006, I and the case officer [Ms AQ], the then Acting Assessor, and an Assistant Assessor [Ms AR], interviewed [Ms B] who was the sole proprietress of [Company D] and director of [Company C]. During the interview, I and [Ms AQ] explained to [Ms B] our findings based on the information collected and our views that the arrangement of including her clinic income under [Company C] was not commercially realistic. In this regard, we observed at the time that the clinic incomes were derived from the sole-proprietorship businesses, i.e. [Company D] and [Dr A]'s clinic respectively carried on by [Ms B] and [Dr A], but were reported as branch business incomes of [Company C] for the purpose of obtaining tax benefits through the set-off of loss sustained by [Company C] and the deduction of expenses (such as director's quarters expenses), which would not otherwise be deductible, against the clinic incomes; and that accordingly the clinic incomes should be assessed in name of [Ms B] and [Dr A] individually with the said incomes excluded from assessment under [Company C].'

(c) Hence, in our view, any allegation that Mr AT asked Ms B to 'retrospectively create written evidence to transfer the tax liability of [Company C]' at the interview on 9 March 2006 was never made out and was unfounded.

(4) Alleged misconduct as a result of internal staff transfer of Mr AT in September 2007

We have already commented on this when we reviewed the evidence and it is clear that this allegation is unfounded, lacking substance and was never made out. Mr AT clearly explained to us the reason why he was transferred. We accept his evidence of being credible and indeed, there was never any evidence before us to show anything untoward happened. Indeed, in cross-examination, Dr A agreed that Mr AT may not be lying but he asserted that Mr AT did not exclude his allegations. We have no hesitation in accepting Mr AT's evidence that his transfer was purely internal and had nothing whatsoever to do with Dr A or Ms B's audit or complaints nor was it an attempt by the IRD to keep Dr A away from dealing with the various matters that are the subject matter of this Appeal.

(5) Alleged conflict of interest on the part of the assessors

(a) This allegation is difficult to understand. In short, Dr A alleges that an assessor can make assessments, investigate into the taxpayer's affairs, negotiate with the taxpayer, give opinions and make comments, and draft determinations for the Commissioner.

(b) But these are the very functions and duties of an assessor conferred by the IRO. Any determination can be objected to by the taxpayer pursuant to the relevant provisions of the IRO (see section 64(4) of the IRO). Again, we accept there is no conflict in an assessor having the power to make an assessment to obtain information from the taxpayer or third parties and in turn, to negotiate and draft a determination for the Commissioner. There is nothing in this point.

(6) Alleged procedural unfairness in not finalizing Company C assessments for 95/96 to 05/06 before assessing the taxpayers under section 61A

Again, Dr A alleges that there was procedural unfairness because the IRD 'chose to hold up the assessment of [Company C] 95/96 to 05/06'. He further alleges that Company C's assessments 'should be finalized first to ascertain the change in financial position to tax payer for the years after 01/02, before we can discuss para 1(d) and (e) of s61A on the taxpayer for the same years of 01/02 to 05/06'. Mr Fung asserts that it is Dr A and Ms B's contention that the IRD should never had considered the application of section 61A because Company C's assessments were not finalized. Dr A when cross-examined again was vague and uncertain about this allegation and could not give us an explanation. However, we have no difficulties in accepting the submission of Mr Fung that section 61A of the IRO is a stand-alone provision and does not depend on whether another taxpayer's assessments have or have not been finalized. Hence, we conclude that there was never any alleged procedural unfairness in the issuing of the relevant section 61A assessments.

(7) Further allegations of dishonesty and illegality and other miscellaneous allegations

(a) As we have pointed out previously, in the witness statement of Dr A, he made a list of numerous allegations against the IRD's assessors. Many of them were incomprehensible and difficult to ascertain and understand. In any event, Mr AT in his examination in chief dealt with each and every allegation and denied that these were true.

(b) We have no hesitation in accepting Mr AT's evidence and rejecting Dr A's allegations. Indeed, no evidence was ever put before the Board to support them. In particular, Dr A talks about utilizing 'spin language', ignoring opposing evidence, using without prejudice correspondence as procedural impropriety and drafting prejudicial draft statement of facts ignoring opposing evidence. None of these allegations were ever made out.

(c) As we have previously indicated, Dr A and Ms B raised the most serious allegations one could ever imagine against the IRD's assessors. They allege dishonesty, capriciousness and have accused Mr AT of lying. As we have previously indicated, we found Mr AT to be a credible witness and we do not accept any of the evidence put to us by Dr A and Ms B.

(d) It is with regret that they had seen fit to raise such allegations without any evidence to support such allegations.

(e) We accept that the Commissioner has gone out of his way to be transparent. He had disclosed numerous documents both internal and external and indeed, tendered Mr AT for cross-examination. They have hidden nothing. We conclude there was nothing in any of Dr A and Ms B's complaints. We also conclude that the relevant IRD's assessors involved in Dr A and Ms B's tax audit and investigations acted in an honest and proper way.

Issue 2 – Whether the expenses claimed by Ms B for 1995/96 to 1998/99 are deductible

122. Section 16(1) of the IRO provides as follows:

'*In ascertaining the profits in respect of which a person is chargeable to tax under this Part for any year of assessment there shall be deducted 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 ...*'

123. Sections 17(1)(a) and (b) provide as follows:

'*For the purpose of ascertaining profits in respect of which a person is chargeable to tax under this Part no deduction shall be allowed in respect of-*

(a) domestic or private expenses .....

> *(b) ..... any disbursements or expenses not being money expended for the purpose of producing such profits .....*'

124. Hence, to be deductible, the expense in question must fall on the taxpayer as a trader and must be for the purpose of earning profits. It is not enough for the expense to simply arise out of the trade or otherwise be connected with the trade. See Strong & Co v Woodifield [1906] AC 448:

> '*In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, or it may be connected with something else quite as much as or even more than with the trade. I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered*'. (per Lord Loreburn at page 452)

> '*I think that the payment of these damages was not money expended "for the purpose of the trade." These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, &c. I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits.*' (per Lord Davey at page 453)

125. To the same effect, our attention was also drawn to:

(1) CIR v Cosmotron Manufacturing Co Ltd [1997] HKLRD 1161; and

(2) CIR v Chu Fung Chee [2006] 2 HKLRD 718.

126. The following disallowed expenses claimed by Ms B during this period are set out as follows:

(1) $72,858 for 1995/96;
(2) $104,813 for 1996/97;
(3) $45,896 for 1997/98; and
(4) $72,448 for 1998/99 (up to 30 September 1998).

127. Ms B was requested to provide information and documents to support those expenses. In particular, we refer to a letter dated 16 June 2004 from the IRD. The Commissioner concluded that the expenses on consumable and entertainment claimed by Ms B were of a private and domestic nature or were not expenses incurred in the production

of chargeable profits and as such, were prohibited from deduction and that the expenses on cleaning, minor equipment, newspaper and magazines, printing and stationary and sundries claimed by Ms B were not substantiated, either in whole or in part, by any documentary evidence.

128. As we have previously pointed out, the burden of proof falls clearly upon the shoulders of Ms B to show that the assessments for years 1995/96 to 1998/99 are incorrect or excessive and in particular, we repeat the provisions of section 68(4) of the IRO. Again, we accept the submissions of Mr Fung that in order to discharge the statutory burden, Ms B must demonstrate to our satisfaction as to why each and every relevant expense is deductible under sections 16 and 17 of the IRO.

129. It is unequivocal and clear that Ms B had not even begun to discharge this burden. In her witness statement, she says nothing about these expenses and indeed, on cross-examination, she never was able to put forward any credible evidence to support that these expenses were indeed deductible.

130. In our review of her evidence, we commented that she failed to give any satisfactory explanation regarding her deductions for various lunches and drinks at AA Club and she relies on the bland statement that the mere fact that she was there and socializing was sufficient to enable these to be deductible. Again, it is quite clear that the entertainment expenses of $21,285 were clearly of a private and domestic nature.

131. We have no hesitation in concluding that she had failed to produce any credible evidence to show that any of these expenses could be deducted.

Issue 3 – Whether the relevant transactions constitute artificial transactions and should be disregarded for the purpose of section 61 of the IRO

132. Section 61 of the IRO provides as follows:

> ' *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.*'

133. There are four stages in the application of section 61:

(i) Identification of the transaction;

(ii) Consideration of whether the transaction reduces the amount of tax payable;

(iii) Consideration of whether the transaction is artificial or fictitious;

(iv) Disregarding of the transaction and making of an assessment accordingly.

See D13/07, (2007-08) IRBRD, vol 22, 365 at 113.

134. The concept of 'artificiality' was dealt with and discussed by Lord Diplock in Seramco Ltd Superannuation Fund Trustees v Income Tax Commissioner [1977] AC 287. Lord Diplock when applying a Jamaican anti-avoidance provision, which was almost identical to section 61 of the IRO said at page 298A-D as follows:

> *' "Artificial" is an adjective which is in general use in the English language ..... 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.'*

135. This passage was cited by Woo JA in Cheung Wah Keung v CIR [2002] 3 HKLRD 773 ('Cheung Wah Keung') at pages 788G-789C. Woo JA went on to say at page 789C-E as follows:

> *'….. We are of the view that whether a transaction which is commercially unrealistic must necessarily be regarded as being "artificial" depends on the circumstances of each particular case. We agree with the submission of Mr. Cooney, however, that commercial realism or otherwise can be one of the considerations for deciding artificiality In the present case, the Board found as a fact that there was no "commercial reality in the transaction" and that there "simply was no commercial sense in the transaction"; thus it was open to the Board to reach the conclusion that the transaction was artificial under s.61.'*

136. The position in respect of service companies was dealt with in D110/98, IRBRD, vol 13, 553, this was a case where the taxpayer was a medical practitioner. The taxpayer claimed that the totality of management fees paid by him to a service company should be treated as deductible expenses under section 16 of the IRO. The Commissioner's position was that the service company was essentially a mere tax vehicle that this was an artificial transaction. The head note provides as follows:

> ' *(1) Section 61 of the IRO is to be given a fair and sensible interpretation. It is there to prevent the use of artificial of fictitious devices in order to gain a tax advantage. The word 'transaction' connotes some form of dealing. In the context of a service company, the relevant transaction is not the setting up of the company itself but the alleged dealing or dealings with the taxpayer said to give rise to the tax relief claimed.*

(2) Where the agreed remuneration is a fixed fee (whether including or excluding expenses) and there is some correlation between that fee and the services provided this is at least an indication of the commerciality of the arrangement. Where, however, there is no fixed fee and there appears little correlation between the management fees charged and the services actually provided, the Commissioner is entitled to raise queries as to the artificiality of service companies.

(3) It is not the function of a service company to provide the means by which domestic and private expenses are made tax deductible. Where the employee of the service company generating these expenses is the taxpayer himself, this leaves much room for scepticism.'

137. Mr Fung put forward the following submissions to us and drew our attention to the relevant indisputable facts. In particular, he drew our attention to the following:

'105. On 24 September 1998, [Ms B] in the capacity of the director of [Company C] applied for business registration of a branch under the name of [Company D]. See also §1(4)(c) of [Dr A]'s Determination.

106. On 20 December 2000, [Dr A] in the capacity of the manager of [Company C] applied for business registration of a branch under the name of [Company K]. See also §1(4)(d) of [Dr A]'s Determination.

107. [Dr A]

(1) For the years of assessment 1995/96, 1996/97, 1997/98, 1998/99, 1999/00 and 2000/01, [Dr A] reported the profits derived from his medical practice and offered them for assessment to profits tax. See also §1(6) of [Dr A]'s Determination.

(2) For the years of assessment 2001/02, 2002/03, 2003/04, 2004/05 and 2005/06 (up to 30 June 2005), [Dr A] declared that he was employed as a consultant by [Company C] and offered his salary for assessment to salaries tax. See also §1(7) of [Dr A]'s Determination.

108. [Ms B]

(1) For the years of assessment 1995/96, 1996/97, 1997/98, and 1998/99, [Ms B] reported the profits derived from her physiotherapy practice and offered them for assessment to profits tax. See also §1(5) of [Ms B]'s Determination.

(2) For the years of assessment 1999/00, 2000/01, 2001/02, 2002/03, 2003/04, 2004/05 and 2005/06, [Ms B] declared that she did not derive profits from any sole proprietorship business or have income chargeable to salaries tax. See also §1(8) of [Ms B]'s Determination.

109. [Company C]

(1) [Company C] was incorporated in Hong Kong on 29 May 1987 with issued share capital of HK$2, divided into 2 ordinary shares of HK$1 each. At the material times, [Ms B] and [Dr A]'s mother were the sole shareholders of [Company C], and [Ms B] and [Dr A]'s late father were the sole directors. See §1(4) of [Dr A]'s Determination.

(2) For the years of assessment 1996/97, 1997/98, 1998/99, 1999/00 and 2000/01, [Company C] reported its assessable profits as "nil". [Company C]'s reported "accumulated loss carried forward" for the year assessment 2000/01 was HK$5,239,865. See also §1(9) of [Ms B]'s Determination.

(3) For the years 2001/02, 2002/03, 2003/04, 2004/05 and 2005/06, [Company C] reported its net assessable profits tax "nil", that it had "accumulated loss carried forward", that it had received "consultation/servicing fee" ranging from HK$1.3 million odd to HK$2.7 million odd, and that it had expenses ranging from HK$1.1 million odd to HK$2.2 million odd. See also §1(10) of [Ms B]'s Determination.

(4) In its notes to the financial statements for the years of assessment 2001/02 to 2003/04, and also the Reports of the Directors for the years of assessment 2004/05 and 2005/06, [Company C] stated the business/trade name as follows:

> "The company carries on business in/under the name of "[Company D]" and "[Company K]"." '

(i) Identification of transaction

138. Mr Fung on behalf of the Commissioner has identified the transaction in Dr A's case as being the interposition of Company C operating a branch under the name of Company K. In Ms B's case, the transaction is the interposition of Company C operating a branch under the name of Company D. For the remainder of these submissions, such interpositions will collectively be referred to as 'the Transactions'.

139. We accept that it is well-established that a transaction for the purpose of section 61 can be identified by reference to the interposition of a company between a taxpayer and a third party (see Cheung Wah Keung).

140. Mr Fung also submits that it is not the incorporation of Company C as being the relevant transaction relied on.

(ii) Whether the transaction reduces the amount of tax payable

141. It is obvious by the interposition of Company C between Dr A and his patients and between Ms B and her patients that their relevant tax liability had been reduced. If there was no interposition of Company C, then Dr A and Ms B would have received fees directly from patients and their respective provision of professional services on which profits tax would be chargeable.

142. As a result of the interposition of Company C, Dr A and Ms B were not chargeable to profits tax in respect of the profits of Company K and Company D respectively. On the other hand Company C claimed as deduction salaries paid to Dr A and Ms B, as well as various other private and domestic expenses or expenses not incurred in the production of chargeable profits which were reported as directors' quarters and fringe benefits. Such expenses would not otherwise be deductible if Dr A and Ms B were themselves carrying on their respective sole-proprietorship practice.

143. Therefore, it is clear that as a result of the interposition of Company C, there had been a reduction of Dr A and Ms B's tax liability.

(iii) Whether the transaction is artificial or fictitious

144. We relied on the decision of Woo JA in Cheung Wah Keung whereby commercial realism is one of the considerations in deciding artificiality. We accept the submissions of Mr Fung on behalf of the Commissioner that the Transactions were commercially unrealistic.

145. Dr A and Ms B tried to portray a genuine incorporation of their professional practice by reference to general textbook advantages of incorporation. In respect of Dr A, we have the following observations:

(1) At all the material times, he was the only doctor practicing at Company K.

(2) The contemporaneous documents show that the insurers and the drug and clinic product suppliers were transacting with Dr A in his own name and not with Company C.

(3) Hospital AM and Company AC also dealt with Dr A in his own name and

not with Company C. Dr A's name was shown in Company AC panel list of doctors.

(4) It was Dr A and not Company C who procured the relevant professional indemnity from the Association AK.

(5) In the employment contract produced by Dr A, it was signed by Dr A for both the employer and the employee. Dr A was stated to be employed as a consultant but no duties were specified in the contract. We also note that this contract was supposed to cover the period from 1 December 2000 but was only signed on 14 January 2003. It is clear that this was a retrospective contract. It is also clear that this was signed after the IRD's commencement of tax audit and investigation. He could also not refer to any credible documents before the Board to show that the $25,000 salary was a reasonable remuneration from an employed doctor at the time. On the contrary, if one looks at his income from 1995/96 to 2000/01, see paragraph 26 above, it is clear that a salary of $25,000 was far from realistic. Hence, we accept the submissions of Mr Fung that this document lacks the realism of a commercial contract.

(6) The absence of Company C in Dr A's medical practice at the material times also demonstrates that the involvement with Company C was completely unnecessary.

146. With regard to Ms B, we have the following observations:

(1) Ms B was the main physiotherapist who personally rendered the services at Company D.

(2) The contemporaneous documents clearly show that Ms B's staff was transacting with Ms B in the name of her practice, Company D, and not with Company C.

(3) Company AB and Company AD also dealt with Ms B in the name of her practice, Company D, and not with Company C.

(4) In cross-examination, Ms B agreed that it was her in the name of Company D and not Company C who dealt with corporate clients. Indeed, she also admitted that it would not be commercial viable to use Company C to deal with the corporate clients because they would not deal with such a company.

(5) In the staff contract produced by Ms B, this was signed by Ms B as both employer and employee. Ms B was stated to be employed as a consultant but no specific duties were set out in the contract. The contract was

undated and the terms of the contract were vague. Again, we refer to paragraph 42 whereby we set out her answers to the various questions put to her in cross-examination. It is clear that the contract was retrospectively made as a result of advice from his accountant, Ms AP. The supposed salary of $20,000 was suggested by the accountant and was never paid. We conclude that this document is clearly unrealistic and indeed, we accept the submissions of Mr Fung that this bears the hallmarks of a fictitious document.

(6) The conspicuous absence of Company C in Ms B's physiotherapy practice at the material times also clearly demonstrates that the involvement with Company C was completely unnecessary.

147. In respect of Company C, we have the following observations:

(1) We are obviously entitled to look at the charging of various private and domestic expenses to the service company to determine whether the involvement of the service company is artificial.

(2) Substantial expenses of a private and domestic nature or not incurred in the production of chargeable profits were allocated to Dr A as expenses of Company C. These expenses included expenses for directors' quarters, electricity, gas and water, entertainment, motor vehicle, overseas travelling, etc. In cross-examination, Dr A agreed that the directors' quarters expenses relating to utility expenses of his then matrimonial home and the entertainment expenses related to the monthly subscription fee for the Club AW and that some of the overseas travelling expenses related to the family holidays he had with his former wife and two children.

148. Hence, it can be seen that for the above reasons, the Transactions were in our view clearly artificial.

(iv) Disregarding of the transaction and making of an assessment accordingly

149. Clearly, if the Transactions are disregarded, then Dr A and Ms B would have been providing their service directly to their respective patients. We accept that the relevant assessments of Dr A and Ms B were made on the basis that they were each carrying on their practice personally.

150. We therefore accept all the above reasons that Dr A and Ms B were correctly assessed to profits tax in respect of the profits allegedly earned by Company C under section 61 of the IRO.

Issue 4 – Whether the sole or dominant purpose of enabling Dr A and Ms B in entering into the relevant transactions was to enable to himself/herself to obtain a tax benefit within the meaning of the section 61A of the IRO

151. Section 61A(1) of the IRO provides as follows:

> ' *This section shall apply where any transaction has been entered into or effected after the commencement of the Inland Revenue (Amendment) Ordinance 1986 (7 of 1986) (other than a transaction in pursuance of a legally enforceable obligation incurred prior to such commencement) 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.'*

152. In Ngai Lik Electronics Co Ltd v CIR [2009] 5 HKLRD 334 ('Ngai Lik'), Ribeiro PJ at paragraph 34 concluded that there were three intersecting conditions that must be satisfied before the Commissioner can exercise a power to raise an assessment under

section 61A. They are:

(1) Identification of the transaction by reference to which the Commissioner seeks to apply the section.

(2) Ascertainment of whether the transaction has the effect of conferring a tax benefit on the taxpayer.

(3) Viewing the transaction through the prism of the 7 factors mentioned in section 61A, whether it would objectively be concluded that it was entered into or carried out for the sole or dominant purpose of enabling the taxpayer to obtain the tax benefit.

Condition 1 – Identification of the 'transaction'

153. 'Transaction' is defined in section 61A(3) to include 'a transaction, operation or scheme whether or not such transaction, operation or scheme is enforceable, or indeed to be enforceable, by legal proceedings'.

154. The transaction is identified by the Commissioner. In turn, the taxpayer cannot object to the Commissioner's identification of it as long as what is identified is a transaction within the statutory meaning of section 61A(3). See:

(1) FCT v Peabody (1994) 181 CLR 359;
(2) FCT v Hart (2004) 217 CLR 216; and
(3) Ngai Lik Electronics Co Ltd v CIR [2009] 5 HKLRD 334.

155. As stated in paragraph 8 of this decision, the Commissioner has provided to Dr A and Ms B particulars of the relevant transactions for the purpose of section 61A.

Condition 2 – Conferring the tax benefit

156. 'Tax benefit' is defined in section 61A(3) to mean 'the avoidance or postponement of the liability to pay tax or the reduction in the amount thereof'.

157. The Commissioner has already provided to Dr A and Ms B particulars of the relevant 'tax benefit' (see paragraph 8).

158. The operative part of this identification is *'Reduction in the amount of [Dr A's or Ms B's] liability to pay profits tax'* which is clearly within the statutory definition of 'tax benefit' in section 61A(3).

159. The quantification of this 'tax benefit' is in short calculated by the difference of tax liability of Dr A's or Ms B's tax liability before and after the interposition.

160. We refer to CIR v Tai Hing Cotton Mill (Development) Ltd (2007) 10 HKCFAR 704 ('Tai Hing'). There, Lord Hoffmann NPJ explained how one answers the question of whether the transaction has the effect of conferring a tax benefit. He states that such a question would involve a comparison because '[a] benefit is something which makes one's position better'. According to Lord Hofmann NPJ in Tai Hing, the comparison is between the effect of the transaction in question on one hand and the effect of an 'appropriate' hypothetical transaction in question on the other.

161. Mr Fung submits that the appropriate hypothetical transaction would be the provision of professional services by Dr A and Ms B to the patients in their respective sole-proprietorship business. Again, we accept that this was exactly what happened before Company C was interposed.

Condition 3 – Determination of Purpose

162. The question of whether or not one of the persons who entered into or carried out the transaction did so with the sole or dominant purpose of enabling the taxpayer to obtain a tax benefit is an objective one (see Yick Fung Estates Ltd v CIR [2001] 1 HKLRD 381).

163. Again, the test is, having regard to the objective facts, as to the 7 matters set out in section 61A(1) of the IRO upon which a reasonable person would conclude that the transaction in question was entered into or carried out for the sole or dominant purpose of enabling the taxpayer to obtain a tax benefit (see FCT v Spotless Services Ltd (1996) 186 CLR 404 and also Ngai Lik).

164. We therefore now turn our attention to the relevant 7 matters with our observations and comments:

(a) The manner in which the transactions was entered into or carried out

(1) This includes the timing of the transaction, the consideration of the way in which and the method or procedure by which the transaction was established.

(2) In Ngai Lik, Ribeiro PJ at paragraph 99(b) said as follows:

> '*tell us that it is permissible to look at the genesis of the transaction and also at the actual manner of its implementation … [and is] not confined simply to the features of the scheme itself or simply to its terms as set out on paper.*'

(3) In the present case, the manner in which the Transactions were entered into or carried out, we have the following observations:

(a) Before the transaction was entered into:

(i) Dr A had been carrying on a medical practice as a sole proprietor for more than 10 years since 1987; and

(ii) Ms B had been providing physiotherapy services as a sole proprietor since 1992.

(b) Company C was a company which had claimed substantial losses out of small incomes for years.

(c) The Transactions were entered into at a time when Company C had accumulated a substantial tax loss.

(d) Dr A was the only doctor in Company C who personally provided all the medical services to the patients. Dr A, not Company C, was the affiliate doctor of Company AC and was the person who had the admission privilege in Hospital AM.

(e) Ms B personally provided substantially all services to the patients. She, and not Company C, was the panel physiotherapist of the employees' medical benefits schemes of Company AB and the Bank V Group.

(f) Ms B and Dr A's parents were the only shareholders/directors of Company C.

(4) Hence, we have no hesitation in concluding that the manner in which the Transactions were entered into or carried out does not suggest a commercial transaction.

(b) The form and substance of the transaction

165. In Ngai Lik, Ribeiro PJ at paragraph 99(c) said as follows:

'*Paragraph (b) indicates that one is entitled to look beyond the form and at the substance of the transaction, making it plain, for instance, that approaches such as that of Lord Tomlin in Commissioner of Inland Revenue v Duke of Westminster [1936] AC 1, confining the court to the legal forms has no place in the s.61A regime. This was a point made by the High Court of Australia in the context of similar Australian legislation in Commissioner of Taxation of the Commonwealth of Australia v Spotless Services Ltd (1996) 186 CLR 404. Clearly, para.(b) overlaps with the other paragraphs as one is in each case looking at the substance and not just the form of the relevant arrangement.*'

166. We would comment as follows:

(1) The form of the Transactions is that Dr A and Ms B were employed as a consultant to Company C.

(2) However, the substance is that Company C really had no function and it was Dr A and Ms B who made day-to-day dealings with third parties. Again, in our view, this is another factor that points to a tax avoidance purpose.

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

167. In Ngai Lik, Ribeiro PJ at paragraph 99(d) again comments that factor (c) 'requires the fiscal effects of the overall transaction to be assessed'.

168. We accept the submission of Mr Fung:

> 'If [Company C] were accepted as the entity operating the medical and physiotherapy practices, the income from such practices would be assessable to profits tax as [Company C]'s income under section 14 of the IRO. Accordingly, [Company C] would be entitled to claim deduction of expenses under section 16(1) of the IRO. Such expenses would include salaries paid to [Dr A] and his father, and disbursement of [Dr A] and [Ms B]'s domestic and private expenses (see the submissions on expenses in the Section on Issue 3 above). The profits from such practices would be set off by the accumulated loss of [Company C]. At the same time, [Dr A] and [Ms B] would not be liable to profits tax in respect of the income accrued to [Company C] for their services while [Dr A] would only be assessed to salaries tax on his reduced income from [Company C] (namely HK$25,000 per month).'

169. However, it is clear that if the interposition of Company C was disregarded under section 61A, Dr A and Ms B would be assessed to profits tax in respect of the income derived from their respective provision of professional services. Hence, Dr A and Ms B's domestic or private expenses would not be allowed to be deducted under section 17(1)(a) of the IRO.

170. The amount of tax which Dr A and Ms B was each paying before and after the interposition of Company C can be summarized in the table below. In their cross-examination, Dr A and Ms B were shown these schedules and were invited to comment. They had no adverse comments.

Dr A

Before interposition of Company C

Year of Assessment	Tax Liability (HK$)
1995/96	78,102
1996/97	212,163
1997/98	199,513
1998/99	216,036
1999/2000	145,021
2000/01	112,129
2000/01 (Additional – 1-5-2000 – 31-12-2000	38,683

After interposition of Company C (but for section 61A)

Year of Assessment	Tax Liability (HK$)
2001/02	120
2002/03	240
2003/04	400
2004/05	560
2005/06	720

Ms B

Before interposition of Company C

Year of Assessment	Tax Liability (HK$)
1996/97	30,670
1997/98	50,407
1998/99	58,909

After interposition of Company C (but for section 61A)

Year of Assessment	Tax Liability (HK$)
1999/2000	0
2000/01	0
2001/02	0
2002/03	0
2003/04	0
2004/05	0
2005/06	0

171. Again, in our view, the above clearly points to a tax avoidance purpose.

(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

172. In Ngai Lik, Ribeiro PJ at paragraph 99(e) says that factors (d) and (e) require the courts '*to look at the financial effects of the particular scheme on the taxpayer and also on persons connected with the taxpayer, such as the group to which a taxpayer company belongs*'. Under factor (d), '*[it] may be highly significant ... that the scheme brings about no changes to the taxpayer's financial position while at the same time producing a tax benefit*'.

173. Again, we accept that it cannot be disputed that Ms B and Dr A's parents were the shareholders and/or directors of Company C at the material times. However, according to the mandate for a bank account of Company C maintained at Bank V, both Dr A and Ms B were authorized to operate such an account. This account (numbered XXX-XXXXXX-XXX) was the very account into which Dr A directed Company AC to pay his fees. Hence, we accept that Dr A and Ms B had the control over the income and expenses of Company C. Therefore, we also accept that there should not be any difference whether the income from the relevant practices were paid into Company C or to Dr A/Ms B in their personal name.

174. We also take the view that the interposition of Company C between Dr A and Ms B and their patients would enable them to claim for deduction of expenses and set off the losses which would not otherwise be available to them. Hence, Dr A and Ms B's financial positions were improved to the extent of the tax savings by interposition of Company C. Again, we accept that this points to a tax avoidance purpose.

(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

175. Again, as far as Dr A and Ms B's patients are concerned, there cannot be any difference to them whether they paid their consultation fee to Company C, or to Dr A/Ms B.

176. As far as Company C is concerned, it did not need to pay for the alleged transfer of business from Dr A to Ms B. Even though Company C did not have any role to play in the earning of its income, it was allowed to receive income which was derived from Dr A and Ms B's personal services to the patients. This is notwithstanding the fact that income from patients was paid into Company C's account, Company C did not need to pay any tax as it had substantial accumulated losses.

177. In short, there is no change in the financial position of persons who have or have had connection with Dr A and Ms B. Again, this factor points to a tax avoidance purpose.

(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

178. In Ngai Lik, Ribeiro PJ at paragraph 99(f) says as follows:

> '*the scheme incorporates dealings which are not at arm's length may (as para.(f) indicates) be an important signpost since commercial dealings are normally conducted at arm's length and the uncommercial features of a transaction may suggest that it was entered into with the dominant purpose of producing a tax benefit for the taxpayer'*.

179. Dr A only received a modest remuneration from Company C in return for his personal services rendered as a medical practitioner. Ms B did not receive any remuneration from Company C (even though the staff contract suggests otherwise) but was only provided with quarters and other fringe benefits.

180. On the other hand, Company C had no real function in operating the relevant practices and was allowed to receive all the income derived from Dr A and Ms B's personal services. But for the fact that Company C was owned and controlled by Ms B and Dr A's parents and that Dr A and Ms B had control over Company C's bank accounts, we accept Mr Fung's submissions that it is most unlikely that Dr A and Ms B would enter into such an agreement.

181. Again, we conclude that the transactions have created rights or obligations which would not normally be created between persons dealing with each other at arm's length. Again, this is another factor pointing towards a tax avoidance purpose.

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

182. This is not applicable. Since Company C is a Hong Kong company, this factor has no application in these Appeals.

183. Therefore, having carefully considered all the 7 matters, we come to the conclusion that a reasonable person would come to the inevitable conclusion that the transactions which were entered into or carried out were for the sole or dominant purpose of enabling Dr A and Ms B to obtain a tax benefit.

184. In short, the reality of the situation was that the taxable income generated from Dr A's medical practice whether carried on in his own name or in the name of Company AC had always been the same income, namely fees received for medical treatments given by Dr A as a medical doctor to his patients. Company C had no function in generating this income. No medical doctor acting at arms length in a commercially viable contract would have agreed to pay such income earned by him to an incorporated company in exchange for a salary (assuming a salary was indeed paid) or even a salary plus director's quarter that was no match to that income. In this case Company C was a company controlled by Dr A and Ms B. They were not inhibited from enjoying the fruit of the income. No matter how they were

disguised, family trips abroad, dining at clubs and outgoings of the matrimonial home were all expenses of a personal nature. By transferring his fee income to Company C, Dr A had not only sought to transfer the tax liability in respect of such income from himself to Company C with the result that he had to pay but nominal tax, these personal expenditure were also transferred to Company C which after deducting such expenses and its accumulated loss was left with a very limited tax liability.

185. The same was true of the income generated from Ms B's physiotherapy practice. It had always been the same income, namely fees received for physiotherapy treatments given by Ms B to her patients. Company C played no part in generating this income. By transferring such income to Company C, Ms B did not have to pay any tax at all while Company C could deduct its accumulated loss and other expenses from such income and thus reducing the consequent tax liability.

186. In our view such interposition of Company C in both cases was clearly artificial and fictitious under section 61 of the IRO. Likewise, it was clearly done for the sole or dominant purpose of enabling Dr A and Ms B to obtain a tax benefit within the meaning of section 61A.

Application of section 61A(2)

187. Since all stages on section 61A(1) have been satisfied, we accept that the Commissioner was clearly correct to apply section 61A(2)(a) to assess Dr A and Ms B as if the Transactions have not been entered into or carried out. Again, we relied on Shui On and in particular, adopt the wordings of Lord Walker NPJ. He said at paragraph 51 as follows:

> '*The simplest situation is when a taxpayer has an existing source of income subject to profits tax, and participates in some free-standing transaction designed to produce a loss in order to set it against the income which would otherwise be taxable. If the three interlocking conditions are satisfied the appropriate action for the Commissioner is to make an assessment in the manner indicated in s.61A(2)(a) – that is by wholly disregarding the loss-making transaction. (Possibly the Commissioner might take the same course under s.61, relating to artificial or fictitious transactions, but in practice s.61 seems to have been little used since s.61A was enacted.)*'

188. We conclude therefore that it was perfectly proper and legitimate for the Commissioner to invoke her power under section 61A(2) to raise the assessments on Dr A and Ms B by disregarding the interposition of Company C and assess Dr A and Ms B in respect of profits tax derived from their respective provision of professional services. This issue was accepted in Asia Master Limited v CIR (unreported, HCAL 114/05, 30.11.06). Chu J said at paragraphs 80 and 81 as follows:

> '*In the context of the present case, the transaction impugned is the interposition of [BVI company] between [the taxpayer] and [Mainland factory]. The*

> *Commissioner also considers that [BVI company] was interposed to bring about and did cause a substantial reduction in the profits, hence tax liability, of [the taxpayer]. On this basis, section 61A(2) empowers the Assistant Commissioner to assess [the taxpayer's] liability to tax as if there was no involvement or interposition of [BVI company] in the sales. Hence, it is open to the Assistant Commissioner to raise assessment on [the taxpayer] on the basis of direct sales between [the taxpayer] and [Mainland factory] and to treat the entire profits of [BVI company] as those of [the taxpayer]. The Assistant Commissioner is further entitled to counteract the tax benefit obtained by [the taxpayer], being the reduction in the amount of [the taxpayer's] tax liability, in such other manner as he considers appropriate.*
>
> *It follows from the above analysis of the effects of ... section 61A that the Commissioner has proper legal basis to treat the whole of [BVI company's] profits as those of [the taxpayer].'*

Conclusions

189. We therefore conclude that we have no hesitation in dismissing this Appeal for the reasons set out above.

190. We refer to section 68(9) of the IRO whereby there is power for this Board to make an order for costs. We have regard to the way in which Ms B conducted this Appeal and have regard to various allegations which we have found to be unfounded.

191. Having regard to the way in which this matter was conducted, we have no hesitation in ordering that a sum of $5,000 should be awarded as costs and the sum is to be added to the tax charge and recovered accordingly. Finally, we take this opportunity of thanking the parties for the assistance in respect of this matter.