Case No. D29/11

Profits tax – outgoings and expenses – whether deductible – treatment of losses – whether set off against assessable profits for subsequent years of assessment – sections 2(1), 14(1), 16(1), 17(1), 19C(4), 19D(1) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Chow Wai Shun (chairman), Chau Cham Kuen and Choi Wun Hing Donald.

Date of hearing: 11 May 2011.
Date of decision: 10 October 2011.

The Appellant contends that the rental refunds, licence fees, professional fees and sundry expenses should have been allowed for deduction in computing its assessable profits in the relevant years of assessment; and that part of its assessable profits for the year of assessment 2001/02 can be set off by the loss claimed for the year of assessment 2000/01.

Held:

1. Pursuant to section 68(4) of the IRO, the onus is on the Appellant to prove:

   (a) Why and to what extent each of the expenses in issue is deductible under sections 16 and 17 of the IRO; and

   (b) That it had sustained the loss claimed for setting off its assessable profits in subsequent years pursuant to section 19C of the IRO.

2. Deductibility of various expenses in issue

   (a) Rental refund

   No deduction allowed as there has been no witness's corroborative evidence, no supporting documentation other than intra-group vouchers or debit notes and no substantiation as to how the amount for each year was decided.

   (b) Licence fees

   (i) Annual Country A government license and local service fees

   Deduction allowed – The Appellant has genuinely incurred such expenses in compliance with the requirements in Country A for

its continual registration as a Part XI company in Hong Kong earning income which is subject to profits tax.

(ii) Hong Kong business registration fees

Deduction allowed – The Appellant has genuinely incurred such expenses in compliance with the requirements in Hong Kong.

(c) Professional fees

(i) Deduction allowed for services rendered in respect of the Appellant's profits tax matters and secretarial services which are generally business expenses.

(ii) Deduction not allowed for services rendered in respect of the attendance of a court hearing on the Appellant's behalf which was not incurred in the production of the Appellant's assessable profits.

(iii) Deduction not allowed for the debit note dated 28 April 2003, in which a lump sum (inclusive of the court attendance service fees) was charged with no basis for any apportionment.

(d) Audit fees

(i) Deduction not allowed for services rendered in connection with auditing the Appellant's financial statements for those relevant years of assessment as the Appellant has no obligation to pay the same.

(ii) Deduction not allowed for those shares in group audit fees as there has been no reason, no explanation of the purpose and no basis of the computation for such sharing of the group expense from the Appellant.

(e) Sundry expenses

Deduction not allowed as the Appellant has made no submission, furnished no information or documents in support.

3. The claim of loss for the year to be carried forward to subsequent years of assessment fails as there has been no submission, oral or written from the Appellant.

4. The appeal has been allowed in part and the case shall be remitted to the Respondent to adjust the assessable profit, and hence the amount of tax payable, in each of those relevant years of assessment accordingly.

5. The Board are obliged to stress again the importance of exchange of relevant documents well in advance before the hearing and seeking to adduce documents at the hearing should be discouraged.

6. Any appellant seeking to adduce documents at the hearing may run the risk of a cost order under section 68(9) against him if circumstances warrant.

Appeal allowed in part.

Cases referred to:

Commissioner of Inland Revenue v Chu Fung Chee [2006] 2 HKLRD 718
So Kai Tong v Commissioner of Inland Revenue [2004] 2 HKLRD 416
Commissioner of Inland Revenue v Secan Limited and Another [2000] 3 HKLRD 627

Mr Li Chak Hung of Profair Limited for the Taxpayer.
Yip Chi Chuen and Ong Wai Man for the Commissioner of Inland Revenue.

Decision:

1. The Appellant, Company C objected to the profits tax assessments for the years of assessment 2000/01 to 2004/05 raised on it. By the Determination of the Acting Deputy Commissioner of Inland Revenue dated 18 March 2010 ('the Determination'), the profits tax assessment for the year of assessment 2000/01 was annulled and the profits tax assessments for the other years of assessment in dispute were revised and reduced. The Appellant appealed against the Determination on the ground that the assessments were incorrect and excessive. No further elaboration, however, was given by the Appellant in its statement of grounds of appeal.

2. Mr Li Chak Hung of Profair Limited appeared for the Appellant. No witness was called. At the hearing, Mr Li requested to adduce additional documents (A2) including the financial report prepared by an auditor for 2000 and supporting evidence of expenses the Appellant claimed over the years from 2000 to 2004. Representatives for the Respondent objected. Both sides were invited to make submissions on this matter. At the end of the day, the Board, not without reluctance, acceded to Appellant's request but allowed the Respondent to make further submission within seven days after the hearing on the additional documents produced, with a right to the Appellant to reply within another seven days on receipt of the Respondent's further submission. We shall deal with A2 in detail.

3. Despite having so ruled, the Board opined that documents should be exchanged between parties in advance of the hearing. For any reason a document only comes about lately, the parties should consider seeking a postponement of the hearing.

4. Since Mr Li raised no dispute to the facts upon which the Determination were arrived at and called no witness to give any further oral evidence, we find the following facts as facts relevant to this appeal:

(a) (i) The Appellant is a private company incorporated in Country A. It was registered as an overseas company in Hong Kong under Part XI of the Companies Ordinance in 2000.

(ii) In its Profits Tax returns for the years of assessment 2000/01 to 2004/05, the Appellant described its principal activities as 'property investment and investment holding'.

(iii) The Appellant closed its accounts on 31 December annually.

(b) On 18 January 2000, the properties at Address B (collectively referred to as 'the Properties') were assigned to the Appellant for nil consideration.

(c) On diver dates, the Appellant filed its profits tax returns, together with relevant financial statements and tax computations, for the years of assessment 2001/02 and 2004/05.

(i) In both tax returns, the Appellant declared no assessable profits.

(ii) The Appellant's detailed profit and loss accounts for the years ended 31 December 2001 and 2004 showed, among other things, the following particulars:

	2001/02	2004/05
	$	$
Dividend income	6,500,000	32,043,685
Rental income	1,032,000	1,053,000
Other income	-	1,474
Total income	7,532,000	33,098,159
Less:		
Operating expenses-		
Auditors remuneration	50,000	-
Deficit on revaluation	245,421	-
Depreciation	222,800	223,820
Insurance	2,992	-
Licence fees	8,790	11,940
Loss on disposal of a subsidiary	-	70,715

	2001/02	2004/05
	$	$
Sundry expenses	77	-
	530,080	306,475
Profits before tax	7,001,920	32,791,684

(iii) Financial statements for the year of assessment 2001/02 were audited by Deloitte Touche Tohmatsu while those for 2004/05 were certified by the Appellant's director.

(iv) In the note to the tax computations for the year of assessment 2001/02, it was stated that the Appellant would elect to assess its rental income under property tax assessment.

(d) Profair Limited, on behalf of the Appellant, stated that the Appellant derived rental income of $1,032,000 from its letting out of the Properties for the year of assessment 2001/02.

(e) The Assessor was of the view that the Appellant should be assessed under profits tax in respect of the rental income it derived from its property letting business. On 20 September 2006, the Assessor raised on the Appellant the following profits tax assessments for the years of assessment 2000/01 to 2004/05:

	2000/01	2001/02	2002/03	2003/04	2004/05
	$	$	$	$	$
Assessable Profits*	1,032,000		1,100,000	1,100,000	
Profits per account#		7,001,920			32,791,684
Less:					
Dividend income#		(6,500,000)			(32,043,685)
		501,920			747,999
Add:					
Depreciation#		222,800			223,820
Deficit on revaluation#		245,421			-
Loss on disposal of a subsidiary#		-			70,715
Assessable profits		970,141			1,042,534
Tax payable thereon	165,120	155,222	176,000	192,500	182,443

Notes: * Pursuant to section 59(3) of the Inland Revenue Ordinance ('IRO').
Paragraph 4(c)(ii).

(f) The Appellant, through Profair Limited, objected to the above profits tax assessments on the ground that the assessments were excessive. To

validate the objection, the Appellant filed its profits tax returns for the years of assessment 2000/01, 2002/03 and 2003/04 with tax computations and financial statements for the years ended 31 December 2000, 2002 and 2003. The Appellant also filed revised profit and loss accounts and tax computations for the years ended 31 December 2001 and 2004.

(g) The Appellant's accounts for the years ended 31 December 2000, 2002 and 2003 and revised accounts for the years ended 31 December 2001 and 2004 showed, among other things, the following particulars:

	2000/01	(Revised) 2001/02	2002/03	2003/04	(Revised) 2004/05
	$	$	$	$	$
Dividend income	-	6,500,000	55,000,000	16,000,000	32,043,685
Other income	-	-	119	4,843	1,474
Rental income	3	1,032,000	1,032,000	1,074,000	1,053,000
Less:					
Rental refund	-	(516,000)	(516,000)	(516,000)	(516,000)
Total income	3	7,016,000	55,516,119	16,562,843	32,582,159
Less:					
Operating expenses-					
Auditors remuneration	-	50,000	-	-	-
Deficit on revaluation	222,800	222,800	343,000	-	-
Depreciation	245,421	245,421	234,821	225,621	223,820
Insurance	-	2,992	-	-	-
Licence fees	6,090	8,790	4,890	14,890	11,940
Professional fees	40,000	-	50,000	50,000	-
Loss on disposal of a subsidiary	-	-	-	-	70,715
Sundry expenses	6,916	77	-	40,720	-
	521,227	530,080	632,711	331,231	306,475
Profits/(Loss) before tax	(521,224)	6,485,920	54,883,408	16,231,612	32,275,684

(h) The Appellant declared the following assessable profits and adjusted loss in its tax computations:

	2000/01	(Revised) 2001/02	2002/03	2003/04	(Revised) 2004/05
	$	$	$	$	$
Profits/(Loss) before tax	(521,224)	6,485,920	54,883,408	16,231,612	32,275,684
Adjusted items	418,506	(6,081,494)	(54,471,894)	(15,824,094)	(31,798,865)
Assessable profits /(Adjusted Loss)	(102,718)	404,426	411,514	407,518	476,819
Less:					
Loss brought forward set-off		(102,718)			
Net assessable Profits		301,708			
Loss brought forward	-	102,718			
Loss for the year	102,718	-			
Less:					
Loss set-off	-	(102,718)			
Loss carried forward	102,718	NIL			

(i) By a letter dated 10 November 2006, the Assessor requested Profair Limited to provide, among other things, the following information:

(i) date of commencement of the Appellant's business;

(ii) the basis upon which rental income shown in the Appellant's profit and loss account for each of the years of assessment 2000/01 to 2004/05 was arrived at;

(iii) details of rental refund of $516,000 for each of the years of assessment 2001/02 to 2004/05; and

(iv) the nature and details of the following expenses:

	2000/01	2001/02	2002/03	2003/04	2004/05
	$	$	$	$	$
Licence fees	6,090	8,790	4,890	14,890	11,940
Professional fees	40,000	-	50,000	50,000	-
Sundry expenses	-	-	-	40,720	-

(j) In the absence of any reply from the Appellant, the Assessor considered that no loss should be allowed for the year of assessment 2000/01. The

Assessor was also not satisfied that the Appellant should be allowed deduction of any rental refund or those expenses listed in paragraph 4(i)(iv). Accordingly, the Assessor proposed to revise the Profits Tax assessments for the years of assessment 2000/01 to 2004/05 as follows:

	2000/01	2001/02	2002/03	2003/04	2004/05
	$	$	$	$	$
Profits per (revised) computations *		404,426	411,514	407,518	476,819
Add:					
Rental refund #		516,000	516,000	516,000	516,000
Licence fees ^		8,790	4,890	14,890	11,940
Professional fees ^		-	50,000	50,000	-
Sundry expenses ^	-	-	-	40,720	-
Assessable profits	NIL	929,216	982,404	1,029,128	1,004,759
Tax payable thereon	NIL	148,674	157,184	180,097	175,832

Notes: * Paragraph 4(h).
Paragraph 4(g).
^ Paragraph 4(i)(iv).

(k) By a letter dated 20 May 2009, Profair Limited, on behalf of the Appellant, made the following reply:

‘ … (the Appellant) does not agree with your proposal ... (The Appellant) shall reply to you in details…’

(l) Despite reminder from the IRD, however, neither the Appellant nor Profair Limited has provided any information as requested in paragraph 4(i) above.

The issue

5. The issues in this appeal are:

(a) whether any of the Appellant’s claims regarding:

(i) the rental refunds (paragraph 4(g));

(ii) the licence fees, the professional fees and the sundry expenses (paragraph 4(i)(iv))

should have been allowed by the Respondent for deduction in computing the Appellant’s assessable profits in the relevant years of assessment; and

(b) whether part of the Appellant's assessable profits for the year of assessment 2001/02 can be set off by the loss claimed for the year of assessment 2000/01 and if so what the amount of loss carried forward should be.

The law

6. The representatives for the Respondent submitted that the following provisions of the Inland Revenue Ordinance are relevant:

(a) Section 2(1) provides:

'*In this Ordinance, unless the context otherwise requires –*

…

"business" … includes… the letting or sub-letting by any corporation to any person of any premises or portion thereof…'

(b) Section 14(1) provides:

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

(c) Section 16(1) provides:

'*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…'*

(d) Section 17(1) provides:

'*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 –*

…

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

(e) Section 19C(4) provides:

'*… where in any year of assessment a corporation … carrying on a trade, profession or business sustains a loss in that trade, profession or business, the amount of that loss shall be set off against the assessable profits of the corporation … for that year of assessment and to the extent not so set off, shall be carried forward and set off against the corporation's … assessable profits … for subsequent years of assessment.'*

(f) Section 19D(1) provides:

'*For the purposes of section 19C, the amount of loss incurred by a person chargeable to tax under this Part for any year of assessment shall be computed in like manner and for such basis period as the assessable profits for that year of assessment would have been computed.'*

(g) Section 68(4) provides:

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

7. They further cited two cases in the written submissions:

(a) Commissioner of Inland Revenue v Chu Fung Chee [2006] 2 HKLRD 718; and

(b) So Kai Tong v Commissioner of Inland Revenue [2004] 2 HKLRD 416.

8. Regarding Commissioner of Inland Revenue v Chu Fung Chee, they referred us to the following extracts which A Chung J cited with approval, at pages 724I to 725C, from 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, … 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 LC at 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, etc. 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 453)

9. Regarding So Kai Tong v Commissioner of Inland Revenue, they referred us to the judgment of Chu J that an objective test should be adopted to decide whether an expense is incurred by a taxpayer in the production of his taxable profits. They further referred us to the following passages where the judge cited with approval, at pages 426I to 427C, and adopted such approach:

> *'24. The appellant contends that the Board erred in following the Board's decision in Case no D94/99 and in turn its approach to the items of expenses. In D94/99, an appeal in which consultancy service fee was claimed as a deductible expense, the Board stated:*
>
> *" 24. … The question here is whether that payment is a deductible expense in law when computing the chargeable profits. This question must be answered objectively. The agreement between the Taxpayer and Company D does not preclude us from examining whether the payment is or is not a deductible expenses incurred in the production of profits.*
>
> *25. Such expense must have been bona fide incurred in the production of profits. We must look at all surrounding circumstances. For example, the relationship between the payer and the payee is a relevant circumstance. So is the purpose or the reason of the payment. The basis and the breakdown of the amount are also important. The lack of a rational basis may lead us to the conclusion that the amount is wholly arbitrary, lacking in commercial reality, and thus not bona fide incurred."*
>
> *…*
>
> *26. … The objective test simply requires all circumstances to be looked at in deciding whether an item is a deductible expense. The Board may conclude that the item is or is not a deductible expense, and if it is, the extent to which it is deductible in accordance with the plain words of s. 16(1).'*

10. The Appellant made no submission in relation to the two cases cited by the Respondent but referred us to Commissioner of Inland Revenue v Secan Limited and Another [2000] 3 HKLRD 627. The Respondent's supplemental submission dealt with this authority.

11. In the supplemental submission, the Respondent first referred to the argument of the appellant in the So Kai Tong case. The appellant in that case argued that once an expense of the kind recognized under section 16(1) but not disallowed under section 17(1) had been effected, the Revenue could not question its genuineness or the amount of the expense irrespective of the amount involved or the reason for it. The argument was, however, rejected by the court and Chu J said, at pages 428D-E, that it plainly defies logic and defeats the role of the Revenue in determining the amount of chargeable profits.

12. Regarding Commissioner of Inland Revenue v Secan Limited and Another, Mr Li's submission, in essence, was that once the Appellant's accounts were prepared based on acceptable accounting principles, the assessable profits should be computed accordingly, unless there existed a specific provision under the Inland Revenue Ordinance requiring adjustment.

13. The Respondent did not agree and, in the supplemental submission, quoted the following extracts of the unanimous judgment of the Court of Final Appeal delivered by Lord Millet NPJ:

> *'16. … Both profits and losses therefore must be ascertained in accordance with the ordinary principles of commercial accounting as modified to conform with the Ordinance. Where the taxpayer's financial statements are correctly drawn in accordance with the ordinary principles of commercial accounting and in conformity with the Ordinance, no further modifications are required or permitted.*
>
> *17. … But the profits of a business cannot be ascertained without deducting the expenses and outgoings incurred in making them, and [section 16] is not needed to authorise them to be deducted. Sections 16 and 17 (which disallows certain deductions) are enacted for the protection of the revenue, not the taxpayer, and in my opinion section 16 is to be read in a negative sense. It permits outgoings to be deducted only to the extent to which that are incurred in the relevant year.'*

14. The Respondent submitted that while profits and losses must be ascertained in accordance with the ordinary principles of commercial accounting, an expense must have also satisfied the conditions for deduction under sections 16 and 17 of the Ordinance as interpreted by the court in order to be deductible.

Our analysis

15. So far as the applicable law and principles are concerned, the only contention between the Appellant and the Respondent is that of the Secan case. With reference to the quoted extracts above, we decide that the Respondent's submission represents the correct understanding of the judgment of the Court of Final Appeal.

16. Pursuant to section 68(4) of the Ordinance, the onus is on the Appellant to prove that the assessment appealed against is excessive or incorrect. In other words, the Appellant must demonstrate to the satisfaction of the Board why and to what extent each of the expenses in issue is deductible under sections 16 and 17 of the Ordinance and that it had sustained the loss claimed for setting off its assessable profits in subsequent years pursuant to section 19C.

17. The Appellant's first bundle (A1) was received prior to the hearing. It includes the Appellant's audited financial statements for the years ended 31 December 2001 to 2004 and its revised or further revised profits tax computations, as the case may be, for the years of assessment 2001/02 to 2004/05. A2, received at the hearing, contains the Appellant's audited financial statements for the year ended 31 December 2000 (and together with those of 2001 to 2004 previously received collectively as 'Audited Accounts'), its revised profits tax computation for the year of assessment 2000/01, copies of certain expense vouchers and receipts for the five years ended 31 December 2004 and a summary of profits tax computations for the years of assessment 2000/01 to 2004/05.

18. The Respondent raised in the supplemental submission, and we note, that the dates of all the Audited Accounts are all 15 January 2011. Mr Li explained in his oral submission and his reply to the Respondent's supplemental submission that the Appellant previously belonged to a group of companies but later spun off from the group and was taken over by the present sole director. According to Mr Li, the sole director retained the auditors to carry out audit on the financial statements of the Appellant after lodging this appeal to the Board.

19. These Audited Accounts are clearly not contemporaneous. In all the auditor's reports, it is stated that the sole director 'is responsible for the preparation and the true and fair presentation' of these Audited Accounts and that the auditor's responsibility is 'to express an opinion on [the Audited Accounts] … and to report [the auditor's] opinion solely to [the shareholder of the Appellant] in accordance with the terms of [the] engagement, and for no other purposes', even though the auditor believes that the audit evidence obtained is 'sufficient and appropriate to provide a basis for the audit opinion'. On these bases, we attach no weight to and on any of these Audited Accounts. In any event, we are subject to the Ordinance and are bound by the Secan case not to accept the Audited Accounts on their face value. The Appellant is subject to the statutory onus of proof and we have to scrutinize the items in dispute before we can decide if any of those items conforms with the statutory provisions in order to be deductible.

Rental refund

20. Under sections 2(1) and 14(1) of the Ordinance, the Appellant, being a corporation on a property letting business, should be assessed under profits tax in respect of its rental income derived from the business. The Appellant claimed deduction of rental refund, in the amount of $516,000, for each of the years of assessment 2001/02 to 2004/05.

21. Mr Li explained at the hearing, and in the Appellant's reply to the Respondent's supplemental submission, that the Appellant had received no 'real' rental income as such. Companies of the group were allowed to use the Properties and were charged for such usage. Since the Appellant did not have a bank account, those charges were only recorded in the respective accounts of those companies. When asked why such refund was required, Mr Li said that such rental refund represented downward adjustment after review since the original charge had been too high. As to when such refund was decided and made, Mr Li said that each time it was made after the relevant financial year but he did not have in hand any information as to the exact year when it was. He further said there existed no documentation of the licences or agreements for such usage and therefore the Appellant had never furnished any proof or information as requested by the Respondent. In our view, these are just submissions for and on behalf of the Appellant. Since no witness was called, there was hardly any corroborative evidence to substantiate the claim.

22. Further or alternatively, the Appellant has provided debit notes issued by apparently a related party in support of its claim for deduction of some of the expenses in issue (see below). While it does not necessarily mean that we would attach any weight to such intra-group vouchers or debit notes, it appears reasonable to expect to see some sort of supporting documentation for the claim of rental refund.

23. Furthermore, the Appellant has not been able to substantiate Mr Li's contention that the charge for using the Properties in the relevant years of assessment had been too high and how the amount of rental refund for each year was decided.

24. The absence of any of such evidence must mean that the Appellant fails to satisfy the requirement of section 68(4) of the Ordinance.

Licence fees

25. The objective test approved by the court in the So Kai Tong case requires all circumstances to be considered. Questions can be raised as to the genuineness and the amount of the expense, as well as the reason for such fees.

26. To substantiate its claim, the Appellant relies on the expense vouchers included in A2. Compared with paragraph 4(i)(iv) above, it is noted that for the years of assessment 2000/01 to 2002/03, no difference in the amounts claimed appeared in A2. For the years of assessment 2003/04 and 2004/05, however, the amounts claimed in A2 were less by $8,000 and $5,050 respectively. No explanation had yet been given by the Appellant for the differences. Incidentally, it is also noted that in A2 the Appellant made, for the year of assessment 2004/05, an additional claim for professional fees in the amount of $5,050 (see below).

27. This category of claim can be divided into the following sub-heads.

Annual Country A government license and local service fees

28. Under this sub-head, the Respondent relies on two debit notes issued by Company C and a receipt and two invoices of Company D.

29. Among Company D documents, the Respondent challenges only the first invoice in the supplemental submission, arguing that both this invoice and one of the debit notes issued by Company C bear the same caption which is '2003 Annual [Country A] government licence and local service fees' and hence the annual fees for 2003 had been doubly charged. Mr Li in his reply to the Respondent's supplemental submission said that the debit note is for the year of assessment 2002/03.

30. Regarding the receipt issued by Company D, it is for the payment of the annual Country A government licence fee and provisions of registered office and registered agent in Country A for the 12-month period ending on 30 November 2002. By the receipt, Company D confirmed that the Appellant was in good standing in Country A until that date. The date of receipt indicates that it falls within the year of assessment 2001/02. Comparing the dates of the receipt and those of the two invoices, we believe that the two invoices should be for the periods ending on 30 November 2004 and 30 November 2005, and hence falling within the years of assessment 2003/04 and 2004/05 respectively. On the same token, since the debit note referred above is dated 1 September 2002, it relates to the period ending
30 November 2003, and hence falling within the year of assessment 2002/03. On such basis, we do not accept the Respondent's contention that the annual fees for 2003 had been doubly charged.

31. The other debit note issued by Company C is dated 24 October 2000 for both '[Country A] government license fee' and '[Country A] Company secretarial fee'. Although no explanation has been offered by the Appellant for why a similar receipt could not have been made available for 2000/01 and 2002/03, we take the view that Country A government license fee and such local service fees are recurring annual expenses. However, in the absence of any further evidence provided by the Appellant, the basis of Company C charging the Appellant the Country A company secretarial fee in the year of assessment 2000/01 is uncertain, if not in doubt.

32. Applying the objective test as approved in the So Kai Tong case, we hold the view that such receipt and invoices of Company D are genuinely prepared. The Appellant has incurred such expenses as per those receipt and invoices for the purposes of complying the requirements in Country A and be in good order so that it can continue to be registered as a Part XI company in Hong Kong to earn, inter alia, such rental income which is subject to profits tax. Further, those expenses are recurring annual expenses. Although debit notes issued by Company C were produced instead, it should not adversely affect the nature of expenditure so represented. Therefore, we allow the claims under this sub-head except the Country A company secretarial fee in the year of assessment 2000/01 as explained in paragraph 29 above.

Hong Kong business registration fees

33. The Appellant made no such claim for the year of assessment 2000/01 but two same amounts were charged in the accounts for the year of assessment 2001/02. Similar claims, but in different amounts were claimed for the years of assessment 2002/03 to 2004/05.

34. For the two amounts in 2001/02, the Appellant provided:

(a) A copy of a cheque of Company C in the amount of $2,250 dated 17 January 2001 payable to the Government of the HKSAR, together with a part of a business registration form 1(b); and

(b) A copy of a business registration certificate effective as from November 2001, showing the amount of $2,250.

35. Inferring from the dates of the cheque and the certificate, they should relate to different periods: the first being for the year of assessment 2000/01 and the second for the year of assessment 2001/02.

36. For other years of assessment, the Appellant supplied copies of business registration certificates, one in the amount of $600 and the other two in the amount of $2,600.

37. Again, applying the objective test as approved in the So Kai Tong case, we hold the view that such supporting documents are genuine. The Appellant has incurred such expenses for the purposes of complying the requirements in Hong Kong so that it can continue to earn, inter alia, such rental income which is subject to profits tax. Further, those expenses are recurring annual expenses. Although by mistake the Appellant did not make a claim for the year of assessment 2000/01, it is clear to us that it incurred such expense in that year of assessment. Consequentially, only $2,250 was incurred in the year of assessment 2001/02. Subject to this modification, we allow the claims under this sub-head.

Professional fees

38. Compared with paragraph 4(i)(iv) above, the Appellant reduced its claim under this category in A2 to zero for the years of assessment 2000/01 and 2002/03. Incidentally, it is noted that the Appellant claimed, inter alia, deduction of audit fees in the respective amounts of $40,000 and $50,000 for those years. Furthermore, the Appellant also reduced its claim from $50,000 to only $7,000 for the year of assessment 2003/04 but claimed, inter alia, deduction of audit fees in the amount of $50,000 for that year. An additional claim in the amount of $5,050 was made for the year of assessment 2004/05.

39. To support these claims, the Appellant provided copies of four debit notes issued by Profair Limited.

40. The first debit note, dated 28 April 2003, relates to services provided by Profair Limited in respect of two matters: the Appellant's profits tax matters and attending a court

hearing on the Appellant's behalf. In his reply to the supplemental submission of the Respondent, Mr Li attached a summon issued under section 8(1) of the Magistrates Ordinance (Chapter 227) dated 27 February 2003 for a matter of sections 51(1), 80(2)(d) and 80(2A) of the Inland Revenue Ordinance. In essence, the Appellant was summoned to appear before the Magistrate for an alleged violation of those sections. While professional fees for taxation services are generally business expenses allowable for deduction, such fees for defending an offence under the Inland Revenue Ordinance cannot be said to have been incurred in the production of the Appellant's assessable profits. Therefore, such fees cannot be allowed. Since a lump sum was charged for two kinds of services under the debit note, we have been provided with no basis for any apportionment. The whole sum must therefore be disallowed.

41. The other debit notes relates to services provided by Profair Limited in respect of the Appellant's property tax matters for the year of assessment 2004/05 and for provision of general secretarial services for the years of assessment 2003/04 and 2004/05.

42. We do not find any basis to challenge the genuineness of these debit notes even though they were issued by Profair Limited which represents the Appellant in this appeal. In such circumstances, we follow the general rule that fees for such taxation and secretarial services are generally allowable for deduction.

Audit fees

43. In A2, the Appellant claimed deduction for audit fees: $60,000 for the year of assessment 2000/01, $70,000 for each of the years of assessment 2001/02 to 2003/04 and $20,000 for the year of assessment 2004/05. In support of such claims, the Appellant provided us with a debit note issued by its auditors and other debit notes issued by Company C and Company C Group Limited.

44. Regarding the debit note issued by the Appellant's auditors, it is dated 12 February 2011 although it is for the auditors' professional services rendered in connection with auditing the Appellant's financial statements for those relevant years of assessment and for each of those years the auditors charged $20,000. It is obvious that the Appellant did not have any obligation to pay the auditors such fees within any of the basis periods for those relevant years of assessment. We cannot allow deduction any of such fees in those years.

45. In relation to those debit notes issued by apparently related companies, we heard nothing from the Appellant about the purpose and the reason for sharing the group expense, as well as the basis of computation of such share or amount. We do not find that the objective test approved in the So Kai Tong case can be satisfied here. We hold that none of these shares in group audit fees can be allowed.

Insurance premium

46. The Appellant also enclosed in A2 an insurance policy, premium of which is

$2,992. Deduction of the expense has been allowed and therefore the document is not relevant to the current appeal.

Sundry expenses

47. The Appellant has made no submission, oral or written, in relation to this claim. It has also failed to furnish any information or documents in support. In this regard, we have no choice but to rule against the Appellant on this on the basis that the Appellant has failed to discharge its onus of proof under section 68(4).

Loss

48. Finally, concerning whether the loss claimed by the Appellant for the year of assessment 2000/01 could be allowed for setting off part of its assessable profits for the year of assessment 2001/02, we were invited by the Revenue to note the following:

(a) The Properties were assigned to the Appellant on 18 January 2000 for nil consideration.

(b) The Appellant registered as an overseas company in Hong Kong under Part XI of the Companies Ordinance in 2000.

(c) According to the Appellant, it had rental income of $3 only for the year ended 31 December 2000.

49. Despite the repeated requests of the Respondent prior to the hearing, the Appellant had failed to provide any information regarding:

(a) the date of commencement of its rental business;

(b) location let, period covered and basis for calculation for the rental income of $3 for the year ended 31 December 2000.

50. The Appellant has made no submission, oral or written, in relation to this claim. Despite our favourable analysis regarding some of the items of expenses claimed in the year of assessment 2000/01, we have no choice but to rule against the Appellant for its failure to satisfy the onus of proof under section 68(4) in substantiating their claim of loss for the year to be carried forward to subsequent years of assessment.

Conclusion

51. In light of the aforesaid analysis, our answers to the issues listed out in paragraph 5 above are:

(a) (i) Rental refund: No.

(ii) Licence fees: Partly yes as noted in paragraphs 32 and 37.

Professional fees: Partly yes as noted in paragraphs 41 and 42; but audit fees: no.

Sundry expenses: No.

(b) Loss: No.

52. Therefore, we allow, partially, the appeal and decide to remit the case to the Respondent to adjust the assessable profit, and hence the amount of tax payable, in each of those relevant years of assessment accordingly.

53. Before we close, we find we are obliged to stress again the importance of exchange of relevant documents well in advance before the hearing and seeking to adduce documents at the hearing should be discouraged. Permission given to the Appellant in this case to adduce further documents at the hearing is exceptional and must not be relied upon by any party of a subsequent case to persuade a later panel of this Board. It can be a waste of time not just to the Board but to the parties. Even if permission is given to an appellant seeking to do so, he may run the risk of a cost order under section 68(9) against him if circumstances warrant.