Case No. D36/07

Profits tax – whether determination can increase the assessment – legitimate expectation – sections 16(1), 17(1), 33A(1), 59(3), 60, 64, 68(4) and 70 of the Inland Revenue Ordinance ('IRO').

Panel: Horace Wong Yuk Lun SC (chairman), Charles Nicholas Brooke and Mark R C Sutherland.

Date of hearing: 29 August 2007.
Date of decision: 27 November 2007.

The appellant, a company incorporated in Hong Kong, failed to submit its 2004/05 profits tax return within the time required by the IRD. The assessor raised on the appellant, pursuant to her power under s59(3) of the IRO, profits tax assessment. The appellant's tax representative, Company A, gave notice to the Commissioner that the appellant objected to the assessment on the ground that it was excessive. On the same date, the appellant filed its profits tax return for the year 2004/05, its profit before taxation was arrived at after making various deductions. The assessor requested Company A to provide information and particulars regarding various expenses set out in the profits and loss account of the appellant. After repeated chasing by the assessor for the information requested with no response from the appellant or Company A, the Deputy Commissioner made a determination on the appellant's objection to the profits tax assessment. The determination increased the assessment by revising upward the assessable profits and increasing the tax payable. The reason for increasing the assessment was that the appellant had failed to provide information to the assessor to justify the deductions. The appellant appealed against the determination on the grounds that :

1. the determination had not considered certain information submitted to the Commissioner.

2. the determination had not considered the information, in respect of commercial building allowance claimed, already submitted with the tax computation for the year of assessment 2003/04.

3. the determination has violated the usual practice of the IRD to issue additional assessment to client to levy tax; in addition, the determination has violated the usual practice of the IRD to issue proposed computation to client beforehand and the appellant had been unfairly treated.

Held:

1. The gist of the appellant's case is that the appellant was entitled to expect that the IRD would follow the 'usual practice' alleged, and insofar as the IRD departed from it in this case, the appellant had been unfairly treated. No evidence has been adduced by the appellant of the existence of such an alleged practice. In the case where the appellant has made an objection to an assessment, the assessment does not become final and conclusive until the determination of the objection (and if the determination is appealed against, until after the determination of the appeal). In determining an objection, the Commissioner may confirm, reduce, increase or annual the assessment objected to. If the initial assessment is considered by the Commissioner to be inadequate (in the sense that it has under-assessed the proper amount of tax chargeable against the taxpayer), he is well entitled to determine that the assessment objected to should be increased. The Commissioner's power to increase the assessment objected to is provided for in section 64(2) of the IRO. Not only is there no evidence of the practice alleged by the appellant, the Board would go further and hold that if there ***were*** indeed such a practice, it would clearly be unlawful. The Commissioner has both the power and the duty to consider and determine an objection under section 64 of the IRO. If the appellant is right, then in all cases where the Commissioner considers that an assessment objected to is in fact an under-assessment, he can not exercise his statutory discretion to increase the assessment under section 64(2) and is bound to issue additional assessments instead. This is tantamount to saying that the statutory powers and duties of the Commissioner have been effectively fettered by the alleged practice (if it exists at all). This cannot be right.

2. The principle that no legitimate expectation, whether based on 'usual practice' or otherwise, could undermine an express statutory discretion is, as pointed out by the Court of Final Appeal, fundamental to our law. The appellant pointed out that in one of its letters, the assessor had indicated that if no reply was received, an additional assessment would be issued to disallow the related expenses claimed. The Board does not think that such a statement in the assessor's letter could possible be taken as a representation by the assessor that the Commissioner would not exercise its statutory power under section 65(2) to revise or increase the assessment, if he considers it right to do so. Neither do we consider that such a statement would give rise to any legitimate expectation that the Commissioner would not revise the assessment. It would not be reasonable or legitimate for the appellant to have any such expectation because, having invoked the statutory procedure under section 64 of the IRO, by raising an objection to the assessment, the only expectation that the appellant could reasonably or legitimately have was that its objection would be

considered and determined by the Commissioner in accordance with the provisions under section 64. In any event, even if some expectation or legitimate expectation could arise from the letter, the Commissioner could not give effect to such an expectation by surrendering or fettering his statutory discretion ' in a way which undermines the statutory purpose.'

3. Save to the extent of the amount conceded by the Commissioner the Board is not satisfied that the appellant has discharged its onus of proving that the alleged expenses were incurred, or that they are deductible expenses under the relevant provisions of the IRO.

Appeal dismissed.

Cases referred to:

D50/02, IRBRD, vol 17, 767
Ng Siu Tung & others v Director of Immigration [2002] 1 HKLRD 561
Interasia Bag Manufacturers Limited v Commissioner of Inland Revenue (HCAL 98/2003)
D24/06, IRBRD, vol 21, 461

Danny Wong, CPA of Messrs Danny C M Wong & Co for the taxpayer.
Chan Wai Yee and Lai Wing Man for the Commissioner of Inland Revenue.

Decision:

Background to the appeal

1. The Appellant in the present appeal is a company incorporated in Hong Kong with limited liability. According to its audited financial statements for the year ended 31 December 2004, the principal activity of the Appellant was in the trading of watches and clocks.

2. The Appellant failed to submit its 2004/05 profits tax return within the time required by the Inland Revenue Department ('IRD'). By a profits tax assessment dated 29 August 2005, the assessor raised on the Appellant, pursuant to her power under section 59(3) of the Inland Revenue Ordinance ('IRO'), profits tax assessment assessing the Appellant' s assessable profits at $1,460,000 and tax payable thereon at $255,500 ('Assessment').

3. By a letter dated 29 December 2005, Company A, tax representatives of the Appellant, gave notice to the Commissioner of Inland Revenue ('the Commissioner') that the Appellant objected to the Assessment on the ground that it was excessive.

4. On the same date, the Appellant filed its profits tax return for the year 2004/05, declaring its assessable profits as $329,039.

5. According to the Appellant's detailed profit and loss account for the year ended 31 December 2004, its profit before taxation was arrived at after making various deductions, as follows:

Sales		$133,293,259
Less: Cost of sales		
Opening stock	$3,068,264	
Purchases	115,818,325	
Less: Closing stock	(3,208,650)	115,677,939
Gross profit		17,615,320
Add: Interest income		1,243
		17,616,563
Less: Operational and administrative expenses		
Commission	$4,756,163	
Depreciation	244,284	
Travelling and transportation	1,679,931	
Others	10,686,260	17,366,638
Profit for the year		$249,925

6. Tax computation for the year of assessment 2004/05 was as follows:

Profit per accounts		$249,925
Add: Depreciation		244,284
		494,209
Less: Depreciation allowance	$20,626	
Depreciation allowance - HP	81,000	
Commercial building allowance	62,301	
Interest income exempted to tax [Fact (6)]	1,243	165,170
Assessable profits		$329,039

7. By letter dated 27 October 2005, the assessor requested Company A to provide information and particulars regarding the commission expenses and the travelling and transportation expenses set out in the said profits and loss account of the Appellant. The assessor also requested Company A to supply information in support of the Appellant's claim for, inter alia, commercial building allowances, as referred to in its tax computation. It was pointed out to Company A that the Appellant had not furnished its profits tax return for the year of assessment 2003/04 and the assessor did not have information regarding the addition and disposal of fixed assets made in 2003/04 to enable her to ascertain whether the allowances claimed in the tax computation were valid or not.

8. Company A did not respond to the request for information despite a chaser issued by the assessor dated 30 December 2005.

9. By another letter dated 13 March 2006 addressed directly to the Appellant, the assessor repeated her request for information and gave notice to the Appellant that the requested information should be furnished within 21 days of the letter. This Appellant did not respond. By a letter dated 15 May 2006, the assessor chased the Appellant again for the requested information.

10. Eventually Company A responded on behalf of the Appellant by its letter dated 28 May 2006. The response was:

> 'Please refer to your enquiry letter issued. On behalf of our client we hereby apply for an extension of time to 20th June 2006 for furnishing a reply thereto because our client need (sic) additional time for extracting the information needed.'

11. By 20 June 2006, however, the requested information was not forthcoming. The assessor wrote again to the Appellant by letter dated 18 July 2006 and stated:

> 'Letters had been issued by the Department on 27 October 2005 and 13 March 2006 requesting further information from your Company. I regret to note that no reply has been received from you up to now. Hence, the objection cannot be settled at present. Please note that the information requested is essential to the processing of your objection. In order for me to process your objection further, please furnish your reply within 14 days from the date of this letter. A copy of the said letter is enclosed herewith for your reference.
>
> In case reply is still not received by the time stipulated above, the standover order previously issued will be cancelled and the Company will be required to pay the tax immediately. Moreover additional assessment will be issued to disallow the related expenses claimed.'

12. There was no response from the Appellant until some seven months later when, according to Company A, it sent a letter to the Commissioner on 27 February 2007 ('**Letter 27-2-07**'). In the letter, Company A provided certain information to the Commissioner and enclosed certain documents. The letter was, however, not received by the Commissioner.

13. On 27 April 2007, in ignorance of the contents of the Letter 27-2-07, the Deputy Commissioner of Inland Revenue made a Determination ('the Determination') on the Appellant's objection to the profits tax assessment. The Determination ***increased*** the Assessment by revising the assessable profits from $1,640,000 to $6,827,434, and increasing the tax payable thereon from $255,500 to $1,194,800.

14. The reason for increasing the Assessment was that the Appellant had failed to provide information to the assessor to justify the deductions (made in its profits and loss account) based on commission expenses (totalling $4,756,163) and travelling and transportation expenses (totalling $1,679,931). It had also failed to provide information in support of the commercial building allowance ($62,301) claimed in its tax computation. Adding these three items back to the profits declared in the Appellant's profits tax return (for the year 2004/05), the revised assessable profits was $6,827,434, and tax payable thereon was $1,194,800.

15. By letter dated 26 May 2007, Messrs Danny C M Wong & Co (DW & Co), gave notice to the Board of the Appellant's appeal against the Determination. The letter set out the grounds of appeal as follows:

> '1. The determination had not considered the information submitted (sic.) the Commissioner on 27th February, 2007 (copy enclosed).
>
> 2. The determination had not considered the information, in respect of Commercial building allowance claimed, already submitted to them with the tax computation for the Year of Assessment 2003/2004.
>
> 3. The determination has violated the usual practice of the IRD to issue additional assessment to client to levy tax; in addition, the determination has violated the usual practice of the IRD to issue proposed computation to client beforehand. Our client had been unfairly treated in the mode of action of the IRD.'

16. After the present appeal was lodged, by letter dated 3 July 2007, the assessor wrote to DW & Co and, amongst other things, informed the Appellant that the IRD had not received the Letter 27-2-07, and that it had only received a copy of the letter when it received the notice of appeal on 28 May 2007 (which had a copy of the letter attached). The assessor asked DW & Co to provide evidence of the sending of the letter to the IRD. She further requested the Appellant to provide further information and explanation regarding the contents of the letter.

17. DW & Co did not respond to the assessor's letter of 3 July 2007. The assessor issued a chaser on 30 July 2007, but this was again ignored.

18. The appeal was heard on 29 August 2007. No witness was called by the Appellant at the hearing of the appeal. No further documents or other evidence have been submitted by the Appellant either before or at the hearing of the appeal.

The alleged practice to issue additional assessment

19. At the forefront of Mr Danny Wong's submission was his argument that it was allegedly the practice of the IRD to issue an additional assessment, and not a revised assessment, against a taxpayer who failed to provide information requested by the assessor to support his profits tax return. He submitted that there was an important difference between a revised assessment and an additional assessment. A taxpayer may raise an objection to an additional assessment raised by the assessor. A revised assessment made by the Commissioner, however, can not be objected to and can only be appealed against. He submitted that in the present case, by revising (and increasing) the profits tax assessment of the Appellant, and not merely issuing an additional assessment, the IRD had departed from its 'usual practice', and had treated the Appellant unfairly. This is because, if an additional assessment *were* issued, the Appellant would have a further right to object to that additional assessment and would not have been required to appeal to the Board.

20. The gist of Mr Danny Wong's submission is that the Appellant was entitled to expect that the IRD would follow the 'usual practice' alleged, and insofar as the IRD departed from it in this case, the Appellant had been unfairly treated. This is what trained lawyers would call a submission of 'legitimate expectation', although Mr Danny Wong did not in fact use that term in his arguments before the Board.

21. No evidence has been adduced by Mr Danny Wong of the existence of such an alleged practice. What Mr Danny Wong did was to refer to a decision of this Board, D50/02, IRBRD, vol 17, 767 as an example of what he alleged to be the practice of IRD. In the case of D50/02, according to the facts set out by the Board in that decision, the taxpayer had, like the Appellant in the present case, repeatedly ignored the requests for information from the IRD. Eventually additional assessments were raised against the taxpayer who subsequently appealed to the Board against the additional assessments.

22. We are of the view that Mr Danny Wong's submissions in this regard are wholly misconceived. There is no reference to the existence of such an alleged practice in the case of D50/02 at all. It appears from the facts of D50/02 that the taxpayer had not made any objection to the initial assessments at all. Accordingly the initial assessments would have become final and conclusive by virtue of section 70 of the IRO. Upon the taxpayer's failure to provide the requested

information, additional assessments were then issued. The power to issue additional assessments, where it appears to an assessor that the taxpayer has either 'not been assessed or has been assessed at less than the proper amount' for any year of assessment, is clearly set out in section 60 of the IRO. Section 60(1) further provides that the provisions of the IRO as to notice of assessment, appeal and other proceedings shall apply to such additional assessments and to the tax thereunder.

23. In the case where the taxpayer has made an objection to an assessment, as in the present case, the situation is different. The assessment does not become final and conclusive until the determination of the objection (and if the determination is appealed against, until after the determination of the appeal). In determining an objection, the Commissioner may confirm, reduce, increase or annul the assessment objected to. If the initial assessment is considered by the Commissioner to be inadequate (in the sense that it has under-assessed the proper amount of tax chargeable against the taxpayer), he is well entitled to determine that the assessment objected to should be increased. The Commissioner's power to increase the assessment objected to is provided for in section 64(2) of the IRO, as follows:

> *'On receipt of a valid notice of objection under subsection (1) the Commissioner shall consider the same and within a reasonable time* ***may*** *confirm, reduce,* ***increase*** *or annul the assessment objected to……' (emphasis added)*

24. Not only is there no evidence of the practice alleged by Mr Danny Wong, we would go further and hold that if there ***were*** indeed such a practice, it would clearly be unlawful. The Commissioner has both the power and the duty to consider and determine an objection under section 64 of the IRO. If Mr Danny Wong is right, then in all cases where the Commissioner considers that an assessment objected to is in fact an under-assessment, he cannot exercise his statutory discretion to increase the assessment under section 64(2) and is bound to issue additional assessments instead. This is tantamount to saying that the statutory powers and duties of the Commissioner have been effectively fettered by the alleged practice (if it exists at all). This cannot be right.

25. In Ng Siu Tung & others v Director of Immigration [2002] 1 HKLRD 561, the Court of Final Appeal held, in reference to a submission of 'legitimate expectation' (paragraph 112, at page 606):

> *'The principle that the court will not give effect to a legitimate expectation where to do so would involve the decision-maker acting contrary to law is fundamental (AG of Hong Kong v Ng Yuen Shiu [1983] 2 p.638; R v. North and East Devon Health Authority, ex p Coughlan [2000] 2 WLR 1115 at pp 1125,1132). Consistently with this principle, the decision-maker cannot give effect to an expectation by exercising his statutory discretion "in a way which*

> *undermines the statutory purpose" (R v Secretary of State for Education and Employment, ex p B (A Minor) at p 1132, per Sedley LJ).'*

26. The principle that no legitimate expectation, whether based on 'usual practice' or otherwise, could undermine an express statutory discretion is, as pointed out by the Court of Final Appeal, fundamental to our law. In the context of tax cases, the principles expounded by the Court of Final Appeal in Ng Siu Tung have been cited and followed by Hartmann J in the case of Interasia Bag Manufacturers Limited v Commissioner of Inland Revenue (HCAL 98/2003) and also by this Board in D24/06, IRBRD, vol 21, 461 (where Interasia Bag was followed).

27. Mr Danny Wong also pointed out that in its letter of 18 July 2006 (see paragraph 11 above), the assessor had indicated that if no reply was received, an additional assessment would be issued to disallow the related expenses claimed. We do not think that such a statement in the assessor's letter could possibly be taken as a representation by the assessor that the Commissioner would not exercise its statutory power under section 64(2) to revise or increase the Assessment, if he considers it right to do so. Neither do we consider that such a statement would give rise to any legitimate expectation that the Commissioner would not revise the Assessment. It would not be reasonable or legitimate for the Appellant to have any such expectation because, having invoked the statutory procedure under section 64 of the IRO by raising an objection to the Assessment, the only expectation that the Appellant could reasonably or legitimately have was that its objection would be considered and determined by the Commissioner in accordance with the provisions under section 64. In any event, as pointed out above, even if some expectation or legitimate expectation could arise from the letter of 18 July 2006, the Commissioner could not give effect to such an expectation by surrendering or fettering his statutory discretion 'in a way which undermines the statutory purpose.'

28. For reasons mentioned above, we reject Mr Danny Wong's submissions based on the alleged usual practice (which in any event was not established by any evidence before this Board).

The deductions

The relevant statutory provisions

29. Section 16(1) of the IRO provides, inter alia, that:

> *'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…' (emphasis added)*

30. Section 17(1) of the IRO provides, inter alia, that:

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

31. Accordingly, only expenses incurred in the production of profits may be deducted. Also, any money expended that is not for the purpose of producing profits would not qualify as deductible expenses.

32. By virtue of section 68(4) of IRO, the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant.

33. To discharge its onus under section 68(4), the Appellant would have to prove that:

(a) the relevant expenses were incurred by it;

(b) the expenses were incurred during the basis period for the year of assessment 2004/05;

(c) the expenses were incurred in the production of the Appellant's profits; and

(d) all monetary expenditures sought to be deducted were money expended for the purpose of producing the Appellant's profits.

The commission expenses

34. In the Letter 27-2-07, DW & Co alleged that the commission expenses totalling $4,756,163 were 'rebates in respect of sales to customers referred by the recipient calculated at a rate of 3.5% to 10%'. In the same letter , DW & Co included copies of certain bank documents evidencing that payments by telegraphic transfer ('T/T Payments') were made by the Appellant to certain recipients on the following dates:

T/T Payment	Date	Amount (US$)	Recipient
1	21-7-2004	85,235	Company B

2	21-7-2004	46,831	Company C
3	21-7-2004	46,831	Company D
4	2-3-2005	199,518	Company B
5	23-3-2005	96,390	Company B
6	24-8-2005	113,625	Company B
Total		**4,730,895 (HKD)**	

35. It is claimed by DW & Co in the Letter 27-2-07 that the aforesaid T/T Payments were commission in the form of 'rebates in respect of sales' to the following customers made in the following periods:

T/T Payment	**Name of customer**	**Period**	**Amount (US$)**
1	Company E	Jan – Mar 2004	85,325
2	Company F	Jan – Mar 2004	46,831
3	Company F	Jan – Mar 2004	46,831
4	Company F	Apr –Dec 2004	224,786
5	Company E	Apr – Jun 2004	96,390
6	Company E	July – Sep 2004	113,625
Total			**4,756,163 (HKD)**

36. There is however no evidence adduced by the Appellant to prove the allegation made by DW & Co that the T/T Payments were made to the recipients as 'rebates' in respect of sales to the aforesaid customers, and no evidence has been presented to prove the basis upon which the alleged expenses were allegedly incurred.

37. In respect of T/T Payments 1, 2, 3, 5 and 6, no contemporaneous documents or records of any sort have been produced by the Appellant at all. There is nothing to show that services had in fact been rendered to the Appellant by the recipients of the relevant T/T Payments. No service agreements, correspondence or any other documents have been produced by the Appellant, and it is not known on what terms the said recipients rendered their services, if any. The Appellant has not produced any receipts, acknowledgements or correspondence from the recipients to show that the payments were received by them as commission or rebates. There was a bare allegation by DW & Co that the T/T Payments were rebates 'calculated at the rate of 3.5% to 10%', but there is nothing to show exactly how the amount of each of the T/T Payments was calculated. There is simply nothing to show that the T/T Payments were payments of commission, as alleged.

38. Further, there is no evidence at all to show that the recipients had in any way assisted in procuring sales by the Appellant, or that their services had in any way contributed to the production of profits of the Appellant. There is no evidence to prove the alleged sales by the

Appellant to the customers identified by DW & Co; and if the alleged sales had taken place, there is no evidence to show when they took place. Nothing is known of the amounts of the alleged sales (no invoices, sales contracts etc. have been produced by the Appellant), and no evidence has been adduced to prove that the amounts of the sales have been included in the business income of the Appellant. There is thus nothing to show that the expenses were incurred in the production of, or for the purpose of producing, the profits for which the Appellant is chargeable to tax.

39. In respect of T/T Payment 4, all that the Appellant produced was a set of commission calculation sheets ('**calculation sheets**'), printed under the letter-head of the Appellant and addressed to one Mr G, which purported to set out certain calculations of commission. The invoices referred to in the calculation sheets have not been produced, and no contracts, sales agreements or other contemporaneous documents have been produced to support the calculations purportedly contained in the said commission calculation sheets. There is no evidence to show what services had been rendered by Mr G, or by anyone else, to the Appellant. No service agreement or other documents have been produced. There is nothing to show that Mr G had rendered any services or had in any way assisted the Appellant in procuring sales to any customer, let alone 'Company F' (the customer identified by DW & Co), whose name was not mentioned in the calculation sheets at all. If Mr G had rendered services in terms of introducing customers to the Appellant (which is not established), there is no evidence to show how he was to be paid for his services. In the absence of any contemporaneous documents explaining, substantiating, and proving the figures contained in the calculation sheets (and showing how these figures came about), the calculation sheets are little more than pieces of arithmetic paper with little probative value.

40. As said, the commission calculation sheets were addressed to one Mr G. One assumes, therefore, that the commission calculated therein were payable to him. Yet the relevant T/T Payment, as noted above, was made to Company B. There is no evidence, or no admissible evidence, to show the relationship, if any, between Mr G and Company B. In any event, the amount of the commission purportedly set out in the calculation sheets do not tally with what DW & Co alleged to be the rebates payable. It may be recalled that according to the Letter 27-2-07, the amount of rebates was US$224,786. This was different from the amount of the relevant T/T Payment (in the amount of US$199,518) and the total amount of commission set out in the calculation sheets. There is no evidence to explain the discrepancy in the amounts.

41. In the circumstances, we are not satisfied that the Appellant has discharged its onus of proving that the alleged commission expenses were incurred by it during the relevant year of assessment in the production of profits; or expended for the purpose of producing its profits.

Transportation and travelling expenses

42. In the Letter 27-2-07, DW & Co alleged that the transportation and traveling expenses consisted of the following:

Local and PRC traveling expenses	$391,131
Transportation expenses	$635,183
Overseas traveling expenses	$653,617
Total	**$1,679,931**

43. Apart from a bare allegation by DW & Co that all such traveling and transportation expenses were incurred in the production of profits, the Appellant has adduced no evidence, and has not submitted any documents or contemporaneous records, to prove that these expenses were in fact expenses incurred by it in the relevant year of assessment. Neither has it produced any evidence to prove that these alleged amounts were incurred in the production of its profits or expended for the purpose of producing its profits. This is despite the repeated requests by the assessor. In particular, the Appellant has produced no document, receipts, contracts, delivery records, tickets or traveling schedules to show how these transportation and traveling expenses were incurred. In respect of the traveling expenses, both local and overseas, there is nothing to show what trips had been made, who made the trips, on what dates, to what place and at what cost. In respect of the transportation expenses, there is nothing to show what had been transported, on what dates, from where or to where.

44. This being the case, we are of the firm view that the Appellant has not begun to discharge its onus of proving that these alleged expenses were incurred, or that they are deductible expenses under the relevant provisions of the IRO.

45. Before we leave this part of the case, we would add this. The financial statements of the Appellant were audited. The auditors (Company A) have certified that, apart from the stock held at a third party's factory in China, they have obtained all the information and explanations which they have required for the purpose of the audit. They stated in their auditor's report that (apart from the stock held in China), they have obtained all the information and explanation which they considered necessary in order to provide them with sufficient evidence to give reasonable assurance as to whether the balance sheet together with the notes thereon are free from material misstatement. One would therefore assume that before the auditors signed the auditor's report, they were satisfied that the relevant expenses claimed to be deductible were supported by sufficient evidence. That being the case, we are surprised that despite repeated requests by the assessor and the lapse of nearly two years, the Appellant was, and still is, unable to produce any documents or evidence at all to support the alleged expenses.

Commercial building allowance

46. This refers to the 'annual allowance' provided for in section 33A(1) of the IRO.

47. Ms Chan, representing the Commissioner, conceded part of the claim at the hearing of the appeal. She accepted, apparently after reviewing the Appellant's profits tax return filed for

the year 2002/03, that an annual allowance of $40,457 should be granted to the Appellant for the year of assessment 2004/05.

48. The only matter in dispute under this head is whether, in the computation of the annual allowance granted under section 33A(1), account should be taken of the alleged decoration costs which the Appellant claimed to have incurred in the refurbishment of a property (that is Address H) acquired by it in March 2003. If the decoration costs were to be taken into account, the Appellant would be entitled to one-twenty-fifth (4%) of the same as annual allowance under section 33A(1).

49. We need only deal with this issue briefly. There is simply no evidence at all that the decoration costs had in fact been expended or incurred by the Appellant. This being the case, the alleged decoration costs cannot be taken into account in the computation of the annual allowance under section 33A(1).

Decision

50. For reasons set out above, the appeal is allowed but only to the extent of the amount conceded by the Commissioner as mentioned in paragraph 47 above. The assessable profits of the Appellant are accordingly reduced by $40,457 to $6,786,977. Save to that extent, the appeal is dismissed.