Case No. D45/03

Profits tax – royalty income – whether profits arising in or derived from business carried on in Hong Kong – apportionment of profits derived – powers of assessor under section 60 – sections 14, 15(1)(b), 59 and 60 of the Inland Revenue Ordinance (' IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Barry J Buttifant and Thomas Mark Lea.

Date of hearing: 20 March 2003.
Date of decision: 25 July 2003.

The appellant company appealed against the additional profits tax assessments raised on it in respect of the royalty income derived by it from licensing the use of trademarks to its related companies.

Company 1 held various trademarks in connection with its business. Mr A and Mr B became part of its management in the 1980' s. They made changes to its business strategy. Mr A, Mr B and Mr C held a management meeting in Hong Kong on 26 October 1987 and decided therein to insure Company 1' s core business against the uncertainty that might exist in Hong Kong after 1997 by transferring its trademarks to an offshore subsidiary.

The appellant is a company incorporated in the Cook Islands under the International Companies Act 1981-82. The principal activities of the appellant company were the acquisition of trademarks and the granting of licences to use the trademarks in return for royalty income.

Mr A and Mr B, among other persons, were directors and office holders of the appellant company. At all material times, Company 1 was the ultimate holding company of the appellant company. The appellant company used the registered office of Company 1 as its correspondence address.

By various trade mark sale and purchase agreements, Company 1 and other companies sold various marks to the appellant company. The appellant company then entered into various licence agreements whereby the appellant company granted various companies the right to use the said marks in return for royalties calculated at a certain percentage of the gross revenue derived from the use of the trademarks.

The appellant company did not register the said trademarks in Cook Islands. They were registered and renewed with the Intellectual Property Department of Hong Kong Government by

Solicitors' Firm F, a firm of solicitors in Hong Kong, on behalf of the appellant company. The appellant company also registered some of its trademarks in a number of countries. The applications for registrations of the trademarks were made on the appellant company's behalf by agents in those countries on instructions of firms of solicitors of Hong Kong.

The appellant company's minutes books were kept in Cook Islands in accordance with the requirements under the Companies Ordinance of Cook Islands. However, copies of the minutes were also kept in Hong Kong. The appellant company's accounting records were kept and audited in Hong Kong.

The assessor made various profits tax assessments under section 15(1)(b) of the IRO in respect of royalties paid or credited by various companies in favour of the appellant company. The appellant company raised no objection against these assessments. The assessor was of the view that the appellant company had been carrying on a business in Hong Kong and should be assessed under section 14 of the IRO and raised additional profits tax assessments. The appellant company objected.

The issues before the Board were:

(a) Did the appellant company carry on any business in Hong Kong during the relevant years of assessment?

(b) Was there any assessable profit arising in or derived from Hong Kong from such business?

(c) Are the additional profits tax assessments null and void on the ground that the same were not raised under section 59(3) of the IRO?

(d) In the event that the Board finds that any part of the profits were derived from Hong Kong, should the profits be apportioned between those arising in and those arising outside Hong Kong in computing the assessable profits?

The appellant company also submitted that the assessments being raised outside the authority of section 59 were ultra vires and amounted to nullity.

Held:

1. The critical issue is ' whether the business activities were carried on in Hong Kong' and business can be carried out in Hong Kong with a very low level of activity. The Board was of the view that the appellant company did carry on a business in Hong Kong. The appellant company had an office address in Hong Kong. Directors'

meetings were held in that office address. Its directors resolved in Hong Kong to acquire certain trademarks registered in Hong Kong. Its directors further resolved in Hong Kong to grant a licence in respect of those trademarks. The instructions given by employees of Company 1 to solicitors in Hong Kong were part of the activities conducted in Hong Kong on the appellant company's behalf. Payments approved by a director of Company 1 in Hong Kong to discharge bills sent to the appellant company were part of such activities.

2. One looks to see what the taxpayer has done to earn the profit in question and where he has done it. The proper approach is to look at the totality of the facts and find out what the taxpayer did to earn the profit. The Board was of the view that the weight of evidence indicated that the likelihood was that the negotiations leading to the agreements all took place in Hong Kong. Company 1 as the controlling company was a company listed in Hong Kong. The appellant company shared and made extensive use of the office of Company 1. The Cook Islands directors were no more than nominee directors acting on instructions. Mr A and Mr B continued to be the moving force behind the various acquisitions and grants. All of them were based in Hong Kong. The trademarks in question were and still are registered in Hong Kong. Their renewals in Hong Kong were an integral part of the activities that produced the royalties in issue.

3. The law required apportionment when the profits arose in or are derived from more than one source both from Hong Kong and from an outside source. The Board was of the opinion that no question of apportionment arose in this case. The effective decision to acquire the trademarks and to grant licences in respect of those trademarks were all made in Hong Kong. The trademarks were registered in Hong Kong and the protective steps were all traceable to directions from Hong Kong. Hong Kong was the only realistic source.

4. Section 59 of the IRO governs the making of first assessments as distinct from additional assessments under section 60 which does not make the filing of any return by the taxpayer a condition for the exercise by the assessor of the powers conferred by that section. The assessor may exercise such powers if it appears to him that any person has not been assessed or been assessed at less than the proper amount. The additional assessment is to be levied according to the assessor's judgment and is not dependent upon the information furnished by the taxpayer in any return.

Appeal dismissed.

Cases referred to:

CIR v Bartica Investment Limited 4 HKTC 129
D107/96, IRBRD, vol 12, 83
CIR v Hang Seng Bank Limited 3 HKTC 351
CIR v HK-TVB 3 HKTC 468
CIR v Magna Industrial Company Limited 4 HKTC 176
CIR v Indosuez W I Carr, IRBRD, vol 16, 1010

Anthony Wu of Department of Justice for the Commissioner of Inland Revenue.
Ho Chi Ming Counsel instructed by Deloitte Touche Tohmatsu for the taxpayer.

Decision:

Background facts

1. This is an appeal by the Appellant against the additional profits tax assessments for the years of assessment 1990/91 to 1993/94, both inclusive, raised on it in respect of the royalty income derived by it from licensing the use of trademarks to its related companies.

2. Company 1

(a) Company 1 is a company incorporated on 13 May 1961. It used to deal in edible oil and detergent. It was the leader in that field. Its brand names were well known in Hong Kong. It held various other trademarks in connection with such business.

(b) Mr A and Mr B became part of its management in the 1980's. They made changes to its business strategy. Company 1's edible oil and detergent business was transferred to Company 2 which is a company incorporated in Hong Kong in 1980 whose principal activities at all relevant times were the processing and trading of edible oils, vegetable fats and detergents. Company 1 however retained its trademarks in connection with such business.

(c) Mr A, Mr B and Mr C held a management meeting in Hong Kong on 26 October 1987. They discussed the uncertainty that might exist in Hong Kong after 1997. They decided to insure Company 1's core business against such uncertainty by transferring its trademarks to an offshore subsidiary.

3. The Appellant

(a) The Appellant is a company incorporated in December 1987 in the Cook Islands under the International Companies Act 1981-82. Its issued and paid up capital was US$2. At all relevant times, the principal activities of the Appellant were the acquisition of trademarks and the granting of licences to use the trademarks in return for royalty income.

(b) The Appellant's directors at the relevant times are set out in Schedule I annexed to this decision.

(c) For the period between December 1987 and October 1990, Company 1 was the Appellant's immediate holding company.

(d) Commencing from October 1990, Company 3, a company incorporated in the British Virgin Islands, became the Appellant's immediate holding company. The shares of Company 3 were wholly owned by Company 4.

(e) Company 4 is a company incorporated in Bermuda. It was a subsidiary of Company 1. Since 24 July 1991, Company 4 was also listed on the Hong Kong Stock Exchange.

4. The 'I', 'II' and 'III' Marks

(a) Prior to 12 May 1988, Company 1 was the owner of the 'I', 'II' and a series of other trade marks ('the III Marks'). These trademarks were mainly used by Company 2.

(b) By a trade mark sale and purchase agreement dated 12 May 1988, Company 1 sold the III Marks to the Appellant for $10,000. The agreement was signed by Mr A for Company 1 and Mr B for the Appellant.

(c) On 14 May 1988, the Appellant and Company 2 entered into a licence agreement whereby the Appellant granted Company 2 the right to use the III Marks, with the exception of the trademark 'IV', in return for royalties calculated at 5% of the gross revenue derived from the use of the trademarks. The agreement was signed by the authorized signatory of Company 5 for the Appellant and Mr A for Company 2. Under clauses 4, 5 and 7 of this licence agreement, the Appellant was entitled to:

(i) request the licensee to supply random samples of the licensed products;

(ii) visit the licensee's premises to inspect the licensed products; and

(iii) inspect and verify the records of the manufacture and sales of the licensed products maintained by the licensee.

(d) By an assignment dated 11 October 1990, Company 1 sold the trademarks ' I' and ' II' to the Appellant at a total consideration of $1,703,720. The agreement was signed by Mr A and Mr C for Company 1 and Mr B for the Appellant. By a licence agreement dated 17 December 1990, the Appellant granted Company 2 the right to use the trademarks ' I' and ' II' in return for royalties calculated at 5% of the gross turnover. The agreement was signed by Mr D for the Appellant and Mr B for Company 2.

5. The V Marks

(a) Company 6 is a company incorporated in Hong Kong in 1954. Its principal activities were the production and trading of flour products.

(b) By a trade mark sale and purchase agreement dated 15 September 1987, Company 2 acquired from Company 6 various trademarks (' the V Marks') at $35,000,000.

(c) On 17 September 1987, Company 1 bought the entire share capital of Company 6.

(d) By a licence agreement dated 21 September 1987, Company 2 granted Company 6 the right to use the V Marks in return for royalties calculated at 5% of Company 6' s gross turnover.

(e) By a trade mark sale and purchase agreement dated 31 December 1991, the Appellant acquired from Company 2 the V Marks at $1. The agreement was signed by Mr A for Company 2 and Company 7 for the Appellant.

(f) On 4 January 1992, the Appellant and Company 6 entered into a licence agreement whereby Company 6 agreed to pay royalties to the Appellant calculated at 5% of its turnover in return for the right to continue to use the V Marks. The agreement was signed by Company 7 for the Appellant and Mr B for Company 6.

6. The VI Mark

(a) Company 8 is a company incorporated in 1980. At all relevant times, it was a wholly owned subsidiary of Company 1.

(b) Prior to 12 May 1988, Company 8 was the owner of the trademark ' VI' (' the VI Mark'). This trademark was used by Company 2.

(c) By a trade mark sale and purchase agreement dated 12 May 1988, Company 8 sold the VI Mark to the Appellant at a consideration of $1,000. The agreement was signed by Mr A for Company 8 and Mr B for the Appellant.

(d) On 30 December 1988, the Appellant and Company 8 entered into a licence agreement whereby the Appellant granted Company 8 the right to use the VI Mark with effect from 12 May 1988. The agreement was signed by Company 5 for the Appellant and Mr C for Company 8. Royalties for use of the mark were fixed at 5% of the gross turnover.

(e) By a sub-licence agreement also dated 30 December 1988, Company 8 granted Company 2 a sub-licence to use the VI Mark with effect from 12 May 1988. The agreement was signed by Mr C for Company 8 and Mr A for Company 2. Royalties for use of the mark were also fixed at 5% of the gross turnover.

(f) By a licence agreement dated 7 May 1992, the Appellant granted the right to use the VI Mark to Company 9 with effect from 1 January 1992. The agreement was signed by Company 7 on behalf of the Appellant and by Mr E for Company 9. Royalties were fixed at 5% of the gross turnover.

(g) By a sub-licence agreement also dated 7 May 1992, Company 9 granted in favour of Company 2 a sub-licence to use the VI Mark with effect from 1 January 1992. The agreement was signed by Mr E for Company 9, Mr C for Company 2 and Company 7 for the Appellant. Royalties under this agreement were likewise fixed at 5% of the gross turnover.

7. Trade mark registration

(a) The Appellant did not register the trademarks described in paragraphs 4 to 6 above in Cook Islands. These trademarks were registered and renewed with the Intellectual Property Department of Hong Kong Government by Solicitors' Firm F, a firm of solicitors in Hong Kong, on behalf of the Appellant.

(b) The Appellant also registered some of its trademarks in a number of countries including USA, UK, Australia, Singapore, Malaysia, PRC, Vietnam, Japan, Taiwan, Burma, Portugal, Macau, Benelux, Cambodia, Canada and France. The applications for registrations of the trademarks were made on the

Appellant's behalf by agents in those countries on instructions of firms of solicitors in Hong Kong.

8. Minutes books and other records of the Appellant

(a) The Appellant's minutes books were kept in Cook Islands in accordance with the requirements under the Companies Ordinance of Cook Islands. However, copies of the minutes books were also kept in Hong Kong.

(b) Since 1990, the Appellant engaged the service of Company 10, a company in Cook Islands, to handle its books of accounts and to prepare its business books and financial statements. Company 10 in turn engaged the service of Company 11, a company in Hong Kong and a member of the Group, to perform the required services on its behalf. Company 10 charged the Appellant an annual service fee of $50,000. Company 4 paid Company 10 on behalf of the Appellant. The Appellant reimbursed Company 4 via periodic set-off of inter-company balances.

(c) The Appellant's accounting records were kept in Hong Kong. Its accounts were audited in Hong Kong.

9. Bank accounts of the Appellant

(a) The Appellant maintained an account with Bank G, Singapore Branch since June 1988. There were transactions recorded in this account in the year of assessment 1990/91. This account was inactive in the years of assessment 1991/92 to 1993/94.

(b) In March 1993, the Appellant opened an account with Bank G in Hong Kong.

10. Royalties received

In the four years ended 31 December 1993, the Appellant received the following amounts of royalty income:

Received from	**1990**	**1991**	**1992**	**1993**
	$	$	$	$
Company 2	12,293,680	18,593,008	17,669,270	4,123,862
Company 6			12,460,751	9,786,870
Company 8	1,520,577	2,100,460		
Company 9			2,105,524	340,532
Total	13,814,257	20,693,468	32,235,545	14,251,264

11. On dates outlined hereunder, the Commissioner issued profits tax returns - in respect of non-resident persons to each of the following companies. The returns were completed and submitted by those companies.

Company	**1990/91**		**1991/92**		**1992/93**		**1993/94**	
	Date issued	Received by IRD	Date issued	Received by IRD	Date issued	Received by IRD	Date issued	Received by IRD
Company 2	2-4-1991	26-6-1991	2-4-1992		30-12-1993	7-1-1994	6-4-1994	
Company 6					17-11-1994		17-11-1994	
Company 8			2-4-1992		1-4-1993	26-4-1993		
Company 9					22-12-1993	16-2-1994		6-6-1994

12. The Commissioner also issued profits tax returns to the same companies as particularised hereunder. These returns were also completed and submitted by those companies.

Company	**1990/91**		**1991/92**		**1992/93**		**1993/94**	
	Date issued	Received by IRD	Date issued	Received by IRD	Date issued	Received by IRD	Date issued	Received by IRD
Company 2	2-4-1991		1-4-1992		1-4-1993		6-4-1994	
Company 6	2-4-1991		1-4-1992		1-4-1993			
Company 8	2-4-1991		1-4-1992					
Company 9					1-1994	16-2-1994	2-5-1994	

13. The assessor made various profits tax assessments under section 15(1)(b) of the IRO in respect of royalties paid or credited by the following companies in favour of the Appellant.

Payer	**1990/91**		**1991/92**		**1992/93**		**1993/94**	
	Royalties assessed	Date of assessment	Royalties assessed	Date of assessment	Royalties assessed	Date of assessment	Royalties assessed	Date of assessment
	$		$		$		$	
Company 2	1,229,368	30-7-1991	1,859,301	6-7-1992	1,766,927	27-4-1994	3,525,265	7-7-1994
Company 6					1,246,075	13-3-1995	8,482,475	13-3-1995
Company 8	152,057		210,046	3-8-1992				
Company 9					210,552	23-3-1994	236,546	3-8-1994
Total	1,381,425		2,069,347		3,223,554		12,244,286	

The Appellant raised no objection against these assessments.

14. Additional profits tax assessment in issue

The assessor is of the view that the Appellant has been carrying on a business in Hong Kong and should be assessed under section 14 of the IRO. On 13 March 1997, the assessor raised on the Appellant the following additional profits tax assessments for the years of assessment 1990/91 to 1993/94:

Year of assessment	**1990/91**	**1991/92**	**1992/93**	**1993/94**
(Additional)	$	$	$	$
Assessable profits being total royalties received [see paragraph 10 above]	13,814,257	20,693,468	32,235,545	14,251,264
Less: Amount already assessed [see paragraph 13 above]	1,381,425	2,069,347	3,223,554	12,244,286
Additional assessable profits	12,432,832	18,624,121	29,011,991	2,006,978
Additional tax payable thereon	2,051,418	3,072,980	5,077,098	351,221

15. The Appellant objected against these additional assessments. By a determination dated 14 May 1999, the then Commissioner confirmed these assessments. This is the Appellant' s appeal against that determination.

The issues

16. The following issues were raised in the notice of appeal of the Appellant:

(a) Did the Appellant carry on any business in Hong Kong during the relevant years of assessment?

(b) Was there any assessable profit arising in or derived from Hong Kong from such business?

(c) Are the additional profits tax assessments null and void on the ground that the same were not raised under section 59(3) of the IRO?

17. At the hearing before us, we gave leave to the Appellant to argue the following additional issue: ' In the event that the Board finds that any part of the profits of the Appellant for the years of assessment 1990/91 to 1993/94 inclusive arose in or were derived from Hong Kong (which is denied by the Appellant), the profits of the Appellant should be apportioned between those arising in and those arising outside Hong Kong in computing the assessable profits for the aforesaid years of assessment' .

The testimony of Mr C

18. Mr C was the only witness called by the Appellant before us. Mr C gave the following sworn testimony:

(a) He was a director of Companies 1 and 11. Both Companies 1 and 11 had business in Hong Kong. He did not hold any position in the Appellant.

(b) Mr H1 held a majority interest in Company 1. He had final say in relation to its affairs. He was based in Singapore but would come to Hong Kong three to four times a year for board meetings.

(c) Mr H1 is the father-in-law of Mr A.

(d) Ms I was the manager of the company section of Company 1. Ms J was her assistant. That section served all subsidiaries of the Group. They were acting on instructions from various trade mark users when they dealt with the local solicitors. Mr C was then confronted with various invoices from the solicitors and conceded that Ms I and Ms J were acting on behalf of the Appellant.

(e) He was cross-examined in relation to the approvals that he gave for payments to discharge bills sent to the Appellant. As the bills were addressed to the Appellant, he reluctantly accepted that he must be approving the same on behalf of the Appellant.

(f) Mr A and Mr B were his seniors. He would consult them in relation to difficult issues that he encountered at work.

(g) He has no knowledge in relation to the negotiations that led to the various licence agreements.

19. We are not impressed by Mr C. He was obviously concerned to minimise the association between the Appellant and Hong Kong and to diminish the roles played by Mr A and Mr B in the affairs of the Appellant. We do not accept his denial of knowledge of the negotiations leading to the various licence agreements.

Additional findings of facts

20. The registered office of Company 1 was at Address K in Kowloon ('the Office'). The Appellant used the Office as its correspondence address. According to a statutory declaration of Mr B dated 25 September 1992, he stated that he was a 'Director of [the Appellant] of [Address K]'.

21. The minutes of meeting of the Appellant's board of directors can be divided into three categories:

(a) Minutes of meeting held at the Office

(i) At a meeting held on 3 January 1989, the directors present (the two Mr Hs, Mr A and Mr B) resolved to open accounts in the name of the Appellant with Bank G, Singapore.

(ii) At a meeting held on 11 October 1990, the directors present (the two Mr Hs, Mr A and Mr B) noted the reorganisation of Company 1 with the transfer of its food manufacturing business to Company 4. 'In order to properly reflect the division of the Group', the directors of the Appellant resolved to acquire the I and the II trademarks from Company 1. Those marks were duly transferred by the assignment dated 11 October 1990 referred to in paragraph 4(d) above. At the same meeting, the directors approved the grant of a licence in favour of Company 2 for the use of those marks and the filing of documents with various Hong Kong authorities in relation to such grant.

(b) According to the minutes of a telephone conference held between the two Mr Hs in Singapore and Mr A and Mr B in Hong Kong on 4 March 1993, those directors of the Appellant resolved to open the account with Bank G in Hong Kong referred to in paragraph 9(b) above.

(c) The bulk of the minutes can be described as 'paper minutes' prepared in accordance with article 101 of the Appellant's articles of association. These minutes were signed by the directors of the Appellant at the relevant times. As indicated by Schedule I, those directors were based in Hong Kong, Singapore and Cook Islands. By these paper minutes, the Appellant resolved to acquire various trademarks referred to above and to grant licences in respect of those trademarks. The corporate directors in Cook Islands were further authorised to execute the relevant agreements.

22. The following agreements were all drafted in Hong Kong:

(a) the licence agreement dated 14 May 1988 in relation to the III Marks referred to in paragraph 4(c) above;

(b) the assignment dated 11 October 1990 in relation to the I and II trademarks referred to in paragraph 4(d) above. This was signed by Mr B on behalf of the Appellant in Hong Kong on 11 October 1990;

(c) the licence agreement dated 17 December 1990 in relation to the I and II trademarks referred to in paragraph 4(d) above.

23. The other licence agreements were drafted by Company 11. At all material times Company 11 carried on business in Hong Kong. There is no evidence that it carried on business elsewhere. We are prepared to infer that the other licence agreements were drafted by Company 11 on behalf of the Appellant in Hong Kong.

24. Two local firms of solicitors (Solicitors' Firms F and L) received extensive instructions from the Appellant in relation to registration of trademarks in Hong Kong and abroad and in relation to alleged infringements in Hong Kong and in the PRC. Those instructions were given by Ms I and Ms J. Ms I and Ms J were employees of Company 1. The bills of these two firms were sent to the Office for the Appellant direct or care of Company 11.

Carrying on a business in Hong Kong

25. The applicable principles can be found in the judgment of Cheung J in CIR v Bartica Investment Limited 4 HKTC 129. At page 159 the learned judge pointed out that:

(a) Business is a wider concept than trade.

(b) In the case of a private individual, it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business.

(c) In contrast, in the case of a company incorporated for the purpose of making profits for its shareholders, any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business.

(d) Where the gainful use to which a company's property is put is letting it out for rent, it is not easy to envisage circumstances that are likely to arise in practice which would displace the prima facie inference that in so doing it was carrying on a business.

(e) The carrying on of business, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between.

26. Those principles were applied by this Board in D107/96, IRBRD, vol 12, 83. The Board there pointed out that the crucial issue is 'whether the business activities were carried on in Hong Kong' and business can be carried out in Hong Kong with a very low level of activity.

27. Mr Ho, Counsel for the Appellant, submitted that:

(a) the position of the Appellant is no different from that of a non-resident making gainful use of his asset in Hong Kong;

(b) operating one bank account and keeping accounting records in Hong Kong do not amount to running a business in Hong Kong and

(c) the acts of Ms I and Ms J should not be attributed to the Appellant.

28. We are of the view that the Appellant did carry on a business in Hong Kong. The Appellant had an office address in Hong Kong. Directors' meetings were held in that office address. Its directors resolved in Hong Kong to acquire the I and the II trademarks registered in Hong Kong. Its directors further resolved in Hong Kong to grant a licence in respect of those trademarks. The instructions given by Ms I and Ms J to solicitors in Hong Kong were part of the activities conducted in Hong Kong on the Appellant' s behalf. The payments approved by Mr C in Hong Kong were part of such activities.

Were the profits arising in or derived from Hong Kong from such business

29. The guiding principle was laid down by Lord Bridge in CIR v Hang Seng Bank Limited 3 HKTC 351:

> *'The broad guiding principle, attested by many authorities, is that one looks to see what the taxpayer has done to earn the profit in question'*.

30. This guiding principle was amplified by Lord Jauncey in CIR v HK-TVB 3 HKTC 468 to read:

> *'One looks to see what the taxpayer has done to earn the profit in question and where he has done it'*.

31. In CIR v Magna Industrial Company Limited 4 HKTC 176, the Court of Appeal indicated that the proper approach is to look at the totality of the facts and find out what the taxpayer did to earn the profit.

32. Mr Ho submitted that:

(a) the royalties in question arose from the grant of licences;

(b) Mr B signed two trademark sale and purchase agreements and one assignment of trademarks on behalf of the Appellant. There is no evidence as to where Mr B signed these agreements;

(c) the other trademark sale and purchase agreements and various licence agreements were signed on behalf of the Appellant by its directors resident in Cook Islands;

(d) the Appellant's board sanctioned the purchase and the licence of the trademarks by paper resolutions. Most of the directors who signed those resolutions were resident overseas.

33. In correspondence with the Revenue, the Appellant further submitted that 'Because of the high turnover rate of management personnel, it is not clear where the negotiation between the licensor and the licensee on the establishment of the agreement took place. Given that the executives of both [the Appellant] and [Company 2] were on frequent business travels during the majority period of the years in question, the negotiation process would have been taken place outside Hong Kong'. No evidence has been adduced before us in support of these assertions. We are of the view that the weight of evidence indicates that the likelihood is that the negotiations leading to the agreements all took place in Hong Kong:

(a) The Appellant and Company 2 were part of the Group. At all material times, Company 1 as their controlling company was a company listed in Hong Kong. The Appellant made extensive use of the Office.

(b) Both the Appellant and Company 2 shared the same address at the Office. It is unlikely for executives of these companies to travel abroad to discuss issues of common interest.

(c) The Cook Islands directors were no more than nominee directors acting on instructions. None of them attended the physical meeting which took place in Hong Kong on 11 October 1990. None of them participated in the telephone conference held on 4 March 1993. Whilst Mr H1 held a controlling interest in Company 1, there is no evidence indicating any instruction emanating from him nor is there any evidence of directors' meeting of the Appellant being held in Singapore. According to the statement of Mr C, Mr A and Mr B joined the Group in the 1980's and 'headed the management team'. The initial proposal of Mr B was considered at a meeting on 26 October 1987 attended by Mr A, Mr B, Mr C and no others. We are of the view that they continued to be the moving force behind the various aquisitions and grants. All of them were based in Hong Kong and it is reasonable in these circumstances to infer that Mr B signed in Hong Kong the agreements drafted by Company 11 in Hong Kong.

34. The trademarks in question were and still are registered in Hong Kong. Their renewals in Hong Kong were an integral part of the activities that produced the royalties in issue. Under the various licence agreements, the licensees were under a duty to inform the Appellant of any infringement and the Appellant ' may take such steps as in [the Appellant' s] opinion shall be desirable for the protection of the Trade Mark ... The expenses incurred in taking such steps and any sums resulting therefrom shall be for [the Appellant' s] account unless otherwise agreed' . Whilst steps were taken in divers jurisdiction to protect the Appellant' s rights, the instructions for the taking of those steps were traceable to Ms I and Ms J acting for the Appellant in Hong Kong.

35. We have not lost sight of the paper minutes and the fact that the Cook Islands directors signed some of the agreements. We are of the view that these are no more than administrative steps taken no further the business decisions taken in Hong Kong by its two Hong Kong directors who headed the management team of the Group which the Appellant formed part.

Apportionment

36. Mr Ho relied on CIR v Indosuez W I Carr, IRBRD, vol 16, 1010 (judgment of Deputy High Court Judge Longley in HCIA 5/2001 dated 30 January 2002) in support of his proposition that the law required apportionment when the profits arose in or are derived from more than one source both from Hong Kong and from an outside source.

37. We are of the opinion that no question of apportionment arises in this case. The effective decision to acquire the trademarks and to grant licences in respect of those trademarks were all made in Hong Kong. The trademarks were registered in Hong Kong and the protective steps were all traceable to directions from Hong Kong. Hong Kong is the only realistic source.

The section 59 point

38. The Appellant submits that:

(a) section 59(1) of the IRO requires an assessor to assess a taxpayer only after the issuance of a return except in relation to a case falling within its proviso;

(b) sections 59(2) and 59(4) provide that the assessor has to examine the return before assessing. A proper return is therefore a necessary pre-condition for the raising of an assessment;

(c) section 60 of the IRO must be read in conjunction with section 59;

(d) ' The assessments being raised outside the authority of s. 59 are ultra vires and amount to nullity' .

39. We reject these contentions of the Appellant. Section 59 of the IRO governs the making of first assessments as distinct from additional assessments under section 60. The assessments before us are additional assessments raised pursuant to section 60 of the IRO. That section provides as follows:

> '*(1) Where it appears to an assessor that for any year of assessment any person chargeable with tax has not been assessed or has been assessed at less than the proper amount, the assessor may, within the year of assessment or within 6 years after the expiration thereof, assess such person at the amount or additional amount at which according to his judgment such person ought to have been assessed ...'*.

40. Section 60 does not make the filing of any return by the taxpayer a condition for the exercise by the assessor of the powers conferred by that section. The assessor may exercise such powers if it appears to him that any person has not been assessed or been assessed at less than the proper amount. The additional assessment is to be levied according to the assessor's judgment and is not dependent upon the information furnished by the taxpayer in any return.

41. For these reasons, we dismiss the Appellant's appeal.

Schedule I

Directors of the Appellant

Name	**Company 5**	**Mr A**	**Mr B**	**Mr H1**	**Mr H2**
Address	Cook Islands	Hong Kong	Hong Kong	Singapore	Singapore
8-12-1987	Appointed				
9-12-1987	*	Appointed	Appointed	Appointed	Appointed
12-7-1989	Resigned	*	*	*	*
11-9-1991		*	*	*	*
19-12-1991		*	*	*	*
31-5-1993		*	*	*	*
8-4-1994		*	*	*	*

Name	**Mr D**	**Company 12**	**Mr M**	**Company 7**	**Company 13**
Address	Cook Islands	Cook Islands	Cook Islands	Cook Islands	Cook Islands
8-12-1987					
9-12-1987					
12-7-1989	Appointed	Appointed			
11-9-1991	Resigned	*	Appointed		
19-12-1991		Resigned	*	Appointed	
31-5-1993			Resigned	*	Appointed
8-4-1994				Resigned	Resigned

* Office holder