Case No. D53/00

Profits tax – service company – deductions claimed in respect of rent of residential home – whether properly deducted – Departmental Interpretation and Practice Note No 24 (‘DIPN 24’) – whether retrospectively effective – sections 16(1), 17(1), 61 and 68(4) of Inland Revenue Ordinance (‘IRO’).

Panel: Mathew Ho Chi Ming (chairman), William E Mocatta and Michael Neale Somerville.

Date of hearing: 6 July 2000.
Date of decision: 6 September 2000.

The taxpayer (a barrister-at-law) and his wife were appointed directors of a service company in October 1990. The taxpayer commenced practicing law in January 1991. The service company was set up as a vehicle to enable the taxpayer to take advantage of legitimate tax benefits that were available at the time. The service company’s sole income was management fees which were paid by the taxpayer and claimed as deductions to reduce his overall assessable income.

The taxpayer, in light of his uncomfortable working environment at the office, worked partly from his residential home (Property 1). The rent and rates of Property 1 were claimed as deductions by the service company, which reported losses every year.

When DIPN 24 was issued in August 1995, the taxpayer ceased using the service company to provide services to his own private practice.

The Revenue argued that only costs which were directly attributable to the services provided by the service company to the professional practice (‘Qualifying services’) plus a mark up fee of 12.5% qualified as tax deductions. The taxpayer complained about the retrospective effect of DIPN 24. He also stated that, in any case, 50% of his rent and rates would be deductible because he had used his family home for his practice – these would either be classified as part of the Qualifying services or simply deductible as expenses.

Held:

1. As far as the retrospective effect of DIPN 24 was concerned, the Revenue was merely reapplying the law as they had seen it all along. DIPN 24 did not change the law in any way.

2. There was no single test to be applied and every case is a question of fact and degree and whether an outgoing has the necessary relation to the gaining of the assessable income.

3. On the facts presented, the expenses were not deductible. The residential home was not used exclusively by the taxpayer for his work. It was, therefore, not dedicated for his work: Anthony Patrick Fahy v CIR 3 HKTC 695 applied.

Appeal dismissed.

Cases referred to:

D110/98, IRBRD, vol 13, 553
D19/99, IRBRD, vol 14, 209
D61/91, IRBRD, vol 6, 457
D32/93, IRBRD, vol 8, 261
Anthony Patrick Fahy v CIR 3 HKTC 695
Handley v FCT 11 ATR 644
FCT v Forsyth 11 ATR 657
D32/94, IRBRD, vol 9, 97
D96/89, IRBRD, vo 6, 372

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

Decision:

Nature of appeal

1. The Taxpayer was assessed with profits tax for the years of assessment 1991/92, 1992/93 and 1995/96 and with additional profits tax for the years of assessment 1993/94 and 1994/95. The Taxpayer objected to the assessments. By a determination made by the Commissioner of Inland Revenue dated 3 February 2000 (‘ Determination’), these assessments were reduced for the years of assessment 1991/92 and 1992/93, confirmed for the years of assessment 1993/94 and 1994/95 and increased for the year of assessment 1995/96. The Taxpayer now appeals against the Determination.

2. The parties have agreed the facts as stated in paragraphs 1(1) to (17) of the

Determination. These agreed facts are part of our findings of fact.

Facts

3. At the hearing of this appeal, the Taxpayer appeared in person and gave oral testimony. The Taxpayer was honest and forthright. We have no hesitation in accepting his evidence. We set out below parts of the agreed facts and the testimony of the Taxpayer which are further findings of fact.

4. The Taxpayer is and was, at the material times, a barrister-at-law. On 19 January 1991, he applied for business registration and commenced to practise in his own name after leaving Government. The practice was first situated at Location A ('Chambers A'). He moved his chambers to Location B ('Chamber B') in March 1994 and then to Location C in May 1997.

5. On 23 October 1990, a company in the name of Company D ('Service Co') was incorporated as a private company in Hong Kong. In December 1990, the Taxpayer and his wife, Ms E (the 'Wife'), were appointed as directors of the Service Co. The Wife and a Mr F were the only shareholders of the Service Co, each holding one share of $1. Mr F was the tax partner of a CPA firm ('Former Rep') and he held the share on trust for the Wife. The Service Co was established on the advice of the Former Rep as a vehicle to enable the Taxpayer to take advantage of legitimate tax benefits that were available.

6. For the years of assessment 1991 to 1995, the Taxpayer paid management fees to the Service Co. There was no written management agreement between the Taxpayer and the Service Co. The fee was verbally agreed on an annual basis. Such management fees were claimed as deductions to reduce the overall assessable income of the Taxpayer for those years of assessment. The Service Co's sole income (except a minor sundry income of $12,000 in year of assessment 1994/95) was the management fee paid to it by the Taxpayer.

7. In respect of the Service Co's own tax, it claimed various allowable deductions so that for the years of assessment 1991 to 1995, there were continued net losses. Part of the deductions claimed by the Service Co were the rent and rates paid by the Service Co as tenant of a property known as Property 1.

8. Property 1 was about 2,500 square feet with three bedrooms. At the material times, five persons resided there: the Taxpayer, his Wife and his three children. Two of the children had left to attend university but they return regularly to stay in Property 1 while on holiday. The Taxpayer had used part of the living room and one of the bedroom for his legal practice. He had the essential law reference books and a computer in Property 1. He would work in one of the bedrooms and when the bedroom was occupied, he would work in a corner in the living room. The

reason for the need to work at home was due to the crowded conditions of the chambers to which he belonged at the material times. The Taxpayer frankly admitted that he was not absolutely forced to work at home. However, at the time he was building up his practice and he was naturally concerned with the quality of his work.

9. Between January 1991 and March 1994, he was in Chambers A where he shared a large library room with eight barristers. It was inconvenient and crowded for the Taxpayer to do legal research and court preparation work. On many occasions, the Taxpayer would bring home the necessary books required (in addition to the major reference works already kept at home) to enable him to work at home.

10. In March 1994, he moved to Chambers B where he stayed until May 1997. In Chambers B, he shared an office room of about 330 square feet with three other barristers. There were less disturbances in Chambers B but nevertheless for the same reasons as for Chambers A, the Taxpayer continued to bring work home. In this manner, the Taxpayer carried out his research and court preparation work in Property 1. He would stay in his chambers when he had meetings with clients. The Taxpayer's business registration application dated 19 January 1991 was produced to us wherein it was stated that the Taxpayer commenced his barrister business on 2 January 1991 at the principal place of business at Chambers A. No branch registration of his business was taken out in respect of Property 1.

11. In August 1995 DIPN 24 was issued. DIPN 24 was the result of the Financial Secretary's 1994/95 Budget Speech announcement to take steps to deal with certain service company arrangements of which two types were identified. The arrangement used by the Taxpayer and his Service Co was a Type II arrangement. DIPN 24 set out the Revenue's position in the application of the existing laws on Type II arrangements. Its purpose was to discourage abuse of such arrangements.

12. Upon issuance of DIPN 24, the Taxpayer immediately ceased to use the Service Co to provide services to his own private practice. For the year of assessment 1995/96, the Taxpayer ceased to pay management fees to the Service Co. Accordingly, various new items of expenses (which were previously claimed as deductible expenses of the Service Co) were claimed as allowable deduction to reduce the Taxpayer's profits for year of assessment 1995/96 including the rent and rates of Property 1 for year of assessment 1995/96 which were paid by the Taxpayer rather than the Service Co.

13. The taxes under dispute for the first four years of assessment (1991/92, 1992/93, 1993/94 and 1994/95) relate to the service company arrangement and the Taxpayer's use of Service Co as a tax vehicle. The Revenue has ignored the Service Co. The Revenue came to the view that not all the management fees paid by the Taxpayer to the Service Co were incurred in the production of the assessable profits of the professional practice. Pursuant to the practices set out in DIPN 24, the Revenue considered that only the costs which were directly attributable to the

services provided by the Service Co to the professional practice (referred to in DIPN 24 jargon as ‘Qualifying Services’) plus a mark-up of 12.5% would qualify for tax deduction. The Revenue therefore disallowed the management fee paid to Service Co as a deductible expense and replaced it with the Qualifying Services which it considered were allowable deductions.

14. The remaining year of assessment under appeal (1995/96) relates to the deductibility of the rent and rates as expenses incurred in the production of the Taxpayer’s profits.

Taxpayer’s case

15. The Taxpayer has adopted a two limb approach in his appeal. His first limb is this. The Taxpayer does not dispute the broad principles of law as articulated in the authorities cited by the Revenue. He was not trying to avoid tax which was not high in Hong Kong. He had been advised by his Former Rep of the use of the Service Co as a legitimate tax vehicle. The Former Rep was his tax representative and he relied on their advice in the operation of this tax vehicle from the beginning of his private practice in 1990 until 1995 when DIPN 24 was issued. After DIPN 24 was issued, he immediately abandoned the use of this tax vehicle. The Taxpayer’s gripe (if we may call it that) was the application of DIPN 24 to his tax affairs prior to DIPN 24; that is for the first four years of assessment under appeal. This apparent retrospective application was harsh, unconscionable and contrary to the principle of natural justice. It is, therefore, the Taxpayer’s case that during these first four years of assessment under appeal, the service company arrangement using Service Co was legitimately set up. The Revenue could not reject the deductibility of the management fee expenses of the Taxpayer paid to the Service Co and the Revenue could not substitute it with the Qualifying Services which it thought was applicable in the Taxpayer’s case.

16. The Taxpayer’s second limb relates to all the five years of assessment under appeal. The Taxpayer’s argument is simply that 50% of the rents and rates were deductible expenses incurred by him in the production of his assessable profits. This was because he used his home for his practice. For the first four years of assessment under appeal when the service company arrangement was in place, if the Revenue was right in ignoring the management fee expenses and substituting the Revenue’s Qualifying Services, then 50% of the rent and rates should be part of the Qualifying Services. For the profits tax for the year of assessment 1995/96, as there was no service company arrangement in place, 50% of the rent and rates were simply deductible as expenses incurred in the production of the taxable profits.

Revenue’s case

17. The Revenue’s case is that the service company arrangement used by the Taxpayer was artificial or fictitious under section 61 of the IRO. The Revenue was entitled to strike down the management fees paid in their entirety and allow only those expenses which were Qualifying Expenses.

18. DIPN 24 was not law nor can it alter the law; as was considered so in D110/98, IRBRD, vol 13, 553 and D19/99, IRBRD, vol 14, 209. The Revenue pointed out that the previous Board decisions cited to us relating to service company arrangements were made prior to DIPN 24. These were the Board decisions in D61/91, IRBRD, vol 6, 457 and D32/93, IRBRD, vol 8, 261 in which service company arrangements were successfully challenged by the Revenue although both Boards disagree with the non-inclusion of certain deductible expenses as Qualifying Services by the Revenue.

19. On the rent and rates, the Revenue rested its case on the essential character of the rent and rates expenditure which were for the residence of the Taxpayer and his family. If an expenditure was for domestic or private purpose as it was for business purpose, it was not possible to distinguish between these purposes and hence no sensible apportionment of the expenses can be made. The Revenue further argued that even if an expenditure could be specifically referable to a specific area which forms part of a home, the expenditure was still not deductible. The Revenue relied on some obiter comments on this issue from a recent Board of Review decision in D19/99, a Hong Kong High Court decision in Anthony Patrick Fahy v CIR 3 HKTC 695 and 2 Australian cases in the High Court of Australia: Handley v FCT 11 ATR 644 and FCT v Forsyth 11 ATR 657.

The statutory provision

20. The deduction of outgoings and expenses is governed by section 16(1) of the IRO.

> ‘ *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 ...*’

21. However, section 17(1) restricts the deduction of certain outgoings and expenses.

> ‘ *For the purpose of ascertaining profits in respect of which a person is chargeable to tax under this Part no deduction shall be allowed in respect of:-*
>
> *(a)* *domestic or private expenses, including the cost of travelling between residence and place of business;*
>
> *(b)* *subject to section 16AA, any disbursement or expenses not being money expended for the purpose of producing such profits;*
>
> .....

> *(f)* *rent of, or expenses in connection with, any premises or part of premises not occupied or used for the purpose of producing such profits;'*

22. Furthermore, section 61 provides that if a transaction is found to artificial or fictitious, the transaction may be disregarded.

> ' *Where an assessor is of opinion that any transaction which reduces or would reduce the amount of tax payable by any person is artificial or fictitious or that any disposition is not in fact given effect to, he may disregard any such transaction or disposition and the person concerned shall be assessed accordingly.*'

23. Section 68(4) of the IRO states the burden of the onus of proof in this appeal:-

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

Tax return filing dates

24. The Taxpayer was uncertain of the dates when he filed his various tax returns relating to this appeal. The Taxpayer was aware that they were filed late. Indeed this was one of the reasons why he was dissatisfied with the service of the Former Rep and decided to act in person. From the tax returns submitted to us, we have the following dates:-

Year of assessment	**Date of issuance of tax return**	**Declaration date**	**Revenue receipt chop date**
(a) <u>Taxpayer' s tax return</u>			
1991/92	23 November 1993 (duplicate on 7 January 1998)	22 January 1998	no chop
1992/93	1 April 1993	16 December 1993	17 December 1993
1993/94	2 May 1994	11 November 1994	15 November 1994
1994/95	1 May 1995	1 December 1995	5 December 1995
1995/96	1 May 1996	19 December 1996	24 December 1996

(b) Service Co tax return

1991/92	13 August 1991	19 June 1992	24 June 1992
1992/93	not produced at hearing		
1993/94	10 May 1996 (duplicate on 12 June 1996)	undated	21 June 1996
1994/95	1 May 1995	31 March 1996	2 April 1996
1995/96	not produced at hearing		

Retrospective application of DIPN 24

25. As early as 17 February 1994 which was the date of the first correspondence between the Revenue and the Taxpayer shown to us, the Revenue referred to the Taxpayer's accounts for the years ended 31 March 1991, 1992 and 1993 and informed the Former Tax Rep that according to D61/91, any portion of the management fees paid to Service Co attributed to private/domestic expenditure was not allowable and details of such private/domestic expenditure was requested from the Taxpayer. This was before DIPN 24. The Former Rep replied more than a year later on 1 March 1995. DIPN 24 was issued in August 1995. Hence irrespective of whether DIPN 24 existed, the Revenue had commenced its enquiry on the nature of the expenses charged on management fees. DIPN 24 merely repeated what the Revenue thought was the correct interpretation of the law on service company arrangements. D61/91 was one of the four cases considered in DIPN 24. The other three cases were D32/93, D32/94, IRBRD, vol 9, 97 and D96/89, vol 6, IRBRD, 372. Although this is mere speculation on our part but we do not think that the outcome may be that much different for the Taxpayer if DIPN 24 had not been issued. The Revenue would have continued to apply D61/91 and D32/93 to dissect the management fee where it was of the view that a service company arrangement was not made on proper commercial basis or which were, in the Revenue's view, artificial or fictitious.

26. Had the tax returns of the Taxpayer been filed on time (within one month of issuance) and had the initial reply of the Former Rep not taken more than one year, perhaps the Taxpayer and the Revenue may have reached a more satisfactory conclusion on the assessable income for years of assessment 1991/92, 1992/93 or maybe even for the year of assessment 1993/94. If this had occurred and assessments had been made, section 70 of the IRO would have operated to prevent the Revenue from attempting to re-open these assessments.

27. The only real complaint that the Taxpayer can make in respect of his first limb was whether the first sentence of paragraph 29 of DIPN 24 was wrong or unfair when it states: ‘However, where an assessment has not been made for any year, including a back year, the Department will be at liberty to apply the Practice Note.’ Is it therefore unfair or unconscionable or contrary to principles of natural justice for the Revenue to apply the Practice Note to a year of assessment prior to the issuance of DIPN 24 (August 1995) but where no assessment had yet been made? We bear in mind the maxim that there is no equity in taxation. Even if there were equity in taxation, the circumstances of this case do not suggest any unconscionable treatment or breach of the natural justice. DIPN 24 is a mere repetition of the Revenue's interpretation of the state of law relating to service company arrangements and a statement that the Revenue intends to apply its interpretation. The Revenue has applied this interpretation in the past to service company arrangements before DIPN 24 was issued. In particular, the Revenue had commenced to challenge, or at least, query the service company arrangement of the Taxpayer before DIPN 24 came into being.

28. Therefore, we respectfully disagree with the Taxpayer that the first limb of the Taxpayer's case was sufficient for us to overrule the Determination relating to the first four years of assessment.

29. We must still deal with whether the service company arrangement was artificial or fictitious and whether the Revenue was entitled to dissect the management fees and substitute it with the Revenue's Qualifying Services which the Revenue had allowed as deductible. Since the Taxpayer's challenge in respect of the service company arrangement was based on the first limb of his case, no further evidence was adduced nor were submissions made in respect of how the Taxpayer's service company arrangement actually operated and whether the Service Co had function as a separate business operating on an arm's length basis in dealing with the Taxpayer. We make no findings on whether the Taxpayer's service company arrangement was artificial or fictitious. Suffice to say that insofar as the Revenue having disallowed the management fee as a deductible expense of the Taxpayer and allowed the Qualifying Services that it had allowed in the Determination, the Taxpayer has not discharged its burden of proving that this resulted in the assessments for the first four years of assessment 1991/92, 1992/93, 1993/94, 1994/95 being incorrect or excessive. The exception to this is the rent and rates for all the five years of assessment which are considered below separately in relation to the second limb of the Taxpayer's case.

Rent and rates

30. In the words of section 16(1) of the IRO, are the rent and rates or a portion thereof deductible ‘*to the extent to which they are incurred ... in the production of the profits?*’. Further, do we apply section 17(1)(a), (b) and (f) to specifically exclude the rent and rates as either ‘*domestic or private expense* - subsection (a)’ or ‘*disbursements or expenses not being money expended for the purpose of producing the Profits* - subsection (b)’ or ‘*rent of, or expenses in connection with, any ..... part of premises not occupied or used for the purpose of*

producing such profits - subsection (f)' .

31. The two Australian High Court Cases Handley v FCT and FCT v Forsyth highlight the two different points of view in respect of deductions of expenses relating to the use of a barrister' s home as part of his legal practice. The two cases were heard at about the same time and decided at the same time by the same five Australian federal judges. It was by a narrow margin of three to two that the court reached its decision to disallow such ' home office' expenses as deductible under section 51(1) of the Australian Income Tax Assessment Act.

32. Section 51(1) of the Australian Act is similar to section 16(1) and section 17(1)(a) of our IRO in effect but not in wording. It states that:- ' *all losses and outgoings to the extent to which they are incurred in gaining or producing the assessable income, or are necessarily incurred in carrying on a business ... shall be allowable deductions except to the extent to which they are ... private or domestic nature ...*'

33. The basic facts in both Australian cases are similar where the taxpayers used a study in their homes in relation to their barrister' s practice. The taxpayer in the Forsyth case had even paid a weekly licence fee to the trustees of the taxpayer' s family trust which owned his home for the privilege of using the study for his practice. One school of thought was to apply the ' essential character' test. This is exemplified by Mason J' s statement in the Handley case: ' *I do not agree that in determining the "essential character of the expenditure", we should look only to the use to which the study is put, though use is obviously a matter of great importance. It is necessary to look to the character of what is said to have been acquired by means of the expenditure, namely the study, and to its relationship to the home of which it forms part, in order to decide whether the expenditure falls within the exception at page 651.*' Hence if the study, or whichever part of a taxpayer' s home, is used for work purpose which generates the taxable income, one looks at the essential character of that part of the premises used. Since that part of the premises is still a part of the taxpayer' s home and its essential character is that of domestic or private or residential, then the expense is non-deductible.

34. The opposite school of thought was to apply the ' use' criterion. Hence if what the taxpayer did by use of the study or a part of his home is directly concerned with his income, then the expense relating to this use was deductible. In the words of Stephen J in Handley at page 647: ' *section 51(1) cannot be affected by vagaries of architecture or design.*'

35. It appears to us that neither school of thought should be adopted to the exclusion of the other. Mason J in the passage quoted above thought that ' use' was obviously a matter of great importance. We agree with the two dissenting judges, Stephen J and Aickin J, in Handley when they said:

> ' *I have thus far described, and in turn discarded, a variety of factors which might be thought to disqualify a taxpayer from deductions for home office*

expenses:- the physical unity of the home with the office, the one being integral with the other; the existence of intercommunication between the two; the presence elsewhere of another and principal place of business; the absence of visits by clients or customers to the home office; its use in part for purely domestic purposes. It would no doubt be possible to conceive of others.

The reason why none of these features provides a satisfactory criterion for the denial of deductibility is because the problem posed by s.51(1) is not of a kind to be answered by specific criteria such as these. The text of s.51(1) itself provides the only criterion of deductibility. Disregarding for the moment the exclusion of particular sub-classes, it is that there should exist a particular relationship between a loss or outgoing and the gaining or producing of the taxpayer's assessable income (I need here refer only to the first limb of the description of the general class of deductibility). That relationship must be such that the loss or outgoing is of a nature or character which is incidental and relevant to the gaining of assessable income and must have been incurred "in the course of gaining or producing" it. Whether or not on each occasion the loss or outgoing is sufficiently incidental or relevant will depend upon a variety of factors. In some circumstances the purpose for which the advantage occasioning the loss or outgoing is sought may evidence a sufficient relationship with the income-earning process, as for instance where interest is payable on borrowed money. On other occasions, the purpose may be of little assistance; it will be necessary to look to other factors to see what role, if any, the loss or outgoing plays in the conduct of the income-earning activity.' - Stephen J in Handley at page 648.

' *It is clear from the joint reasons in Lunney's case that the nature of the expenditure is not to be taken as the only test or for that matter to exclude recourse, where it is useful, to the purpose for which the expenditure has been incurred. The same would doubtless be true of other so-called "tests" of deductibility such as the use to which the study is put in order to produce income. It is clear that their Honours were not laying down any simple formula which would delimit with precision the scope of s.51(1). As my brother Stephen has rightly observed the only criterion of deductibility is the wording of the section itself. He has also made it clear that in this context there is no necessary conflict between the factors such as use and the determination of the essential character of the payment.*' - Aickin J in Handley at page 653.

Wilson J in the Forsyth case at page 660 pointed out that: ' *The proper construction of s.51 has been discussed ... and I think it is fair to say that its application in the circumstances of each case remains very much a matter of fact and degree.*'

36. The wording of the Australian section 51(1) is different from our section 16(1) and section 17(1) of the IRO. The two Australian cases are not binding on us. However, we adopt the view that the only criterion of deductibility is in the statutory wording itself. Therefore we would look at the wording of section 16 for deduction of expenses '*to the extent to which they are incurred ... in the production of profits.*' We also look at the wording of section 17(1)(a), (b) and (f). We then seek to apply the statutory wording and its construction to the circumstances and facts of this appeal.

37. On the interpretation of section 17(1)(a), we have binding authority in the form of Anthony Patrick Fahy v CIR 3 HKTC 695 where an accountant taxpayer claimed medical expenses incurred due to an accident injuring his leg as deductible expenses. Godfrey J held that:- '*medical treatment of whatever character must (except in the very rare sort of case ...) be for a domestic or private purpose. Expenses incurred in this connection are not expenses incurred in the production of profit* - at page 702.' He also said:

> '*But where the expenditure has a dual purpose, partly of a domestic or private nature, and partly for the purposes of the preservation of the Taxpayer of his own person as an asset to his business, to the extent that the expenditure is a domestic or private character, in my judgment it is not allowable.*
>
> *It seems to me that the appeal of the Taxpayer here must fail at this hurdle.*
>
> *In my judgment, the requirement for this operation was as much for domestic or private as it was for business purposes. I cannot believe (although I think at one stage the Taxpayer was inclined to suggest it) that the Taxpayer would not have had this operation at all but for the purpose of earning or continuing to earn the profits of his profession. Nor can I see any way of distinguishing between those elements of the purpose which are domestic and private and those which are business. It seems to me to be one indivisible matter; there cannot be any sensible apportionment.* - at page 701'

We are dealing with an entirely different type of expense in this appeal. There is some similarity between the rent and rates expenses of this appeal and the medical expenses in the Fahy case in the sense that it could be argued that both expenses had a dual purpose - that of domestic and business (or insofar as the business aspect was concerned, the preservation or maintenance of the taxpayer of his own person as an asset to his business).

38. Taking into consideration the wordings of section 16(1) and section 17(1) and our view that there is no single test to be applied and every case is a question of fact and degree whether an outgoing has the necessary relation to the gaining of the assessable income, we conclude that the rent and rates were not deductible in the circumstances of this case. The bedroom and part of the living room were not used exclusively for the Taxpayer's work. It was shared with other family

members and used by the Taxpayer for both domestic and business purpose. The Taxpayer has his own place of work, albeit crowded. Not all of his research and case preparation were done at his home. Research and case preparation themselves were only part of his overall work and operation which includes court appearances and meeting with clients in his chambers. The space at home used was not dedicated for his work use nor was the space predominantly used by him for the purpose of his work. The rent and rates would have been incurred irrespective of whether he worked from home or not. The rent and rates were essentially payments in respect of his residence and to maintain himself as an asset to his legal practice and to maintain his family. Further and for the same reasons, we think that, in the circumstances of this case, apportionment of the rent and rates is not appropriate. Thus we are of the view that the rent and rates in this case were not deductible as an outgoing '*to the extent to which they are incurred ... in the production of profits*' under section 16(1).

39. Further, we are of the view that the rent and rates were specifically non-deductible as '*domestic or private expenses*' under section 17(1)(a). Insofar as the rent and rates had dual purpose, we are bound by Godfrey J's judgment in Anthony Patrick Fahy as quoted above. Even if it could be successfully argued that the rent and rates were deductible as having been incurred in the production of profits or there should be apportionment of the rent and rates, section 17(1)(a) and the Anthony Patrick Fahy case specifically excluded them as deductible.

40. This does not mean that all 'home office' expenses are non-deductible or cannot be apportioned. It is a question of fact and degree for each individual case and all the surrounding circumstances need to be considered.

41. The Taxpayer is applauded for his honest and straight forward no-nonsense approach in this appeal. However, we are unable to agree with his submissions. We share his grievance at the unfortunate delay that may have been avoided if his tax affairs for the years prior to 1995 could have been finalized prior to the issue of DIPN 24. But DIPN 24 did not change the law in any way. In the circumstances, the appeal is dismissed and the Determination is confirmed.