INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D56/04

Profits tax – source of profits – goods manufactured outside Hong Kong by a joint venture company.

Panel: Kenneth Kwok Hing Wai SC (chairman), Ho Kai Cheong and Fonnie Wong Fung Yi.

Dates of hearing: 2, 3, 4 and 5 December 2003.
Date of decision: 15 November 2004.

The appellant company entered into a joint venture agreement with an enterprise in Mainland China to from a JV company. The JV company was a limited company and manufactured knitwear apparel products.

The appellant contented that its profits were derived from the manufacturing activities which took place outside Hong Kong and thus not being subject to profits tax.

Held:

1. The test is to see what the appellant has done to earn the profit in question and where it has done it. (CIR v Hang Seng Bank Limited; Commissioner of Inland Revenue v HK-TVB International Limited applied; CIR v Wardley Investment Services (Hong Kong) Limited followed).

2. The mere fact that the goods were made offshore does not help the appellant unless it was the appellant who made the goods and this was what it had done to earn the profit in question.

3. The goods were made by the JV company, a separate legal entity. There was also not evidence that the JV company was the appellant's agent.

4. Thus, the Board found the appellant's offshore case failed at the outset.

5. Having considered the appellant's financial statements, the Board also found that the appellant was not engaged in manufacturing but trading business.

Appeal dismissed.

Cases referred to:

Mok Tsze Fung v Commissioner of Inland Revenue 1 HKTC 166
Commissioner of Inland Revenue v The Board of Review, ex paste Herald International Ltd [1964] HKLR 224
Chinachem Investment Company Limited v Commissioner of Inland Revenue (1987) 2 HKTC 261
All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750
Li Tin Sang v Poon Bun Chak & others, unreported, CACV 153 of 2002, 18 November 2002, the Court of Appeal
CIR v Hang Seng Bank Limited [1991] 1 AC 306
Commissioner of Inland Revenue v HK-TVB International Limited [1992] 2 AC 397
Orion Caribbean Ltd (in voluntary liquidation) v Commissioner of Inland Revenue [1997] HKLRD 924
CIR v Wardley Investment Services (Hong Kong) Limited 3 HKTC 703
Liverpool Roman Catholic Association Trust v Goldberg [2001] All ER (Ch Div) vol 4, TLR 09/03/01
Field and another v Leeds City Council [2000] 1 EGLR 54
R (Factortame) Ltd v Transport Secretary (No. 8) [2002] 3 WLR 1004
Tang Ping Choi & another v Secretary for Transport [2004] 2 HKLRD 284
The Ikarian Reefer [1993] 2 Lloyd's Rep 68
Whitehouse v Jordan [1981] 1 WLR 246
Polivitte Ltd v Commercial Union Assurance Co plc [1987] 1 Lloyd's Rep 379
Re J [1990] FCR 193
Derby & Co Ltd and others v Weldon and others, The Times, 9 November 1990
CIR v Indosuez WI Carr Securities Ltd [2002] HKLRD 308

Lee Yun Hung for the Commissioner of Inland Revenue.
Fu Chi Kwong Joseph of Messrs Deloitte Touche Tohmatsu for the taxpayer.

Decision:

1. This is an appeal against the determination of the Acting Deputy Commissioner of Inland Revenue dated 1 August 2003 whereby:

(a) Profits tax assessment for the year of assessment 1993/94 under charge number 1-5028877-94-5, dated 6 January 2000, showing assessable profits of $3,836,039 with tax payable thereon of $671,306 was confirmed.

(b) Profits tax assessment for the year of assessment 1994/95 under charge number 1-5052944-95-9, dated 6 January 2000, showing assessable profits of $5,819,778 with tax payable thereon of $960,263 was confirmed.

(c) Profits tax assessment for the year of assessment 1995/96 under charge number 1-3148191-96-8, dated 6 January 2000, showing assessable profits of $3,876,219 with tax payable thereon of $639,576 was confirmed.

(d) Profits tax assessment for the year of assessment 1996/97 under charge number 1-1147579-97-9, dated 6 January 2000, showing assessable profits of $4,301,840 with tax payable thereon of $709,803 was confirmed.

(e) Profits tax assessment for the year of assessment 1997/98 under charge number 1-2896070-98-0, dated 6 January 2000, showing assessable profits of $5,758,675 with tax payable thereon of $855,163 was confirmed.

The agreed facts

2. Subject to some minor changes (incorporated below), the facts in the 'Facts upon which the Determination was arrived at' in the determination were agreed and we find them as facts.

3. The appellant had objected to the profits tax assessments for the years of assessment 1993/94 to 1997/98 raised on it. The appellant claimed that its profits were derived from a source outside Hong Kong and therefore should not be chargeable to profits tax.

4. The appellant was incorporated as a private company in Hong Kong on 23 December 1982. At the relevant time, the directors of the appellant were Mr A, Mr B, Mr C, Mr D, Ms E and Mr F.

5. On 10 November 1991, the appellant entered into a Sino-foreign equity joint venture agreement ('the JV Agreement') with an enterprise in City G in Mainland China to form a company, the JV Company in the Mainland. The JV Agreement provided, among others, as follows:

(a) The JV Company was a limited company and would manufacture knitwear apparel products. (Clauses 6 and 12)

(b) The appellant would contribute 66.6% of the registered capital of the JV Company. (Clause 7)

(c) Responsibilities of the appellant included:

(i) assisting the JV Company in purchasing equipment, parts, materials, etc. outside the Mainland,

(ii) guiding the installation, testing and trial production of the equipment, and

(iii) training the technical personnel and workers of the JV Company. (Clause 14)

(d) 80% of the products of the JV Company would be sold in overseas market and 20% in local market. (Clause 12)

(e) The pricing method to be adopted for the finished products was 'production cost plus reasonable profits'. (Clause 12)

(f) The board of directors of the JV Company should compose of five directors, of whom three were to be appointed by the appellant. The chairman of the board should also be appointed by the appellant. (Clause 16)

(g) The profits of the JV Company were to be shared in accordance with the ratio of capital contributions by the joint venture shareholders. (Clause 36)

6. (a) The appellant filed its profits tax returns for the years of assessment 1993/94 to 1997/98. It was stated in the profits tax returns that the main business address of the appellant in Hong Kong was Address H in HK. In the financial statements submitted with the profits tax returns, the appellant described the nature of its business as 'manufacture and sale of knitwear apparel'.

(b) The appellant's profit and loss accounts showed the following particulars:

Year of assessment:	**1993/94**	**1994/95**	**1995/96**	**1996/97**	**1997/98**
Year ended:	30-4-1993	30-4-1994	30-4-1995	30-4-1996	30-4-1997
	$	$	$	$	$
Sales	77,741,214	64,592,239	60,568,157	84,303,403	82,285,239
Less: Cost of sales –					
Opening stock	17,396,364	8,298,785	10,003,615	12,357,469	10,283,131
Purchases	38,016,712	37,258,463	30,117,411	38,769,331	36,229,628
Depreciation of land and buildings outside Hong Kong	-	-	794,468	467,334	467,334
Depreciation of plant and machinery and motor vehicles	1,780,588	2,019,773	1,532,799	635,251	376,193
Dyeing and testing					

	charges	-	938,829	3,344,210	3,196,219	3,079,938
	Insurance	130,958	75,519	82,388	51,462	55,164
	Rent	-	-	1,401,333	668,000	868,000
	Consumables	1,135,414	840,996	1,083,741	838,939	896,025
	Sub-contracting charges	17,176,044	13,306,994	11,895,116	24,069,216	24,249,939
	Transportation	952,810	684,334	729,575	819,563	874,426
		76,588,890	63,423,693	60,984,656	81,872,784	77,379,778
Less:	Closing stock	8,298,785	10,003,615	12,357,469	10,283,131	7,392,991
		68,290,105	53,420,078	48,627,187	71,589,653	69,986,787
Gross profit		9,451,109	11,172,161	11,940,970	12,713,750	12,298,452
Add:	Other income –					
	Dividend	102,000	102,000	102,000	102,000	102,000
	Gain on disposal of fixed assets	67,973	109,374	-	8,758	-
	Gain on disposal of interest in an associated company	-	-	-	225,740	-
	Others	607,235	35,211	54,818	98,393	113,434
		777,208	246,585	156,818	434,891	215,434
		10,228,317	11,418,746	12,097,788	13,148,641	12,513,886
Less:	Selling expenses	495,712	746,266	3,514,316	2,669,341	719,070
	Administrative expenses –					
	Depreciation of buildings, leasehold improvement & furniture & fixtures	274,439	385,354	264,731	245,079	130,337
	Directors' remuneration	1,303,572	1,449,448	1,491,381	1,712,060	1,881,825
	Loss on disposal of fixed assets	-	-	-	-	2,884
	Provision for permanent diminution in value of investment	-	-	235,791	-	-
	Salaries and allowances	2,710,970	2,057,792	2,200,733	2,064,559	2,488,052
	Others	2,677,785	2,182,662	1,624,707	1,565,122	1,660,795
		6,966,766	6,075,256	5,817,343	5,586,820	6,163,893
	Finance expenses	814,854	971,199	1,615,699	1,601,806	746,996
	Total expenses	8,277,332	7,792,721	10,947,358	9,857,967	7,629,959
Profit before taxation		1,950,985	3,626,025	1,150,430	3,290,674	4,883,927

(c) The appellant claimed that all its work was performed in the Mainland and hence the profits should not be subject to profits tax. It declared 'nil' assessable profits in its profits tax returns for the years of assessment 1993/94, 1996/97 and 1997/98. However, assessable profits of $3,618,612 and $1,019,022

were declared in the profits tax returns for the years of assessment 1994/95 and 1995/96 respectively.

7. In response to the assessor's enquiries, the appellant stated as follows:

(a) The appellant's mode of operation of business remained unchanged, that is, being a manufacturing factory in the Mainland, throughout the years. All its work was performed in the Mainland.

(b) The factory operated by the appellant was the JV Company.

(c) All the appellant's products were manufactured by the JV Company.

(d) No processing agreement entered into with the JV Company was available.

(e) The appellant had an office in the factory in the Mainland. It did not need to negotiate with its customers and suppliers as it had steady orders from its customers, the trading companies and actually the appellant's associated companies.

(f) Most of the raw materials were arranged by the appellant's customers who controlled the kind of raw materials used.

(g) The raw materials might be bought from the customers, or might upon arrangement with the customers, be delivered to the dyeing factories (some of which were located in the Mainland). The dyed yarn would be shipped to the Mainland directly.

(h) The appellant's office in Hong Kong would assist the delivery of raw materials to the Mainland, if necessary. No inspection would be done in Hong Kong.

(i) Some raw materials from suppliers would pass through the appellant. No stock of merchandise was maintained in Hong Kong.

(j) The appellant's major suppliers were as follows:

Name of supplier	**Address**	**Purchase for the year ended 30-4-1996**
		$
Company I	Address J in HK	18,616,059
Company K	Same as that of Company I	756,498
Company L	Address M in HK	3,148,682

		(dyeing charges)
Company N	Address O in HK	13,921,095
Company P	Address Q in HK	1,547,633

Notes

Company I, Company K and Company L were associated companies of the appellant.

Company I and Company K supplied raw materials and accessories for producing their orders.

Company L provided dyeing services for the appellant.

Company N supplied raw materials for producing the associated companies' orders.

Company P supplied raw materials for producing other customers' orders.

(k) '[Company I] arrange the delivery of raw material. They contact the godown and ask us to send our truck to the godown.

Our staff in [the Mainland] arrange the delivery of finished goods. They prepare the packing list and fax to [Company I] directly.

[Company I] arrange with the shipping co. and shipping document with the packing list.'

(l) The appellant's major customers were as follows:

Name of customer	**Address**	**Sale for the year ended 30-4-1996**
		$
Company I	Address J in HK	67,545,611
Company K	Same as that of Company I	1,647,254
Company R	Address U in HK	13,195,296
Company S	(This company was winding up)	1,135,251
Company T	Address V in HK	942,676

(m) The appellant was not required to locate customers. More than 80% of its sales were made to associated companies, such as Company I, Company K and Company L and the rest 20% were made to Company N, the appellant's old customer.

(n) The associated companies sent their purchase orders to the appellant.

(o) The finished products delivered to Hong Kong were shipped directly to the customers. They were not processed in Hong Kong.

(p) The associated companies always settled their accounts by bank cheques. The other customers settled their accounts by bank cheques or letters of credit.

(q) 'The reason that our profit is offshore because:

a) The whole manufacturing process (sampling, knitting, washing and packing) are all carried out in [the Mainland]. We need not make any sales and purchases as we have steady order from our customer (our associated company/the trading company); besides, all materials, design and production information are also prepared by the associated company or trading company.

b) The office in HK only involves in simple book-keeping and arranging deliveries of raw materials and finished goods. The production manager stayed in [the Mainland] throughout the year and never worked in HK.

c) All fundamental activities in relation to the production are outside HK and all major preparation work are carried out by our customer directly, therefore the profit so derived should be offshore and not subject to tax in HK.'

8. The appellant provided, among others, copies of the following documents in relation to its business transactions:

<u>Sales to Company I</u>

(a) Invoice dated 22 November 1995 issued by Company I to the appellant in Hong Kong regarding the appellant's purchase of 2,254.5 lbs of '1/16 40% angora 50% lambswool 10% nylon' together with (i) delivery note dated 8 November 1995 issued by Factory W for delivery the aforesaid materials to 'Factory X' and (ii) packing list of Company Y of Hong Kong.

(b) Purchase confirmation dated 2 December 1995 from Company I to the appellant in Hong Kong for 5,000 pieces of ladies' knitted pullovers and cardigans.

(c) Hong Kong import notification (textiles) declared by the appellant on 7 December 1995 for importing 5,000 pieces of ladies' knitted pullovers and cardigans from the Mainland for re-export to Japan together with Hong Kong

Customs & Excise' s import manifest stating that the consignee was 'Company Z'.

(d) Invoices dated 10 December 1995 issued by the appellant in Hong Kong to Company I for the sale of 1,844 pieces of each of ladies' knitted pullovers and cardigans together with delivery notes of 'Company AA' also dated 10 December 1995.

(e) Packing lists dated 10 December 1995.

(f) Debit note dated 11 December 1995 from Company I to the appellant in Hong Kong for charge of accessories.

(g) Statement of account for December 1995 issued by the JV Company together with a factory delivery list.

(h) Cheque dated 20 December 1995 issued by Company I payable to the appellant in the amount of $402,851.6 together with Bank AB Hong Kong Branch' s customer' s advice informing the appellant that the aforesaid cheque was deposited into the appellant' s bank account on 21 December 1995.

(i) Statement of payment details dated 20 December 1995 issued by Company I to the appellant.

(j) The Bank AB Hong Kong Branch' s customer receipt and debit advice showing that the appellant remitted a sum of $523,040 to 'Factory AC in City G' on 30 January 1996 in relation to invoice numbers 35 to 69.

<u>Purchases from Company N</u>

(k) Hong Kong export notification (textiles) declared by the appellant on 29 June 1995 for exporting knitting yarn to the Mainland together with Hong Kong Customs & Excise' s export manifest.

(l) Invoices, delivery notes and receipts all dated 30 June 1995 issued by Company N to the appellant in Hong Kong in respect of 60,000 lbs of yarn sold and delivered.

(m) Letter of credit dated 20 September 1995 issued by Bank AD, under reference no. WFH419414 and upon application of the appellant in Hong Kong, to Company N as the beneficiary in the amount of $1,290,000.

(n) Advices dated 29 September 1995, 24 November 1995 and 6 December 1995 issued by Bank AD to the appellant in Hong Kong regarding settlement under documentary credit no. WFH419414.

(o) Invoice dated 15 October 1995 issued by Company L of Hong Kong to the appellant in Hong Kong regarding dyeing charges together with the knitwear delivery notes for delivery to 'Company AE in City AF' and 'Company AE in City AG'.

Sales to Company R

(p) Purchase orders dated 18 December 1995 from Company R to the appellant in Hong Kong for 5,314 pieces of blouses.

(q) Letter of credit dated 19 March 1996 issued by Bank AH, upon application of Company R of the Country AI, in favour of the appellant, for negotiation at Bank AH Hong Kong Branch, to the extent of US$52,744.20, together with Bank AH Hong Kong Branch's covering notice dated 22 March 1996 issued to the appellant in Hong Kong.

(r) Hong Kong import notification (textiles) declared by the appellant on 19 March 1996 for importing 6,514 pieces of ladies' knitted blouses from the Mainland for re-export to the Country AI together with Hong Kong Customs & Excise's import manifest stating that the consignee was 'Company Z'.

(s) Invoices dated 21 March 1996 issued by the appellant in Hong Kong to Company R of Country AI for the sale of 5,286 pieces of ladies' knitted blouses together with packing lists also dated 21 March 1996.

(t) Cargo receipt dated 21 March 1996 regarding the shipment of cartons of knitted blouses from Hong Kong to Country AI.

(u) Company R's certificate of inspection dated 22 March 1996.

(v) Collection letter issued by Bank AJ and letter dated 18 April 1996 and credit advice dated 26 April 1996 issued by Bank AJ Hong Kong to the appellant in Hong Kong regarding settlement of a sum due from Company R.

9. In correspondence with the assessor, the appellant further stated as follows:

(a) Of the directors of the appellant, Mr B and Mr D were stationed in Hong Kong. Mr B was the representative of Company I. Mr D was the founder of the

appellant. Mr D helped to solve problems in the Mainland so that he had to go to the Mainland every week. Mr D and Mr B were responsible for the overall planning of the appellant and negotiation with the factory in the Mainland and with the Mainland authority.

(b) Mr C and Mr F were responsible for supervising the production in the Mainland. They spent most of their working time in the Mainland.

(c) Ms E was responsible for supervising the processing in Hong Kong.

(d) One of the appellant's staff, Mr AK, was the Production Manager and responsible for planning the production schedule in the Mainland. He also spent most of his working time in the Mainland.

(e) The three merchandisers employed by the appellant always visited the Mainland.

(f) The sub-contracting charges [paragraph 6(b)] were paid to the JV Company.

10. The appellant provided copies of the following documents:

(a) List of staff stationed in the Mainland and Hong Kong as at the date of reply.

(b) Plant and machinery installed in the factory in the Mainland as at 30 April 1996.

(c) Auditors' reports and financial statements of the JV Company for the years ended 31 December 1996 and 31 December 1997.

11. The appellant contended the following:

(a) 'In considering the source of profit of a manufacturing company, the operations which actually cause the income to be received should be examined – purchases, manufacturing and sales.

For customers and suppliers, the work done to locate the customers and suppliers is more important than the location of the customers and suppliers.

... most of our customers and suppliers are our related companies. That means it is not required to do any work to locate the customers and suppliers.'

(b) '... all the sub-contracting charges were paid by our company to the factories in [the Mainland]. That means all the manufacturing works are performed in [the Mainland]. The ownership of the factory is not important.'

(c) 'For [Mr B], he received salaries from many companies in Hong Kong. [The appellant] paid him a very small amount of money comparing with his total income) He worked for [the appellant] only when he stayed in [the Mainland] together with other directors. He negotiated with the Factory in [the Mainland] and the [Mainland] Authority, of course, in [the Mainland].'

'For [Mr D], he is a retired person. He only worked when he visited [the Mainland].'

(d) 'For a manufacturing company like us, only some immaterial works can be done in Hong Kong. In view of all the operations which actually cause the income is performed in [the Mainland], therefore, the profits derived by our company should not be subject to Hong Kong Profits Tax.'

12. The assessor was of the view that all the profits of the appellant arose in or were derived from Hong Kong. He accordingly raised on the appellant the following 1993/94 to 1997/98 profits tax assessments:

	1993/94 $	**1994/95** $	**1995/96** $	**1996/97** $	**1997/98** $
Profits per accounts [Paragraph 6(b)]	1,950,985	3,626,025	1,150,430	3,290,674	4,883,927
Add: [Paragraph 6(b)]					
Depreciation charged on-					
Land and buildings outside Hong Kong	-	-	794,468	467,334	467,334
Plant & machinery & motor vehicles	1,780,588	2,019,773	1,532,799	635,251	376,193
Building, leasehold improvement, & furniture & fittings	274,439	385,354	264,731	245,079	130,337
Loss on disposal of fixed assets	-	-	-	-	2,884
Provision for permanent diminution in value of investment	-	-	235,791	-	-
	2,055,027	2,405,127	2,827,789	1,347,664	976,748
Less: [Paragraph 6(b)]					
Dividend	102,000	102,000	102,000	102,000	102,000

Gain on disposal of fixed assets	67,973	109,374	-	8,758	-
Gain on disposal of interest in an associated company	-	-	-	225,740	-
	169,973	211,374	102,000	336,498	102,000
Assessable profits	3,836,039	5,819,778	3,876,219	4,301,840	5,758,675
Tax payable thereon (Note)	671,306	960,263	639,576	709,803	855,163

Note: The tax payable for the year of assessment 1997/98 was computed after deduction of 10% tax rebate.

13. The appellant objected to the 1993/94 to 1997/98 profits tax assessments on the grounds that the appellant's profits should not be subject to Hong Kong profits tax.

14. In response to the assessor's enquiries, the appellant stated as follows:

(a) Plant and machinery costing $8,696,267 as shown in the appellant's balance sheet as at 30 April 1996 were owned by the appellant. The appellant could get back all the plant and machinery when the JV Agreement was terminated.

(b) 'This point [i.e. paragraph (14)(a) above] is very important, all our plant and machinery are put in the factory to produce our product. All the plant and machinery in the factory belongs to us. (Others are buildings) For our company, the sub-contracting charges paid just like wages and rental only.'

(c) As regards the sub-contracting charges, the unit charge for each kind of product manufactured by the JV Company was calculated by the JV Company and was approved by Mr F in the Mainland. The negotiation regarding the charges was performed by Mr F in the Mainland.

(d) The sub-contracting charges due to the JV Company were paid by remittance, draft or cheque. All of them had to be settled within six months.

(e) The JV Company also manufactured goods for either Mainland or Hong Kong entities other than the appellant.

(f) The sub-contracting charges for the years ended 30 April 1993, 1994, 1995 and 1996 were paid to the following entities:

Year ended	The JV Company	Factory AL	Factory AM in City AG	Mr AN	Total
	$	$	$	$	$

30-4-1993	12,566,817	4,609,228	-	-	17,176,045
30-4-1994	12,363,875	386,561	-	556,559	13,306,995
30-4-1995	10,279,138	-	1,130,822	485,156	11,895,116

Year ended	**The JV Company (processing with materials provided)**	**The JV Company (Joint venture processing)**	**Other Sub-contractors**	**Total**
	$	$	$	$
30-4-1996	6,869,754	11,739,115	5,460,347	24,069,216

(g) The mode of operation of the appellant remained unchanged throughout the period from 1 May 1992 to 30 April 1997.

15. The appellant further provided copies of the following documents:

(a) Supplementary agreement dated 20 November 1991 to the JV Agreement stating the arrangement regarding the plant and machinery supplied by the appellant.

(b) Quotation lists of unit processing charges of the JV Company, with confirmation of the JV Company and the appellant, for the months August and December 1995.

(c) Statements of accounts for the months from May 1995 to April 1996 issued under the names of the JV Company and 'Factory AC in City G'.

The grounds of appeal

16. The objection having failed, the appellant gave notice of appeal through Messrs Deloitte Touche Tohmatsu by letter dated 27 August 2003 on the following grounds:

' (a) The amount of tax assessed in the Notices of Assessment issued for the years of assessment 1993/94 to 1997/98 are incorrect and excessive.

(b) Profits of the Company for the years of assessment 1993/94 to 1997/98 were derived from a source outside Hong Kong, i.e. offshore profits. As such, the Company should not be liable to Hong Kong profits tax.

(c) The Determination was concluded based on incomplete facts.'

The appeal hearing

17. The appellant lodged a bundle of the following authorities:

(a) Inland Revenue Ordinance, Chapter 112, sections 2(1) and 14(1);

(b) Departmental Interpretation & Practice Notes No 21 (revised 1998);

(c) Implementation Rules for the Regulations of the People's Republic of China on the Registration of Enterprises as Legal Persons promulgated on 3 November 1988 (revised on 1 December 2000) (Extract) (**中華人民共和國企業法人登記管理條例施行細則**) (1988 **年** 11 **月** 3 **號發佈**) (2000 **年** 12 **月** 1 **號修訂**)) – with unofficial English translation;

(d) Regulations of General Administration of Customs of the People's Republic of China on the Control of Processing and Assembly Undertaken for Foreign Parties (Promulgated on 5 October 1990 by the General Administration of Customs) (Extract) (**中華人民共和國海關關於對外加工裝配業務管理規定（**1990 **年** 10 **月** 5 **日海關總署修訂發佈**）) – with unofficial English translation;

(e) The People's Government of Changping Town of Dongguan City for the Regulations on the Fee Payment and Management of Foreign Exchange Settlement and Collection for Enterprises with Foreign Investments for Year 2000 (**東莞市常平鎮人民政府關於** 2000 **年涉外企業結匯收匯收費方式和有關管理的規定**) – with unofficial English translation;

(f) Nathan v Federal Commissioner of Taxation, (1918) 25 CLR 183;

(g) Liquidator, Rhodesia Metals Ltd (in liquidation) v Commissioner of Taxes (1940) AC 774;

(h) Montreal v Montreal Locomotive Works Ltd (1947) 1 DLR 161;

(i) CIR v The Hong Kong & Whampoa Dock Co, Ltd (1960) 1 HKTC 85;

(j) Market Investigations Ltd v Minister of Social Security (1968) 2 QB 173;

(k) CIR v International Wood Products Ltd (1971) 1 HKTC 551;

(l) CIR v Hang Seng Bank Limited (1990) 3 HKTC 351;

(m) CIR v HK-TVB International Ltd (1992) STC 723;

(n) CIR v Magna Industrial Company Limited (1996) 11 IRBRD 600;

(o) CIR v Indosuez WI Carr Securities Ltd [2002] HKLRD 308;

(p) D8/00, IRBRD, vol 15, 268;

(q) Willoughby and Halkyard, Encyclopedia of Hong Kong Taxation, Vol 3, Division II, 1507 – 1551;

(r) Littlewood, M, The Taxation of Manufacturing Profits: A Re-interpretation (1997) 27 HKLJ 313 – 323.

18. The respondent lodged a bundle of the following authorities:

(a) CIR v Wardley Investment Services (Hong Kong) Ltd 3 HKTC 703;

(b) CIR v Euro Tech (Far East) Ltd 4 HKTC 30;

(c) Secan Ltd, Ranon Ltd and CIR 5 HKTC 266;

(d) CIR and Kwong Mile Services Ltd (In Members' Voluntary Winding Up) CACV 371/2002;

(e) Liverpool Roman Catholic Association Trust v Goldberg [2001] All ER (Ch Div) Vol 4, TLR 09/03/01;

(f) Board of Review Decision D145/99, IRBRD, vol 15, 91;

(g) Board of Review Decision D20/02, IRBRD, vol 17, 487;

(h) Board of Review Decision D102/02, IRBRD, vol 18, 54;

(i) Odhams Press Limited v Cook 23 TC 233;

(j) Burman v Hedges & Butler Limited 52 TC 501.

19. At the hearing of the appeal, the appellant was represented by Mr Fu Chi-kwong, Joseph of Messrs Deloitte Touche Tohmatsu, and the respondent by Mr Lee Yun-hung, chief assessor.

20. Mr Fu Chi-kwong, Joseph, indulged us by supplying us with nearly a thousand pages of documents.

21. He helpfully summed up the appellant's case by saying that the appellant's profits arose out of manufacturing activities which took place outside Hong Kong and that the appellant would try to establish that the appellant owned the facilities and controlled the facilities by sending their own employees to run their production.

22. He called three factual witnesses, Mr F, Mr AK and Ms E.

23. On the third day of hearing of this appeal, he applied for leave to add the following grounds of appeal:

> ' (d) Not all the profits of the Company for the relevant period were derived from its business in Hong Kong.
>
> (e) In determination the amount of assessable profits, depreciation allowances should be granted in respect of assets used by the Company in production of profits chargeable to Hong Kong profits tax.'

24. After it had been pointed out to him that ground (d) as drafted seemed incomplete, he revised his proposed ground (d) to read as follows:

> ' (d) Not all the profits of the Company for the relevant period were derived from its business in Hong Kong. The part of the Company's profits attributable to its business in Hong Kong should be determined according to the value added by the functions it performed in Hong Kong in relation to its business in Hong Kong.'

25. Mr Lee Yun-hung opposed the application for leave to amend the grounds of appeal.

26. After hearing submissions by Mr Fu Chi-kwong, Joseph, and Mr Lee Yun-hung, we told the parties that we would rule on the amendment application at the time of our decision.

27. Mr Fu Chi-kwong, Joseph, wished to call Mr AO, as an expert. Mr Lee Yun-hung opposed on the ground, among others, that Mr AO, was not an expert. We heard submissions and told the parties that we would hear the evidence *de bene esse* and give our ruling at the time of our decision.

Our decision

Onus of proof and previous inconsistent accounting treatment

28. Section 68(4) of the Inland Revenue Ordinance, Chapter 112, ('IRO') provides that:

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

29. As the onus of disturbing the assessment lies on the appellant, failure to discharge the onus may be decisive against the appellant.

30. In Mok Tsze Fung v Commissioner of Inland Revenue 1 HKTC 166 {also reported in [1962] HKLR 258}, Mills Owens J said (at page 183 of the HKTC report and page 281 of the HKLR report) that:

> '*It was for the appellant to adduce evidence before the Board of Review in order to discharge the onus resting upon him, and on his failure to do so the Board was entitled, indeed bound, to reject his appeal (vide* ***Pyrah v Amis****).*'

31. In Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224 Blair Kerr J said that:

> '*According to section 68(3) the assessor attends the hearing before the Board "in support of the assessment", but the onus of proving that "the assessment as determined by the Commissioner .... is excessive" is placed fairly and squarely on the appellant by section 68(4).' (at page 229)*
>
> '*The question for the Board of Review is not whether the Commissioner erred in some way, but whether the assessment is excessive. As Mr Sneath so aptly put it:-*
>
> *'The question is: "Did the Commissioner get the correct answer"; not "did the Commissioner get the correct answer by the wrong method".'*
>
> *And the onus of proving that the assessment is excessive lies on the taxpayer-appellant.' (at page 237)*

32. On a taxpayer's previous inconsistent treatment in its accounts and on burden of proof, Macdougall J said in Chinachem Investment Company Limited v Commissioner of Inland Revenue (1987) 2 HKTC 261 at page 302 that:

> '*I entirely accept that the matter is not concluded by the way in which it has been treated in the taxpayer's books of account, but it seems to me that the way in which the properties have been treated in the accounts is by no means an insignificant factor to be taken into consideration, particularly where there has also been no attempt to claim depreciation in respect of those properties.*

...

The Board, therefore, had before them a witness in Mrs Wang whom they did not believe, no evidence in the form of company minutes or resolutions to support her evidence, accounts which classified the properties as current assets, no claims for depreciation, no real explanation from Mrs Wang as to the misclassification of the properties or the failure to claim depreciation, and finally, no evidence from any of the persons who could reasonably be expected to shed light on these matters. Bearing in mind that that the burden lay on the taxpayer to establish that the Commissioner's assessment was wrong, it is hardly surprising that the Board came to the decision to which they did. They were entitled to disbelieve Mrs Wang and had ample reason to do so.'

On appeal to the Court of Appeal, Huggins VP said at page 308 that:

'It is accepted by the Commissioner that the accounts are not conclusive evidence of the matter in issue, and obviously that is rightly accepted. Nevertheless the accounts must remain important and call for credible explanation, because they are contemporaneous evidence of the Company's intention ... I agree with the judge that "the way in which the properties have been treated in the accounts is by no means an insignificant factor" and I am not persuaded that the Board regarded them as conclusive.'

33. In All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750 at page 772, Mortimer J said that:

'It must be remembered that the burden of disturbing the assessment, rests upon the taxpayer.'

34. In Li Tin Sang v Poon Bun Chak & others, unreported, CACV 153 of 2002, 18 November 2002, the Court of Appeal held that a judge is not bound always to make a finding one way or the other and may decide the case on the burden of proof.

'I agree with Cheung JA and Stone J that the answer lies in Rhesa Shipping Co SA v Herbert David Edmunds (The "Popi M") [1985] 1 WLR 948, 955H-956A, [1985] 2 Lloyd's Rep. 1 at 6, where Lord Brandon observed that the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties and may decide the case on the burden of proof. This was what happened below: the judge found that the plaintiff had failed to prove his case', per Le Pichon JA, at paragraph 3.

'*A judge is not bound always to make a finding one way or the other with regard to facts averred by the parties. While the court does not generally favour deciding a case on the basis of burden of proof, a judge has open to him this third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden: Rhesa Shipping Co SA v Herbert David Edmunds, ("The Popi M") [1985] 2 Lloyd's Law Report 1', per Cheung JA at paragraph 63.*

'*A trial judge is not bound to find one way or the other, and it is open to the court to decide the case on the burden of proof: see here the observations of Lord Brandon in The "Popi M" [1985] 2 Lloyd's LR 1, at p.6', per Stone J at paragraph 77.*

Law on source of profits

35. Section 14(1) provides that:

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

36. Three conditions must be satisfied before a charge to tax can arise under section 14 (CIR v Hang Seng Bank Limited [1991] 1 AC 306 at page 318):

'*(1) the taxpayer must carry on a trade, profession or business in Hong Kong;*

(2) the profits to be charged must be "from such trade, profession or business," which their Lordships construe to mean from the trade, profession or business carried on by the taxpayer in Hong Kong;

(3) the profits must be "profits arising in or derived from" Hong Kong'.

It follows that a distinction must fall to be made between profits arising in or derived from Hong Kong ('Hong Kong profits') and profits arising in or derived from a place outside Hong Kong ('offshore profits') according to the nature of the different transactions by which the profits are generated (at page 319). The question is one of fact and the broad guiding principle is to look to see what the taxpayer has done to earn the profit in question (pages 322-323):

> '*But the question whether the gross profit resulting from a particular transaction arose in or derived from one place or another is always in the last analysis a question of fact depending on the nature of the transaction. It is impossible to lay down precise rules of law by which the answer to that question is to be determined. 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. If he has rendered a service or engaged in an activity such as the manufacture of goods, the profit will have arisen or derived from the place where the service was rendered or the profit making activity carried on. But if the profit was earned by the exploitation of property assets as by letting property, lending money or dealing in commodities or securities by buying and reselling at a profit, the profit will have arisen in or derived from the place where the property was let, the money was lent or the contracts of purchase and sale were effected. There may, of course, be cases where the gross profits deriving from an individual transaction will have arisen in or derived from different places. Thus, for example, goods sold outside Hong Kong may have been subject to manufacturing and finishing processes which took place partly in Hong Kong and partly overseas. In such a case the absence of a specific provision for apportionment in the Ordinance would not obviate the necessity to apportion the gross profit on sale as having arisen partly in Hong Kong and partly outside Hong Kong.*'

37. The guiding principle laid down by Lord Bridge in the Hang Seng Bank case was expanded and applied by Lord Jauncey in Commissioner of Inland Revenue v HK-TVB International Limited [1992] 2 AC 397 at pages 407 as follows:

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

The proper approach (page 409):

> '*is to ascertain what were the operations which produced the relevant profits and where those operations took place.*
>
> ...
>
> *In the view of their Lordships it can only be in rare cases that a taxpayer with a principal place of business in Hong Kong can earn profits which are not chargeable to profits tax under section 14 of the Inland Revenue Ordinance.*'

38. The ascertaining of the actual source of income is a 'practical hard matter of fact', Orion Caribbean Ltd (in voluntary liquidation) v Commissioner of Inland Revenue [1997] HKLRD 924 at page 931:

> *'... more generally, the proposition that Lord Bridge was laying down a rule of law to the effect that, in the case of a loan of money, the source of income was always located in the place where the money was lent, is one that cannot stand with the opening words of Lord Bridge quoted above, nor with the explanation of his remarks by Lord Jauncey in the HK-TVB case, nor with the whole range of authority starting from the judgment of Atkin LJ in FL Smidth & Co v Greenwood onwards, to the effect that the ascertaining of the actual source of income is a "practical hard matter of fact", to use words employed, again by Lord Atkin, in Liquidator, Rhodesia Metals Ltd v Commissioner of Taxes [1940] AC 774 at page 789. No simple, single, legal test can be employed.'*

39. In CIR v Wardley Investment Services (Hong Kong) Limited 3 HKTC 703, Fuad VP, delivering the leading judgment of the majority, made the point that the Board of Review in that case had looked more at what the overseas brokers had done to earn their profits which told us nothing about what the taxpayer in that case did (and where) to earn its profit. Fuad VP cited Lord Bridge's 'broad guiding principle' expressed in the Hang Seng Bank case, as expanded by Lord Jauncey in the HK-TVB case and continued (page 729):

> *' "one looks to see what the taxpayer has done to earn the profit in question and where he has done it."*
>
> *When addressing the question the Board had formulated for itself 'where did the operations take place from which the profits in substance arise', in my respectful judgment the Board did not appear to appreciate that it is the operations of the taxpayer which are the relevant consideration. If the Board had been able to benefit from the decisions of the Privy Council in the **Hang Seng Bank** and the **HK-TVB** case, I have little doubt the Board's general approach to the issues would not have been the same. I think that Miss Li was right when she submitted that the case stated clearly indicated that the Board had looked more at what the overseas brokers had done to earn their profits. Of course, there would have been no 'additional remuneration' ultimately credited to the Taxpayer if the brokers had not executed the relevant transactions, and these took place abroad, but this does not tell us what the Taxpayer did (and where) to earn its profit. The Taxpayer, it seems to me, while carrying on business in Hong Kong, instructed the overseas broker from Hong Kong to execute a particular transaction. The Taxpayer was carrying out its contractual duties to its client and performing services under the management agreement in Hong Kong and in return receiving the*

> *management fee as well as the 'additional remuneration as manager' to which it was entitled under that agreement. In my view, the Taxpayer did nothing abroad to earn the profit sought to be taxed. The Taxpayer would be acting in precisely the same manner, and in the same place, to earn its profit, whether it was giving instructions, in pursuance of a management contract, to a broker in Hong Kong or to one overseas. The profit to the Taxpayer was generated in Hong Kong from that contract although it could be traced back to the transaction which earned the broker a commission.'*

40. Our task is 'to see what the taxpayer has done to earn the profit in question and where he has done it', bearing in mind the onus of proof.

The appellant's offshore case

41. The appellant's offshore case as helpfully summarised by Mr Fu Chi-kwong, Joseph, was that the appellant's profits arose out of manufacturing activities which took place outside Hong Kong.

42. The mere fact that the goods were made offshore does not help the appellant unless it was the appellant who made the goods and this was what it had done to earn the profit in question.

43. The goods in this case were made by the JV Company. Mr Fu Chi-kwong, Joseph conceded in paragraph 5.1.1.2 of his opening submission which he called 'Technical Submission' that the JV Company was a separate legal entity from the appellant:

> 'Joint ventures are typically formed as a legal person, as seen in this case.'

In his closing submission, he stated categorically that the appellant did not dispute that the JV Company was a separate legal entity.

44. Significantly, there was *no evidence* that the JV Company was the appellant's agent.

45. The relevant enquiry is what the appellant did to earn the profit in question, not what a separate legal entity (that is, the JV Company) did to earn the JV Company's profit or suffer its loss, see Wardley Investment Services (Hong Kong) Limited. The appellant's offshore case fails at the outset.

46. Further and in any event, any contention that the appellant was engaged in manufacturing instead of trading business is contradicted by the appellant's financial statements.

47. The appellant's financial statements for the years ended 30 April 1993, 30 April 1994, 30 April 1995, 30 April 1996 and 30 April 1997 were audited by Mr Fu Chi-kwong, Joseph's

firm, Messrs Deloitte Touche Tohmatsu, who opined that the financial statements gave a true and fair view of the state of affairs of the appellant and the Group and of the profit and cash flows of the group for the year then ended and had been properly prepared in accordance with the Companies Ordinance.

48. The appellant's financial statements for the year ended 30 April 1993 showed a closing stock of $8,298,785, defined in Note 2 as follows:

> 'Stocks, which comprise direct materials, are stated at the lower of cost and net realisable value. Cost is calculated using the first-in first-out method. Net realisable value represents the estimated selling price less all further costs to completion and costs to be incurred in selling and distribution.'

49. This was not the only indicia in Note 2 of trading activities. Turnover was defined as follows:

> 'Turnover represents the amounts received and receivable for goods sold, less returns and discounts, to outside customers during the year.'

50. The profit and loss account [see paragraph 6(b) above] showed substantial 'Sales', 'Cost of Sales', 'Opening Stock', 'Purhcases', and 'Closing Stock', 'Sub-contracting Charges' but no direct labour costs.

51. Similar indicia of trading business appeared in the appellant's financial statements for the years ended 30 April 1994, 30 April 1995, 30 April 1996, and 30 April 1997.

52. Note 11 to the appellant's financial statements for the years ended 30 April 1995 explained that 'Stocks' were calculated by adding 'Raw materials' and 'Finished goods', less a 'Provision for stocks'.

53. The appellant's financial statements for the years ended 30 April 1996 and 30 April 1997 defined the appellant's revenue recognition policy as follows:

> 'Sales of goods are recognised when the goods are delivered and the title has been passed.'

54. The appellant's financial statements, audited by Messrs Deloitte Touche Tohmatsu, contradicted the appellant's case of manufacturing business and the assertion of Mr Fu Chi-kwong, Joseph in his final submission that:

> 'The [appellant] derived its income by charging its customers a CMT fee for the production services it provided at its factories on the mainland. It then had to pay

> the wages for the workers and other overheads at the factories in Mainland China. The difference was the profits it made.'

The financial statements cried out for a credible explanation. There was no explanation, let alone a credible one. Applying Chinachem Investment Company Limited, the appellant's offshore manufacturing case must fail and fails.

Section 66(3) and the grounds of appeal

55. Section 66(3) provides that:

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

56. The grounds of appeal (see paragraph 16 above) do not raise any issue on apportionment or depreciation. Unless we allow the appellant to amend its grounds of appeal, neither apportionment nor depreciation is in issue.

Decision on amendment application re apportionment

57. The question of apportionment had not been raised until shortly before the hearing. The appellant asserted that it no longer had all the contemporaneous documents. The respondent did not have any opportunity to investigate any factual basis for any possible apportionment. We are not persuaded that we should exercise our discretion to allow such a late amendment and we do not consent to the appellant relying on ground (d). Apportionment is thus not in issue.

Decision on application to adduce 'expert' evidence

58. Mr Lee Yun-hung cited the Goldberg case and questioned the independence of Mr AO.

59. The Goldberg case is to be contrasted with Field and another v Leeds City Council [2000] 1 EGLR 54. In any event, the Goldberg case was disapproved by the English Court of Appeal in R (Factortame) Ltd v Transport Secretary (No. 8) [2002] 3 WLR 1004 at paragraph 70:

> '*We do not believe that this approach is correct. It would inevitably exclude an employee from giving expert evidence on behalf of an employer. Expert evidence comes in many forms and in relation to many different types of issue. It is always desirable that an expert should have no actual or apparent interest*

> *in the outcome of the proceedings in which he gives evidence, but such disinterest is not automatically a precondition to the admissibility of his evidence. Where an expert has an interest of one kind or another in the outcome of the case, this fact should be made known to the court as soon as possible. The question of whether the proposed expert should be permitted to give evidence should then be determined in the course of case management.'*

60. In a judgment handed down by the Hong Kong Court of Appeal after the hearing of this appeal, the Court of Appeal declined to follow the Goldberg case, see Tang Ping Choi & another v Secretary for Transport [2004] 2 HKLRD 284 at paragraphs 16, 34 and 37.

61. Since we have refused leave to amend the grounds of appeal to raise apportionment, the 'expert's' evidence is irrelevant and therefore not admissible.

62. If we had permitted the issue of apportionment to be raised, we would have to decide the competency of Mr AO as a preliminary question, Phipson on Evidence, 15th Edition, paragraph 37-46. It would be for us to decide whether he had sufficient knowledge or expertise to qualify as an expert, and there was no need for it to have been acquired professionally, Halsbury's Laws of England, 4th edition, volume 17(1), paragraph 751, footnote 9.

63. We are not satisfied that Mr AO had sufficient knowledge or expertise to qualify as an expert to give evidence on apportionment. He had no professional qualification, whether as an accountant or a lawyer. He had no degree in accounts or in law. He did not obtain his first degree, a BA in political science, until May 2000 and his 'MA in international policy studies with a concentration in international economics' until June 2001. He had practically no working experience before June 2001 and no Hong Kong taxation experience before January 2003.

64. In any event, we would have attached no weight to his report. Any person holding himself out as an expert witness should acquaint himself with the duties and responsibilities of expert witnesses stated by Cresswell J in The Ikarian Reefer [1993] 2 Lloyd's Rep 68 at page 81. These include the following:

1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: Whitehouse v Jordan [1981] 1 WLR 246 at 256, per Lord Wilberforce.

2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his expertise: see Polivitte Ltd v Commercial Union Assurance Co plc [1987] 1 Lloyd's Rep 379 at 386, Garland J and Re J [1990] FCR 193, Cazalet J. An expert witness in the High Court should never assume the role of an advocate.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion (Re J, supra).

4. An expert witness should make it clear when a particular question or issue falls outside his expertise.

5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one (Re J, supra). In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report: Derby & Co Ltd and others v Weldon and others, The Times, 9 November 1990, per Staughton LJ.

65. The attempt to adduce the evidence of Mr AO as expert evidence contributed to the length of the hearing and we do not wish to unduly burden our decision with comments on his evidence. Suffice it to point out that what he said at page 3 of his 'Study on the Apportionment of Profits' is at best a misunderstanding and at worse a misuse of authority. There he said that (written exactly as it stands in the original):

> ' Finally, apportionment of profits by reference to value-added is also consistent with the principles cited by Deputy Judge Longley in the case *Commissioner of Inland Revenue v Indosuez WI Carr Securities Ltd (2002)*, when he reminded the Board of Revenue to bear in mind of "added value" in assessing the source of profits if apportionment of profits is both "permissible and appropriate."'

66. There were five questions of law on appeal in the Indosuez case and Question 4 was:

> *' Whether on the facts found by the Board of Review, the Board of Review erred in law in concluding that the source of profits generated by the taxpayer from orders from Hong Kong clients executed on overseas markets was predominantly Hong Kong or that Hong Kong was where the acts more immediately responsible for the receipt of the profits were undertaken.'*

67. The learned Deputy Judge dealt with Question 4 in paragraphs 58 and 59. Paragraph 59 was the only place where the learned Deputy Judge mentioned 'added value.'

> *' Question 4*

> *58. The 4th question for the opinion of the court is related to the 5th question as if apportionment is both permissible and appropriate the question of whether the source of profits generated by the Taxpayer from orders from Hong Kong clients executed on overseas markets was predominantly Hong Kong or that Hong Kong was where the acts more immediately responsible for the receipt of profits were undertaken becomes redundant.*
>
> *59. Clearly my finding that the execution of the orders from Hong Kong clients on the overseas markets were the acts of the Taxpayer increases the offshore element the source of profits, though it will have to be borne in mind in assessing the source of profits that the Taxpayer was charging his clients much higher fees that a discount brokerage would charge by way of commission reflecting the possibility that the "added value" in having the Taxpayer execute the transaction may well reflect an onshore element to the profits.'*

68. As Question 4 was redundant, what the learned Deputy Judge said under Question 4 was clearly *obiter*.

69. Moreover, the reference to 'added value' was made in passing in the context of value to the Hong Kong clients of having a local broker. Indosuez was not a manufacturing case.

Decision on amendment application re depreciation

70. Ground (e) on depreciation is conspicuous in the absence of particulars. It is not known whether 'assets' comprised buildings and structures (for a claim under section 34), machinery or plant (for a claim under section 37), or both. There is no allegation of the date when or the amount in which capital expenditure was allegedly incurred in the construction of a building or structure. There is no allegation of the date when or the amount in which capital expenditure was allegedly incurred on the provision of machinery or plant. The appellant asserted that it no longer had all the contemporaneous documents. The respondent did not have any opportunity to investigate any factual basis for any possible depreciation claim. We are not persuaded that we should exercise our discretion to allow such a late amendment and we do not consent to the appellant relying on ground (e). Depreciation is thus not in issue.

71. It would appear from paragraph 14(a) and (b) above that the depreciation claim was made in respect of the plant and machinery in the JV Company or factory. If such be the case, then we agreed with the submission of Mr Lee Yun-hung that such plant and machinery represented the appellant's capital contribution to the JV Company (see clause 7 of the JV Agreement which obliged the appellant to contribute $12.156 million by way of plant and machinery). Upon contribution, such plant and machinery became the capital of the JV Company, a separate legal

entity. The depreciation claim is thus bound to fail. This is another reason why we disallow the amendment application.

Conclusion

72. The appellant has failed to discharge its onus of showing that any of the assessments appealed against is excessive or incorrect.

Disposition

73. We dismiss the appeal and confirm the assessments as confirmed by the Acting Deputy Commissioner.