Case No. D56/08

Profits tax – company interposed between appellant and group companies in the course of trading – transaction entered into for the sole or dominant purpose of obtaining tax benefits – sections 14, 16(1), 61, 61A and 68 of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Benny Kwok Kai Bun and Mark R C Sutherland.

Dates of hearing: 10 and 11 December 2008.
Date of decision: 25 February 2009.

The appellant traded in raw materials used by the animal feeds business. The appellant was a wholly owned subsidiary of HoldingCo, which was also the holding company of InterposedCo and UserCo1, UserCo2 and UserCo3 (together 'the UserCos').

The appellant bought raw materials from suppliers and sold them at a nominal mark up of 0.75% to InterposedCo. InterposedCo then sold the raw materials at a profit to the UserCos.

The Assistant Commissioner was of the opinion that InterposedCo was interposed between the appellant and other companies for the sole or dominant purpose of enabling the appellant to obtain a tax benefit and raised on the appellant additional profits tax assessment.

One of the grounds of appeal was that InterposedCo was the purchasing agent of the UserCos and it did not maintain any office in Hong Kong and the pertinent activities in deriving its profits were carried out outside Hong Kong and the profits should not therefore be subject to Hong Kong profits tax under section 14 of the IRO.

Held:

1. A taxpayer's tax affairs are matters peculiarly within the knowledge of the taxpayer and the taxpayer might be expected to have material evidence to give on its taxation affairs. In the absence of any dispute raised by the appellant, it is found as facts that the appellant was the sole supplier of InterposedCo, selling at a mark-up of 0.75% on costs and the UserCos were the only customers of InterposedCo buying at a mark-up percentage determined by the purchasing director of InterposedCo and the goods were normally shipped to the UserCos directly.

(Kao Lee & Yip v Koo Hoi Yan and others [2003] 3 HKLRD 296; Wisniewski v Central Manchester HA [1998] Lloyd's Rep Med 223 applied.)

2. The appeal was not InterposedCo's appeal on whether its profits were assessable to profits tax. The appellant's ground of appeal regarding section 14 of the IRO was plainly an incorrect ground. The appellant's conduct of this appeal as a 'source of profits' case on the part of InterposedCo was fundamentally misconceived. (Ngai Lik Electronics Company Limited v Commissioner of Inland Revenue CACV 22/2008 applied.)

3. By selling to InterposedCo at the nominal mark-up of 0.75%, the interposition transaction had the effect of conferring a tax benefit on the appellant by mopping up a large portion of the appellant's profits and transferring them to InterposedCo. The evidence suggests that the most likely transaction if the appellant had not been able to secure the tax benefit would be direct sales by the appellant to the UserCos at the prices at which InterposedCo sold to the UserCos under the interposition transaction. The tax benefit is plain and obvious. (Commissioner of Inland Revenue v Tai Hing Cotton Mill (Development) Limited [2008] 2 HKLRD 40; Commissioner of Inland Revenue v HIT Finance Limited [2008] 2 HKLRD 52 applied.)

4. On the issue of purpose, the approach is an objective one and there is the requirement of dominance. Having considered the various matters at (a) to (g) in section 61A(1), the Board finds that the dominant purpose of the appellant and the other parties to or participants in the transaction in entering into or carrying out the transaction was to enable the appellant to obtain a tax benefit. (Commissioner of Inland Revenue v Tai Hing Cotton Mill (Development) Limited [2008] 2 HKLRD 40; Ngai Lik Electronics Company Limited v Commissioner of Inland Revenue CACV 22/2008; Yick Fung Estates Limited v Commissioner of Inland Revenue [2000] 1 HKLRD 381 applied.)

Appeal dismissed and costs order in the amount of $5,000 imposed.

Cases referred to:

ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2008) 1 HKC 1
Commissioner of Inland Revenue v Hang Seng Bank Ltd [1990] 3 WLR 1120
Harrods (Buenos Aires) Ltd v Taylor-Gooby (1964) 41 TC 450
Tata Hydro-Electric Agencies Ltd Bombay v CIT, Bombay Presidency and Aden [1937] AC 685

Pondicherry Ry Co v ITC (1931) 58 LR Ind App 239
CIR v Cosmotron Manufacturing Ltd [1997] HKLRD 1161
Seramco Ltd Superannuation Fund Trustees v Income Tax Commissioner [1977] AC 287
Cheung Wah Keung v CIR [2002] 3 HKLRD 773
CIR v Tai Hing Cotton Mill (Development) Ltd [2008] 2 HKLRD 40
FCT v Peabody (1994) 181 CLR 359
Yick Fung Estates Ltd v CIR [2001] 1 HKLRD 381
FCT v Spotless Services Ltd (1996) 186 CLR 404
Asia Master Limited v CIR (unreported, HCAL 114/05, 30.11.06) & Corrigenda
Kao Lee & Yip v Koo Hoi Yan and others [2003] 3 HKLRD 296
Wisniewski v Central Manchester HA [1998] Lloyd' s Rep Med 223
Bank of China (Hong Kong) Limited v Wong Tang and others, HCMP 4222 of 2003
Kim Eng Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2007) 10 HKCFAR 213
D60/05, (2005-06) IRBRD, vol 20, 828
Shui On Credit Company Limited v Commissioner of Inland Revenue, HCIA 2/2007
Shui On Credit Company Limited v Commissioner of Inland Revenue, CACV 85/2008
D83/06, (2007-08) IRBRD, vol 22, 87
Ngai Lik Electronics Company Limited v Commissioner of Inland Revenue, HCIA 5/2007
Ngai Lik Electronics Company Limited v Commissioner of Inland Revenue, CACV 22/2008
D109/03, IRBRD, vol 19, 14
Commissioner of Inland Revenue v HIT Finance Limited [2008] 2 HKLRD 52
CIR v Euro Tech (Far East) Limited (1995) 4 HKTC 30

Ho Chi Ming Counsel instructed by Messrs Cheng Chan & Co, Solicitors, for the taxpayer.
Eugene Fung Counsel instructed by the Department of Justice for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal against the Determination ('the Determination') of the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') dated 18 October 2007 whereby:

(a) Additional profits tax assessment for the year of assessment 1993/94 under charge number X-XXXXXXX-XX-X, dated 31 March 2000, showing additional assessable profits of $7,000,000 with tax payable thereon of $1,225,000 was increased to additional assessable profits of $19,199,327 with tax payable thereon of $3,359,882.

(b) Additional profits tax assessment for the year of assessment 1994/95 under charge number X-XXXXXXX-XX-X, dated 29 March 2001, showing additional assessable profits of $5,000,000 with tax payable thereon of $825,000 was increased to additional assessable profits of $16,331,514 with tax payable thereon of $2,694,699.

(c) Additional profits tax assessment for the year of assessment 1995/96 under charge number X-XXXXXXX-XX-X, dated 27 March 2002, showing additional assessable profits of $60,000,000 with tax payable thereon of $9,900,000 was reduced to additional assessable profits of $36,521,412 with tax payable thereon of $6,026,033.

(d) Additional profits tax assessment for the year of assessment 1996/97 under charge number X-XXXXXXX-XX-X, dated 28 March 2003, showing additional assessable profits of $70,000,000 with tax payable thereon of $11,550,000 was reduced to additional assessable profits of $55,415,151 with tax payable thereon of $9,143,500.

(e) Additional profits tax assessment for the year of assessment 1997/98 under charge number X-XXXXXXX-XX-X, dated 25 March 2004, showing additional assessable profits of $75,000,000 with tax payable thereon of $11,137,501 was reduced to additional assessable profits of $60,094,145 with tax payable thereon of $8,923,981.

(f) Additional profits tax assessment for the year of assessment 1998/99 under charge number X-XXXXXXX-XX-X, dated 7 January 2005, showing additional assessable profits of $62,000,000 with tax payable thereon of $9,920,000 was reduced to additional assessable profits of $28,424,465 with tax payable thereon of $4,547,914.

2. The appellant traded in raw materials used by the animal feeds business. It bought raw materials from suppliers and sold them at a nominal mark up of 0.75% to a fellow wholly owned subsidiary ('InterposedCo') of its holding company ('HoldingCo'). InterposedCo then sold the raw materials at a profit to 3 user companies ('UserCos') which were also fellow wholly owned subsidiaries of HoldingCo.

3. The assessor commenced an investigation into the tax affairs of the appellant as from May 2000.

4. The Assistant Commissioner was of the opinion that InterposedCo was interposed between the appellant and the UserCos for the sole or dominant purpose of enabling the appellant to obtain a tax benefit and raised on the appellant various additional profits tax assessments under section 61A(2) of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance').

5. The appellant objected.

6. By his Determination, the Deputy Commissioner, upheld[1] the assessments objected against, relying on sections 61 and 61A of the Ordinance.

7. In this appeal, Mr Ho Chi Ming, counsel for the appellant, did not cite or make any submission on any judgment or decision on the tax avoidance provisions. He opened this appeal as if it were a dispute on the source of profits of InterposedCo.

The agreed facts

8. The parties agreed the following facts in the Statement of Facts and we find them as facts.

9. The appellant was incorporated as a private limited company in Hong Kong on 20 June 1985. In the reports of the directors for all the relevant years, it was stated that the appellant's[2] principal activities were sales of animal feeds and trading of raw materials used by the animal feeds business. It closes its accounts on 31 December of each year.

10. At all relevant times, the appellant was a wholly owned subsidiary of HoldingCo which was incorporated in Bermuda on 29 December 1988. In HoldingCo's reports of the directors for all the relevant years, it was said that HoldingCo's principal activities were investment holding and that its subsidiaries were principally engaged in the production and marketing of scientifically formulated livestock and poultry feeds, sales of poultry breeding stock and commodity trading. Organisation charts of HoldingCo as of October 1991 and July 1996 are at Appendices[3] A1 and A2. Below are details of HoldingCo's principal subsidiary and associated companies:

Name of company	Country of incorporation	% of direct ownership

[1] Subject to revision by reason of an item conceded by the assessor.

[2] The appellant was referred to as 'the Company' in the Determination and 'the Taxpayer' in the Statement of Agreed Facts. However, 'the Company' cropped up every so often.

[3] There is no appendix to the Statement of Agreed Facts. We were told that the references were to appendices to the Determination.

UserCo1	Hong Kong	100%
UserCo2	Hong Kong	100%
UserCo3	Hong Kong	100%
OtherCo1	Hong Kong	100%
OtherCo2	Hong Kong	100%
The appellant	Hong Kong	100%
MainlandCo	Mainland China	100%
InterposedCo	Bermuda	100%
DissolvedCo	Hong Kong	100%
JVCo	-	50%

11. At all relevant times, UltimateHoldingCo was the ultimate holding company of HoldingCo and the appellant. UltimateHoldingCo was incorporated in Hong Kong on 29 May 1981. Its principal activities were investment holding.

12. DissolvedCo, incorporated in Hong Kong on 28 October 1983, was at all relevant times, a wholly owned subsidiary of HoldingCo. In DissolvedCo' s reports of the directors, it was stated that DissolvedCo' s principal activities were the trading of raw materials used by the animal feed business. DissolvedCo became inactive since 31 December 1994. In 1995, it became dormant. It was placed into members' voluntary liquidation on 21 September 1998 and dissolved on 24 May 1999.

13. InterposedCo was incorporated in Bermuda on 15 February 1989. Its registered address was in Bermuda, which was the same as that of HoldingCo, also a Bermuda company. It closes its accounts on 31 December of each year. In InterposedCo' s reports of the directors for all the relevant years, it was said that InterposedCo' s principal activity was the trading of raw materials used by the animal feeds business of its related companies. InterposedCo commenced business in February 1991 and ceased operation in 1999. InterposedCo had never taken out a business registration in Hong Kong. InterposedCo operated a Hong Kong dollar and a US dollar account with the Hong Kong branch of a bank.

14. The following persons were directors of the appellant, HoldingCo, UltimateHoldingCo, DissolvedCo and InterposedCo:

Name of director	The appellant[4]		HoldingCo		Ultimate HoldingCo		Dissolved Co		Interposed Co	
Director1	x		x		x		x		x	
Director2	x	(a)	x	(b)	x	(b)				
Director3	x		x		x		x		x	
Director4	x	(c)	x	(c)	x	(c)	x		x	(c)

[4] ' The Company' cropped up again.

Director5	x	(d)	x	(d)	x	(d)	x	(d)	x	(d)
Director6	x	(e)	x	(e)	x	(e)	x	(e)	x	(e)
Director7			x	(a)	x	(a)	x	(a)	x	(a)

Notes:
(a) Resigned on 18-4-1996
(b) Appointed on 28-5-1993
(c) Resigned on 31-12-1997
(d) Appointed on 18-4-1996
(e) Appointed on 12-1-1998

15. The assessor raised on the appellant profits tax assessments for the years of assessment 1993/94 to 1998/99 with assessable profits as per the appellant's profits tax returns. No objection against the assessments was received.

16. The assessor commenced an investigation into the tax affairs of the appellant as from May 2000.

17. Below is a summary of the profit and loss accounts of the appellant[5] for the years ended 31 December 1992 to 1998:

	1992	1993	1994	1995	1996	1997	1998
	(HK$)	(HK$)	(HK$)	(RMB)	(RMB)	(RMB)	(RMB)
Sales	421,631,583	214,584,127	188,101,766	473,926,545	524,999,900	504,643,624	478,743,105
Less: Cost of sales	413,988,721	198,491,958	177,525,762	468,871,556	518,890,595	500,168,982	474,487,576
Gross profit	7,642,862	16,092,169	10,576,004	5,054,989	6,109,305	4,474,642	4,255,529
Other income	664,150	1,053,686	-	77,692	2,075,790	680,882	117,072
Exchange gain	-	-	-	-	-	459,269	268,759
	8,307,012	17,145,855	10,576,004	5,132,681	8,185,095	5,614,793	4,641,360
Less:							
Salaries & wages	1,559,110	1,479,894	1,356,136	1,460,737	1,759,612	2,140,563	1,654,351
Bonus	-	-	-	424,841	165,942	364,527	146,255
Employee benefits	255,660	297,934	307,381	368,691	390,394	381,050	265,217
Travelling & entertainment	45,615	67,219	82,239	60,871	86,749	63,607	50,285
Automobile expenses	234,923	207,600	170,102	204,225	227,279	374,397	222,291
Legal & prof. fees	203,450	134,818	129,472	173,576	222,789	159,724	177,854
Repairs & maintenance	28,108	41,671	10,243	6,965	14,325	19,097	15,627
Utilities	5,096	4,637	6,339	8,712	8,563	9,025	9,751
Depreciation	72,936	74,855	41,931	21,700	49,674	18,770	7,094
Advertising & promotion	3,523	9,573	5,583	3,960	2,154	8,149	2,262
Rent and rates	275,000	312,500	318,000	368,308	361,846	361,847	310,153

[5] 'The Company' cropped up again.

General and adm. expenses	370,379	441,711	396,118	336,773	277,928	266,389	229,130
allocated by parent co.							
Miscellaneous	10,497	14,103	14,693	7,683	4,654	9,245	2,991
Insurance	99,850	159,416	139,668	78,138	70,331	50,709	-
Dues and subscription	31,759	39,414	37,712	39,892	39,338	38,300	30,195
Supplies	69,232	51,269	45,160	44,197	47,890	31,324	24,403
Sales incentive commission	6,000	27,587	101,572	38,154	71,351	93,349	64,882
Telephone, telex & postage	62,290	61,157	46,691	39,237	38,688	42,721	42,032
Provident fund	49,825	61,371	53,547	55,354	71,130	93,575	66,989
Donation	250	-	-	-	-	-	-
Product bonus	3,662	-	-	-	-	-	-
Executive bonus	358,604	1,035,304	524,935	96,947	312,900	65,773	79,261
Bank charges	214,518	74,684	81,312	106,960	137,648	178,236	182,554
EDP expenses	-	-	26,215	5,393	2,057	1,911	695
Canteen expenses	-	-	5,552	12,433	61,615	47,031	38,673
Management fee	-	-	-	7,892	8,077	7,969	7,753
Others	-	-	433,401	-	-	-	-
Training	-	-	-	-	1,389	-	-
Transportation	-	-	-	-	-	-	100,580
Net profit	4,346,725	12,549,138	6,242,002	1,161,042	3,750,772	787,505	910,082
Gross profit rate	1.8%	7.5%	5.6%	1.1%	1.2%	0.9%	0.9%

18. Below are the assessable profits and adjusted losses, per returns, of DissolvedCo, the appellant[6], UltimateHoldingCo and HoldingCo for the years of assessment 1988/89 to 1998/99:

Year of assessment	DissolvedCo	The appellant[7]	UltimateHoldingCo	HoldingCo	Total
	(HK$)	(HK$)	(HK$)	(HK$)	(HK$)
1988/89	14,485,354	12,711,436	2,007,164	-	29,203,954
1989/90	20,041,101	12,354,047	-	(1,759,467)	30,635,681
1990/91	38,090,198	(2,347,520)	-	(956,670)	34,786,008
1991/92	34,470,640	407,543	-	2,185,684	37,063,867
1992/93	16,267,465	4,551,513	-	4,561,297	25,380,275
1993/94	3,391,060	12,611,345	-	1,751,449	17,753,854
1994/95	1,541,496	7,890,292	-	596,692	10,028,480
1995/96	64,824	1,055,051	-	341,554	1,461,429
1996/97	-	2,060,469	-	1,225,314	3,285,783
1997/98	-	542,945	-	(614,792)	(71,847)
1998/99	-	906,369	-	1,834,662	2,741,031

[6] 'The Company' cropped up again.
[7] 'The Company' cropped up again.

128,352,138	52,743,490	2,007,164	9,165,723	192,268,515	

Note: Figures in bracket represent losses assessed.

19. InterposedCo recorded the following income and expenses in its profit and loss accounts for the years ended 31 December 1993 to 1998:

Year ended 31 December	1993 (RMB)	1994 (RMB)	1995 (RMB)	1996 (RMB)	1997 (RMB)	1998 (RMB)
Sales to:						
UserCo2	106,288,002	123,223,072	404,150,630	433,892,110	367,811,421	309,948,802
UserCo3	-	-	14,458,007	17,186,663	42,008,550	44,838,696
UserCo1	-	-	14,286,154	16,124,586	43,190,796	43,287,972
Total turnover	106,288,002	123,223,072	432,894,791	467,203,359	453,010,767	398,075,470
Less: Purchases from the appellant[8]	85,114,697	107,535,371	391,736,871	405,989,192	389,626,873	365,575,265
Gross profit	21,173,305	15,687,701	41,157,920	61,214,167	63,383,894	32,500,205
Add: Translation gain	-	-	43,055	-	-	-
Sundry income	-	3,150,129	36,825	-	3,968,360	807,647
Exceptional item	-	-	-	-	-	35,680,300
	21,173,305	18,837,830	41,237,800	61,214,167	67,352,254	68,988,152
Less: Audit fee	105,599	105,999	120,000	120,000	120,000	80,000
Expenses allocated by parent co.	1,565,144	1,580,737	3,576,540	5,387,382	5,844,421	2,939,085
Salaries	921,905	1,086,350	1,326,499	995,785	1,380,140	1,470,065
Staff bonus	125,675	181,616	281,616	406,583	636,017	487,560
Travelling	8,580	8,580	-	-	-	-
Office supplies	1,980	-	5,141	1,744	1,594	-
Professional fee	55,818	-	52,890	41,422	26,167	51,813
Employee benefits & provident fund	22,424	-	119,720	364,172	897,350	919,752
Bank charge	3,302	-	116	9,402	2,275	-
Exchange loss	-	-	249	346	77	169
Sundry	(52,204)	68,222	-	13,472	-	-
Profit before taxation	18,415,082	15,806,326	35,755,029	53,873,859	58,444,213	63,039,708
Gross profit rate	19.92%	12.73%	9.51%	13.10%	13.99%	8.16%

Notes:
The accounts for years ended 31 December 1993 and 1994 were originally prepared in Hong Kong currency.

20. In the course of investigation, the assessor raised on the appellant the following additional profits tax assessments for the years of assessment 1993/94 and 1994/95:

Year of assessment	Additional assessable profits	Tax payable

[8] ' The Company' cropped up again.

	(HK$)	(HK$)
1993/94	7,000,000	1,225,000
1994/95	5,000,000	825,000

21. The appellant through a firm of certified public accountants, CPA1, lodged objection to the additional assessments on the grounds that the assessments were excessive and not in accordance with the profits reported.

22. In July 2002, CPA1 merged with CPA2 and since then CPA2 had become the appellant's tax representatives.

23. (a) The following sums were charged by the appellant and HoldingCo and recorded as bonus or executive bonus under the selling, general and administrative expense in their profit and loss accounts:

Year ended 31 December	1993 (HK$'000)	1994 (HK$'000)	1995 (RMB'000)	1996 (RMB'000)	1997 (RMB'000)	1998 (RMB'000)
The appellant	1,035	525	97	313	66	79
HoldingCo	1,566	733	1,867	1,362	2,880	1,781

(b) The above sums were paid to PayeeCo1 and PayeeCo2.

24. The Assistant Commissioner was of the opinion that InterposedCo was interposed between the appellant and the Mainland[9] companies for the sole or dominant purpose of enabling the appellant to obtain a tax benefit. On divers dates, the Assistant Commissioner, pursuant to section 61A(2) of the Ordinance, raised on the appellant the following additional profits tax assessments:

Year of assessment	Additional assessable profits (HK$)	Tax payable (HK$)
1995/96	60,000,000	9,900,000
1996/97	70,000,000	11,550,000
1997/98	75,000,000	11,137,501
1998/99	62,000,000	9,920,000

25. The appellant through CPA2 lodged an objection to the additional assessments above on the grounds that the additional assessments were excessive and not in accordance with the profits reported.

[9] There is no definition of the 'Mainland' companies in the Statement of Facts. Of the companies referred to in paragraph 10 above, only one company was incorporated in the Mainland. In the corresponding paragraph in the Determination, there was no mention of any 'Mainland' company andthree UserCos were identified by their names.

26. In the Deputy Commissioner's Determination of 18 October 2007, the additional profits tax assessments for the years of assessment 1993/94 to 1998/99 raised on the appellant were revised by computing tax on the additional assessable profits of InterposedCo shown below:

	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99
	(RMB)	(RMB)	(RMB)	(RMB)	(RMB)	(RMB)
Profits of InterposedCo before taxation	18,415,082	15,806,326	35,755,029	53,873,859	58,444,213	63,039,708
Less: Exceptional income	-	-	-	-	-	(35,680,300)
	18,415,082	15,806,326	35,755,029	53,873,859	58,444,213	27,359,408
Add: Expenses allocated by parent co.	1,565,144	1,580,737	3,576,540	5,387,382	5,844,421	2,939,085
	19,980,226	17,387,063	39,331,569	59,261,241	64,288,634	30,298,493
Exchange rate	0.9091	0.9091	0.926269	0.930188	0.933800	0.9357
	(HK$)	(HK$)	(HK$)	(HK$)	(HK$)	(HK$)
	18,164,023	15,806,579	36,431,613	55,124,095	60,032,726	28,350,300
Add: Executive bonus charged in the appellant's [10] accounts	1,035,304	524,935	89,799	291,056	61,419	74,165
Additional assessable profits	19,199,327	16,331,514	36,521,412	55,415,151	60,094,145	28,424,465
Profits tax thereon	3,359,882	2,694,699	6,026,033	9,143,500	8,923,981	4,547,914

Grounds of appeal

27. By letter dated 19 November 2007, CPA2 gave notice of appeal on behalf of the appellant on the following grounds (written exactly as it stands in the original):

> '(a) [InterposedCo] was the purchasing agent of [UserCo2, UserCo1 and UserCo3[11]], and the existence of [InterposedCo] for the source of goods from [the appellant] and sales to [UserCo2, UserCo1 and UserCo3[12]] is not a transaction entered into for the sole or dominant purpose of enabling [the appellant] to obtain a tax benefit under Section 61A of the Inland Revenue Ordinance ["IRO"].
>
> (b) [InterposedCo] did not maintain any office in Hong Kong. The personnel who worked for [InterposedCo] were non-Hong Kong citizens stationing in the PRC. All purchase orders were negotiated and concluded in the PRC by the purchasing directors of the group purchasing department. In respect of the sales transactions, a formal sales contract was made for every order and was

[10] 'The Company' cropped up again.
[11] As amended at the hearing without objection by the respondent and with the consent of the Board.
[12] As amended at the hearing without objection by the respondent and with the consent of the Board.

prepared and signed in the PRC by the personnel of [InterposedCo] based in the PRC. In view that the pertinent activities in deriving the profits of [InterposedCo] were carried out outside Hong Kong, regardless of the application of Section 61A of the IRO, the profits should be offshore sourced and not subject to Hong Kong profits tax under Section 14 of the IRO.

(c) The expenses allocated by [InterposedCo's] parent company should be allowable deductions to [InterposedCo] should its profits be regarded as taxable for Hong Kong profits tax purpose.

(d) The executive bonus charged in [the appellant's] accounts represented the service fees to the group companies for the provision of, mainly, human resources management and administrative services, which were centralized and co-ordinated by the group parent companies. As such, the expenses should be tax deductible as they were incurred in the production of [the appellant's] assessable profits.'

The hearing

28. The appellant was represented by Mr Ho Chi Ming, counsel, instructed by Messrs Cheng Chan & Co, solicitors.

29. The respondent was represented by Mr Eugene Fung, counsel, on the instructions of the Department of Justice.

30. Mr Ho Chi Ming sent a document called 'Authorities of Appellant' to the Clerk to the Board of Review. The only item on it read as follows:

> ' ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2008) 1 HKC 1'.

In the course of the hearing, he gave us a copy of Commissioner of Inland Revenue v Hang Seng Bank Ltd [1990] 3 WLR 1120. He did not cite any of the Court of Final Appeal, Court of Appeal, or Court of First Instance judgments on the anti-avoidance provisions, i.e. sections 61A and 61, and made no submission on any judgments on sections 61A or 61.

31. Mr Eugene Fung furnished us with a bundle of the following authorities:

1. Inland Revenue Ordinance, Chapter 112, sections 14, 16, 17, 61, 61A, 68 and Schedule 5
2. Harrods (Buenos Aires) Ltd v Taylor-Gooby (1964) 41 TC 450

3. Tata Hydro-Electric Agencies Ltd Bombay v CIT, Bombay Presidency and Aden [1937] AC 685
4. Pondicherry Ry Co v ITC (1931) 58 LR Ind App 239
5. CIR v Cosmotron Manufacturing Ltd [1997] HKLRD 1161
6. Seramco Ltd Superannuation Fund Trustees v Income Tax Commissioner [1977] AC 287
7. Cheung Wah Keung v CIR [2002] 3 HKLRD 773
8. CIR v Tai Hing Cotton Mill (Development) Ltd [2008] 2 HKLRD 40
9. FCT v Peabody (1994) 181 CLR 359
10. Yick Fung Estates Ltd v CIR [2001] 1 HKLRD 381
11. FCT v Spotless Services Ltd (1996) 186 CLR 404
12. Ngai Lik Electronics Co Ltd v CIR (unreported, CACV 22/08, 15.10.08)
13. Asia Master Limited v CIR (unreported, HCAL 114/05, 30.11.06) & Corrigenda

32. Mr Ho Chi Ming called 2 persons to give oral evidence. The first witness, Witness1, was employed by HoldingCo from June 1995 to July 2000 and held the position of purchasing director of UserCo2. Director5 was the second witness called and he was the president of HoldingCo and a director of the appellant, DissolvedCo and InterposedCo from June 1996 to December 2001.

33. Mr Eugene Fung did not call any witness.

34. After Mr Ho Chi Ming had concluded his submission, we asked him to address us on costs under section 68(9).

Information provided by 2 ex-employees

35. On 17 January 2005, the assessors interviewed the materials co-ordinator ('the Materials Co-ordinator') of the appellant. The assessors' Note of Interview was amended by the Materials Co-ordinator and confirmed by him to be a true and correct record of the meeting. Paragraphs 3.5 and 3.6 of the English translation read as follows:

> '3.5 [The Materials Co-ordinator] said that the purchasing department was comprised of him and the manager ["the Purchasing Manager"] only. He was responsible for issuing invoices so that raw materials were sold from [the appellant] to [InterposedCo] and then from [InterposedCo] to [the group's] companies concerned on the Mainland. [The Materials Co-ordinator] sold raw materials to [InterposedCo] at a price equivalent to the purchase cost plus freight or a narrow margin of profits. Then he would issue invoices for [InterposedCo] to [the group's] companies concerned on the Mainland according to the predetermined profit margin set by the company. If the

market price of the raw materials rose a lot after they were delivered, [the Purchasing Manager] would inform [the Materials Co-ordinator] to correspondingly increase the profit margin on the same sold by [InterposedCo] to the companies concerned on the Mainland. When the purchased raw materials were delivered to Hong Kong, [The Materials Co-ordinator] would have to prepare a purchase/sale contract between [InterposedCo] and [the group's] companies concerned on the Mainland. The contract would be signed by [the Purchasing Manager's] supervisor who was an employee of the head office and came from [one overseas territory] or [another overseas territory].

3.6 The officers showed [The Materials Co-ordinator] an Invoice Requisition (Purchase contract number …). [The Materials Co-ordinator] confirmed that he himself affixed the signature therein. He was responsible for preparing the Invoice Requisition, which was divided into two parts: the upper part was about sale from [the appellant] to [InterposedCo] whereas the lower one was about sale at a certain profit margin from [InterposedCo] to [UserCo2]. [The Materials Co-ordinator] pointed out that a container of 20 feet long could carry a load of 17 MT. To carry to the Mainland 313 MT of goods as specified in the contract, 18 container trucks were required. The invoice issued by [the appellant] to [InterposedCo] was prepared and signed by [2 named persons] of the accounting department. The signature in the column under "Buyer" in the purchase contract between [the appellant] and [a named supplier] was that of [the Purchasing Manager] as confirmed by [the Materials Co-ordinator]. [The Materials Co-ordinator] also pointed out that [the named supplier] was the Hong Kong agent. When raw materials arrived in Hong Kong, he would directly contact the company concerned on the Mainland for collection. The contract in respect of sale from [InterposedCo] to [the group's] company concerned on the Mainland was prepared for signature by him for signature by [the Purchasing Manager's] supervisor. He issued the invoice to [InterposedCo] on the instruction of his supervisor. To his knowledge, [InterposedCo] was incorporated in Bermuda. It had no employees. Its existence was only for the sake of paper arrangements.'

36. On 8 February 2005, the assessor interviewed the Purchasing Manager. The assessor's Note of Interview was amended by the Purchasing Manager and confirmed by him to be a true and correct record of the meeting. The following is the English translation of paragraph 3.4:

'3.4 In 1990, [a named person] was responsible for shipping matters. Subsequently, it was [another named person]. He worked for one to two years before [the Materials Co-ordinator] took up the work relating to shipping, documents, etc. [The Purchasing Manager] handed the purchase

contracts to [the Materials Co-ordinator] for follow-ups and contacting the accounting department. There was a certain period of time when [a named female person], a secretary, also assisted [the Materials Co-ordinator] in following up the shipping documents. [The Purchasing Manager] said as far as he knew, the Hong Kong company sold goods to [InterposedCo], which in turn sold goods to the Mainland companies. [The Purchasing Manager] did not know much about [InterposedCo], a company which appeared only on documents and of which he was not clear about the operation.'

37. Under cover of her letter dated 30 November 2005, the assessor sent CPA2 a copy of the draft Statement of Facts which she intended to place before the Commissioner for her consideration in determining the objection and invited CPA2's comments on the draft. Facts (27) and (28) read as follows:

'(27) The Assessors conducted an interview with [the Materials Co-ordinator], an ex-employee of [the appellant]. He provided the following information in relation to the sourcing of raw materials:

(a) Since 1990, [the Materials Co-ordinator] was responsible for arranging the shipping, documentary credit, receipt of raw materials in Hong Kong and the delivery of the same to the PRC offices. [The Purchasing Manager] was the purchasing manager of [the appellant] see [Fact (25)(a)(i) above]. [The Purchasing Manager] arranged the purchase of raw materials and passed the purchase contract to [the Materials Co-ordinator] for follow-up action.

(b) [The Materials Co-ordinator] prepared the invoice requisition with Parts A and B [see Fact (25)(a)(vii) above]. Part A was designed for sale of raw material by [the appellant] to [InterposedCo] while Part B was designed for sale of raw material by [InterposedCo] to [UserCo2]. [The Materials Co-ordinator] signed both Parts A and B.

(c) The purchase contract was made by [the appellant] with the seller. [The Purchasing Manager] signed in the buyer's column.

(d) [The Materials Co-ordinator] prepared the sales contracts between [InterposedCo] and [the group] companies in the PRC for the signature by [the Purchasing Manager's] seniors. According to [the Materials Co-ordinator], [InterposedCo] did not have any employee. The inclusion of [InterposedCo] in the Invoice Requisition was a mere paper arrangement and as instructed by management.

(28) The Assessors conducted an interview with [the Purchasing Manager], an ex-employee of [the appellant]. He provided the following information among other things:

(a) [The Purchasing Manager] was the Purchasing Manager of [the appellant]. He was responsible to the Purchasing Director of [the group]. The Purchasing Director was to oversee the purchasing function of the companies in [the group].

(b) [The Purchasing Manager's] duties were to purchase additive (**添加濟**) mainly from overseas. Prior to 1999, [the Purchasing Manager] was stationed in Hong Kong. He contacted the sellers and arranged the supplies according to [the appellant's] pre-determined plan. He negotiated the price and sought approval from the Purchasing Director. He also prepared and signed the purchase contract.

(c) Some of the purchase contracts and cheque requisition/payment voucher were shown to [the Purchasing Manager]. He confirmed his signatures on them.

(d) In August 1999, [the Purchasing Manager] was relocated to the PRC office to handle the purchasing function there. Until the year 2002, [a named female person] and [the Materials Co-ordinator] continued to purchase raw materials and additive for [the appellant] in Hong Kong.'

38. Under cover of their letter dated 17 March 2006, CPA2 forwarded the appellant's comments on, and suggested amendments to, the draft Statement of Facts. The appellant's comments on Facts (27) and (28) read as follows:

'Fact (27)
As the management of [the appellant] and we, [CPA2] did not attend the interview meeting between your Department and [the Materials Co-ordinator], we cannot comment on this.

Fact (28)
As the management of [the appellant] and we, [CPA2] did not attend the interview meeting between your Department and [the Purchasing Manager], we cannot comment on this.'

39. Facts (27) and (28) in the draft Statement of Facts were re-numbered and became Facts (28) and (29) in the Determination which read as follows (with the changes from the draft being marked up):

'(2~~7~~8) The Assessor~~s~~ conducted an interview with [the Materials Co-ordinator] [Fact (26)(g), *supra*], an ex-employee of [the appellant]. He provided the following information in relation to the sourcing of raw materials:

(a) Since 1990, [the Materials Co-ordinator] was responsible for arranging the shipping, documentary credit, receipt of raw materials in Hong Kong and the delivery of the same to the ~~PRC~~ Mainland offices. [The Purchasing Manager] was the ~~p~~Purchasing ~~m~~Manager of [the appellant] [see ~~f~~Fact (2~~5~~6)(a)~~(i) above~~]. [The Purchasing Manager] arranged the purchase of raw materials and passed the purchase contract~~s~~ to [the Materials Co-ordinator] for follow-up action.

(b) [The Materials Co-ordinator] prepared the invoice requisition with Parts A and B [see Fact (2~~5~~6)(~~a~~g)~~(vii) above~~]. Part A was designed for sale of raw material~~s~~ by [the appellant] to [InterposedCo] while Part B was designed for sale of raw materials by [InterposedCo] to [UserCo2]. [The Materials Co-ordinator] signed both Parts A and B.

(c) The purchase contract was made by [the appellant] with the seller. [The Purchasing Manager] signed in the buyer's column.

(d) [The Materials Co-ordinator] prepared the sales contracts between [InterposedCo] and [the group] companies in ~~the PRC~~ Mainland China for the signature by [the Purchasing Manager's] seniors. According to [the Materials Co-ordinator], [InterposedCo] did not have any employee. The inclusion of [InterposedCo] in the Invoice Requisition was a mere paper arrangement and ~~as instructed by~~ an instruction from the management.

(2~~8~~9) The Assessor~~s~~ conducted an interview with [the Purchasing Manager~~], an ex-employee of [the appellant]~~ [see Fact (26)(a)] He provided the following information ~~among other things~~:

(a) [The Purchasing Manager] was the Purchasing Manager of [the appellant]. He was responsible to the Purchasing Director of [the group]. The Purchasing Director was to oversee the purchasing function of the companies in [the group].

(b) [The Purchasing Manager's] duties were to purchase additive (**添加濟**) mainly from overseas. Prior to 1999, [the Purchasing Manager] was stationed in Hong Kong. He contacted the sellers and arranged the

supplies according to [the appellant's] pre-determined plan. He negotiated the price and sought approval from the Purchasing Director. He also prepared and signed the purchase contract.

(c) Some of the purchase contracts and cheque requisition/payment vouchers were shown to [the Purchasing Manager]. He confirmed his signatures on them.

(d) In August 1999, [the Purchasing Manager] was relocated to the ~~PRC~~ Mainland office to handle the purchasing function there. Until the year 2002, [a named female person] and [the Materials Co-ordinator] continued to purchase raw materials and additive for [the appellant] in Hong Kong.'

40. In giving reasons for his Determination, the Deputy Commissioner relied on, inter alia, Facts (28) and (29) in the Determination. In paragraph 3(5)(b)(iv), and (v), the Deputy Commissioner said:

'(iv) It employed Raw Material Co-ordinator [the Materials Co-ordinator], Purchase Manager [the Purchasing Manager] and other staff [Facts (25), (27) and (28)]. Both [the Purchasing Manager] and [the Materials Co-ordinator] confirmed that they arranged the purchases and relevant documentations in Hong Kong.

(v) A contract was made by [the appellant] for every purchase [Fact (21)(c)]. It was signed between [the appellant's] Purchasing Manager and the supplier, which was later authorized by the group's Purchasing Director and [the appellant's] Director [Facts (26)(a) and (29)].'

Findings of fact

41. Witness1 confirmed under cross-examination that:

(a) paragraphs 3.5 and 3.6 of the Note of Interview of the Materials Co-ordinator; and

(b) paragraph 3.4 of the Note of Interview of the Purchasing Manager;

were factually correct. The appellant is bound by the evidence of the witnesses it called. We make the following findings of fact:

(1) The purchasing department was responsible for purchasing. It was comprised of the Materials Co-ordinator and the Purchasing Manager only.

(2) The Materials Co-ordinator was responsible for work relating to shipping and documentation, including the issue of invoices by the appellant to InterposedCo and by InterposedCo to the UserCos.

(3) The invoices issued by the appellant were signed by 2 named persons of the accounting department and the Purchasing Manager signed on behalf of InterposedCo as buyer.

(4) The documents on the sale by InterposedCo to the UserCos were prepared by the Materials Co-ordinator for signature by the Purchasing Manager's supervisor.

(5) When the raw materials arrived in Hong Kong, the Materials Co-ordinator would contact the relevant UserCo for collection.

(6) InterposedCo had no employees and its existence was only for documentation purposes.

42. A taxpayer's tax affairs are matters peculiarly within the knowledge of the taxpayer and the taxpayer might be expected to have material evidence to give on its taxation affairs. The absence or silence of a witness does not assist the taxpayer. Ma J (as he then was) summarised the principle on drawing of inferences in cases of absence of material evidence as follows in Kao Lee & Yip v Koo Hoi Yan and others [2003] 3 HKLRD 296 at paragraph 34:

> '*None of the Defendants gave evidence. In these circumstances, adverse inferences may be more easily drawn against them and correspondingly, any inferences favourable to KLY can more confidently be drawn as well:- see Polaroid Far East Ltd v Bel Trade Co Ltd [1992] HKLR 447 at 454; Jones v Dunkel (1958-1959) 101 CLR 298. This is of course providing that the rest of the evidence allows such inferences to be drawn and that such evidence is credible in the first place.'*

In Wisniewski v Central Manchester HA [1998] Lloyd's Rep Med 223 at page 240 Brooke LJ derived the following principles from the line of authority he had cited:

> '(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness' s absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect or his/her absence or silence may be reduced or nullified.'

Wisniewski was applied by Chu J in Bank of China (Hong Kong) Limited v Wong Tang and others, HCMP 4222 of 2003, 24 August 2006, at paragraph 60.

43. It is clear from the wording of Facts (27) and (28) of the draft Statement of Facts that their importance lies in the truth of the information provided. It took CPA2 3 ½ months to comment on the draft Statement of Facts. As stated above, the appellant' s tax affairs were matters peculiarly within the knowledge of the appellant. CPA2 and the appellant had had ample time to investigate and comment on the truth or otherwise of the information provided. CPA2 and the appellant also had had ample time to discuss with the Materials Co-ordinator and the Purchasing Manager and to ask the Revenue for a copy of the notes taken at the interviews. In the event, CPA2 gave an evasive response to draft Facts (27) and (28).

44. Neither of the witnesses called by Mr Ho Chi Ming dealt specifically with the factual account in the notes of interview or in the draft Facts. We have some sympathy for these 2 persons. They had been asked by the appellant to give evidence on matters much of which was plainly not within their personal knowledge. In particular, the 2 witnesses did not have any knowledge of the rationale for the arrangements involving InterposedCo. The relevant years of assessment in this appeal are from 1993/94 to 1998/99. As the appellant had December year ends, the relevant basis periods were from 1 January 1993 to 31 December 1998. Witness1 was not involved until June 1995 and Director5 until June 1996. While hearsay evidence is not by itself inadmissible, weight is a different matter. The draftsman of their witness statements took great liberty in the inclusion of what is clearly hearsay or statements of information or belief, but importantly, without stating the sources thereof or the grounds therefor. Further, the liberal use of the passive voice without disclosing the subject is less than helpful in resolving the question of who did what. Plainly, the appellant cannot seek to benefit from its own deficiency in its discharge of its onus of proof under section 68(4), see Kim Eng Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2007) 10 HKCFAR 213 at paragraph 50 where Bokhary PJ noted that the bulk of the evidence in that

case related to dealings on the Singapore Stock Exchange and that in relation to dealings on the other foreign stock exchanges, the evidence was sparse and stated that:

> The *'Taxpayer is not in the position to benefit from such sparsity. After all, it bears the burden of showing that the assessments are wrong.'*
>
> We attach no weight to their:
>
> (1) evidence on matters based on information or belief;
>
> (2) evidence on matters where the actor(s) had not been identified; and
>
> (3) evidence-in-chief or evidence in re-examination insofar as such evidence was:
>
> (a) contradicted by their evidence under cross-examination;
>
> (b) not consistent with the notes of interview of the Materials Co-ordinator or the Purchasing Manager; or
>
> (c) not consistent with draft Facts (27) and (28).

45. Based on what the witnesses confirmed under cross-examination and based on the failures to grapple with draft Facts (27) and (28), we make the following further finding of fact:

(7)[13] The Purchasing Manager was the purchasing manager of the appellant and he was stationed in Hong Kong at all material times[14].

(8) Some purchase contracts, cheque requisitions and payment vouchers were signed by the Purchasing Manager.

46. Draft Fact (21) recited information concerning InterposedCo provided by CPA2. In the absence of any dispute by CPA2 on behalf of the appellant, we find the following as facts:

(9)[15] The appellant was the sole supplier of InterposedCo, selling at a mark-up of 0.75% on costs.

(10) The 3 UserCos were the only customers of InterposedCo.

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[13] Continuing from paragraph 41 above.
[14] The last of the relevant basis periods ended on 31 December 1998 and the Purchasing Manager was stationed in Hong Kong prior to 1999.
[15] Continuing from paragraph 45 above.

(11) InterposedCo sold to the 3 UserCos at a mark-up percentage determined by the purchase director of InterposedCo. There was no documentary evidence showing the determination and calculation of the selling price.

(12) The goods were normally shipped to the 3 UserCos directly.

47. Witness1 alleged in paragraph 22 of his witness statement that InterposedCo would 'incur a profit or loss' if raw materials prices fluctuated and referred to 2 appendices to the Determination to contend that InterposedCo suffered a loss in that transaction. We reject his testimony for the following reasons:

(1) This assertion was contradicted by Witness1's acceptance of the truth of the statement by the Materials Co-ordinator that InterposedCo would invoice the UserCos at the predetermined or adjusted profit margin, see paragraph 35 above.

(2) This was also contradicted by information provided by CPA2 to the Revenue informing the latter that InterposedCo sold to the 3 UserCos at a mark-up percentage determined by the purchase director of InterposedCo.

(3) As demonstrated by Mr Eugene Fung by reference to an extract from InterposedCo's ledger, that sale by InterposedCo was in fact at a profit, not a loss.

(4) InterposedCo's audited financial statements recorded a gross profit of RMB15 million to RMB63 million from the purchase by InterposedCo from the appellant and the sale by InterposedCo to the UserCos during the relevant years of assessment[16].

Relevant provisions in the Ordinance

48. Section 14(1) provides that:

'*Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment ... 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.*'

49. Section 16(1) provides that:

[16] See paragraph 19 above.

'*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 ...*'

50. Section 61 provides that:

'*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 assessable accordingly.*'

51. Section 61A provides that:

'*(1) This section shall apply where any transaction has been entered into or effected after the commencement of the Inland Revenue (Amendment) Ordinance 1986 (7 of 1986) (other than a transaction in pursuance of a legally enforceable obligation incurred prior to such commencement) and that transaction has, or would have had but for this section, the effect of conferring a tax benefit on a person (in this section referred to as "the relevant person"), and, having regard to –*

(a) the manner in which the transaction was entered into or carried out;

(b) the form and substance of the transaction;

(c) the result in relation to the operation of this Ordinance that, but for this section, would have been achieved by the transaction;

(d) any change in the financial position of the relevant person that has resulted, will result, or may reasonably be expected to result, from the transaction;

(e) any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant person, being a change that has resulted or may reasonably be expected to result from the transaction;

(f) whether the transaction has created rights or obligations which would not normally be created between persons dealing with each other at arm's length under a transaction of the kind in question; and

(g) the participation in the transaction of a corporation resident or carrying on business outside Hong Kong,

it would be concluded that the person, or one of the persons, who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person, either alone or in conjunction with other persons, to obtain a tax benefit.

(2) Where subsection (1) applies, the powers conferred upon an assessor under Part X shall be exercised by an assistant commissioner, and such assistant commissioner shall, without derogation from the powers which he may exercise under that Part, assess the liability to tax of the relevant person –

(a) as if the transaction or any part thereof had not been entered into or carried out; or

(b) in such other manner as the assistant commissioner considers appropriate to counteract the tax benefit which would otherwise be obtained.

(3) In this section –

*"tax benefit"(**稅項利益**) means the avoidance or postponement of the liability to pay tax or the reduction in the amount thereof;*

*"transaction"(**交易**) includes a transaction, operation or scheme whether or not such transaction, operation or scheme is enforceable, or intended to be enforceable, by legal proceedings.'*

52. Sections 68(4) and 68(9) provide that:

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

'*(9) Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the appellant to pay as costs of the*

Board a sum not exceeding the amount specified in Part I of Schedule 5, which shall be added to the tax charged and recovered therewith.'

The amount specified in Part I of Schedule 5 is $5,000.

BOARD' S DECISION ON THE SECTION 61A POINT

Matters to be considered

53. Section 61A calls for:

(1) Identification of the transaction.

(2) Identification of the relevant person.

(3) Consideration of the question of tax benefit.

(4) Consideration of the question of dominant purpose[17].

See:

(a) D60/05, (Kenneth Kwok Hing Wai SC, Patrick James Harvey and Thomas Mark Lea), (2005-06) IRBRD, vol 20, 828, upheld on appeal by Reyes J[18] and the Court of Appeal[19]; and

(b) D83/06 (Kenneth Kwok Hing Wai SC, Edward Cheung Wing Yui and William Tsui Hing Chuen), (2007-08) IRBRD, vol 22, 87, upheld on appeal by Reyes J[20] and the Court of Appeal[21].

The transaction

54. The first task is to identify the 'transaction'. The Deputy Commissioner and Mr Eugene Fung identified the interposition of InterposedCo between the appellant and the 3 UserCos as the transaction, with the appellant selling to InterposedCo at a mark-up of 0.75% on costs and InterposedCo selling to the UserCos at a profit.

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[17] Or sole purpose.
[18] Shui On Credit Company Limited v Commissioner of Inland Revenue, HCIA 2/2007, 5 March 2008.
[19] Shui On Credit Company Limited v Commissioner of Inland Revenue, Rogers VP, Le Pichon JA and Stone J, CACV 85/2008 18 December 2008.
[20] Ngai Lik Electronics Company Limited v Commissioner of Inland Revenue, HCIA 5/2007, 11 December 2007.
[21] Ngai Lik Electronics Company Limited v Commissioner of Inland Revenue, Le Pichon JA, Stone and Chu JJ, CACV 22/2008, 15 October 2008.

55. Common sense tells us that the taxpayer must tackle the transaction as identified by the Revenue. It is ill advised for the appellant or CPA2 to define something else as the transaction (as CPA2 did by ground (a) of the grounds of appeal, see paragraph 27(a) above) and to contend that section 61A did not apply to its, or CPA2' s, version of the transaction. The reason is simple – this leaves the Revenue' s contention unanswered.

The relevant person

56. For the purpose of a tax appeal, section 61A will not be relevant unless the appellant is the 'relevant person'.

The tax benefit

57. The question as defined by statute is whether the 'transaction has, or would have had but for this section, the effect of conferring a tax benefit on' the taxpayer.

58. The focus here is on the *effect* of the transaction.

59. There is *no* requirement here of dominance.

60. On 4 December 2007, the Court of Final Appeal handed down 2 judgments which explained why section 61A is a much more powerful and flexible weapon in the hands of the Commissioner.

61. Commissioner of Inland Revenue v Tai Hing Cotton Mill (Development) Limited [2008] 2 HKLRD 40 is one of them. It was the Commissioner' s appeal from D109/03, IRBRD, vol 19, 14. The Board (Kenneth Kwok Hing Wai SC, Michael Robert Daniel Bunting SC and Wong Kwai Huen) held that the transaction did not have, and would not have had but for section 61A, the effect of conferring a tax benefit on the taxpayer and that even if the Commissioner was right on the tax benefit point, the tax benefit was not the sole or predominant purpose of the transaction – a sale in return for a share of profits was a common form of transaction with a commercial justification[22]. The Board' s decision was reversed by the judge, restored by the Court of Appeal and reversed by the Court of Final Appeal. On the question of benefit, Lord Hoffmann NPJ[23] held that:

> (a) A benefit is something which makes your position better. The word invites a comparison ... The Ordinance speaks of a transaction which has the 'effect' of conferring a tax benefit. A transaction may have an effect on tax liabilities which arise at a future date[24].

[22] As summarised by Lord Hoffmann NPJ at paragraph 11.
[23] The other judges agreed with Lord Hoffmann' s judgment.
[24] At paragraph 13.

(b) ... s.61A raises a straightforward question of causation and comparison. If the effect of the transaction is that your liability to tax is less than it would have been on some other appropriate hypothesis, you have had a tax benefit. Provided that the calculation is properly done, the section is not concerned with how the elements of the calculation are categorised for other purposes of tax law[25].

(c) The real question is the alternative hypothesis which the comparison requires. That is a question of construction. It must be gathered from the terms of the section as a whole. Section 61A is what is called in the trade a general anti-avoidance rule. It applies generally to any method of avoiding any tax[26] ...

(d) ... s.61A(2) gives the Commissioner an option. Paragraph (a) says that she may assess the taxpayer as if the transaction had not been entered into or carried out. That is the equivalent of the New Zealand provision considered by Lord Diplock in Europa Oil. But she may also, under paragraph (b), assess the taxpayer in such other manner as she considers appropriate 'to counteract the tax benefit which would otherwise be obtained'. The hypothesis of an assessment under (b) must therefore be, not only that the actual transaction did not take place, but that some other transaction took place instead. Otherwise (b) would add nothing to (a). What that other transaction might be is a question to which I shall return later, but the effect of s.61A is that, unlike the position under the New Zealand Act, the tax benefit does not have to relate some other pre-existing source of income, external to the transaction. The Commissioner, under s.61A(2)(b), can assess the taxpayer on the hypothesis that there was a transaction which created income, but without the features which conferred the tax benefit. That makes s.61A a much more powerful and flexible weapon in the hands of the Commissioner than the New Zealand section.[27]

(e) The Commissioner may adopt the hypothesis which the evidence suggests was most likely to have been the transaction if the taxpayer had not been able to secure the tax benefit[28].

(f) The transaction had, in general terms, a proper commercial purpose. But, as the High Court said in *Spotless Services* case (at p.416) ?

[25] At paragraph 14.
[26] At paragraph 15.
[27] At paragraph 17.
[28] At paragraph 21.

> 'The "shape" of that transaction need not necessarily take only one form. … A particular course of action may be … both "tax driven" and bear the character of a rational commercial decision. The presence of the latter characteristic does not determine the answer to the question whether … a person entered into or carried out a "scheme" for the "dominant purpose" of enabling the taxpayer to obtain a "tax benefit".'[29]

62. Commissioner of Inland Revenue v HIT Finance Limited [2008] 2 HKLRD 52 is the other case. Lord Hoffmann NPJ[30] held that:

> (a) A tax benefit simply means a difference favourable to the taxpayer between his tax liability computed on one basis and his liability computed on a different basis. It does not mean any particular element in that computation[31].
>
> (b) In my opinion a transaction with terms or features which reduce the taxpayer's liability, compared with what it would have been without them, confers a tax benefit upon him. If those terms or features were included for the sole or predominant purpose of securing that benefit, the Commissioner may counteract that benefit under s.61A(2)(b) by assessing him on the basis that the transaction took the form it might reasonably be expected to have taken without those terms or features[32].

63. Mr Eugene Fung submitted that:

> (1) This was not InterposedCo's appeal on whether its profits were assessable to profits tax.
>
> (2) Ground (2) of the grounds of appeal was plainly an incorrect ground.
>
> (3) From Mr Ho Chi Ming's opening submission, it appeared that the appellant was conducting this appeal as if it were a 'source of profits' case on the part of InterposedCo.
>
> (4) This approach was fundamentally misconceived and demonstrated failure to properly understand the effect of section 61A.

64. We agree.

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[29] At paragraph 23.
[30] The other judges agreed with Lord Hoffmann's judgment.
[31] At paragraph 17.
[32] At paragraph 18.

65. Mr Ho Chi Ming's argument on source had been rejected by Le Pichon JA in Ngai Lik where her ladyship held that[33]:

> (a) Mr Barlow's approach is explained by that which in my view is a mischaracterization of the central issue on this appeal, namely as 'whether section 61A can extend the territorial ambit of the Ordinance, so as to charge to Hong Kong profits tax profits from off-shore businesses that are otherwise outwith the section 14 charge'. His approach thus distracts attention away from the sole question posed in the case stated, which relates to the correctness of the Board's conclusion that the taxpayer had entered into the scheme for the dominant purpose of obtaining a tax benefit. I agree with Mr Ho SC, who appeared for the commissioner, that section 61A of the Ordinance lies at the heart of the appeal and not section 14.[34]
>
> (b) Accordingly, Mr Barlow's reliance on *ING Barings Securities (Hong Kong) v CIR* (2007) 10 HKCFAR 417 is misplaced because this case is not about section 14 nor its reach. The additional assessments were directed at counteracting the perceived tax benefit achieved by use of the transfer pricing policy to shift the taxpayer's profits offshore. The lawfulness or reasonableness of the exercise of the section 61A(2) power does not arise for consideration. The question on this appeal is confined to whether the scheme is one that falls within section 61A(1).[35]
>
> (c) The focus of the opening paragraph of section 61A(1) is on the *effect* of the scheme. If the scheme is shown to have the ability to confer a tax benefit, that is sufficient. In my view, quantification of the tax benefit is not a pre-requisite to the application of the section. Accordingly, the Board's conclusion that the transaction had the effect of conferring a tax benefit on the taxpayer is unassailable.[36]
>
> Mr Ho Chi Ming did not say anything about Ngai Lik. Indeed, he did not say anything about Tai Hing Cotton Mill, HIT Finance or any other judgment on anti-avoidance.

66. Lord Hoffmann's opinion that 'a transaction with terms or features which reduce the taxpayer's liability, compared with what it would have been without them, confers a tax benefit upon him' may seem true by virtue of its logical form. This shows how easy it is to satisfy the tax benefit requirement. That is under section 61A(2)(b). The other limb, section 61A(2)(a), is on the basis of the transaction not having been entered into.

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[33] With whose judgment the other judges agreed.
[34] At paragraph 23.
[35] At paragraph 24.
[36] At paragraph 30.

67. The appellant traded in raw materials used by the animal feeds business. Barnett J made the point in CIR v Euro Tech (Far East) Limited (1995) 4 HKTC 30 at page 58 that for trading companies, what the taxpayer was doing was no more than bringing together the complementary needs of sellers and buyers and looked at where the taxpayer did the bringing together. With the whole of its 2-men purchasing department being stationed in Hong Kong, the appellant[37] had done the bringing together of its sellers (or suppliers) and buyers in Hong Kong. The appellant's profits from the purchase and sale of raw materials were sourced in Hong Kong and were within the section 14 charge.

68. The lower the sale prices, the less tax the appellant would have to pay. By selling to InterposedCo at the nominal mark-up of 0.75%, the interposition transaction had the effect of conferring a tax benefit on the appellant by mopping up a large a portion of the appellant's profits and transferring them to InterposedCo.

69. The evidence suggests that the most likely transaction if the appellant had not been able to secure the tax benefit would be direct sales by the appellant to the UserCos at the prices at which InterposedCo sold to the UserCos under the interposition transaction. The tax benefit is plain and obvious.

Dominant purpose

70. The question as defined by statute is whether 'the person, or one of the persons, who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person, either alone or in conjunction with other persons, to obtain a tax benefit'.

71. The issue as defined by statute is a long one. Judges and the Board some times abbreviated it to the 'purpose of the transaction'.

72. There may be no difference in some cases.

73. But, the purpose which the statute speaks of is the purpose of one or more of the *parties* to the transaction, *not* the purpose of the *transaction*. So far as the transaction is concerned, it is the *effect* which matters.

74. On the issue of purpose, the approach is an objective one and there is the requirement of dominance[38].

[37] We are not concerned with what InterposedCo or any of the UserCos did to earn its respective profits and where it had done it.
[38] Or sole purpose.

75. In Tai Hing Cotton Mill, Lord Hoffmann referred in paragraph 24 to 'purpose of the parties' and at paragraph 28 defined the question in section 61A thus:

> '*The question in s.61A is not what the purpose of the parties actually was, but the objective question of what would be concluded from a consideration of the various matters listed in paragraphs (a) to (g).*'

76. In Ngai Lik, Le Pichon JA referred at paragraph 32 to the dominant purpose of the taxpayer in these terms:

> '*It is apparent from the decision that the Board gave meticulous consideration to each of the 7 factors to which it was required to have regard. Having looked at its assessment of those matters globally, it came to the overall conclusion that the dominant purpose of the taxpayer and the other participants in the scheme was to enable the taxpayer to obtain a tax benefit. The weight it saw fit to attach to each of those factors was a matter for the Board and short of the Board's overall conclusion being perverse in the sense that no reasonable tribunal could have reached such a conclusion, that conclusion cannot be disturbed.*'

77. Yick Fung Estates Limited v CIR [2000] 1 HKLRD 381 is another authority on the objective approach to the question of purpose. Rogers JA said at page 399:

> '*... the tests set out in s.61A have to be applied objectively.*
>
> *There are seven matters (a) to (g) to which the section requires that regard must be had. On a clear construction of the subsection, the section would not be relevant or the subject matter of consideration unless there was a tax benefit, in other words, the avoidance or postponement of the liability to pay tax or the reduction in the amount thereof. In this case, it is said that there has been an avoidance of tax in respect of HK$108,327,586 profits or at any rate, there has been a reduction in the amount of tax that would otherwise have been payable. On that basis, the various matters at (a) to (g) have to be considered and if upon that exercise, the conclusion would be arrived at that the person who entered into or carried out the transaction did so for the sole or dominant purpose of obtaining a tax benefit, the Assistant Commissioner may exercise one of the two powers set out in sub-s.(2).*
>
> *In this Court, there was some discussion as to whether it is necessary for more than one item in matters (a) to (g) to indicate the sole or dominant purpose for it to be possible that that conclusion be arrived at. In my view, the posing of the question itself possibly indicates an erroneous approach to the section. Clearly,*

what must happen is that those matters must be considered and the strength or otherwise of the various resulting conclusions from considering those matters must be looked at globally. On the basis of that assessment, it must be decided whether the sole or dominant purpose was the obtaining of a tax benefit. It may be observed, for example, that one or other of the matters in (a) to (g) may be strongly or weakly suggestive of a purpose of obtaining a tax benefit or may be strongly or weakly suggestive of some other purpose. The Assistant Commissioner who undertakes such task has to use his own common sense and apply the results of his deliberations in respect of each matter and come to an overall conclusion.

... The Board approached the matter on the basis that the word "form" related to the legal effect or, as I would put it, the legal nature of the transaction and that the substance related to the practical or commercial end result of the transaction. In that respect, I would have no cause to disagree with the way in which this was put.'

The 7 matters

78. We turn now to consider the various matters at (a) to (g) in section 61A(1).

The manner in which the transaction was entered into or carried out

79. The transaction was carried out among wholly owned subsidiaries of HoldingCo. The appellant was the sole supplier to InterposedCo. The 3 UserCos were the only customers of InterposedCo. InterposedCo had no employee and its existence was only for documentation purposes. The appellant's purchasing department was staffed by its 2 employees who were both stationed in Hong Kong and they were responsible for work relating to purchasing, shipping and documentation. The goods were delivered directly to, or collected by, the UserCos. The appellant sold to InterposedCo at a 0.75% mark-up and InterposedCo sold to the UserCos at a profit.

80. The appellant had sold raw materials directly to JVCo. There is no reason and no explanation why the appellant could not and did not sell directly to the UserCos, thereby making much higher profits.

81. Following Lord Hoffmann's reasoning in paragraphs 26 and 27 in Tai Hing Cotton Mill, the appellant, InterposedCo and the UserCos were plainly not dealing at arms' length. They were all wholly owned subsidiaries of HoldingCo; in economic terms the same enterprise under the same direction. The notion that each was trying to get the best deal it could is quite unreal and totally unsubstantiated by any evidence. The price at which the appellant sold to InterposedCo was simply being passed from one pocket to the other. It did not matter to the parties what the terms of sale were. In economic terms, the result would have been exactly the same whatever

InterposedCo agreed to pay. It is therefore necessary to ask why the parties chose the price formula which they did rather than fixing it in some other way. What purpose could the parties possibly have had in choosing this method of fixing the price rather than some other method? The answer must be that the purpose of the transaction was to mop up a large portion of the appellant's profits and transfer them to InterposedCo. As InterposedCo did not conduct any business activities in Hong Kong, its profits fell outside the section 14 charge. Its financial statements, audited by CPA1, contained the following notes to the financial statements:

Year ended	Note to the Financial Statement
31-12-1994	[InterposedCo] is not subject to any profits tax in Bermuda.
31-12-1995	[InterposedCo] is not subject to any profits tax in Bermuda.
31-12-1996	[InterposedCo] is not subject to any profits tax in Bermuda.
31-12-1997	[InterposedCo] is not subject to any profits tax in Bermuda.
31-12-1998	[InterposedCo] is not subject to any profits tax in Bermuda.

We have no reason to disagree with CPA1 and accept its statement that InterposedCo was not be subject to profits tax in Bermuda. Thus the transfer of a large portion of the appellant's profits to InterposedCo was tax free.

82. The manner in which the transaction was entered into was strongly suggestive that:

(1) the appellant; and

(2) the other parties to or participants in the transaction;

entered into or carried out the transaction for the dominant purpose of enabling the appellant to obtain a tax benefit.

The form and substance of the transaction

83. The form of the transaction is the back-to-back sale of raw materials by the appellant to InterposedCo and the sale of those raw materials by InterposedCo to the UserCos.

84. The substance of the transaction is that the appellant was performing all the activities giving rise to the profits which were siphoned off to InterposedCo and were tax free.

85. The form and substance of the transaction was strongly suggestive that:

(1) the appellant; and

(2) the other parties to or participants in the transaction;

entered into or carried out the transaction for the dominant purpose of enabling the appellant to obtain a tax benefit.

The result in relation to the operation of this Ordinance that, but for section 61A, would have been achieved by the transaction

86. But for section 61A, the appellant would only be assessable on any profit it might have made from sales of the raw materials to InterposedCo at a mark up of 0.75% on costs. It would not be assessable to tax for the profits siphoned off to InterposedCo.

87. InterposedCo did not operate in Hong Kong and its profits siphoned off from the appellant would not be assessable to profits tax under the Ordinance.

88. The position of the UserCos remained unchanged. They operated outside Hong Kong and their profits remained outside the section 14 charge.

89. This matter was strongly suggestive that:

(1) the appellant; and

(2) the other parties to or participants in the transaction;

entered into or carried out the transaction for the dominant purpose of enabling the appellant to obtain a tax benefit.

Any change in the financial position of the relevant person that has resulted, will result, or may reasonably be expected to result, from the transaction

90. By siphoning off a large portion of its trading profits to InterposedCo, the appellant paid less tax. But, that was at the expense of making much less profits.

91. This matter was strongly suggestive that:

(1) the appellant; and

(2) the other parties to or participants in the transaction;

entered into or carried out the transaction for the dominant purpose of enabling the appellant to obtain a tax benefit.

Any change in the financial position of any person who has, or has had, any connection (whether of a business, family or other nature) with the relevant person, being a change that has resulted or may reasonably be expected to result from the transaction

92. InterposedCo was highly profitable by reason of the profits siphoned off by the appellant to it. Such profits were tax free, whether in Hong Kong or Bermuda.

93. There was no change in the financial position of any of the UserCos.

94. So far as HoldingCo was concerned, its before tax profits remained unchanged. However, by reason of the mopping up of a large portion of the appellant's trading profits and transfer tax free to InterposedCo, HoldingCo's financial position improved because its subsidiaries, i.e. the appellant and InterposedCo, were paying less tax resulting from the transaction.

95. This matter was strongly suggestive that:

(1) the appellant; and

(2) the other parties to or participants in the transaction;

entered into or carried out the transaction for the dominant purpose of enabling the appellant to obtain a tax benefit.

Whether the transaction has created rights or obligations which would not normally be created between persons dealing with each other at arm's length under a transaction of the kind in question

96. We repeat paragraph 81 above. The appellant, InterposedCo and the UserCos were plainly not dealing at arm's length basis.

97. This matter was strongly suggestive that:

(1) the appellant; and

(2) the other parties to or participants in the transaction;

entered into or carried out the transaction for the dominant purpose of enabling the appellant to obtain a tax benefit.

The participation in the transaction of a corporation resident or carrying on business outside Hong Kong

98. InterposedCo was incorporated outside Hong Kong and did not carry on any business activity in Hong Kong.

99. This matter was strongly suggestive that:

(1) the appellant; and

(2) the other parties to or participants in the transaction;

entered into or carried out the transaction for the dominant purpose of enabling the appellant to obtain a tax benefit.

Dominant purpose

100. We must now look at the matters globally and arrive at an overall conclusion. We find that the dominant purpose of:

(a) the appellant, and

(b) the other parties to or participants in the transaction;

in entering into or carrying out the transaction was to enable the appellant to obtain a tax benefit.

Conclusion on section 61A point

101. The Deputy Commissioner was correct in invoking section 61A.

102. The Deputy Commissioner was content to allow deduction of InterposedCo's expenses under section 61A(2)(b).

103. We are not disposed to, and do not, disagree.

SECTION 61 POINT

104. We have decided the section 61A point in favour of the respondent.

105. Following Lord Hoffmann's example in HIT Finance[39], we propose to say nothing about section 61.

DEDUCTION OF EXPENSES ALLOCATED BY PARENT COMPANY

[39] See paragraph 24.

106. This item can be disposed of quickly.

107. In InterposedCo's accounts, an item of expenditure described as 'Expenses allocated by parent company' was deducted from InterposedCo's gross profits. The amounts were set out in paragraph 19 above.

108. There is simply no evidential or factual basis for this item to succeed.

109. The evidence of the 2 witnesses called by Mr Ho Chi Ming was silent on how such expenses were said to have been incurred during the basis period for the year of assessment by InterposedCo in the production of profits.

110. There is no factual basis for the deduction of such expenses in the application of section 61A(2)(b).

111. The appellant has not begun to discharge its onus of proof under section 68(4) on this item.

DEDUCTION OF EXECUTIVE BONUS

112. This item can likewise be disposed of quickly.

113. The amounts were set out in paragraph 26 above.

114. The appellant's audited financial statements contained the following statements:

Year of assessment	Note to the Financial Statement
1993/94	'As of December 31, 1993, an amount of approximately $1,035,000 had been accrued by the Company as an executive bonus. As the directors of the Company have not yet determined to whom this amount will be paid, it is not included in directors' emoluments as stated above.'
1994/95	'As of December 31, 1994, an amount of approximately RMB525,000 had been accrued by the Company as an executive bonus. As the directors of the Company have not yet determined to whom this amount will be paid, it is not included in directors' emoluments as stated above.'
1995/96	'As of December 31 1995, an amount of approximately RMB97,000 had been accrued by the Company as an

executive bonus. As the directors of the Company have not yet determined to whom this amount will be paid, it is not included in directors' emoluments as stated above.'

1996/97 'As of December 31 1996, an amount of approximately RMB313,000 had been accrued by the Company as an executive bonus. As the directors of the Company have not yet determined to whom this amount will be paid, it is not included in directors' emoluments as stated above.'

1997/98 'As of December 31 1997, an amount of approximately RMB66,000 had been accrued by the Company as an executive bonus. As the directors of the Company have not yet determined to whom this amount will be paid, it is not included in directors' emoluments as stated above.'

1998/99 'As of December 31 1998, an amount of approximately RMB79,000 had been accrued by the Company as an executive bonus. As the directors of the Company have not yet determined to whom this amount will be paid, it is not included in directors' emoluments as stated above.'

115. The deduction seems dubious. There is no corresponding inclusion in the emoluments of the executives or directors. What was attempted was to obtain a tax benefit.

116. It is an agreed fact that sums charged as bonus or executive bonus by the appellant and HoldingCo were paid to PayeeCo1 and PayeeCo2, see paragraph 23 above. There is no evidence to show that either PayeeCo1 or PayeeCo2 had anything to do with any executive or director of the appellant.

117. There is simply no evidential basis to prove that such expenses were deductible under section 16(1).

118. The evidence of the 2 witnesses called by Mr Ho Chi Ming was silent on how such expenses were said to have been incurred during the basis period for the year of assessment by the appellant in the production of profits.

119. The appellant has not begun to discharge its onus of proof under section 68(4) on this item.

CONCLUSION

120. This appeal fails and must be dismissed.

DISPOSITION AND COSTS

121. We dismiss the appeal and confirm the assessments appealed against as increased or reduced (as the case may be) by the Deputy Commissioner.

122. The appellant was in breach of the directions it sought by consent and were given by the Chairman of the Board of Review. There was no attempt by those acting for the appellant to ensure that all the documents lodged with the Board were legible. The Board must be able to read the documents before it could decide whether, and if so, what importance should be attached to them. The consequence of some of the documents being illegible is that we were unable to attach any importance to the illegible documents. The points made on behalf of the appellant were *non sequitur* and/or irrelevant and/or convoluted. Its approach was fundamentally misconceived and demonstrated a failure to understand how section 61A works, despite the judgments handed down by the Court of Final Appeal in early December 2007 and the guidance given by the Courts and the Board. This is a hopeless appeal.

123. Pursuant to section 68(9) of the Ordinance, we order the appellant to pay the sum of $5,000 as costs of the Board, which $5,000 shall be added to the tax charged and recovered therewith.