Case No. D7/08

Profits tax - whether notice of appeal out of time - whether a valid notice of appeal - extension of time - any arguable ground of appeal - consent to rely on new grounds - section 66(1), 66(1)(a) and 66(3) of the Inland Revenue Ordinance

Panel: Kenneth Kwok Hing Wai SC (chairman), Diana Cheung Han Chu and Anna Chow Mun Wah.

Dates of hearing: 28 and 29 February 2008.
Date of decision: 16 April 2008.

By letter dated 2 August 2007, the appellant wrote to the Acting Commissioner to express its disagreement to his Determination dated 30 July 2007.

By letter dated 10 August 2007, the chief assessor wrote to advise the appellant that its letter of 2 August 2007 was not and could not be regarded as a notice of appeal.

The appellant wrote another letter dated 29 August 2007 to the chief assessor without stating any ground of appeal.

By letter dated 30 August 2007, the chief assessor reiterated that the proper course for the appellant was to lodge a timely appeal to the Board.

By letter dated 31 August 2007, the tax representative of the appellant gave notice of appeal to the Clerk with the following 'grounds':

> 'We cannot agree to the Statement of Facts based on which the determination was made for reasons of errors and omissions.'

Held:

1. The Board finds as a fact that the notice of appeal was within the one month time limit under section 66(1).

2. Yet, harping on unspecified disagreement on facts without stating any ground of appeal, the notice of appeal was not given in accordance with section 66(1).

3. No extension of time under section 66(1A) as the appellant has no reasonable cause for not submitting its grounds of appeal within the one month time limit.

4. No consent under section 66(3) as the proposed new grounds are not intelligible, are conspicuous in the absence of material particulars and are unhelpful to the Board.

5. Even if the notice of appeal is to be entertained, the appeal should be dismissed as there is no arguable ground of appeal in the notice of appeal and the proposed new grounds.

6. If it is necessary to consider the appeal on its merits, the appeal should be dismissed as:

    6.1 Source is a 'practical hard matter of fact' yet the appellant decided not to adduce any oral evidence.

    6.2 Even on the appellant's case, it was used for the purpose of entering into processing agreements with the Mainland Factory and maintaining bank accounts in Hong Kong to facilitate settlement of the trading transactions in order to comply with or circumvent the trade barriers then imposed by Country A.

    6.3 As such the appellant's presence and activities in Hong Kong (however limited) were thus crucial and were what the appellant did to earn the profits in question which were done in Hong Kong.

Appeal dismissed.

Cases referred to:

D16/07, (2007-08) IRBRD, vol 22, 454
Chow Kwong Fai (Edward) v CIR [2005] 4 HKLRD 687
D78/06, (2007-08) IRBRD, vol 22, 36
D35/07, (2007-08) IRBRD, vol 22, 809
D3/07, (2007-08) IRBRD, vol 22, 226
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
Kim Eng Securities (Hong Kong) Ltd v Commissioner of Inland Revenue [2007] 2 HKLRD 117

ING Baring Securities (Hong Kong) Ltd v Commissioner of Inland Revenue [2007-08] IRBRD, vol 22, 657

Elina Hung of Messrs Elina Hung & Co Certified Public Accountants for the taxpayer.
Paul Leung Counsel instructed by Francis Kwan Senior Government Counsel of Department of Justice for the Commissioner of Inland Revenue.

Decision:

Preliminary issues

1. We start by considering the following preliminary issues:

   (a) Whether the notice of appeal was served within the one month time limit under section 66(1) of the Inland Revenue Ordinance, Chapter 112.

   (b) Whether the requirements for giving notice in accordance with section 66(1)(a) have been complied with.

   (c) If the answer to (a) or (b) is in the negative, whether the Board should extend time.

   (d) If the appeal should be entertained, whether the notice of appeal contains any arguable ground of appeal, and if not, whether consent should be given under section 66(3) to rely on new grounds.

The Determination

2. By a Determination dated 30 July 2007, the Acting Commissioner of Inland Revenue:

   (a) increased additional profits tax assessment for the year of assessment 1997/98 under charge number 1-2913728-98-5, dated 11 March 2004, showing additional assessable profits of $15,294,002 with additional tax payable thereon of $2,271,160 to additional assessable profits of $15,448,479 with additional tax payable thereon of $2,294,099;

   (b) increased additional profits tax assessment for the year of assessment 1998/99 under charge number 1-1123720-99-A, dated 15 March 2004, showing additional assessable profits of $24,296,393 with additional tax payable

thereon of $3,887,423 to additional assessable profits of $27,448,063 with additional tax payable thereon of $4,391,690;

(c) reduced profits tax assessment for the year of assessment 1999/2000 under charge number 1-1115685-00-5, dated 15 March 2004, showing assessable profits of $28,441,778 with tax payable thereon of $4,550,684 to assessable profits of $27,769,461 with tax payable thereon of $4,443,113;

(d) increased profits tax assessment for the year of assessment 2000/01 under charge number 1-1116080-01-8, dated 15 March 2004, showing assessable profits of $28,490,486 with tax payable thereon of $4,558,477 to assessable profits of $31,573,197 with tax payable thereon of $5,051,711;

(e) increased profits tax assessment for the year of assessment 2001/02 under charge number 1-1109241-02-8, dated 15 March 2004, showing assessable profits of $20,293,339 with tax payable thereon of $3,246,934 to assessable profits of $21,266,713 with tax payable thereon of $3,402,674;

(f) reduced profits tax assessment for the year of assessment 2002/03 under charge number 1-1090572-03-2, dated 15 March 2004, showing assessable profits of $22,718,506 with tax payable thereon of $3,634,960 to assessable profits of $22,495,311 with tax payable thereon of $3,599,249;

(g) increased profits tax assessment for the year of assessment 2003/04 under charge number 1-1081615-04-2, dated 22 December 2004, showing assessable profits of $13,000,000 with tax payable thereon of $2,275,000 to assessable profits of $15,510,158 with tax payable thereon of $2,714,277; and

(h) reduced profits tax assessment for the year of assessment 2004/05 under charge number 1-1049663-05-3, dated 10 October 2005, showing assessable profits of $7,336,695 with tax payable thereon of $1,283,921 to assessable profits of $7,183,932 with tax payable thereon of $1,257,188.

The hearing

3. Neither party called any witness, whether on the preliminary issues or on the merits.

4. The hearing was adjourned a number of times for Ms Elina Hung to consider her position, to formulate proposed new grounds of appeal and to submit a bundle of 290 pages of copy documents.

WHETHER APPEAL SHOULD BE ENTERTAINED

Correspondence between appellant and Revenue

5. The Determination was sent under cover of a letter from the Acting Commissioner dated 30 July 2007 drawing the appellant's attention to section 66, quoting it in full and giving contact details of the Clerk to the Board.

6. By letter dated 2 August 2007, the appellant wrote to the Acting Commissioner expressing its disagreement.

7. We find as a fact that the Determination had been transmitted to the appellant by 2 August 2007, at the latest.

8. By letter dated 10 August 2007, the chief assessor wrote drawing attention to information on appeals to the Board and advising that the letter dated 2 August 2007 was not and could not be regarded as a notice of appeal.

9. By letter dated 29 August 2007, the appellant wrote to the chief assessor stating, among others, that (written exactly as it stands in the original):

> '... It is our belief that this particular determination can only be a result of an error in the Statement of Facts as presented to the Ag Commissioner. Thus, we do not wish to state our grounds of appeal on a foundation of disagreement with how the IRD understands and interprets the facts.
>
> To allow the case fair representation at the Board of Review, we ask you to reopen this dialog to put forth the facts as they are and prevent the case from becoming one about misinformation or misinterpretation.
>
> Please understand the 30 August 2007 deadline to lodge an appeal is quickly approaching. We kindly ask you to respond as soon as possible so that we may prepare our appeal application accordingly.'

10. It is clear from the appellant's letter dated 29 August 2007 that the appellant chose not to state its grounds of appeal.

11. By letter dated 30 August 2007, the chief assessor reiterated that the Determination represented the final decision of the Revenue regarding the objections lodged by the appellant and that if the appellant should consider the assessments objected against incorrect or excessive, the proper course was for the appellant to lodge a timely appeal to the Board.

Notice of appeal and 'grounds of appeal'

12. By letter dated 31 August 2007, Ms Elina Hung & Co, certified public accountants, wrote on behalf of the appellant to the Clerk giving notice of appeal on the following 'grounds' (written exactly as it stands in the original):

> 'We cannot agree to the Statement of Facts based on which the determination was made for reasons of errors and omissions.'

13. By letter dated 3 September 2007, the appellant wrote to the chief assessor sending a copy of the notice of appeal and stated that:

> 'Our intention is still the same, to allow the case fair representation at the Board of Review.'

Correspondence between Ms Elina Hung & Co and the Clerk

14. By letter dated 4 September 2007, the Clerk wrote stating that, subject to any submission which Ms Elina Hung & Co might make, the notice of appeal fell outside the statutory one month period and invited Ms Elina Hung & Co to consider invoking the jurisdiction of the Board to grant an extension of time.

15. By letter dated 21 September 2007, Ms Elina Hung & Co responded on the one month time limit.

16. By letter dated 27 February 2008, the Clerk wrote to the appellant and the respondent as follows:

> 'This is to give you notice that the presiding chairman intends to invite the parties to submit on whether there is a statement of the grounds of appeal in compliance with section 66(1) of the Inland Revenue Ordinance, Cap 112, and if the answer is in the negative, whether the appeal should be entertained.
>
> You may like to consider D16/07, (2007-08) 22 IRBRD 454 with your representatives.'

Whether notice of appeal served within one month time limit

17. 30 July 2007 is the date of the Determination. The notice of appeal dated 31 August 2007 was received by the Clerk on 31 August 2007.

18. The time limit under section 66 is within '1 month after the transmission to him under section 64(4) of the Commissioner' s written determination together with the reasons therefor and the statement of facts'.

19. The date of transmission is a matter peculiarly within the knowledge of the respondent. Mr Paul Leung, counsel for the respondent, told us that he was not taking the point that the notice of appeal was served out of time.

20. In the circumstances of this case and given the concession by Mr Paul Leung, we find as a fact that the notice of appeal was received by the Clerk within the one month time limit under section 66(1).

Grounds of appeal as a requirement

21. Section 66 provides that:

> *'(1) Any person (hereinafter referred to as the appellant) who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within –*
>
> *(a) 1 month after the transmission to him under section 64(4) of the Commissioner' s written determination together with the reasons therefor and the statement of facts; or*
>
> *(b) such further period as the Board may allow under subsection (1A),*
>
> *either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by a copy of the Commissioner' s written determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal. (Replaced 2 of 1971 s. 42)*
>
> *(1A) If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1). This subsection shall apply to an appeal relating to any assessment in respect of which notice of assessment is given on or after 1 April 1971 (Added 2 of 1971 s. 42. Amended 7 of 1986 s. 12)*

(2) The appellant shall at the same time as he gives notice of appeal to the Board serve on the Commissioner a copy of such notice and of the statement of the grounds of appeal.

(3) 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).

(Replaced 35 of 1965 s. 32)'

22. In D16/07, (2007-08) IRBRD, vol 22, 454, the Board (Kenneth Kwok Hing Wai SC, Eva Chan Yee Wah and Paul Lam Ting Kwok) identified the requirements for giving notice in accordance with section 66(1)(a) and held that the Board has jurisdiction to extend time for compliance with such requirements:

(1) 'We do not think that one can draw a distinction between the notice of appeal and the specified accompanying documents. Both are requirements for the entertainment of the notice of appeal' (paragraph 9).

(2) 'As the notice must be served on the Clerk within the 1 month time limit, the specified accompanying documents must also be served on the Clerk within the same time limit. If the written notice and the specified accompanying documents are not served on the Clerk within the 1 month time limit, the appeal is out of time' (paragraph 11).

(3) 'Giving notice of appeal "in accordance with subsection (1)(a)" requires more than just giving notice within the 1 month time limit. The requirements for giving notice "in accordance with subsection (1)(a)" are as follows:-

(a) The notice of appeal must be given in writing.

(b) The written notice must be given to the Clerk.

(c) The written notice must be accompanied by all the specified accompanying documents.

> *(d) Both the written notice and the specified accompanying documents must be served on the Clerk within the 1 month time limit' (paragraph 48).*
>
> *(4) The Board has jurisdiction to extend time for compliance with the requirements of giving notice of appeal in accordance with section 66(1)(a) (paragraph 55).*

23. We agree with the above. We would add that there is no need for the statement of the grounds of appeal to be contained in a separate document so long as there is a statement of the grounds of appeal in the notice of appeal.

Whether notice of appeal given in accordance with section 66(1)(a)

24. The appellant's letter dated 29 August 2007 referred to in paragraph 9 above made it plain that it was withholding its grounds of appeal pending agreement on facts.

25. The chief assessor's response was that the appellant should lodge a timely appeal to the Board.

26. The 'grounds' of appeal in the notice of appeal dated 31 August 2007 lodged by Ms Elina Hung & Co read as follows:

> 'We cannot agree to the Statement of Facts based on which the determination was made for reasons of errors and omissions.'

27. This approach was no different from the appellant's approach as stated in its letter dated 29 August 2007. Both the appellant and Ms Elina Hung & Co were harping on unspecified disagreement on facts instead of stating any ground of appeal.

28. This approach was confirmed by the appellant's letter dated 3 September 2007 quoted in paragraph 13 above.

29. As there were no grounds of appeal, notice of appeal was not given in accordance with section 66(1). Unless time for compliance is extended under section 66(1A), section 66(1) mandates that the notice of appeal shall not be entertained.

Application to extend time for giving notice in compliance with section 66(1)

30. Ms Elina Hung applied for our consent for her to rely on proposed new grounds of appeal but made no application to extend time for giving notice in compliance with section 66(1).

31. We assume in favour of the appellant that an application had been made to extend time for giving notice in compliance with section 66(1). We should add that we are surprised that, despite the Clerk's letter dated 27 February 2008, no such application had been made.

The governing principles

32. In Chow Kwong Fai (Edward) v CIR [2005] 4 HKLRD 687, at paragraph 20, Woo VP (with whose judgment the other two members of the Court of Appeal agreed) said:

> *'20. In my opinion, while a liberal interpretation must be given to the word "prevented" used in s 66(1A), it should best be understood to bear the meaning of the term "未能" in the Chinese language version of the subsection (referred to in D176/98 cited above). The term means "unable to". The choice of this meaning not only has the advantage of reconciling the versions in the two languages, if any reconciliation is needed, but also provides a less stringent test than the word "prevent". On the other hand, "unable to" imposes a higher threshold than a mere excuse and would appear to give proper effect to the rigour of time limit imposed by a taxation statute. The rationale for the stringent time limit for raising tax objections and appeals was described in Case U175, 87 ATC 1007. Tang J had in the judgment under appeal cited quite extensively from that case. I will thus refer only to one short passage:*
>
> *"It seems that the need for taxation revenue to flow in predictable amounts according to projections as to cash flow have (sic) considered to be such that dispute as to the claims made by the community upon individuals for payment of tax have been treated as quite unlike any other classes of dispute within the community." '*

33. At paragraph 46, Cheung JA (with whose observation Barma J agreed) added the following observation:

> *'46. If there is a reasonable cause and because of that reason an appellant does not file the notice of appeal within time, then he has satisfied the requirement of section 66(1A). It is not necessary to put a gloss on the word 'prevent' in its interpretation. If an appellant does not file the notice of appeal within time because of that reasonable cause, then it must be the reasonable cause which has "prevented" him from complying with the time requirement.'*

Whether to extend time for giving notice in compliance with section 66(1)

34. Ms Elina Hung elected not to adduce any oral evidence on the preliminary issues.

35. The appellant is a limited company. There is no allegation of or evidence on any prevention by sickness or absence from Hong Kong.

36. As stated above, it was the appellant's decision (whether or not it was acting on advice by Ms Elina Hung & Co) not to state its grounds of appeal. Such decision was the cause of the failure to comply with the requirements of giving notice of appeal in accordance with section 66(1). Its decision to ignore statutory requirements, drawn expressly to its attention by the Acting Commissioner in his covering letter, is not a 'reasonable cause'.

37. By the time of the hearing, almost seven months have elapsed since the Determination was transmitted to the appellant by 2 August 2007. No fact whatsoever has been agreed. There is no explanation why the appellant did not get on and disclose its grounds of appeal and apply to the Board for consent to rely on them.

38. In her submission in reply to Mr Paul Leung's submission on the preliminary issues, Ms Elina Hung mentioned the Chow Kwong Fai case and claimed that it was a case 'where the appellant was said to be have been misled by advice of the Board of Review clerk'. She stated that she 'had been led to believe that my case has been accepted because all along I have been sent letters confirming that the panel has been arranged to be heard (*sic*) on these two days' and that (written exactly as was stated by her):

> 'Ms Hung: ... my emphasis had all the time been on late appeal.
>
> Chairman: My question is, is there any room for misunderstanding after reading the clerk's letter dated yesterday?
>
> Ms Hung: There is no room in the way that was worded, but that was the reason behind it, because of my misconception that my case has a problem because of that one day. This was my focus and again, I have to say that I do audits and I am trained to think that everything is what we see, what we cannot see is not what is there.'

39. In the Chow Kwong Fai case, the Court of Appeal held that there was no evidence that the alleged misunderstanding or understanding of the appellant in that case was consequent on advice said to be given by staff in the Clerk's office (paragraph 32) and that:

> *'The alleged unreasonable reading of the statutory provisions, his alleged misunderstanding and understanding, together with his alleged ignorance, even if fully accepted to be the true reasons, in my judgment, cannot amount to a*

reasonable cause under s 66(1A) to make him unable to lodge his notice of appeal within time' (paragraph 34).

40. In the absence of any evidence on her reliance or understanding or misunderstanding or on being misled or at all, we attach no weight to her assertion or suggestion made for the first time in reply after Mr Paul Leung had concluded his submission.

41. Further, it is incumbent on a tax adviser, and in this case, a certified public accountant, holding herself out as competent to represent a taxpayer on an appeal to the Board, to ensure compliance with the statutory requirements for lodging a valid notice of appeal. It is the duty of the tax representative, not the Revenue who is the opponent, nor the Board which is the appeal tribunal, to advise the taxpayer. Neither the Revenue nor the Board owes the tax representative any duty to advise her. Arranging a hearing was to provide the appellant with the benefit of an oral hearing. That Ms Elina Hung did not take up the invitation in the Clerk' s letter dated 27 February 2008 was a matter for her.

42. More importantly, the issue here is whether the appellant was prevented by a reasonable cause from giving notice in accordance with section 66(1), that is to say, within the 1 month time limit. The Board has not come into the picture at all within the one month time limit. We have found as a fact that the Determination was transmitted to the appellant by 2 August 2007. By the time the Clerk wrote the letter dated 4 September 2007, the one month time limit for appeal had expired. The Board could not possibly have 'prevented' and did not prevent the appellant from giving notice of appeal in accordance with section 66(1).

43. In our Decision, the appellant has no reasonable cause for not submitting grounds of appeal within the one month time limit.

44. We decline to extend time.

45. Notice of appeal was not given in accordance with section 66(1) and we have declined to extend time. By virtue of section 66(1), the notice of appeal shall not be entertained.

WHETHER TO PERMIT RELIANCE ON NEW GROUNDS OF APPEAL

Whether 'grounds' of appeal arguable

46. In our decision, the notice of appeal contains no arguable ground of appeal because:

(a) As the Board (Kenneth Kwok Hing Wai SC, Simon S M Ho and Leung Lit On) held in D78/06, (2007-08) IRBRD, vol 22, 36 at paragraphs 23 – 25, whether a taxpayer agrees with the Determination is quite beside the point because it is trite law that what the Board is concerned with is whether the assessment

appealed against is incorrect or excessive. An assessment appealed against is not incorrect or excessive just because a taxpayer disagrees.

(b) The 'grounds' are misconceived and unhelpful. Unhelpful because no attempt had been made to identify the facts not agreed. Misconceived because, in the absence of agreement on facts, the party making the assertion should prove it, bearing in mind section 68(4) on the onus of proof, see D35/07, (2007-08) IRBRD, vol 22, 809, (Kenneth Kwok Hing Wai SC, Susan Beatrice Johnson and Richard Leung Wai Keung) at paragraphs 8 and 12 – 17.

(c) The fact finding functions lies in the Board, not Ms Elina Hung & Co.

47. What Ms Elina Hung & Co referred to as 'grounds' in the notice of appeal are not grounds of appeal, arguable or at all. Unless consent is given by the Board under section 66(3) for the appellant to rely on new grounds, this appeal must be dismissed, even if it is to be entertained.

The proposed new grounds

48. Ms Elina Hung asked for our consent under section 66(3) to rely on the following 'grounds' of appeal, formulated after an adjournment at her request (written exactly as it stands in the original):

'The assessments have been excessive for reasons of errors and omissions.

(1) the Commissioner has not considered the circumstances of our case – evidence are considered with the pre-conception that they are relevant

(2) False analogy of the facts of our case to other cases

(3) Wrong application of [principles] laid down in the law.'

Whether consent should be given under section 66(3)

49. We agree with what the Board (Kenneth Kwok Hing Wai SC, Erik Shum and Michael Wilkinson) said in paragraphs 31 – 32 of D3/07, (2007-08) IRBRD, vol 22, 226:

'31. In Hebei Enterprises Limited and others v Livasiri & Co (a firm) and others, HCA 20094/1998, 3 June 2004, unreported, Deputy Judge Poon (as he then was), in giving reasons for having dismissed an application to amend the pleadings, began by stating the applicable principles. These include the following. The proposed amendment must be sufficiently intelligible. It is incumbent on the party seeking amendment

> *to ensure adequate particularity. It is no answer to an objection that a proposed amendment lacks particulars, to say that particulars can be given later. This is particularly so in the case of late amendments. See paragraphs 3 – 10 of the Reasons for Decision and the cases there cited.*
>
> *32. We considered that these principles were equally applicable to an application under section 66(3), especially in respect of late applications.'*

50. The proposed new grounds are not intelligible.

51. They are conspicuous in the absence of material particulars.

52. The proposed grounds do not tell the respondent what case she has to meet and are quite useless to her. They are also unhelpful to the Board. By way of example, the proposed grounds contain no indication that the source of profits was intended to be in issue.

53. In the exercise of our discretion, we deline to give our consent under section 66(3).

54. As there are no arguable grounds of appeal and as we have declined to give our consent to the appellant to rely on the proposed new grounds, this appeal must be dismissed, even if it is to be entertained.

DISPOSAL OF THIS CASE

55. To sum up, the notice of appeal was not given in accordance with section 66(1) and we have declined to extend time under section 66(1A). Section 66(1) mandates that the notice of appeal shall not be entertained. The appeal should be dismissed for want of a valid notice of appeal which we now do. This disposes of this case.

56. Even if the notice of appeal is to be entertained, the appeal should be dismissed and the assessments appealed against should be confirmed because:

(a) the notice of appeal contains no arguable ground of appeal;

(b) the proposed new grounds contain no arguable ground of appeal; and

(c) the application for consent to rely on proposed new grounds has been refused.

APPEAL ON THE MERITS

57. There is thus no need for us to consider the merits of this appeal.

58. In view of the efforts put into the preparation of this case by the team led by Mr Paul Leung, we will comment on the merits briefly. Our comments are necessarily brief because there are no arguable or intelligible grounds of appeal and the assertions made by the appellant's representatives orally and in writing are neither easy to understand nor to follow.

Relevant authorities

59. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellant.

60. 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.'*

61. 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.'*

62. 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.'*

63. 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 and Kim Eng Securities (Hong Kong) Ltd v Commissioner of Inland Revenue [2007] 2 HKLRD 117 at paragraph 56.

Consideration on merits

64. Despite bearing the onus of proof, Ms Elina Hung decided to adduce no oral evidence. Source is a 'practical hard matter of fact' and we permit ourselves to wonder how the appellant hoped to succeed on a factual issue without adducing any oral evidence. We attach no weight to the assertions made by Ms Elina Hung in her submission. She has repeatedly been told that a fact is not proved by her assertions.

65. Ms Elina Hung said she challenged all three conditions referred to in the Hang Seng case. We do not understand how or why she claimed that the appellant did not carry on a trade, profession or business in Hong Kong. Nor do we understand how or why she claimed that the appellant' s profits in question were otherwise than from the trade, profession or business carried on by the appellant in Hong Kong. We will comment further on these points under the third condition.

66. We asked her what the appellant did to earn the profits in question and where it had done it. Her reply was that (written exactly as she stated):

> 'Profit in question was a result of difference of sales price and cost to manufacture product being sold. Product was manufactured by the Company in PRC. Sales price was determined by its customer which is [the Country A company]. That sales price is same as what [the Country A company] sells to its ultimate customer.'

67. By letter dated 7 January 2004, Ms Elina Hung & Co asserted that (written exactly as it stands in the original):

> 'The reason for having a Hong Kong company is to enter into a sub-contracting agreement and to have a bank account to facilitate remittance of funds to run the factory in China and settlement of certain purchases in Hong Kong dollar. Before 1998, there were difficulties for [Country A] to remit money to China without channelling through a Hong Kong company.'

68. By letter dated 4 November 2004, solicitors for the appellant wrote to the Revenue and stated that:

> 'Essentially, it is our client's case that [the appellant] is a company whose sole role is to facilitate the movement of raw materials from [Country A] to the PRC and finished products from the PRC to [Country A] and overseas customers.'

69. By letter dated 20 January 2005, Ms Elina Hung asserted that (written exactly as it stands in the original):

> '[Country A] companies are not allowed to deal directly with PRC. Not mentioned in the rule is the [Country A] regulations on remittance to the country which has to be reported and regulated. It specifically states that there has to be "triangular trade" and this terminology has been used by all [Country A] companies (see that in their ledger) and CPA and assessors who handle [Country A] cases could verify my statement'.

70. The case which the appellant put forward was that the interposition of a Hong Kong based company (or for that matter, anywhere else outside Country A or the Mainland) was necessary in order to comply with or circumvent the trade barriers imposed at the time by Country A. The appellant's Hong Kong presence and activities in Hong Kong (however limited) were crucial. As a matter of fact, a Country B company was interposed between the Country A company and the appellant. Making the appellant a customer of the Country A company and of the Mainland manufacturing factory freed the Country A company from the trade barriers. The appellant's presence and relevant activities in Hong Kong (however limited) were what the appellant did to earn the profits in question and the appellant had done them in Hong Kong.

71. In giving his reasons for his determination, the Acting Commissioner referred to what was described by the appellant's solicitors as 'the sole role of the company' and continued in paragraph 3(9) as follows:

> '[The appellant] has also admitted through [Ms Elina Hung & Co.] that in order to circumvent the trade barrier between the mainland of China and [Country A] at the

time, it was used for the purpose of entering into the processing agreements with the Mainland Factory and maintaining bank accounts in Hong Kong to facilitate settlement of the trading transactions. No doubt, the import/export declaration of the raw materials and finished goods to and from Hong Kong is crucial to the successful implementation of the circumvention arrangement. As such work had to be done by [the appellant] in Hong Kong, it follows that the source of the profits derived by it therefrom was Hong Kong.'

72. In our decision, the Acting Commissioner was applying what the Court of Final Appeal held in the Kim Eng case on the effective cause of the production of the profits in question and was plainly correct.

73. In the Kim Eng case, the Court of Final Appeal held that:

(a) *'I am unable to accept the Taxpayer's argument that its presence and activities in Hong Kong go only to the existence and operation of a Hong Kong business. If the Taxpayer disputed the existence and operation of a Hong Kong business - which it does not - then its presence and activities in Hong Kong would probably be conclusive against it on such an issue. Of course the Taxpayer's presence and activities in Hong Kong are far from conclusive against it on the question of source. But that does not render such presence and activities wholly irrelevant to that question' (paragraph 54).*

(b) *'As was its practical purpose, making the customer a customer of a stockbroker outside the country of the stock exchange on which the dealing took place freed the dealing from the minimum commission rates prescribed by that stock exchange. In the circumstances of the present case, I see no justification for saying that the true and only reasonable conclusion contradicts the Board of Review's determination that what the Taxpayer did to earn its net commission or brokerage was done in Hong Kong. That being so, there is no room to substitute a foreign or mixed source for the Hong Kong source which the Board of Review ascribed to the Taxpayer's net commission or brokerage income' (paragraph 56).*

74. In ING Baring Securities (Hong Kong) Limited v Commissioner of Inland Revenue [2007-08] IRBRD, vol 22, 657 at paragraph 148, Lord Millet NPJ made the following comment about the Kim Eng case:

'The taxpayer earned its commissions not from transactions in Singapore which had already taken place but from taking part in what Lord Scott NPJ described

as "a dressing-up arrangement" which was orchestrated and implemented in Hong Kong.'

75. There is no merit in the appeal. If it is necessary to consider the appeal on its merits, we would:

(a) dismiss it;

(b) confirm the assessments appealed against; and

(c) order the appellant to pay the sum of $5,000 as costs of the Board, which $5,000 should be added to the tax charged and recovered therewith because this appeal was an hopeless one which had no prospect of success.