Case No. D72/03

Profits tax – whether or not net commission and brokerage income from dealings on behalf of its customers of stocks traded on stock exchanges outside Hong Kong and income arising from margin facilities granted by the appellant to customers for trading on overseas stock exchanges were incomes sourced from Hong Kong – sections 14(1) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Robin M Bridge and Patrick James Harvey.

Dates of hearing: 2 and 3 June 2003.
Date of decision: 28 October 2003.

The appellant was a private company. The appellant acted as the broker for local customers and overseas customers in the purchase and sale of securities in the stock exchanges in Hong Kong, Singapore, Malaysia, Shanghai and the Philippines and earned commission therefrom.

The appellant returned assessable profits after excluding the income as offshore income. The Commissioner determined that the net commission and brokerage income from dealings on behalf of its customers of stocks traded on stock exchanges outside Hong Kong and income arising from margin facilities granted by the appellant to customers for trading on overseas stock exchanges, namely contango commission (being commission charged for margin accounts which had been inactive for 90 days based on the notional, not actual, trading of shares subject to that account), sub-underwriting commission or commitment fee and interest income, were incomes earned by the appellant and were sourced from Hong Kong.

The appellant argued that the net commission and brokerage from transactions executed in overseas stock exchanges, the consulting fee, the contango commission, the commitment fee and the interest income from margin customers were wholly derived outside Hong Kong and should not be subject to profits tax. Secondly, the operations which produced the commission and brokerage, the consulting fee, the contango commission, the commitment fee and the interest income from margin customers were carried out outside Hong Kong. The activities in Hong Kong were merely ancillary activities not being the operations which produced the aforesaid profits. Thirdly, the Commissioner wrongly refused to accept that the overseas brokers were the agents of the appellant in the earning of the aforesaid profits.

Held:

1. A distinction must fall to be made between profits arising in or derived from Hong Kong and profits arising in or derived from a place outside Hong Kong according to the nature of the different transactions by which the profits are generated. 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. The ascertaining of the actual source of income is a 'practical hard matter of fact' (Commissioner of Inland Revenue v Hang Seng Bank [1991] 1 AC 306; Commissioner of Inland Revenue v HK-TVB International Ltd [1992] 2 AC 397; Commissioner of Inland Revenue v Wardley Investment Services (Hong Kong) Ltd (1992) 3 HKTC 703; Commissioner of Inland Revenue v Magna Industrial Co Ltd (1996) 4 HKTC 176; Orion Caribbean Ltd (in voluntary liquidation) v Commissioner of Inland Revenue (1997) 4 HKTC 432 and All Best Wishes Limited v CIR (1992) 3 HKTC 750 followed).

2. The Board's task was 'to see what the taxpayer has done to earn the profit in question and where he has done it'. The Board found that the appellant was not brought into the picture, did not earn its share of the minimum commission and was not paid for 'effecting and executing the trades outside Hong Kong'. Of course, the appellant would not have earned its share of the minimum commission if the overseas brokers had not executed the relevant transactions and these took place abroad, but this did not tell the Board why the appellant came into the picture at all. What the appellant was doing to earn its share of the minimum commission was bringing together the complementary needs of the customer (to pay less than the minimum commission) and the overseas broker (to earn a portion of the minimum commission from customers who were not prepared to pay the minimum commission), and that bringing together the appellant did in Hong Kong.

3. To allow the provision of margin facilities to customers for 'non-marginable' securities, the appellant came into the picture as a 'foreign' provider of funds or broker to 'circumvent' the 'non-marginable' securities rule. Here again, what the appellant was doing to earn its income from margin accounts and commission from trades of the margin account customers was bringing together the complementary needs of the customer (to obtain margin trading facilities with 'non-marginable' securities as securities) and the overseas broker (to earn commission from transactions on the overseas stock exchange), and that bringing together the appellant did in Hong Kong.

4. Taking all the factors into consideration, including the fact that the source of funds was offshore, and the reasons the Board has given on commission income, the Board concluded that the income arising from margin facilities arose in, or was derived from, Hong Kong. The appellant has not discharged the onus under

section 68(4) of proving that any of the assessments appealed against was excessive or incorrect.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v Hong Kong & Whampoa Dock (1960) 1 HKTC 85
Commissioner of Inland Revenue v International Wood Products Ltd (1971) 1 HKTC 551
Commissioner of Inland Revenue v Hang Seng Bank [1991] 1 AC 306
Commissioner of Inland Revenue v HK-TVB International Ltd [1992] 2 AC 397
Commissioner of Inland Revenue v Wardley Investment Services (Hong Kong) Ltd (1992) 3 HKTC 703
Commissioner of Inland Revenue v Magna Industrial Co Ltd (1996) 4 HKTC 176
Orion Caribbean Ltd (in voluntary liquidation) v Commissioner of Inland Revenue (1997) 4 HKTC 432
Commissioner of Inland Revenue v Indosuez WI Carr Securities Ltd [2002] 1 HKLRD 308
Commissioner of Income-Tax, Bombay Presidency and Aden v Chunilal B Mehta of Bombay (1938) LR 65 Ind App 332
D71/97, IRBRD, vol 12, 410
D152/01, IRBRD, vol 17, 118
Liquidator, Rhodesia Metals Ltd v Commissioner of Taxes [1940] AC 774
Nathan v Federal Commissioner of Taxation (1918) 25 CLR 183
FL Smidth and Company v Greenwood [1921] 3 KB 583
Commissioners of Taxation v Kirk [1900] AC 588
Commissioner of Inland Revenue v NV Philips' Gloeilampenfabrieken [1955] NZLR 868
D14/89, IRBRD, vol 4, 247
D14/96, IRBRD, vol 11, 406
D28/86, IRBRD, vol 10, 220
D47/93, IRBRD, vol 8, 342
All Best Wishes Limited v CIR (1992) 3 HKTC 750

Anselmo Reyes SC instructed by Department of Justice for the Commissioner of Inland Revenue.
Robert Kotewall SC instructed by Messrs Ernst & Young for the taxpayer.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 17 January 2001 whereby:

(a) additional profits tax assessment for the year of assessment 1995/96 under charge number 1-3132384-96-6 dated 9 December 1997, showing additional assessable profits of $37,920,479 with tax payable thereon of $6,256,879 was increased to additional assessable profits of $44,560,362 with tax payable thereon of $7,352,460;

(b) additional profits tax assessment for the year of assessment 1996/97 under charge number 1-1089445-97-9 dated 9 December 1997, showing additional assessable profits of $34,141,903 with tax payable thereon of $5,633,414 was increased to additional assessable profits of $56,398,455 with tax payable thereon of $9,305,745.

Facts upon which the determination was arrived at

2. In the determination, the Commissioner set out the facts upon which the determination was arrived at. Mr Robert Kotewall, SC, leading counsel for the Appellant, declined our invitation to indicate whether the Appellant agreed with or admitted any of the facts in the ' Facts upon which the determination was arrived at' in the determination. What we will do is to narrate in this section the facts as the Commissioner saw them.

3. The Appellant had objected to the additional profits tax assessments for the years of assessment 1995/96 and 1996/97 raised on it, claiming that certain incomes arising from share transactions made on behalf of its customers in the overseas stock exchanges were derived outside Hong Kong and should not be chargeable to Hong Kong profits tax.

4. The Appellant was incorporated as a private company in Hong Kong on 3 November 1987. The Appellant had been a member of the Stock Exchange of Hong Kong since 1988.

5. At all relevant times, the Appellant acted as the broker for both local customers and overseas customers in the purchase and sale of securities in the stock exchanges in Hong Kong, Singapore, Malaysia, Shanghai and the Philippines and earned commission therefrom. The Appellant did not maintain or operate any office in Singapore, Malaysia, China or the Philippines. The securities transactions in the Singapore, Malaysia and the Philippines stock exchanges were handled by fellow subsidiaries, namely Company A-Singapore, Company A-Malaysia and Company A-Philippines. For shares traded on the Shanghai Stock Exchange, the transactions for the year of assessment 1995/96 were handled by local brokers in Shanghai while transactions for the year of assessment 1996/97 were handled by local brokers in Hong Kong. The brokers, be they overseas or local, charged the Appellant a certain percent on the value of transaction as

commission while the Appellant charged its customer a higher percent and the difference represented the profit made by the Appellant.

6. The Appellant's customers comprised individual investors, corporate clients and institutional clients. These clients could be further classified into three major groups as follows:

(a) Margin customers

This category included individual and corporate clients who had opened margin accounts with the Appellant. They traded on margin account and the shares which they had bought were kept by the Appellant as security for the credit facilities extended to them. Their accounts usually showed a debit balance. The Appellant issued a monthly statement to this type of customers. Institutional customers could not trade on margin account.

(b) Custodian customers

This category included individual and corporate clients who kept the securities with the Appellant. These customers traded on cash basis and monthly statement would be sent to them showing the position of their accounts.

(c) Delivery against payment ('DVP') customers

These customers were mainly institutional customers. They traded on cash basis and no monthly statement of accounts would be sent to them.

7. For customers who wished to buy or sell shares through the Appellant, they had to complete the following documents:

(a) a form titled 'Account Opening Information';

(b) a securities dealing agreement; and

(c) a 'Margin Agreement' (for customers who intended to trade on margin basis).

8. For the customer who operated a margin account with the Appellant, if the customer did not settle the balance due to the Appellant within 90 days from the date of purchase, the Appellant would charge the customer a commission known as 'contango commission' which was computed as if it had sold and re-purchased at the open market price the shares that were held as security. The rate of contango commission was 1% on the value of shares sold and re-purchased. There was no actual sale and purchase of shares. The relevant provision for the payment of contango commission was contained in clause 9 of the Margin Agreement which read as follows:

'If no demand for payment is received by [the customer] ..., [the customer] shall within ninety (90) days of the purchase of the shares pay to [the Appellant] all outstanding credit facilities. However, if [the customer fails] to do, [the Appellant] shall without notice to [the customer] and in addition and not in derogation of the other conditions herein, be entitled at [the Appellant's] sole discretion to sell at [the Appellant's] own judgement as to timing the shares through the Stock Exchange and immediately thereafter purchase the shares again in likewise manner (this process shall hereinafter be referred to as 'contango') and thereupon, [the customer] shall have, subject to condition 1 hereof, a further ninety (90) days to settle all the new outstanding credit facilities. [The customer] further [agrees] that:-

(a) [the Appellant] at [its] sole discretion further contango the shares held by [the Appellant] after each period of ninety (90) days for any multiple of times until [the Appellant] hear from [the customer] to the contrary;

(b) a commission of one per cent (1%) of the value of the shares at the date of the contango shall be paid by [the customer] to [the Appellant] in respect to each contango transaction.'

9. The Appellant's representatives ('the Representatives') provided copies of monthly statements issued by the Appellant to one of its customers, Company B, to illustrate a contango transaction. The Appellant granted Company B a margin facilities of S$3,501,040 to acquire 4,627,500 shares in a company ('the Shares'), which were listed on the Singapore Stock Exchange. The Shares were held by the Appellant as collateral security. The margin facilities were drawn down by Company B on 13 September 1995. When there was no trading transactions for 90 days in the margin account, the Appellant sold the Shares at S$1.5 per share on 9 January 1996 and on the same date acquired the Shares at the same price and charged Company B a commission of 0.75% on each of the sale and re-purchase of the shares. However, there was no actual sale and re-purchase of the shares in the stock exchange, nor had any contract note and confirmation advice been issued. So there would not be any profit or loss arising from the contango transaction. Company B settled the contango commission of S$104,119 on 27 February 1996. Copies of the monthly statement issued by the Appellant to Company B for the month of January and February 1996 showing the contango transactions were furnished.

10. The Appellant's profit and loss accounts for the two years ended 31 March 1996 and 1997 showed that it had earned the following income:

	1996	**1997**
	$'000	$'000
Net commission and brokerage		
- The Hong Kong Stock Exchange	56,351	88,496

- Overseas exchange	36,680	34,142
Profit/(loss) on trading in securities listed on		
- The Hong Kong Stock Exchange	(907)	(1,016)
- Overseas exchange	929	(2,232)
Sub-underwriting commission	5,036	11,408
Handling commission	670	2,812
Interest received	16,039	65,089
Dividend	9	21
Administration and research fees	472	323
Exchange gain	1,566	-
Sundry	1,695	4,985
Write back of provision for bad and doubtful debts	-	577
Write back of provision against marketable securities	-	6
	118,540	204,611

A breakdown of the net commission and brokerage income (that is, net of commission paid to overseas brokers, including the Appellant's fellow subsidiaries) earned by the Appellant for the year ended 31 March 1996 with reference to the location of the overseas stock exchanges is shown below:

Location of stock exchange	**Hong Kong orders**	**Overseas orders**	**Total**
	$	$	$
Singapore	3,332,199	10,479,858	13,812,057
Malaysia	5,007,213	15,459,533	20,466,746
Shanghai	158,475	47,810	206,285
Philippines	773,118	1,421,990	2,195,108
	9,271,005	27,409,191	36,680,196

11. (a) The Appellant returned assessable profits of $10,487,675 and $69,825,371 for the years of assessment 1995/96 and 1996/97 respectively which were arrived at after excluding the following income as offshore income:

	1995/96	**1996/97**
	$	$
Net commission and brokerage from share transactions executed on overseas stock exchange	36,680,197	34,141,903
Consulting fee (included as sundry income)	1,240,282	-
Contango commission (included as sundry income)	-	4,970,956
Sub-underwriting commission	1,251,453	-

Interest from margin customers trading in overseas stock exchanges	7,543,562	18,153,238

(b) The Appellant also stated that the following expenses were not deductible because they were incurred to earn the above offshore income:

	1995/96	**1996/97**
	$	$
Rebates [paragraph 12, infra]	1,259,432	867,642
Interest on loan from Company A-Malaysia [paragraph 5, supra] to finance margin clients in Malaysia	895,700	-

(c) Profits tax assessments were raised on the profits returned against which no objection had been lodged.

12. The rebates mentioned at paragraph 11(b) were paid to the following companies for bringing in business to the Appellant in respect of shares traded on the overseas stock exchanges:

	1996	**1997**
	$	$
Singapore stocks		
Company 1	-	59,984
Company 2	102,979	-
Company 3	58,259	1,628
Company 4	84,232	14,639
Company 5	-	9,264
Company 6	1,914	-
Company A-Singapore	264	-
Company 7	36,207	-
Company 8	-	1,349
Company 9	40,964	-
Company 10	-	1,582
Company 11	-	82,793
Company 12-HK	87,928	3,132
Company 12-Singapore	250,008	-
Company 13	-	27,597
Company 14	-	42,593
Malaysian stocks		
Company 15	2,440	-
Company 16	-	14,178
Company 1	-	63,790

Company 3	20,693	1,249
Company 4	161,802	-
Company 5	30,309	155,447
Company 17	-	39,394
Company 9	29,989	-
Company 11	-	86,899
Company 18	-	11,687
Company 12-HK	171,656	52,416
Company 12-Singapore	42,293	132,539
Company 19	136,785	-
Company 13	-	17,916
Company 14	-	47,566
Philippines stocks	710	-
Total	1,259,432	867,642

13. In response to the assessor's enquiries, the Representatives confirmed in a letter dated 27 November 1997 that the overseas brokers had not been granted general authority to enter into agreement with the Appellant's overseas customers directly, nor to receive and execute orders from such overseas customers directly.

14. By letter dated 10 September 1998, the Representatives used four transactions to explain the steps taken in relation to shares traded on the stock exchanges of Singapore, Malaysia, Shanghai and the Philippines which were summarised in a document. In that letter, the Representatives stated that the customers gave instructions to the Appellant by long distance telephone call to buy and sell shares. However, in a letter dated 15 December 2000, the Representatives claimed that in relation to the shares traded in the stock exchanges of Singapore, Malaysia and the Philippines, the customers directly called the respective brokers to place orders instead of making long distance calls to the Appellant and that the overseas brokers telephoned the Appellant to type up the relevant contract notes after the transactions had been executed.

15. The Representatives subsequently confirmed that the consulting fee of $1,240,282 [see paragraph 11(a)] was in fact an introduction fee earned by the Appellant for introducing several customers to its related company in Singapore and that the Appellant was prepared to offer the income for assessment. The assessor raised on the Appellant the following additional profits tax assessments for the years of assessment 1995/96 and 1996/97:

	1995/96	**1996/97**
	$	$
Commission and brokerage from securities traded on overseas stock exchange [paragraph 11(a)]	36,680,197	34,141,903
Consulting fee [paragraph 11(a)]	1,240,282	-
Additional assessable profits	37,920,479	34,141,903

Tax payable thereon	6,256,879	5,633,414

16. The Representatives on behalf of the Appellant objected to the additional profits tax assessments for the years of assessment 1995/96 and 1996/97 in the following terms:

> 'We do not agree with your department's view that the commission and brokerage income received by our client for securities dealing on overseas stock exchanges (HK$36,680,197 for 1995/96 and HK$34,141,903 for 1996/97) were sourced in Hong Kong. We consider that such amounts were derived outside Hong Kong and therefore should not be chargeable to Hong Kong Profits Tax pursuant to Section 14(1) of the Inland Revenue Ordinance.
>
> According to the Departmental Interpretation & Practice Notes ("DIPN") No. 21 on "Locality of Profits", the place where the agency works giving rise to the commission income were performed determines the locality of profits of a service provider. The place where incidental activities performed prior to or subsequent to the earnings of the commission in not generally relevant.
>
> In our client's case, as our client is not a member of any Stock Exchange, all customers' orders in respect of sales and purchase of shares listed on the overseas stock exchanges had to be transmitted to the group's office in Singapore and Malaysia for execution and completion. These execution and completion works were immediately responsible for the generation of our client's commission and brokerage income. The execution works were performed by the group's offices in Singapore and Malaysia as our client's agent. These activities overseas have to be taken into account in considering the source of the brokerage income. In fact, case law indicates that it is not improper to consider the activities of authorised agents provided these are relevant to earning the profit in question. Accordingly, the locations where these works were performed, namely Singapore and Malaysia, should be regarded as the locality of such income.
>
> In view of the above, the fact that our client provided incidental accounting and administrative activities such as matching confirmations, preparing bought and sold notes as well as book-keeping in Hong Kong prior to or subsequent to the earning of the commission and brokerage income were ancillary and did not affect the offshore status of the operation. In fact, your department had agreed that such commission and brokerage income was offshore in nature upon receipt of our letter dated 13 April 1994.'

17. The Representatives offered the following explanations for the arrangements between the Appellant and its fellow subsidiaries in relation to the commission and brokerage income which were claimed to be booked profit:

(a) ' Similar to the stock brokerage industry in Hong Kong, brokers in the overseas stock markets cannot charge their clients or overseas stock brokers commission at a rate lower than the minimum commission rates set by the respective local stock exchanges. The minimum commission rates set by the overseas stock exchanges are summarized in appendices on:

- Minimum commission rates for individual clients set by the Singapore Stock Exchange

- Minimum commission rates for overseas stock brokers set by the Malaysia Stock Exchange

- Minimum commission rates for individual clients set by the Philippines Stock Exchange'

(b) ' In the Singapore Stock Exchange, stock brokers are not allowed to give rebate commission to individual clients or local brokers. However, rebate commission can legally be paid out to overseas stock brokers ...

Therefore, there is a common practice in the industry if a client has high bargaining power and wants to pay less commission for trading in a particular stock exchange, the stock broker can arrange for the transaction to be booked through an overseas broker. Under such an arrangement, the overseas broker will become the principal engaging the local broker to execute the transactions. Even though the local broker is still obliged to charge the minimum commission, it can pay a rebate commission to the overseas broker (maximum rebate commission equal to 50% of commission paid to the local broker). The overseas broker can then pay a rebate commission to the client or charge the client a commission at a lower rate.

To achieve the above, the clients of the overseas fellow subsidiaries first open accounts with the Company. Thereafter, these clients legally become the clients of the Company. The overseas fellow subsidiaries provide the same kind of services to these clients even though the Company is the contracting party of the overseas fellow subsidiaries in these transactions. Whenever these overseas fellow subsidiaries receive orders from these clients directly, they in most cases execute the transactions and subsequently forward the relevant information to the Company for preparing contract notes and other paper work.'

(c) ' In general, the Company charges these clients commission and brokerage fee at a rate pre-set by the overseas fellow subsidiaries. The commission rates are set between the minimum commission rates to overseas brokers and individuals set by the overseas stock exchanges. The commission and brokerage fee received from these clients of the Company will then be shared between the Company and the overseas fellow subsidiaries.

Since the shareholders of the Company and the overseas fellow subsidiaries were the same before the Company was first listed on the main board of the Hong Kong Stock Exchange in January 1998, the group viewed that a substantial portion of the brokerage and commission income booked into the accounts of the Company would have no material impact on the group's overall results.

The Company contended that apart from turning around the minimum commission requirement, there was no reason for the clients not to trade directly with the Company's overseas fellow subsidiaries as they were well known as security firms which offered quality services. For example, [Company A-Singapore] in Singapore was awarded as the Best Securities Firm in Singapore by [a magazine] for 1993-1995.'

(d) ' Although the Company was the principal to the overseas fellow subsidiaries and the agent to the clients on the share dealing transactions under review, the Company contended that the overseas fellow subsidiaries had undertaken the underlying default risk of the clients.

The Company quoted a client, [a named person], to illustrate this point. The share dealing transactions of [the named person] had been booked through Hong Kong. This client had subsequently defaulted payment of RM1,368,086 and the Company's fellow subsidiary in Singapore, [Company A-Singapore] had reimbursed the Company on the defaulted amount. After netting off the reimbursed amount, the Company only remitted the net difference payable to [Company A-Singapore]. Remittance advice in relation to this transaction is enclosed ...

In addition, the Company also quoted the salesman commission calculation basis as an example to illustrate its contention that the commission and brokerage income in dispute is merely a booked profit. Commission paid to salesmen in the fellow subsidiary in Singapore had been calculated by reference to the gross commission received from the client (i.e. before any allocation of profit to the Company). A letter issued by the fellow subsidiary in

Singapore, [Company A-Singapore], on 7 December 2000 confirming this is enclosed ...'

(e) ' Based on the management representations, security trading transactions on the overseas stock exchanges for the overseas clients were actually handled by the overseas fellow subsidiaries. The Company was only responsible for administrative support services, (e.g. issue contract notes based on the overseas fellow subsidiaries instructions, transaction matching and collecting the purchase considerations of the transactions) in relation to these transactions even though it had contractual relationships with these clients.'

(f) ' The Company also contended that if these commission and brokerage income were not booked profit in nature, the Company would not be entitled to a share of up to 45% of the overall commission income by simply handling administrative and supportive work on these transactions.'

18. The Representatives provided an analysis for the months of August and October 1996 showing the ratio of net commission and brokerage income earned by the Appellant and overseas brokers. As regards the rebates charged in the Appellant' s accounts at paragraph 12 above, the Representatives explained the circumstances giving rise to such payments in the following terms:

(a) 'The rebate commissions were only paid to institutional clients (including stock broker clients) ..., some institutional clients have high bargaining power so that they were able to negotiate better commission rates ... (Local) brokers in Singapore can give a maximum rebate commission to overseas stock brokers equal to 50% of the commission received. Whereas, the maximum rebate commission that the local brokers to fund managers is only 25% of the commission received. Therefore, if the share dealing transactions of the fund managers are booked through overseas brokers, they may bargain for a rebate commission that is higher than 25% of the original commission payment.'

(b) ' It is worth noting that the institutional clients have offices in major international cities in the world. Therefore, even if some rebate commissions were paid to institutional clients in Hong Kong, this did not necessarily mean that these institutional clients placed their orders directly with [the Appellant] in Hong Kong.

[The Appellant] confirmed that most of the institutional clients placed orders directly with the overseas fellow subsidiaries. To turnaround the minimum commission requirements of the overseas stock exchanges, the transactions were then booked through [the Appellant].'

The Representatives provided a schedule showing the amount of net commission received and rebate paid by the Appellant for the two years ended 31 March 1996 and 1997.

19. The Representatives further contended that the contango commission was also a booked profit and that its source should be the same as that for the net commission and brokerage (that is, outside Hong Kong) because the shares were traded on overseas stock exchanges.

20. In correspondence with the assessor, the Representatives provided the following arguments to contend that the sub-underwriting commission and interest from margin customers trading in overseas stock exchanges [see paragraph 11] were not chargeable to tax:

(a) Sub-underwriting commission

> ' This is actually a commitment fee which has been mistakenly classified as sub-writing commission ...
>
> [The Appellant] provided margin financing facilities in Singapore to its overseas customers on some Singapore/Malaysian stocks and received a commitment fee of S$230,000 from the overseas customers. The overseas customers pledged their Singapore/Malaysian stocks with [the Appellant] for the margin financing facilities.'

(b) Interest from margin customers trading in overseas stock exchanges

> ' The funds made available to the margin customers trading on Singapore and Malaysian stock exchanges were borrowed from [the Appellant's] ultimate holding company, [Company A-Holding], in Singapore. The funds were transferred directly by [Company A-Holding] to the overseas margin customers' margin accounts maintained under [the Appellant's] account with the stock broker in Singapore, [Company A-Singapore]. No money ever passed through [the Appellant's] bank accounts in Hong Kong or elsewhere ...
>
> .
>
> As the provision of credit in respect of such funds made available to the margin customers is located outside Hong Kong, interest income derived therefrom should not be taxable pursuant to Section 14(1) of the Inland Revenue Ordinance.'

21. The assessor maintained the view that the net commission and brokerage income derived from the purchase and sales of securities in the overseas stock exchanges and the contango commission charged on the margin customers were chargeable to Hong Kong profits tax.

Moreover, he considered that the commitment fee and the interest income derived from the margin facilities granted to the margin customers should also be chargeable to tax while the rebates paid to other brokers [paragraph 11(b)] and interest paid to Company A-Malaysia [paragraph 11(b)] should be deductible. To give effect to the above, the additional profits tax assessments for the years of assessment 1995/96 and 1996/97 should be revised as follows:

	1995/96	**1996/97**
	$	$
Additional assessable profits per paragraph 15	37,920,479	34,141,903
Add: Contango commission	-	4,970,956
Commitment fee	1,251,453	-
Interest income from margin customers	7,543,562	18,153,238
	46,715,494	57,266,097
Less: Rebates	1,259,432	867,642
Interest paid to Company B	895,700	-
Revised additional assessable profits	44,560,362	56,398,455
Tax payable thereon	7,352,460	9,305,745

The determination

22. The Commissioner determined that the following four types of income earned by the Appellant were sourced from Hong Kong, and agreed with the assessor's conclusion and computation (paragraph 21):

(a) the net commission and brokerage income from dealings on behalf of its customers of stocks traded on stock exchanges outside Hong Kong;

(b) the contango commission;

(b) the sub-underwriting commission or commitment fee; and

(d) the interest income from margin customers trading on overseas stock exchanges.

23. The Commissioner did not deal with the consulting fee income of $1,240,282 in the year of assessment 1995/96, presumably because of the Appellant's offer of this income for assessment (see paragraphs 11(a) and 15).

24. In their letter dated 16 April 1997, the Representatives said:

'3. ***Consulting fee for consulting services provided to a Singapore client (HK$1,240,282)***

> Our client introduced several major overseas customers to the Group's Singapore office. These customers placed orders directly with the Singapore office instead of via our client in Hong Kong. Consequently our client received an introduction fee from the Singapore office.'

In a further letter dated 27 November 1997, the Representatives said:

> 'Regarding the consulting fee of HK$1,240,282 which is in the nature of an introduction fee, our client is prepared to offer the amount for assessment.'

The grounds of appeal

25. By letter dated 16 February 2001, Messrs Ernst & Young gave notice of appeal on behalf of the Appellant on the following grounds:

> '1. That the net commission and brokerage from transactions executed in overseas stock exchanges in the amount of $36,680,197 and $34,141,903 derived in the basis periods for the years of assessment 1995/96 and 1996/97 respectively ("the Commission and Brokerage") were wholly derived outside Hong Kong and should not be subject to profits tax;
>
> 2. That the consulting fee in the amount of $1,240,282 derived in the basis period for the year of assessment 1995/96 ("the Consulting Fee") was wholly derived outside Hong Kong and should not be subject to profits tax;
>
> 3. That the contango commission in the amount of $4,970,956 derived in the basis period for the year of assessment 1996/97 ("the Contango Commission") was wholly derived outside Hong Kong and should not be subject to profits tax;
>
> 4. That the commitment fee in the amount of $1,251,453 derived in the basis period for the year of assessment 1995/96 ("the Commitment Fee") was wholly derived outside Hong Kong and should not be subject to profits tax;
>
> 5. That the interest income from margin customers in the amount of $7,543,562 and $18,153,238 derived in the basis periods for the years of assessment 1995/96 and 1996/97 respectively ("the Interest Income From Margin Customers") were wholly derived outside Hong Kong and should not be subject to profits tax;

6. Without prejudice to other grounds of appeal, that the operations which produced the Commission and Brokerage, the Consulting Fee, the Contango Commission, the Commitment Fee and the Interest Income From Margin Customers were carried out outside Hong Kong. The activities in Hong Kong were merely ancillary activities not being the operations which produced the aforesaid profits.

7. The Commissioner wrongly refused to accept that the overseas brokers were the agents of the Taxpayer in the earning of the aforesaid profits.'

26. Ground 2 is puzzling in view of what the Representatives said in their letters dated 16 April 1997 and 27 November 1997.

The appeal hearing

27. The Appellant lodged a bundle of the following authorities:

(a) Commissioner of Inland Revenue v Hong Kong & Whampoa Dock (1960) 1 HKTC 85;

(b) Commissioner of Inland Revenue v International Wood Products Ltd (1971) 1 HKTC 551;

(c) Commissioner of Inland Revenue v Hang Seng Bank [1991] 1 AC 306;

(d) Commissioner of Inland Revenue v HK-TVB International Ltd [1992] 2 AC 397;

(e) Commissioner of Inland Revenue v Wardley Investment Services (Hong Kong) Ltd (1992) 3 HKTC 703;

(f) Commissioner of Inland Revenue v Magna Industrial Co Ltd (1996) 4 HKTC 176;

(g) Orion Caribbean Ltd (in voluntary liquidation) v Commissioner of Inland Revenue (1997) 4 HKTC 432;

(h) Commissioner of Inland Revenue v Indosuez WI Carr Securities Ltd [2002] 1 HKLRD 308;

(i) Commissioner of Income-Tax, Bombay Presidency and Aden v Chunilal B Mehta of Bombay (1938) LR 65 Ind App 332;

(j) D71/97, IRBRD, vol 12, 410;

(k) D152/01, IRBRD, vol 17, 118;

(l) Liquidator, Rhodesia Metals Ltd v Commissioner of Taxes [1940] AC 774;

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

(n) FL Smidth and Company v Greenwood [1921] 3 KB 583;

(o) Commissioners of Taxation v Kirk [1900] AC 588;

(p) Commissioner of Inland Revenue v NV Philips' Gloeilampenfabrieken [1955] NZLR 868;

(q) D14/89, IRBRD, vol 4, 247;

(r) D14/96, IRBRD, vol 11, 406;

(s) Willoughby and Halkyard, Encyclopaedia of Hong Kong Taxation, volume 3, paragraphs II[6031] to [6034];

(t) Income and Corporation Taxes Act 1988, section 18 (Schedule D);

(u) Bowstead and Reynolds on Agency (17th edition), paragraphs 1-001 to 1-004; 2-001; 2-030 to 2-033.

28. The Respondent did not lodge any authorities, presumably because the Respondent saw no need to add to the Appellant's list. However, Mr Anselmo Reyes, SC, cited D28/86, IRBRD, vol 10, 220 and D47/93, IRBRD, vol 8, 342 in his submission.

29. Mr Robert Kotewall, SC, told us in his opening that four categories of income were in issue:

(a) the net commission and brokerage income from dealings of the Appellant on behalf of its customers in respect of stocks traded on stock exchanges outside Hong Kong (that is, stock exchanges in Singapore, Malaysia, the Philippines, Shanghai and Indonesia);

(b) income arising from margin facilities granted by the Appellant to customers for trading on overseas stock exchanges, namely:

(i) contango commission (being commission charged for margin accounts which had been inactive for 90 days based on the notional, not actual, trading of shares subject to that account);

(ii) sub-underwriting commission or commitment fee; and

(iii) interest income.

For each category of income, the issue was the source thereof for the purpose of section 14 of the IRO. The Appellant accepted that the first two conditions (see paragraph 35 below) were satisfied. The only issue was on the third condition, that is, whether the profits were profits arising in or derived from Hong Kong. The Appellant also accepted that it did not maintain, operate or keep any office in any of the territories mentioned above and was not a member of the stock exchanges in those territories.

30. Mr Robert Kotewall, SC, called four witnesses who confirmed their witness statements. Mr Anselmo Reyes, SC, leading counsel for the Respondent, agreed that the witness statements of two more witnesses of the Appellant be taken as read. Mr Anselmo Reyes, SC, did not call any witness.

31. Before closing his case, Mr Robert Kotewall, SC, applied for leave to add the following ground of appeal:

> '8. If, contrary to the Taxpayer's argument that each category of its income referred to in paragraphs 1, 3, 4 and 5 is wholly derived outside Hong Kong, the Board of Review is of the view that any of the said category was derived partly from activities or operations in Hong Kong and partly from activities or operations outside Hong Kong, that the income in any such category should be apportioned according to the proportion which ought, as a matter of fact, be accorded respectively to such activities or operations as were carried out in Hong Kong and such activities or operations as were carried out outside Hong Kong.'

32. Mr Anselmo Reyes, SC, opposed the application. Both counsel were content that we deferred the decision on the application until our 'main' decision on the appeal.

Our decision

The law

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

34. 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.*'

35. 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 to 323):

> '*But the question whether the gross profit resulting from a particular transaction arose in or derived from one place or another is always in the last analysis a question of fact depending on the nature of the transaction. It is impossible to lay down precise rules of law by which the answer to that question is to be determined. The broad guiding principle, attested by many authorities, is that one looks to see what the taxpayer has done to earn the profit in question. If he has rendered a service or engaged in an activity such as the manufacture of goods, the profit will have arisen or derived from the place where the service was rendered or the profit making activity carried on. But if the profit was earned by the exploitation of property assets as by letting property, lending money or dealing in commodities or securities by buying and reselling at a profit, the profit will have arisen in or derived from the place where the property was let, the money was lent or the contracts of purchase*

and sale were effected. There may, of course, be cases where the gross profits deriving from an individual transaction will have arisen in or derived from different places. Thus, for example, goods sold outside Hong Kong may have been subject to manufacturing and finishing processes which took place partly in Hong Kong and partly overseas. In such a case the absence of a specific provision for apportionment in the Ordinance would not obviate the necessity to apportion the gross profit on sale as having arisen partly in Hong Kong and partly outside Hong Kong.'

36. 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 page 407 as follows:

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

The proper approach (page 409):

'is to ascertain what were the operations which produced the relevant profits and where those operations took place.

...

In the view of their Lordships it can only be in rare cases that a taxpayer with a principal place of business in Hong Kong can earn profits which are not chargeable to profits tax under section 14 of the Inland Revenue Ordinance.'

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

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

38. The ascertaining of the actual source of income being a ' practical hard matter of fact' , the Court of Appeal concluded in CIR v Magna Industrial Company Limited [1997] HKLRD 173 that on the facts of that case, the Board of Review was entitled in law to conclude, as a practical hard matter of fact, that the profits arose overseas and not in Hong Kong and allowed an appeal from the judge who reversed the Board of Review' s decision:

> ' *As can be seen from the above summary of the facts, there were undoubtedly substantial activities taking place in Hong Kong, attributable to Magna, without which the gross profits from the sales could not have been earned. Whilst the goods were physically withdrawn from the warehouse by A Ltd' s staff (who also controlled the inventory) Magna was in fact the shipper of the goods, incurring contractual obligations as shipper. Magna was the beneficiary under the letter of credit and presented the documents in Hong Kong for payments. So we have here a situation where:*
>
> *(i) The sales, the proceeds of which gave rise to the gross profits, all took place overseas;*
>
> *(ii) The goods sold by Magna overseas were stored in Hong Kong by A Ltd in its own name;*
>
> *(iii) To fulfill the overseas orders, Magna bought the goods from A Ltd and then processed the orders in Hong Kong;*
>
> *(iv) Magna shipped the goods CIF;*
>
> *(v) Magna received payment for the goods in Hong Kong.'* (page 178)
>
> ' *In these circumstances, was the Board of Review entitled in law to conclude, as a practical hard matter of fact, that the profits arose overseas and not in Hong Kong?'* (page 179)
>
> ' *Having regard to the activities as a whole which bear upon the question of source, this case might be regarded as falling within the extreme limits of the spectrum: But, nevertheless, the Board' s conclusion is, in our view, sustainable in law.*
>
> *We therefore conclude that the answer to the question in the case stated: "Was the Board correct in holding that the relevant profits did not arise in or derive from Hong Kong" should have been "Yes".'* (page 181)

39. We remind ourselves of what Mortimer J (as he then was) said in All Best Wishes Limited v CIR (1992) 3 HKTC 750 at page 770:

> *'Reference to cases where analogous facts are decided, is of limited value unless the principle behind those analogous facts can be clearly identified.'* (at page 770)

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

> *'"one looks to see what the taxpayer has done to earn the profit in question and where he has done it."*
>
> *When addressing the question the Board had formulated for itself: "where did the operations take place from which the profits in substance arise", in my respectful judgment the Board did not appear to appreciate that it is the operations of the taxpayer which are the relevant consideration. If the Board had been able to benefit from the decisions of the Privy Council in the Hang Seng Bank and the HK-TVB case, I have little doubt the Board's general approach to the issues would not have been the same. I think that Miss Li was right when she submitted that the case stated clearly indicated that the Board had looked more at what the overseas brokers had done to earn their profits. Of course, there would have been no "additional remuneration" ultimately credited to the Taxpayer if the brokers had not executed the relevant transactions, and these took place abroad, but this does not tell us what the Taxpayer did (and where) to earn its profit. The Taxpayer, it seems to me, while carrying on business in Hong Kong, instructed the overseas broker from Hong Kong to execute a particular transaction. The Taxpayer was carrying out its contractual duties to its client and performing services under the management agreement in Hong Kong and in return receiving the management fee as well as the "additional remuneration as manager" to which it was entitled under that agreement. In my view, the Taxpayer did nothing abroad to earn the profit sought to be taxed. The Taxpayer would be acting in precisely the same manner, and in the same place, to earn its profit, whether it was giving instructions, in pursuance of a management contract, to a broker in Hong Kong or to one overseas. The profit to the Taxpayer was generated in Hong Kong from that contract although it could be traced back to the transaction which earned the broker a commission.'*

Commission income

41. The commission in dispute was commission from dealings of the Appellant on behalf of its customers in respect of stocks traded on stock exchanges outside Hong Kong (that is, stock exchanges in Singapore, Malaysia, the Philippines, Shanghai and Indonesia). There was no issue on commission earned by the Appellant for dealings on the Hong Kong Stock Exchange.

42. The Appellant argued that:

(a) the source was overseas because the activities or transactions which gave rise to the same were the acts of the overseas brokers as the Appellant' s agents in effecting and executing the trades outside Hong Kong and those were the activities which earned the income for the Appellant; and

(b) the only activities which took place in Hong Kong were:

(i) the opening of accounts and recording settlement instructions, booking of the transactions, contract document generation, and book-keeping – but these were not profit-producing in that they were merely ancillary activities no amount of which would have produced the commission in question for the Appellant;

(ii) the assistance in foreign exchange settlement for trades on the Philippines Stock Exchange; and

(iii) the acts of the account executives of the Appellant, but only in so far as customers were procured and handled by them – but no profits arose from mere customer procurement and management and commission income was not paid for such services, but for each specific transaction successfully executed on an overseas exchange.

43. The Appellant' s arguments remind us of the approach of the Board of Review in Wardley' s .

44. Our task is ' to see what the taxpayer has done to earn the profit in question and where he has done it' .

45. We ask ourselves why the Appellant came into the picture at all in transactions made by overseas brokers on overseas stock exchanges for customers serviced by account executives of the Appellant' s fellow subsidiaries or related companies. As Mr C of the Appellant said, someone

who wished to trade in, say, the Philippines, would (but for the reasons given) open an account with Company A-Philippines instead of the Appellant.

46. The three reasons given were summarised in the Appellant's opening as follows:

(a) to circumvent the minimum commission rates prescribed by the Singapore Stock Exchange, so as to allow a lower commission rate to be charged to the customer and increase the competitiveness of the group;

(b) to allow the provision of margin facilities to customers for 'non-marginable' securities; and

(c) to allow for aggregation of orders of a customer dealing for a number of sub-accounts.

47. Thus, transactions made by, say, Company A-Singapore on, say, the Singapore Stock Exchange for customers serviced by account executives of Company A-Singapore would (but for the reasons given) have been booked to Company A-Singapore. Company A-Singapore would have earned the minimum commission **in full**. The customers would have to pay the minimum commission and the customers would be contracting with Company A-Singapore, the company which the customers were actually dealing with. There were some customers or potential customers who wished to pay less than the minimum commission and Company A-Singapore saw its way to agreeing to accede to the wishes of some or all of them. To 'circumvent' the minimum commission rate, a 'foreign' broker had to be brought into the picture. It could have been any foreign broker, but in this appeal we are only concerned with the Appellant as a 'foreign' broker for the purposes of the Singapore Stock Exchange rule. By bringing in the Appellant as a 'foreign' broker, the minimum commission would effectively be shared among Company A-Singapore, the Appellant and the customer. What then had the Appellant done to earn **its own share** of the minimum commission and where it had done it?

48. The relevant bye-laws of the Singapore Stock Exchange provided:

*'2 **BROKERAGE***

2.1 Unless otherwise determined by the Committee, the following shall be the rates of commission charged for each contract for the purchase or sale of securities, and in all transactions where a Member Company acts for both the seller and buyer, each of them shall be charged commission at the rates stated ...'

'2.3 <u>Sharing or rebating of brokerage prohibited</u>

Except as provided in these Bye-Laws, sharing or rebating of brokerage by any device, or the wrongful use of brokers' discretion in regard to the Exchange Rates is entirely prohibited.'

'*2.11 <u>Sharing of Brokerage with Foreign Brokers</u>*

(a) For transactions with foreign brokers in respect of stocks quoted on the Exchange, a rebate of one-half of the commission may be granted to the foreign broker. In the case of net contracts, a mark-up of at least one-half of the commission rate must be built in the contract price.

(b) For the purpose of this Clause 2.11(a) a "foreign broker" [shall mean/includes] a non-member company who holds a dealer's licence by the Relevant Authority.'

49. Sharing or rebate of commission was permitted under clause 2.11 in relation to **transactions <u>with</u> foreign brokers** in respect of stocks quoted on the Singapore Stock Exchange. The relevant transactions were transactions between Company A-Singapore and the Appellant.

50. Mr C told us that (paragraphs 20 and 23 of his witness statement):

' Thus, for a customer who wanted to take advantage of this system so as to pay a lower rate, [the Appellant] would be the notional entity with whom a customer would open an account. The customer might already have an account with another Group company, but it would have to open an account with [the Appellant] to take advantage of this system. These other accounts with other members of the Group are not relevant here, as this case concerns the commission income derived by [the Appellant] in trading for customers on overseas stock exchanges under accounts opened with [the Appellant].

...

... to take advantage of the ability to rebate foreign brokers, the only relevant account through which the customer traded was with [the Appellant], which would be the party issuing all the necessary documents and confirmations to the customer.'

51. In our decision, the Appellant was not brought into the picture, did not earn its share of the minimum commission and was not paid for ' effecting and executing the trades outside Hong Kong' . Of course, the Appellant would not have earned its share of the minimum commission if the overseas brokers had not executed the relevant transactions, and these took place abroad, but this does not tell us why the Appellant came into the picture at all. What the Appellant was doing to

earn its share of the minimum commission was bringing together the complementary needs of the customer (to pay less than the minimum commission) and the overseas broker (to earn a portion of the minimum commission from customers who were not prepared to pay the minimum commission), and that bringing together the Appellant did in Hong Kong by:

(a) opening a trading account for a customer upon notification by an overseas account executive, or in the case of a customer solicited by its own account executive;

(b) taking note of settlement procedure or instructions;

(c) booking trades as confirmed by the overseas account executive and executing broker;

(d) matching confirmations;

(e) generating contract notes and related settlement and accounting documents for trade;

(f) following up on settlement of trades with the account executive and the executing broker (if necessary) and updating records accordingly;

(g) making book entries of the transactions and reconciling statements; and

(h) preparing or generating reports on commission.

52. In cases where the account executives were account executives of the Appellant, the source was clearly Hong Kong because the Appellant earned its commission by attending to the customers and giving instructions to foreign brokers and these the Appellant did in Hong Kong.

53. We turn now to the second reason given, that is, to allow the provision of margin facilities to customers for 'non-marginable' securities. Here again, the Appellant came into the picture as a 'foreign' (to Singapore) provider of funds or broker to 'circumvent' the 'non-marginable' securities rule. Here again, what the Appellant was doing to earn its income from margin accounts and commission from trades of the margin account customers was bringing together the complementary needs of the customer (to obtain margin trading facilities with 'non-marginable' securities as securities) and the overseas broker (to earn commission from transactions on the overseas stock exchange), and that bringing together the Appellant did in Hong Kong.

54. The third reason given, that is, to allow for aggregation of orders of a customer dealing for a number of sub-accounts, is said to be a London requirement. Hong Kong is as 'foreign' to

London as Singapore. This does not explain why the Appellant came into the picture in place of Company A-Singapore unless some Singapore rules were relevant. If Singapore rules were relevant, then for similar reasons in respect of the other two reasons, what the Appellant did to earn its share of the commission was again in Hong Kong.

55. Taking all the factors into consideration, and for the reasons we have given, we conclude that the commission income arose in, or was derived from, Hong Kong.

Income arising from margin facilities

56. Taking all the factors into consideration, including the fact that the source of funds was offshore, and for the reasons we have given in the section above on commission income (including paragraph 53), we conclude that the income arising from margin facilities arose in, or was derived from, Hong Kong.

Apportionment

57. As we have concluded that Hong Kong was the source of all four categories of income in issue, apportionment does not arise.

58. In any event, we should say that we are not persuaded that we should exercise our discretion to give the Appellant leave to amend.

59. The question of apportionment had not been raised until shortly before the hearing. The Respondent did not have any opportunity to investigate any factual basis for any possible apportionment. The proposed amendment does not state any basis, let alone rational basis, for apportionment. The approach of remitting the case to the Respondent, without any indication or direction on the basis for apportionment, does not commend itself to us. We see no reason why we should attempt to sort it out for the Appellant or for the Appellant to be allowed to fish for a possible basis.

Conclusion

60. The Appellant has not discharged the onus under section 68(4) of proving that any of the assessments appealed against is excessive or incorrect. We dismiss the appeal and confirm the assessments as increased by the Commissioner.