INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D77/99

Profits Tax – whether commission or consultancy fee was deductible expenses – section 61 of the Inland Revenue Ordinance, Chapter 112.

Panel: Audrey Eu Yuet Mee SC (chairman), Berry Hsu Fong Chung and Bernard Pun Wing Mou.

Date of hearing: 19 July 1999.
Date of decision: 20 October 1999.

The taxpayer company appealed against the determination of the Commissioner in respect of the profits tax assessment for the year of assessment 1997/98. The issue was whether a payment of $3,300,000 commission or consultancy fee by the taxpayer company was deductible expense or whether it should be disregarded under section 61 of the Inland Revenue Ordinance as an artificial or fictitious transaction.

The taxpayer company came into existence for the purpose of the subject property at the ground floor of Building A at District B ('the Property') It made a gross profit of $4,500,000. Out of that, it paid $3,300,000 to Company E as commission or consultancy fee.

It is common ground that Company E is a related company, being wholly owned and controlled by Mr C and his wife.

Held:

1. The Board applied the following legal principles, namely:

   (1) The words 'artificial' and 'fictitious' are to be given the ordinary meaning.

   (2) 'Artificial' is wider than 'fictitious'. According to the Shorter Oxford Dictionary, 'artificial' means not natural, a substitute for what is natural or real, feigned, fictitious. 'Fictitious' means artificial, counterfeit, sham, not genuine, feigned, assumed, not real, imaginary, of the nature of fiction.

   (3) All the circumstances of the particular transaction have to be examined in order to see if it is artificial or fictitious.

(4) A transaction is not artificial by reason of the fact that it is between related parties.

(5) A transaction is not artificial by reason of the fact that it is intended for tax planning purpose.

(6) However if there is no commercial sense for the transaction and no purpose for the transaction other than for tax benefit, it may well fit the expression 'artificial'. (Seramco v Income Tax Commissioner [1976] STC 100; CIR v Douglas Henry Howe [1977] 1 HKTC 936; D68/90, IRBRD, vol 5, 640; Cairns v MacDiarmid 56 TC 556; D44/92, IRBRD, vol 7, 324; D32/94, IRBRD, vol 9, 97; D103/97, IRBRD, vol 12, 555; D69/98, IRBRD, vol 13, 412; D110/98, IRBRD, vol 13, 553 considered and applied)

2. On the facts the Board found that the evidence given by the taxpayer was not credible and it did not make commercial sense to give $1,100,000 per month for the services rendered by Company E. The commission amounted to 73% of the gross profit. This pointed to the direction that such commission was not payable in a genuine arms-length commercial transaction.

Appeal dismissed.

Cases referred to:

Seramco v Income Tax Commissioner [1976] STC 100
CIR v Douglas Henry Howe [1977] 1 HKTC 936
D68/90, IRBRD, vol 5, 460
Cairns v MacDiarmid 56 TC 556
D44/92, IRBRD, vol 7, 324
D32/94, IRBRD, vol 9, 97
D103/97, IRBRD, vol 12, 555
D69/98, IRBRD, vol 13, 412
D110/98, IRBRD, vol 13, 553

Wong Ki Fong for the Commissioner of Inland Revenue.
Kennedy Tang of Messrs Kennedy Tang, Arthur Li & Co for the taxpayer.

Decision:

The appeal

1. This is an appeal by a company (in members' voluntary liquidation) ('the Company') against the determination of the Commissioner of Inland Revenue dated 27 November 1998 in respect of the profits tax assessment of the Company for the year of assessment 1997/98. The dispute is whether a payment of $3,300,000 commission or consultancy fee by the Company was deductible expense or whether it should be disregarded under section 61 of the Inland Revenue Ordinance (the IRO) as an artificial or fictitious transaction.

The language problem

2. This is a case where the parties have submitted all the documents and conducted all the correspondence in English but preferred to have the hearing in a mixture of Cantonese and English as and when it suited them. Although the evidence was given in Cantonese, (except for some English names), the written submissions were in English supplemented by oral submissions in a mixture of Cantonese interposed with English words and expressions when the speaker was at a loss for the equivalent Chinese expressions. It certainly reduces the length of the hearing or perhaps the time for preparation. But it means extra difficulties and work for the Board. We give our decision in one and sometimes both languages, when we make reference to the earlier correspondence, the evidence or the submission, which are in a mixture of English or Chinese, inevitably, we have to do a lot of translation to convert these references into the language of the decision. If we merely include the reference in the language as it is used by the parties, the decision will look very odd and untidy with bits and pieces of the references and sometimes just an odd word in a different language. Naturally, the parties have to use English when quoting from precedents. But often the parties are not using English just for the law. They switch between languages as when it is convenient to them. This is not the first time when parties have adopted this approach for their convenience. This is not what is meant by being bilingual. It is extremely inconvenient for the Board and not healthy for the development of our jurisprudence. We understand that everyone has to adapt to the greater use of Chinese and teething problems are inevitable. But we hope that in future, parties will stick to one language save that English can be used for submissions on the law. They should ensure that the documents and correspondence are in the same language that they wish to adopt for the hearing, if not, translations should be provided. They should not expect the Board to do translation work for them.

3. We have asked both parties whether they prefer the decision to be in English or in Chinese. They have indicated no special preference. In the circumstances, to save time and resources, we have decided to issue our decision in English only.

The agreed facts

4. The parties have presented a statement of agreed facts. The Company came into existence for the purpose of the subject property at the ground floor of Building A at District B ('the Property'). On 12 October 1996, Mr C and his wife were appointed the first directors of the Company. On the same day, the shares were allotted with 90% to Mr C and the remaining 10% to Company D. Two days later, on 14 October 1996, the Company signed a formal sale and purchase agreement to purchase the Property for $14,000,000. Some 3 months later, on 28 January 1997, the Company signed a preliminary sale and purchase agreement to sell the Property for $18,500,000. It made a gross profit of $4,500,000. Out of that, it paid $3,300,000 to Company E as commission or consultancy fee.

5. It is common ground that Company E is a related company, being wholly owned and controlled by Mr C and his wife.

The issue

6. The issue is whether the commission of $3,300,000 paid to Company E is a deductible expense for the Company or whether it should be disregarded by reason of section 61 of the IRO as an artificial and fictitious transaction.

The evidence

7. The Company called Mr C as its only witness. When first questioned, Mr C refused to disclose the person behind the other 10% shareholder on the ground that this was a matter of personal privacy. Later, on re-examination and after the mid morning break, he told the Board that the other 10% was in fact beneficially held by Mr F, a solicitor in a law firm. The Chairman of the panel informed the parties that Mr F was her former classmate in law school. Neither party indicated any objection to the Chairman continuing with the hearing.

8. Mr C and his wife have been operating Company E since 1978. Company E carried on the business of property investment, particularly in the redevelopment of old buildings. Company E would look for old buildings suitable for redevelopment. When a deal was clinched, a new company would be used to hold the property. Mr C said that this was the practice of most developers. As the broker, Company E had the expertise and the experience, it could make arrangements for raising finance and broaching deals, identifying properties, introducing potential sellers, buyers, agents, solicitors, bankers etc. The new company would bear the legal and financial responsibility for holding the property. This way, Company E would not have to run the risk of acquiring the property.

9. Throughout his entire evidence, Mr C repeatedly stressed the difficulty in the task of acquiring old buildings (收購舊樓), namely the task of acquiring units in old buildings for redevelopment purpose. The owners would try to raise the price once they knew of an interest in possible redevelopment. After the Company has purchased the ground

floor of Building A (this was known as 「入釘」or putting in a nail), it could not approach the other owners in the same building direct. It had to do so through Company E as the broker. Mr C explained that it was more convenient that way, otherwise there might be a conflict of interest and the other owners would be alive to the possibility of a redevelopment and the acquisition would be made more difficult.

10. The same modus operandi was adopted in this case. The preliminary sale and purchase agreement for the Property was signed on 2 October 1996. The purchaser was Mr C or his nominee. In addition, Mr C produced various land search records for the other floors of Building A and Building G at District B which were dated September and October 1996, prior to the appointment of the directors for the Company. Mr C said that these searches were conducted by the staff of Company E. He also produced three letters sent by Company E to owners of other floors of Building A offering to purchase their properties for redevelopment purpose. These letters were all dated 11 October 1996, one day before the Company appointed its directors. The documents do confirm the modus operandi. The Property was first targeted and identified by Company E and the Company was then used to acquire it. However, insofar as it was necessary to keep the redevelopment potential secret, that purpose was clearly not served by the letters from Company E which expressly stated that Company E was writing on behalf of a client who was interested in purchasing their properties for redevelopment purpose.

11. Mr C soon discovered that there was absolutely no hope of acquiring the other floors in the same building. The owner of the 4th floor was the same as the owner of the ground floor and related to the owners of the 2nd and 3rd floors. Further there was competition in that another redeveloper was interested in the building two numbers away. Mr C decided to give up the intention of acquiring the other floors for redevelopment purpose and the Property was thus put on the market for resale.

12. Company H introduced a purchaser for the Property and a provisional sale and purchase agreement was signed on 28 January 1997 for $18,500,000. A 1% commission was paid to Company H for introducing the purchaser.

13. On 10 April 1997, more than 2 months later, Company E and the Company purported to sign an agreement subject to contract. We set out the full text of the letter as follows. It was signed by Mr C on behalf of the Company.

Date: 10 April 1997

The Company

Subject to contract

Dear Sirs,

Re: G/F, Building A

Further to the telephone conversation, we understand that you are the registered owner of the captioned premises and would like to sell out the said property, we now beg to introduce you our clients who intended to purchase the aforesaid premises subject to the terms and conditions mentioned as follows:

1.	Price	:	$18,500,000 (subject to existing tenancy)
2.	Completion date	:	Completion on or before 21-4-1997
3.	Possession	:	Existing condition
4.	Rental income	:	$108,000/m (excluding rates & management fee)
5.	Lease expire	:	31-10-1998
6.	Stamp duty	:	To be borne by the purchaser
7.	Legal cost	:	Each party to bear its own legal costs

In consideration of our *successful introduction* to you to sell out the property, we will charge a consultancy fee with the following terms:

1. Selling price at $20,000,000, consultancy fee at $4,000,000.

2. Selling price at $15,000,000, consultancy fee at $3,000,000.

Please confirm if this is agreeable to you by signing and returning the copy to us.

Yours faithfully,

Accepted & confirmed by :

For and on behalf of Company E	For and on behalf of
(Sd) illegible	(Sd) Mr C
Authorized signature(s)	Authorized signature(s)

14. According to this letter, the consultancy fee was only payable upon the *'successful introduction'* of a seller. At the hearing, Mr C agreed that it was Company H that introduced the purchaser to the Company and Company E did not introduce any purchaser at all.

15. The sale was completed on 21 April 1997. On 23 April 1997, two days later, the Company issued two cheques to Mr C totalling over $5,600,000. On 28 May 1997, Mr C issued a cheque to Company E for $3,300,000.

16. Company E issued a debit note and gave a receipt to the Company for $3,300,000. The debit note was dated 1 May 1997 and the receipt 31 May 1997. Both documents described the payment as an introduction commission for selling the Property. This amounted to 17.84% of the selling price and 73% of the gross profit.

17. Mr Tang for the Company admitted that there was an error in the documentary evidence. But he said that with related companies, such errors could easily be rectified. In fact, Company E provided services much more extensive and comprehensive than what was provided by an estate agent. In the written submission, Mr Tang listed the services provided by Company E as follows:

(a) identify potential property;

(b) visit and evaluate usage of the property such as redevelopment or investment;

(c) negotiate a good price;

(d) arrange acquisition and conveyance;

(e) arrange finance for acquisition;

(f) collect rental income;

(g) preparation of letters etc to landlord for bidding the whole premises;

(h) provision of administrative advice and human resources.

18. Mr C was repeatedly asked how the sum of $3,300,000 was arrived at. He could only say that it was based on the volume of work. When pressed to give further details of the work done, he said it was very difficult to say. He repeatedly stressed that the work was very difficult, and that it would go on from day to night. The owners could call them up during night time or during holidays. When asked how many visits were made, he went along with the suggestion that it could be 30 times, at least. In addition to himself and his wife, Company E had 4 staff and 1 messenger. Ms I was the executive director with some 15 years experience in negotiating for the acquisition of old properties. Ms J was also responsible for negotiations. Ms K was mainly responsible for office and internal affairs and Ms L for book-keeping. However, as is generally the case with small companies, there was no strict division of work. When asked about the salary for Ms I, Mr C said it was over $40,000 a month plus bonus. When challenged with the returns filed by Company E, he agreed that it should be $338,000 for the entire year, that is, less than $30,000 a month. It was put to him

that the cost for Company E for providing the alleged service was not high. He said that the value of the service could not be measured by the cost price for the provider. It was for the efforts put in and this could not really be measured on an objective basis. He said it was a package or lump sum deal and it was an all or nothing situation. In other words, either this Board accepts the entire sum of $3,300,000 as deductible or the whole sum is disregarded. It is impossible to give any breakdown.

19. It was put to him that if Company E was not a related company, the commission or consultancy fee payable would not be as high as $3,300,000. Mr C denied this. He said it would be the same.

20. He was asked when this $3,300,000 was first arrived at. He said that even before the purchase, as early as Ocotber 1996, it was agreed between his wife acting for Company E on the one hand, and he and Mr F acting for the Company on the other that upon re-selling, Company E would be paid between 17-20% of the selling price. When it was pointed out to him that this was inconsistent with his evidence that the intention was to acquire the Property for redevelopemnt purpose and the sale only came about because the redevelopment intention could not be realized, he could not really explain the inconsistency. He simply repeated his previous answers. He was asked why the parties decided on 17-20% as the fair percentage and not some other percentage. Again he could not explain.

21. He pointed out that there were prior occasions when Company E received a commission for services rendered in the acquisition of properties for redevelopment. He gave the following details.

Name of companies	**Sale proceeds $**	**Amount of commission $**	**Percentage %**
Company 1	16,800,000	1,500,000	9
Company 2	17,500,000	2,000,000	11
Company 3	16,200,000	2,000,000	12

22. In answer to questions put by the Board, he said that these payments were all made after successful acquisitions. These payments were initially queried by the assessors but eventually accepted.

The adjournment

23. The parties made their submissions on 19 July 1999. At the end of the submissions, the Board requested the parties to do further research into relevant authorities and principles on section 61 of the IRO, in particular, on the question of commercial reality in transactions between related parties. The hearing was adjourned to 23 September 1999 for further submissions. By a letter dated 30 July 1999, the Revenue made further written submissions on the law. This was sent to the Taxpayer's representative. By a letter dated 6 August 1999, Mr Tang informed the Clerk to the Board that he did not have further

submissions to make. Both representatives have informed the Clerk to the Board that they do not need to make further oral submissions. In the circumstances, the hearing fixed for 23 September 1999 was vacated and we now give our decision.

The law

24. Section 61 of the IRO provides:

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

25. In Seramco v Income Tax Commissioner [1976] STC 100, the Privy Council had to consider the meaning of a similar provision in section 10(1) of the Income Tax Law 1954:

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

The Privy Council was considering the above section in relation to a shares agreement reached between the owners of a company and certain trustees intended to strip the company of its dividends without having to incur a tax liability. Lord Diplock said at page 107:

> *'The shares agreement thus falls within the subsection if, but only if, the transaction for which it purports to provide was artificial or fictitious. The fact that the shares agreement provides for dividend stripping is not of itself sufficient to bring it within the subsection. ... It is only when the method used for dividend stripping involves a transaction which can properly be described as "artificial" or "fictitious" that it comes within the ambit of s 10(1). Whether it can properly be so described depends on the terms of the particular transaction that is impugned and the circumstances in which it was made and carried out.*
>
> *"Artificial" is an adjective which is in general use in the English language. It is not a term of legal art; it is capable of bearing a variety of meanings according to the context in which it is used. In common with all three members of the Court of Appeal, their Lordships reject the trustees' first contention that its use by the draftsman of the subsection is pleonastic – that is a mere synonym for "fictitious". A fictitious transaction is one which those who are ostensibly the parties to it never intended should be carried out. "Artificial" as descriptive of a transaction is, in their Lordships' view, a word of wider import.*

> *Where in a provision of an Act an ordinary English word is used: it is neither necessary nor wise for a court of construction to attempt to lay down in substitution for it, some paraphrase which would be of general application to all cases arising under the provision to be construed. Judicial exegesis should be confined to what is necessary for the decision of the particular case. Their Lordships will accordingly limit themselves to an examination of the shares agreement and the circumstances in which it was made and carried out, in order to see whether that particular transaction is properly described as "artificial" within the ordinary meaning of that word.'*

26. Seramco was followed in CIR v Douglas Henry Howe [1977] 1 HKTC 936. The taxpayer transferred all his existing and future earnings as an author to a limited company set up and controlled by him. He ceased business in his own right and took up employment with his company. The Revenue challenged the sale which was at an undervalue as artificial. Cons J held as follows:

> *'What then are the arrangements and the circumstances in which they were made and carried out that I must examine in order to see whether or not they are artificial? Simply they are these. By two separate agreements the taxpayer effectively transferred all his existing and future earnings as an author to a limited company. The consideration in each case was valuable in the technical sense but by no stretch of the imagination otherwise. If that were all, the agreements would have been, as counsel for the Commissioner suggests, in the words of their Lordship quite "unrealistic from a business point of view". But there is one other circumstance to consider. The limited company which is the beneficiary of the taxpayer's apparent generosity is controlled by the taxpayer himself. That was a fact found by the Board of Review and I assume it to meant that the taxpayer holds all or substantially all of the shares therein. In this situation it does not necessarily follow that the transactions are commercially unrealistic. The overall position remains the same. What the taxpayer loses on the roundabouts he makes up on the swings. But the taxpayer may well have other matters in mind. I find nothing on the face of things that makes the agreement artificial in the way that their Lordships approached the* ***Seramco*** *situation.'*

27. In D68/90, IRBRD, vol 5, 640 the taxpayer was trying to claim interest expenses paid to associated companies within the same group. The Board examined the surrounding transactions and found that there was no commercial reason at all. The sole motive for the loan and interest was an attempt to achieve by artificial noncommercial means a tax advantage. Adopting the words of Norris J in Cairns v MacDiarmid 56 TC 556 at page 578 and 580, the Board said that the claimed expense 'was a payment made in discharge of a purely artificial liability which was created in order to achieve a tax advantage'.

28. In D44/92, IRBRD, vol 7, 324 the taxpayer purportedly sold certain trade marks to another company. Those trade marks were eventually licensed back to the taxpayer. The

royalties paid by the taxpayer were claimed as deductible expenses. The Board examined the circumstances of the transaction and came to the conclusion that it was artificial and the expense was not deductible.

29. In D32/94, IRBRD, vol 9, 97 the taxpayer who was a medical practitioner wanted to deduct the management fees he paid to his service company. He accepted that the arrangement between him and his service company was artificial and fictitious.

30. In D103/97, IRBRD, vol 12, 555 the taxpayer interposed his company between him and his employer. Similarly the Board examined all the circumstances and found that the transaction between the employer and the company so interposed was artificial and fictitious.

31. D69/98, IRBRD, vol 13, 412 was another case where the taxpayer interposed a company between him and his employer. After examining all the facts, the Board stood back and looked at the whole picture as painted by the evidence and found that the interposition of the firm was commercially unrealistic and was artificial.

32. Finally D110/98, IRBRD, vol 13, 553 was another case involving the service company of a medical practitioner. The Board said:

> *'Of particular significance always when questions arise as to the artificiality of service companies, is the amount of remuneration which is agreed between the company and the professional. Where the agreed remuneration is a fixed fee (whether including or excluding expenses) and there is some correlation between that fee and the services provided, this is at least an indication of commerciality of the arrangement. Where, however, there is no fixed fee and there appears little correlation between the management fees charged and the services actually provided, the Commissioner is entitled to raise queries as to this.'*

The Board concluded:

> *'It is clear to us that Company X was used as a tax vehicle to enable the Taxpayer to deduct the whole of his expenses, whether professional or otherwise, from his fees so as to reduce drastically his liability to profits tax. We are not satisfied that the services provided by Company X were wholly proportionate to the fees charged by the company as management fees.'*

33. We draw the following principles from the above cases:

(a) The words 'artificial' and 'fictitious' are to be given the ordinary meaning. We note the equivalent descriptions in the Chinese text of section 61. Similarly they should be given the ordinary dictionary meaning. We also have regard to section 10B of the Interpretation and General Clauses

Ordinance. We are satisfied that both the English and the Chinese texts intended to and bear the same meaning.

(b) 'Artificial' is wider than 'fictitious'. According to the Shorter Oxford Dictionary, artificial means not natural, a substitute for what is natural or real, feigned, fictitious. 'Fictitious' means artificial, counterfeit, sham, not genuine, feigned, assumed, not real, imaginery, of the nature of fiction.

(c) All the circumstances of the particular transaction have to be examined in order to see if it is artificial or fictitious.

(d) A transaction is not artificial by reason of the fact that it is between related parties.

(e) A transaction is not artificial by reason of the fact that it is intended for tax planning purpose.

(f) However if there is no commercial sense for the transaction and no purpose for the transaction other than for tax benefit, it may well fit the expression 'artificial'.

The Revenue's case

34. The Revenue contends that the commission to Company E is both artificial and fictitious. It relies on the following circumstances:

(a) The sale of Property took place more than two months before Company E purported to introduce a prospective purchaser to the Company. It was Company H which introduced the purchaser to the Company, for which it received a commission. The debit note and receipt issued by Company E which alleged that the $3,300,000 was introduction commission was fictitious.

(b) Company H only charged commission at 1% of the sale price. However the commission to Company E was 17.83% of the sale price or 73% of the gross profit.

(c) There was no commercial sense in the Company paying such a huge commission to Company E.

(d) The alleged oral agreements given by Mr C in evidence was flatly contrary to the debit note and the receipt as to the reason for paying the $3,300,000.

The Taxpayer's case

35. Mr Tang submitted that transaction between the Company and Company E was necessary, commercially realistic and common practice within the property investment industry. He repeated Mr C's evidence as to why it was necessary to have Company E as the agent or the consultant whilst the Company was used to hold the Property or act as the developer. The quantum of service fee is a matter of negotiation and agreement between two contracting parties, having both the capacity and the intention to enter into a legally binding contract.

Reasons for decision

36. We regret to say that we do not find Mr C to be a credible witness. He claimed that as early as October 1996, even before the purchase, it was agreed between his wife acting for Company E and he and Mr F acting for the Company that upon reselling the Property Company E would be paid between 17-20% of the sale price. We reject that evidence. It is most unreal. This is contrary to his own evidence that the intention to purchase the Property at the time was for redevelopment and not resale. Further, it was difficult to believe how the parties could have arrived at the figure of 17-20% when the sale price was not yet known and when the amount of work to be done was not yet known. Mr C could not offer any explanation as to why it should be 17-20% and not some other percentage. If there was such an oral agreement, then the later letter of 10 April 1977 which gave a different reason for the payment of the commission would not have been written in his way.

37. We find Mr C's explanation as to how the $3,300,000 sum was arrived at vague and totally unconvincing. Company E might indeed have provided some of the service listed in Mr Tang's written submission. Some of these services were done by Mr C who was also a director and shareholder of the Company. But even accepting that it was Company E that provided all the services, and that such services were intended to be paid for, neither the volume, value nor nature of such services could have merited the sum of $3,300,000. Mr C was unable to say the amount of time or cost spent for the provision of the services. But the entire period from the acquisition of the Property to the disposal was only 3 months. It would mean an average of $1,100,000 a month for the services rendered. We do not accept Mr C's evidence when he insisted that the commission would still be the same if Company E was not a related company. Such evidence undermines his credibility as a witness. The commission amounted to 73% of the gross profit. It is totally lacking in commercial reality. We do not accept that such commission would have been payable in a genuine arms-length commercial transaction. It does not reflect the market value for the services provided by Company E.

38. The letter of 10 April 1997, the debit note and the receipt have not been satisfactorily explained. Mr C did not say how the 'error' came about. It was written more than 2 months after the estate company found a purchaser and the Company had already concluded an agreement to sell to this purchaser. We do not accept these as genuine documents bona fide created to reflect the parties intention or the transaction at the time.

39. For the above reasons, we find that the transaction, namely the payment of the $3,300,000 to be artificial and fictitious.

40. The appeal is dismissed accordingly.