INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D84/04

Property tax – exemption for profits tax – exemption for property tax – sections 5(2), 24 and 25 of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Krishnan Arjunan and Lawrence Lai Wai Chung.

Date of hearing: 14 January 2005.
Date of decision: 18 February 2005.

Club A allowed telecommunication companies to make use of the Club's premises for installation of equipment for providing communication services in return for consideration.

The issue is whether the Club is liable to pay property tax for the consideration received.

Held:

1. Though the Club is deemed not carrying on business under section 24 of the IRO and thus being exempt from paying profits tax, it does not follow that it will be exempt from property tax. (Louis Kwan-nang Kwong and Carlos Kwok-nang Kwong v CIR considered; Harley Development Inc and Trillium Ltd v CIR followed).

2. The Club is liable to pay property tax unless exemption is obtained under section 5(2) of the IRO. However, exemption under section 5(2) will only be granted where it is proved to the satisfaction of the Commissioner that the taxpayer will be entitled, if exemption were not granted to set-off the property tax under section 25 of the IRO.

3. It is clear that the Commissioner has not been satisfied and accordingly a prerequisite for exemption has not been met.

Obiter:

1. As the Club was deemed not carrying on business by section 24, the Club could not be entitled to relief under section 25 as it applies only to those 'carrying on a trade, profession or business'.

2. Section 25 is intended to provide relief from double taxation, i.e. where property tax is payable, reduction of any profits tax payable. Where no profits tax is payable, the section has no application (D27/98 considered).

Appeal dismissed.

Cases referred to:

Louis Kwan-nang Kwong and Carlos Kwok-nang Kwong v CIR 2 HKTC 541
Harley Development Inc and Trillium Ltd v CIR 4 HKTC 119
D27/98, IRBRD, vol 13, 227
Cape Brandy Syndicate v Commissioner of Inland Revenue 12 TC 358

Austin Grady for the Commissioner of Inland Revenue.
Neil Thomson Counsel instructed by Messrs Angela Wang & Company, Solicitors for the taxpayer.

Decision:

1. This is an appeal by Club A ('the Club') who have objected to property tax assessments for the years of assessment 1995/96, 1996/97, 1997/98, 1998/99, 1999/2000, 2000/01 and 2001/02.

2. The Club entered into agreements with various telecommunication companies. Those companies were entitled pursuant to the agreements entered into, to make use of the Club's premises for installation of equipment for the purpose of providing personal communication services. Repeater stations were allowed to be installed at the Club's premises at Location B which enabled the communication services to be transmitted through the Tunnel C.

3. The issue which we need to decide in this case is whether the Club was correctly charged the property tax in respect of the consideration received from the various telecommunication companies.

The agreed facts

4. The following facts were agreed by the parties and we find them as facts:

(1) The Club has objected to the property tax assessments for the years of assessment 1995/96, 1996/97, 1997/98, 1998/99, 1999/2000, 2000/01 and 2001/02 raised on it. The Club claims that it should be exempt from property tax on the considerations it received from certain telecommunication companies.

(2) The Club was incorporated in Hong Kong under the Companies Ordinance as a company limited by guarantee. At all relevant times, it was the lessee of the land and premises described as Address D (also known as Location B) ('the Property').

(3) During the years of assessment 1995/96 to 2001/02, the Club entered into agreements with various telecommunication companies, granting them the rights of use of the Property for the installation, operation, repair and maintenance, etc., of certain equipments for the purposes of providing personal communication services. In return, the Club received the following amounts of considerations:

	1995/96	**1996/97**	**1997/98**	**1998/99**	**1999/2000**	**2000/01**
	$	$	$	$	$	$
Telecommunication Company E	314,857	390,000	480,000	570,000	828,000	828,000
Telecommunication Company F	-----	175,483	480,000	480,000	305,333	-----
Telecommunication Company G	-----	120,000	480,000	480,000	480,000	480,000
Telecommunication Company H	-----	-----	504,000	504,000	577,500	588,000
Total	314,857	685,483	1,944,000	2,034,000	2,190,833	1,896,000

(4) That the source of the fees in dispute was from telecommunication companies related to the siting of telecommunication equipment at the premises of the Club.

(5) The amount of such fees in each of the relevant years is:

(i) 1995/96 – HK$ 314,857.00
(ii) 1996/97 – HK$ 685,483.00
(iii) 1997/98 – HK$1,944,000.00
(iv) 1998/99 – HK$2,034,000.00
(v) 1999/2000 – HK$2,190,833.00
(vi) 2000/01 – HK$1,896,000.00

(vii) 2001/02 – HK$1,896,000.00.

(6) The Club is a private members club which in each of the relevant years derived substantially more than 50% of its income from voting members and as such is deemed not to carry on a business (section 24(1) of the Inland Revenue Ordinance ('IRO')).

The evidence

5. Mr Neil Thomson of Counsel on behalf of the Club ('Mr Thomson') decided not to call any evidence and relied on the above agreed facts.

The relevant statutory provisions of the IRO

6. The following sections are relevant to the issues that need to be dealt with in respect of this appeal:

Section 2 of the IRO

'...

"business" includes agricultural undertaking, poultry and pig rearing and the letting or sub-letting by any corporation to any person of any premises or portion thereof, and the sub-letting by any other person of any premises or portion of any premises held by him under a lease or tenancy other than from the Government.

...'

Section 5(2) of the IRO

'...

(2)(a) Notwithstanding subsection (1), any corporation carrying on a trade, profession or business in Hong Kong shall, on application made in writing to the Commissioner and on proof of the facts to the satisfaction of the Commissioner, be entitled to exemption from the property tax for any year of assessment in respect of any land or buildings or land and buildings owned by the corporation where the corporation would be entitled under section 25 to a set-off of the property tax which, if exemption were not granted under this subsection, would be paid by the corporation; and the property shall be and remain exempted from property tax for each year of assessment in

which the circumstances are such as to qualify the property for such exemption for that year.

...'

Section 24 of the IRO

'(1) Where a person carries on a club or similar institution which receives from its members not less than half of its gross receipts on revenue account (including entrance fees and subscriptions), such person shall be deemed not to carry on a business; but where less than half of its gross receipts are received from members, the whole of the income from transactions both with members and others (including entrance fees and subscriptions) shall be deemed to be receipts from a business, and such person shall be chargeable in respect of the profits therefrom.

(2) Where a person carries on a trade, professional or business association in such circumstances that more than half its receipts by way of subscriptions are from persons who claim or would be entitled to claim that such sums were allowable deductions for the purposes of section 16, such person shall be deemed to carry on a business, and the whole of the income of such association from transactions both with members and others (including entrance fees and subscriptions) shall be deemed to be receipts from business, and such person shall be chargeable in respect of the profits therefrom.

(3) In this section, "members" means those persons entitled to vote at a general meeting of the club, or similar institution, or trade, professional or business association.'

Section 25 of the IRO

'Where property tax is payable for any year of assessment under Part II in respect of any land or buildings owned by a person carrying on a trade, profession or business, any profits tax payable by such person in respect of that year of assessment shall be reduced by a sum not exceeding the amount of such property tax paid by him:

Provided that-

(a) no reduction shall be allowed unless either the profits derived from such property are part of the profits of the trade, profession or business

carried on by such person or the property is occupied or used by him for the purposes of producing profits in respect of which he is chargeable to tax under this Part;

(b) if the amount of property tax paid for a year of assessment exceeds the profits tax payable, the amount so paid in excess shall be refunded in accordance with the provisions of section 79;

(c) (Repealed 19 of 1996 s.8)'.

The submissions and our analysis

7. Mr Thomson puts forward the proposition that since the Club needed not pay profits tax, it in turn should not need to pay property tax. The basis for such a submission is that Mr Thomson asserts that section 24 and section 25 should be read together. He submits that since they are in the same part of the IRO and that it is the basic rule of statutory construction, that the IRO should be construed as a whole. He further submits that most if not all the members clubs in Hong Kong are carrying on a business. He submits that in the case of the Club, it is carrying on a business and it would be taxed upon its profits made but for a specific exemption that is afforded to it by section 24.

8. We would pause here to state that section 24 clearly provides an exemption from the charge of profits tax when more than half of the revenue of a club is derived from its members. Where a club is formed for the benefit of its members and the bulk of its income comes from its members, tax will not be levied, what would otherwise be taxed to profits tax as income from a source in Hong Kong.

9. Mr Thomson in his submissions relies on the role of section 5(2) which in turn exempts a corporation from filing profits tax return when that company will be entitled to a set-off.

10. However from the authorities that were put to us, section 5(2) of the IRO is an administrative section and the principle effect of the sub-section is to avoid the necessity of making more than one return where income from the property is included in the sums chargeable to profits tax.

11. As Mr Grady on behalf of the Commissioner of Inland Revenue quite rightly points out it is appropriate and proper for us to consider carefully the terms of section 24 and in particular whether that section itself provides the type of relief which Mr Thomson on behalf of the Club has put to us.

12. We agree with Mr Grady's submission that the first point to note is that section 24 unlike section 88 of the IRO does not actually provide exemption from tax of any kind. Mr Grady's

proposition is that section 24(1) provides in certain circumstances where a person carries on a club, the person is deemed not to carry on a business. As a consequence of the deeming provision, the person may not be chargeable to profits tax. In short, this consequence does not flow from the person being exempt from tax as such, but instead because the person is deemed not to be carrying on a business, and accordingly does not fall within the general charge to profits tax as imposed by section 14.

13. Mr Grady also submitted that even if section 24 were to be regarded as providing exemption from profits tax which he asserts that it does not, it will not therefore follow that that the Club would as a consequence also be exempt from property tax. He submits that profits tax and property tax are separate taxes. He asserts that the former is a tax on 'assessable profits' from the carrying on of particular activities whilst the later is a tax imposed on the ownership of land or buildings. We agree with this submission and it is clear that the IRO imposes separate and distinct taxes. This has been made clear in a number of decisions. In particular, we refer to Louis Kwan-nang Kwong and Carlos Kwok-nang Kwong v CIR 2 HKTC 541 where Mayo J stated at page 557:

> *'The scheme of taxation in Hong Kong is entirely different to that of the United Kingdom. There is no overall income tax in Hong Kong. Under the Inland Revenue Ordinance, Cap.112, there are various separate heads of tax. The principles applying to each of these heads are separate and distinct and accordingly the principles propounded in the cases cited by Mr. Bemacchi are of very little assistance to me in attempting to answer the questions which have been posed.'*

14. We accept the submissions put to us by Mr Grady that profits tax and property tax must be regarded as separate taxes and in the absence of any express provision or applicable principle, it must follow that the Club cannot obtain relief from property tax by virtue of section 24 of the IRO.

15. We need now to consider whether or not there is an exemption or relief available to the Club under any other provisions. Mr Thomson in his submissions made reference to section 2, section 24, section 25 and section 5(2). It is clear that:

(a) the Club is an 'owner of land and buildings' within the terms of section 5(1) by virtue of the definition of 'owner' in section 2(1) and its interest in the property which provides the site on which certain telecommunications facilities are located;

(b) it has received consideration from the telecommunication companies concerned in terms of section 5B; and

(c) the 'net assessable value' as per the assessments in questions has been calculated in accordance with section 5(1A).

16. In considering the interaction of the property tax and profits tax provisions, we would refer to Privy Council's judgment in Harley Development Inc and Trillium Ltd v CIR 4 HKTC 119 at 120. The issue in that case was whether property tax was payable in circumstances where there was no liability to profits tax. Lord Jauncey of Tullichettle at page 120 of his judgment, stated as follows:

'*Issue A*

In Hong Kong profits tax is chargeable for each year of assessment on the assessable profits from a trade, profession or business but excluding profits arising from the sale of capital assets (s.14 of the Ordinance). The letting or sub-letting by any corporation of premises is a business for the purposes of the Ordinance (s.2). Property tax is chargeable for each year of assessment on every person owning land or buildings on the net assessable value thereof which is defined as the consideration payable in the year for the right of use thereof (ss 5(1), 5(B)(2) of the Ordinance).

However, s.5(2)(a) provides for exempting corporations from property tax in certain circumstances:

"Notwithstanding subsection (1), any corporation carrying on a trade, profession or business in Hong Kong shall, on application made in writing to the Commissioner and on proof of the facts to the satisfaction of the Commissioner, be entitled to exemption from the property tax for any year of assessment in respect of any land or buildings or land and buildings owned by the corporation where the corporation would be entitled under section 25 to a set-off of the property tax which, if exemption were not granted under this subsection, would be paid by the corporation; and the property shall be and remain exempted from property tax for each year of assessment in which the circumstances, throughout the whole of that year, are such as to qualify the property for such exemption for that year."

Sub-section (c) of s.5(2) requires an exempted corporation to notify the Commissioner within thirty days "of any change in the ownership or use [of the land or buildings] or in any other circumstances affecting such exemption". Section 25 provides inter alia:

"Where property tax is payable for any year of assessment under Part II in respect of any land or buildings owned by a person carrying on a trade,

profession or business, any profits tax payable by such person in respect of that year of assessment shall be reduced by a sum not exceeding the amount of each property tax paid by him:

Provided that –

(a) no reduction shall be allowed unless either the profits derived from such property are part of the profits of the trade, profession or business carried on by such person or the property is occupied or used by him for the purposes of producing profits in respect of which he is chargeable to tax under this Part;

(b) if the amount of property tax paid for a year of assessment exceeds the profits tax payable, the amount so paid in excess shall be refunded in accordance with the provisions of section 79."

What is clearly demonstrated by a consideration of sections 5(2) and 25 is that the former provision is purely administrative. The rights conferred upon a taxpayer by section 25 are unaffected by the provisions of section 5(2)(a). Thus a taxpayer who is entitled to a reduction in profits tax in any year of assessment to the extent that it has paid property tax will receive that reduction whether or not it has been granted exemption under section 5(2)(a). What the latter provision does is simply to save the taxpayer making returns for two different taxes with consequential adjustments. The grant of exemption has no effect whatsoever on the gross amount of tax payable whether it be composed of profits tax alone or a combination of profits tax and property tax.'

17. This case clearly supports the view that every person owning land or buildings in Hong Kong and receiving consideration for the right of use of those land and buildings is chargeable to property tax unless exemption is obtained under section 5(2)(a). Although exemption may be provided to corporations, it is not automatic; it is only provided for 'in certain circumstances'.

18. Mr Grady drew our attention to the fact that one must look at the words of the IRO to ascertain what the 'certain circumstances' are. In this regard, it can be seen that apart from other requirements, exemption is only to be granted where it is proved to the satisfaction of the Commissioner that the corporation will be entitled, if exemption were not granted to set-off the property tax under section 25 of the IRO. In this case, we accept the submissions of Mr Grady that it is clear that the Commissioner has not been satisfied and accordingly a prerequisite for exemption has not been met.

19. We would also accept Mr Grady's submissions that if one looks at the terms of section 25, as a matter of interpretation, the Club could not be entitled to relief under the section. It should be noted that the opening words of the section restrict its application to cases

> '*Where property tax is payable ... in respect of any land or buildings owned by a person carrying on a trade, profession or business ...*'.

20. We accept the submission put forward by Mr Grady that given both section 24 and section 25 fall within part IV of the IRO and section 24 deems that the Club is not carrying on a business, it must follow that the Club does not come within the scope of section 25.

21. We also rely on the opening words of section 25 that make it clear that the section is intended to provide relief from double taxation – where property tax is payable, it provides for the reduction of any profits tax payable. Where no profits tax is payable, as in the present case, it should again follow that the section can have no application. We also rely on the Board of Review's decision in D27/98, IRBRD, vol 13, 227 where the Board said at page 232:

> '*We agree with Counsel for the Commissioner that the basis for an exemption under section 5(2) does not exist. There must firstly be an application in writing to the Commissioner. There was none. Secondly, the taxpayer has to prove facts to the satisfaction to the Commissioner that if exemption were not granted, it would have been paying both profits tax as well as property tax on the same income and thus entitled to a set-off under section 25. It cannot be entitled to an exemption when it had not even been charged profits tax.*'

22. We also refer to proviso (a) to section 25 which we accept has the effect of precluding relief under section 25. We again accept the submission put forward by Mr Grady that this is because neither of the alternative conditions for eligibility is satisfied; the Club is deemed by section 24 not to be carrying on a business and accordingly does not satisfy the first condition and, because its profits are for the same reason not chargeable to profits tax, it likewise does not satisfy the second condition.

23. In Mr Thomson's submissions, he draws our attention to the various principles of statutory interpretation and submitted that it is clear that section 24 provides that members clubs are granted exemption from tax upon their revenue. He submits that this exemption is not to be denied unless clearly stated. However, we rely on the often cited words of Mr Justice Rowlatt in Cape Brandy Syndicate v Commissioners of Inland Revenue 12 TC 358 which in turn provides the relevant canon to be followed when interpreting Revenue statutes:

> '*one has to look merely at what is clearly said. There is no room for intendment. There is no equity about a tax. There is no presumption as to tax.*

Nothing is to be read in; nothing is to be implied. One can only look fairly at the language used.'

24. Mr Thomson submits that section 24 and section 25 should be construed together. He submits that sections of an Ordinance do not stand in isolation and in particular he relies on the fact that section 24 and section 25 are to be read together. However, in our view, section 24 in certain circumstances enables a club to be deemed not to carry on a business under section 24 and accordingly was not chargeable to profits tax. We have no hesitation accepting Mr Grady's submissions that this in turn precludes any relief under section 25.

25. Mr Thomson also submits to us that any ambiguities must be resolved in the taxpayer's favour. However, we have come to a conclusion that there are no ambiguities. Mr Thomson also submits to us that there is a submission against absurdity as well as the fact that we should interpret a statute to avoid an anomalous result. However, in the case before us, it is quite clear that the Club as a result of the application of section 24 is not chargeable to profits tax but in turn is chargeable to property tax. This situation simply reflects the nature and application of our tax system here in Hong Kong.

26. Indeed, the decision of Harley Development Inc and Trillium Ltd v CIR 4 HKTC 119 at 120 provides an example of a situation where there was no liability to profits tax in respect of consideration received, but there was a liability to property tax.

27. In our view, there is nothing anomalous or absurd here as there is no question of there being double taxation and therefore there is no reason to provide relief in respect of a clear liability to property tax.

28. Hence, for the above reasons, we have no hesitation in dismissing the Club's appeal and uphold the relevant assessments.