INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D9/89

Profits tax – source of profits – agents abroad effecting operations on taxpayer's behalf – whether it is possible to infer agency of a director or shareholder – s 14 of the Inland Revenue Ordinance.

Profits tax – source of profits – trading company – factor: administrative facilities in Hong Kong – whether profits arose in or derived from Hong Kong – s 14 of the Inland Revenue Ordinance.

Profits tax – source of profits – trading company – significance of place of concluding contracts – s14 of the Inland Revenue Ordinance.

Panel: H F G Hobson (chairman), Jorgen B Schonfeldt and Yeung Kwok Chor.

Dates of hearing: 22 to 24 November 1988.
Date of decision: 28 April 1989.

The taxpayer company purchased goods from suppliers both inside and outside Hong Kong and resold them to related companies both inside and outside Hong Kong which in turn resold the goods to end-users. The taxpayer accepted that the profits from its sales to customers in Hong Kong were taxable. However, it argued that the profits from sales to offshore buyers, which comprised about 20% of all of its sales, did not have a Hong Kong source.

The evidence presented to the Board was somewhat disjointed. The taxpayer employed between 32 and 40 staff in Hong Kong. It leased 10,000 square feet of warehouse facilities in Hong Kong, although a small portion of goods was shipped directly from suppliers to the offshore buyers. A stock control system was maintained in Hong Kong. Purchase orders and other documentation were prepared in Hong Kong.

The taxpayer gave a life-time guarantee on some of its goods, but end-users' claims were handled by the offshore buyers. Insurance against claims by end-users was maintained by a related company in Hong Kong. The offshore buyers arranged their own packaging for the goods which they bought. The taxpayer never needed to borrow funds to finance its trading activities because suppliers extended generous credit terms, whereas the offshore buyers paid immediately on shipment.

The taxpayer alleged that the offshore buyers acted as its agents in setting the taxpayer's selling prices and also in purchasing goods from the taxpayer's suppliers. No written evidence of such agency was produced.

The IRD assessed the taxpayer to profits tax on all of its profits. The taxpayer claimed that its profits from sales to offshore customers were not subject to tax.

Held:

The profits were sourced in Hong Kong and were therefore subject to profits tax.

(a) The place where a contract of sale is entered into is not necessarily the source of the profits arising from that sale. That criterion is relevant primarily for determining only whether the taxpayer carries on business in that place.

(b) Where a person owns a company, it is easier to infer that he has authority to act as an agent on behalf of the company. It will not be automatically inferred that a director acts as an agent for his company.

(c) Generally, the employment of staff and the maintenance of an office in Hong Kong, with all necessary services and facilities including telephone and telex, are the essence of a trading company's activities. Where these are all in Hong Kong, it could be concluded that the resultant profits have a Hong Kong source. The fact that goods are located and delivered outside Hong Kong is not material for this purpose.

(d) The taxpayer's evidence was unsatisfactory and was inconsistent with statements which had previously been made by its tax representatives to the IRD in correspondence. The evidence did not enable the Board to form a coherent picture. Accordingly, the taxpayer had failed to discharge its burden of proving that the assessment was incorrect.

Appeal dismissed.

Cases referred to:

BR18/73, IRBRD, vol 1, 118
D13/86 (unreported)
D50/87, IRBRD, vol 2, 453
D18/88, IRBRD, vol 3, 241
D21/88, IRBRD, vol 3, 267
CIR v International Wood Products Ltd (1971) 1 HKTC 55
CIR v The Hong Kong & Whampoa Dock Co Ltd (1960) 1 HKTC 85
Firestone Tyre & Rubber Co Ltd v Llewellin (1957) 37 TC 111
MacLaine & Co v Eccott (1926) 10 TC 481
Sinolink Overseas Ltd v CIR (1985) 2 HKTC 127
Smidth (F L) & Co v Greenwood [1921] 3 KB 583

S P Barns for the Commissioner of Inland Revenue.
Jimmy Chung of Coopers & Lybrand for the taxpayer.

Decision:

This appeal is concerned with whether or not profits received during the two years covered by the 1977/78 and 1978/79 years of assessment of a Hong Kong company from its sales of ABC products, supplied from outside Hong Kong, to buyers in Australia and South Africa were liable to tax in the particular circumstances of this case.

1. PRIMARY FACTS

The following facts are not in dispute.

1.1 Mr X established A Limited in Australia when he went there in 1965. He remained as a director for the first 6 months. His son-in-law, Mr Y, joined him as a director in March 1965.

A Limited began business by exporting ABC products ('the products') under five brand names. However, around 1971, because of strikes and shipping difficulties and oil prices, A Limited ceased exporting though it continued to sell merchandise in Australia. At this point, Mr X went to Mexico. Mr Y remained in Australia as the controlling director of A Limited.

Mr X came to Hong Kong in about 1974 and has lived here continuously since 1976.

1.2 The Taxpayer Company ('the company') was incorporated in Hong Kong in 1973 and became active in 1974. It is a wholly-owned subsidiary of B Limited in Hong Kong. At all material times (that is, from October 1976 to September 1978) Mr X and Mr Y were the sole directors of the company, Mr X being the managing director.

Mr Z is a South African citizen and was at all relevant times the managing director of C Limited and D Limited which operated in South Africa.

When the company became active, it traded in the same product lines with the same brand names that A Limited had previously dealt in. It obtained its supplies from Germany, Austria, USA and Canada (though certain products were purchased from Hong Kong manufacturers) and resold some of them to B Limited and some to A Limited, C Limited and D Limited. (The last three are sometimes hereafter referred to collectively as 'the off-shore buyers'). It is only

the tax assessed on the sales to the off-shore buyers which is the subject of this appeal.

2. TESTIMONY

Mr X gave evidence on oath. However, his evidence, which unfortunately was not well presented in chief, was very disjointed and not easy to follow. The following is our attempt at a logical summary:

2.1 Though a director of the company, he was not a shareholder nor was he a director or shareholder of its parent company, B Limited. Though he had been a shareholder of A Limited, he was neither a shareholder nor a director during the material period. He was neither a director nor a shareholder of C Limited or D Limited. He believed the shareholder of A Limited was E Limited, but he was unsure. He believed the directors of A Limited were Mr Y and two lawyers. Mr Y was certainly the managing director. Mr Z had worked for C Limited for 25 years and was looked upon by Mr X as 'one of the family'.

2.2 A Limited is by now a large organization having 8,000 square feet of head office spaces in Sydney with many branches. It also has a warehouse. A Limited engaged salesmen, acting as independent contractors, to canvass for the sale of the products in Australia. The same was true of the two South African companies.

2.3 Mr X said that Mr Y and Mr Z were respectively authorized to act for the company in setting the prices at which A Limited or C Limited or D Limited, as the case might be, bought the products from the company. In other words, it was the three off-shore buyers, not the company itself, which decided what price the company would receive. It was Mr X's understanding that, so far as A Limited was concerned, only Mr Y, A Limited's secretary and an ex-secretary were entitled to accept on behalf of the company orders placed by A Limited for the products with the company.

2.4 The company's relationships with its suppliers in West Germany, Austria, USA and UK had developed through Mr X's dealings with them in the 1940s. He said that Mr Y had complete authority to act for the company in purchasing from suppliers in just the same way as Mr Y had complete authority to act for the company in its sales to A Limited. Mr Y therefore visited the suppliers on behalf of the company and accepted supply contracts in that capacity, as did Mr X himself.

2.5 Mr X went on to explain that A Limited (and presumably C Limited and D Limited) did not require very large supplies of the products though it wanted the price which could be achieved if large orders were made. The suppliers were prepared to give the best price for large orders and to give the company 120

days' credit after arrival of the products in Hong Kong or Australia or South Africa. So long therefore as the company could lay large orders and be sure of resales, it would achieve not only the best price but also the transactions would be self-financing because the off-shore buyers would have paid the company before the company had to pay its suppliers. Indeed, the company never had an overdraft during the years in question. Generally, the products were paid for as to 90% by sight draft payable through a bank 120 days after arrival of the goods although, in the case of one Californian supplier, the company was given one year's credit and a German supplier gave the company 50% credit for six months with the balance 50% payable in 12 months after arrival of the products. The off-shore buyers on the other hand paid letters of credit which were negotiable, among other things, on signing of sight drafts.

2.6 Mr X said that Mr Y in effect wore two hats. He was the managing director of A Limited (which bought the products from the company) and he (plus A Limited's secretary and an ex-secretary of A Limited) acted for the company in the sale of these products to A Limited. Consequently, if A Limited's computer said that it needed some products, Mr Y (or the other two) would place an order with the company and at the same time accept the order on behalf of the company. It was Mr Y who, with Mr X's blanket approval, set the purchase price.

It was for the foregoing reasons that the company left it to the three off-shore buyers to set the price at which they purchased from the company. So long as that price 'was more than the cost to the company', it was acceptable to the company.

2.7 B Limited, which also bought products from the company, on-sold to Swedish buyers (and presumably other overseas purchasers) and in those cases the price was fixed by B Limited.

2.8 In addition to dealing in these products, A Limited owned a facility which sold equipment. It also sold products made in Australia and products obtained from China, but the company was not involved in any of these activities. These other activities constituted the greater part of the business of A Limited (no specific reference was made to C Limited and D Limited), and it was only in the case of the products in which the company dealed that it made commercial sense to buy them from the company in Hong Kong.

2.9 The company leased a godown of about 10,000 square feet in Hong Kong in which it kept stocks and supplies.

2.10 Some products were shipped directly from manufacturers to the off-shore buyers. For example, a ton might be ordered, a small amount of which would be delivered directly to A Limited and a much larger portion of which would be

delivered to Hong Kong. The company would bill A Limited for the smaller amount only.

2.11 During the years concerned, the company had a staff of about 12 in 1977 to between 32 and 40 in 1979. The staff apparently also worked for B Limited. The two previous years of operations namely 1975 and 1976, were basically test years. In contrast, A Limited engaged about 200 salesmen and C Limited and D Limited together engaged about 160.

2.12 So far as board decisions of the company were concerned, most of these were conducted over the telephone. In 1976, Mr X had a heart attack, so Mr Y came to Hong Kong to manage the company's affairs. He remained in Hong Kong for a period (Mr X could not remember whether it was simply weeks or months) while Mr X recovered.

2.13 As regards profits, only about 20% was attributable to the sales to the off-shore buyers. Only a small profit was made on the on-shore sales to B Limited, the company paying the suppliers and then billing B Limited at the end of each year.

2.14 A Limited's method of operation was to seek customers and, having received their orders, then place aggregate orders with the company. (We assume the same was true of C Limited and D Limited.) Mr X explained that all the products are used for maintenance work. Consequently, as soon as the stocks of the end-users run down, new orders and deliveries have to be made promptly so that the end-user does not have his machinery or workmen idle.

2.15 Checking of the quality of the product was done in Australia (or South Africa) because the company had no capability to do it in Hong Kong. However, unless a product of a new supplier or a claim to defects arose, the off-shore buyers had no need to check the product before passing it on to their customers. B Limited took out insurance against damages claims by end-users and the company got 'a free ride' out of that cover.

2.16 The company would arrange the packaging in Hong Kong for products sold to B Limited. However, the off-shore buyers were left to do their own packaging.

2.17 Essentially, the situation with existing suppliers did not involve negotiation for repeat orders unless the price of the products concerned went up, in which the case an increase in price would need to be negotiated. Naturally, in the case of new suppliers and new products, the prices would have to be negotiated.

2.18 Mr X was quite categorical that the company had no permanent establishment outside Hong Kong. This statement contrasted with that of the company's accountants.

2.19 The company did not know who were the end-users of the products, nor the prices at which they were purchasing. Everything, so far as Mr X was concerned, was done off-shore, namely, the placing of orders there and the acceptance of those orders by Mr Y (or his deputies) or Mr Z on behalf of the company.

2.20 The company gave a life-time guarantee on some of its products, and this was an attraction to end-users. As regards complaints by customers of the off-shore buyers, if the complaint was genuine and the amount not large, then the off-shore buyer concerned would refund its customers at its own cost. If the complaint involved a large amount, then the company would refer it to B Limited's insurance company which would examine the facts. In 99 cases out of a 100, it was the customers' fault.

2.21 Mr X was unable to say whether any written evidence existed of the authority of Mr Y, his deputies and Mr Z to act on behalf of the company in accepting orders placed by A Limited on the one hand and C Limited and D Limited on the other.

2.22 In cross-examination, Mr X was referred to an item of $271,693 shown as directors' remuneration in the company's accounts for 1978. He thought that a part of that might be referable to Mr Y's stay in Hong Kong during Mr X's incapacity.

3. OTHER EVIDENCE

3.1 In the Commissioner's determination, reference was made to a letter (apparently dated 17 February 1986) from the company's tax representatives.

That letter made the following points which were not specifically referred to in testimony.

(a) The company maintained a stock control system. The type and quantity of goods to be ordered were determined by periodic reviews of inventory and sales records. The operations manager who prepared the re-order lists was the person involved in negotiating with local suppliers/manufacturers. The local purchase orders were placed after the prices and terms of sales were agreed verbally. Formal purchase orders were then issued to the suppliers for confirmation. For overseas purchases, the purchase orders to be sent out to the suppliers were prepared by the operations assistant in accordance with the re-order lists and the overseas suppliers' price lists.

(b) All the overseas purchases were authorised by Mr X after examining the weekly inventory report prepared by the operations manager, who also had authority to

sign purchase orders when Mr X was away. All the paper work and documentation were prepared in Hong Kong.

(c) The company carried substantial stocks in respect of all popular lines of goods, and purchase orders were placed when the pre-set re-order levels were reached but not in response to any corresponding sales. The goods were stored at the warehouse upon delivery. The accounts department of the company was responsible for updating the purchase day book and creditors' sub-ledgers from the suppliers' invoices after carrying out internal control procedures for the purpose of ascertaining whether the price, quantity and condition of the goods were in order.

(d) Goods produced by overseas manufacturers/suppliers were either directly shipped to the overseas customers or stored in Hong Kong for future sales.

3.2 Certain other information contained in the said letter is not entirely consistent with Mr X's testimony.

(a) It is stated that 'orders for [off-shore sales] were procured by negotiation carried out and concluded by an agent outside Hong Kong. This agent was an officer of certain affiliated companies outside Hong Kong and he had discretionary power to negotiate and conclude contracts on our client's behalf'. Conceivably, Mr Y is the agent referred to so far as Australia is concerned and conceivably the word 'agent' is used in a loose sense. Granted, Mr Y was a director of both the company and A Limited. However, we heard no evidence to suggest any shareholding affiliation between any of the off-shore buyers on the one hand and the company or B Limited on the other. The same can be said of Mr Z and the South African companies. Moreover, even if Mr Y could be treated as an 'agent' of the company merely by virtue of his directorship, the same could not be said of his deputies or of Mr Z.

(b) 'We would mention that the off-shore sales were to a related company in Sydney.' There was no evidence of any shareholding relationship.

(c) 'The lines of goods are presented in a catalogue with standardized prices and therefore the negotiation of sales is kept to a minimum.' Mr X said that this was not correct and believed it arose from a misunderstanding between the company and its tax representatives. The paragraph goes on: 'The prospective buyers would order their goods through telexes in the first instance and forward their confirmation by sending the purchase orders to our client later. There are no other documentations available to demonstrate the negotiation and conclusion of sales.'

(d) 'With regard to the stock control system, A Limited, C Limited and D Limited provide our clients [the company] with sales forecasts based on which

purchases are made in Hong Kong. Again, the directors in Hong Kong do not exercise any discretion over the level of stock maintained in Hong Kong for off-shore sales.' Mr X made it clear that the directors of the company in Hong Kong did exercise discretion in general by-arranging top-up of stock to meet global requirements of its customers. Moreover, he acknowledged that the requirements of the off-shore buyers constituted only a small part of the stock requirements.

4. COMPUTATION OF PROFITS

In correspondence, the company's tax representatives told the Revenue that they were unable to determine the actual cost of the products sold to the overseas buyers in order to arrive at those profits which they argued should be excluded from the assessment. They approached the subject from three directions, namely:

(a) Allocation of costs based on suppliers' invoices. However, the company was unable to match purchases against sales.

(b) Computation of costs based on average gross profit ratio of off-shore sales. As there was no fixed gross ratio for the off-shore sales, there was a fluctuation which could not be determined because of the point made in (a) above.

(c) Computation of costs based on the average gross profit ratio of local sales. Again, this approach would not work because of the variety of the products and wide range of gross profits. The gross profit percentage of each product tended to move frequently.

For these reasons, the tax representative suggested that the easiest means of determining the cost was to apportion the total cost of sales on a turnover basis.

5. SUBMISSIONS BY THE COMPANY'S REPRESENTATIVE

5.1 The company's representative submitted that the relevant decided cases deal basically with three types of income, namely, income derived from property (such as rental or income from mining operations), income derived from services (such as the salvage operation in CIR v The Hong Kong & Whampoa Dock Co Ltd (1960) 1 HKTC 85) and income derived from contracts entered into for the purchase and sale of merchandise. The appropriate tests for the first two types would be the 'locus' test and the 'operations test' respectively. As regards the last type, apart from Sinolink Overseas Ltd v CIR (1985) 2 HKTC 127, there is very little authority as to source. He submitted that the earlier cases of Smidth (F L) & Co v Greenwood [1921] 3 KB 583 and MacLaine & Co v Eccott (1926) 10 TC 481 indicated that the place where the contracts of sale were made was crucial in determining the source of income of a business trading in merchandise.

5.2 He referred to two Board of Review cases, D13/86 (unreported) and BR18/73, IRBRD, vol 1, 118 which show that the operations test is not always appropriate.

5.3 As regards Sinolink (above), the company's representative noted that the judge had himself indicated that his decision should not be regarded as a test case because it turned upon its own facts, and for that reason alone not too much reliance should be placed upon it.

5.4 He urged upon us the proposition that, in the case of trading in goods, the question to decide source should be: 'where came the profit?', not 'where was the operation?'

5.5 Turning then to the evidence, the company's representative made the following points:

(a) The selling prices for all the transactions with the off-shore buyers were determined overseas by Mr Y (or his deputies) or Mr Z. The management in Hong Kong had no control over the setting of prices.

(b) Mr Y and Mr Z were in fact permanent agents of the company in Australia and South Africa and acted on the company's behalf in concluding contracts of sales between the company and their own Australian and South African companies.

(c) The off-shore buyers may be regarded as the company's 'distributors'. The off-shore buyers sold to the end-users, retained a portion of the proceeds and gave the balance to the company as the company's share of profit in respect of the sales to the end-users. If there had been no distributors, there would have been no sales in the Australian of South African markets, and certainly no profits to the company. The testings were carried out in Australia and South Africa at the discretion of the overseas buyers. The company did not carry an inventory specifically for the overseas buyers without obtaining confirmation from the overseas buyers.

(d) The maintainance of stocks and warehousing in Hong Kong are not relevant issues because the company carried a very large stock to meet its local Hong Kong sales as well as sales to other buyers outside Hong Kong.

(e) Although post-contract functions were carried out in Hong Kong, they should not be given undue weight. The sales were already concluded and the profits were already made before the post-contract functions were performed.

(f) The instant case is not affected by modern communications technology (a reference to passage from the Sinolink decision) because the company did not rely on telexes, long-distance calls, etc in sales and negotiations with the off-shore buyers.

Mr Y and Mr Z made the decisions and concluded the contracts for the company without the need to communicate with the company's management in Hong Kong.

(g) The on-shore and off-shore sales were not homogeneous, as stated in the Commissioner's determination, although they were filled from a common pool of stock. There were no overseas agents who fixed selling prices and concluded sales contract for on-shore transactions.

5.6 The company's representative also referred to a circular issued by the Commissioner of Inland Revenue dated 25 August 1971. However, we do not think that the circular is material, particularly as it is not of any binding affect.

6. THE REVENUE'S SUBMISSIONS

6.1 The Commissioner's representative referred us to dicta from Smidth (F L) & Co v Greenwood (above), Nathan v Federal Commissioner of Taxation (1918) 25 CLR 183 (the ascertainment of source is a practical hard matter of fact), the Dock Company case (above), Sinolink (above), D50/87, IRBRD, vol 2, 453 and D21/88, IRBRD, vol 3, 267.

6.2 With the foregoing in mind, the representative went on to submit that the company, by its actions of buying and selling, incurred legal consequences and that, for a trading company, the important operations are the acts of buying and selling goods. He cited passages in the Sinolink decision as indicative of the importance to the attached to such matters. He contrasted the situation in CIR v International Wood Products Ltd (1971) 1 HKTC 551 where the profits in question arose out of commissions paid to the Hong Kong taxpayer by its overseas principals on logs sold out of the Philippines to Japan. He stressed that Mr X was the person in general control of the business operations of the company, that he is based in Hong Kong and that much of the skill and decision-making required of the company took place in Hong Kong. He submitted that Sinolink was indicative that 'the place where the directing mind and will of the trading company normally works and makes its decisions is a very significant matter'. Of the facts to be taken into account, he noted that Mr Y only came to Hong Kong for a period when Mr X was ill and that the company had a godown in Hong Kong. The fact that the company did not deal with complaints from end-users was not a relevant consideration.

6.3 The Revenue's representative argued that A Limited and the company were separate legal entities and that accordingly, A Limited's sales were not the sales of the company. The representative evidently felt it was necessary to deal with this point because it was clear at an early stage of Mr X's testimony that he personally viewed the canvassing activities in Australia and South Africa by (self-employed) sales personnel on behalf of their principals (the off-shore buyers) as relevant to the company. However, as the company's representative acknowledged that those activities were not material, we need not deal further with the point.

6.4 Reverting to the Sinolink decision, the Revenue representative submitted that the fact, that personnel from the company frequently travelled out of Hong Kong and even signed sales contracts out of Hong Kong were not decisively in favour of the argument that the profits from the sales arose outside Hong Kong.

6.5 Reference was also made to D18/88, IRBRD, vol 3, 241 where all the sales of the taxpayer's group's products made to its merchandising affiliates were to a company outside Hong Kong for the supply of products outside Hong Kong or for resale outside Hong Kong. On the facts of that case, after a lengthy examination of relevant case law, the Board concluded that the profits concerned were derived from or arose in Hong Kong because all of the activities, such as the employment of staff and the maintainance of an office in Hong Kong with all necessary office services and facilities including telephones, telex, etc, were the essence of the activities of a trading company and they all took place in Hong Kong. The Board concluded that the place where the goods are situated was not material on the facts of that particular case. The Board also rejected the taxpayer's argument that the profits arose where the goods were delivered.

7. CONCLUSIONS

7.1 We respectfully agree with the well-reasoned opinions expressed by the Board in D18/88 (at 250 onwards) concerning the principles for determining source, both as they are generally expanded in that decision and particularly as they relate to the profit of a company trading in goods in overseas markets. Despite the urgings of the company's representative, it seems to us that the place where the goods are sold is not, per se, the location of the source.

7.2 We do not consider, as suggested to us by the company's representative, that the MacLaine case (above) or the earlier case of Smidth (above) are in truth authority for the proposition that the place where trading contracts are made is crucial or decisive for establishing source. In both cases the courts were endeavouring to decide whether a firm was exercising a trade in England and in doing so looked, in the first instance, to whether the contracts by which the trade was exercised were made in England. We believe it is going too far to

read into the judgments a corollary that, as a matter of principle, profits from contracts made outside Hong Kong are not liable to Hong Kong profits tax. (The remarks of Lord Radcliffe in Firestone Tyre & Rubber Co Ltd v Llewellin (1957) 37 TC 111, mentioned by Hunter J in Sinolink, in our opinion supports this belief).

7.3 However, the foregoing remarks are largely superfluous because in many respects the evidence was unsatisfactory. Just how Mr X or Mr Z could establish the cost of products sold to the off-shore buyers so as to price them (as indicated in para 2.6 above), when the company's accountants themselves could find no uncontroversial way of doing so, was never made clear.

7.4 There is no doubt that Mr X's position as managing director was no mere sinecure. He did take an active part in approving orders for supplies put before him by the operation manager. This is borne out by the need for Mr Y to come to Hong Kong to deputize for Mr X after the latter's heart attack.

7.5 Whilst the absence of any written evidence of the authority of Mr Y (or his deputies) and Mr Z to act for the company might be explained away by the long-standing relationship between Mr X and Mr Y and Mr Z, and in Mr Y's case his directorship of the company, this explanation was not urged on us nor did Mr X make the point in any positive sense. Perhaps the lack of evidence of authority could be overlooked if Mr X, Mr Y or Mr Z owned the company but, so far as the evidence went, none of them were shareholders of the company and no evidence was forthcoming to suggest that they owned shares in B Limited.

7.6 Having regard to our comments at paragraphs 3.2, 7.3, 7.4 and 7.5 above, we found ourselves unable, with any sense of certainty, to form a coherent picture. Accordingly, we find that the company has failed to discharge the onus upon it to show why the assessments were wrong. In our opinion, sufficient incidents of merchandising took place in Hong Kong to support the Commissioner's conclusion that the source of the profits from the sales to the overseas buyers was Hong Kong. In many, if not all, instances, orders for supplies were sent from Hong Kong, those supplies were paid for by letters of credit opened in Hong Kong, and the company's other activities included many of the other features referred to in D18/88 (para 6.5 above).

We therefore dismiss this appeal.