Case No. D14/21

Profits tax – deductions – whether Appellant incurred the alleged expenditure – whether appellant can prove that the expenditure was incurred in the production of profits – sections 16, 17, 68(4), 68(9) of the Inland Revenue Ordinance ('the Ordinance') [Decision in Chinese]

Panel: Wu Pui Ching Teresa (chairman), Lee Ian Philip and Ken To.

Date of hearing: 18 June 2021.
Date of decision: 28 January 2022.

The Appellant company was a property agent in Hong Kong. In reporting for Profits Tax Assessment for the 2019/20 year of assessment, the Appellant reported a deduction of $1,880,000 ('the Sum'). It was alleged that the Sum was paid to an intermediary ('Mr E') as his commission for introducing clients and their associates. Responding to the queries made by the Assessor, the Appellant said it only had an oral agreement with Mr E for referring potential clients from the Mainland. The Sum was paid as consultancy commission to Mr E, and did not correspond to his reference of any specific clients. It was further alleged that the Sum was paid to Mr E in the Mainland around May 2019. The Assessor refused to recognise the Sum as deductions, and raised Profits Tax Assessment accordingly.

The Appellant appealed against the above assessment. Before the Board, the Appellant claimed that, according to the oral agreement it had with Mr E, if the friends of a client referred by Mr E purchased or rented any property through the Appellant, Mr E would be entitled to 45% of the commission it received. It was further claimed that the Appellant received commission between August 2018 and May 2019 on 3 property transactions, in which the buyers were the friends of a client referred by Mr E. Therefore, the Appellant needed to pay 45% of the commission received, which was subsequently agreed to be the Sum.

Mr E died in 2020, before the Appellant sought to appeal against the assessment. He thus did not give evidence before the Board. Records showed that the Appellant's witness was only absent from Hong Kong in May 2009 days before the Appellant received the commissions from the last of the 3 property transactions, and before the date of the cheques allegedly used to pay Mr E. There was also no evidence to show that the buyers were indeed the friends of the client referred by Mr E.

Held:

1. The Board would not draw adverse inference against the Appellant for the failure to call the intermediary to give evidence (Li Sau Keung v Maxcredit Engineering Ltd & Another, CACV 16/2003 (unrep., 25-11-2003); Pacific Electric Wire & Cable Company Limited v Texan Management Limited & Others, CACV 90, 91, 93-96/2012 (unrep., 17/9/2013) considered). Nevertheless, the Appellant could not prove that it did pay the intermediary his commission as alleged when the evidence is objective considered (So Kai Tong v Commissioner of Inland Revenue [2004] 2 HKLRD 416; D94/99, IRBRD, vol 14, 603 followed). The claims made before the Board about the existence and the terms of the oral agreement with the intermediary were not made in response to the queries made by the Assessor. Hence, these claims were incredible (Goldbay Fortis v Asia Allied Infrastructure Holdings Ltd & Another [2021] HKCFI 1684 considered).

2. The Appellant also could not prove that the commission, if indeed paid, was incurred in the production of profits. There was insufficient evidence to show that the commission was paid to the intermediary as a result of the 3 property transactions relied on by the Appellant before the Board.

3. As a result, the Appellant failed in its appeal because it failed to prove its contention before the Board (Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433 considered). The Board exercised the power under section 68(9) of the Ordinance to impose costs of $10,000.

Appeal dismissed and costs order in the amount of $10,000 imposed.

Cases referred to:

Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue [2008] 11 HKCFAR 433
So Kai Tong v Commissioner of Inland Revenue [2004] 2 HKLRD 416
D94/99, IRBRD, vol 14, 603
Commissioner of Inland Revenue v Chu Fung Chee [2006] 2 HKLRD 718
Lo Tim Fat v Commissioner of Inland Revenue [2006] 2 HKLRD 689
Li Sau Keung v Maxcredit Engineering Ltd & Another, CACV 16/2003 (unrep., 25-11-2003)
Pacific Electric Wire & Cable Company Limited v Texan Management Limited & Others, CACV 90, 91, 93-96/2012 (unrep., 17-09-2013)
Goldbay Fortis Ltd v Asia Allied Infrastructure Holdings Ltd & Another [2021] HKCFI 1684
Yu Man Fung Alice v Chiau Sing Chi Stephen [2020] HKCFI 2923

Appellant's Position C appeared for the Appellant.
Chan Wun Fai, Yu Wai Lim and Ching Wa Kong, for the Commissioner of Inland Revenue.

案件编号 D14/21

利得税–扣减–曾否招致声称的开支–声称的开支是否为产生应课税利润而招致–《税务条例》(下称「该条例」)第16, 17, 68(4), 68(9)条

委员会：乌佩贞（主席）、李承沛及杜中

聆讯日期：2021年6月18日
裁决日期：2022年1月28日

上诉人公司是在香港的物业代理。就2019/20课税年度的利得税报税，上诉人公司申报了一项$1,880,000的扣减(下称「该款项」)。上诉人公司声称它支付该款项给一名中介人(「E先生」)，作为转介客户或客户相关人士的服务费。在回复评税主任的查询时，上诉人公司指它与E先生就转介内地客户一事上只有口头协议。该款项是E先生的佣金顾问费，并不是指向转介了任何指定客户。上诉人公司进一步指称它于2019年5月在内地向E先生支付该款项。评税主任不同意该款项作出扣减，并基于此决定作出利得税评税。

上诉人公司就评税向委员会提出上诉。在委员会席前，上诉人公司指跟据它与E先生的口头协议，如果E先生介绍的客户的朋友通过上诉人公司购买或租赁单位，E先生可得到上诉人公司收到的佣金的45%。上诉人公司指出E先生介绍的客户的朋友购买了3个物业；它在2018年8月至2019年5月期间收到相关佣金。因此，上于人公司须向E先生支付该些佣金的45%。双方其后同意金额为该款项。

E先生于2020年身故，早于上诉人公司就评税提出的上诉。因此，他没有在委员会席前作供。记录显示上诉人公司的证人只是在2019年5月不在香港，而且这是在上诉人公司收到3个物业交易的最后一个的相关佣金，及上诉人公司声称用以支付E先生的支票的日子数天前发生的。同时，没有证据显示3个物业的买家确是E先生介绍的客户的朋友。

决定：

1. 委员会不会因上诉人公司没有传召中介人作供而对它作出不利的推论(考虑Li Sau Keung v Maxcredit Engineering Ltd & Another, CACV 16/2003 (unrep., 25-11-2003); Pacific Electric Wire & Cable Company Limited v Texan Management Limited & Others, CACV 90, 91, 93-96/2012 (unrep., 17/9/2013))。纵使如此，当委员会客观考虑席前证据

时，上诉人公司未能证明它确曾如声称般向中介人支付他的佣金(跟从So Kai Tong v Commissioner of Inland Revenue [2004] 2 HKLRD 416; D94/99, IRBRD, vol 14, 603)。上诉人公司在委员会席前有关口头协议的架在及其条款的指称，并未曾于回应评税主任的查询时提出，所以这些指称并不可信(考虑Goldbay Fortis v Asia Allied Infrastructure Holdings Ltd & Another [2021] HKCFI 1684 considered)。

2. 上诉人公司也未能证明该些佣金(如曾支付的话)是在产生利润的过程衍生。委员会席前没有足够的证据显示上诉人公司是基于它在委员会席前依赖的3个物业交易而向中介人支付佣金。

3. 根据上述，上诉人公司因未能证明它在委员会席前的说法而未能成功上诉(考虑Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433)。委员会行使该条例第68(9)条的权力，命令上诉人缴付 $10,000 讼费。

上诉驳回及判处港币10,000元的讼费命令。

参考案例：

Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue [2008] 11 HKCFAR 433
So Kai Tong v Commissioner of Inland Revenue [2004] 2 HKLRD 416
D94/99, IRBRD, vol 14, 603
Commissioner of Inland Revenue v Chu Fung Chee [2006] 2 HKLRD 718
Lo Tim Fat v Commissioner of Inland Revenue [2006] 2 HKLRD 689
Li Sau Keung v Maxcredit Engineering Ltd & Another, CACV 16/2003 (unrep., 25-11-2003)
Pacific Electric Wire & Cable Company Limited v Texan Management Limited & Others, CACV 90, 91, 93-96/2012 (unrep., 17-09-2013)
Goldbay Fortis Ltd v Asia Allied Infrastructure Holdings Ltd & Another [2021] HKCFI 1684
Yu Man Fung Alice v Chiau Sing Chi Stephen [2020] HKCFI 2923

上诉人公司C职位代表上诉人出席聆讯。
陈焕辉、余伟濂及程华港代表税务局局长出席聆讯。

决 定 书:

本上诉

1. 上诉人A公司反对税务局向其作出的2019/20课税年度利得税评税，声称相关的应评税利润过高，认为一笔1,880,000元的声称佣金(以下简称「该笔声称佣金」)应可获得扣减。2021年2月1日，税务局以书面通知A公司未能同意其反对(以下简称「该决定」)，并附上书面决定 (以下简称「该决定书」)、决定理由及事实陈述书。

2. A公司根据《税务条例》(第112章)(以下简称「税例」)第66条向税务上诉委员会(以下简称「本上诉委员会」)提出上诉该决定(以下简称「本上诉」)。经考虑后，本上诉委员会一致裁定上诉人败诉，理由详述如下。

双方同意的事实

3. 就本上诉，A公司与税务局局长代表同意采用该决定书中列出的「决定所据事实」的第1(1)至(8)段作为事实基础(以下简称「双方同意的事实」)，其中包括如下：

(1) 2011年，A公司在香港注册成立为私人有限公司，A公司在利得税报税表内申报其主要业务性质为「提供物业代理服务」(provision of property agency service)。B女士在相关期间是A公司唯一的C职位，而A公司的股东则分别为B女士及D女士。A公司的会计账目年结日期为每年6月30日。

(2) 由于A公司未有在指定期限前提交2019/20课税年度利得税报税表，故评税主任按税例第59(3)条的规定向A公司作出下列2019/20课税年度利得税评税：

	(元)
应评税利润	710,000
应缴税款	97,150

(3) A公司透过会计师事务所反对上述评税，认为应评税利润过高，并选择以两级制利得税税率课税。

(4) 其后，A公司提交2019/20课税年度利得税报税表及截至2019年6月30日(评税基期为2018年7月1日至2019年6月30日)的财务报表和利得税计算表。在报税表内，A公司申报应评税利润为1,241,239元，该笔声称佣金于A公司截至2019年6月30日的损益

帐中被提及，A公司并于利得税计算表的附表显示该笔声称佣金是用以支付E先生的：

	(元)
代理费	7,991,664
加：其他收入	4,545
	7,996,209
减：佣金	1,880,000
	(注：即该笔声称佣金)
其他行政及财务支出	4,898,603
税前利润	1,217,606

(5) 评税主任曾致函A公司查询该笔声称佣金的资料。A公司回复，该笔声称佣金是用以支付E先生作为转介客户或客户相关人士的服务费，如客户成功购入物业，E先生便可获得佣金。该笔声称佣金大约于2019年5月以现金方式支付，没有凭证。另外，A公司与E先生没有签订书面合同，只有口头协议，而协议内容规定A公司须按E先生要求的数目支付他，并没有比例基准。A公司提供了E先生在中国G省份的地址作参考。A公司亦指出，E先生与B女士没有任何关系，属不相关人士。

(6) 评税主任曾要求A公司就该笔声称佣金提交进一步的资料和文件：A公司须在整个物业交易中的哪个阶段支付佣金予E先生、A公司须支付E先生佣金的物业交易详情(包括买家名称、物业地点、合同价格、交易日期、A公司从每宗相关交易中所获得的佣金金额及A公司须支付E先生佣金的资料)、A公司每次支付E先生佣金的记录及E先生每次收取佣金所发出的凭证，以及A公司以现金支付E先生佣金的证明文件如银行记录等。

(7) A公司就E先生递交一份日期为2020年11月2日「支付酬金给雇员以外人士的通知书」，以申报E先生于2019年4月1日至2020年3月31日期间以中国地区顾问的身份收取该笔声称佣金。根据A公司的说法，E先生与A公司达成口头协议，E先生负责在国内推广及转介潜在客户予A公司，而A公司则支付佣金顾问费予E先生。由于客户在国内都是经「转介再转介再转介」，所以并没有指定客户，E先生负责推广A公司在国内的知名度，令更多人士推介及直接介绍物业予A公司。此外，A公司声称，B女士在国内是以现金支付该笔声称佣金予E先生，而B女士则与A公司于往来帐对数。

税务局的书面决定

4. 评税主任并不接纳A公司可就该笔声称佣金获得扣减，并修订A公司2019/20课税年度利得税评税，于2020年8月20日所发出的2019/20课税年度利得税评税通知书上所显示的应评税利润及应缴税款应分别由710,000元及97,150元增至3,121,239元及330,004元：

	(元)
报税表申报的利润	1,241,239 (见上述第3(4)段的双方同意的事实)
加：该笔声称佣金	1,880,000
应评税利润	3,121,239
按课税率计算的税款	
首2,000,000元 x 8.25%	165,000
余额1,121,239元 x 16.5%	185,004
	350,004
减：税款宽减	20,000
应缴税款	330,004

A公司的上诉理据

5. 就税务局的上述决定，A公司向本上诉委员会提出上诉，所依赖的是A公司与E先生声称达成的口头协议(以下简称「该声称口头协议」)。根据A公司于「上诉理由陈述书」的描述，该声称口头协议的内容是E先生为A公司推广及介绍客户，E先生成功为A公司带来实际佣金收入则可获分相关佣金，并按以下三种情况分配：

(1) E先生直接介绍客户A君，A君成功通过A公司购买或租赁单位，该笔交易产生的佣金A公司占50%、E先生占50%。

(2) E先生直接介绍客户A君，A君又顺带介绍B君或B君的相关朋友等，B君或B君的相关朋友等成功通过A公司购买或租赁单位，则该笔交易产生的佣金会有两个分配方式：

(a) 如A君只属友好介绍，没有收取佣金，则该佣金E先生占45%、A公司占55%。

(b) 如A君要分配佣金，则该笔佣金A君占40%、A公司占40%、E先生占20%。

6. A公司于上诉理由陈述书指出，A公司及其股东、C职位与E先生没有任何关系。根据A公司，E先生介绍F小姐予A公司，F小姐并于2016年通过A公司购买一个A公司名为「J物业」的物业，当时E先生表示不会分该笔交易佣金，说当作是送

给A公司的贺礼，并期望F小姐的广阔人脉日后能直接或间接给A公司带来不少相关客户，可长期合作，但E先生表明希望A公司能遵守口头承诺，将来分佣金给他。

7. 有关该笔声称佣金，A公司于上诉理由陈述书提出的案情是A公司是通过F小姐介绍的相关朋友成功促成以下三个新楼盘的交易的：

物业地址	K物业	L物业	M物业
买方	H买家	N买家	P买家
成交价 (元)	20,602,450	15,661,400	265,860,000
成交日期	28/5/2018	9/3/2018	28/3/2019
佣金 (元)	700,483	663,909.50	10,634,400
收佣日期	28/8/2018	5/11/2018	6/5/2019
回赠买方新居贺礼 (元)	38,000	-	7,975,800

8. 根据A公司，F小姐在上述三个物业成交只以友好身份介绍，并没收取任何佣金，按该声称口头协议，A公司应占佣金的55%，而E先生应获分45%，即共1,793,246元：

物业地址	交易所产生佣金 (元)	该声称口头协议下E先生获分比例	金额 (元)
K物业	(700,483–38,000) = 662,483	45%	298,117
L物业	663,909.50	45%	298,759
M物业	(10,634,400–7,975,800) = 2,658,600	45%	1,196,370
		共	1,793,246

9. A公司亦于上诉理由陈述书声称，E先生曾表示诚如他当日预期，F小姐确实为A公司带来实际生意及可观佣金收入，为求合作愉快及讨一个好彩头，E先生要求A公司上调他的佣金至1,880,000元，并获A公司同意。由于E先生在国内，故A公司于2019年5月14日开出两张支票(分别为1,000,000元及1,390,000元(支票号码XXXXXX & XXXXXX))予B女士转付E先生1,880,000元。

本上诉的相关问题与适用法律条文及原则

10. 本上诉委员会于本上诉中须决定的相关问题是该笔声称佣金在计算A公司的应评税利润时是否应获得扣减(以下简称「本上诉的相关问题」)。

11. 根据税例第68(4)条，本上诉的举证责任落在身为上诉人的A公司身上：

> 「*证明上诉所针对的评税额过多或不正确的举证责任，**须由上诉人承担**。**(语气强调)***」

12. 终审庭于Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433解释并重申向上诉委员会提出上诉的纳税人须证明其声称及相关要求如下述：

> '*47. Suppose a tax assessment is made on the footing that the position is X and the taxpayer appeals against the assessment by contending that the position is Y.* ***The taxpayer will have to prove his contention. So his appeal to the Board of Review would fail if the Board positively determines that, contrary to his contention, the position is X. And it would likewise fail if the Board merely determines that he has not proved his contention that the position is Y. Either way, no appeal by the taxpayer against the Board's decision could succeed on the 'true and only reasonable conclusion' basis unless the court is of the view that the true and only reasonable conclusion is that the position is Y (语气强调)****.*'

13. 相关本上诉的税例第16(1)条明确订明：

> 「*在确定任何人在任何课税年度根据本部应课税的利润时，该人在该课税年度的评税基期内，****为产生根据本部应课税的其在任何期间的利润而招致的一切支出及开支****，均须予扣除...****(语气强调)***」

14. 至于税例第17条则订明，为确定任何人的利得税应课税利润时，以下项目不得容许扣除：

> 「*(1) 为确定任何人根据本部应课税的利润，以下各项均不得容许扣除——*
>
> *...*
>
> *(b) ... 任何支出或开支****而又并非为产生上述利润而花费者****...****(语气强调)***」

15. Chu J于So Kai Tong v Commissioner of Inland Revenue [2004] 2 HKLRD 416详细检视税例第16及17条，并指出在决定相关支出及开支是否为产生应课税利润而招致时，法庭应采用客观标准，考虑所有相关情况：

> '*27. The appellant argues that there is under the IRO no concept of a computation of expenses. He says that s. 16(1) is a "qualifying section" that sets out the allowable tax deductions. Section 17(1), on the other hand, is a "disallowing section" that sets out the expenses that cannot be allowed, even though they are qualified under s. 16.* ***The appellant contends that where an expense is qualified as a***

deduction under s. 16(1), so long as it is not disallowed by s. 17(1), then it should be allowed in whole, and there is no room for apportionment. In other words, the appellant suggests that s. 16(1) has to be read subject to s. 17(1).

28. ***I am unable to accept this submission.*** *Firstly, there is nothing in the two sections to suggest, let alone permit, such a construction. It is unsupported by any authority. Neither do the judgments of the Privy Council in CIR v Mutual Investment Co Ltd [1967] 1 AC 587 and Lo & Lo v CIR (1986) 2 HKTC 34 support such construction.* ***Secondly, the appellant is effectively saying that once an expense of the kind recognized under s. 16(1), but not disallowed under s. 17(1), had been effected, then irrespective of the amount involved or the reason for it, the Revenue cannot question its genuineness or the amount of the expense. This plainly defies logic and defeats the role of the Revenue in determining the amount of chargeable profits.***

…

30. *It is correct for the appellant to say that the words "wholly and exclusively" had been removed from s. 16(1).* ***In its place, however, the words "to the extent to which" the outgoings and expenses had been enacted.*** *In Lo & Lo v CIR (1986) 2 HKTC 34, Lord Brightman (at p. 71) pointed out that:*

"Sections 16 and 17 provide exhaustively for deductions in the sense that permitted deductions are confined to outgoings and expenses incurred in the production of profits in respect of which tax is chargeable; that such permitted deductions expressly include those specified in (a) to (h) of s. 16(1), and expressly exclude those in s. 17." *(Emphasis added).*

31. ***Therefore, notwithstanding the deletion of the words "wholly and exclusively", it remains necessary to identify what part of the outgoings and expenses are incurred for the production of chargeable profits.*** *As noted above, once the Commissioner, on the material before her, comes to the view that only part of the outgoing or expense under examination is incurred for the production of chargeable profits, she is under a duty to ascertain the extent to which such outgoing and expense is so incurred…*

32. ***As noted above, an objective approach is called for in determining what part of the outgoing or expense is deductible. This involves looking at all the circumstances, including commercial considerations****: Lo & Lo v CIR (1986) 2 HKTC 34 at p. 71…****(语气强调)***'

16. 上诉个案D94/99的判词亦有就这点讨论如下：

> '*24. Mr. B said that it was solely a matter for the Taxpayer and Company D as to what the fair and reasonable service would be.* ***We accept the Revenue's submission that the matter had to be assessed objectively.*** *That is not to say that we are lifting the corporate veil. Nor are we saying that the Taxpayer is not free to decide its own affairs.* ***The Taxpayer is free to give away part of its income as it so wishes to a related company or to a relative or indeed to any third party. The question here is whether that payment is a deductible expense in law when computing the chargeable profits. This question must be answered objectively.*** *The agreement between the Taxpayer and Company D does not preclude us from examining whether the payment is or is not a deductible expense incurred in the production of profits.*
>
> *25.* ***Such expense must have been bona fide incurred in the production of profits. We must look at all surrounding circumstances.*** *For example,* ***the relation between the payer and the payee is a relevant circumstance. So is the purpose or the reason of the payment. The basis and the breakdown of the amount are also important. The lack of a rational basis may lead us to the conclusion that the amount is wholly arbitrary, lacking in commercial reality, and thus not bona fide incurred (语气强调)***.'

17. Chung J于Commissioner of Inland Revenue v Chu Fung Chee [2006] 2 HKLRD 718阐释税例第16条。其中，Chung J在援引案例后作出结论，认为 'for the purposes of the trade'及'in the production of profits'的意思相同：

> '*19. In Strong & Co of Romsey Ltd v Woodifield (Surveyor of Taxes) [1906] AC 448, the House of Lords dealt with an appeal which concerned the Third Rule, Sch. D, Income Tax Act 1842, which contained the phrase "for the purposes of the trade". The taxpayer in Strong &^ Co v Woodifield (Surveyor of Taxes) claimed that damages and costs were deductible. The Court said:*
>
> *"In my opinion, however, it does not follow that if a loss is in any sense connected with the trade, it must always be allowed as a deduction; for it may be only remotely connected with the trade, ...I think only such losses can be deducted as are connected with in the sense that they are really incidental to the trade itself. They cannot be deducted if they are mainly incidental to some other vocation or fall on the trader in some character other than that of trader. The nature of the trade is to be considered..."*

"I think that the payment of these damages was not money expended 'for the purpose of the trade'. These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade, etc. ***I think the disbursements permitted are such as are made for that purpose. It is not enough that the disbursement is made in the course of, or arises out of, or is connected with, the trade, or is made out of the profits of the trade. It must be made for the purpose of earning the profits…"***

Thus, the degree of connection between the expenses and the profit-earning process of the trade, profession or business is important…and must satisfy the tests of being "really incidental to the trade itself" or having been incurred "for the purpose of earning the profits"*.*

20. *Although the wordings in the English tax statutes were different from that in our s. 16(1), the Privy Council said in Commissioner of Inland Revenue v Cosmotron Manufacturing Co Ltd [1997] HKLRD 1161 (on appeal from Hong Kong):*

"…[Liu JA] regarded the words 'in the production of profits' as having a much narrower ambit than the words 'for the purposes of the trade' which appear in the Income and Corporation Taxes Act 1988.

The difference in language is undeniable, but the phrase used in the United Kingdom legislation has generally been interpreted by the courts in a manner, consistent with that of the Inland Revenue Ordinance. *Thus in [Woodifield], Lord Davey said: [the above passage was quoted] (p. 1167)."*

In short, therefore, the two phrases were considered to have the same meaning.

21. *In Commissioner of Inland Revenue v Tai Hing Cotton Mill (Development) Ltd [2006] 2 HKLRD 325, the test adopted for determining this point was expressed as:*

It is the nature of the payment that matters. "It is necessary to…attend to the true nature of the expenditure, and to ask oneself the question,…is it expenditure laid out as part of the process of profit earning?" *(para 94).*

I consider the court in Commissioner of Inland Revenue v Tai Hing Cotton Mill (Development) Ltd to be stating the same tests propounded in Strong & Co of Romsey Ltd v Woodifield (Surveyor of Taxes) [1906] AC 448 in a different way. (语气强调)'

18. 就税例第16条，Recorder Edward Chan SC于Lo Tim Fat v Commissioner of Inland Revenue [2006] 2 HKLRD 689的判词中提到：

> '*16.* ***It is clear that the deduction could only be made in respect of expenses incurred during the basis period for the year of assessment.*** *Hence it may be the case that in order to produce any particular profit in a particular year, the taxpayer would have to incur expenses in the years before or after that year of assessment,* ***and yet the deduction permitted is restricted to those incurred "during the basis period for that year of assessment****". Thus the section envisages that there is a possibility that a certain profit for one year of assessment may be the result of certain expenses incurred in other assessment years. The corollary is that the fact that expenses may have to be incurred in a number of years does not necessarily mean that the profit resulted from such expenses must be treated as profits for the years when the expenses are incurred.* ***(语气强调)***'

A公司未能证明该笔声称佣金及/或该笔$1,880,000的款项(如有的话)是为产生应课税利润而招致的

19. 根据税例第16(1)条，在确定A公司在2019/20课税年度应课税的利润时，A公司在该课税年度的评税基期内，为产生应课税的利润而招致的一切支出及开支须予扣除；而税例第17条则明确规定，任何支出或开支而又并非为产生上述利润而花费者则不得容许扣除。本上诉委员会认为，A公司所依赖的该声称口头协议并不可信，A公司未能证明根据该声称口头协议A公司须要并且确实已通过B女士支付该笔声称佣金予E先生(见上述12段；Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue第47段)。另外，即使假设A公司曾支付E先生一笔1,880,000元的款项，A公司仍未能证明该笔款项是为产生A公司的应课税利润而招致的。

20. 本上诉委员会质疑该声称口头协议并不存在，以及认为A公司的相关案情不可信的原因及理据包括下列各项。

21. 首先，B女士是A公司在本上诉中的唯一证人，A公司并没有传召另一关键人士E先生作证。E先生的证供与A公司于本上诉的案情有密切关连，根据A公司的说法，E先生从B女士手中收取了A公司该笔声称佣金共1,880,000元。就这方面的案情，A公司提供了两张日期为2019年6月15日的文件，其中一张连同E先生的公民身份证副本及手写笔录「致：A公司 本人E先生收到由贵公司股东B女士付于本人应收之佣金港币壹佰捌拾捌万元整(K物业$298117元 L物业$298759元 M物业$196370元及奖金几万元)共$1880000」，至于另一张则电脑打印如下：「收据 本人收到A公司佣金共港币壹佰捌拾捌万元整」。两张文件都备有看起来是E先生中文全名的签署(「E先生」)。A公司于上诉理由陈述书形容该两张文件为「E先生收到我司的佣金收据」(以下简称「该声称的佣金收据」)。

22. 就与讼双方其中一方没有传召相关人士作证人这一点，上诉庭于Li Sau Keung v Maxcredit Engineering Ltd & Another, CACV 16/2003 (unrep., 25-11-2003)提到：

> '*28. But the plaintiff's evidence was unequivocal: he maintained that he had told So about the fall. Not only was it not put to the plaintiff that he never told So about it,* ***So, who was an employee of the 2nd defendant, was not called to give evidence. Mr Chan SC rightly submitted that this was a matter that may properly be taken into account.*** *In* ***Cavendish Funding Ltd v Henry Spencer & Sons Ltd*** *[1998] 6 EG 146 at 148-149, Aldous LJ cited the following passage from the judgment of Newton and Norris JJ in* ***O'Donnell v Reichard*** *[1975] VR 916 at 929:*
>
> *"It is sufficient to say that in our opinion for the purposes of the present case* ***the law may be stated to be that where a person without explanation fails to call as a witness a person who he might reasonably be expected to call, if that person's evidence would be favourable to him, then, although the jury may not treat as evidence what they may as a matter of speculation think that that person would have said if he had been called as a witness, nevertheless it is open to the jury to infer that that person's evidence would not have helped that party's case; if the jury draw that inference then they may properly take it into account against the party in question for two purposes, namely****:*
>
> ***(a) in deciding whether to accept any particular evidence, which has in fact been given, either for or against that party, and which relates to a matter with respect to which the person not called as a witness could have spoken****...****(语气强调)***"'

23. 另一上诉庭的案件Pacific Electric Wire & Cable Company Limited v Texan Management Limited & Others, CACV 90, 91, 93-96/2012 (unrep., 17/9/2013)列出适用这方面的法律原则如下：

> '*106. The relevant principles are set out by Brooke LJ in Wisniewski v Central Manchester Health Authority [1998] PIQR 324 at 340:*
>
> ***(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.***
>
> ***(2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other***

party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified. (语气强调)'

24. 对于A公司没有传召E先生作证人一事，B女士解释，E先生于2020年下半年身故，B女士是于2020年底从E先生的家人方面得悉此事。根据B女士，E先生的媳妇是B女士的同学、朋友，她们的「上一代」认识了多年，居于「同一条村」。如B女士所言属实，A公司于2021年2月提出本上诉申请时已无法传召E先生作证。虽然A公司未有提供任何文件作佐证，但另一方面亦没有证据显示或证明B女士的解释不可信或属谎言，按本上诉委员会理解，税务局局长代表亦没有提出这方面的指控(亦应没有足够理据提出此等指控)，故本上诉委员会认为，在本上诉对A公司未有传召E先生作证人作出「不利推定」(adverse inference)并不合适或稳妥。

25. 接下来，在考虑B女士作为A公司唯一的证人的证供是否可信时，本上诉委员会应用了Yeung J于Goldbay Fortis Ltd v Asia Allied Infrastructure Holdings Ltd & Another [2021] HKCFI 1684 提及的法律原则：

'*73. The approach for assessing credibility is not in dispute. I have been cited a number of authorities, which include Hui Cheung Fai & Another v Daiwa Development Ltd & Others, unrep., HCA 1734/2009, 8 April 2014, §§77-79 per DHCJ Eugene Fung SC and Hua Tyan Development Ltd v Zurich Insurance Co Ltd [2012] 4 HKLRD 827 §27 per Andrew Chung J, Hung Fung Enterprises Holdings Ltd and Other v The Agricultural Bank of China, unrep., HCA 16459/1998, 4 October 2010, §47 per To J.* ***I remind myself when considering a witness' credibility the importance of considering the inherent likelihood or unlikelihood of the witness' evidence, the consistency of the witness' evidence with undisputed or indisputable evidence, with contemporaneous conduct and documents, and the internal consistency of the witness' evidence. I need to consider the totality of the evidence.*** *I warn myself against attaching undue weight on demeanour, though demeanour is obviously relevant when considering credibility. I also bear in mind Re H (Minors) [1996] AC 563, which Mr. Li has reminded me of, that*

> *the more serious the allegation sought to be proved is, the more cogent the evidence relied upon to support it must be.* ***(语气强调)***'

A公司未能证明曾招致该笔声称佣金

26. 本上诉委员会认为，B女士声称A公司与E先生曾达成该声称口头协议，并根据该声称口头协议，A公司须支付并确实已通过B女士以现金方式支付E先生该笔声称佣金共1,880,000元存在根本问题(inherent difficulties)，且与A公司自身提供的文件不相符，B女士的证供亦有前后不一、自相矛盾的问题，并不可信。

27. 第一，A公司于上诉理由陈述书提出该声称口头协议及其内容作为上诉理据，但A公司却从未提及A公司与E先生是如何达成该声称口头协议的详情，包括A公司是透过谁(是否B女士)、双方是在何时，以及在何种情况下(例如，是A公司还是E先生提出「邀约」(offer)、另一方如何回应、洽谈中有否「反邀约」(counter-offer)等情况及邀约是如何被「接纳」(acceptance) 等) 达成该声称口头协议的。早于2020年9月30日，当A公司回复税务局的查询时 (以下简称「2020年9月30日的回复」)，A公司只简略地提出A公司与E先生「并没有合同，只有口头协定」。A公司于较后时段亦没作其他补充。最后，A公司虽然于上诉理由陈述书表明希望详细表述「整个过程」，但A公司于上诉理由陈述书仍未对该声称口头协议达成的相关情况作任何描述。

28. 该等A公司从未能提供的详情及细节关乎该声称口头协议是否存在。Yu Man Fung Alice v Chiau Sing Chi Stephen [2020] HKCFI 2923 的判决曾就口头协议成立的要求及法庭在定夺口头协议是否存在时应用的客观标准等作详细讨论，并重申相关法律原则如下：

> '*17. The basic requirements for a contract are trite.* ***Those requirements are that: (1) the parties have reached an agreement, which (2) is intended to be legally binding, (3) is supported by consideration, and (4) is sufficiently certain and complete to be enforceable.***
>
> *18.* ***There is, of course, no legal requirement that a contract must be concluded in writing, or be evidenced in some form of written record.*** *It is in general possible and permissible in Hong Kong law to make a contract without any formality, and to do so simply orally.*
>
> *19.* ***But it is obvious that the absence of a written record may make the existence and terms of a contract harder to prove. Anyone with business experience will understand the value of a written record. Therefore, the absence of any written record may – depending on the circumstances – tend to suggest that no contract was in fact, concluded.***
>
> *20.* ***Hong Kong law applies an "objective" test in determining whether an agreement has been made, what its terms are and whether it is***

intended to be legally binding. *It is settled that for questions of meaning in the law of contract, the "touchstone" is how the words used, in their context, would be understood by a reasonable person. For these purposes, the context includes all relevant matters of background fact known to both parties. It may also be important to recall that the relevant intentions are, in most cases, those at the time of the alleged agreement/contract, and not any subsequent intention.*

...

22. ***As to reaching an agreement, all law students know that an agreement is reached when one party makes an offer which the other accepts. An offer is a person's expression, by words or conduct, of a willingness to be bound by specified terms if and as soon as there is acceptance by the person to whom the offer is made.*** *It may, however, be necessary to look closely at the words actually used, as in some circumstances they may be such that it is unlikely that anyone could reasonably have thought that the words were meant seriously.*

23. Acceptance may also be by words (whether written or oral) or by conduct. Likewise, it may be necessary to look closely at the words actually used, as in some circumstances they may be such that it is unlikely that anyone could reasonably have thought the words were meant as a serious acceptance of the offer.

24. There is a separate and independent requirement of a contract that there be certainty and completeness of terms. So even in cases where the Court concludes that the parties have made an agreement which is intended to be legally binding, the court may nevertheless also conclude that the agreement is too uncertain or incomplete to be enforceable. A typical example is because the agreement lacks an essential term which the court cannot supply for the parties. But the court will only hold that the contract, or some part of it, is void for uncertainty if it is legally or practically impossible to give the agreement, or that part of it, any sensible content.

25. Vagueness in what is said or omission of important terms may also be a ground for concluding either that no agreement has been reached at all or that, although an agreement has been reached, it is not intended to be legally binding. ***(语气强调)***'

29. 第二，税务局于2020年10月28日(以下简称「2020年10月28日的查询」)曾明确要求A公司「**细项列出由[E先生]所转介客户而须缴付[E先生]佣金的物业交易**，包括**买家名称**、**交易日期**、**有关物业地点**、**合同价格**、**公司从该宗交易所得佣金**、

公司收取佣金方式、**需付[E先生]的佣金金额资料**，并提供有关交易文件副本，文件当中显示公司从该宗交易收取的协议佣金数额 **(语气强调)**」。

30. A公司于2020年11月23日的回复(以下简称「2020年11月23日的回复」)中表示，「[E先生]与我司是口头协议在国内负责推广，转介潜在客户，**故我司支付的佣金顾问费无特定指向哪个客户**，**因为国内的转介再转介再转介**，**他负责推广我司在国内的知名度及令到更多人士推介及直接介绍物业等... (语气强调)**」。

31. 这与A公司现时于上诉理由陈述书列出的案情以及B女士的证供，声称该笔声称佣金与A公司通过F小姐介绍的相关朋友成功促成的三个物业(即K物业、L物业及M物业)成交完全不符。

32. 除此以外，A公司于2020年9月30日的回复时提到，「当时口头协定，只按他[E先生]要求的数目办理**没有比例基准 (语气强调)**」，A公司当时的声称亦与现在所依赖作为上诉理据的E先生可获分佣金的情况及佣金比例截然不同(即如E先生直接介绍客户A君，而A君又顺带介绍B君或B君的相关朋友，B君或B君的相关朋友等成功通过A公司购买单位，则该笔交易产生的佣金，在A君只属友好介绍，没有收取佣金的情况下，E先生占45%，A公司占55%)。

33. 就A公司的案情而言，上述差异毫无疑问地属根本性的差异，但B女士的证供并没有提供任何合理或可信的解释。

34. 第三，于2020年10月28日的查询，税务局亦要求A公司确认，「根据声称口头协议，进一步说明在整个物业交易中，公司[A公司]**在何阶段需支付E [E先生]的佣金 (语气强调)**」。A公司于2020年11月23日的回复并未提出相关的付款阶段。A公司只于较早前(见2020年9月30日的回复)提到支付E先生该笔声称佣金的日期大约是2019年5月。承上，如当时A公司与E先生达成的口头协定既不包括E先生可获分佣金的情况、佣金比例基准(而是按E先生要求的数目办理)，又不包括付款阶段等，那么该所谓「口头协定」是否具备足够肯定(sufficiently certain)的条款以及是否完整(complete)而可被予以执行的效力(enforceable)亦成疑问。

35. 第四，明显地，B女士的证供已完全推翻A公司于2020年9月30日的回复及上诉理由陈述书中声称指「[E先生]与本公司[C职位]股东**没有任何关系**，属于**不相关人士 (语气强调)**」。至于A公司当时为何要隐瞒税务局B女士与E先生是相识及他们两家人多年的关系，甚至向税务局作出虚假的回复，及在上诉理由陈述书一再强调，B女士并没有提供任何合理解释。

36. 第五，于2020年9月30日的回复，A公司提到该笔声称佣金「没有凭证」，是以「现金方式交收」，而付款日期则大约是2019年5月。于2020年10月28日的查询，税务局要求A公司确认「公司每次支付[E先生]佣金的记录方法、[E先生]每次收取佣金所发出的凭证及提供证明文件(包括银行记录)，显示每次公司从银行提取现金从而支付[E先生]佣金的资料」。

37. 根据A公司于2020年11月23日的回复，A公司只提出「...我司给予[E先生]的佣金顾问费由股东[B女士]在国内支付现金给予[E先生]，而公司则和[B女士]股东在公司的往来帐之间对数」。A公司没有提供税务局要求关于支付E先生佣金的记录方法、E先生收取佣金后发出的凭证或其他证明文件显示A公司从银行提取现金支付E先生或注明该等税务局要求的文件的存在。

38. A公司亦未有披露与B女士之间的「往来账」，不过，即使A公司提供该等「往来帐」，B女士的证供已确认它们仍不能准确显示A公司与B女士之间的相关「对数」过程。

39. B女士作供时解释，A公司是「细公司」，以家庭模式经营，没有聘用文员、秘书，亦不需向其他人交代，因另一位股东是弟妇，是「代持」的身份。B女士亦提到，A公司面临经营困难、租金的压力等，故没有向税务局提出满意解释，只是「系咁意写几只字...拖延住...希望税务局能够体谅...」。本上诉委员会认为，这种种都不是能令人信服或接受的解释，亦不是处理税务相关事宜应有的正确态度，况且，不要忘记的是，A公司绝对有实际诱因把资料整理好，以期望可以获得扣减佣金。

40. 第六，至于该声称的佣金收据，本上诉委员会同意税务局局长代表的有关陈词，提出A公司截至2019年6月30日的收益表中显示，该年度的一般行政费用(General And Administrative Expense)总额为6,587,826.73元，其中包括该笔声称佣金(1,880,000元)，收款人的姓名(E先生)以及其国内身份证号码亦有被注明。2020年8月21日，B女士作为A公司的单一C职位为A公司签署该年度的财务报表，A公司理应已备存充分的记录以证明曾支付E先生该笔声称佣金，但于2020年9月30日的回复，A公司却确认没有支付该笔声称佣金予E先生的凭证。之后，于2020年11月23日的回复，A公司同样未能提供支付凭证(除「支付酬金给雇员以外人士的通知书」(以下简称「该通知书」)外)。A公司是直至2021年2月10日才向本上诉委员会提供该声称的佣金收据。

41. 本上诉委员会同意税务局局长代表对该声称的佣金收据的真确性的质疑。究竟A公司于2020年8月签署2019/20课税年度的财务报表时是否已从E先生获取该声称的佣金收据?如已收到的话，为何A公司不早于2020年9月30日的回复及2020年11月23日的回复提供该声称的佣金收据供税务局考虑?

42. 除此以外，该声称的佣金收据的其中一张所提及E先生就M物业交易所获得的佣金就只有196,370元，而A公司于上诉理由陈述书提出的则是1,196,370元。

43. B女士对上述的所有质疑、疑团均未能提供任何合理、圆满的解释供本上诉委员会考虑。

44. 第七，A公司于2020年11月23日的回复中提供该通知书(IR56M表格)的副本供考虑，但值得留意的是，A公司承认「忘记」填写IR56M表格，而该通知书

是A公司于2020年11月「让会计师补上申报税局的」，换言之，该通知书是在税务局开始查询A公司有关该笔声称佣金之后才存在。而且，该通知书是截至2020年3月31日止的年度内，该通知书上显示E先生作为A公司的「中国地区顾问」的服务期间为2019年4月1日至2020年3月31日，而A公司所依赖的相关物业交易及A公司的收佣日期则分别为2018年8月28日(K物业)、2018年11月5日(L物业)及2019年5月6日(M物业)。至于A公司应于何时支付E先生佣金，税务局曾于2020年10月28日的查询提出，但A公司于2020年11月23日的回复未有明确答复，亦未于上诉理由陈述书交代。

45. 第八，根据A公司于上诉理由陈述书列出有关E先生佣金的比例(45%)及其计算方式，A公司须支付E先生的金额应为1,793,246元，这与A公司声称该笔声称佣金的总数1,880,000元有着明显差异。根据A公司详列于上诉理由陈述书的案情，E先生要求A公司「多给他几万佣金」，加至1,880,000元是「好彩头」的数目，但这方面A公司却从未在较早前向税务局作的回复中提出。

46. A公司所提供于2019年5月14日开出给B女士的Q银行支票号码XXXXXX (1,000,000元)和XXXXXX (1,390,000元)只能证明B女士曾从A公司收到总数2,390,000元，但却未能进一步证明A公司须支付E先生的金额为1,793,246元、A公司与E先生的该声称口头协议包括将该笔声称佣金调高至1,880,000元，以及B女士曾以现金方式支付该笔声称佣金共1,880,000元予E先生。

47. 至于A公司依赖的该声称的佣金收据，如上述，本上诉委员会接纳税务局局长代表的陈词，对它们的真确性存疑。

48. 另外，B女士的证供提到，她在国内以现金支付E先生，以「商议出来」的0.9港币兑人民币的换算率换算。B女士亦声称，她在国内有「亲朋戚友」帮忙，从他们处取得人民币，另在香港「对数」。当被问及此等「对数」有否记录时，B女士答复没有，理由是她「自己对数」，所以没有记录，B女士又提及她有时会以「手袋」作「对数」之用等。B女士上述的说法不但全部是新提出的，没有佐证，A公司亦没有传召该等声称曾为B女士于国内支付该笔声称佣金予E先生时提供帮忙及牵涉于与B女士「对数」过程的人士作证，极不可信。

49. 最后，B女士的证供重申，以她「记忆」所及，是她本人亲身于2019年5月将该笔声称佣金交给E先生的，但她却不记得确实日期。根据税务局提供的入境事务处记录，于2019年4月1日至2019年6月30日，B女士只曾在2019年5月3日离开香港，并于2019年5月5日回港。

50. 本上诉委员会同意税务局局长代表提出的质疑，如B女士确实在国内以现金支付该笔声称佣金予E先生，那便意味着B女士是在A公司尚未在2019年5月6日收取M物业的佣金及她自己尚未收取A公司于2019年5月14日开出的两张共值2,390,000元的支票之前已预先支付E先生该笔声称佣金共1,880,000元，但A公司却从未于上诉理由陈述书提及B女士曾替A公司垫付该笔声称佣金予E先生。相反，A公司于上诉理由陈述书的说法是B女士在收取A公司于2019年5月14日开出的两张支票

后，A公司「让股东[B女士]**转付**[E先生]**(语气强调)**」该笔声称佣金的。另外，B女士是否有足够的现金流在A公司尚未收取M物业的佣金前先支付E先生该笔声称佣金，B女士并没有解释或提供任何证明作支持。

51. 基于上述，本上诉委员会未能接纳A公司曾与E先生达成该声称口头协议，以及根据该声称口头协议，A公司须支付并确实已通过B女士以现金方式支付E先生该笔声称佣金共1,880,000元。

A公司未能证明该笔1,880,000元的款项(如有的话)是为产生应课税利润而招致的

52. 再者，即使假设A公司曾支付E先生一笔1,880,000元的款项，本上诉委员会认为，A公司亦未能证明该笔款项是为产生应课税利润而招致的。

53. 首先，正如税务局局长代表陈词指出，根据A公司于上诉理由陈述书的案情，A公司是通过F小姐介绍的「相关朋友」，成功促成K物业、L物业和M物业的三宗物业买卖而赚取佣金共11,998,793元。A公司现依赖作为支持E先生可获分佣金的情况是，E先生直接介绍客户A君(F小姐)，A君(F小姐)又顺带介绍B君或B君的相关朋友(F小姐介绍的「相关朋友」)等，B君或B君的相关朋友(F小姐介绍的「相关朋友」)等成功通过A公司购买单位，如A君(F小姐)只属友好介绍，没有收取佣金，则该笔交易产生的佣金E先生占45%而A公司占55%。

54. 即使E先生可在该情况获分佣金，A公司仍须但却未能提供足够及可信的资料显示或证明F小姐是由E先生介绍给A公司的，以及K物业、L物业和M物业的买家是F小姐的「相关朋友」。A公司只在上诉理由陈述书声称「[E先生]介绍[F小姐]给我司」，另外，A公司甚至从未明确指出F小姐的「相关朋友」的身份。因此，即使假设A公司曾支付E先生1,880,000元，本上诉委员会仍未能接纳该笔款项与A公司从该三宗物业买卖所赚取的佣金有关，是为产生应课税利润而招致的。

55. 另外，A公司分别是在2018年8月28日(K物业)、2018年11月5日(L物业)及2019年5月6日(M物业)收取该三宗物业买卖的佣金的，但A公司却未能提出须支付E先生该1,880,000元的确实时间。本上诉委员会未能接纳该1,880,000元(如A公司确实曾通过B女士支付E先生的话)必然与A公司从该三宗物业买卖赚取的佣金有关，是为产生应课税利润而招致的。

结论

56. 综合上述各项原因，本上诉委员会不接纳A公司可就该笔声称佣金获得扣减，本上诉委员会认为A公司未能证明本上诉所针对的评税额过多或不正确，因此决定驳回本上诉及确认税务局于该决定书第1(9)段作出的修订及第2段作出的决定。

57. 另外，本上诉委员会根据税例第68(9)条命令A公司缴付10,000元作为本上诉委员会的讼费，该笔款项须加在征收的税款内一并追讨。