Consco Trading Company Limited *(Appellant)*

and

Commissioner of Inland Revenue *(Respondent)*

Court of First Instance
(Inland Revenue Appeal No. 3 of 2003)

Deputy High Court J. To
Date of Hearing: 19 November 2003
Date of Judgment: 12 May 2004

Inland Revenue Ordinance (Cap. 112) - Profits Tax - whether profits arose in or were derived from Hong Kong - section 14

The Appellant was a company incorporated in Hong Kong and carried on the business of trading in polysilicon. It did not have any overseas office or any other form of permanent establishment outside Hong Kong. It is the Appellant's case that the activities which produced the profits were performed by its agents outside Hong Kong.

The Board of Review found that the processing activity in Beijing was that of the subcontractor and thus should not be taken as a relevant factor in determining the source of the Appellant's profits. The Board further found that the opening of letters of credit and placing of orders by the Appellant in Hong Kong were relevant and crucial factors in determining the source of profits in question. It did not accept the Appellant's assertion that the agents did not perform any duties in Hong Kong. The Board concluded that a high preponderance of the Appellant's profit-making activities was done in Hong Kong and thus the profits in question were derived from Hong Kong.

In addition to the questions of law set out in the Case Stated, the Appellant sought to argue before the Court that the Board should have made an apportionment of the profits in question. The Board had considered that this was not a proper question of law and declined to include it as a question to be determined by the Court.

Held:

(1) The powers of the Court were very limited on an appeal and were only confined to expressing an opinion on the questions of law in the Case Stated.

(2) The Court might only interfere with the Board's decision if the Board had misdirected itself in law or if it had drawn inferences or come to conclusions which could not stand because the primary facts found by it did not admit of such inferences or conclusions. The Court might not substitute its own inferences and conclusions for those of the Board's.

(3) The authorities had clearly established that ascertainment of the actual source of income was a practical hard matter of fact and no simple, single legal test was determinative. To determine the source of profits, one must look broadly and consider all the circumstances and all the activities which generated the profits.

(4) There was no rule of law that the place where the contract of sale and purchase was made was conclusive of the source of profits, though it was an important factor to be considered.

(5) The Board is entitled to take a global view of the evidence. The Board carried out a weighing exercise and then concluded that the preponderance of the activities which earned the profits was performed in Hong Kong and were thus profits derived from Hong Kong. The Board applied the proper legal principles and considered the relevant facts.

(6) Credit facilities in one form or another such as letters of credit formed an indispensable element in any overseas sale and purchase transaction. Questions such as who opened theses letters of credit and provided the securities required, where were these letters of credit opened etc must be relevant factors to be considered by the Board in determining the source of the profits. As for the weight to be attached to these factors, it was entirely a matter for the Board. The Court should not substitute its own view for that of the Board's.

(7) It was an abuse of process of the Court for the Appellant to argue the apportionment issue when the Board had decided that this was not a proper question of law to be included in the Case Stated.

Appeal dismissed.

Mr Ivan Cheung, instructed by Messrs Poon & Cheung, for the Appellant.
Mr Eugene Fung, instructed by the Department of Justice, for the Respondent

Cases referred to in the judgment:

Edwards v. Bairstow [1956] AC 14
CIR v. Inland Revenue Board of Review [1989] 2 HKLR 40
CIR v. Hang Seng Bank Ltd. [1991] 1 AC 306
CIR v. HK-TVB International Ltd. [1992] 2 AC 397
CIR v. Orion Caribbean Ltd. [1997] HKLRD 924
Magna Industrial Co. Ltd. v. CIR [1997] HKLRD 173