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What's inside

Editorial

We feature three articles in this edition.

The first article sets out the main features of the Electronic Transactions (Amendment) Bill 2023 which facilitates government departments and bureaux to achieve the Government's targets to turn all Government services online by mid-2024 and provide one-stop digital services by 2025.

The second article discusses the indoor management rule in Royal British Bank v Turquand which dispenses with third parties' need to investigate the companies' internal proceedings to satisfy themselves of the actual authority of the agents.

The third article outlines the main features of the Stamp Duty (Amendment) (Residential Properties) Bill 2023 which introduces a mechanism for suspension of payment of the Buyer's Stamp Duty and New Residential Stamp Duty for incoming talents' acquisition of residential property in Hong Kong.

We also feature three case reports in this edition.

In the first case, the court had to decide whether "time was of the essence" of an agreement for the sale and purchase of surgical masks in Hong Kong in early 2020 where the agreement did not contain an express provision.

The second case is about the exercise of the court's discretion to wind up foreign companies in Hong Kong. In the case, the court considered the three core requirements for the exercise of the discretion as stated in the CFA decision in Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd.

The third case is about the interpretation of s.82A of the Inland Revenue Ordinance which provides that any person who made an incorrect tax return should be liable to be assessed to additional tax. The CFA held that s.82A did not apply to a director of a company who signed the company's tax return.

YUNG Lap-yan

Introduction

To meet the rising expectation and changing needs of businesses and members of the public in the digital era, the Government is committed to promoting and improving delivery of public services through electronic means. In the 2022 Policy Address, the Chief Executive outlined the Government's goal of transitioning all government forms and applications to electronic form by mid-2024, except for those licensing and government services subject to legal requirements or international conventions/practices that may not be provided by electronic means.

Against that background, in November 2023, the Government introduced the Electronic Transactions (Amendment) Bill 2023 ("Bill") into the Legislative Council to amend the Electronic Transactions Ordinance (Cap. 553) (the "ETO") to facilitate the provision of e-government services.

The Bill

To facilitate the adoption of electronic means and delivery of e-government services, the Bill addresses two major areas of legal impediments which require legislative amendments to the existing ETO and related subsidiary legislation:

(a) service of documents in means other than by personal service or by post; and

(b) providing information and serving documents in multiple copies.

Service of documents in means other than by personal service or by post

Under section 5A of the ETO, if a rule of law under a statutory provision set out in Schedule 3 requires a document to be served on a person by personal service or by post, the provision shall be construed as also providing that service of the document in the form of an electronic record to an information system designated by the person satisfies the rule of law's requirement under the provision (if the information in the electronic record is accessible so as to be usable for subsequent reference). A "rule of law" is defined in section 2 of the ETO to mean "(a) an Ordinance; (b) a rule of common law or a rule of equity; or (c) customary law". Schedule 3 may be amended by the Secretary for Innovation, Technology and Industry from time to time by order published in the Gazette to include any statutory provisions with the rule of law that requires a document to be served by personal service or by post.

However, section 5A and Schedule 3 are restricted to service by personal service or by post. They do not cover other means of service of documents such as service by registered post.

With the advancement in digital technology, the Government considers it feasible and reliable for electronic service of documents to perform the unique functions of registered post, viz. providing a sender proof and an acknowledgement receipt. Hence, the Bill proposes amending the ETO to enable the service of an electronic copy of documents to satisfy the rule of law which requires service of documents by registered post. The Government also takes the opportunity to amend the ETO so that the service of an electronic copy also satisfies the rule of law requirement regarding other means of service of documents, such as service by means of filing, delivery or submission. The application of the ETO in respect of the service of documents will be much widened as a result of the legislative amendment.

By the Bill, more provisions on the rule of law requirement of service of documents in the News Agencies Registration Regulations (Cap. 268 sub. leg. A), the Newspapers Registration and Distribution Regulations (Cap. 268 sub. leg. B), the Road Traffic Ordinance (Cap. 374), the Film Censorship Ordinance (Cap. 392), the Film Censorship Regulations (Cap. 392 sub. leg. A), and the Land Drainage Ordinance (Cap. 446) will be added to Schedule 3 to the ETO. It will allow certain forms, notices, statements, directions, refusals, orders or requests under those provisions to be served by electronic means.

Providing information and serving documents in multiple copies

The second aspect of the amendments to the ETO pertains to serving documents or provision of information in multiple copies. There are currently provisions in a number of legislation that require serving documents or provision of information in multiple physical copies. Such requirements do not catch up with the increasing use of electronic records and may undermine the efficiency of adopting electronic submission.

The Bill proposes amending the ETO to allow the service of a single electronic copy to satisfy the rule of law which requires serving documents in multiple

copies. Schedule 3 to the ETO will also be amended to include relevant provisions in the Commercial Bathhouses Regulation (Cap. 132 sub. leg. I), the Food Business Regulation (Cap. 132 sub. leg. X), the Frozen Confections Regulation (Cap. 132 sub. leg. AC), the Milk Regulation (Cap. 132 sub. leg. AQ), the Offensive Trades Regulation (Cap. 132 sub. leg. AX), and the Aerial Ropeways (Safety) Ordinance (Cap. 211) to allow service of a single electronic record to satisfy the requirement of service of a document in multiple copies under those provisions.

Conclusion

The Bill facilitates government departments and bureaus to achieve the Government's targets to turn all Government services online by mid-2024 and provide one-stop digital services by 2025. As Hong Kong moves towards a digital future, the Bill sets the stage for a more connected and technologically-advanced society.

Angel Li

Apparent Authority and the Turquand Rule

Introduction

Companies are artificial entities that can only enter into contracts through their officers as agents. A company is liable for contracts made by its agents when acting within the scope of their authority, provided that the contracts are within the company's power[1]. The situation becomes more complicated where the agent acts outside the scope of his actual authority. Under what circumstances will the principal company be bound by the agent's act? Can a third party dealing with the company rely on the agent's authority? This article focuses on the doctrine of apparent authority and the indoor management rule ("Turquand Rule") established in *Royal British Bank v Turquand*[2] ("*Turquand*").

Apparent Authority

In *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd & Anor*[3] ("*Freeman*"), the defendant company's articles contained power to appoint a managing director but none was appointed. One of the directors who was not appointed as a managing director acted as such to the knowledge of the company's board, and instructed the plaintiffs for certain work on the company's behalf. The plaintiffs executed the work and claimed their fees. The Court held that the director's act in engaging the plaintiffs was within the ordinary ambit of a managing director's authority and the plaintiffs did not have to inquire whether he was properly appointed. Hence, the company was liable for the plaintiffs' fees.

According to *Freeman*, which was followed by the Court of Final Appeal in *Akai Holdings Ltd (in liquidation) v Thanakharn Kasikorn Thai Chamkat*[4] *("Akai")*, where a third party wishes to enforce a contract against a company entered into by a purported agent without actual authority, the third party has to establish that:

(1) a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to him;
(2) such representation was made by person(s) who had actual authority to manage the company's business;
(3) he was induced by such representation to enter into the contract; and
(4) under its memorandum or articles of association, the company was not deprived of the capacity to enter into a contract of the kind sought to be enforced or to delegate to the agent the authority to enter into a contract of that kind.

Representation

The representation which creates apparent authority may take a variety of forms. The commonest is representation by conduct – by permitting the agent to act in some way in the conduct of the principal company's business[5]. Representation made solely by an agent as to the extent of his authority does not amount to a holding out by the principal company[6].

In *First Energy (UK) Ltd v Hungarian International Bank Ltd*[7], a senior manager of a bank's branch represented to a client that he had no actual authority to approve a credit facility. The manager however notified the client subsequently of the "approval" by the bank's head office of the client's interim financing

1 Para. 279, Halsbury's Laws of England, Companies (Volume 14 (2023)) ("Halsbury's").
2 [1843-60] All ER Rep 435.
3 [1964] 2 QB 480.
4 [2011] 1 HKC 357.
5 *Freeman*, at 502.
6 Para. 25, Halsbury's Laws of England, Agency (Volume 1 (2022)).
7 [1993] BCLC 1409.

application. It was held that the bank was bound by the transaction. The senior manager's apparent authority to communicate the head office's decisions stemmed from his usual authority in the higher management position. It would be unrealistic to expect the client to check with the head office whether the transaction was approved.

Reliance

In a commercial context, a person should be entitled to rely on what he is told in the absence of any dishonesty or irrationality[8]. Reliance is generally presumed if the third party is able to prove that the company held the alleged agent out as having authority to bind the company, and that the third party subsequently entered into a contract with the alleged agent purportedly acting on behalf of the company[9].

The Turquand Rule

In *Turquand*, the directors had, in contravention of the company's articles, borrowed money on bond without passing any shareholders' resolution. The Court held that the bond was binding on the company on the ground that the other party was entitled to assume that the internal procedures to exercise the board's power to borrow had been legitimately carried out.

The Turquand Rule was subsequently explicated in *Morris v Kanssen*[10]: "persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular"[11].

The purpose of the Turquand Rule is to promote business convenience by dispensing with third parties' need to investigate the companies' internal proceedings to satisfy themselves of the actual authority of the agents and the validity of the documents[12]. However, it is important to note that the Turquand Rule cannot be used to create authority where none otherwise exists[13]. It operates only where the agent purporting to act on behalf of the company is acting within the scope of his actual or apparent authority[14].

Exceptions

The Turquand Rule does not apply if the third party has actual knowledge of the irregularity or has been put on enquiry as to whether there has been an irregularity[15]. In *Northside*, the company's common seal was affixed to a mortgage in contravention of its articles. The mortgage was executed to secure an advance to entities owned by the director who affixed the seal. The company had no interest in those entities. The Court held that a third party dealing with the company was not entitled to rely on the affixing of the seal to assume validity of the mortgage if the very nature of the transaction (i.e. entered into for purposes apparently unrelated to the company's business) was such as to put him on inquiry. The Turquand Rule did not apply in such case.

The Turquand Rule neither applies to a forged document which is a nullity[16]. In *Hua Rong Finance Ltd v Mega Capital Enterprises Ltd*[17], the director, who was entrusted with the company seal, submitted a board resolution bearing the forged signatures of two other directors for a loan application. The director then disappeared after withdrawing the money. The Court held that the loan agreement was null and void *ab initio* as the director did not have the apparent authority to procure the loan.

Concluding Remarks

The doctrine of apparent authority and the Turquand Rule are both subject to limitations for a claimant seeking to rely on them to prove validity of transactions with companies. It is therefore prudent to ascertain the agent's authority (preferably actual authority), such as requiring the companies to produce satisfactory documentary evidence as to the authority, before entering into such transactions.

Oswald Law

8 *Akai*, at [52].
9 *Ibid.*, at [75].
10 [1946] AC 459.
11 *Ibid.*, at 474.
12 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146 ("*Northside*"), at 164.
13 *Akai*, at [59].
14 *Ibid.*
15 Para. 270, Halsbury's.
16 *Ibid.*
17 [2001] 3 HKLRD 623.

Introduction

The Stamp Duty (Amendment) (Residential Properties) Bill 2023 ("Bill") was introduced into the Legislative Council in November 2023 to introduce a mechanism for suspension of payment of the Buyer's Stamp Duty ("BSD") and New Residential Stamp Duty ("NRSD") for incoming talents' acquisition of residential property in Hong Kong ("Suspension Mechanism").

This article outlines the major features of the Bill.

What is the objective of the Suspension Mechanism?

To attract and retain talents.

At present, acquisitions of residential property by non-Hong Kong permanent residents ("non-HKPRs") are subject to a stamp duty of 15% of the amount or value of the consideration, consisting of:

(a) BSD at 7.5%[18], which applies to all residential property transactions except for those acquired by a Hong Kong permanent resident ("HKPR") acting on his or her own behalf; and

(b) NRSD at 7.5%[19], which applies to all residential property transactions except for those acquired by a HKPR acting on his or her own behalf and not owning any other residential property in Hong Kong at the time of acquisition.

As one of the measures to attract and retain talents in the 2022 Policy Address, the Government has introduced a refund mechanism ("Refund Mechanism") under the BSD and NRSD regimes for non-HKPRs who have entered Hong Kong under designated talent admission schemes, purchased a residential property in Hong Kong on or after 19 October 2022 and subsequently become HKPRs.[20]

The Government is committed to attracting and retaining incoming talents from around the world with a view to injecting impetus to the growth of Hong Kong. With due regard to the property market situation as well as views received since the implementation of the Refund Mechanism, the Government considers that there is room to enhance the related arrangements to further facilitate home purchase of incoming talents. As such, the Government proposes to provide a mechanism for suspension of payment of BSD and NRSD for incoming talents' acquisition of residential property in Hong Kong.

Who is eligible under the Suspension Mechanism?

Eligible incoming talents.

An eligible incoming talent is a person to whom a specified talent scheme[21] applies (provided under Schedule 12 to the Stamp Duty Ordinance (Cap. 117) ("SDO")), who at the time of acquisition of the residential property, is not a beneficial owner of any other residential property.

What may be suspended?

BSD and part of NRSD.

If an eligible incoming talent purchases a residential property in Hong Kong on or after 25 October 2023 (i.e. the 2023 Policy Address date), he/she may apply to the Inland Revenue Department ("IRD") for suspension of stamp duty payment in respect of BSD and the difference between NRSD and the ad valorem stamp duty ("AVD") at Scale 2 rates (i.e. "specified amount") when presenting the instrument of acquisition to IRD for stamping. The eligible incoming talent still has to pay AVD at Scale 2 rates to IRD.

How to protect government revenue?

A statutory charge.

Upon IRD's vetting and approval of the application for suspension, a statutory charge will be constituted in favour of the Collector of Stamp Revenue ("Collector") automatically by law. IRD will register an instrument denoting the statutory charge (i.e. a certificate of charge) at the Land Registry ("LR"). In

[18] Reduced from 15% to 7.5% from 25 October 2023 onwards.

[19] Reduced from 15% to 7.5% from 25 October 2023 onwards.

[20] The enabling legislation, i.e. the Stamp Duty (Amendment) (No. 3) Ordinance 2023, was gazetted on 30 June 2023.

[21] The schemes currently specified in Schedule 12 to the SDO are the General Employment Policy, Admission Scheme for Mainland Talents and Professionals, Quality Migrant Admission Scheme, Immigration Arrangements for Non-local Graduates, Technology Talent Admission Scheme, Admission Scheme for the Second Generation of Chinese Hong Kong Permanent Residents and the Top Talent Pass Scheme. Any subsequent amendment to the scope of the specified talent admission schemes in future would be made by means of subsidiary legislation through the negative vetting procedure.

terms of priority, the statutory charge in favour of the Collector is proposed to be second only to the first mortgage for acquiring the property to the extent of a reserved amount [22] for striking a proper balance between protecting government revenue and allowing the eligible incoming talent to obtain a mortgage to finance the acquisition of the property concerned with relative ease.

What happens after an eligible incoming talent becomes a HKPR?

Specified amount waived and statutory charge discharged.

After the eligible incoming talent becomes a HKPR, he/she can submit an application for waiver to IRD for waiving the liabilities in respect of the specified amount. Upon IRD's vetting and approval, IRD will issue a certificate of discharge, which has the effect of discharging the statutory charge and is registrable at LR.

What happens if an eligible incoming talent fails to become a HKPR?

Liable to pay specified amount.

In the event that the eligible incoming talent fails to become HKPR within nine years from the date when he/she is permitted to stay in Hong Kong under the designated talent scheme (i.e. seven years of ordinary residence in Hong Kong plus two years as buffer), or under certain triggering circumstances[23], he/she will be liable to pay the specified amount to IRD within 30 days of the occurrence of the circumstance. If the eligible incoming talent fails to pay the specified amount timely, he/she will be liable to pay late stamping penalty, which is set with reference to the existing provision on "late stamping" under the s.9 of the SDO[24]. **Sandy Hung**

[22] The reserved amount would be the lower of (a) the sum of any outstanding principal and interest in respect of the loan for acquiring the subject property under the acquisition mortgage concerned and any costs due under that mortgage; or (b) an amount arrived at by deducting the specified amount from the amount/value of the consideration for the acquisition of the subject property to cater for cases where the sum of mortgage loan taken out exceeds the value/consideration of the property.

[23] The triggering circumstances are (a) on any date before the deadline for waiver – if the talent buyer/each of the talent co-buyers cease(s) to be a beneficial owner of the subject property, or a person, other than one closely related to the buyer or all of the remaining co-buyers, becomes a beneficial owner of the subject property; and (b) as at the deadline for waiver – in case where no liability has been waived by the Collector in respect of the specified amount.

[24] The late stamping penalty is to be imposed according to the following scale –
(a) Not exceeding 1 month – double the amount of the specified amount;
(b) Exceeding 1 month but not exceeding 2 months – 4 times the specified amount; and
(c) In any other case – 10 times the amount of the specified amount.

Ngan Wang Sang v Chang Bo Kwong Chris [2023] HKDC 1496

Facts

The Plaintiff ("P"), a sole proprietor, entered into an agreement (the "Agreement") by his daughter Madam Ngan with the 1st Defendant ("D1"), who was the sole director of the 2nd Defendant ("D2"), a limited company incorporated in Hong Kong, for purchasing 1,000 boxes of surgical masks (the "Masks") at the purchase price of HK$180,000 (the "Purchase Price"). The Agreement was evidenced by WhatsApp messages between Madam Ngan and D1, and an invoice issued by D2 to P (the "Original Invoice").

Two days after entering into the Agreement, P paid and transferred to the personal account of D1 the Purchase Price in full. Madam Ngan also requested D1 to issue an amended invoice (the "Amended Invoice") with a clause stating "client shall receive full refund in case goods above are out of stock on/before 23 March 2020" (the "Refund Clause") inserted into it.

The Masks were not delivered to P on 23 March 2020. Despite multiple extensions allowed for the date of delivery and demand for refund of the Purchase Price, D1 and D2 failed to deliver the Masks or refund the Purchase Price to P.

P claimed against D1 and D2 for damages of HK$180,000 as a result of D2's breach of the Agreement in failing to deliver the Masks on the agreed date of delivery and failing to refund the Purchase Price to P.

Issues

The issues before the District Court (the "Court") were:

(a) whether the Agreement was entered into between D2 and Madam Ngan in her personal capacity or on behalf of P;
(b) whether time was of the essence of the Agreement, and accordingly, whether D2 breached the Agreement; and
(c) whether P is entitled to the refund of the Purchase Price for total failure of consideration, and/or by reason of the principle of trust law.

Decision

Issue (a)

D1 and D2 contended that the Agreement was entered into with Madam Ngan in her personal capacity given the name and residential address of Madam Ngan were written in the Original and Amended Invoices instead of the name and business address of P. Nevertheless, the Court noted that in the contemporaneous WhatsApp messages between Madam Ngan and D1, Madam Ngan had repeatedly mentioned, and D1 had acknowledged in his reply, that she was purchasing the Masks for and on behalf of P. On this basis, the Court accepted that Madam Ngan was, at all material times, representing P in its dealings with D1, who was acting for D2.

Issue (b)

The Court held that there is no requirement that the phrase "time is of the essence" should be expressly provided in the contract verbatim, and time is still of the essence if a contract simply provides that the innocent party is entitled to terminate in the event of one party's failure to perform within the stipulated time. The Court accepted that it was common knowledge of the parties that the price of the surgical masks in the market would be fluctuated rapidly according to the circumstances of pandemic and the Refund Clause had stipulated the time for delivery of the Masks to P and the consequences of failing to do the same, viz. P would be entitled to a full refund of the Purchase Price. Hence, time was clearly of the essence for the Agreement, and D2 had breached the Agreement by failing to ensure the Masks were in stock with D2 in Hong Kong on 23 March 2020 as stipulated in the Refund Clause.

Issue (c)

The Court applied the concept of resulting trust in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council*[25] which stated that "*where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested… in B alone…, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A…*" and decided that, where Madam Ngan made the full payment of the Purchase Price by transferring the moneys to D1's personal account, the Purchase Price was vested in D1. Upon the failure of D2's delivery of the Masks on 23 March 2020 or the further extended dates of delivery resulting in the repudiation of the Agreement, the specific purpose for D1 to hold the Purchase Price of the Masks has failed. The Purchase Price was held in resulting trust for P and P shall be entitled for a refund of the Purchase Price.

Lilian Chiu

Re Guoan International Ltd [2023] HKCFI 666

Facts

Guoan International Ltd ("Company"), an investment holding company incorporated in the Cayman Islands, carried on business in Hong Kong through its subsidiaries in telecommunications and financial services industries. The shares of the Company were listed on The Stock Exchange of Hong Kong Limited.

On 28 February 2022, the Cayman court made a winding up order against the Company and appointed liquidators for the Company ("Liquidators"). On 30 March 2022, the Liquidators obtained an order from the Court of First Instance ("Court") recognising the liquidation of the Company and the appointment of the Liquidators ("Recognition Order").

On 2 December 2022, a creditor of the Company ("Petitioner") presented a petition before the Court seeking an ancillary winding up order against the Company. The petition was opposed by certain creditors of the Company ("OCs").

Legal principles

The statutory jurisdiction under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32) to wind up a foreign company is subject to three core requirements as stated by the Court of Final Appeal in *Shandong Chenming Paper Holdings Ltd v Arjowiggins HKK 2 Ltd* ("*Shandong Chenming*")[26]:

(1) There must be a sufficient connection with Hong Kong but this does not necessarily require the presence of assets within Hong Kong.
(2) There must be a reasonable possibility that the winding up order will benefit those applying for it.
(3) The court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

On the second core requirement:

[25] [1996] AC 669

[26] (2022) 25 HKCFAR 98, at [3].

(1) The test is whether there is a reasonable prospect that the petitioner will derive a sufficient benefit from the making of a winding up order, whether by the distribution of its assets or otherwise.
(2) The Court adopts a pragmatic approach in assessing whether it would be useful to make a winding up order against the foreign company.
(3) The leverage or benefit derived from the presentation of the winding up petition over a foreign company may constitute a benefit so long as the benefit can be said to be a real possibility.

(*Shandong Chenming* and *Kam Leung Sui Kwan v Kam Kwan Lai*[27] applied.)

Where a foreign company has already been wound up at its place of incorporation and is carrying on business "only for the purpose of winding up its affairs" under s.327(3)(a) of Cap. 32, the Court may make a winding up order ancillary to the one made by the court of its place of incorporation.[28]

Issue

In the present case, it was undisputed that the first and third core requirements were satisfied. The main issue was whether the second core requirement was satisfied.

Petitioner's arguments

The Petitioner pleaded that there was a reasonable possibility that the winding up order would benefit the Petitioner and other creditors of the Company as that would allow liquidators to be appointed in Hong Kong to deal with and dispose of a property owned by the Company's subsidiary ("Property") and to apply to set aside the Company's questionable antecedent transactions.

OCs' arguments

The OCs contended that the Petitioner's arguments could not justify the triggering of the local insolvency regime because:

(1) The sale of the Property had already been sanctioned by the Cayman court.
(2) The Petitioner could not explain why liquidators should be appointed in Hong Kong to re-open the challenges to the Company's antecedent transactions that had already been determined by the Court.

Further, the OCs submitted that the winding up order by the Court ancillary to the one made by the Cayman court might result in significant costs, time and resources being incurred or even wasted.

Decision

The Court held that the second core requirement was satisfied for the following reasons:

(1) The making of a winding up order against the Company was the *only* way to bring into operation the statutory scheme of winding up under Cap. 32. In the absence of the winding up order made by the Court, neither the Company nor the Liquidators could rely on or benefit from the use of any provision under Cap. 32.
(2) The OCs seemed to proceed on the erroneous assumption that the Recognition Order conferred power on the Liquidators to deal with and dispose of the Company's assets within Hong Kong. As explained in *Singularis Holdings Ltd v Pricewaterhouse Coopers*[29], the proposition that a domestic court had common law power to assist the foreign court by doing whatever it could have done in a domestic insolvency was wrong. The mere fact that the Liquidators had taken efforts to deal with and sell the Company's assets as if they had the power to do so did not imply that the Recognition Order granted them such power. It was necessary and certainly in the interests of the creditors for the Company to be wound up, so that the liquidators could deal with and dispose of the Company's assets. The benefits would far outweigh the *ad valorem* fees to be paid by the Company based on its assets realized if the Company were to be wound up in Hong Kong.
(3) As almost all business and affairs of the Company were conducted by the former directors and management in Hong Kong, it must be in the interest of the creditors that liquidators be appointed in Hong Kong, so that they could conduct the liquidation under the Court's supervision. The liquidators could exercise all of the powers under Cap. 32 to carry out their functions expeditiously and cost-effectively.

The Court was satisfied that there would be substantial benefits to the Petitioner and the Company's creditors as a whole if a winding up order were to be made against the Company in Hong Kong.

[27] (2015) 18 HKCFAR 501.
[28] *Re Up Energy Development Group Ltd* [2022] 2 HKLRD 993, at [46].
[29] [2015] AC 1675.

The Court made the winding up order against the Company. The OCs were ordered to pay the costs occasioned by their opposition to the petition.

Ida Chan

Koo Ming Kown & Anor v The Commissioner of Inland Revenue [2022] 25 HKCFAR 233

Facts

The Applicants, being the directors of the Company at the relevant time, respectively signed the Company's tax returns for the years 1996/1997, 1997/1998 and 1999/2000 ("Tax Returns"). The Tax Returns were later found to be incorrect. The Company was assessed additional tax under s.60 of the Inland Revenue Ordinance (Cap. 112) ("IRO") to which the Company unsuccessfully challenged. The Company did not pay the amounts assessed and was wound up by the Commissioner of Inland Revenue ("CIR").

At the relevant time, s.82A(1)(a) of the IRO rendered any person who without reasonable excuse made an incorrect return by omitting or understating anything in respect of which he was required by the IRO to make a return, either on his behalf or on behalf of another person, liable to be assessed to additional tax. The then s.57(1) of the IRO made any director of a corporation answerable for doing all such acts as were required to be done under the IRO by such corporation.

On the basis of the incorrect Tax Returns, the Applicants were assessed to additional tax pursuant to s.82A(1)(a).

The Board of Review upheld the CIR's assessments. The Applicants then appealed to the Court of First Instance ("CFI"), which allowed the appeal. The CFI's decision was upheld by the Court of Appeal ("CA") and the Court of Final Appeal ("CFA").

CFI's Judgment

The Applicants argued that s.82A(1)(a) did not apply to them as they did not fall within the description of a person who made an incorrect return by omitting or understating anything in respect of which he was required by the IRO to make a return. The argument was accepted by the CFI.

The CFI further noted that s.51(1) of the IRO was put into effect by the Inland Revenue Department ("IRD") via sending the Company a blank profits tax return form with a requirement printed thereon to make a return on that form. All the relevant s.51(1) notices were addressed to the Company. In such circumstances, it was the Company, rather than the Applicants, that furnished or made the Tax Returns in compliance with the requirements of the notices.

In this regard, the judge further elaborated that making or furnishing a tax return is a legal act capable of being said to have been done directly by a corporation albeit through physical steps undertaken by human beings. There is no doubt that a corporation could only furnish a tax return through acts of natural persons, and physical acts were necessary to achieve it: someone had to use a typewriter or a pen to fill in the form, someone had to sign in the box and someone had to post or deliver the completed form to the IRD, but it does not follow that these individuals, or one or a combination of them, or the board of directors who authorised or instructed them, made the tax return.

Accordingly, it was held that s.82A(1)(a) could not be applied to permit a penalty assessment to be made on the Applicants.

CA's Judgment

The CA similarly pointed out that the s.51(1) notices were issued and directed to the Company. Furthermore, it was found that the Applicants simply declared their belief in the correctness of the information in the Tax Returns – they did not assume the capacity of the makers of the Tax Returns merely by signing the declarations.

It was held by the CA that although s.57(1) made the Applicants (as the Company's directors) "answerable", it remained the Company which was required to do the acts, matters and things in question.

CFA's Judgment

The issue before the CFA was whether s.82A of the IRO permits the CIR to assess additional tax on a secretary, manager, director or liquidator who has physically signed an incorrect tax return of a corporate taxpayer.

CIR's argument

The CIR contended that it was the Company which was primarily required to make the Tax Returns, and any requirement under which the Applicants were acting was a secondary requirement. In such circumstances, both the Company and the Applicants were liable to additional tax under s.82A(1)(a). The Applicants' act in making the Tax Returns was done on behalf of the Company and attributed to the Company, which was "vicariously liable" but not to

the exclusion of the Applicants' liability.

Applicants' argument

It was the Applicants' contention that s.82A only covered a person who made an incorrect return, but did not make specific reference to the potential liability of an officer of a corporation who signed the corporation's incorrect tax return. On this basis, the Applicants argued that they did not fall within the statutory description.

CFA's analysis

For there to be an assessment to additional tax under s.82A, there must be an incorrect tax return and an amount of tax that has been undercharged in consequence of such incorrect tax return. It was accepted by both parties that a corporate taxpayer may be liable to additional tax under s.82A(1) if the corporation's tax return is incorrect.

Although the signing of the declaration at the conclusion of the tax return by a corporation's officer is part of the process by which the corporation acts to fulfil the requirement that it makes a tax return, it would be difficult to render such an officer the maker of the tax return because: (a) s.57(1) concerned all members of the class of persons to which it referred (namely, the secretary, manager, any director or the liquidator of a corporation) and did not single out any particular member (e.g. the Applicants in this case) as subject to a requirement to make the corporation's tax return; (b) it was the Company that was "primarily required to make the return", the collective requirement on the class of persons referred to in s.57(1) must be secondary – but this would result in something of a conceptual tangle as it was also the CIR's case that the Company was vicariously liable for the act of signing and making done by the Applicants; and (c) s.57(1) did not, in terms, impose a legal obligation on the officers whom it identified, either collectively or individually, primarily or secondarily, to do anything; s.57(1) merely made them "answerable" for doing certain acts which were required to be done by a corporation.

Conclusion

The CFA affirmed the decisions of the CFI and the CA that it was the taxpayer (i.e. the Company) that was required to make, and made, the Tax Returns. Hence, the CIR's appeal was dismissed.

Silvia Tang