

Hong Kong Tax Law

Cases and Materials

Revised Fifth Edition

AJ Halkyard

LLB (Hons) (ANU), LLM (Virg)
Adjunct Professor, Faculty of Law, University of Hong Kong
Consultant, International Tax Group, Baker & McKenzie
Hong Kong

Jefferson P VanderWolk

BA, MA, JD
Head of Pacific Rim Tax
Merrill Lynch
Hong Kong

Wilson W S Chow

LLB (Hons), LLM, Solicitor
Faculty of Law, University of Hong Kong
Consultant, Chu & Lau Solicitors & Notaries
Hong Kong

With a contribution from
Caroline Hague, BA
Formerly, Lecturer in Law, University of Hong Kong

LexisNexis

Hong Kong • Singapore • Malaysia • India
2009

Contents

<i>Preface to fifth edition</i>	v
<i>Preface to first edition</i>	vii
<i>Acknowledgments</i>	ix
<i>Table of Cases</i>	xv
<i>Table of Board of Review Cases</i>	xxv
<i>Table of Statutes</i>	xxix
<i>List of Abbreviations</i>	xxxiii
Chapter 1 Principles of Interpretation of Tax Legislation	1
A. Legislative purpose	4
B. An example	10
C. Relevance of tax decisions from Commonwealth jurisdictions	11
Chapter 2 Profits Tax: Trade, Profession or Business	13
A. Introduction to profits tax	13
B. The definitions in s 2(1)	13
C. Meaning of 'trade'	15
1. General meaning of 'trade'	15
2. The 'badges of trade'	17
3. The 'badges of trade' – summary and restatement	28
4. Does it all depend on intention?	32
5. Application of the general principles to land and share dealing	39
6. Special considerations relating to a company	41
7. Lack of profit motive	42
8. Hedge against inflation	43
9. Change of intention	44
10. Illustrative cases	47
D. Meaning of 'business'	49
1. Definitions	49
2. Letting of property	51
3. Use of a corporate vehicle	53
4. Normal versus abnormal exploitation of property	57

5. Continuity	58
6. Summary	58
E. Meaning of 'profession'	59
F. Cessation of a trade, profession or business	60

Chapter 3 Profits Tax: The Source Concept 61

A. Business must be carried on in Hong Kong	61
B. Profits must arise in or be derived from Hong Kong	71
1. 'Arise in' versus 'derived from'	71
2. Generally	71
3. Services	78
4. Trading profits	90
5. Manufacturing	99
6. Exploitation of intellectual property	102
7. Share dealing	105
8. Interest on loans	105
9. Concept of apportionment	108
10. Deemed source	115
11. Inland Revenue Department practice	116

Chapter 4 Profits Tax: Assessable Profits 125

A. Capital versus revenue receipts	126
B. Receipts of a compensatory nature: capital or revenue?	137
1. Payment for covenant not to work or trade	137
2. Sterilisation of a capital asset	139
3. Loss of profits	140
4. Cancellation of business contracts	143
C. Timing of assessability of trading receipts	148
D. Trading stock	150
1. Adjustment of profits annually	150
2. Deemed sales	154
3. Cessation of business	160
E. Exempt receipts	160
F. Special classes of business and taxpayers	161
1. Special classes of business	161
2. Clubs and trade associations	162
3. Partnerships	163
4. Husband and wife	163
5. Non-residents carrying on business in Hong Kong	163

Chapter 5 Profits Tax: Deductible Expenses and Losses 167

A. Deductible expenses	168
1. Has an expense been incurred?	168
2. To what extent was the expense incurred in the production of chargeable profits?	177
3. Was the expense a private or domestic expense?	200
4. Is the expense covered by a special provision?	202
B. Losses	207
1. Losses of an individual	208
2. Losses of a corporation	208
3. Losses of a partnership	209

Chapter 6 Profits Tax: Depreciation Allowances 211

A. Industrial buildings	211
B. Commercial buildings	221
C. Plant and machinery	223
1. Definition of 'plant'	226
2. Anti-avoidance provisions	236

Chapter 7 Property Tax 239

A. Who is liable?	239
B. Rate of property tax	240
C. What land is caught?	240
D. What amount is property tax levied on?	240
1. Consideration for the right to use land	240
2. Consideration 'payable' to the owner	241
3. Payable 'to, to the order of, or for the benefit of' the owner	241
4. Payable in 'money or money's worth'	241
5. Payment for 'right to use' land	241
6. Payment for services	242
7. Payment of premiums	242
8. Use of 'land and/or buildings'	242
E. Deductions from gross consideration	242
1. Advantage of using a service company	243
2. Irrecoverable rentals	243
3. Interest payments	243
F. Relationship with profits tax	244
1. Companies	244
2. Individuals	244
3. Avoidance of double tax	244

Chapter 8 Salaries Tax	249
A. Employment or office versus trade, profession or business	250
B. Does the income arise in Hong Kong?	261
C. Departmental Interpretation and Practice Notes No 10: The charge to salaries tax	269
1. Basic charge – Employment	269
2. Extension of charge – Employment	276
3. Exclusion from charge – Employment	277
4. Directors' fees	278
5. Exclusion – Tax paid outside Hong Kong	278
C. Is the income from the employment?	290
1. Reimbursement of expenses	307
2. Assessability of income: fringe benefits	309
D. Statutory exemptions and other special provisions	316
1. Share options	316
2. Housing benefits	320
E. Deductibility of expenses	327
F. Timing of receipt	336
G. Personal allowances, personal assessment and concessionary deductions	340
Chapter 9 Administration	343
A. Returns: Part IX, ss 51–58	343
B. Assessments: Part X, ss 59–63 and 70	345
C. Objections and appeals: Part XI, ss 64–70A	351
D. Payment of tax: Part XII, ss 71–77A	356
E. Penalties: Part XIV, ss 80–84	357
F. Advance rulings: s 88A and Schedule 10	361
Chapter 10 Anti-Avoidance Rules and Doctrines	363
A. Tax avoidance versus tax evasion	363
B. Case law doctrines	365
1. Form over substance	365
2. Purposive interpretation	367
C. Statutory anti-avoidance rules	379
1. Specific provisions	379
2. Specific anti-avoidance provisions	379
3. General anti-avoidance provisions	381
<i>Reading and Resources List</i>	405
<i>Index</i>	407

Table of Cases

Page references printed in **bold type** indicate where the case is set out in part or in full

	PAGE		PAGE
A		B	
A Solicitor v Law Society of Hong Kong [2008] 2 HKLRD 576, FACV No 24 of 2007	12	Banin v MacKinlay [1985] 1 All ER 842	354
Abenheim, Re (1913) 109 LT 219	58	Bank of India v Gobindram Naraindas Sadhwant [1988] 2 HKLR 262	272
A-G v Ashton [1904] 2 Ch 621, [1906] AC 10	185	Bank Voor Handel v Slatford [1952] 2 All ER 956	251
A-G v Chino Industries Ltd in voluntary liquidation) [1997] HKLRD 833	348	Banque Nationale de Paris v IR (1985) 2 HKTC 139	173
AL et al v The Commissioner of Income Tax [EATC Vol 2 at page 148]	137	Barclays Bank v Naylor [1961] 1 Ch 7	306, 308
Alexander v Wallington General Commissioners [1993] STC 588	345	Barclays Bank v Naylor 39 TC 256	314
Allied Mills Industries Pty Ltd v FCT (1988) 19 ATR 1724	145	Barclays Mercantile Business Finance Ltd v Mawson [2002] All ER (D) 195	378
Allied Mills Industries Pty Ltd v FCT (1988) 83 ALR 368, FC Australia, Gen Div	146	Barr, Crombie & Co v IRC (1945) 26 TC 406	145
American Leaf Blending Co Sdn Bhd v DGIR (Malaysia) [1978] 3 WLR 985	42, 54	Beak v Robson [1943] AC 352	306
American Leaf Blending Co Sdn Bhd v DGIR (Malaysia) [1979] AC 676	55, 56	Beautiland Co Ltd v CIR [1991] 2 HKLR 511 (PC)	33, 48
Ammonia Soda Co Ltd v Chamberlain [1918] 1 Ch 266, CA (Eng)	129	Bennet v Marshall (1937) 22 TC 73	263
Ammonia Soda Company v Chamberlain [1918] 1 Ch D 286	194	Bennett v Marshall [1938] 1 KB 591	266, 267, 268
Anglo-French Exploration Co Ltd v Clayson (1956) 36 TC 545	145	Benson (Inspector of Taxes) v Yard Arm Club Ltd (1979) 53 TC 67	230
Anglo-Persian Oil Co Ltd v Dale [1932] 1 KB 124	191	Black Nominees Ltd v Nicol (1975) 50 TC 229	368
Argosy Co Ltd v CIR (Guyana) [1971] 1 WLR 514, PC	347, 348	Blake v Shaw (1860) John 732	226
Artemis, The [1983] HKLR 364	64	BP Australia Ltd v Commissioner of Taxation [1966] AC 224 (PC)	194
Associated Portland Cement Manufacturers Ltd v IRC [1946] 1 All ER 68	192	Brand Dragon Ltd v CIR (2002) HKRC 90; HCIA 2/2001 (November 2001)	33, 36
Avco Financial Services Ltd v FCT 82 ATC 4246; (1983) 13 ATR 63	198	Bray v Best [1989] 1 WLR 167	340
		Bray v Colenbrander and Harvey v Breyfogle (1953) 34 TC 138	263, 266
		Brigg Neumann & Co v IRC (1928) 12 TC 1191	152