海外利潤豁免課稅

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判斷海外豁免的準則

稅務條例第 14(1)條規定了利得稅(profits tax)的徵稅範圍(scope of charge) — 只有源於香港或得自香港的利潤(profit arising in or derived from Hong Kong)才須徵稅。換句話說，即使納稅人在香港經營業務(trade, business or profession)，但如果某項利潤並非來自香港，他亦無須為該項利潤繳交利得稅。

根據案例，「利潤來源 source of profit」，是一項事實的問題，但也是一項如何按法律原則找出結論的法律問題。事實上，對於跨國公司，或業務牽涉香港及外地的公司，利潤來源是一項經常爭議的稅務課題，但對於一些主要在本港經營的公司，稅局通常不會接受納稅人以利潤來自港外業務的豁免申請。

在 CIR v Euro Tech (Far East) Ltd 案件中，法官指出，在判斷利潤來源時，最主要的考慮因素是: 在賺取利潤時，納稅人做了些什麼，以及他在何處做，至於公司的行政及輔助工作，是無需考慮的。

在 CIR v Hong Kong & Whampoa Dock Co. Ltd 和 CIR v International Wood Products Ltd 案件中，法官不約而同地指出，釐定利潤來源，是一個實際而困難的事情：The source of income is a practical, hard matter of fact。

在 CIR v Hang Seng Bank Ltd 案件中，法官指出，最首要的原則是: 追查納稅人做了些什麼去賺取利潤，和他在何處做了這些工作 The leading principle is to look to what the taxpayer has done to earn the profits in question and where he has done it。

在 CIR v HK-TVB International Ltd 案件中，法官指出，最基本的方法是：找出

什麼行動引致有關利潤 The basic approach is to ascertain what are the operations that gave rise to the profits and where are they?

以上原則，看來相當清晰，但當應用到實際個案時，郤偶有爭議，而最具爭議的關鍵是：什麼是最能賺錢的活動或工作？以一間提供法律、會計、或顧問服務的公司來說，稅局是不會接納有關貨物的買賣地點為考慮因素。在 Kwong Miles Services Ltd. v CIR 案中，公司於內地發展地產獲利，稅局以獲利是基於香港執行的包銷合約(contract for underwriting sales)而賺取的，所以雖則物業在內地，但海外豁免不適用，法院同意稅局的評稅，判納稅人敗訴。此外，在稅務上訴委員會個案 D14/96 中，一間旅行社申請海外旅行團的利潤免稅，稅局認為業務地點(即出售為最賺錢的活動)在港為理據，拒絕申請，委員會同意稅局的理據，亦判納稅人敗訴。

海外豁免案例論析

以下是評稅主任經常引用的案例，由於案件判詞是英文，以及評稅準則亦是英文，故以下論析亦採用英文。

CIR v The Hong Kong Whampoa Dock Co. Ltd.

This case concerns the profit derived by a Hong Kong ship-building company from a ship-salvage operation performed in waters outside Hong Kong's boundary. The company argued that because the operation was done outside Hong Kong, the profit was not taxable. The Board allowed the company's appeal. CIR appealed to the court. The court upheld the Board's decision and held that the payment of services is of no importance in deciding the issue and because almost the entire services performed, which gave rise to the profits, were performed outside Hong Kong, the profit did not arise in or derive from Hong Kong.

CIR v Euro Tech (Far East) Ltd.

The taxpayer was incorporated in Hong Kong. It was a subsidiary of a UK public company. Its business comprised of marketing and trading of electronic equipments. The equipments were bought from the UK parent company as well as from within the group companies. It entered into a distributorship agreement with a Korean company and a Singaporean company. Having received orders from these two companies, the taxpayer sent orders to its UK parent or group companies. Then, the equipments were shipped directly from UK to the two companies. The profit earned by the taxpayer was assessed to Profits Tax. The taxpayer appealed to the Board who allowed the appeal. Then, CIR appealed to the High Court and got the Board's decision reversed. The court ruled that it was the bridging operations done by the taxpayer between the UK companies and the two overseas buyer companies in Hong Kong that gave rise to the profit. The court said: "If a taxpayer has a principal place of business in Hong Kong, it is likely that it is in Hong Kong that he earns his profits. It will be difficult for such taxpayer to demonstrate that the profits were earned outside Hong Kong and therefore not chargeable to tax."

CIR v International Wood Products Ltd.

The company acted as agent for two overseas principals for sale of logs. It appointed sub-agents outside Hong Kong for the sale. Orders and payments were sent directly to its principals. The company received commission and passed on sub-commission to the sub-agents. Profits Tax assessments were raised to assess the amount retained by the company. The Board annulled the assessments because the work giving rise to the commission was found outside Hong Kong. This decision was upheld by the court saying that the source of the commission income was the place where the services were rendered to earn the income and the source in the case was outside Hong Kong --- the services done by the sub-agents outside Hong Kong --- even though the company did some ancillary services in Hong Kong.

CIR v Karsten Larssen & Co. (H. K.) Ltd.

The case also concerned commission involving overseas services but the commission was held to be taxable. In the case, the commission was earned by a ship broker for seeking charterers and concluding charter agreements. Although some services were carried out overseas by an agent appointed by the taxpayer, the profit retained by the Hong Kong company was held to be derived from Hong Kong --- based on the fact that there was an agreement identifying the taxpayer and the overseas agent and their share of the commission.

Sinolink Overseas Ltd. v CIR

The company bought plywood for sale in Hong Kong and mainland China. The company did not have an office in China but had one in Wanchai. Its sales to China were concluded in China by a director who had full power to sign contract on behalf of the company. After conclusion of the sales, the company sent purchase orders to overseas manufacturers. The company argued that it had carried on two businesses: one in Hong Kong and the other in China. Both arguments were rejected by the court. Applying the operations test, the judge Hunter J ruled that it was the activities of the Hong Kong office that produced the profits. The reasoning is as follows: (1)The setting for business and the logistics for the purchase and sale were all done in Hong Kong. (2)The purchases were managed and arranged in Hong Kong. (3)The China sales were concluded in China. But the company's profits should be regarded as from both the purchase and sale. This factor could not alone make the profit from China sales non-taxable. (4) The post-contract activities and management work were done in Hong Kong. On a totality of the above factors, the judge concluded that all the profits --- whether from Hong Kong sales or China sales --- were taxable. The decision in Sinolink case is controversial. Its importance has been falling, especially after the recent case CIR v. Magna Industrial Company Ltd.

CIR v. HK-TVB International Ltd.

The taxpayer (hereinafter called TVBI) carried on the business of licensing films that had been produced by its parent company HK-TVB Ltd (hereinafter called TVB). Pursuant to agreements between the taxpayer and TVB, the taxpayer was granted the exclusive right to broadcast and export TVB's television films and programs outside Hong Kong and to grant sub-licenses to others. The negotiations between the taxpayer and its customers usually took place outside Hong Kong. The business contracts signed by the overseas customers were sent to the taxpayer in Hong Kong for conclusion. The taxpayer objected to the profits tax assessment on the grounds that the profits were outside Hong Kong. The Board agreed to the taxpayer's arguments. The case finally went to Privy Council. It was held that the profits were assessable because the operations producing the profits --- the acquisition of the exclusive rights of granting sub-licenses together with the relevant films and the grant of those sub-licenses together with the provision of the film by contracts with individual customers --- were carried out in Hong Kong.

CIR v Emerson Radio Corporation

The taxpayer is an American corporation manufacturing and selling electronic equipments. It was the registered owner of a trade mark “E”. It had a wholly owned subsidiary in Hong Kong. The Hong Kong subsidiary contracted with manufacturers in

various Asian countries, including Hong Kong, for the manufacture of electronic equipment to be sold mainly in US. No goods were sold in Hong Kong. Profits tax was paid by the Hong Kong subsidiary in respect of its trading profits arising from its course of business in Hong Kong. The Hong Kong subsidiary had entered into a royalty agreement with the taxpayer under which the Hong Kong subsidiary was allowed to use the trade mark on goods sold by the Hong Kong subsidiary to the US. CIR assessed the taxpayer to profits tax on its royalty income under Section 15(1)(b). The taxpayer appealed to the Board on the grounds that the trade mark was not used in Hong Kong. The Board dismissed the taxpayer's appeal and ruled that the royalty income was indivisible sum --- it could not be apportioned between goods manufactured in Hong Kong and goods manufactured outside Hong Kong. The taxpayer appealed to Court of First Instance. It was held that only the royalty income attributable to the goods manufactured in Hong Kong is taxable and the income attributable to the goods manufactured outside Hong Kong is not taxable. Therefore, apportionment of income could be made. The ruling of the Court of First Instance was upheld by the Court of Final Appeal.

Bank of India v CIR

The Bank was carrying on business in Hong Kong and was active in trade financing through discounting of foreign bills. The bills originated from international trade. The drawers of the bills, companies of Hong Kong, were suppliers of goods. The drawees were importers of goods residing outside Hong Kong. The Bank was the payee. On application of the customers, the Bank discounted the bills and paid the proceeds to the customers in Hong Kong while the collection of the value of the bills on maturity was performed overseas by the Bank's agent. The Bank made profits from the difference between the costs of the bills and proceeds on the maturity of the bills. The profits were assessed to Profits Tax. The Bank appealed to the Board who decided in favor of CIR. The Bank appealed to the High Court. CIR won. It was held that the operations from which the profits arose took place in Hong Kong.

Board of Review case D14/96

The company was a travel agent selling outbound tours through its retail outlets in Hong Kong. It claimed that the outbound tour income should not be assessable because such income arose mainly from activities outside Hong Kong. The Revenue disallowed the claim and the company appealed to the Board of Review. The Revenue contended that the income was derived from the buying and selling of tour packages and all such activities were done in Hong Kong. In fact, the company had a number of retail outlets in Hong Kong. It also purchased all airline tickets for its tours in Hong Kong. The Board’s approach was to analyze the case by identifying the company’s activities concerning the issue. It found that the company’s relevant activities consisted

of:

1. the marketing and sale of the tours through its retail outlets
2. the purchase and sale of airline tickets
3. the discharging of the obligations of the company and its agents for the tour services

No doubt, the first and second type of activities were done in Hong Kong. As for the third activity, the Board found that it took place mainly outside Hong Kong. In this activity, although no formal agency agreement was entered into by the company with its land operators in each tour destination, the land operators acted on behalf of the company to perform the various activities which the company had contracted to provide for the tour. The relationship between the company and the land operators was based on trust and the land operators should be regarded as agents of the company and their activities were also relevant to the earning of the profits. The Board considered whether the profits should be apportioned between the three activities. However, the Board found this question problematic because neither the company nor the CIR admitted the possibility of apportionment. The Board said: “Presumably this was on the basis that the profit was on inseparable whole obtained as the indiscriminate result of the entirety of operations.” So, the Board adopted the principle of the Whampoa Dock case: where apportionment was not possible, the locality where the profits arise must be determined by considerations which fasten upon the acts more immediately responsible for the receipt of the profit. Having considered all the relevant facts, the Board took the view that the first and second activities namely marketing and sale of the outbound tour in Hong Kong was more immediately responsible for the receipt of the profit. The Board therefore held that the profit arose in Hong Kong and was taxable.

Exxon Chemical International Supply SA v CIR

The taxpayer was the wholly-owned subsidiary of a multi-national corporation in the USA. It carried on business in Hong Kong and the Bahamas. In the course of business in Hong Kong, it purchased goods from one affiliate within the group and sold them to another at a profit. The taxpayer invoked Section 70 A to correct a profits tax assessment on the argument that all services (for example shipping of goods) were performed outside Hong Kong. After his claim rejected by CIR, the taxpayer appealed to the Board which upheld the CIR's determination. The taxpayer then appealed to High Court and his appeal was dismissed.

In the Exxon case, the court said: "ECIS submits that before deciding where a profit is derived (or, I suppose, where it arises) it is necessary first to determine how the profit is derived and then (and then only) secondly to determine where it is derived. I am content for the purposes of the present case to accept this; having already demonstrated how the profit on the transaction in question was derived I can satisfy myself that it was derived from a “mark-up” on sales (as ECIS itself submitted) and I can go on to consider where it was derived. I ask myself: Where did ECIS obtain the buyer's order for the goods? The answer is that it obtained that order in Hong Kong. I ask myself: Where did ECIS place its

order with the seller for the goods to meet the buyer's requirement? The answer is that it placed that order from Hong Kong. These acts, the obtaining of the buyer's order in Hong Kong and the placing of the order with the seller from Hong Kong, are the foundations of the transaction; for it is the differential between the selling price and the buying price ("the mark-up") which generates, indeed represents, the profit... In my judgment (and on this I agree with the Board), on the facts ECIS derived its profit from what it did in Hong Kong. The income which arose from the "mark-up" taken by ECIS arose where the mark-up was taken; that is to say, in Hong Kong. No doubt, income arose on the delivery of the goods to the buyer, but that was the income of those responsible for getting the goods from Houston to Singapore. The only income of ECIS was its "turn" between the selling and buying prices. ECIS does not operate, outside Hong Kong, any activity with a view to profit. It is in my view immaterial that the subject of the transaction, effected in this case by the acceptance of ECIS of the order from the buyer and matched (at a profit) by its own order placed with the seller, was a load of lube oil additive destined for transhipment from the USA to Singapore. The business was transacted in Hong Kong."

CIR v. Magna Industrial Company Ltd.

The taxpayer was a limited company carrying on business in Hong Kong. It acquired industrial products from its wholly-owned subsidiary and sold them to overseas customers. The subsidiary acquired the products from overseas suppliers and warehoused them in its name in Hong Kong. The taxpayer set up a sales network comprised of independent contractors in their own countries. The independent contractors were to find suitable distributors, to train and supervise them and to promote the sale of the taxpayer's products. The independent contractors were authorized to enter into sales orders. The independent contractors sent the sales orders to taxpayer in Hong Kong for processing. Then, the taxpayer bought the goods from its subsidiary and shipped the goods to the customers and collected the sales money. The profit made by the taxpayer on the sale of the goods was assessed to Profits Tax. The taxpayer appealed to the Board successfully. It was held that the activities in the purchase of products were those of the wholly-owned subsidiary, and not the taxpayer, and the sales of products were effected by a network of overseas independent contractors who had the authority to bind the taxpayer to specific orders. Therefore, the profits were derived outside Hong Kong. CIR appealed to the High Court. The High Court allowed CIR's appeal based on the findings that the subsidiary was the taxpayer's agent in its purchase activities in Hong Kong. The taxpayer appealed to Court of Appeal. This time, the taxpayer won and the Board's findings and decision were restored.

Note the following court comments: "More often than not, it would not be the quantity of activities but the nature and quality of them that matters more. The cause and effect of such activities on the profits is the determining factor. It is what role such activities played and the relative importance of them in the making of profits that would usually tilt the scale and not the number of activities carried out at a particular place… This is a case of trading profit and the purchase and the sale are the important factors. We place on record that

we have included in our deliberations all of the relevant facts and not just the purchase and sale of the products. Clearly everything must be weighed by a Board when reaching its factual decision as to the true source of the profit. We must look at the totality of the facts and find out what the Taxpayer did to earn the profit... Obviously the question where the goods were bought and sold is important. But there are other questions: For example: How were the goods procured and stored? How were the sales solicited? How were the orders processed? How were the goods shipped? How was the financing arranged? How was payment effected?"

It is noteworthy that different judges have different decisions on the same issue in the same case. This reflects the practical difficulty in identifying what is the immediate operation to earn the profit in question. The reality is: If the IRD disallows an off-shore claim, the taxpayer has to appeal to the Board or even the court and then to bear all the costs involved and the uncertainty of the judgment. Therefore, a prudent taxpayer must endeavor to put forward all the relevant facts as early as possible to convince the IRD to accept his claim.

Wardley Investment Services (Hong Kong Limited) v CIR

Taxpayer was a company incorporated in Hong Kong and carried on business as investment adviser. In the course of business, it arranged for sale and purchase of overseas securities on behalf of its clients; and from such activities it earned rebate from overseas stock-brokers. The rebate was assessed but the taxpayer appealed to the Board against such assessment. In its decision, the Board of Review ruled that the rebate was not assessable. The ruling was based on the 'operation test' and its findings that the 'operations' giving rise to the profits were done outside Hong Kong. The Board's findings and decision were overturned by the High Court. The taxpayer appealed to Court of Appeal. It was held by majority that the profits were taxable because the taxpayer did nothing outside Hong Kong to earn the profits. Author's comment: In my experience, it is hard to convince the Revenue to accept the offshore claim where the taxpayer's activities outside Hong Kong were minimal. It should be noted in this case that the overseas operations giving rise to the profits were not done by the taxpayer but by the overseas stock-brokers.

Commissioner of Inland Revenue v. Hang Seng Bank Ltd.

This case concerned the investment activities of a Hong Kong bank in the purchase and sale of certificates of deposit, bonds and gilt edged securities. Both the purchase and sale of these financial instruments (that gave the profits) took place outside Hong Kong (in London and Singapore). It was held that the relevant profits were made as a result of activities that took place outside Hong Kong even though the decision to buy or sell the instruments in question was made in Hong Kong. Accordingly, the profit was not taxable. It should be noted that after this case the relevant law was amended, vide section 15(1)(l), so that such income of a Hong Kong fincancial institution, whereever it took place, was deemed to be chargeable income.

It was held that there were three conditions for a charge to arise:
(1) the taxpayer must carry on a trade, profession or business in Hong Kong;
(2) the profits to be charged must be "from such trade, profession or business" carried on in Hong Kong;
(3) the profits must be "profits arising in or derived from" Hong Kong."

The principle derived from this case is: "one looks to see what the taxpayer has done to earn the profit in question."

To summarize, Lord Bridge of Harwich made the following comments: “It is not enough for the purposes of section 14(1) merely to find the existence of profits which have been made by a business carried on in Hong Kong. It does not follow that such profits arose in or were derived from Hong Kong. Thus, for example, the fact that a company carries on business in Hong Kong (as many Hong Kong companies do) does not mean automatically that all its profits become liable to profits tax. One must go further to inquire whether the relevant profits actually arose in or were derived from Hong Kong. These are the very words found in section 14(1) as well as other related parts of the Ordinance such as section15 and also rule 2A of the Inland Revenue Rules… The three conditions must be satisfied before a charge to tax can arise under section 14: (1) the taxpayer must carry on a trade, profession or business in Hong Kong; (2) the profits to be charged must be 'from such trade, profession or business,' which their Lordships construe to mean from the trade, profession or business carried on by the taxpayer in Hong Kong; (3) the profits must be 'profits arising in or derived from' Hong Kong. Thus the structure of the section presupposes that the profits of a business carried on in Hong Kong may accrue from different sources, some located within Hong Kong, others overseas. The former are taxable, the latter are not. The determination of whether or not profits arise in or are derived from Hong Kong is ultimately a question of fact depending on the nature of the relevant transactions:-see 322H(4). However, the "broad guiding principle" is that one must look to see what the taxpayer has done to earn the relevant profits. Section 14(1) also requires that the relevant profits must have arisen from activities or operations carried on by the taxpayer in Hong Kong. This last requirement follows from the words in section 14(1), "assessable profits arising in or deriving from Hong Kong".

Kwong Mile Services Limited v CIR

The taxpayer carried on business in Hong Kong. It got profit from a property development in mainland China. Such profit was assessed to Profits Tax. In fact, the profit was from its underwriting of the sale of the property in Hong Kong. The underwriting contract was a two-page document and contained six short clauses. The taxpayer agreed to underwrite the sale of the units in the building in the sum of $84,314,015. The underwriting period was up to 30 June 1992. If on or before that day, the total price the developer received from the sale of the building exceeded $84,314,015, then the developer would pay the difference to the taxpayer. If the amount was less than the underwritten amount, the taxpayer would

have to pay the difference to the developer and take up the unsold units. To implement the underwriting, the taxpayer advertised the property development in Hong Kong and secured contracts of sale for the units with purchasers in Hong Kong. The purchasers had to sign in Hong Kong a "pre-contract provisional agreement" with the developer. The taxpayer arranged for these purchasers to go to Mainland to sign a pre-contract formal agreement" with the developer. The taxpayer was not a party to these agreements. The sale was a big success. The amount from the sale exceeded the underwritten sum of $84,314.015. The taxpayer received the agreed difference from the developer. The taxpayer appealed to the Board against the Profits Tax assessment. The Board allowed the taxpayer's appeal. Then, CIR appealed to High Court and CIR won. Then, the taxpayer appealed to Court of Appeal and again, CIR won. The court ruled that it was the underwriting of the sale that gave rise to the profit and because the underwriting was substantially carried out in Hong Kong, the profit derived from Hong Kong and therefore taxable.

CIR v Orion Caribbean Ltd

This case concerns source of interest income. In this case, the company received deposits from its holding company outside Hong Kong. Then, it lend the money to a person outside Hong Kong. The CIR argued that by accepting the deposits the company was a financial institution under section 15(1)(i) and therefore the interest income is taxable. This argument was rejected by the court. The following court's comments are noteworthy.

"There are three difficulties inherent in this proposition. The first is that it attributes to Lord Bridge's words, even if they are taken in isolation, a rather broader meaning than that which they naturally bear. Lord Bridge speaks of profit earned ‘by the exploitation of property assets as by letting property, lending money or dealing in commodities or securities'. The reference to ‘property assets' in relation to the letting of property or the lending of money may have been intended to refer simply to the exploitation of property or money owned by the taxpayer. If ORPL lent its own money to a borrower in, say, New York, then other things being equal there might be little difficulty in saying that the location of the source of the interest on the loan was New York. If on the other hand, Lord Bridge was intending to cover, by his examples, a case such as that of OCL where they money has to be borrowed before it can be lent – like the commodities which have to be bought before they can be resold – it would be surprising if he were suggesting that regard should be had solely to the place of lending, to the exclusion of the place of borrowing. Secondly, and more generally, the proposition that Lord Bridge was laying down a rule of law to the effect that, in the case of a loan of money, the source of income was always located in the place where the money was lent, is one that cannot stand with the opening words of Lord Bridge quoted above, nor with the explanation of his remarks by Lord Jauncey in the HK-TVB case, nor with the whole range of authority starting from the judgment of Atkin LJ in F.L. Smidth & Co v Greenwood onwards, to the effect that the ascertaining of the actual source of income is a ‘practical hard matter of fact', to use words employed, again by Lord Atkin, in Liquidator, Rhodesia Metals Ltd v Commissioner of Taxes [1940] AC 774 at page 789. No simple, single, legal test can be employed..."

In general, the IRD will adopt the "provision of credit" test to decide the source of interest income. However, because of the above court comments, other tests may be used if the "provision of credit" has apparently been used as a trick to avoid tax.

一般評稅準則

據本人經驗，以下是評稅主任的一般評稅準則:

<u>貿易公司的利潤</u>

在釐定買賣貨物利潤來源地時，一般根據買賣合約訂立的地點。法理上，「訂立」包括商議、訂立、及執行合約。以下是買賣貨物評稅的基本原則:

- 若買貨合約與賣貨合約俱在港訂立，利潤須課稅。
- 若買貨合約與賣貨合約俱在香港境外訂立，利潤不須課稅。
- 若買貨合約與賣貨合約其中一項在港訂立，稅局會先假定利潤須課稅，然後再考慮全部事實，才確定利潤的來源地。
- 若銷售對象是香港人，稅局會認為賣貨合約在港訂立。
- 若有關人士不須離港，而是透過電話或電子媒介來訂立合約，稅局會認為合約在港訂立。
- 買賣貨物的利潤不可攤分。

<u>製造業務的利潤</u>

製造業務的利潤來源地是製造貨品的地點。香港製造的貨品的利潤， 須全部課稅。若製造工序部分在港進行，部分在香港境外進行，利潤可以攤分。

<u>買賣交易的佣金</u>

稅局認為提供促成交易的服務地點是佣金的來源地，而委託人 (即貨物或服務的賣家) 的所在地、及代理人 (即買賣雙方的中介人) 如何接觸委託

人，通常與佣金來源地無關。若賺取佣金的服務 (即代理人物色買家及安排買賣) 在港外進行，佣金不須課稅。

物業的租金收入及買賣利潤

若有關物業在香港境內，便須課稅；否則，不須課稅。

買賣股票的利潤

若有關股票買賣在香港證券交易所進行，便須課稅；否則，不須課稅。惟對在港經營金融業務的公司，稅局不會輕易以此豁免，而會以業務所在地及資金來源為主要考慮。

服務費

若服務在香港提供，便須課稅；否則，不須課稅。

利息收入

若貸款人在香港提供款項(provision of credit in Hong Kong)，便須課稅；否則，不須課稅。惟對在港經營金融業務的公司，稅局不會輕易以此豁免，而會以業務所在地、決策地點及資金來源為主要考慮。

按地域來源攤分利潤 Apportionment of profit

基於案例，在決定一項利潤是否源自香港時，主要的考慮是：什麼「行動 operations」或者是什麼「工作活動 activities」賺取了該項利潤。在 CIR v HK Whampoa Dock Co. Ltd 案件中，法官 Renee J 就以救護船隻的行動(ship salvage operation)在香港境外而判定行動的利潤不須課稅，法官指出：倘若有關利潤是不可分割，其來源地就以最緊接利潤的行為來決定 Where the total profit is an inseparable whole..., the locality where the profit arises is to determined by

considerations which fasten upon the acts more immediately responsible for the receipt of the profit.

基於上述判決，如果有關利潤是不可分割，它就不可以按地域來源攤分，換言之，一就是全數徵稅，一就是全數免稅 [如 3.9 節提及，稅局一向認為買賣貨物的利潤是不可分割的]。但上述判決並沒有解釋什麼利潤是不可分割的(inseparable)，也沒有判令如果有關利潤是可以分割的(separable)，利潤是否可以按地域來源分攤徵稅。

由於稅務條例第 14 條沒有禁止將溢利按地域來源攤分，所以，在實務上，如果部份利潤是由香港以外的「行動 operations」或者是香港境外的「工作活動 activities」所賺取，納稅人可要求將屬於境外賺取的利潤豁免繳稅。

來料加工

事實上，最常見的按地域來源分攤利潤的例子，就是納稅人的業務有部份在內地進行，例如在內地開設工廠。在這些情況下，稅局通常會將有關利潤以 50:50 分攤，即只有一半利潤才須徵稅。這種利潤分攤，主要適用於「來料加工 contract processing」的個案。

「來料加工」，又稱「三來一補」，是指香港公司與內地政府單位簽訂加工合同 processing contract：所謂「三來」，就是由香港公司提供原料、機械和技術，而「一補」，就是香港公司提供金錢補助；內地單位則提供土地及工人，以獲得租金及工資，而所有生產設備及貨物，仍屬港商。這種合作方式，在七十年代初期盛行，但到了九十年代，當內地單位掌握生產技術後，便要分享利潤，所以，有些內地單位便不再繼續接受「來料加工」的合作模式，而改由雙方另設獨立的法人公司，並採用「外判加工」來為香港公

司提供生產服務。

外判加工

在「外判加工，又稱進料加工 import processing」的個案中，由於根據有關業務合約條款，納稅人必須在內地與國內機構成立獨立公司去進行生產，所以，一般來說，稅局不會接納利潤按 50:50 分攤來徵稅。不過，納稅人可將向獨立公司支付的貨款，以營運支出全數扣稅。

貨物轉移定價 Transfer pricing

當納稅人與有關連的公司進行貨物轉移，基於兩者關係密切，稅局或會質疑貨物轉移價(transfer price)是否合理。要判定是否合理，最好是用公開市場(open market)中的同類貨品來比較，即所謂 comparable uncontrolled price (CUP)，如果它沒有同類貨品，例如它是半製成品，稅局會以該貨品在完成後或最後推出市場的市價(resale price)，減去加工或額外成本，來判定帳目中的轉移定價是否合理；如果認為不合理，而又能在公開市場找到類似交易，稅局會傾向以市場公開價(market price)來徵稅，若沒有類似交易，稅局會考慮以有關集團的全球利潤(world-wide profits)為評算基準(basis of assessment)，然後按香港公司的功用(function)於全球貿易的貢獻比率(contribution ratio)來計算應課稅利潤 (即功用分析法 functional analysis)。

怎樣釐定「全球利潤」？一般來說，稅局會參照有關集團的綜合會計帳目(consolidated accounts)，找出集團(group)的全球利潤(global rofits)及其會計準則(accounting practices)，然後按香港的評稅原則及慣例調整。

怎樣釐定「香港公司的功用於全球貿易的貢獻比率」？當然，這個是一個事實問題，而且頗具爭議，一般來說，稅局會考慮香港公司在集團的業務角色、性質、資產、工序、僱員人數...等因素，如果在公開市場中有同類公司、業務或產品可供比較，稅局會參考市場資料；如果沒有，就會透過談判解決，倘若稅局與納稅人不能達成協議，稅局就會按自己的計算方法向納稅人發出估稅，那麼，如果納稅人不滿估稅，就只得循反對程序上訴至稅務上訴委員會，那時，納稅人須提出理據，推翻稅局的計算方法。為了避免稅局挑戰(challenge)納稅人的貨物轉移定價，納稅人最好釐定一套合理的貨物轉移定價準則。如何釐定合理準則？一些國家，如中國、美國有既定指引，如果納稅人的關連交易涉及這些國家，最好依照有關指引，以避免利潤被重覆徵稅；如果沒有既定指引，最穩當的做法就是按功能及風險來定價。什麼功能最能賺錢呢？當然要視乎個案情況而定，一般來說，以最賺錢排先的功能依序為：生產、技術、貿易、物流、會計；至於風險，即是市場起落的幅度和速度，按市場規律來說，當然是哪間公司承受的風險愈大，它要求的回報（即價錢）就愈高了。

此外，根據雙重徵稅協議，若香港以外的政府調高該地的轉移定價而令集團多付稅款，納稅人可向稅局申請適當地減低香港的稅負。

調查科個案

除了「來料加工」的個案，稅局在涉及內地業務的調查案件中，亦經常以攤分利潤的方法來徵稅。

稅局對海外豁免的慣例

納稅人在港公司的規模與功用

如果公司的規模很小，比方說，只有兩三個人，負責聯絡、會計紀錄、銀行出入數等支援性工作，而海外活動卻有數百人，從事生產、買賣、運輸、倉存...等賺取利潤的活動，那麼，稅局便多會接納申請。

納稅人是否在海外設有固定基地

如果納稅人在海外沒有固定基地，稅局不會輕易批准申請。當然，以稅例及案例來說，在海外是否設有固定基地不是決定性因素，故此，即使納稅人在海外沒有固定基地，若賺取利潤的活動位於海外，他是可取得海外豁免的。

納稅人的行業

對於從事買賣的貿易公司，稅局多會以買貨合約及賣貨合約的所在地為主要考慮因素，若兩者俱在海外訂立，稅局多會接納申請。對於佣金收入，稅局會以獲取佣金服務的所在地及外地人員的權責為考慮。對於營辦工廠的納稅人，若部份工序位於香港境外，稅局會豁免一半利潤；若所有工序皆位於香港境外，納稅人可申索全部豁免；但若納稅人將所有工序外判給內地的獨立法人公司，並付出外判費用，而納稅人在港只從事銷售或購買業務，那麼，稅局便會按從事買賣貿易的準則來評稅，而豁免內地生產的利潤。對於從事金融業務的公司，稅局多會以業務經營地點、決策所在地、及有關資金來源為主要考慮因素，而有關市場的所在地或借出款項的地點，一般是次要的考慮因素。