Answers

Cases are given in the answers for educational purposes. Unless specifically requested, candidates were not required to quote specific case names to obtain the marks, only to provide the general principles involved.

The suggested answers are of the nature of general comment only. They are not offered as advice on any particular matter and should not be taken as such. No reader should rely on the suggested answers as the basis for any decision. The examiners expressly disclaim all liability to any person in respect of any indirect, incidental, consequential or any other damages relating to the use of the suggested answers.

1 Report to Mr Man of HK Engineering Co Ltd (HK Co)

To: Mr Man
From: Tax Advisors
Date: 6 June 2011
Subject: Project Victory

We refer to our discussion with your Mr FF in respect of Project Victory. As we understand it, this project involves a contract (Contract) to be signed with the Vietnam government to supply and install the equipment required for the Vietnam government's water plant project. You have requested us to review the Hong Kong tax position of HK Co arising from the Contract and provide comments on the issues and concerns raised.

(a) Vietnam subsidiary with equipment and staff supplied by HK Co

(i) Hong Kong tax implications

You are considering establishing a subsidiary in Vietnam for the purpose of signing the Contract and as a start-up to expand HK Co's business into Vietnam. If HK Co sets up a subsidiary in Vietnam for the Contract, the Vietnam operation would be regarded as run by the Vietnam subsidiary. All the income earned from the Contract would be recorded by the Vietnam subsidiary and subject to the tax and other regulatory requirements in Vietnam. In the circumstances, it would be advisable that Vietnam tax advice be sought to ascertain the local tax position of the Vietnam subsidiary.

The Hong Kong tax implications to HK Co would depend on the involvement of the company in the Vietnam operation and the nature of the income received. Generally speaking, if the Vietnam subsidiary distributes dividends to HK Co, there would be no Hong Kong tax implication to HK Co as dividend income is not taxable in Hong Kong, on the basis that it is either capital or offshore in nature. However, should HK Co perform significant activities in Hong Kong on behalf of the Vietnam subsidiary, such as supplying equipment and staff, there is a risk that part of the Contract income would be challenged by the Inland Revenue Department (IRD) as sourced in Hong Kong and taxable here.

There is also a risk that HK Co may be subject to Vietnam tax if the company's activities in Vietnam are significant enough to constitute a permanent establishment there (e.g. through the activities of HK Co's staff). Vietnam tax advice should be sought on this point also.

(ii) Transfer pricing issues

Since both HK Co and the Vietnam subsidiary are separate legal entities, it would be appropriate for the respective entities to properly account for the supply of equipment and staff on a principal-to-principal basis. For example, the equipment supplied by HK Co should be accounted for as a sale of equipment at market value to the Vietnam subsidiary. Also, the relevant staff should be posted to the subsidiary by HK Co at a reasonable charge. Any profit earned from the sale of the equipment and the staff posting would be separately assessed on HK Co according to the Hong Kong profits tax regime.

In determining the reasonable charge for the supply of the equipment and staff, the arm's length principle must be observed, making reference to the Departmental Interpretation and Practice Notes (DIPN) 45 and 46 issued in 2009 on transfer pricing rules. Transfer pricing is concerned with prices charged between associated entities for the transfer of goods, services and intangible property. From the IRD's perspective, the transfer pricing requirements apply to transactions between Hong Kong and countries with double taxation agreements (DTA) signed with Hong Kong, as well as to transactions that involve non-DTA offshore countries. Moreover, transactions between domestic Hong Kong entities are also required to observe these rules.

Based on DIPN 46, the arm's length principle refers to using the transactions of independent enterprises as a benchmark to determine how profits and expenses should be allocated between the associated enterprises. When comparing the actual prices used by the associated enterprises with those adopted by truly independent enterprises, any excess or shortfall may be adjusted. In the case of HK Co's supply of equipment and staff to its Vietnam subsidiary, the recharge price determined should be comparable to that which would have been charged by HK Co if the supply was provided to an independent buyer. Where it is found that the price charged was not at arm's length and as a result HK Co was assessed to tax at less than the proper amount, an additional assessment may be raised under s.60 to bring the income shortfall into the Hong Kong tax net. Alternatively, the IRD may seek to disallow a portion of the equipment cost or staff cost under s.16(1) on the basis that the tax deduction should be restricted only to the portion of expenditure 'to the extent' incurred in the production of assessable profits. However, this rationale has recently been challenged by the Court of Final Appeal (CFA) (in the case of *Ngai Nik Electronics Co Ltd* v *CIR* (FACV No. 29 of 2008)) where the CFA held

that s.16(1) and s.17(1)(b) were not applicable by the IRD in order to 'disallow the purchase prices paid by the taxpayer for the purchase of the products for resale even if they were considered excessive'. In the extreme, the IRD may seek to challenge that HK Co is involved in a tax avoidance scheme under s.61A. That said, if the set-up of the Vietnam subsidiary is commercially justified such as to facilitate future expansion into that offshore market, the chance of the IRD taking this challenge successfully should not be high.

Whenever a price is charged on a supply to the Vietnam subsidiary, it is advisable for HK Co to maintain a proper record documenting the basis of the price charged, in the event that such documentation may be requested by the IRD to justify its arm's length nature. Although DIPN 46 mentions that transfer pricing documentation is not mandatory, taxpayers are encouraged to observe the record-keeping requirement under s.51C and ensure such documentation is retained.

(Note to markers: if candidates elaborate the transfer pricing rules and arm's length principles under other parts of this question, marks will also be awarded in this section as if those answers had been included in this part.)

(b) Direct investment in Vietnam by HK Co

In this section, we assume that no Vietnam subsidiary is set up and that HK Co directly contracts with the Vietnam government for the Contract and supplies the equipment and installation services directly to the Vietnam government. A new BVI Co will also be set up and used to purchase the equipment from the independent supplier and on-sell the equipment to HK Co.

(i) Hong Kong tax implications to HK Co

Contract value

The total contract value of $20m will be income accrued to HK Co directly. Whether or not the total $20m is taxable in Hong Kong would depend on whether all or part of the income is considered sourced in Hong Kong. There is no statutory or comprehensive guidance under the IRO as to how the source of profits is to be determined. Based on case law and DIPN 21 (revised 2009), the broad guiding principle is the so-called 'operation test', which asks 'where do the operations take place from which the profits in substance arise'. However, the 'operations' that would be required to take place would be different depending on the nature of the income. In the case of service income, the principle is that the source follows the place where the services were rendered (drawn from the *Whampoa Dock* case and *International Wood Products* case). In HK Co's case, if the Contract, or part of the Contract, is performed outside Hong Kong, the contract value, or part of it, would likely be regarded as non-taxable in Hong Kong.

In the case of trading income arising from the buying and selling of equipment, it is the practice of the IRD to look into the activities on both sides of the buying and selling of the equipment, and the place where these activities are carried out. Based on the *Hang Seng Bank* case, the source of trading profits is to be determined by looking at the contract of purchase as well as the contract of sale; and the place where these contracts were effected determines the source. This 'contract effected test' is then further elaborated in the case of *Magna*, which provided that all factors leading to the transaction should be considered altogether. Various debates and arguments on similar source issues are found in subsequent court cases and Board of Review decisions. Based on DIPN 21 (revised 2009), the IRD's view is that the place where the contracts of purchase and sale are effected continues to be the primary determinant of the source of trading profit, but the totality of facts must be considered to determine what a taxpayer did to earn the profits in question. Where either the purchase or sale contract is effected in Hong Kong, the IRD will initially presume that the profits are fully taxable in Hong Kong, unless other more relevant factors or activities exist to prove otherwise. In HK Co's case, since the Chief Engineer would deal with the purchase of equipment directly with the supplier in Hong Kong, including negotiating and concluding the purchase terms, it is very likely that all the trading income would be regarded as sourced in Hong Kong. This would be the case regardless of the fact that the Contract might have been concluded and signed offshore. Moreover, it is also the IRD's practice not to adopt apportionment for trading profit; although this issue has been addressed in the *Indosuez WI Carr Securities* case where it was held that apportionment should not be prohibited for profits arising in two or more jurisdictions.

The above analysis demonstrates that different rules apply to the equipment sale and the installation service components respectively. Thus, it would be highly advisable for HK Co to either enter into separate contracts, or if that is not feasible, to split the contract value into two distinct components. The portion of income attributable to the installation is likely to be non-taxable if it can be proved that all of the income arises from the services performed in Vietnam. The other portion of income attributable to the equipment supply may be determined based on the place where the contracts of purchase and sale of equipment are effected. If the total contract value is not distinguished into two elements, it is likely that the IRD would regard the whole contract as in the nature of trading and apply the more stringent contract effected test to ascertain the source of profit.

Equipment cost

Under the proposed structure, the equipment is to be purchased by HK Co from BVI Co at the cost of $15m. Since the equipment will be used to fulfil the obligation under the Contract, it is trading stock rather than a capital asset. Provided that the income earned from the Contract on the equipment supply is taxed in Hong Kong, the cost of the equipment should be allowed for tax deduction purposes under s.16(1). However, in the event that the quantum of expenses is disproportionate to the benefit of the income derived, the IRD is likely to restrict the deduction to the extent that is commensurate with the benefit, and seek to disallow the excess. Under DIPN 46, the IRD highlights that payments made to an associated enterprise on a basis other than arm's length would be disallowed as a deduction on the ground that they were not made for the purposes of the taxpayer's trade. This is supported by both s.16(1) and s.17(1)(b).

Thus, in HK Co's case, the major concern would be whether the cost of $15m can be justified to be at arm's length. HK Co is required to prove to the satisfaction of the IRD that the cost of $15m is comparable to the price charged by an independent supplier. In the absence of such evidence, it is likely that part of the $15m may not be allowed as a tax deduction.

Tutorial note: *On the issue of disallowing part of the expenses, the CFA in the* Ngai Nik *case made the comment that s.16(1) and s.17(1)(b) could not be applied by the IRD to disallow purchase prices paid by the taxpayer for the purchase of products for resale even if they were considered excessive. Since DIPN 46 was issued after the* Ngai Nik *case, it is believed that these comments were not taken by the IRD and thus the risk of partial disallowance still exists.*

Staff costs

When HK Co sends its staff to Vietnam to perform the services required under the Contract, the tax deductibility of the related staff cost would depend on whether or not the relevant contract income attributable to these services is taxed in Hong Kong. As mentioned above, if the portion of contract income attributable to the installation services is sourced outside Hong Kong and not taxable, all related costs including staff costs would not be tax deductible. However, if all the contract income earned by the staff services is taxed in Hong Kong, the related staff costs would accordingly be deductible, regardless of the fact that the costs may be incurred offshore.

Bank loan interest

HK Co has the intention to finance the equipment purchase by way of a bank loan. The interest incurred by HK Co on the loan would be tax deductible if all the following conditions are met:

(i) The portion of contract income attributable to the equipment supply is taxable in Hong Kong (s.16(1));
(ii) All the bank loan money was used to purchase the equipment (s.16(1)(a));
(iii) The bank is an authorised financial institution either in Hong Kong or overseas (s.16(2)(d));
(iv) The bank loan is not secured by any deposit or loan which derives non-taxable income in Hong Kong (s.16(2A)); and
(v) No arrangement is in place whereby any interest payment is ultimately paid back to HK Co or any connected person (s.16(2B)).

Alternatively, s.16(2)(e) may also be relied upon to claim the interest deduction on the basis that the equipment is trading stock and the lender is not associated with the borrower (HK Co). Note that the conditions under (i), (ii), (iv) and (v) above would still apply in such a case.

(ii) Hong Kong tax implications to BVI Co

Under s.14, BVI Co would be subject to Hong Kong profits tax if it (a) carries on business in Hong Kong; (b) derives profits from that business other than profits arising from the sale of capital assets; and (c) those profits are sourced in Hong Kong. The place of incorporation is irrelevant.

There have been numerous cases debating the factors that determine the place where a business is carried on. In general, the IRD's practice is to look at the place of the company's effective management and control, which usually refers to the place where the board of directors meet and make decisions, and where the company's day-to-day activities are conducted. However, each case should be assessed on its own merits. In the case of BVI Co, the information available on hand is not sufficient for us to draw any conclusion in this context. Should it be considered necessary to carry out this review, please provide further details.

In the event that BVI Co is considered as carrying on a business in Hong Kong, the profit from the sale of equipment would be taxed in Hong Kong if it is sourced in Hong Kong. As mentioned above, it is the practice of the IRD in determining the source of trading profit to look at the place where the purchase and sale contracts are effected. In the case of BVI Co, if the purchase activities leading to the conclusion of the contract are performed in Hong Kong through HK Co, it is very likely that the profit of BVI Co would be considered as sourced in Hong Kong and, thus, taxable in Hong Kong.

Setting aside s.14, BVI Co may still be at risk of being challenged by the IRD under s.20. This section is designed to counteract the diversion of profits from Hong Kong to a closely connected non-resident. Since HK Co carries on business with BVI Co which is closely connected to HK Co, and the sale of the equipment gives rise to an overly significant tax deduction of equipment cost of $15 million to HK Co (against an original cost of only $8 million), s.20(2) would apply to deem BVI Co to have carried on business in Hong Kong through HK Co. As a result, an assessment would be issued to tax the profit of BVI Co in the name of HK Co as an agent.

Alternatively, there is a risk that the structure adopted will be challenged by the IRD as tax avoidance under s.61A. For s.61A to apply successfully, there must be a clearly identified transaction, a tax benefit and a sole or dominant purpose of avoiding tax. In the *Ngai Nik* case, the court also provided that the tax benefit must also be quantified and well-defined. Before we can conclude whether a tax avoidance risk exists, we would need more detailed information for review.

We trust that the above addresses all the Hong Kong profits tax implications arising from the proposed transactions. Should there be any questions, please let us know.

End of Report

2 **Tax consultant & address**

Mr and Mrs Kwok
[Address]
[Date]

Dear Mr and Mrs Kwok,

Thank you for engaging us to review your tax position for the year of assessment 2011/12. Based on the information you supplied, we outline our advice as follows:

(a) Final payments

Since 1 August 2002, you have been employed by the Company (your employer) and have been providing services in Hong Kong. In general, s.9(1)(a) of the Inland Revenue Ordinance provides that remuneration, including any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance, would be taxable provided that it represents an award for your services under the employment. This is the case regardless of whether it comes from the employer or from some other person.

Based on your intended date of leaving service on 1 August 2011, the taxability of each item of the final payments estimated as receivable by yourself on the day of leaving service, is analysed as follows:

(1) Lump sum incentive payment of $50,000

As we understand it, this payment was made as a result of your intended resignation in August 2010. However, it was the desire of your employer to encourage you to continue with your service for another year up to August 2011. In compensation for your agreement to the extension of your service, your employer agreed to make this payment on 1 August 2011. This is, therefore, by nature a payment for future services or an advance payment of salary (see *Cameron* v *Prendergast* (23 TC 122)), and thus, is taxable as part of your employment remuneration for services under s.9(1)(a).

(2) Estimated bonus of $100,000 and potential top-up in April 2012

A bonus paid for services rendered is a contractual entitlement and is obviously a taxable remuneration under s.9(1)(a). This is the case regardless of the fact that the amount is estimated or may only be quantified and paid at a later date (*D46/98*). Provided that the amount of $100,000 is actually paid to you during the year of assessment 2011/12, the amount would be included in your taxable income for the captioned year. As regards the potential receipt of the top-up amount in April 2012, any amount received representing part of the bonus would therefore carry the same nature of taxable remuneration and would become taxable. Although the timing of receipt of the top-up would fall after the year of assessment 2011/12, the top-up would be deemed as being received on the last day of your employment, i.e. 31 July 2011. Under s.11D(b), income is deemed to have accrued to a taxpayer in a year of assessment when he is entitled to receive it, regardless of whether or not he actually receives it during that year of assessment; but the assessment to tax of that income cannot be made until the taxpayer has actually received it. When income relating to an employment is only 'paid by the employer' after the taxpayer has ceased that employment, the income is deemed to have accrued to the taxpayer on the last day of that employment (s.11D(b)(ii)) and is accordingly assessed for that year of assessment in which the employment ceased. As a result, the top-up amount would become part of your taxable income for the year of assessment 2011/12. Should the tax assessment for 2011/12 already have been issued, an additional assessment would be raised under s.60 bringing the top-up amount back into the tax net.

(3) Payment for leave not taken amounting to $20,000

Compensation for leave untaken is regarded as an income from employment and, therefore, it is taxable for the year of assessment 2011/12. The fact that some leave days being compensated were brought forward from the previous year is not relevant since the amount is not received by you until 2011/12, and thus the payment will be assessed in the year 2011/12, assuming it is paid to you immediately when you are entitled to it.

(4) Leaving service benefit from retirement plan

Assuming that you would leave the services of the Company by way of resignation (i.e. option 4(i)), the amount you would withdraw from the retirement plan would be a 'leaving service benefit' in the amount of $1,000,000. Pursuant to s.8(2)(cc)(i), any amount, other than a pension, withdrawn from a recognised occupational retirement scheme upon termination of service, death, incapacity or retirement, would be exempt from tax; but the exemption is restricted to, in the case of termination of service (as in your case), the proportionate benefit. The proportionate benefit is calculated by way of the following formula:

Amount of accrued benefit from the scheme x no. of completed months of service/120

whereby 'accrued benefit' refers to the maximum amount that the person would have been entitled to receive on the basis of his completed service had he retired at the date on which his employment terminated.

In your case, the total number of completed months of service with your employer is 108. Therefore, the ratio applying to the 'accrued benefit' for apportionment purpose would be 108/120. Accrued benefit may or may not be the same as the leaving service benefit depending on the plan rules, and the amount should be obtained directly from the plan trustee or through your employer. Should the amount representing 108/120 of your accrued benefit be less than $1,000,000, part of the excess as attributable to your employer's contribution would be added to your taxable income for the year 2011/12. If you have had the chance to obtain the figure of accrued benefit, we will be able to calculate the amount of taxable and exempt income for your reference.

(b) Leaving service by way of retirement

Should you leave your services by way of retirement and receive 'retirement benefit' in a lump sum (i.e. option (4)(ii)), the full amount of the retirement benefit would be tax exempt under s.8(2)(cc)(i). The abovesaid restriction of the exempt amount to the proportionate benefit does not apply to withdrawal by way of retirement. It is therefore more advantageous for you to receive this amount by way of retirement benefit.

You may also choose to receive a periodic monthly pension from your employer's plan up to your death (i.e. option (4)(iii)). However, under s.8(1), pension income is regarded as taxable income chargeable to salaries tax, unless the fund is an independent fund located outside Hong Kong. Alternatively, you may ask to receive your pension in a lump sum by way of commutation in lieu of periodic pension payment. A lump sum received in this way will also be exempt from tax under s.8(2)(c).

In essence, the most tax effective way of receiving benefits from a recognised retirement plan is either by way of a lump sum retirement benefit or by way of a lump sum commutation of pension.

(c) Tax position for the year of assessment 2011/12 and future years

Apart from the final payments, you have provided us with other information regarding your existing income structure and the future consultancy service. The tax implications of these are analysed as follows:

Tax regime for 2011/12

Based on the information provided, your employment will cease on 1 August 2011. Any income received from your employment will continue to be taxable under the salaries tax regime as in prior years.

With effect from 1 August 2011, you will then act as an independent consultant of your then ex-employer. By providing independent consultancy services at a remuneration dependent upon the number of hours performed, you are regarded as carrying on a consultancy business. Any fee earned from your consultancy services, albeit from the same company as your existing employer, would be in the nature of business profits arising in and derived from a consultancy business carried on in Hong Kong, and such profits would therefore be taxable in Hong Kong under the profits tax regime.

Therefore, in the year 2011/12, other things being held constant, you would expect to be assessed to salaries tax on your employment income accrued up to 1 August 2011; and assessed to profits tax on your consultancy income earned from 1 August 2011 onwards. Alternatively, if more beneficial, you may elect to be assessed under 'personal assessment' so that income from all sources would be aggregated for assessment. For the purpose of tax reporting, the consultancy fee income should be reported under a separate section in the same tax return as that used for reporting your employment income.

Salaries tax for 2011/12

As stated above, your monthly salary and other employment income accrued up to 1 August 2011 will continue to be assessed under salaries tax for the year 2011/12. This would include the four months' salary of $320,000, the annual bonuses of $100,000 for each of the years 2010 and 2011 and the taxable lump sum incentive and in lieu of leave payments of $50,000 and $20,000 respectively received on the termination of your employment. On top of this, a rental value of 10% of the total $590,000 would need to be added as representing the taxable value for the housing benefit, reduced by the total rental contribution of $20,000. (Note: 'Rental value' is calculated by applying 10% (in the case of a residence which is not a hotel, hostel or boarding house) on the assessable income from employment for the period during which the accommodation is provided, but reduced by any share option benefit, certain withdrawals from retirement schemes, a lump sum or gratuity paid upon retirement, and eligible outgoings/expenses/depreciation allowances.) Therefore, your aggregate total taxable income before any deductions would be $629,000 ($590,000 + $590,000*10% – $20,000) for 2011/12.

Eligible deductions would include your retirement plan contribution subject to a maximum of $12,000 per annum. But please note that the 5% retirement contribution deducted from your monthly salary is not tax deductible. Other eligible deductions would include approved charitable deductions, if any, elderly residential care expenses, and other expenses wholly, necessarily and exclusively incurred for producing your employment income. You would be entitled to a married person's allowance as your wife is not working. Should you also maintain other family members such as grandparents, parents and dependent brothers, appropriate allowances could also be claimed.

Leased property

It is worth noting that the property income earned by Mrs Kwok has been assessed to property tax in prior years. Under the property tax regime, no deduction is allowed for any interest incurred on mortgage loan taken to finance the property. Thus, in the case of Mrs Kwok, the monthly interest of $1,000 would not be deductible against the taxable rental income under property tax. However, such interest deduction would be available if both you and Mrs Kwok elect to be assessed under personal assessment. If such an election were made, all of your income including consultancy fee income, employment income (only applicable for 2011/12) and property income would be aggregated and assessed on a total basis. Allowances and progressive tax rates that are otherwise applicable to salaries tax would also apply to the total income under personal assessment. Other deductions are also available including business losses (e.g. from the consultancy business) and mortgage loan interest for the leased property. Based on the available information, we anticipate that you and your wife should elect for personal assessment to obtain the maximum tax advantage in both 2011/12 and future years. Should you wish us to calculate the estimated tax liability under personal assessment, please let us know as we would require further details from you and Mrs Kwok.

Provisional salaries tax for 2011/12

You are right to understand that provisional salaries tax for 2011/12 would be imposed based on the income earned in 2010/11. However, there are ways to help you ease the cash burden in meeting this provisional salaries tax. If the notice demanding payment of provisional salaries tax (tax demand notice) for 2010/11 has not been received, it is possible for you to write to the IRD advising the details of your cessation of employment, the income received during the year and the amount of the final payments to be received under the employment. Because of the estimated nature of provisional salaries tax, it is possible for the IRD to take into account your reduction of employment income during the year for the purpose of issuing the tax demand notice. Even if the tax demand notice has already been issued, a taxpayer is eligible to apply for the holding over of part or all of the provisional salaries tax in certain circumstances, one of which is where the taxpayer has ceased or will cease to derive a source of income chargeable to salaries tax during the year. You are, therefore, eligible to apply for holdover on the condition that you will cease to receive employment income effective from 1 August 2011. Your provisional salaries tax payable for 2011/12 will then be calculated based on your estimated employment income up to August 2011, and any excess of the amount charged over the estimated amount will be held-over. Such application must be made in writing and lodged with the IRD not later than 28 days before the due date of payment or not later than 14 days after the date of the tax demand notice, whichever is later.

Tutorial note: *Other circumstances in which provisional salaries tax can be held over are:*

(i) where the taxpayer has become entitled during the year of assessment to a personal allowance which was not eligible in the prior year;
(ii) where the net chargeable income of the current year is, or is likely to be, less than 90% of the sum assessed to provisional salaries tax;
(iii) where the final assessment for the preceding year is under objection.

Consultancy agreement

(i) Fee
Under the terms of the consultancy agreement, you will be entitled to receive a fee based on the number of hours of services performed. As mentioned above, the fee becomes taxable profits from this business and would be brought into profits tax.

(ii) Housing
You are allowed to continue to occupy the Company's staff quarter at a rental of $5,000 per month. This used to be a benefit accrued to you for your employment services and thus, as stated earlier, resulted in a taxable value, calculated on a formula basis, for salaries tax purposes. However, effective 1 August 2011, you are no longer employed by the Company. Your relationship with the Company is on a principal-to-principal basis and so the provision of the 'housing benefit' is no longer governed by the salaries tax regime. Under the profits tax regime, the taxation of this 'benefit' is based on the arm's-length principle, whereby the value of the place of residence is equal to the difference between the market rental and the actual rental contributed by you. As the residence is provided pursuant to the terms of the contract for consultancy, there is evidence to prove that there is a value associated with the provision of the consultancy services leading to the recognition of this value as part of your business income.

(iii) Gratuity of $10,000
At the expiry of the two-year tenure, you may be awarded a gratuity of $10,000. This payment has direct association with the consultancy services performed by you during the period, and thus should be regarded as part of your business income subject to profits tax. In terms of timing of assessment, although the benefit starts to accrue from the commencement of the agreement, it is only payable at the discretion of the Company. More importantly, it will only be brought into your taxable income as and when it becomes payable to you and such amount is accounted for as business income of your consultancy business. Assuming that the $10,000 is payable to you on 1 August 2013, the income should likely be taxed in the year of assessment 2013/14.

Conclusion

During the years of assessment 2010/11 and 2011/12, it should be advantageous for you to elect for personal assessment so that your employment income, sole proprietorship consultancy income and the property income of Mrs Kwok will be aggregated and assessed on a total basis. Overall tax liability should be reduced as a mortgage interest deduction would be available and progressive tax rates would apply. Going forward, only proprietorship business income and property income would be earned. *Prima facie*, personal assessment should still be advantageous, but it would be more helpful if you could provide further details to enable us to work out an estimated computation before this recommendation is finalised.

As regards the retirement benefit, the most tax effective option is to leave services by way of retirement, and to receive the retirement benefit in the form of a lump sum or by way of the commutation of pension in lieu of periodic pension.

Should there be any questions, please feel free to let us know.

Yours sincerely

Tax consultant

3 (a) Under the profits tax regime of the Inland Revenue Ordinance, a person's residence status is not relevant in determining whether the person is chargeable to tax in Hong Kong. The basic test for profits tax chargeability is whether the person carries on a trade, profession or business in Hong Kong from which a profit is derived, and that profit is sourced in Hong Kong. The test is multi-fold: first, there must be a trade, profession or business being carried on; secondly, the trade, profession or business is being carried on in Hong Kong; and lastly, the profit derived therefrom is sourced in Hong Kong.

Whether a transaction or activity constitutes a trade, profession or business is not always easy and straightforward. Section 2 of the IRO defines trade as including 'every trade and manufacture and every adventure and concern in the nature of trade.' The broad general guideline is to look at the intention of the person at the time of the transaction; and in this aspect, the 'badges of trade' are commonly used:

(1) The subject matter of the realisation – In the case of John Yuan, the subject matter is shares listed in Hong Kong and the US. Listed shares are generally accepted as a common subject of trading, but there are also numerous cases that tend to support the proposition that share trading is close to gambling. This is further analysed below.
(2) The length of period of ownership – John's portfolio has an average holding period of less than 30 days, which illustrates the short-term trading intention.
(3) The frequency or number of similar transactions by the same person – John and Peter communicate nearly every day, and a monthly statement is prepared and monitored by Peter for John's review. This demonstrates the high frequency of trading activities.
(4) Supplementary work on or in connection with the property realised – Primarily no supplementary work has been done on the shares before they are sold, but there is ancillary work done by Peter in support of John's share trading activities such as collecting and sending the market news and analysts' reports.
(5) The circumstances that were responsible for the realisation – In the case of share trading, the realisation must be driven by profit maximisation or loss minimisation.
(6) The motive – A profit making motive is obviously connected with John's share trading activities.

Judging from the above badges of trade, it is quite obvious that John's buying and selling of listed shares would likely constitute a trade. However, there are numerous cases in Hong Kong concerning individuals buying and selling shares, and most of these cases decided that speculative transactions in shares by an individual do not amount to a trade, although it is well recognised that each case needs to be considered on its own merits (see *CIR* v *Dr Chang Liang-Jen* (HKTC 975); *D30/84*; *D111/97*; *D74/00*; and *Lee Yee Shing, Jacky and Yeung Yuk Ching* v *CIR* (2005)). Based on the Court of Final Appeal in the case of *Lee Yee Shing, Jacky*, the fact that an undertaking had a profit-making purpose, although an indicator of a trade or business, was not determinative. The court considered that speculation was akin to gambling, which had generally been found not to amount to a trade unless undertaken by a person with some special knowledge of the particular activity or industry which was the subject of the speculation (see *Burdge* v *Pyne* (45 TC 320)). In respect of this very last point mentioned by the court, being the share trading associated with special relevant knowledge, John Yuan could still be regarded as carrying on a trade or business through Peter Yuan by applying Peter's special knowledge and expertise in share trading since Peter is a registered stockbroker or dealer.

Assuming that the share trading activities constitute a trade or business, the second issue is whether the trade or business is being carried on in Hong Kong. Generally speaking, if a person has established a 'permanent establishment' in Hong Kong (either a fixed presence in Hong Kong or a full agent in Hong Kong), he would be considered to be carrying on the trade or business in Hong Kong. Under Rule 5(1), a permanent establishment includes a physical place of business i.e. a branch, management or other place of business, and also an agent. An agent in Hong Kong would constitute a permanent establishment of the non-resident if the agent (i) has, and habitually exercises, a general authority to negotiate and conclude contracts on behalf of his principal; or (ii) has a stock of merchandise from which he regularly fills orders on behalf of his principal. Once it is established that the non-resident has a permanent establishment in Hong Kong, then in accordance with Rule 5(1), the assessable profits of the non-resident would be ascertained based on Rule 5(2). In the case of John Yuan, the fact that he allows his brother, Peter Yuan, to operate his securities account with full authority and discretion demonstrates that a general authority has been given to Peter to 'negotiate and conclude contracts on his behalf'. In the circumstances, it is very likely that John Yuan would be regarded as having established a permanent establishment in Hong Kong via Peter Yuan as his agent.

Lastly, whether John Yuan will be chargeable to tax in Hong Kong depends on whether the profits derived from the share trading activities are sourced in Hong Kong. In general, the source of profits is determined by applying the 'operation test', i.e. where do the operations take place from which the profits in substance arise. The interpretation and application of this test in different situations may not be the same. In the case of trading in listed shares, the general rule as laid down by Departmental Interpretation and Practice Notes (DIPN) 21 (revised 2009) is that profit has its source where the shares are listed since this is the place where share transfers would be registered. In the case of John Yuan, as profits are earned partly from trading in Hong Kong listed shares and partly from trading in US listed shares, it would likely be the case that profits arising from trading in Hong Kong listed shares would be considered as sourced in Hong Kong and taxable; whereas profits arising from trading in US listed shares would be considered as offshore and not taxable.

Tutorial note: *the issue of whether or not the role of agents and their activities should determine the source of profits of the taxpayer has been widely discussed in various court cases including* Indosuez WI Carr Securities*,* ING Baring Securities *and* Kim Eng Securities*. The IRD opined in DIPN 21 that the agency concept as stated in the* ING *case only applied to the brokerage business. For this question, candidates are not required to discuss these cases in detail, but are encouraged to study the cases for learning purposes.*

(b) Should John Yuan be determined to be chargeable to profits tax, tax assessments may be issued by the IRD to Peter Yuan as the agent of John Yuan. 'Agent' is widely defined under s.2 as including (i) an agent, attorney, factor, receiver, or manager in Hong Kong of a non-resident principal; and (ii) any person in Hong Kong through whom a non-resident principal is in receipt of profits or income arising in Hong Kong.

Pursuant to s.20A(1), the IRD is authorised to collect the tax due from a non-resident in respect of profits from a business undertaken through a Hong Kong agent. This is the case regardless of whether or not the agent has receipt of the profits. When tax is assessed on Peter Yuan as John's agent, Peter Yuan is obliged to pay the tax as demanded or else he would be deemed to be in default of tax payment. Moreover, s.20A(2) also requires Peter to retain, or withhold, a sufficient amount from John's assets coming into his possession or control so that the retained amount may be used to settle the tax liability due.

In the case of a stockbroker or dealer or investment advisor, the IRO does contain specific provisions seeking to exempt the broker or dealer, or investment advisor, from being deemed as agent for the purpose of s.20A. The exemption was granted on the premise that it would be practically too difficult for the stockbrokers or dealers to determine whether the investment activities of their non-resident clients constitute a chargeable trade or business in Hong Kong and to ascertain the net chargeable profits to which tax should apply. However, for the exemption to apply, ALL of the following conditions must be fulfilled:

(i) at the time of the transaction in Hong Kong, the agent was carrying on a business of registered broker or approved investment advisor, being a person duly registered in such capacity under Part VI of the Securities Ordinance;
(ii) the transaction was carried out by the broker for the non-resident in the ordinary course of his business;
(iii) the broker has received remuneration at a rate not less than the customary rate for that class of business;
(iv) all transactions through the broker must meet the exemption conditions so that after the exemption, the non-resident has no assessable profits for the year in respect of which the broker would be treated as agent; and
(v) the broker was not an associate of the non-resident.

In the case of Peter Yuan, although Peter is a registered broker, the exemption under s.20A would likely not apply due to the fact that he is an associate of John Yuan by virtue of their relationship. It is also not clear from the facts given whether or not Peter was paid any arm's length remuneration by John. In any case, this aspect is no longer relevant.

When a tax assessment is issued to Peter Yuan as agent of John Yuan, and Peter pays the tax on behalf of John by applying John's money in his possession, Peter will be statutorily indemnified against any claim made by John in respect of such act to apply John's money in settlement of tax.

4 **(a)** The principle that duty is charged only on instruments and not on transactions is fundamental to stamp duty and admits no exception. It follows that if a transaction can be structured so that no dutiable instrument is brought into being, there can be no liability to stamp duty.

Hong Kong's domestic law does, however, provide that, for certain transactions, a written document is required in order for a transaction to be legally effective. Such provisions require that written instruments subject to stamp duty must be brought into existence. The provisions relevant for stamp duty are as follows:

(1) All assignments of land in Hong Kong must be by way of deed.
(2) Any transfer of an interest in land must be evidenced by a memorandum in writing.
(3) A lease of immovable property for a period of more than three years must be in writing and registered at the Land Office.
(4) For any sale and purchase of Hong Kong stock, contract notes must be prepared and an instrument of transfer executed: s.19 of the Stamp Duty Ordinance (SDO).
(5) No transfer of Hong Kong stock should be registered without the production of a properly stamped instrument of transfer: s.15(2) and s.21 of the SDO.

A good example of using this principle to avoid stamp duty is in relation to a lease for a term not exceeding three years. Such a lease can be made orally and as there is no instrument, no liability to stamp duty will arise.

Tutorial note: *as a matter of commercial practice it is nevertheless often appropriate to draw up a written lease to spell out the terms agreed for the purposes of future enforcement, if necessary.*

(b) **(i)** In the case of a corporation, the general rules governing the treatment of tax losses include:

(1) The loss must have arisen in Hong Kong to be deductible and carried forward.
(2) The loss must have arisen from the corporation's trade, profession or business to be deductible and carried forward.
(3) The loss must be revenue in nature.
(4) The loss cannot be carried backward to offset against prior years' taxable profits.
(5) There must not be any duplication of loss to be utilised to offset profits. The loss to offset taxable profits in one year of assessment cannot be used again for any other year.
(6) The amount to be set off against taxable profits must not exceed the amount of the actual loss suffered.
(7) There is no group loss relief in Hong Kong so that losses incurred by one corporation in a group cannot be used to offset the taxable profits earned by another corporation in the same group.

(Note to markers: marks may be awarded for any other rules that are relevant and correct.)

(ii) Profits tax implications

Sun Cheong Ltd (SCL) has a tax loss that can be used to set-off the profits generated from the business transferred from Tai Cheong Ltd (TCL). Normally, this carry-forward of tax losses for offsetting against future taxable profits is allowed under s.19C. However, s.61B would apply to deny the set-off of the tax loss if the following conditions exist:

(1) There is a change in shareholding with the result that profits have been received by or accrued to the company (SCL); and
(2) The sole or dominant purpose of the change is to use a loss sustained in a trade, profession or business carried on by the company, to obtain a tax benefit for the company or another taxpayer.

As such, s.61B may be used by the IRD to question whether the change in shareholding in SCL is solely or dominantly for the purpose of obtaining tax benefits. In applying s.61B, one has to look at both the outcome, i.e. whether a tax benefit is obtained; and the purpose of the change in shareholding, i.e. the reason for the change. If the IRD considers that there is no reason for the change, except for obtaining a tax benefit, s.61B may be invoked and the carry forward of the tax loss will be disallowed.

However, TCL may succeed in arguing that there are commercial reasons for the change in shareholding, other than obtaining a tax benefit, such as acquisition of a major competitor. Hence, obtaining a tax benefit was neither the sole nor dominant purpose for the change in shareholding.

Stamp duty implications

Documents are chargeable to stamp duty if they fall within either of the four charging Heads of the SDO. The necessary documents for the proposed transactions and their stamp duty implications are described below:

(1) The documents in the proposed acquisition of the shares in SCL are the bought and sold notes and the instrument of transfer. The bought and sold notes are chargeable under Head 2(1) and the stamp duty is 0·2% of $500,000, i.e. $1,000. The instrument of transfer is also dutiable under Head 2(4) and the stamp duty is $5.

(2) The proposed lease agreement for the rental shop is chargeable under Head 1(2). As the term of lease is over three years, the stamp duty payable is 1% of the average yearly rent. Since the annual rent depends on the gross annual revenue subject to a maximum of $800,000, based on the principle of contingency, the sum of $800,000 will be used to determine the stamp duty payable, which is $8,000. Although TCL and SCL will be regarded as associated corporations under s.45 of the SDO, this exemption is not applicable to lease agreements.

5 Based on the extract of information available, it appears that Selling Co Ltd (Selling Co) has maintained a satisfactory level of tax compliance in terms of profits tax return filing and tax payments. There have been no significant tax queries raised by the IRD in prior years. This may indicate that the tax returns have been prepared to a very good standard and/or no major and contentious tax adjustments have been made in the tax returns filed. However, it is assumed that all tax records are made available for due diligence purpose or requests for information for inspection have been properly and completely made. To avoid unnecessary misunderstanding or disputes on unintentional non-disclosure, the seller i.e. Mr Shum should give an undertaking that all tax related records have been fully disclosed and made available for due diligence purposes.

The information reveals that all the prior years' assessments were issued per the tax returns lodged. Mr Shum also guaranteed that all assessments were finalised and there is no tax dispute outstanding. Unfortunately, this guarantee may not be practically effective. Under the IRO, s.60(1) empowers the assessor to raise any assessment within six years after the end of the year of assessment in which the transaction or event occurs. In the case of fraud or wilful evasion, the six-year time limit prescribed for raising an assessment is extended to ten years. The power also extends to additional assessments in respect of any year of assessment for which an assessment has already been issued, if the assessor is of the opinion that the taxpayer has been under-assessed for that year of assessment.

Moreover, under s.70, an assessment is final and conclusive if:

(i) no valid objection or appeal has been lodged;
(ii) the objection or appeal has been withdrawn or an appeal has been dismissed;
(iii) the assessment under an objection has been agreed; or
(iv) the assessment is determined upon objection or appeal and no further appeal has been lodged.

Based on the proviso to s.70, the IRD can still raise an additional assessment to a final and conclusive assessment provided that it does not involve re-opening any question or matter which has previously been determined on an objection or appeal.

In the case of Selling Co, the guarantee from Mr Shum would not prevent the IRD from taking any of the abovesaid actions should they consider it necessary to do so. To protect future potential tax risk, Buying Co Ltd (Buying Co) should ask for an indemnity from Mr Shum to shelter any additional tax liabilities that may arise as a result of any additional assessments being raised by the assessor within the time limit of six years, or ten years in the case of fraud or wilful evasion.

In the event that any additional assessment is issued, it would be issued in the name of Selling Co as a separate and independent legal entity. It would not be issued to Mr Shum (i.e. the current shareholder of Selling Co) nor to Buying Co. The change in shareholding or management would not be relevant. Selling Co cannot rely on the change in shareholding as an excuse to avoid responding to any queries raised by the IRD. It may be possible for the company to request for additional time to submit the information required on the basis that the change in the company's management might have an impact on the collection of

information. However, when queries (including additional assessments) are raised, the current management of Selling Co will be responsible for handling them with the IRD. Although Selling Co may appoint Mr Shum or any other person if appropriate as its representative in dealing with the IRD, the primary responsibility is still on the account of Selling Co. As such, the guarantee given by Mr Shum to hold himself fully responsible for handling the future tax disputes is not practically effective. Moreover, should there be any tax payments made, it would be for the account of Selling Co but not Mr Shum or any other person.

To protect Buying Co against any potential additional tax liability arising to Selling Co from any event that occurred before the change in shareholding, an indemnity should be insisted upon and obtained from Mr Shum so that any additional tax burden, including surcharge may be compensated by him.

Another risk to Buying Co is that if the conduct of handling any tax query or assessment is placed in the hands of persons who are no longer the current management of the company, the company's interests may not be well protected. In the event that an additional (or estimated) assessment is issued and disagreed by the company, objection should be lodged in writing within one month, addressed to the Commissioner, with the clear ground of objection stated. If no objection is lodged within the time limit, the assessment will become final and conclusive after that date and cannot be challenged further. Other courses of action may include whether a tax payment should be made or held-over. These courses of actions would require management decisions to be made in the best interests of Selling Co. Buying Co should ensure, therefore, that Selling Co retains the rights and control over the conduct of any tax disputes arising after the acquisition.

			Available	Maximum
1	**(a)**	**Vietnam subsidiary with equipment and staff supplied by HK Co**		
	(i)	HK tax implications for HK Co		
		Income earned by Vietnam subsidiary taxed in Vietnam	1	
		Dividend received not taxable in HK	1	
		Significant HK activities may risk income partly taxable	1·5	
			3·5	3
		Vietnam tax advice needed re:		
		– tax position of subsidiary	1	
		– PE risk to HK Co	1	
			2	1
	(ii)	Transfer pricing issues		
		Equipment supply treated as sale to subsidiary at market price	1	
		Staff supply charged at reasonable cost	1	
		Arm's length or transfer pricing principle to be observed	1	
		Transfer pricing on DTA and non-DTA countries; offshore or domestic	1	
		Benchmark to independent enterprises; difference to be adjusted	1	
		Additional assessment on understated profit	1	
		Overstated cost to be disallowed – 'to the extent'	1	
		Disallowance authority challenged by court	1	
		Tax avoidance challenge subject to commercial justification	1	
		Documentation and record keeping requirement	1	
			10	8
	(b)	**Direct investment in Vietnam**		
	(i)	HK tax implication to HK Co		
		Contract value		
		Taxable if sourced in HK	1	
		Broad guiding principle of operation test	1	
		Source of service income determined by the place of service	1	
		If all services done offshore, not taxable	1	
		Source of trading income determined by the place where purchase and sale contracts are effected	1	
		Totality of facts are also examined	1	
		Either purchase or sale in HK, assume fully taxable	1	
		Equipment purchase handled in HK, likely taxable	1	
		Profit apportionment not applicable to trading profit	1	
		Suggest split contract/income	1	
			10	9
		Equipment cost		
		Trading stock	0·5	
		Tax deductible if equipment sale profit is taxable	1	
		Deductible only 'to the extent' for producing profit	1	
		Need to prove the cost is at arm's length	1	
			3·5	3
		Staff costs		
		Tax deductible if service portion of contract income is taxable	1	
		Not deductible if income agreed as offshore and non-taxable	1	2
		Bank loan interest		
		General tax deduction principles [s.16(1) and s.16(1)(a)]	1	
		Deduction rule for loan obtained from financial institution, flow through test and security test [s.16(2)(d), s.16(2A) and s.16(2B)]	2	
		Deduction rule for loan obtained for trading stock, flow through test and security test [s.16(2)(e), s.16(2A) and s.16(2B)]	2	
			5	3

		Available	Maximum
(ii)	HK tax implications to BVI Co		
	Taxable if two limbs under s.14 are fulfilled	1	
	Place of incorporation is irrelevant	1	
	Place of effective management and control, board meetings and day to day operation	1	
	Insufficient information about BVI Co	1	
	Trading profit subject to contract effected test	1	
	Equipment profit taxable if sourced in HK	1	
	Equipment purchase handled by HK Co in HK, likely taxable	1	
	Risk under s.20, business with closely connected non-resident	1	
	Leading to nil or less than reasonable profit to resident	1	
	Taxed in the name of HK Co in HK as agent	1	
	Risk of challenge under s.61A as tax avoidance	1	
		11	9
Appropriate format and presentation		1	
Effectiveness of communication		1	2
Total			**40**

			Available	Maximum
2	**(a)**	**Final payments**		
	(1)	Lump sum incentive payment		
		Encourage to continue service	0·5	
		Payment for future service and thus taxable	1	
			1·5	1
	(2)	Estimated bonus and top-up		
		Contractual entitlement and taxable	1	
		Regardless of whether estimated or paid later	0·5	
		Top-up carries the same nature and taxable	0·5	
		Top-up deemed to be received on last day of employment	1	
		Assessment issued only when income is received	1	
		Top-up taxable in 2011/12 as revised assessment	0·5	
			4·5	4
	(3)	Payment for leave		
		Income from employment and services	1	
		Taxable when payment received in 2011/12	1	2
	(4)	Leaving service benefit		
		Exempt if withdrawn from recognised occupational retirement scheme upon termination of service, death, incapacity or retirement	1	
		Restricted to proportionate benefit	1	
		Formula	1	
		Excess attributable to employer's contribution is taxable	1	4
	(b)	**Retirement**		
		Lump sum from recognised fund fully exempt	1	
		Restriction of proportionate benefit not applicable	1	
		More advantageous than leaving service	1	
		Periodic pension taxable	1	
		Commutation in lieu of periodic pension exempt	1	5
	(c)	**2011/12 tax position**		
		Employment income s.t. salaries tax up to 1 August 2011	0·5	
		Consultancy business s.t. profits tax thereafter	0·5	
		Personal assessment is a choice	0·5	
		Both sources of income reported in same return	0·5	
		Four months' salary, bonuses and other termination items taxable	1	
		Rental value 10% less rental contribution	1	
		Aggregate taxable income before deduction $629,000	0·5	
		Retirement plan deduction and limit	0·5	
		Other eligible deductions and allowances	1	
		Property income s.t. property tax	0·5	
		Loan interest not deductible unless personal assessment	1	
		Personal assessment expected to be more advantageous	1	
		Eligible for provisional tax holdover on grounds of cessation of employment, whether or not demand notice issued	2	
		Application in writing, not later than 28 days before payment due date or not later than 14 days after notice date, whichever later	1	
		Consultancy fee taxable profits	0·5	
		Housing benefit taxable based on arm's length principle	1·5	
		Gratuity related to service and taxable	1	
		Gratuity taxable in the year of receipt	0·5	
			15	12
				28
		Appropriate format and presentation, including conclusion	1	
		Effectiveness of communication	1	2
	Total			**30**

			Available	Maximum
3	**(a)**	Section 14 scope of charge (3 x 0·5)	1·5	
		Application of badges of trade (6 x 0·5)	3	
		Share-trading by individuals as speculation and non-taxable	0·5	
		Unless with special knowledge	0·5	
		Peter Yuan is broker and has knowledge, subject to challenge	1	
		Permanent establishment definition under Rule 5	1	
		Peter Yuan has full discretion and thus John's agent	1	
		Source of trading in listed shares is place of listing	1	
		HK listed shares sourced in HK	0·5	
		US listed shares are offshore and non-taxable	1	
			11	10
	(b)	Assessment to Peter Yuan as agent of John Yuan; and tax collected	1	
		Peter Yuan has obligation to retain or withhold	1	
		Exemption to stockbroker or investment advisor	1	
		Conditions for exemption	2	
		But exemption not applicable due to 'associates'	1	
		Protection to Peter Yuan re claim by John Yuan on tax payment	1	
			7	5
	Total			**15**
4	**(a)**	The principle of charging stamp duty on instruments	0·5	
		Transactions that must be evidenced by a document (5 x 0·5)	2·5	
		Example of using this principle to avoid stamp duty	1	4
	(b)	**(i)** Rules governing the treatment of tax losses for corporations: – 0·5 each – maximum		3
		(ii) Profits tax implications		
		Loss set-off under s.19C	1	
		Conditions for s.61B to apply (2 x 0·5)	1	
		Effect of s.61B	0·5	
		Whether s.61B may be applied	2	
		Stamp duty implications		
		Stamp duty payable under Head 2(1)	1	
		Stamp duty payable under Head 2(4)	0·5	
		Principle of contingency	1	
		Stamp duty payable	1	
		TCL and SCL are associated	0·5	
		Exemption under s.45 not applicable to lease agreements	0·5	
			9	8
	Total			**15**

		Available	Maximum
5	Satisfactory tax compliance re filing and tax payments	1	
	No significant tax query and all assessments issued per return	1	
	Assumed full records disclosed	1	
	Need undertaking of full disclosure	1	
	Shum's guarantee not effective	1	
	Six years additional assessment	1	
	Extended to ten years if fraud or wilful evasion	1	
	Conditions for final and conclusive assessment (4 x 0·5)	2	
	Proviso re s.70	1	
	Tax indemnity required	1	
	Additional assessment issued to Selling Co and handled by it, not Shum	1	
	Change of shareholding or management not an excuse	1	
	Guarantee by Shum to be held responsible not practically effective	1	
	Conduct of handling tax disputes should be with Selling Co	1	
	Need for management decisions in best interests of company	1	
		16	
	Total		**15**