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INCOME TAX - SOURCE PRINCIPLE REFINED?

Commissioner of Inland Revenue v. *HK-TVB International Limited*[1]

THE Privy Council had in the Hong Kong case of *C.I.R.* v. *Hang Seng Bank Ltd.*[2] propounded a basic principle to assist courts in the determination of the source of profits for tax purposes.[3] The Privy Council has recently reconsidered the basic source principle in the case of *Commissioner of Inland Revenue* v. *HK-TVB International Limited* (*"TVBI* case"), a case on appeal from the Hong Kong Court of Appeal. This case throws fresh light on the doctrine of source in the Hong Kong context and invites comment.

The facts of the *TVBI* case are simple and straightforward. The taxpayer company ("TVBI") was incorporated in Hong Kong and was a subsidiary of another Hong Kong company, TVB. TVB made or acquired films in various Chinese dialects. TVB granted rights to TVBI, *inter alia,* to grant sub-licences to sub-licensees to copy, adapt, broadcast and exploit all other derivative rights in TVB films. Thereafter TVBI granted various sub-licences to foreign parties and during the relevant years of assessments made profits amounting to some HK$57 million. The Hong Kong Revenue authorities ("the Revenue") sought to charge to tax these profits as having arisen in or derived from Hong Kong from a business carried on in Hong Kong under section 14 of the Inland Revenue Ordinance.[4]

TVBI argued before the Privy Council that there were two alternative approaches to the problem; (1) that TVBI provided a service in an overseas territory, for instance Vancouver, by sub-licencing film rights in Vancouver, and/or (2) that TVBI exploited property assets by sub-licencing these rights which were only capable of use in Vancouver. It was argued that since both the provision of services and exploitation of property assets took place outside Hong Kong, it could not be said, following the basic source principle[5] propounded by Lord Bridge in the *Hang Seng Bank* case, that the source of profits arose in or were derived from Hong Kong.

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1 Privy Council Appeal No. 28 of 1991 from Hong Kong. [1992] 3 W.L.R. 439.
2 [1990] S.T.C. 733.
3 See the writer's comment on the case in [1991] S.J.L.S. 517.
4 Cap. 112, Laws of Hong Kong 1986 Ed.
5 *Infra.*

Lord Jauncey of Tullichettle delivering the judgment of the Privy Council, rejected the two arguments and held that the profits arose in or were derived from (*i.e.* sourced in) Hong Kong and were subject to Hong Kong profits tax. Lord Jauncey said that (1) "rendering a service connotes some positive action on the part of the renderer and not a state of passivity".[6] The granting therefore of rights to exploit copyrights outside Hong Kong did not amount to such a rendering of services; (2) Neither could TVBI be said to be exploiting property within the meaning of the basic source principle since this argument presupposed "that intellectual property rights have a *situs* similar to immovable property".[7] In the latter situation "profits accruing to a resident taxpayer from the sale of foreign immovable property are likely to arise in the country where that property is situated ... but it by no means follows, however, that intellectual property rights exercisable only in one country are to be equiparated to immovable property in that country". Lord Jauncey observed that "when Lord Bridge used the words 'place where the property was let' he must have been referring to the place where the property let was situated and not to the place or places where the lease happened to have been signed".[8] The Privy Council in the *TVBI* case had thus limited Lord Bridge's statement to immovable property and not intellectual property rights.

Lord Jauncey went on to further comment that,

> ... it is a mistake to try and find an analogy between the facts in this appeal and the examples given by Lord Bridge in the *Hang Seng Bank* case. The circumstances in that case involving, as they did, buying and selling in well defined foreign markets were very different from those in the present and the examples were never intended to be exhaustive of all situations in which section 14 of the Ordinance might have to be considered. *The proper approach is to ascertain what were the operations which produced the relevant profits and where those operations took place.*[9]

On this approach, it was found that the taxpayer was acquiring films and rights of exhibition and exploiting those rights by granting sub-licences to overseas customers. The relevant business carried on in Hong Kong was the acquisition of rights to the films and the granting of sub-licences to overseas customers. As such, the profits arose in or were derived from Hong Kong and were subject to tax in Hong Kong.

Lord Jauncey also went on to say that it would only be in rare cases

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6 *Supra,* note 1, at p. 445.
7 *Supra,* note 1, at pp. 445-446.
8 *Ibid.*
9 *Supra,* note 7. Emphasis added.

that a taxpayer with a principal place of business in Hong Kong could earn profits not chargeable to profits tax in Hong Kong. There were only three cases which counsel were able to refer to in which the source of profits had been held not to be in the principal place of business –*C.I.T.* v. *Chunilal Mehta,* [10]*C.I.R.* v. *The Hong Kong & Whampoa Dock Co.,*[11] and the *Hang Seng Bank* case itself. The Revenue's appeal was thus allowed with costs.

Lord Jauncey's judgment is lucid but on a closer analysis presents some difficulties. The *TVBI* case is significant for at least three points as follows:

The Broad Guiding Principle

In the *Hang Seng Bank* case, the approach in determining sources of income was to see what the taxpayer had done to earn the profits in question. It depended on the profit making activity the taxpayer was engaged in. If, according to Lord Bridge, it involved rendering of a service or engaging in a profit making "activity such as the manufacture of goods" then the profit will have arisen from the place where the services were rendered or activity carried on. If the profit was earned by the exploitation of property assets as by letting property, lending money or dealing in commodities or securities by buying and reselling at a profit then in general the profit would have arisen from the place where the property assets were exploited *viz.,* "where the property was let, the money was lent, or the contracts of purchase or sale were effected".[12] While Lord Bridge cautioned that it was impossible to lay down precise rules on locating the source of income, his services/property dichotomy was not surprisingly thought by many[13] to be the basic source principle upon which source of income issues would be determined.

However as mentioned above, Lord Jauncey held that Lord Bridge's illustrations in the *Hang Seng Bank* case were never intended to be exhaustive of all possible fact situations, being given in the context of a case (the *Hang Seng Bank* case) which was very different from the facts of the instant case.[14]

With respect, the writer is of the view that the Court in the *TVBI* case did not give sufficient weight to the illustrations used by Lord Bridge in

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[10] A.I.R. [1938] P.C. 232.

[11] [1960] 1 H.K.T.C. 85.

[12] *Supra,* note 2 at pp. 740, 741.

[13] See APTIRC Bulletin Nov/Dec 1990 p. 389, (1992) 22 H.K.L.J. 48, and even the Court of Appeal in the *TVBI* case in [1991] 2 H.K.L.R. 216, at p. 218.

[14] *Supra* note 1 at p. 444 of the judgment, Lord Jauncey said that when Lord Bridge gave certain examples, he "was not intending thereby to lay down an exhaustive list of tests to be applied in all cases in determining whether or not profits arose in or derived from Hong Kong". More significantly, at p. 446, he said, "Their Lordships consider it is a mistake to try and find an analogy between the facts in this appeal and the examples given by Lord Bridge in the *Hang Seng Bank* case".

the *Hang Seng Bank* case. Lord Bridge in the *Hang Seng Bank* case was clearly laying down a broad guiding principle, which he mentions as being attested to by many authorities, for future case law development.

The broad guiding principle has been understood to include his examples[15] which really formed two different categories of income earning activities – income from personal exertion and income from exploitation of property. It has even been stated by an Australian judge[16] that the two such categories are exhaustive of all fact situations from which sources from income may be derived, *i.e.,* that sources of income will only be derived from these two and probably no other categories of income earning activities. It is submitted that Lord Bridge's illustrations provided a sense of direction and focus to the courts in that where income arose from a person's activities, the courts would be enjoined to examine the location of the activities to determine the source of income and where the income arose from exploitation of property assets then the courts would have to pay closer attention to the location of the income producing asset. It was clear that Lord Bridge never intended these illustrations to be anything more than simple examples because he had also stated that it was impossible to lay down precise rules of law to determine the source of profits. While there would be at least two difficulties in applying these examples by analogy to fact situations[17] they would provide, as mentioned earlier, some direction to the courts for future case law development. It is puzzling therefore that the Privy Council did not build upon Lord Bridge's illustrations. The Court in the *TVBI* case instead took the approach that one should "ascertain what were the operations which produced the relevant profits and where those operations took place".[18] The inquiry is two-fold – the courts are to determine the profit-making operations and where the operations took place. The basis of this approach is Atkin L.J.'s dicta in *Smidth* v. *Greenwood.*[19] The 'operations' approach is presumably not inconsistent with Lord Bridge's guiding principle since Lord Jauncey stated it was an expansion of Lord Bridge's guiding principle and that Lord Bridge was said to have had the *Smidth* case in mind when he propounded the guiding principle. However the *Smidth* case was not even mentioned in Lord Bridge's judgment. It may therefore be said that

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[15] *Supra,* note 13.

[16] Latham C.J. in *F.C.T.* v. *United Aircraft Corporation* (1943) 2 A.I.T.R. 458 at p. 466.

[17] One difficulty is that often a source of income can be explained as having been derived from both the provision of services and exploitation of property assets. In fact, the Court of Appeal in the *TVBI* case analysed the position of *TVBI* as such – see *supra,* note 11. This difficulty may lead to problems in other areas of income tax law in Singapore. Another difficulty is that the examples on closer analysis may break down. See *supra,* note 2 at pp. 519-523.

[18] *Supra,* note 1, at p. 8.

[19] [1921] 3 K.B. 583.

the broad guiding principle and the 'operations' approach may be different altogether.

Furthermore, the problem with this approach is that unlike the guiding principle it may be too vague. What is meant by "operations"? How does one frame an activity as an 'operation' for the purposes of this approach? A taxpayer may carry on many activities all of which contribute to generating profits in one way or another. Which of these activities constitute the relevant operations in the determination of source? The courts themselves have difficulties answering these questions. This was evident in the *Whampoa Dock* case where Gregg J. in the High Court disagreed with the Board of Review's meaning of 'operations'. However, Reece J. (with whom the other members of the court concurred) in the Court of Appeal held that operations in that case referred to the salvage operations of refloating and towing a vessel to a destination was the relevant 'operations' but did not suggest how this was determined, preferring instead to consider 'operations' from the view of a practical man.[20] Lord Jauncey in the *TVBI* case simply held that the Court of Appeal was in error having "failed to give proper consideration to the fundamental question of what were the operations of TVBI which produced the relevant profit".[21] However, he too did not give any indication as to how the relevant operations were to be determined, merely holding that the Court of Appeal was wrong.

The problem is one of definition. It is clear that the word 'operations' refers to income generating activities but must also include situations where a taxpayer exploits property assets to generate income (as, for example, where income is derived from the rental of immovable property). Yet, the word 'operation' is defined in the *Oxford Advanced Learner's Dictionary* as, *inter alia, "activity,* often involving several people and/or spread over a period of time."[22] 'Operations' therefore appears to be just a synonym for 'activity' and this brings us nowhere in the search for location of source of profits. The application therefore of an 'operations' approach is unsatisfactory since practically any activity of an income generating enterprise can be labelled as an 'operation'.

Even if it is felt that Lord Jauncey's approach is useful, it can also be said that the very objection to the usefulness of the illustrations in Lord Bridge's broad guiding principle (that the facts in the *Hang Seng Bank*

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[20] *Supra,* note 11 at p. 114. He was applying a practical man approach which originated in the dicta of Isaacs J. in *Nathan* v. *F.C.T.* (1918) 35 C.L.R. 183, at p. 189 who said that source "is not a legal concept but something which a practical man would regard as a real source of income, and the ascertaining of source is a practical hard matter of fact". This approach has been endorsed by the Privy Council in *Liquidator, Rhodesia Metals* v. *C.I.T.* [1940] A.C. 774.

[21] *Supra,* note 1, at p. 448.

[22] 4th ed., 1989. Emphasis added.

case were different) will apply equally to Lord Jauncey's reliance on Atkin L.J.'s dicta in *Smidth* v. *Greenwood.*[23] The facts in the *Smidth* case concerned sale of machinery in England by a Danish trader resident in Copenhagen while the *TVBI* case concerned the sub-licensing of copyright. More importantly, the charging provision[24] which the Court of Appeal had to construe in the *Smidth* case was vastly different from section 14 of the Income Tax Ordinance[25] in the *TVBI* case. The question in the *Smidth* case was whether the Danish company "exercise[d] a trade in [the United Kingdom] so that profits accrue to them from the trade so exercised". The focus therefore was whether a trade was exercised in the U.K., but in the *TVBI* case the question in section 14 of the Income Tax Ordinance was whether profits arose in or were derived from Hong Kong. It is clear that the nature of enquiry is entirely different.[26] The *Hang Seng Bank* case on the other hand concerned the same provision (section 14 of the Ordinance) and the issue there was also whether profits arose in or were derived from Hong Kong. Theoretically, it is more difficult to see why the approach in the *Hang Seng Bank* case should not be closely followed while Atkin L.J.'s dicta in the *Smidth* case (the 'operations' approach) provided the suitable approach to the question at hand.

The fundamental question remains: is it ever possible to have a definite test for determining source of profits? It is submitted that it is not possible to find a definite test. Denning L.J. said, in *Paisner* v. *Goodrich,*

> .... when interpreting a statute, the sole function of the Court is to apply the words of the statute to a given situation ... the courts must be governed by the statute and not by words of the judges.[27]

Lord Reid in *Goodrich* v *Paisner* said, "[n]o Court is entitled to substitute its words for the words of the Act."[28] The word 'operations' is not found in section 14, rather, in the *TVBI* case the question was whether the profits "arose in or were derived from Hong Kong". These are the words which the courts have to construe. The 'test' of ascertaining "the operations which produced the relevant profits and where those operations took place" is

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[23] *Ibid.*

[24] S. 41 U.K. Income Tax Act 1842 (5 & 6 Vict. c. 35).

[25] *Supra,* note 4.

[26] For a view that source of profits is located in the country where trade or business is carried on, see Khattar, "The Concept and Determination of Sources of Income from Trades, Businesses, Professions or Vocations" in *Singapore Concise Tax Programme* (1984) pp. 5, 6. But see Soon, "Tax Jurisdiction of Singapore" (1985) 27 Mal.L.R. 29 at p. 32, 33, which takes a different view.

[27] [1955] 2 K.B. 353 at p. 358.

[28] [1957] A.C. 65 at p. 88.

at best, one approach (albeit a vague one) in determining the source of profits and whether they arose in or were derived from Hong Kong.

Lord Bridge's approach in the *Hang Seng Bank* case on the other hand envisages a tendency to apply and extrapolate from the categories and illustrations given by Lord Bridge to fact situations. In fact the Court of Appeal in the *TVBI* case analysed the profits as having arisen from both the provision of services and the exploitation of property assets. Kempster J.A. delivering the judgment of the Court, observed, of TVBI's activities,

> Essentially the profit-making activity was carried on and the services, being provision of the rights, were rendered outside Hong Kong. Alternatively, the profit was earned by exploitation of property assets and arose or was derived from the places where those assets were when sold or licensed and remain; all outside Hong Kong. *English, Scottish and Australian Bank Ltd* v. *I.R.C.* [1932] A.C. 238.[29]

Much may be said for the tendency to extrapolate from Lord Bridge's illustrations. In fact this is how the common law develops – by way of extrapolation and precedent. With greatest respect to Lord Jauncey the operations approach may have a stultifying effect on common law development. One is left with the test of determining what constitutes the relevant operations for tax purposes; a test which is clearly unhelpful.

Intellectual Property Rights

It will be recalled that Lord Jauncey held that what the taxpayer was doing did not involve the rendering of services nor the exploitation of property assets since the former connoted "some positive action on the part of the renderer and not a state of passivity"[30] and the latter presupposed that intellectual property rights had a *situs* similar to immovable property. It could not be said "that intellectual property rights exercisable only in one country are to be equiparated to immovable property in that country".[31] It could not also be said that forbearance from taking action in overseas country was productive of profit in that country. Lord Jauncey also went on to give an example that where a taxpayer hired equipment for a given time on payment of a fixed fee the profit is derived from the contract of hire and not from forbearance from taking action from seeking to recover the equipment during the contract period.[32]

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[29] *Supra,* note 13.
[30] *Supra,* note 1, at p. 445
[31] *Supra,* note 1, at p. 446
[32] *Ibid.*

This reasoning is surprising for two reasons. First, copyright as a form of intellectual property has been held to have a *situs* in a particular location and royalties therefrom have been taxed on that basis. In *Curtis Brown Ltd* v. *Jarvis,*[33] the appellant was a literary agent in the U.K. acting for and on behalf of foreign authors not resident in the U.K. The appellant acted on behalf of the authors by receiving manuscripts of the literary productions and submitting them to publishers likely to accept them. Where the publishers accepted the manuscripts a contract would be entered into between the publisher and the author. Consequently royalties payable under the contract would be paid to the appellant who in turn would remit the amount of such royalties to the authors after deducting therefrom its commission and incidental expenses incurred. The U.K. Revenue authorities sought to tax the royalties of the authors as profits or gains arising from property in the U.K. Rowlatt J. held that the royalties were so taxable. The learned judge said:

> Copyright is an intangible piece of property. It takes effect only as a right, it has no extension in space; but its taking effect and its operation, is limited by locality, and when we speak, as we do in common parlance, of copyright in the United Kingdom, it seems to me that the phrase is absolutely accurate, it limits the extent ... it defines the property as existing, perhaps among places, in the United Kingdom.[34]

This case therefore is authority that (1) copyright is an intangible property and (2) it can be situate, for tax purposes, in a particular locality.[35] In the *TVBI* case TVBI was granting sub-licences to exploit copyright property in overseas countries. It could therefore be argued that the source of income was the copyright as intellectual property which was located outside Hong Kong. It is regrettable that Lord Jauncey was not referred to the *Curtis Brown* case, preferring to rule, not too convincingly in this writer's view, that what was relevant was the grant of sub-licences in Hong Kong and as such the source was in Hong Kong.

The second reason relates to Lord Jauncey's example on hire of equipment. With respect, the example is misleading in that it cannot always be said that the contract of hire is the source of profit of the letting of machinery. Indeed, there is authority to the contrary that in some cases the source of rental income is where the machinery is leased, and not where the lease

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[33] (1929) 14 T.C. 744.

[34] *Ibid.,* at p. 751.

[35] Income from patent rights are similarly taxable as gains arising from property within the U.K. See *Internal Combustion Ltd.* v. *C.I.R.* 16 T.C. 532.

is signed. In *C.O.T.* v. *British United Shoe Machinery (S.A.) (Pty) Ltd.*[36] the taxpayer company was in the business of *inter alia,* leasing machinery used in the manufacture of footwear. Leases for the machinery were signed in Port Elizabeth, South Africa, but the machines were used by the lessees in Rhodesia. The question was whether the source of rental income arose in Rhodesia where the machines were used (in which case tax would be chargeable) or in Port Elizabeth where the lease agreements were signed. The Federal Supreme Court of Rhodesia held that the source of income was the property – the machinery, so that income was derived from Rhodesia since the machines were used in Rhodesia. The Court, however, drew a distinction between the facts of the case and the hire of *smaller* machines for a more *limited period.*[37] In such a case, it would be the business activities of the taxpayer which would be the source of income. But Clayden C.J. (with whom the other members of the Court concurred) said:

> I consider that it is clear that with property of this nature, and leases of so long duration so that *the emphasis is on the property and not on the business of the lessor,* the source of income derived from the property is where the property is used.[38]

It could therefore be said that in an equipment rental business where the emphasis[39] is on property the source of income would be where the equipment was situate. In the words of Clayden C.J. in the *British United Shoe Machinery* case, the source of the income arises "because someone is using the machines, the property of the [taxpayer]".[40] It will be recalled that Lord Jauncey in his example suggested that the profits derive from the contract of hire of equipment. If the profits arose from the contract of hire then his example may well be inconsistent with the *British United Shoe Machinery* case. For instance, would the source still be in Hong Kong if the taxpayer was the owner of, say, two or three immovable properties situate outside Hong Kong and executed lease agreements in Hong Kong for the rental of these properties? Following the *British United Shoe Machinery* case this could be a business with an emphasis on property and therefore

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[36] (1964) 26 S.A.T.C. 163.

[37] *Ibid.,* at p. 167. The leases of the machines were for five to ten years. An illustration of 'smaller machines' given by the Court was that of motor cars.

[38] *Supra,* note 36 at p. 168. Emphasis added.

[39] This word was not defined. Perhaps one example where the emphasis would be on property would be where the taxpayer owned one or two pieces of equipment which he hired for profit, *e.g.,* a taxpayer shipowner of two vessels out on charter. But *cf. James Fenwick & Co. Ltd.* v. *F.C.T.* (1921) 29 C.L.R. 164, a case which was distinguished in the *British United Shoe Machinery case.*

[40] *Supra,* note 37.

the source of income would be located where the property was situate. But Lord Jauncey's example suggests that the source would be where the lease agreements are signed, *i.e.,* in Hong Kong!

Business Carried on in Hong Kong

Lord Jauncey stated that "it can only be in rare cases that a taxpayer with a principal place of business in Hong Kong can earn profits which are not chargeable to profits tax ...."[41] How exactly this conclusion was arrived at is unclear. Also, his Lordship did not elaborate as to when it would ever be the case that profits would be sourced overseas and not chargeable to tax. One is left to surmise that this result was reached by the application of the operations approach to businesses carried on in Hong Kong. Lord Jauncey stated that there were only three cases which counsel was able to cite where profits were not chargeable to tax and he went on to discuss them.[42] It could be implied[43] from Lord Jauncey's judgment that in these three cases, a common factor was that the relevant contracts which produced the profits were all entered into and performed outside Hong Kong but on an examination of these cases the location of the place where the contract was entered into and performed was not a crucial factor. Only the *Whampoa Dock* case held that the contract element should not be treated as having 'no significance'[44] though the case ultimately turned on the application of the 'operations' approach.[45] It is also notable that these three cases were leading cases on source of income and they all indicate that the place where the taxpayer's business enterprise was situate was not necessarily the location of the source of profits. In the *Chunilal Mehta* case and the *Hang Seng Bank* case the taxpayers made investment decisions in Bombay and Hong Kong respectively to buy and sell commodities and certificates of deposit in foreign markets. It was held by the Privy Council in both cases that Indian and Hong Kong tax was not chargeable. In *Chunilal Mehta* itself the Privy Council stated that "... it cannot be held that it is ... [a] test of chargeability ... that profits arise or accrue at the place where the business is carried on".[46] The *Hang Seng Bank* case held that section 14 presupposed that profits of a business carried on in Hong Kong might have accrued from different sources, those located in Hong Kong being taxable.[47] In fact

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[41] Supra, note 1 at p. 446
[42] *Supra,* p. 3.
[43] *Supra,* note 1 at p. 446, 446 of the judgment.
[44] *Supra,* note 11, at p. 109.
[45] *Supra,* note 11, at pp. 114, 115.
[46] *Supra,* note 10, at p. 236.
[47] *Supra,* note 2, at p. 736.

in the *Hang Seng Bank* case the argument that the carrying on of a business in Hong Kong from which profits arose itself was sufficient to attract tax was rejected by Lord Bridge. It was a further requirement that profits had to be sourced in Hong Kong. In the *Whampoa Dock* case, the contract of salvage was entered into, and salvage work was performed outside Hong Kong. It was held that the source of profits was outside Hong Kong, even though the taxpayer carried on business as shipbuilders in Hong Kong. Dicta in these three cases therefore indicate that Lord Jauncey's statement is perhaps too wide. Indeed, the plain words of section 14 which only require profits to arise in or be derived from Hong Kong do not bear out Lord Jauncey's generalization.

Another generalization is Lord Jauncey's example of a manufacturer in Hong Kong selling goods to a merchant in Manila.[48] The payment which such a manufacturer receives would comprise profits which, Lord Jauncey stated, arose in or is derived from Hong Kong. It is respectfully submitted that this would not always be the case. Manufacturing and sale depends on a number of processes – the sourcing of (including negotiations for) raw materials, the converting of raw materials into finished product (the manufacturing process itself), the advertising and ultimate sale of products and the receipt of monies from the sale. If practically all other processes, except the manufacturing process, took place outside Hong Kong would the source of income still be in Hong Kong? To state that the source would be in Hong Kong would be to give an undue emphasis to the manufacturing activity to the exclusion of other activities of the business. Lord Bridge in the *Hang Seng Bank* case referred to a situation where "goods sold outside Hong Kong may have been subject to manufacturing and finishing processes which took place partly in Hong Kong and partly overseas".[49] In such situations it was, according to Lord Bridge, necessary to apportion the gross profit on sale as having arisen partly in Hong Kong and partly outside Hong Kong. The solution is not as straightforward as Lord Jauncey has put it. It will be recalled that Lord Bridge had stated that it was impossible to lay down precise rules governing the location of source. But the tenor of Lord Jauncey' s judgment in the *TVBI* case is to subject to tax all profits emanating from businesses carried on in Hong Kong.

Conclusion

The concept of source in Hong Kong is similar to that of Singapore's. A notable difference would be that section 14 of the Hong Kong Income Tax

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[48] Supra, note 1, at p. 447.
[49] *Supra,* note 2, at p. 740.

Ordinance requires a business to be carried on in Hong Kong and Singapore's section 10 does not require a business to be carried on in Singapore. This is inconsequential insofar as the *TVBI* case was concerned, since it was assumed on the facts that a business was carried on in Hong Kong, the sole issue being whether the profits were sourced in Hong Kong. Aside from the difficulties presented by the *TVBI* case, there are in the local context, two implications which follow from the decision. First, it is likely that the local courts will follow the *TVBI* case.[50] As such, the operations approach is the way ahead in the determination of sources of income.

Secondly, this writer is of the view that the desire behind the playing down, so to speak, of Lord Bridge's illustrations, and Lord Jauncey's general comments on profits of businesses being normally taxed in Hong Kong were possibly to plug potential loopholes for tax avoiders. The two examples of the hiring agreements signed in Hong Kong and the manufacturer selling goods to Manila purchasers while going against the tenor of Lord Bridge's dicta that it was impossible to lay down precise rules governing the determination of the source of profits, indicate that the tendency is to impose a wider tax net on businesses in Hong Kong. This is not undesirable – it would have been very tempting for taxpayers to arrange as far as possible their affairs in accordance with or within the illustrations in Lord Bridge's guiding principle to avoid tax. If the Revenue had failed in its appeal in the *TVBI* case, Hong Kong would have become a tax haven, at least where income from the licensing of copyright is concerned.

It has often been said that the determination of source is what a practical man would regard as real source of income and is a practical hard matter of fact.[51] Lord Bridge's guiding principle and illustrations while possibly fraught with difficulties provided a rough and ready guide by segregating into two categories the location of source of profits. While his Lordship admitted that it would not be possible to formulate a definite test for determining the source of profits the guiding principle gave some direction to the courts. Lord Jauncey's decision in the *TVBI* case, however, may have taken us back to square one, so to speak, since one is simply asked to look at the facts of the case to determine what the profit making operations are and where they take place. Indeed, given his Lordship's two examples, one

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[50] See the writer's comment on the *Hang Seng Bank* case, *supra,* note 3 at p. 527. More significantly the practice of the Singapore courts to treat themselves as bound by Privy Council decisions has actually been acknowledged by the judiciary – see Hwang J.C. at p. 13 of his judgment in *Indo Commercial Society (Pte) Ltd.* v. *Ebrahim Yusof Abdul Rahman Rahmani & Anor.* (unreported, High Court Suit No. 2963 of 1986).

[51] See *supra,* note 20 for the practical man approach. For a local authority applying this approach, see *Chandos Pte. Ltd.* v. *C.I.T.* [1987] 2 M.L.J. 670, at p. 676.

is uncertain if Lord Jauncey would agree that the determination of source is what a practical man would regard as a practical hard matter of fact.

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