

# CG Lighting: No green light to Court of Final Appeal for tax dispute

For background to this case, please revisit our previous e-Legal on [CG Lighting](#).

In a recent decision, the Leave Committee of the Court of Final Appeal denied permission for a taxpayer, whether "as of right" or by the Court's discretion, to proceed with an appeal to the Court of Final Appeal.

## Brief recap

CG Lighting Ltd<sup>1</sup> (**Taxpayer**) was a private company in Hong Kong, whose wholly-owned subsidiary CG Electrical (Shenzhen) Limited (**CGES**) carried on a business in Mainland China of manufacturing lighting fixtures which were sold by the Taxpayer. The Taxpayer provided raw materials, technical know-how, management staff, production skill, computer software, product designs, skilled labour, training, supervision and manufacturing plant and machinery to CGES at no cost. In turn, CGES provided factory premises and workers to manufacture the lighting fixtures for a processing fee from the Taxpayer. The Taxpayer's sale of such lighting fixtures resulted in certain profits (**Profits**), being the subject matter of the tax assessments by the Commissioner of Inland Revenue (the **Commissioner**).

The Commissioner assessed the Taxpayer to profits tax on the full amount of its Profits on the basis that they arose in Hong Kong. The Board of Review upheld the Taxpayer's appeal, concluding that part of the Taxpayer's Profits was sourced outside Hong Kong. The Court of First Instance allowed the Tax Commissioner's appeal, holding that the Taxpayer's profit-making transactions were the sales to its customers which took place in Hong Kong. The Taxpayer appealed against the Court of First Instance's decision to the Court of Appeal, which applied the decisions of *Datatronic*<sup>2</sup> and *Ngai Lik*<sup>3</sup> (discussed in our previous e-Legal on [CG Lighting](#)) and dismissed the Taxpayer's appeal. The Taxpayer required leave to further appeal to the Court of Final Appeal. Leave to final appeal was refused by the Court of Appeal. The Taxpayer then applied to the Court of Final Appeal for leave.

## Court of Final Appeal's decision and reasoning

In a very succinct decision, the Leave Committee of the Court of Final Appeal (consisting of Chan ACJ, Bokhary PJ and Ribeiro PJ) unanimously affirmed the Court of Appeal's refusal to grant leave to final appeal on two grounds:

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<sup>1</sup> *CG Lighting Ltd v CIR* [2011] HKEC 1139 (*CG Lighting*)

<sup>2</sup> *CIR v Datatronic* [2009] 4 HKLRD 756 (*Datatronic*)

<sup>3</sup> *Ngai Lik Electronics Co. Ltd v CIR* [2009] 5 HKLRD 334 (*Ngai Lik*)

- *No appeal "as of right"*

Generally, right to final appeal lies "as of right" under section 22(1)(a) of the Hong Kong Court of Final Appeal Ordinance (**CFA Ordinance**) in any civil matter where the dispute amounts to the value of HKD 1 million.

However, unquantifiable monetary claims which require assessment (and are therefore unliquidated rather than liquidated) do not come within section 22(1)(a). The Court of Final Appeal considered that as tax requires assessment, tax demands do not come within section 22(1)(a). The appeal which the Taxpayer sought to bring did not lie "as of right".

- *No exceptional circumstances*

Right to final appeal also lies in the Court's discretion under section 22(1)(b) of the CFA Ordinance, where the dispute involves a question of great general or public importance or the Court otherwise considers that the appeal ought to proceed.

The Court of Final Appeal was not persuaded that there was any question of legal principle to be resolved (let alone whether of great general or public importance), and did not consider that there were any exceptional circumstances to warrant its discretion otherwise.

## Repercussions

For the first time, it is confirmed that tax appeals, by nature, cannot be expected to reach the Court of Final Appeal "as of right". Therefore, unless the matter clearly involves questions of great general or public importance or genuine exceptional circumstances exist, taxpayers should no longer retain an expectation that a tax dispute exceeding HKD 1 million would necessarily be given the green light to the Court of Final Appeal.

The Court is yet to provide guidance, in the context of tax appeals, as to what constitutes questions of great general or public importance or exceptional circumstances.

*CG Lighting* demonstrated that the decisions in *Datatronic* and *Ngai Lik* continue to have significant implications as to the tax positions of many manufacturing groups in Hong Kong which have their manufacturing operations undertaken by subsidiaries in Mainland China.

The position remains that where the profit-making transaction is identified to be a sale of goods in Hong Kong, acts of the taxpayer participating in the manufacturing process of a non-agent third party (albeit a subsidiary) are considered antecedent or incidental activities which should be disregarded in determining the source of the profits of the taxpayer.

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