Applications No 13 of 2020

IN THE ANTI-MONEY LAUNDERING AND COUNTER-TERRORIST FINANCING REVIEW TRIBUNAL

IN THE MATTER of a Decision made by the Commissioner of Customs and Excise pursuant to section 31 of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance, Cap. 615

and

IN THE MATTER of section 59 of the Anti-Money Laundering and Counter-Terrorist Financing Ordinance, Cap. 615

BETWEEN

PAYECO COMMERCIAL SERVICES LIMITED Applicant

and

COMMISSIONER OF CUSTOMS AND EXCISE Respondent

Before: Mr. Shieh Wing-tai Paul, SC, Chairman
Date of determination: 29 November 2022

DETERMINATION

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1. This is an application by Payeco Commercial Services Ltd ("**the Applicant**") for review of decision by the Commissioner of Customs and Excise ("**the Respondent**") by a decision notice dated 22 April 2020, refusing the Applicant's application for renewal of its Money Service Operator ("**MSO**") licence under the Anti-Money Laundering and Counter-Terrorist Financing Ordinance (cap 615) ("**the Ordinance**").

2. By correspondence in May and June 2021:

(1) The Applicant indicated that no witness statements would be filed by the Applicant.

(2) The parties agreed that the application can be dealt with by me alone, purely on papers and on the basis of the witness statements of the Respondent.

3. On 12 January 2022 the parties exchanged their written submissions. On 31 January 2021 the Applicant filed its reply submissions. The Respondent did not file any reply submissions.

Background facts

4. The background facts can be summarized as follows.

5. On 27 December 2017, the Applicant was granted an MSO licence. Pursuant to section 30(6) of the Ordinance, on granting the MSO licence, the Respondent imposed conditions on the licence by issuing a "notice in writing". The imposition of licence conditions took effect from 29 December 2017 until further notice. The conditions include the following:-

(1) The Applicant was required to submit, on a quarterly basis, a Statement of Transactions (a "**periodic return**"), to the Customs and Excise Department to report the information prescribed therein about the

Applicant's business. The periodic return must be submitted within 2 weeks by close of the respective quarter.

(2) The compliance officer (or management staff) of the Applicant was required to attend 5 hours of continuous professional training ("**CPT**") which includes seminars organized by the Customs and Excise Department, the Financial Services and the Treasury Bureau or training courses organized by training institutes regarding anti-money laundering and counter-terrorist financing within a period of 12 months starting from 29 December 2017.

(3) The Applicant was required to notify the Customs and Excise Department in writing and submit relevant training records upon completion of the 5-hour CPT within the specified period.

6. During the period from 10 April 2018 to 8 October 2019 [the Respondent's Case Summary stated this latter date to be 8 October 2018 which was an obvious mistake], the Applicant submitted a total of seven periodic returns, reporting that it had not conducted any money service business during the period from 22 December 2017 to 30 September 2019. However, among the seven submitted periodic returns, three periodic returns (i.e. the periodic returns for the periods (a) 1 April 2018 to 30 June 2018, (b) 1 July 2018 to 30 September 2018, and (c) 1 October 2018 to 31 December 2018) were submitted retrospectively on 10 April 2019.

7. As the Applicant had not provided any money service business for a long period of time from 22 December 2017 to 30 September 2019, i.e. 1 year and 9 months, as shown in the seven submitted periodic returns mentioned above since the grant of its MSO licence, on 5 November 2019 the Customs and Excise Department sent a "notice of intention to revoke or suspend money service operator licence" ("**Notice of Intention**") to the Applicant. It was mentioned in the Notice of Intention that the Respondent was considering revoking or suspending the Applicant's MSO licence upon its prolonged status of nil transaction, and the Applicant was given a 14-day period from the issue date of the Notice of Intention to provide written submission if any in response to the Customs and Excise Department's Notice of Intention.

8. On 12 November 2019, the Applicant submitted a written submission dated 8 November 2019 (the "**Written Submission**"), attaching (among other things) a Report and Financial Statements for The Year Ended 31 December 2018, in response to the Notice of Intention. The first page of the Written Submission mentioned, among others, that "我公司 '易聯商業服務有限公司' ***於 2017 年 12 月至 2019 年 9 月在香港持續經營金錢服務牌照相關業務***。具體證據有: A. 2018 年香港會計師事務所審計報告，B. 香港稅務局 2018 年利得稅稅務表，C. 大陸母公司提供的在香港子公司 '易聯商業服務有限公司' 業務數據，包含(業務統計表、部份客戶合同、部份銀行流水及回單)".

9. The Written Submission and the attachments showed that the Applicant had conducted money service business for the period from December 2017 to September 2019. Besides, in the Written Submission, the Applicant also admitted its failure to timely submit periodic returns due to its "negligence" and would attend the CPT as required by the conditions imposed on its licence.

10. Subsequently the Applicant submitted an application for renewal of its MSO licence to the Customs and Excise Department, on 12 November 2019.

11. On 28 November 2019, the Customs and Excise Department sent a letter to inform the Applicant that it had breached the licensing conditions imposed on its MSO licence, and that the Customs and Excise Department would follow up on the Applicant's failure to submit accurate periodic returns and reserved rights to take disciplinary and/or other administrative actions such as suspension and/or revocation of the MSO licence.

12. On 27 December 2019, the Applicant submitted a Form 6 to notify the Respondent of several changes of its company particulars. This was supplied to Ms Priscila Lee of the Customs and Excise Department when she was conducting a compliance inspection on the Respondent.

13. According to the information provided in the Form 6, the Applicant had not notified the Respondent of a number of changes within one month beginning on the

date on which the change took place as stipulated in section 40(1) of the Ordinance, the changes were:-

1) The travel document, i.e. passport, of Ms. Le La, the ultimate owner of the Applicant, had been renewed since 15 January 2018;

2) Mr. Li Luogen had resigned as the director of the Applicant since 22 July 2019;

3) Mr. Wang Liping had resigned as the ultimate owner of the Applicant since 1 March 2018 (the Respondent's Case Summary stated this to be 1 January 2018 but the date stated on the actual Form 6 was 1 March 2018);

4) One bank account used for operating money service had been closed since 1 February 2019;

5) Nine bank accounts used for operating money service had been added between 27 December 2017 and 29 October 2019. (the Form 6 also notified three additional bank accounts but those changes were said to take effect from 27 December 2019 and therefore were not late).

(According to §4 of the witness statement of Clara Lee (who took over the compliance investigation from Priscilla Lee on 6 April 2020) three China CITIC Bank statements were submitted together with the Form 6 which recorded account activities as early as 2013. Curiously Priscilla Lee herself had not referred to these in her statement. Since the Respondent does not seem to rely on these three bank statements in its Case Summary I shall say no more about them).

14. A follow-up investigation was taken against the Applicant on the contravention of section 40(1) of the Ordinance which required a licensee to notify the Respondent of any change of particulars in connection with application for an MSO licence or its renewal.

15. On 10 January 2020, the Applicant submitted a letter dated 9 January 2020 to notify the Respondent that a staff of the Applicant had attended a seminar, i.e. "*2019 年金錢服務經營者舉辦的打擊洗黑錢講座*" on 25 May 2018 and 23 December 2019 respectively, and also a seminar, i.e. "金融服務經營者合規培訓班", on 29 October 2019.

16. Except for the said letter, the Applicant had never notified the Respondent in writing of any other record of its CPT.

17. The Respondent refused the Applicant's renewal application on 22 April 2020.

18. The Applicant made this application on 11 May 2020.

Grounds of decision

19. By a Case Summary dated 19 May 2020, the Respondent set out its reasons for refusing the Applicant's renewal application. In gist they are as follows:

(1) Breach of licensing conditions in the following respects:

(a) Failing to submit periodic returns in a timely manner on three occasions in 2018.

(b) Failure to comply with the condition requiring attendance (by its compliance officer or management staff) of 5-hour CPT within the period 29 December 2017 to 28 December 2018.

(2) Submission of false information in its periodic returns, in that:

(a) whilst in its periodic returns submitted on seven occasions from 10 April 2018 to 8 October 2019 it had repeatedly stated that it had zero money service transactions,

(b) in the Written Submission the Applicant contended that it had continued to carry on money service business from December 2017 to September 2019, and enclosed documents showing that it had in fact been carrying on money service business during such period.

(3) Breach of the statutory requirement under section 40(1) of the Ordinance to notify the Respondent of a change in particulars in connection with the Applicant's application for a MSO licence within one month of the change.

Grounds of appeal

20. The Applicant's arguments in support of its application for review, as seen from its submissions and reply submissions, can be summarized as follows:

(1) There had been no finding as to any "fit and proper" status of anyone.

(2) It was not sufficient for the Respondent to have regard to factors which are relevant to whether someone is fit and proper, because failure to meet any individual elements of the "fit and proper" criteria does not necessarily lead to the conclusion that someone is not fit and proper. They only *may* lead to such conclusion, and the Respondent had failed to consider whether they *did* adversely affect the Applicant's "fit and proper" status.

(3) No adequate reasons had been given.

(4) There was no evidence that the Applicant *only* attended 3 hours (hence less than the required 5 hours) CPT within the requisite period.

(5) The Respondent wrongly regarded the Written Submission as "evidence" that it had in fact maintained operation of a money service business during the period in question.

(6) It was a breach of implied undertaking for the Respondent to rely on the Written Submissions against the Applicant.

(7) There was no inconsistency between those submissions and the Applicant's returns of "zero" transactions.

(8) Breach of licensing conditions should only lead to disciplinary actions, not refusal of renewal.

(9) There had been no charge or conviction for violation of section 40 of the Ordinance.

(10) The Respondent failed to consider the fact that even though the Applicant was late in supplying periodic returns on three occasions, it had "purged" the failure and there had not been any other delay ever since, and so any failure could not be said to have been persistent.

Discussion of the Applicant's arguments

Whether any findings made

21. The first three arguments can be conveniently dealt with together.

22. In essence the Applicant complained that in its Case Summary (described by the Applicant's submissions as being the Respondent's Decision of 22 April 2020) the Respondent did not make any relevant findings as to whether anyone was not "fit and proper".

23. Sections 30(3)(a)(iii) and (4) of the Ordinance provide as follows:

> "(3) The Commissioner may grant a licence to an applicant only if the Commissioner is satisfied that (a)...
>
> (iii) where the applicant is a corporation –
>
> (A) each director of the corporation is a fit and proper person to be associated with the business of operating a money service; and

(B) if there is an ultimate owner in relation to the corporation, the ultimate owner is a fit and proper person to be associated with the business of operating a money service.

(4) In determining whether a person is a fit and proper person under subsection (3)(a), the Commissioner must, in addition to any other matter that the Commissioner considers relevant, have regard to the following –

(a) whether the person has been convicted of –

(i) an offence under section 5(5), (6), (7) or (8), 10(1), (3), (5), (6), (7) or (8), 13(1), (3), (5), (6), (7) or (8), 17(9), 20(1), 61(2) or 66(3);

(ii) an offence under section 14 of the United Nations (Anti-Terrorism Measures) Ordinance (Cap. 575);

(iii) an offence under section 25(1), 25A(5) or (7) of, or any offence specified in Schedule 1 to, the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405); or

(iv) an offence under section 25(1), 25A(5) or (7) of, or any offence specified in Schedule 1 or 2 to, the Organized and Serious Crimes Ordinance (Cap. 455);

(b) whether the person has a conviction in a place outside Hong Kong –

(i) for an offence in respect of an act that would have constituted an offence specified in paragraph (a)(i), (ii), (iii) or (iv) had it been done in Hong Kong;

(ii) for an offence relating to money laundering or terrorist financing; or

(iii) for an offence for which it was necessary to find that the person had acted fraudulently, corruptly or dishonestly…"

24. The Applicant complained – with reference to section 30(3)(a)(iii) - that there was no discussion by the Respondent as to whether any of the Applicant's directors or ultimate owner was not a fit and proper person for the purpose of the renewal.

25. The Case Summary (which provides the Respondent's reasons for rejecting the renewal application) must be read as a whole, in a common sensical

manner and not in a pedantic and hair-splitting way. §2(a) and 2(b) the Case Summary expressly referred to section 30(3) of the Ordinance (specifically, the part concerning where the applicant is a corporation). The Case Summary sets out the names of the directors and the ultimate owner. The discussion at §4 focused on matters that are said to be relevant to the "fit and proper" test. It is obvious that the Respondent's stance is that it was not satisfied that the "fit and proper requirement" in section 30(3) had been satisfied in respect of all the directors and the ultimate owner and that such a conclusion is reached on the basis of the various items of "negative" factors identified under §4. In any event the Respondent had confirmed this to be its position in §28 of its submissions. The Applicant may disagree with this conclusion and can advance substantive reasons for so disagreeing, but that is a different point. Insofar as its argument is that the Case Summary did not contain any discussions or findings as to the relevant "fit and proper" test, I reject it.

26. The Applicant also complained – with reference to section 30(4) of the Ordinance – that the Respondent *must* have regard to the matters listed in that sub section (which included certain types of convictions). I do not see how this assists the Applicant – while the Applicant may not have been convicted of the various offences, those convictions are not the *only* matters that the Respondent can have regard to when exercising his discretion. Therefore the absence of any convictions mentioned in that sub paragraph is not a positive point that the Applicant can rely upon.

27. The Applicant further contended that of the factors that the Respondent had taken into account (as set out in §4(v), (w) and (y) of the Case Summary), they are not matters that will *necessarily* lead to a refusal of renewal. Specifically, the Applicant relies on the Supplementary Guideline on Criteria for Determining Fitness and Propriety (January 2020) (the "**Supplementary Guideline**") published by the Customs and Excise Department, which provides that "failure of any licensees to meet the fit and proper criteria may reflect adversely on the fit and proper person status" (§5) and that "failure to comply with individual elements [of the fit and proper criteria] may not result in the CCE not being satisfied that a person is fit and proper" (§7). The Supplementary Guideline was actually published after the Applicant had submitted its renewal application (in November 2019). The original Guideline on Criteria for Determining Fitness and Propriety was issued in April 2018 (the version in existence when the

Applicant submitted its renewal application) did not contain any wording similar or equivalent to §7 of the Supplementary Guideline and so the Applicant could not have relied on the wording of §7 in conducting its affairs or in submitting its renewal application. Be that as it may I am prepared to consider the Supplementary Guideline in deciding this application.

28. The wording of § 7 of the Supplementary Guideline (relied on by the Applicant) is actually quite awkward and I do not know whether anything had gone amiss in the drafting process. In the drafting of a discretionary list of factors in a statute or guideline, the word "may" usually means that the presence of the factors will engage (or trigger) the discretionary power, entitling the authority to rely on it to exercise the power in a certain way. It goes without saying that if something "may" have a certain effect, sometimes it "may not" have that effect. But the "may not" aspect is not something that one often finds explicitly mentioned, or emphasized, in a provision (which is what §7 does). Certainly I do not think that the presence of the "may not" wording in §7 is any kind of indication or encouragement for the decision maker to disregard the factor in question. That would be a most odd thing to do.

29. I suspect that either the draftsmen inadvertently added a "not" between "may" and "result", or that the word "necessarily" or "always" is inadvertently omitted. But that is not something that I need to resolve or make any ruling. The point made by the Applicant is that the matters mentioned in §4(v), (w) and (y) of the Case Summary (namely breach of licence condition, provision of false and misleading information and breach of notification requirement) are discretionary factors only, and they may not always lead to the conclusion that an application for renewal will be refused. I am entirely prepared to accept that. Indeed that is the essence of a discretion.

30. The Applicant contends that since these factors are discretionary factors only, therefore merely by mentioning them in the Case Summary does not explain why or how (or indeed whether) these factors did *actually* render the Applicant not a fit and proper person. This argument is somewhat unreal, and is pedantic in the extreme. The factors mentioned in the Case Summary are, by nature, factors which impacts against someone's fitness and propriety. To mention them under the "Reasons for refusal of licence renewal" section of the Case Summary, the Respondent could only have meant

that it had taken these into consideration negatively, against the fitness and propriety of the Applicant. Insofar as the Applicant is saying that the Respondent had not explicitly stated its conclusion that those factors did render the Applicant not "fit and proper", I reject such contention as unduly formulaic. It is hard to see why else the Respondent would mention these negative factors if they did not lead to the ultimate conclusion that the Applicant was actually (not just may be, or may potentially be) not fit and proper (in the section 30(3)((a)(iii) sense). The Applicant may disagree with such a conclusion (or evaluation) by the Respondent and it can seek to persuade me otherwise, but that is a different point to be addressed below. The Applicant's present point is that the Respondent did not appear to have explained how the discretionary factors led to any decision as to fitness and propriety. I reject this point.

31. I also reject the Applicant's argument that there was a failure to give adequate reasons. As I said above it was reasonably clear what the reasons were for rejecting the application for renewal. I repeat that the Applicant is entitled to (as it did) contend that the application was wrongly refused, but it cannot complain that it did not know what the reasons for refusal were.

Number of hours of CPT

32. As to the number of hours of attendance at CPT, according to the letter from the Applicant dated 9 January 2020, its representative was stated to have attended CPT on 25 May 2018 (which lasted three hours according to the official records). This is the only date mentioned in the letter which fell within the period 29 December 2017 to 28 December 2018 which was the period within which the Applicant's representative must receive 5 hours of CPT according to the licensing conditions (the other timeslots mentioned in the letter fell outside the requisite timeframe). That is *prima facie* in breach of the licensing condition requirement of 5 hours.

33. The Applicant contended that there is no evidence that those three hours were the only training received by the Applicant's representative for the period in question. If that means that the Applicant's letter did not contain the word "only", that is technically correct. However, in my view, that does not assist the Applicant, for the following reasons.

34. First, there is an obligation under the licensing conditions for the Applicant to report the CPT that it had received. Unless the Applicant is saying that (contrary to the licensing condition that requires it to do so) by its letter it has not fully reported - and it did not intend to fully report - all the training that it had received, the Respondent (and this Tribunal) is entirely entitled to treat the 9 January 2020 letter as reporting all the training that the Applicant had received during the relevant period.

35. At this juncture I would also add that even though the relevant licensing condition did not stipulate a time limit within which to report the CPT received, the licensing condition should be subject to a requirement of "within a reasonable time upon receiving the training" (because otherwise there would be no way for the Respondent to monitor compliance with the substantive training requirement). *Prima facie* there has been inordinate delay in reporting training received in 2018 only in January 2020. On this basis there has been a breach of the licensing condition concerning reporting of CPT.

36. Secondly it is not open to the Applicant to take the point that the 9 January 2020 letter in its first sentence only purported to refer to training received in the year 2019 (and hence, implicitly, that the letter was not intended to cover the period of 29 December 2017 to 28 December 2018). The fact remains that it had chosen to write, in manuscript, the hours of training that it had received in 2018. One is entitled to treat the letter as intending to include CPT it had received in 2018 as well. It cannot be seriously suggested that the reference to the 2018 hours in the letter was just a gratuitous and selective mentioning of some (but not all of the) training that the Applicant had received in 2018 and that there had been some training that the Applicant's staff had in fact received (over and above the three hours mentioned in manuscript) but which had not been mentioned for some unarticulated reason.

37. Thirdly, this appeal is a hearing *de novo* (see section 60(1)(a) of the Ordinance as to the Tribunal's power to substitute its own decision and section 61(1)(a) as to the wide range of materials that the Tribunal may receive). It is open to the Applicant, if it so wishes, to produce evidence that it did in fact receive the requisite five hour training (and not just three) during the 29 December 2017 - 28 December

2018 period. And if it is the Applicant's case that by its 9 January 2020 letter it had not fully reported on its training received between 29 December 2017 and 28 December 2018, it could and should have rectified its omission by reporting what it now says to be the full training it received during that period. The fact is that it has not done so.

38. The licensing condition required the Applicant to report all the hours of CPT, and (as mentioned above) apart from the 9 January 2020 letter the Applicant had not reported any other CPT. I am therefore entitled to act on the basis of its letter as containing all the training that it had received during the requisite period.

39. There is therefore a breach of the relevant licensing conditions concerning number of CPT hours and reporting of CPT received.

False and misleading information concerning transactions

40. The cluster of complaints under this heading can be dealt with together.

41. As to the argument that the contents of the Written Submissions are unsworn and unsigned and "not evidence", and hence cannot be relied upon, I reject that for the following reasons.

42. First, when the Respondent was considering the renewal application, it was not doing so in any "forensic" or "judicial" setting and there is no need for any materials considered by it to be in the form of "evidence" such as having to be in a particular prescribed format or backed up by an oath.

43. Second, insofar as this application before the Tribunal is concerned, under section 61(1)(a) of the Ordinance, the materials that I can considered are not confined to materials that would be admissible in a court of law. There is no dispute as to the authenticity of the Written Submissions (in terms of whether it is an authentic document emanating from the Applicant) and there is no reason why I cannot consider it as a signed statement by the Applicant. The Applicant may (in theory) try to explain away the contents of the document but that is something that goes to weight, not admissibility.

44. Third, in any event, insofar as the Written Submission and its attachments contain matters that are adverse to the Applicant's position, under ordinary rules of evidence it is admissible as admission against a party's interest by way of exception to the hearsay rule. Therefore even assuming for the sake of argument that the strict rules of evidence are applicable, the Written Submission is admissible as evidence against the Applicant.

45. As to the argument that it would be a breach of the implied undertaking to rely on the Written Submission, I am of the view that the implied undertaking does not apply in the present context.

46. The "implied undertaking" is a reference to the implied undertaking, imposed by law, that a party who receives documents *by way of discovery* (see e.g. the formulation at paragraph 22 of SJ v Florence Tsang [2014] 6 HKC 285 at 292 cited by the Applicant) from the other side is not allowed to use the documents for any collateral purposes unless with the permission of the court. The rationale is that the compulsory process of discovery in litigation is an invasion of one's privacy and as a *quid pro quo* for that, a party making discovery under such compulsion is entitled to the protection of the implied undertaking (see the discussion in Shun Kai Finance Co Ltd v Japan Leasing (Ltd) (No.2) [2000] 3 HKLRD 539). The corollary is that where disclosure of documents and information is not under compulsion, the implied undertaking does not apply. Therefore it has been held that the implied undertaking does not apply to affidavit voluntarily filed by a party in interlocutory proceedings because such a party had voluntarily chosen to put the contents of the affidavit (and documents referred to therein) in evidence and waived any privacy (see Derby v Weldon (No 2) (unrep 19 October 1988).

47. The rule therefore arose in the specific context of adversarial court proceedings where the rules of compulsory discovery of documents apply. It is an implied undertaking given to the Court, and the Court has the power to relax it. It is hard to see how this can (and in my view it cannot) be applied in the context of a licensing function. There is no "adversary" to whom compulsory disclosure is given, and no "court-like" institution or entity to whom any such undertaking can be impliedly

given, or which can grant any relaxation. Rather, the public authority concerned, namely the Respondent, plays a licensing and regulatory role. It receives information and representation and then exercises a relevant discretion according to law. The context is completely inapposite to any implication of an undertaking of the type one sees in the discovery context.

48. Further, even if one were to assume that the rules concerning the implied undertaking were to apply, the Applicant were not forced to disclose the information contained in the Written Submission by any process of compulsory disclosure. By the Respondent's letter dated 5 November 2019 the Applicant was given a chance to (but not coerced or ordered to) make representations on the Respondent's intended revocation of its MSO licence. In response, the Applicant chose to submit the Written Submission with attachments. In my judgment the Written Submission and the attachments were not provided under compulsion and the implied undertaking does not arise.

49. Next the Applicant said that there is no inconsistency between (i) saying (in the periodic returns) that there were no transactions and (ii) saying (in the Written Submission) that the Applicant was maintaining the operation of its money service business. I agree that purely on the face of these two statements there is not necessarily any inconsistency. One could well be "maintaining a business" but yet the business did not generate any actual transaction. A money exchanging operator business could open its door for business (and hence was "maintaining its business") but no customer gave it any business and hence it had no transaction. A restaurant may well be open for business every day but no one ate there and so there is no revenue and no transaction.

50. But the matter does not stop there. Even on the basis that the statement on the face of the Written Submission is not inconsistent with the periodical returns of "nil transaction", the contents of the attachments to the Written Submission are inconsistent.

51. First the audited financial statements of the Applicant for the year ending 31 December 2018 showed a revenue figure of HK$614,575 for that year. A loss was reported for that year, but that is not the point. The point is that the Applicant had six-

digit revenue during that financial year and that is not consistent with there being "nil transaction". According to the directors' report, the principal activities of the Applicant was provision of payment services. There is nothing to suggest that the revenue reported in the financial statements were derived from activities other than that covered by the MSO licence.

52. The tax return for the year ending 31 March 2019 stated an income of HK$725,807 for that year (which is based on the same revenue figure of HK$614,575 in the 2018 audited financial statements plus "interest income" of HK$111,232).

53. The Written Submission also attached three sets of transaction records for the years January to December 2017, January to December 2018 and January to October 2019, with breakdown given as to dates of transactions, customers' names, amount involved and profit/loss made on exchange transactions. The transaction total for each of those years ran into millions of dollars of RMB. There were also some bank letters and documentation purporting to show an agreement with an entity called Sunrate, and some forex and payment transactions done through China CITIC Bank international, but there was no narrative or explanation as to the more detailed nature of the transactions evidenced by these documents.

54. However, disregarding these latter categories of documents (on the basis of lack of narrative explanation as to the underlying transaction) and focusing purely on the three years of transaction records, they clearly show, on their face, millions of dollars (RMB) worth of transactions had been transacted for customers, which transactions gave rise to exchange profit/losses. Viewed in the context of the purpose of the Written Submission (namely as a representation that the MSO licence should not be revoked), such transactions clearly showed that the Applicant had handled these millions of dollars worth of transactions within the scope of the MSO licence (in fact they even show that transactions took place before the grant of the MSO licence in December 2017 but this is not a fact relied on by the Respondent in its Case Summary), and this is inconsistent with any periodic returns to the effect that there had been zero transactions. The discrepancy in figures (between millions and "zero") is such that the difference could not have been due to any error or inadvertence.

55. As I have said above, this is a hearing *de novo*. Given the inconsistencies identified above, it was open to the Applicant to explain away those inconsistencies by written representations or by filing evidence. However, the Applicant has not provided any explanation, In these circumstances I find that in filing its periodical returns of "nil transactions" the Applicant had provided false and misleading information to the Respondent.

Disciplinary actions only?

56. The Applicant contended that the sanction for any breach of licensing condition is only disciplinary action and not refusal of renewal. The Applicant relies on section 43(1)(b) and 43(2) of the Ordinance and contends that the Respondent is entitled in law to take disciplinary action if there is a contravention of any licensing condition.

57. The Applicant further refers to the "notice in writing" issued by the Respondent (which imposed the licensing conditions) which stated that *"the Respondent may take disciplinary actions against the Applicant pursuant to s.43(1)(b) of the [Ordinance]"* and contends that this is a representation that any consequence of non-compliance with licensing conditions would be disciplinary action without more. It is said that the Applicant has acted to its detriment with the understanding that any breach of licensing conditions would be confined to disciplinary actions and that the Respondent is estopped from sanctioning the Applicant in a way beyond the representation in the notice in writing. It also contends that the Respondent had waived the exercise of its powers (if any) to refuse to renew the MSO licence by reason of the representation in the notice in writing.

58. I reject the contention that the notice in writing had the effect of the representation suggested by the Applicant. The notice in writing did not contain any wording or language which suggested that disciplinary action was the *only* sanction for non-compliance with licensing conditions. It simply reminded an applicant of the effect of the statute. In fact the Supplementary Guideline expressly stated (at §6(a)) that any non-compliance with licensing condition would be a relevant factor to be taken

into account by the Respondent in deciding fit and proper status. This was also stated in the original Guideline in 2018.

59. Further, the alleged "reliance" (or "acting to its detriment) was not supported by any evidence and inherently incredible. For there to be any such detrimental reliance on the representation that disciplinary action was the sole sanction, the Applicant had to say that it had actually thought about the matter and considered that the worst that could happen to it is disciplinary action (but not non-renewal) and that was why it had decided not to comply. In other words it was a calculated move to not comply, because it thought that the consequences were limited. I will require a lot of persuasion that the Applicant actually went through that kind of thought process. The Applicant has failed to produce any materials to persuade me. In any event I am not persuaded that the doctrine of estoppel can apply in the present context. It is not just an *inter parties* civil right but a matter of regulating the money services business, something affecting the wider public and the reputation of Hong Kong as a financial market.

60. For the same reasons I reject any argument based on waiver. The Respondent had not done or said anything to show that it would not take the non compliance into account as a reason for non renewal.

Failure to notify change in particulars – no conviction

61. The Applicant argued that while there was an investigation against the Applicant by the Respondent for breach of the section 40 requirement to notify any change in particulars in connection with the Applicant's licence application, no charges had been laid and there had been no conviction.

62. The Applicant's submissions are dated 12 January 2022. The Respondent in its submissions (of the same date) included two certificates of trial dated 17 December 2021 purporting to show that the Applicant had been convicted of two charges on 20 January 2021 of breach of section 40, and had been subject to fines of HK$3,000 for each conviction. The convictions were therefore already in existence at the time when the Applicant filed its submissions and yet the Applicant still positively

contended that there had been no conviction or charges. The Applicant in its reply submissions at footnote 2 accepted that the convictions "included" the renewal of the travel document of one of the relevant persons of the Applicant. Curiously, the Applicant's reply submissions stated that "upon the receipt of the Certificate [in the singular, though there are in fact two of them] of Trial dated 17 December 2021, it is clarified that....", sounding as if it was only upon receipt of the certificate of trial that the Applicant knew about the convictions and that it even had to "clarify" what the conviction was about. Yet this was not explicitly stated.

63. This is all very unsatisfactory. There is a gap in the materials as to whether the nature of the conviction and whether the Applicant knew about it and why it did not mention it in the first submissions and why even in the reply submissions it chose to deal with the convictions in a footnote and in an incomplete way, dealing only with one certificate.

64. Be that as it may, the Applicant's present point can be addressed without regard to the question of whether there had in fact been convictions (and what those convictions are based on). The short point is that even assuming in the Applicant's favour that there has been no charge and no conviction, it does not mean that the *fact* of contravention of section 40, if it can be proved as a matter of fact, cannot be considered, or is not relevant to the question of fitness and propriety. On the facts of this case there did appear to have been non notification of changes to particulars of the Applicant (concerning the travel document of the ultimate owner, change in director, change in ultimate owner and change in bank accounts) and the Applicant has not disputed this as a matter of fact. Even on the basis that there had been no conviction, I am still not precluded from taking this fact into account; and I do take it into account.

Violations not persistent

65. The Applicant argues that in relation to the licensing condition of filing periodic returns, it has only been late for three occasions and the delay in question only ranged from three months to less than nine months and by the time of the renewal application all the delays had been "purged" and there was no longer any further failures or delays.

66. I accept that not every failure or delay bears the same weight in the evaluation of whether someone is fit and proper. A one off omission due to inadvertence, on one end of the spectrum, is quite different from a wholesale disregard of the requirement due to ignorance of the requirement altogether. In between there will be wide spectrum. Each case will depend on its own facts and the explanation (if any) offered. On the facts of this case while there may only be three instances of delay, there has been no explanation as to the delay. Those are not "one off" omissions. The matters to be reported and notified are self evidently matters that are important for the Respondent to know as part of the regulatory and monitoring process and this ought to have been well known to the Applicant and its directors. The omissions/failures are not something to be ignored.

The overall evaluative exercise

67. Deciding on this application (and whether the MSO licence application should be approved or rejected) is not a mechanical exercise or an exercise of "ticking boxes". The criteria relied upon by the Respondent is "fit and proper". A host of factors are relevant to whether someone is fit and proper and it is, at the end of the day, an evaluative exercise. In some cases it may be possible to identify individual directors or ultimate owner and attributes specific to them as to why he/she is not "fit and proper". However, that is not the only way the "fit and proper" test can be engaged. Sometimes there may not be specific evidence as to the fitness or propriety of any single individual but circumstances could well enable an inference to be drawn that those directing the business could not all have been fit and proper persons.

68. For example if a corporate applicant can be shown to be conducting its business in an extremely incompetent manner (and which cannot be explained by reference to isolated instances of oversight or inadvertence by lower level staff), the inference can legitimately be drawn that one or more of those directing the business of the company did not know how to conduct the business properly and were not fit and proper persons. In such a case the conclusion would be that not every director was a fit and proper person even though one may not be able to name a specific one who is not fit and proper.

69. Turning to the facts of this case, I have set out the relevant factors above. They are self-evidently matters which impact negatively upon a person's fitness and propriety because they all have to do with a person's knowledge of, and ability to comply with, rules which regulate the money service business. At the risk of stating the obvious, compliance with the rules is important for the purpose of upholding the integrity of the system, minimizing the risk of money laundering and enabling the Respondent to properly monitor the operation of MSO licence holders.

70. Among the factors, the point that struck me the most is the inconsistency between the Written Submission and the periodic returns concerning the volume of transactions. As I said above, the inconsistency could not have been due to inadvertence. The rather detailed statement of transactions attached to the Written Submission and the financial statements and tax return point to the conclusion that the "zero transaction" return was false and knowing so. There was no explanation from the Applicant (for example) that the inconsistency was due to reasons which have nothing to do with the fitness and propriety of the directors.

71. This goes to the integrity and honesty of those running the business and I place strong weight on this factor *against* the fitness and propriety of the directors of the Applicant to be associated with the business of operating a money service.

72. As to the CPT requirement, the requirement to undergo 5 hours of CPT is a clear condition. The requisite period was 29 December 2017 to 28 December 2018 and there was no impediment that one can think of why it may not be possible or convenient for the Applicant to undergo such training. There was no attempt even to "mitigate" because the Applicant's stance before me was to pick on the wording of the Applicant's letter dated 9 January 2020 and insist that there was no evidence that the Applicant only received 5 hours of CPT during the requisite period. Once I reject this argument, there is no "fallback" stance or explanation by the Applicant as to why it breached the requirement. As I said, the requirement is clear. It is not something that can easily be overlooked. In the circumstances I conclude that there had been knowing non-compliance, and this reflects adversely on the preparedness and willingness of the directors of the Applicant to abide by even a simple requirement, and hence adversely

on their fitness and propriety to be associated with the business of operating a money service.

73. Likewise for the non notification of the changes in particulars (in contravention of section 40 of the Ordinance) and the failure to file periodic returns on three occasions in contravention of the licensing conditions – while these were eventually "cured" in the sense that the Applicant eventually provided the requisite notification and returns, the fact was that in the first instance it failed to provide or file them, in breach of the regulations. The omissions may not be as serious as provision of misleading information concerning its volume of transactions but are still something that I would throw in the overall mix of factors in deciding fitness and propriety. They show (at least) an unfamiliarity and lack of attentiveness to legal and regulatory requirements and negate on the Applicant's (and its directors') suitability and ability to vigilantly comply with other requirements, and their general appropriateness in operating a money service business.

74. Taking into account all the above matters and as a matter of evaluation and discretion, I am not satisfied that each of the directors and the ultimate owner of the Applicant was a fit and proper person to be associated with operating money service business.

75. I therefore dismiss the application with costs.

Shieh Wing-tai Paul, SC
Chairman
Anti-Money Laundering and
Counter-Terrorist Financing Review Tribunal

Ernest Yuen and Caspar Ng, Counsel, instructed by Ng and Fang Solicitors & Notaries for the Applicant

Ms Agnes Fong, Government Counsel, instructed by Commissioner of Customs & Excise for the Respondent