Case No. D27/93

Profits tax – whether taxpayer carried on business in Hong Kong – whether profits subject to assessment to profits tax.

Panel: William Turnbull (chairman), Michael Choy Wah Ying and Stephen Lau Man Lung.

Dates of hearing: 21, 22 April and 3 May 1993.
Date of decision: 18 October 1993.

The taxpayer was a private limited company in Hong Kong. It was acquired by a family resident in Country A to enable the family to finance the construction and operation of a hotel in Country A in a manner which was tax effective in Country A. The procedure adopted was for the company owned by the family in Country A to borrow money from various banks and to provide security to those banks in the form of deposits in the name of the taxpayer. Interest was earned by the taxpayer on these deposits on a 'back to back' arrangement with the banks concerned.

Some of the deposits were placed with banks in Country B and some of the deposits were placed with banks in Hong Kong. The taxpayer was assessed to tax on interest income which it earned from deposits which were placed in Hong Kong. The company argued that it did not carry on business in Hong Kong and that accordingly the interest was not taxable in Hong Kong.

Held:

What the taxpayer did was not carrying on business in Hong Kong and accordingly it was not taxable in Hong Kong.

Appeal allowed.

[Editor's note: The Commissioner has filed an appeal against this decision.]

Cases referred to:

CIR v The Korean Syndicate Ltd [1921] 12 TC 181
American Leaf Blending v Director-General [1978] STC 561
CIR v The Marine Steam Turbine Co Ltd 12 TC 174
Louis Kwan Nang-Kwong and Carlos Kwok Nang-Kwong v CIR 2 HKTC 541
CIR v Li and Fung 1 HKTC 1193
The Egyptian Hotels Ltd v Mitchell 6 TC 152, 542

Malayan Shipping Co Ltd v Federal Commissioner of Taxation [1946] 8 ATD 75
De Beers Consolidated Mines Ltd v Howe 5 TC 198
D33/91, IRBRD, vol 6, 115
D20/91, IRBRD, vol 6, 42
CIR v The South Behar Railway Co Ltd 12 TC 657
D17/88, IRBRD, vol 3, 232
D10/91, IRBRD, vol 5, 570

S P Barns for the Commissioner of Inland Revenue.
W D McKenzie of Price Waterhouse Tax for the taxpayer.

Decision:

This is an appeal by a private limited company incorporated in Hong Kong against a number of profits tax assessments for the years of assessment 1984/85 to 1989/90 inclusive. The ground of the appeal is that the Taxpayer claims that it did not carry on any business in Hong Kong during the years in question and that it is therefore not subject to profits tax. The facts of the case are as follows:

1. The Taxpayer was incorporated as a private limited company in Hong Kong on 16 December 1993.

2. Mr X, his wife Mrs X, and their two children Mr Y and Miss Z ('the family') all lived in Country A and had strong connections with Country B. The family had substantial assets in Country B which they sold in the year of assessment 1982/83 and used to invest in a hotel in Country A, and also a small hotel in Country C which for the purposes of this appeal is not relevant.

3. The hotel in Country A was owned by a company incorporated in Country A ('the hotel company') which in turn was owned by a family trust the beneficiaries of which were Mr X and Mrs X, Mr Y and Miss Z. It was advantageous for Country A's tax purposes that the hotel company should borrow money commercially from banks in Country A against the security of offshore fixed deposits belonging to the family.

4. The first loan of the hotel company which involved the Taxpayer was with Bank A, a bank carrying on business in Country A with branches and subsidiaries in other countries. Mr X and Miss Z handled the negotiations with Bank A in Country A. Bank A suggested that it would be advantageous for Country A's tax purposes for the family to borrow money in Country A against the security of offshore deposits belonging to the family. After checking in Country A that it was alright so to do it was decided to follow the suggestion of Bank A. All of these negotiations with Bank A took place in Country A. When referring to 'Bank A' in this decision it is not necessary for us to distinguish between branches and subsidiaries as it is not of material importance. If and when there is any significance we have drawn attention to it for example (see fact 10 below).

5. When Bank A proposed to Mr X that there would be a back to back arrangement with an offshore deposit or deposits from the family, Mr X contacted the tax representative, an international audit and an accounting firm, for their assistance and it was with their assistance and acting on the suggestion of Bank A that Mr X and his family acquired ownership of the Taxpayer in mid-1984. The Taxpayer had been incorporated by the tax representative as a shelf company. The issued shares of the Taxpayer were not registered in the names of Mr X and his family but were registered in the names of nominee companies in Hong Kong owned and controlled by the tax representative. These nominee companies held the shares on trust beneficially as to 25 % for Miss Z, as to 25 % for Mr Y, as to 25 % for Mrs X and as to 25 % for Mr X.

6. The directors and secretary of the Taxpayer were all nominee companies incorporated in Hong Kong which were owned and managed by the tax representative. In all matters the directors and secretary of the Taxpayer acted on the direct instructions of Mr X and his daughter Miss Z and did not at any time act on their own discretion. At all times all of the member of the family including Mr X and Miss Z were resident in Country A from where instructions were customarily given to the tax representative and their nominees in Hong Kong. On occasions instructions were given from Country B. The Taxpayer kept all of its accounting and other records in Hong Kong. The same were maintained by the tax representative and/or its nominee companies. No decisions were ever taken in Hong Kong. The nominee directors in Hong Kong at all times followed instructions given to them from Country A or possibly Country B by Mr X, Mr Y and Miss Z. Board meetings of the nominee directors, if the same were ever held, took place in Hong Kong. Evidence was given to the effect that resolutions took the form of papers being signed by nominee directors without any meetings actually taking place. Mr X, Mr Y and Miss Z informed the tax representative and its nominees whenever decisions were made or instructions were given.

7. Mrs X had on deposit with Bank A in Country C a certain sum due to mature on 9 November 1984 and another amount with Bank A in Hong Kong due to mature on 23 November 1984. On 7 November 1984 Mrs X by letter to Bank A in Country A confirmed previous verbal instructions that these two fixed deposits were to be transferred upon maturity to the account of the Taxpayer with Bank A in Hong Kong. Mr X gave instructions by telephone from Country A to the tax representative in Hong Kong on or before 8 November 1984 that the two deposits should be combined into one deposit on 23 November 1984.

8. At that time Mr X also had on deposit with Bank A in Country C a certain sum due to mature on 19 November 1984. On 8 November 1984 he wrote to Bank A in Country A giving instructions that this deposit was to be transferred upon maturity to the account of the Taxpayer with Bank A in Hong Kong.

9. On 27 November 1984 Mr X gave instructions on behalf of the Taxpayer in Country A to Bank A to create two deposits, one for ninety days and one for thirty days which were to be used as security for Bank A loan to the hotel company and the balance of

the funds of the Taxpayer (including interest) should be placed separately on deposit for thirty days.

10. All of the foregoing transactions were put into effect. The hotel company received a loan in Country A from Bank A on the security of the fixed deposits in the name of the Taxpayer which deposits the Taxpayer pledged to Bank A. This pledge took the form of a first mortgage dated 19 November 1984 by the Taxpayer in favour of Bank A in Country B even though the loan appears to have been made by Bank A in Country A. In this instance the branch in Country B was the same legal entity as the branch in Country A which made the loan. Correspondence between Bank A and the hotel company suggests that the dollar loan of Country A received by the hotel company may have been designated by Bank A as an offshore loan and booked through Country B so that interest rates on the deposits in the name of the Taxpayer and on the loan would be similar, or back to back. The effect of this was that the hotel company would pay to Bank A the same rate of interest as that received by the Taxpayer plus one half per cent spread in favour of Bank A.

11. The loan to the hotel company and the pledge of the deposits continued in existence until 29 November 1989. By letter dated 8 November 1989 Mr X, writing as chairman and managing director of the hotel company informed Bank A in Country A that the loan would be repaid on 29 November 1989 by utilising the deposit of the Taxpayer.

12. During the period of the loan by Bank A instructions were periodically given by Mr X or Miss Z in Country A or Country B to roll over the deposit or deposits in the name of the Taxpayer to accord with interest periods applicable to the loan to the hotel company, that is, the deposits were maintained on a back to back basis.

13. The deposits transferred to the Taxpayer by Mrs X and Mr X were treated as interest free shareholder loans and when payment was made to Bank A by the Taxpayer on behalf of the hotel company it was treated as a repayment of part of the then existing shareholder loans. Interest earned on the deposits was treated as income of the Taxpayer. Interest earned was kept separate from the deposits pledged to Bank A. Most of the interest earned by the Taxpayer was used by the family to offset interest which was paid by the hotel company in Country A.

14. Whenever instructions were given by Mr X or Miss Z relating to the affairs of the Taxpayer they were copied or relayed to the tax representative in Hong Kong who carried out whatever ‘follow up’ action might be necessary. Though instructions were given to and accepted by Bank A in Country A from either Mr X or Miss Z it would appear that the legal authorised signatories of the Taxpayer were the nominees of the tax representative who were required to confirm the instructions.

15. Additional funds were required by the hotel company. Bank A were not prepared to advance further monies and Miss Z arranged for additional loans from Bank B with which bank her family had had a long relationship. The negotiations took place in Country A and in Country B. Miss Z had previously worked with Bank B in Country B and

the proposal was that monies belonging to the family would be put on deposit in Country B with Bank B to give security for monies lent by Bank B in Country A.

16. Bank B agreed to lend to the hotel company in Country A a certain sum provided that the family placed on deposit with Bank B in Country B a similar amount. It was decided to use the Taxpayer for this purpose. On 24 and 29 January 1985 respectively the family transferred to the Taxpayer a certain sum. These funds were remitted to Bank A in Hong Kong and were combined with the balance of the monies previously transferred to the Taxpayer by Mrs X and Mr X and accrued interest thereon. In accordance with instructions given by Mr Y from Country B on 25 January 1985 the sum was transferred by Bank A in Hong Kong to Bank B in Country B.

17. To secure a further loan from Bank B to the hotel company in Country A the family transferred sufficient amount to the Taxpayer on 29 March 1985. These monies were received in Hong Kong by Bank A and in accordance with instructions given by Mr Y from Country B on 28 March 1985 a further sum of same amount was transferred by Bank A in Hong Kong to Bank B in Country B.

18. These two deposits each plus accumulated interest remained on deposit with and pledged to Bank B in Country B until September and August 1986 respectively when the same were transferred to Bank B in Hong Kong, still under pledge. The reason for this transfer was because Miss Z knew the staff of Bank B subsidiary company in Country B which held the funds. Bank B by letter dated 18 June 1986 notified Miss Z in Country A that the funds would be transferred to a different Bank B subsidiary company in Country B with which Miss Z was not familiar. As she knew some of Bank B staff in Hong Kong she decided to transfer the funds to Bank B in Hong Kong which was acceptable to Bank B, and this was accordingly done.

19. Starting in December 1987 the hotel company began to repay and restructure its loans in Country A which included its back to back loans with Bank B secured by the deposits belonging to the Taxpayer. As this took place the deposits with Bank B in Hong Kong were uplifted and remitted to Country A for the account of the hotel company. By January 1989 the entirely thereof together with accumulated interest had been uplifted and remitted to the hotel company in Country A.

20. The monies transferred to the Taxpayer by the family and which were placed on deposit with Bank B in Country B were treated as interest free shareholder loans and when the proceeds thereof including interest were paid to the hotel company in Country A the sums were credited to the accounts of the relevant shareholders.

21. Because they had previously had business relationships in Country B, when foreign banks were allowed to operate in Country A Bank C contacted Mr X in Country A. Mr X hoped that a good relationship could be built up with Bank C in Country A. It was anticipated that additional funds would be required for the hotel and it was hoped that Bank C would be prepared to provide such funds on a back to back basis as with the other two banks. The Taxpayer at that time had monies available which were not pledged to either

Bank A or Bank B. Instructions were given in Country A for the Taxpayer to open an account in Country B with Bank C and to place on deposit on 29 September 1986 a certain sum. This sum represented accumulated interest earned by the Taxpayer. Shortly thereafter Mr X and Miss Z found out that Bank C in Country A would not provide any funds and the account with Bank C was accordingly closed. The monies were paid to the hotel company in Country A and treated by the Taxpayer as a repayment of shareholder loans.

22. In 1985 and 1986 the family decided to transfer to the Taxpayer certain personal investment portfolios which they had with three international investment or brokerage firms. These accounts had been managed and controlled by the family through Country B. The three investment accounts were operated and managed from Country B. The investments had originated when the family were resident in Country B and had not been liquidated when the family went to live in Country A. It was decided to use the Taxpayer to hold these investments. To open the accounts the directors in Hong Kong passed the appropriate resolutions which authorised the four members of the family to operate the accounts. In practice Miss Z would make decisions as to whether to buy, sell or hold investments and these decisions were made by her either in Country A or Country B. From time to time particulars of transactions which had been effected were sent to the tax representative in Hong Kong. No instructions were ever given to any of the investment or brokerage firms in Hong Kong. No securities were bought or sold on the Hong Kong Stock Exchange.

23. In 1988 an associate of Mr X was organising a hotel management company on the Hong Kong Stock Exchange. Shares in the company and the opportunity to underwrite certain shares were offered to Mr X and it was decided that the Taxpayer would accept the same. This decision was made by Mr X in Country A and appropriate instructions were given to implement the same. It was intended to be a long term investment but in approximately eighteen months the public company was taken over which meant that the family would only have a small minority interest. Accordingly Mr X decided that it was unattractive to retain the shares in this Hong Kong public company and the same were sold.

24. In respect of the years of assessment 1984/85 to 1989/90 inclusive the Taxpayer submitted its profits tax returns and offered no profits for assessment. The assessor rejected these tax returns and was of the opinion that the Taxpayer had carried on business in Hong Kong and had earned profits arising in or derived from Hong Kong, namely interest on deposits in Hong Kong, which were assessable to profits tax. He accordingly issued six profits tax assessments in respect of the six years of assessment which are the subject matter of this appeal. He assessed to tax the interest earned by the Taxpayer on all of the deposits with Bank A in Hong Kong, Bank B in Hong Kong and Bank C but excluded therefrom the interest earned on the deposits with Bank B in Country B and other income of the Taxpayer namely the profit from sale of investments, income from investments, and exchange gains. It appears from the Commissioner's determination that in deciding whether or not interest was 'earned on bank deposits in Hong Kong' the assessor based his decision on information then provided by the tax representatives for the Taxpayer. Having heard the evidence and having studied the papers laid before this Board it would appear that the tax advisers and subsequently the assessor, may have been mistaken with

regard to the situation of the bank deposits. The deposits with Bank C were stated to have been placed on deposit in Country B.

25. The Taxpayer duly objected to these assessments on the grounds that the Taxpayer did not carry on any trade or business in Hong Kong and that any income it received was therefore not liable to profits tax.

26. By his determination dated 4 September 1992 the Commissioner of Inland Revenue confirmed the view of the assessor and confirmed all of the profits tax assessments against which the Taxpayer had objected save and except that in respect of the years of assessment 1985/86, 1986/87 and 1987/88 the Commissioner increased the amount of the assessable profits and the tax payable thereon to correct certain errors which had subsequently come to light.

27. By letter dated 2 October 1992 the Taxpayer duly appealed to this Board of Review and gave four grounds of appeal as follows:

> '(i) The company was not liable to profits tax for any of the years of assessment because it was not carrying on business in Hong Kong at any time during the period and therefore had no assessable profits.
>
> (ii) The income treated as assessable have been incorrectly charged under section 14 and section 15(l)(f) of the IRO. Interest should only be chargeable, inter alia, if it accrues to a corporation carrying on a trade, profession or business in Hong Kong and as no such activity was carried on in Hong Kong by the company it is incorrect to assess the company on interest income. Further, for the years of assessment 1984/85 and 1985/86 the interest did not arise through or from the carrying on of business from Hong Kong.
>
> (iii) The assessable profits have not been calculated in accordance with the IRO in other respects.
>
> (iv) The statement of facts is not agreed in its entirety.'

At the hearing of the appeal the Taxpayer was represented by its tax representative. Mr X and Miss Z both gave evidence and offered themselves for cross examination. The evidence which they gave was clear and concise and we have no hesitation in accepting the same. In addition two other witnesses were called who gave formal evidence with regard to the role played by the tax representative and their nominee companies. We also accept the evidence given by them.

The representative for the Taxpayer submitted that the Taxpayer was not carrying on business and had been acquired by the family for the sole purpose of the back to back financing of the hotel company. He said that the matters to be decided by the Board was whether or not the Taxpayer was carrying on any form of business. If the answer was

negative then that was an answer to the entire case. If the answer was positive then it was necessary to decide whether or not the business was carried on in Hong Kong.

The representative for the Taxpayer reviewed the facts and evidence before us and pointed out that the Taxpayer was in reality totally controlled by the family who made all decisions outside of Hong Kong. He said that the nominee directors in Hong Kong had no discretion and could not make any decisions other than to act in accordance with instructions which they received from the family in Country A or Country B.

He pointed out that the Revenue accepted that the profits made on the three share investment accounts and the one isolated investment in a Hong Kong public company were not subject to tax and accordingly it was not necessary for him to deal with either of these aspects of the case in any detail.

He summarised the position of the Taxpayer by saying that all that it had done was to maintain fixed deposits as security for loans granted to the hotel company and in one case loans which were expected to be granted (Bank C). He said that the mere rolling over of deposits could not constitute the carrying on of business. He said that the affairs of the Taxpayer in relation to these deposits was not of a businesslike nature. He drew attention to the fact that all of the monies of the Taxpayer had been used in one way or another to support or finance the hotel company.

The representative for the Taxpayer cited to us the following cases:

CIR v The Korean Syndicate Ltd [1921] 12 TC 181
American Leaf Blending v Director-General [1978] STC 561
CIR v The Marine Steam Turbine Co Ltd 12 TC 174
Louis KWAN Nang-kwong and Carlos KWOK Nang-kwong v CIR 2 HKTC 541
CIR v Li and Fung 1 HKTC 1193
Inland Revenue practice note No 13
The Egyptian Hotels Ltd v Mitchell 6 TC 152, 542
Malayan Shipping Co Ltd v Federal Commissioner of Taxation [1946] 8 ATD 75
De Beers Consolidated Mines Ltd v Howe 5 TC 198
D33/91, IRBRD, vol 6, 115
D20/91, IRBRD, vol 6, 42
CIR v The South Behar Railway Co Ltd 12 TC 657
D17/88, IRBRD, vol 3, 232
D10/91, IRBRD, vol 5, 570

The representative for the Commissioner drew our attention to section 14 of the Inland Revenue Ordinance followed by section 15(1), 15(5), and the definition of ‘business’ in section 2.

He said that central to the resolution of the issue before us is to decide whether a taxpayer has to be 'busy' before it can be said to be carrying on a business. He submitted that a business may be carried on even though there is little business activity and pointed out that Lord Summer had observed in the South Behar Railway case that business is not confined to being busy.

He went on to submit that the courts have taken the approach that it is easier to say that a company is carrying on a business than it is to say that an individual is carrying on a business.

The representative then went on to the concept of 'mind and management'. He said that the Commissioner accepted the evidence that decisions were made in Country A but did not accept that it follows from this that any business could only have been carried on in Country A. He submitted that the mind and management might well be separate from the place where the business was carried on.

He went to say to submit on the facts of the case that the primary considerations were:

(i) Extent of the deposits,
(ii) duration of the deposits,
(iii) the amount of interest income derived from these deposits.

He then took us through what he described as the 'core' deposits with Bank A in Hong Kong and Bank B in Hong Kong.

He also referred us to the authorities cited by the representative for the Taxpayer and the submissions made on behalf of the Taxpayer.

This appeal is both very important in principle and fascinating. It is also one of the more difficult cases recently to have come before the Board. We are much indebted to Mr McKenzie of Price Waterhouse who represented the Taxpayer and Mr Barnes, senior assessor, who represented the Commissioner. They placed the facts of the case clearly before us and were of great assistance to us in clarifying the important legal points which are in issue before us. They should both be complemented on the way in which they presented their respective cases and assisted the Board.

It is interesting to note that this appeal relates entirely to the question of whether the Taxpayer was carrying on business in Hong Kong. It has been rare for taxpayers to rely alone on such ground of appeal. It has been customary in the past for taxpayers to submit that profits have not arisen in or been derived from Hong Kong without challenging whether or not a taxpayer has been carrying on business in Hong Kong. No explanation was given to us and indeed there is no reason why the parties should do so.

A number of questions fall for our decision. First of all we must decide whether or not what the Taxpayer did constituted the carrying on of a business. If our

answer to this question is negative then that is an end of the case. If, however, we find that the Taxpayer was carrying on business then we have additional questions to answer, namely, what was the nature of that business and where was it carried on.

A number of cases and Board decisions were cited to us and we have set out the same earlier in this decision. However they are of limited assistance to us. This is one of the first and rare cases which have come before a Board of Review in Hong Kong which require a clear and precise decision as to what constitutes the carrying on of a business. We now have much authority with regard to the distinction between an individual being self-employed or an employee but those cases are of little or no help to us in the present appeal. They involve different questions and facts.

Perhaps the starting point is to place on record that the decision whether a person is carrying on business or not is primarily a matter of fact. There is no useful legal definition of business or carrying on business and previous courts have not given any significant judicial interpretation to the words or the concept. The definition in the Inland Revenue Ordinance is merely inclusive and of little help. Lord Atkin in a different context said that to decide the source of a profit is a practical hard matter of fact. The same words can be applied to what we must now decide. We must look all of the facts, decide what are the salient or important matters so that we can give a fair and proper weighting to them and then reach our decision accordingly.

Having reached this point we then pose another question. We ask whether there is any distinction to be drawn between a company and a private individual. In other words when we ask the question whether a person is carrying on business, do different rules apply to a person who is a company and a person who is a private individual. The representative for the Commissioner submitted that there was a difference but as a matter of law the answer must be in the negative. The Inland Revenue Ordinance does not draw any distinction whatsoever between a corporation and a private individual for profits taxation matters. We do not have the concept in Hong Kong of corporate profits tax. Our profits tax applied to all persons alike be they corporations or individuals. However that does not mean that one ignores the fact that the Taxpayer is a private person or a corporation. This is a fact in each case and is a relevant fact to a greater or lesser extent depending upon the circumstances. For example one of the tests in deciding whether or not a person is carrying on business is to enquire as to the way in which the person conducted his or its activities. A person who or which ‘establishes a business like organisation to carry out his, her, or its activities is more likely to be seen as carrying on business. In the case of a corporation it is almost invariably the case that proper or full records are kept including accounting records. It is often the case that private individuals are not so meticulous in the handling of their affairs. Companies often, if not usually, have offices and indeed in most jurisdictions throughout the world they are required to have a registered office or address. This is usually an address associated with business transactions as opposed to a private individual whose address is often or normally a residential address.

Companies as well as individuals which carry on business usually are quite distinct from those that do not. There is often a full time dedicated office with staff and

services. There are invoices, filing systems, banking facilities with overdraft accounts and all of the paraphernalia which go with an active modern business operation. However there are no hard and fast rules about what constitutes the carrying on of a business. Some individuals who do not carry on business may be meticulous in the way that they handle their private affairs. This does not mean that they will be deemed to carry on business. Likewise companies may have little or no 'business organisation' but may still be actively carrying on business. All of the facts and circumstances must be carefully studied.

This is no doubt what the Privy Council had in mind in the American Leaf Blending case when Lord Diplock said at page 565:

'In the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business. In contrast, in their Lordships' view, in the case of company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business.'

The same point was made by the Master of the Rolls, Lord Sterndale in the Korean Syndicate case where at page 202 he said:

'If you once get the individual and the company spending exactly on the same basis, then there would be no difference between them at all. But the fact that the limited company comes into existence in a different way is a matter to be considered. An individual comes into existence for many purposes, or perhaps sometimes for none, whereas a limited company comes into existence for some particular purpose, and if it comes into existence for the particular purpose of carrying out a transaction by getting possession of concessions and turning them to account, then that is a matter to be considered when you come to decide whether doing that is carrying on a business or not.'

Atkin, LJ in the same case at page 204 stated:

'Now I quite agree that it does not necessarily follow that because a company is incorporated under the Companies Act, it is carrying on a business.'

What is being said in all of the decided cases is that every case depends upon its own facts which must be carefully analyzed. More often than not a company carries on business whereas a private individual does not. However that does not mean that there is any legal presumption one way or the other.

Another question which we pose is whether there is any distinction between a company which is incorporated in Hong Kong and a company which is incorporated overseas. Here again there is no legal distinction whatsoever as far as the Inland Revenue Ordinance is concerned. A company incorporated in Hong Kong may or may not carry on business in Hong Kong and likewise a company incorporated overseas may or may not carry on business in Hong Kong. The tests, if there are any, are identical. The question to be asked is what did the particular company do in Hong Kong and whether or not it was

incorporated in Hong Kong. This is important in the present case because there seems to be a suggestion made by the Revenue that because the company is a Hong Kong company with directors in Hong Kong therefore it is carrying on business in Hong Kong. The word 'therefore' is a non-sequitur. First one must decide as a matter of fact whether what has been done amounts to the carrying on of a business and then as a second and distinct question whether if the answer is in the affirmative whether such activities were carried on in Hong Kong or not.

Having dealt with these preliminary points and questions we now come to the nub of this case. That is the question whether or not a company which is not totally dormant can be said for taxation purposes not to be carrying on business. Clearly if a company is totally dormant and does nothing then it cannot be said to be carrying on business.

It is possible to argue that if a company carries on any form of activity whatsoever that it is carrying on business. However we reject such a proposition. The logic of this proposition is based on the historic creation of the concept of a joint stock company. A joint stock company when created in the nineteenth century was created to enable groups of individuals to pool their resources for business purposes with limited liability. It can be argued that the nature of a company is by definition a business entity and that accordingly everything which it does must constitute the carrying on of business. As stated we reject any such notion. At least for purposes of taxation, if not for other corporate purposes, it is clearly possible for a company to exist and carry on activities of some sort or another without being considered to carry on business. It can be argued that any company which holds shares or places money on deposit is carrying on business. In our opinion much more is required before such activities will constitute the carrying on of a business by the company. The Marine Steam Turbine case, The Korean Syndicate case, The South Behar Railway case and the American Leaf Blending case are all clear authority to say that one must look carefully at what a company does before being able to decide whether or not it is carrying on business. The activities of a company must be placed in context before it is possible to decide whether or not it is carrying on a business. Again there is no presumption one way or the other.

Having established that there is no legal difference between a private individual and a company and having established that the mere fact of being a company does not import into all and any activities the fact of carrying on business it is then necessary and possible for us to look at the facts and all of the facts of this appeal to ascertain whether or not in the present case what the Taxpayer did constituted the carrying on of business.

Clearly the Taxpayer was not a dormant company. It carried on certain activities. For convenience we will split these activities into different groups and then analyse them separately and collectively.

We have found as a fact that the Taxpayer was originally established for the purpose of holding monies offshore from Country A which monies came from the family and were used by the Taxpayer to give financial support to the hotel company.

The mere placing of money on deposit with a bank does not of itself constitute the carrying on of a business for taxation purposes in Hong Kong. More is required and as always everything is a matter of degree. If a person places money on deposit and collects interest on that deposit this will clearly not constitute business. If however a person has numerous deposits which are actively managed to maximize the return on the investment by frequently changing the deposits from one bank to another, actively seeking out what interest rates are the highest, and weighing risk against interest returns then clearly such a person will be carrying on a business. There is obviously a grey area between these two extremes where it is necessary to review all of the other factors to decide on which side of the fence the activities fall.

In the case before us we are of the opinion that what the Taxpayer did when it placed deposits with the three banks in question and rolled over those deposits did not constitute the carrying on of business for taxation purposes in Hong Kong. The Taxpayer was not carrying on an active business of borrowing money and placing such money on deposit for the benefit of the Taxpayer. As we have said above such activities can constitute the carrying on of business but they must be clothed with the attributes of a person carrying on business. Merely to receive money from someone, place it on deposit with a nominated bank, roll over the deposits as they mature, and ultimately uplift the deposits and repay the money originally lent does not constitute the carrying on of business for profits tax purposes.

If that had been an end of the matter then we would have no hesitation whatsoever in finding in favour of the Taxpayer. However there is another important fact which must be brought into focus. The Taxpayer pledged the deposits which it had in whole or in part to the banks with whom it had such deposits to support the hotel company. Here again we apply the same tests and view the matter in the same way as we did with regard to the placing of the deposits themselves. There clearly can be two extremes and there is a wide grey area in between. It is possible for a person to actively carry on the business of giving secured guarantees. There is likewise the possibility of a person giving one or more guarantees which does not constitute the carrying on of a business. In the present case we find as a fact that the Taxpayer was not carrying on a business when it gave secured guarantees to the banks. The secured guarantees were given without any commercial motive so far as the Taxpayer was concerned. The position might have been different if the Taxpayer had charged the hotel company a fee for the services which it was providing. No such fees were charged and what the Taxpayer did was done without any seeking of a reward. The Taxpayer in giving the secured guarantees did not clothe itself with the trappings of a person carrying on a business of giving guarantees.

Though we find as a fact that neither the placing of funds by the Taxpayer nor the giving of guarantees by the Taxpayer constitute the carrying on of a business, that is not a complete answer to this part of the overall question. What we must also ask ourselves is whether or not the combined effect of placing money on deposit and the giving of secured guarantees constituted a business activity for taxation purposes. Here again we are not able to find as a fact that what the company did was the carrying on of a business. Clearly

everything is a question of degree but on the facts before us we find that a combination of holding deposits and the giving of guarantees did not constitute the carrying on of a business by the Taxpayer.

We now come to consider what effect, if any, it has upon the activities of the Taxpayer that it performed two further functions. One was that the company was called upon by its shareholders to accept an underwriting and to acquire shares in a Hong Kong public company. The other was that the Taxpayer was called upon by its shareholders to invest in stocks and shares. It appears to us that the first of these two activities might well constitute the carrying on of business and the second probably did constitute the carrying on of business but we do not think that either activity is material in deciding the case before us.

It is well established that because a person carries on one activity which comprises a business does not mean that everything which that person does comes within the ambit of that business. A person can carry on more than one business and can carry on both business activities and non business activities. This has been well established as a matter of principle in many different ways. By way of example we would mention that the mere holding of an asset which appreciates in value does not necessarily mean that a person is carrying on business. If such were not the case then there would be no distinction between capital profits which may or may not be taxable in different countries and trading and operating profits which are clearly of a business nature.

It is patently obvious on the facts before us that the acquisition of shares in the Hong Kong public company had nothing whatsoever to do with the placing of monies on deposit and the giving of secured guarantees. These different activities were totally unrelated to each other. Likewise the decision to invest in stocks and shares was totally unrelated to the placing of money on deposit and the giving of secured guarantees.

Having decided that what the Taxpayer did does not constitute the carrying on of business it is not necessary for us to consider the matter further. However in case it should be material we have also considered what would have been our answer if we had decided that the Taxpayer was carrying on a business of placing money on deposit and giving secured guarantees. If we had so decided then it would be necessary for us to consider where such business was conducted. We would have had no hesitation on the facts before us in finding that such a business did not take place in Hong Kong. If there were any such business then it is clear to us that the business took place in Country A. That is where all of the negotiations took place and that is where all decisions were made. It could possibly be argued that in the case of Bank B the locus was Country B but it certainly was not Hong Kong. It was argued before us by the representative for the Commissioner that the fact that the directors of the company were physically situate in Hong Kong and the company was incorporated in Hong Kong meant that its activities constituted the carrying on of business in Hong Kong as opposed to Country A or Country B. On the facts before us we could not agree with this.

For the reasons given we allow this appeal and direct that the assessments against which the Taxpayer has appealed should all be annulled.