HCIA 6/2001

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

INLAND REVENUE APPEAL NO. 6 OF 2001

BETWEEN

SOUTHTIME LIMITED Appellant

AND

COMMISSIONER OF INLAND REVENUE Respondent

Coram: Deputy High Court Judge Andrew Cheung in Court
Date of Hearing: 11 March 2002
Date of Handing Down Judgment: 27 March 2002

J U D G M E N T

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1. This is an appeal by way of case stated arising out of a decision of the Board of Review, dismissing the appeal brought by the Appellant against a determination by the Acting Deputy Commissioner of the Inland Revenue dated 31 March 2000. In that determination, the Acting Deputy Commissioner increased the profits tax assessment on the Appellant, the Taxpayer, for the year 1991/1992 to $27,195,404 with tax payable thereon of $4,487,241.

2. Pursuant to section 69 of the Inland Revenue Ordinance (Cap. 112), the Board

of Review stated a case on the following question of law for the opinion of this Court, namely,

> "Does section 15C of the Inland Revenue Ordinance apply in a case where a taxpayer holds units in the same building, some of which are for investment and some for the purpose of trading, and ceases his trading business but, nevertheless, continues with the investment?"

3. Before the Board of Review, the facts were essentially agreed between the parties. The Board accepted them as proved and set them out in the Case Stated.

4. According to the Case Stated, the Taxpayer was incorporated as a private company in Hong Kong on 17 February 1989 with an authorized share capital of $10,000 divided into 10,000 shares of $1 each. Two subscriber shares were issued and fully paid-up. By an agreement dated 23 May 1989, the Taxpayer acquired the first and second floors of a shopping centre known as Kwai Chung Plaza, which was then still under construction, at a total consideration of $352,910,000. There were 132 shop units on the first floor and 159 shop units on the second floor. The Taxpayer was entitled to subsell the shop units before completion of the acquisition.

5. The Taxpayer commenced to put up the shop units for sale through various media like newspapers, banners, radio and television broadcasting. The Taxpayer maintained a sales office at Shop No. B35 (being one of the shop units on the first floor so acquired by the Taxpayer) for the purpose of selling the shop units in Kwai Chung Plaza. That unit was subsequently sold by the Taxpayer to Ausnation Consultants Limited ("Ausnation"), which had common directors as the Taxpayer, on 11 May 1990, for $550,000.

6. According to the Case Stated,

> "2.5 In a minutes dated 1 July 1990, the Taxpayer's directors resolved to retain the following units in Kwai Chung Plaza as investment properties for rental income:
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> (a) Shop Nos.
> ... on 1/F (20 units in total) ["Lot 1"];
>
> (b) Shop Nos.
> ... on 1/F (16 units in total) ["Lot 2"]; and
>
> (c) Shop Nos.
> ... on 2/F (13 units in total) ["Lot 3"].
>
> Lot 2 and Lot 3 were let out to Fortress Limited and Wellcome Company Limited for a term of 6 years commencing on 31 May 1990 and 5 November 1990 respectively."

7. During the period ended 31 March 1991, the Taxpayer made a gross profit of $47,294,550 from the sale of the shop units in Kwai Chung Plaza, and the same was offered by the Taxpayer for assessment. In the Taxpayer's balance sheets as at 31 March 1991, Lot 1, Lot 2 and Lot 3 were classified as "fixed assets" at a total cost of $42,800,000, whereas 32 units, which remained unsold, were shown as "stock" at a cost of $40,118,800 in total.

8. On 23 April 1991, one of the 32 unsold units was sold and the gross profit made was offered for assessment. 31 units remained unsold ("Unsold Units"). According to the Case Stated,

> "2.8 In a minutes dated 18 February 1991, the Taxpayer's directors resolved to sell the Unsold Units to the shareholders and director at market price."

9. The certificate of compliance in respect of Kwai Chung Plaza was issued on 17 May 1991.

10. On 31 May 1991, the Unsold Units were assigned to the Taxpayer's shareholders and director for a total sum of $38,500,000. According to the Case Stated,

> "2.10 ... Upon the transfer of the Unsold Units, there was no more stock-in-trade shown in the Taxpayer's balance sheets. The sales office was closed upon the disposal of Shop No. B35 by Ausnation to [one of the shareholders of the Taxpayer] on 31 May 1991 for $1,500,000. The profit made by Ausnation from the disposal of Shop No. B35 was claimed and accepted as a non-taxable capital gain. During the years 1990/91 to 1991/92, the turnover shown in the Taxpayer's accounts was rental income derived from Lot 2 and Lot 3."

11. During the year ended 31 March 1992, some of the Unsold Units so transferred were sold, whilst the other units were let for rental income. Rebuilding allowances in respect of those units that had been let were claimed and granted.

12. According to the Taxpayer's 1991/92 profits tax computations, "the remaining stock of flats were internally transferred to the Company's shareholders and directors at cost."

13. According to the Case Stated,

> "2.14 In reply to the Assessor's enquiry, the Former Representatives [of the Taxpayer] advanced the following reasons for the transfer of the Unsold Units to the Taxpayer's shareholders and director:
>
> *(a) "The company's intention in purchasing (the Unsold Units) is for re-sales purposes ..."*

(b) *"In May 1989, (the Taxpayer) acquired all the shops of 1st and 2nd Floor of Kwai Chung Plaza, after reserved some shops for long-term investment, all other shops were for sales to the public. However, up to February 1991 (19 months), there still remained 31 shops unable to sell to the public. In order to close the sales outlet and minimize the administrative cost, so (the Taxpayer) decided to transfer the unsold shops to the shareholders and director in order to simplify the operations of (the Taxpayer)."*

(c) *"In February 1991, (the Taxpayer) decided to transferred (sic) those shops, which were unable to sell to public, at their best market prices. In order to simplify the paperwork of accounting, the cost of closing stocks for those shops were stated at ($38,500,000)."*

2.15 In September 1992, the Taxpayer re-aligned Lot 1 into 79 smaller units, 31 of which were sold in the year of assessment 1993/94. The Taxpayer claimed that these units were acquired as its capital assets with the intention of letting out for rental income. Hence, the profits arising from their disposal should be non-taxable. The claim was accepted.

2.16 The Taxpayer sold the remaining 48 units (i.e. 79 units - 31 units) of Lot 1 in the years 1995/96 and 1996/97 and the gains were treated as non-taxable gains arising from the disposal of capital assets. The claim was accepted."

14. According to the Commissioner of Rating and Valuation, the open market value of the Unsold Units as at 31 May 1991 on a vacant possession basis was $69,400,000. Thus there was a difference between the market value and the cost at which the Unsold Units were sold on 31 May 1991.

15. The Inland Revenue relied on section 15C(b) of the Ordinance, contending that the Taxpayer had carried on a trade of dealing in properties which had ceased on 31 May 1991 following the sale of the Unsold Units within the meaning of the section, to deem the value of the stock (i.e. the Unsold Units) to be the amount which it would have realized if it had been sold in the open market at the date of cessation, and determined to increase the profits tax assessment on the Taxpayer for the year 1991/92 accordingly.

16. At this juncture, it is useful to set out in full section 15C of the Ordinance:

"Where a person ceases to carry on a trade or business in Hong Kong the trading stock of the trade or business at the date of cessation shall be valued for the purpose of computing the profits in respect of which that person is chargeable to tax under this Part as follows -

(a) in the case of any such trading stock -

(i) which is sold or transferred for valuable consideration to a person who carries on or intends to carry on a trade or business in Hong Kong; and

(ii) the cost whereof may be deducted by the purchaser as an expense in computing the profits from such trade or business in respect of which such purchaser is chargeable to tax under this Part, the value thereof shall be taken to be the amount realized on the sale or the value of the consideration given for the transfer;

(b) in the case of any other such trading stock, the value thereof shall be taken to be the amount which it would have realized if it had been sold in the open market at the date of cessation."

17. As mentioned above, the Board of Review agreed with the Acting Deputy Commissioner's determination based on section 15C. According to the Case Stated,

"5. The reasons for our decision were as follows. On the facts as agreed, the Taxpayer clearly embarked upon a trade in the purchase and sale of units in Kwai Chung Plaza. The Unsold Units were treated as its stock. Upon the transfer of all the Unsold Units to its shareholders and director on 16 May 1991, the Taxpayer ceased to carry on the trade. It is nothing to the point that the Taxpayer may have embarked upon and continued to run another business by way of investment in other units which the Taxpayer decided to keep on a long term basis. In our view, the Acting Commissioner was plainly correct in concluding that s. 15C applies.

6. The facts are again too clear for argument that s.15C(b) is applicable here and that the relevant date is 16 May 1991 ... Mr Wong [for the Taxpayer before the Board] does not challenge the Commissioner's decision to value the Unsold Units at $69,400,000.

7. For these reason[s], we dismissed the appeal and confirmed the assessment appealed against ..."

18. At the hearing of the Appellant's appeal before this Court, Mr Burkett, counsel for the Appellant, essentially took two points. First, he argued that there was no cessation of trade or business after 31 May 1991 (or for that matter 16 May 1991), the trade or business of the Taxpayer being "the purchase, sale and rental of units in Kwai Chung Plaza", and therefore section 15C, on its proper construction, does not apply in this case. Second, Mr Burkett argued in essence that, on the assumption that prior to 31 (or 16) May 1991 the Taxpayer had been carrying on a trade or business in the purchase and

re-sale of units in Kwai Chung Plaza the cessation of which would attract the operation of section 15C, as a matter of fact, there was no cessation of the trade or business in the purchase and re-sale of units on or after the relevant date; and in support of that argument, Mr Burkett relied on the subsequent selling of the Lot 1 units as evidence that the trade or business of purchasing and re-selling units did not cease at the relevant date. In those circumstances, section 15C does not apply.

19. Mr Burkett's first argument deals with the question of law posed by the Board of Review for the opinion of this Court. I have already set out section 15C in full above. Mr Burkett told me during submission that he could find no direct authority on the proper construction of the section in the present context. Mr Miu, counsel for the Respondent, did not suggest otherwise.

20. Mr Burkett argued that his client carried on a trade or business in the purchase, sale *and rental* of units in Kwai Chung Plaza. This was a single or indivisible trade or business, and it could not be broken into individual components for the purpose of applying section 15C. From that basic premise, he argued that although the Unsold Units could not be successfully sold to the public despite effort and had to be transferred to the Taxpayer's shareholders and director to suit the prevailing circumstances in respect of the trade or business (as defined above), there was no abandonment or cessation of the trade or business.

21. In relation to this argument, Mr Burkett did not concede for the purpose of his argument that the internal transfer of the Unsold Units signified the cessation of a component of the trade or business (as defined by him), namely, the cessation of the property *trading* component. On the other hand, it is clear from the question of law formulated by the Board of Review that the Board based the question of law on the premise that the property trading component (to use Mr Burkett's formulation) had ceased. It would appear to me that if Mr Burkett was right with his argument, whether there was a cessation of the property trading component would not matter; in either case, section 15C would not apply. This is for the simple reason that even assuming that this property trading component had ceased, the single or indivisible trade or business (as defined by Mr Burkett) did not cease as such, and therefore section 15C would have no scope of operation.

22. Section 15C applies, on its own wording, to the cessation of the carrying on of "a trade or business in Hong Kong". It should be read together with section 14(1) of the Ordinance:

> "(1) Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part."

23. Section 14(1) imposes a charge of profits tax on a person "carrying on *a trade, profession or business* in Hong Kong in respect of his assessable profits ... from such trade, profession or business (excluding profits arising from the sale of capital assets)".

24. When such a person ceases to carry on *the* trade or business in question, the previous carrying on of which by him attracted liability to profits tax under section 14(1), the value of his trading stock of *that* trade or business will have to be valued at market price for the purpose of computing profits in accordance with section 15C. (I am not concerned with "*a profession*" in this appeal, which does not feature in section 15C anyway.)

25. At this juncture, some elaboration is helpful. In computing the assessable profits of a trade or business under section 14(1), it is normal accounting practice to bring into account the value of trading stock with the object of ensuring that the true profits of the accounting period are ascertained as accurately as possible. Trading stock is therefore valued and the value is entered in the accounts at the beginning and end of each accounting period. The higher the value of trading stock at the end of each period the greater the trading profit will be, and the lower the valuation the lower it will be. The fundamental rule is said to be that stock may be valued at cost or market value whichever is lower. The effect of this is to exclude appreciation in stock values from the accounts but to anticipate losses where the market value is less than cost. This is obviously to the advantage of the taxpayer. The significance of section 15C is that the section provides that any trading stock held by a trade or business at the date of cessation must be valued at market price at that date, thereby taking away the benefit of the normal option available for a continuing business of valuing stock at cost or market value, whichever is lower. See generally *Willoughby and Halkyard, Encyclopaedia of Hong Kong Taxation* (Vol. 3) para. II[5854] sub-para. (6) and para. II[7741].

26. The question raised in this appeal is a specific one, namely, how does one define "*a* trade" or "*a* business" as a basic unit for the operation of section 15C, or for that matter, section 14(1)? The definitions of the words "business" and "trade" in section 2(1) are helpful to some extent:

> ""business" ... includes agricultural undertaking, poultry and pig rearing and *the letting or sub-letting by any corporation to any person of any premises or portion thereof*, and the sub-letting by any other person of any premises or portion of any premises held by him under a lease or tenancy other than from the Government;
>
> ...
>
> "trade" ... includes every trade and manufacture, and every adventure and concern in the nature of trade". (emphasis added)

27. In the context of the present case, in my judgment, one may very properly term the property purchase and re-sale activities of the Taxpayer as property trading activities

constituting a "trade" or "an adventure in the nature of trade"; and refer to the letting activities of the units in Kwai Chung Plaza held for long-term investment purpose as business activities done by a corporation, falling squarely within the definition of a "business" within the meaning of the Ordinance.

28. If that is the case, what happened at the relevant date in the present case was the cessation of the carrying on of *a trade* in the purchase and re-sale of the units in Kwai Chung Plaza. The continuation of the carrying on of *a business* in letting other units in the same building held for long-term investment purpose by the same Taxpayer would not alter the fact of cessation of a trade. Thus analyzed, *prima facie*, a case for the application of section 15C has been made out. Put another way and more in terms of the question of law formulated, section 15C applies in a case where a taxpayer ceases his *trade* for the purchase and re-sale of units in a building in which he also held and continues to hold other units which he lets out for long-term investment *business* purpose.

29. Does the above conclusion depend on calling the letting/investment activities a business and the purchase/re-sale activities a trade? Given the very wide meanings of the two words, can it not be reasonably argued that both may be called a *business*? (I do not think the letting/investment activities can be called without unduly stretching the word a trade.) Indeed the question of law formulated by the Board refers to the purchase/re-sale activities as the Taxpayer's "trading *business*". After all, "Every trade is a business, but every business is not a trade": *Wetherell v Bird* (1834) 2 Ad. 4 E. 161, 165-166.

30. In my judgment, the answer is "no". Even if one calls each of the respective activities a business, it does not alter the basic fact that they are very different activities by nature, involving different fixed assets and/or stock-in-trade, and generating different types of assessable profits for the purpose of section 14(1). It is simply trite that under the letting/investment activities, the fixed assets involved are the units in the building, and there is no "stock-in-trade" as after all no trade is being carried on. The assessable profits generated from the activities are the rental incomes from the tenants net of the expenditure.

31. In respect of the purchase/re-sale activities, the stock-in-trade comprises the units purchased by the taxpayer for re-sale purpose for profits. Depending on the facts, there may or may not be fixed assets involved. An example of a fixed asset in such a case is the sales outlet in the present case, or the office used by the taxpayer to run the purchase/re-sale activities. Anyhow, the assessable profits generated from the activities comprise the profits earned in the purchase and re-sale process.

32. All this is really trite. In my judgment, regardless of whether the activities are termed a trade or a business, one is concerned with two *different* types of activities. In those circumstances, for the operation of section 14(1) and section 15C, I can see no objection in terms of the wordings used or in terms of the object and intention behind the respective sections, to treat each type of activities as comprising a single or individual "trade" or "business" - the basic unit of operation of the two sections. Indeed, I can see every reason for so treating them. In respect of different types of activities generating

different types of profit, there is every good reason for treating them separately for the purpose of assessing the different types of profits generated therefrom respectively; and upon the cessation of one type of activities, there is also every good reason for valuing the remaining stock-in-trade, if any, involved in that type of activities according to its true market value so as to determine finally how much profits for tax purpose the taxpayer has earned from that type of activities which are no longer to be carried on. The reason for allowing it to be valued at cost (at the option of the taxpayer) no longer exists. This is because whilst the trade or business remains a continuing one, and the stock has not yet been sold, the valuation of the stock in the accounts is merely a paper exercise, and the valuation, from the angle of assessing profit or loss, is nothing more than a provisional one. The stock has not yet been sold and no real profit has yet been earned. Thus there is scope for conceding to the taxpayer an option to value his stock at market value or cost, as he prefers. But when his particular trading or business activities come to an end, the profit or loss of the activities has to be finally computed and determined. And if there still remains unsold stock of those particular activities, of course it should be valued according to its true market value, so that the true profit or loss of the now ceased activities can be finally worked out. There is no longer any justification to value it at cost. That is the obvious intention behind section 15C.

33. This being the case, it is difficult to see why the existence of a *different* type of activities that is continued to be carried on by the same taxpayer should make any difference as a matter of principle to the operation of section 15C. After all, the two types of activities are, by definition, different types of activities.

34. Does the fact that the taxpayer started off with carrying on the letting/investment activities and purchase/re-sale activities together as one single "project", "venture" or "enterprise" make any difference to the above conclusion? It should be noted that the Board did not make any express or specific finding relating to what was the intention of the Taxpayer at the time when it contracted to buy the units in Kwai Chung Plaza back in 1989. The question of law posed by the Board is couched in sufficiently wide language to admit of an intention right from the outset to engage in both types of activities as a single project, venture or enterprise, or alternatively an initial intention to trade in the units only that was subsequently modified to the extent of holding some of the units for long-term investment purpose.

35. In my judgment, it does not matter. There is no place for any game of words here. Regardless of whether what was originally intended or planned (with or without subsequent modification) is called a "single" "project", "venture" or "enterprise", one must look at the *substance* of the matter. In particular, one must look at whether the taxpayer was carrying on one or more than one "trade or business" that were different from each other, whether by way of an original plan or an original plan as subsequently modified - in either case, in my judgment, this does not make any difference at all. As analyzed above, the two types of activities in question are very much different from each other in nature. The fact that one type of activities was carried on by the taxpayer at the same time as another type of activities both pursuant to one single plan would not turn the two different types of activities into one, or in any way reduce or eliminate the differences

between them; *a fortiori*, the modification of the original plan comprising only the purchase/re-sale of properties into one comprising both the purchase/re-sale of some of these properties and the letting/investment of the remaining properties. In my judgment, the basic unit of operation under section 14(1) and section 15C remains the same, i.e. a trade or business. With or without a master plan or a plan as subsequently modified, there were at all material times two different businesses, or alternatively one trade and one (different) business that were being carried on by the Taxpayer. One of them subsequently ceased, thereby attracting the operation of section 15C in respect of the one that ceased.

36. In other words, I reject Mr Burkett's first argument.

37. Turning to his second argument, Mr Burkett argued that the trade/business of purchase/re-sale of units in Kwai Chung Plaza never ceased, and therefore there was no scope for applying section 15C in any event. He based his argument on the subsequent sales of the Lot 1 units in 1993 to 1997. He argued that these subsequent sales indicated that the Taxpayer was throughout carrying on the trade/business of purchase/re-sale of units in Kwai Chung Plaza. He further argued that the accounting treatment of the Lot 1 units as "fixed assets" in the balance sheets of the Taxpayer was inconclusive. Likewise, he argued that the successful claims by the Taxpayer after the subsequent sales of these units as disposal of capital assets not attracting tax on the profits derived therefrom were equally inconclusive, they being something which followed naturally from the accounting treatment.

38. Mr Burkett based his argument on the rather well-known case of *Chinachem Investment Limited v Commissioner of Inland Revenue* (1986) 2 HKTC 261 (Macdougall J.); (1987) 2 HKTC 261 (C.A.). In that case, both the first instance judge and the Court of Appeal agreed with the Commissioner's view that the facts that some of the properties in question were in the ownership of the taxpayer for substantial periods of time - in some cases as long as 15 years - and that they were generally let throughout as being consistent with the finding that they were being held by the taxpayer as trading stock throughout awaiting a favourable opportunity to sell and in the meantime being put to good account generating rental income. The Courts concluded that the taxpayer held the properties for trade at all material times, and therefore the profits generated from their eventual disposal attracted profits tax.

39. Likewise, Mr Burkett argued that the Lot 1 units, if not the Lot 2 and Lot 3 units, were held by the Taxpayer for letting purpose to suit the prevailing market circumstances, as they could not be sold successfully despite much effort, awaiting the arrival of a favourable opportunity to sell. This was evidenced by the subsequent sales of the Lot 1 units between 1993 and 1997. The Taxpayer never abandoned its intention to trade those units in question. In other words, the Taxpayer never ceased to carry on the trade or business of the purchase/re-sale of units in Kwai Chung Plaza. When the Unsold Units (not comprising the Lot 1, Lot 2 or Lot 3 units) were transferred in May 1991, there was no cessation of the trade or business of the purchase/re-sale of units in Kwai Chung Plaza. Therefore section 15C does not apply.

40. First, I note that this does not fall within the question of law formulated by the Board. Indeed this argument goes against the basic premise of the question of law formulated, i.e. that the taxpayer has ceased his trading business but is continuing with his investment business. This is not necessarily fatal to the Taxpayer in this appeal. According to the decision of Mr Recorder Ribeiro SC (as he then was) in *Emerson Radio Corp v Commissioner of Inland Revenue* [1998] 3 HKC 427, 444 A-C, it is permissible as a matter of law for a party to a case stated from the Board of Review to seek the opinion of the Court of First Instance on questions additional to those framed in the case stated provided that such questions may fairly be said to arise out of the stated findings and decision of the Board of Review. On appeal ([1999] 2 HKLRD 671), Rogers J.A. (as he then was) agreed with what was said below on this point (at pp. 679H to 680E), whilst the other two members simply dealt with the issues argued by the parties on their merits. On further appeal to the Court of Final Appeal ([2000] 1 HKLRD 238), Lord Hoffmann NPJ in giving the leading judgment of the Court left this "disputed point" open because the question was regarded by the Court as entirely academic in that case (pp. 245J to 246B).

41. Anyhow, a second hurdle facing the Appellant is this. In my judgment, quite plainly the Board of Review has made a finding of fact that apart from the Unsold Units that were sold in May 1991, the Taxpayer held no other units in Kwai Chung Plaza for trading purpose after the sale. This is in particular apparent from paragraph 5 of the Case Stated quoted above, in which the Board said in no uncertain terms as follows:

> "On the facts as agreed, the Taxpayer clearly embarked upon *a trade in the purchase and sale of units* in Kwai Chung Plaza ... Upon the transfer of all the Unsold Units to its shareholders and director on 16 May 1991, *the Taxpayer ceased to carry on the trade*." (emphasis added)

42. In the *present* context, regardless of whether "the Taxpayer ceased to carry on the trade" within the meaning of section 15C, what the Board said there clearly constituted a finding of fact that upon the sale of the Unsold Units, the Taxpayer did not have any further units held by it for the purpose of trading in them, and therefore upon the sale of the Unsold Units, the Taxpayer ceased to carry on the "trade in the purchase and sale of units in Kwai Chung Plaza".

43. That this was the finding of the Board may also be gathered from the question of law formulated by the Board for the opinion of this Court which, as I mentioned above, premises on the cessation of the taxpayer's trading business but continuation of his investment in relation to units in the same building.

44. Furthermore, it must be remembered that at the hearing of the appeal before the Board, the facts were essentially agreed, and the Board accepted them as proved, and they were then set out in the Case Stated (paragraph 2). Paragraphs 2.5, 2.6, 2.14, 2.15 and 2.16 of the Case Stated extracted above record the agreed evidence put before the Board and there is no record of any challenge or dispute by the Taxpayer before the Board regarding the correctness of the contents of the Taxpayer's documents such as its minutes

of board resolution, balance sheets, the former representative's written reasons, and the Taxpayer's tax claims referred to in these paragraphs in the Case Stated. The Board was of course the primary fact-finding tribunal. The Board accepted the agreed facts "as proved" and set them out in the Case Stated. Therefore even if one were only to look at these paragraphs by themselves, the Board must have made a finding that apart from the Unsold Units that were eventually transferred in May 1991, the Taxpayer kept no other units in Kwai Chung Plaza for trading purpose. In other words, its trade/business in the purchase and re-sale of shop units ceased upon the disposal of the Unsold Units.

45. And in my judgment, looking at the Case Stated as a whole, the Board did make such a finding.

46. This being the position, the second argument of Mr Burkett amounts to a challenge to a finding of fact made by the Board in this appeal. In this type of situation, very broadly stated, this Court sitting as an appellate court cannot disturb a primary finding of fact unless it is not supported by any or sufficient evidence, and it may only disturb an inference of fact drawn from primary findings of fact if the inference is one which no reasonable tribunal of fact would have drawn from all the relevant primary findings of fact: See generally *Willoughby and Halkyard* (Vol. 4), para. II[20881] *et seq.*; and also see *Edwards v Bairstow* [1956] AC 14; *Richfield International Land and Investment Company Limited v Commissioner of Inland Revenue* [1989] 1 HKLR 125 (C.A.), affirmed on appeal (1989) 3 HKTC 167 (P.C.); and *Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Ltd.* [1989] 2 HKLR 40 (Barnett J.), appeal withdrawn by compromise: (1989) 3 HKTC 223 (C.A.) See also the latest Court of Final Appeal decision in *Ting Kwok Keung v Tam Dick Yuen* FACV 12/2001 (14/3/2002) dealing with the disturbing of a trial judge's finding of fact by an intermediate appellate court in general.

47. In my judgment, regardless of whether the finding of fact by the Board in question is a finding of primary fact or an inference drawn from primary facts, there is no ground whatsoever to disturb it, there being obviously much evidence before the Board as revealed in the Case Stated to enable the Board to come to such a conclusion.

48. The decision of the Courts in *Chinachem* obviously depended very much on the evidence available in that case. Each case must be decided according to the facts peculiar to it. As for the argument that accounting treatment is not conclusive, whilst I accept it as a matter of principle, yet first, accounting treatment does constitute some evidence of the truth of the subject of treatment in the accounts; and second, in the present case the available evidence goes far beyond mere accounting treatment, but includes minutes of board resolution, written reasons supplied by the Taxpayer's former tax representatives, tax claims made by the Taxpayer in relation to the disposal of the Lot 1 units, the truthfulness and correctness of the contents of which were not disputed by the Taxpayer before the Board at all, as well as the closure of the sales outlet. In my view, there was more than sufficient evidence and material before the Board to enable the Board to make the finding in question.

49. In those circumstances, even *assuming* that the second argument of Mr Burkett may be entertained notwithstanding that it does not fall within the question of law formulated for the opinion of this Court (as to which I need not express any final view), I am of the view that the argument must fail for the reasons set out above.

50. In conclusion, I agree with the decision of the Board in dismissing the appeal of the Taxpayer from the determination of the Acting Deputy Commissioner and in confirming the assessment appealed against. As to the question of law formulated by the Board, I would answer it in the affirmative. The assessment in question is confirmed.

51. The appeal is dismissed. I make an order *nisi* that the Appellant pay to the Respondent her costs of the appeal, to be taxed if not agreed. Unless either party applies to vary this order *nisi* within 14 days after this judgment is handed down, the order will become an absolute order upon the expiry of the 14-day period.

Andrew Cheung
Deputy Judge of the Court of First Instance
High Court

Representation:

Mr Francis Burkett instructed by Messrs Knight & Ho, for the Appellant

Mr Nelson Miu instructed by the Department of Justice, for the Respondent