IN THE SUPREME COURT OF HONG KONG

INLAND REVENUE APPEAL NO. 3 OF 1994

BETWEEN

COMMISSIONER OF INLAND REVENUE — Appellant

and

BARTICA INVESTMENT LTD. — Respondent

Coram : Hon Mr Justice Cheung in Court

Date of hearing : 23rd May 1996

Date of handing down judgment : 5th June 1996

J U D G M E N T

The application

This is an appeal by way of a Case Stated by the Board of Review ("the Board"), pursuant to s.69 of the *Inland Revenue Ordinance* ("the *Ordinance*").

Facts

The facts found by the Board were set out in the Case Stated. The following is a summary. The taxpayer was incorporated as a private limited company in Hong Kong on 16th December 1983. It was incorporated as a shelf company by Price Waterhouse, an international audit and accounting firm. The shareholders and directors and the secretary of the taxpayer were all nominee companies incorporated in Hong Kong which were owned and managed by Price Waterhouse.

The nominee companies held the shares on trust beneficially for Mr X and his family ("the family"). The family lived in Australia and they invested in a hotel in Australia. The hotel was owned by a company incorporated in Australia ("the hotel company") which in turn was beneficially owned by the family. It was advantageous for

Australian tax purposes that the hotel company should borrow money commercially from banks in Australia against the security of off-shore fixed deposits belonging to the family.

Westpac Banking Corporation

The first loan of the hotel company which involved the taxpayer was with the Westpac Banking Corporation ("Westpac Bank"), a bank carrying on business in Australia with branches and subsidiaries in other countries. Mr X and his daughter handled the negotiations with Westpac Bank in Australia. The bank suggested that it would be advantageous for Australian tax purposes for the family to borrow money in Australia against the security of off-shore deposits belonging to the family.

When Westpac Bank proposed to Mr X that there would be a back-to-back arrangement with an off-shore deposit from the family, Mr X contacted Price Waterhouse. He and his family acquired ownership of the taxpayer on 10th July 1984.

In November 1984, money belonging to the family were transferred to the account of the taxpayer with the Westpac Bank in Hong Kong. On 27th November 1984, Mr X in Australia gave instructions on behalf of the taxpayer to the Westpac Bank to create two deposits, one of A$2 million for 90 days and one of A$4 million for 30 days which were to be used as security for the Westpac Bank loan to the hotel company and the balance of the funds of the taxpayer of approximately A$700,000 (including interest) should be placed separately on deposit for 30 days.

Transactions put into effect

The transactions were put into effect. The hotel company received a loan in Australia from the Westpac Bank on the security of the fixed deposits in the name of the taxpayer. The deposits were pledged by the taxpayer to the bank in the form of a first mortgage dated 19th November 1984. The effect of this was that the hotel company would pay to the Westpac Bank the same rate of interest as that received by the taxpayer plus 1½% spread in favour of Westpac Bank.

The loan to the hotel company and the pledge of the deposits continued in existence until 29th November 1989. By a letter dated 8th November 1989 Mr X, writing as Chairman and Managing Director of the hotel company informed Westpac Bank in Australia that the loan would be repaid on 29th November 1989 by utilising the A$6 million deposit of the taxpayer.

During the period of the loan by Westpac Bank, instructions were periodically given by Mr X or his daughter in Australia or Singapore 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, i.e. the deposits were maintained on a back-to-back basis.

Nature of the deposits

The deposits transferred to the taxpayer by Mr X and his family were treated as interest free shareholder loans and when payment was made to Westpac Bank 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 the income of the taxpayer. The interest earned was kept separate from the deposits pledged to the Westpac Bank. Most of the interest earned by the taxpayer was used by the family to offset interest which was paid by the hotel company in Australia.

Role of Price Waterhouse

Whenever instructions were given by Mr X or his daughter relating to the affairs of the taxpayer, they were copied or related to Price Waterhouse in Hong Kong who carried out whatever "follow-up" action might be necessary. Though instructions were given to and accepted by Westpac Bank in Australia from either Mr X or his daughter, it would appear that the legal authorised signatory of the taxpayer were the nominees of Price Waterhouse who were required to confirm the instructions.

Citibank

Additional funds were required by the hotel company. Westpac Bank was not prepared to advance further monies and the daughter arranged for additional loans from Citibank. The negotiations took place in Australia and in Singapore. The proposal was that monies belonging to the family would be put on deposit in Singapore with Citibank to give security for monies lent by Citibank in Australia.

Citibank agreed to lend to the hotel company in Australia A$2 million provided that the family placed on deposit with Citibank in Singapore a similar amount of A$2 million. Again the taxpayer was used for this purpose. In January 1985, the family transferred money to the taxpayer through Westpac Bank. This money was combined with the balance of the money previously transferred to the taxpayer by the family and accrued interest thereon. Pursuant to instructions given by Mr X's son from Singapore, A$2 million was transferred to Citibank Singapore by Westpac Bank in Hong Kong.

To secure a further loan of A$2 million from Citibank to the hotel company, the family further transferred, in March 1985, to the taxpayer a sum of A$2 million odd. These monies were received in Hong Kong by the Westpac Bank and a further sum of A$2 million was transferred by Westpac Bank in Hong Kong to Citibank in Singapore.

These two deposits of A$2 million each plus accumulated interest remained on deposit with and pledged to Citibank Singapore until September and August 1986 respectively when the same were transferred to Citibank in Hong Kong. The money was still under pledge.

Starting in December 1987, the hotel company began to repay and restructure its loans in Australia which included its back-to-back loans with Citibank secured by the deposits belonging to the taxpayer. The deposits with Citibank in Hong Kong were uplifted and remitted to Australia for the account of the hotel company. By January 1989, the entirety thereof together with accumulated interest had been uplifted and remitted to the hotel company in Australia.

The monies transferred to the taxpayer by the family and which were placed on deposit with Citibank Singapore were treated as interest-free shareholder loans and when the proceeds thereof including interest were paid to the hotel company in Australia, the sums were credited to the accounts of the relevant shareholders.

Hongkong Bank

In anticipation that additional funds would be required for the hotel and it was hope that the Hong Kong and Shanghai Banking Corporation in Australia ("the Hongkong Bank") would be prepared to provide such funds on a back-to-back basis, an account was opened in the name of the taxpayer with the Hongkong Bank in Singapore in September 1986 and money was deposited into this account. The money represented accumulated interest earned by the taxpayer.

Shortly thereafter Mr X and his daughter found out that the Hongkong Bank in Australia would not provide any funds and their account with the Hongkong Bank was accordingly closed. The monies were paid to the hotel company in Australia and treated by the taxpayer as a repayment shareholder loan.

Investment portfolios

In 1985 and 1986, the family decided to transfer to the taxpayer certain personal investment portfolios which they have with three international investment or brokerage firms. These accounts have been managed and controlled by the family through Singapore. The three investment accounts were operated and managed from Singapore.

It was decided to use the taxpayer to hold this investment. To open the accounts, the directors of the taxpayer in Hong Kong passed the appropriate resolutions which authorised the four members of the family to operate the accounts. In practice, the daughter would make decisions as to whether to sell, buy or hold investments from time to time. Particulars on transactions which had been effected were sent to Price Waterhouse 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.

Shares

In 1988, an associate of Mr X was organising an 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. The decision was made by Mr X in Australia and appropriate instructions were given to implement the same. It was intended to be a long-term investment but in approximately 80 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.

Assessment

In respect of the years of assessment 1984/85 to 89/90 inclusive, the taxpayer submitted its profit 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 profit 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 the deposit with the Westpac Bank in Hong Kong, Citibank in Hong Kong and the Hongkong Bank, but excluded therefrom the interest earned on the deposits with the Citibank in Singapore and other income of the taxpayer, namely the profit from sale of investments, income from investments and exchange gains.

The objection

The taxpayer objected to this assessment on the grounds that the taxpayer did not carry on any trade or business in Hong Kong and that any income received was therefore not liable to profits tax.

The Commissioner of Inland Revenue

By his determination dated 4th September 1995, the Commissioner of Inland Revenue ("the Commissioner") 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, 86/87 and 87/88, the Commissioner increased the amount of the assessable profits and the tax payable thereon to correct certain errors which had subsequently come to light.

The Board of Review

The taxpayer appealed to the Board of Review, the Board allowed the appeal.

The Board came to the conclusion that on the facts the taxpayer was not carrying on business. Its reasoning can be gathered from the Case Stated.

(1) 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.

(2) The taxpayer was not carrying on an active business of borrowing money and placing such money on deposits for the benefit of the taxpayer. It is possible for a person to actively carry on the business of giving secured guarantees. But on the facts, 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 on 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.

(3) The combined effect of placing money on deposit and the giving of secured guarantees did not constitute a business activity for taxation purposes.

In respect of the other activity of the taxpayer, namely the taxpayer accepted an underwriting and to acquire shares in a Hong Kong public company, the Board was of the view that this might well constitute the carrying on of a business; and in respect of the activity of the taxpayer being called upon by its shareholders to invest in stocks and shares, the Board concluded that it did constitute the carrying on of business. The Board, however, did not think that either activity is material in deciding the case : these two activities were not in any way connected with the placing of money on deposits and the giving of secured guarantees.

Questions of law

The questions of law for the opinion of the Court are :-

(1) Whether on the facts found by the Board, the Board has erred in law in holding that the taxpayer was not carrying on a business in Hong Kong during the years of assessment 1984/85 to 1989/90 inclusive;

(2) Whether, on the facts found by the Board, the true and only reasonable conclusion is that the interest income accrued to the taxpayer during the years of assessment 1984/85 to 1989/90 inclusive was chargeable to profits tax under ss.14 and 15(1)(f) of the *Ordinance, Cap. 112*.

The Ordinance

Section 14 of the *Ordinance* provides that profits tax shall be charged 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.

Under s.15(1)(f), sums received by or accrued to a corporation carrying on a trade, profession or business in Hong Kong by way of interest derived from Hong Kong is deemed to be receipts arising in or derived from Hong Kong from a trade, profession or business carried on in Hong Kong.

Between 1984 and 1986, the deeming provision of s.15(1)(f) is as follows :

> "(f) Sums received by or accrued to a corporation by way of interest arising through or from the carrying on by the corporation of its business in the colony, notwithstanding that the monies in respect of which the interest is received or accrued are made available outside the colony."

S.15(1)(f) has since been amended to its current form.

Principles

The authority in this area is **American Leaf Blending Co. Sd Bhd v. Director General of Inland Revenue** [1978] STC 561. The company had its principal object of carrying on a tobacco business. Its Memorandum of Association covered a wide variety of objects including the granting of licences over, and generally dealing with, the land and other rights over property of the company. After it had ceased trading in tobacco the company began granting licences to others to use and occupy the factory and warehouse for storage purposes in return for a monthly rent. The issue was whether the rental income was from a "source consisting of a business". The decision of the Privy Council was delivered by Lord Diplock. The following principles can be extracted from the speech :

(1) Rents may constitute income from a source consisting of a business if they are receivable in the course of carrying on a business of putting the taxpayer's property to profitable use by letting it out for rent.

(2) The question whether the company was carrying on a business of letting out its premises for rent is one of fact.

(3) The Privy Council would not endorse the view that every isolated act of a kind that is authorised by its memorandum if done by company necessarily constitutes the carrying on of a business.

(4) Business is a wider concept than trade.

(5) 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.

(6) In contrast, in the case of a 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.

(7) Where the gainful use to which a company's property is put is letting it out for rent, it is not easy to envisage circumstances that are likely to arise in practice which would displace the prima facie inference that in so doing so it was carrying on a business.

(8) The carrying on of business, usually calls for some activity on the part of whoever carries it on, though, depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between.

The Privy Council found that,

"On the evidence to which they have referred there is only one conclusion of fact that any reasonable commissioners could reach, viz. that there is nothing in the evidence capable of rebutting the prima facie inference that in the relevant periods of assessment the company was carrying on a business of letting out its premises for rent. On the contrary, the evidence serves only to reinforce that prima facie inference."

In the earlier case of **Commissioner of Inland Revenue v. The South Behar Railway Co. Ltd.** 12 Tax Cases 657, the taxpayer held a railway which was operated by another company. The taxpayer was entitled to a share in the profits in the operation of the railway. Later, it relinquished the possession of the railway and it was arranged that it should be paid an annuity in lieu of the share of profit. Thereafter, the taxpayer did nothing but receive and distribute the said annuity to its shareholders.

It was held by the House of Lords that the taxpayer was carrying on a trade or business or undertaking of similar character and was therefore liable to corporation profits tax. Lord Sumner held that :

"(1) To ascertain the business of a limited liability company one must look at its Memorandum and see for what business that provides and whether its objects are still being pursued. (Korean Syndicate's Case 12 T.C.181, [1921] 3 KB 285). (Page 710)

(2) I do not attach much importance to the domestic operations of declaring and paying dividends, remunerating directors and presenting reports, but the operation of receiving and thus

discharging the annuity payments goes on continuously, and however simple, it is not a mere passive acquiescence. It is the transaction of business between debtor and creditor resulting periodically in the discharge of a debt. The present is not the case of a company existing to do one act only and once for all. Not only did the Company make the agreement of 1906, but it plays its recurring part in every payment and receipt of gains, and there is here, therefore, that 'repetition of acts,' which Lord Justice Brett says (15 Ch. D. at p.277) is implied in 'carrying on business.' (Page 711)

(3) Business is not confined to being busy : in many businesses long intervals of inactivity occurred. (Page 712)"

The argument

The gist of the Commissioner's argument is that the Board was in error in arriving at its conclusion. Although it cited **American Leaf** and the other leading authorities, it had not applied the test correctly.

The taxpayer argued that :

1. The Court can *only* interfere with the Board's conclusion *if* it was a conclusion which "*could not reasonable have been drawn from the primary facts*" : **Bracefirdle v. Oxley**, [1947] KB 349, at 358 per Denning, J. (as he then was).

2. The Court cannot interfere with the Board's conclusion *unless* it holds that "*the true and* ***only*** *reasonable conclusion would have been that*" the Respondent was carrying on business : **Orion Caribbean Ltd. v. Commissioner of Inland Revenue**, (unrep. Inland Revenue Appeals Nos.4 & 5 of 1994) per Godfrey, JA., at 12F-K, when citing and following **Edwards (Inspector of Taxes) v. Bairstow**, [1956] AC 14.

3. For the Court to hold that the Board's conclusion is contradictory of the "*true and* ***only*** *reasonable conclusion*", it must conclude that the Board's decision either contains an error of law patent on its face, or that *no* tribunal properly directing itself *could* have come to the decision : **Edwards v. Bairstow**, per Lord Radcliffe, at 36.

4. The Commissioner cannot succeed in persuading the Court to give an answer "Yes" to the Questions asked in Stated Case *unless* he can demonstrate to the Court that "*no person, if properly instructed in the law and acting judicially,* ***could have reached the determination of*** *the [Board]*": **Reed (Inspector of Taxes) v. Nova Securities Ltd.**, [1985] 1 WLR 193, at 200B.

5. Even if it could be said that the primary facts pointed *equally* to the inference or conclusion that the Respondent did carry on business, that *is not* sufficient for the Commissioner to succeed on the appeal. It is no function of an appellate court to substitute its own preferred inference or conclusion for that legitimately drawn by the Board : **Richfield International Land and Investment Co. v. IRC**, [1989] STC, at 824*h* per Lord Jauncey (delivering the judgment of the Privy Council); and **FCT v. Bivona Pty. Ltd.**, (1990) 21 ATR 151, at 157-158 *per curiam.*

6. The Court should be cautious before embarking on its own analysis of the evidence where the task *of assessing facts* has been placed by the Legislature in the hands of *specialist* bodies such as the Board - the Board being a specialist body well equipped to deal with and properly assess the facts : **Brown v. Repatriation Commission**, (1985) 60 ALR 289, at 291.

The taxpayer's case is that the decision of the Board discloses nothing which is *ex facie* bad in law. It betrays no error of law. The conclusion reached by the Board from the primary facts found was fully justified and reasonable.

Error of the Board

It is clear from the Case Stated that the Board had considered cases such as the **America Leaf** and **Korea Syndicate**. However, it is equally clear that the Board had not applied the test propounded in **American Leaf** to the facts of the case when they reached the conclusion that the taxpayer was not carrying on any business. It is relevant to repeat the words of Lord Diplock in **American Leaf** :

> "... In the case of company incorporated for the purpose of making profits for its shareholders any gainful use which puts any of its assets prima facie amounts to the carrying on a business."

The lack of understanding by the Board of the principle is shown by what it said at p.12, namely :

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

And at p.14 it was said that :

> "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."

While ultimately it is a question of fact whether the taxpayer was carrying on business, the prima facie inference for a company incorporated for the purpose of making profits for its shareholders and puts its assets to gainful use is that it is carrying on a business. This is something that the Board in its analysis of the evidence had clearly overlooked.

Memorandum of Association

From the terms of the Memorandum of Association of the taxpayer, it is clear that the taxpayer was incorporated for the purpose of making profits for its shareholders. The relevant clauses of Clause 3 are as follows :

> "3. The objects for which the Company is established are :
>
> (1) To carry on the business of an investment company and/or a holding company.

(2)To subscriber, underwrite, purchase, or otherwise acquire, and to hold, dispose of, and deal with, any shares or other securities or investments of any nature whatsoever, and any options or rights in respect thereof, and to buy and sell foreign exchange.

> (7) To carry on any other business of any nature whatsoever which may seem to the Directors to be capable of being conveniently carried on in connection or conjunction with any business of the Company hereinbefore or hereinafter authorised or to be expedient with a view to rendering profitable or more profitable

any of the Company's assets or utilising its know-how or expertise.

(15) To advance, lend or deposit money or give credit to or with any company, firm or person on such terms as may be thought fit and with or without security.

(16) To guarantee or give indemnities or provide security, whether by personal covenant or by mortgage or charge upon all or any part of the undertaking, property and assets (present and future) and the uncalled capital of the Company, or by all or any such methods, and whether with or without consideration, for the performance of any contracts or obligations, and the payment of capital or principal (together with any premium) and dividends or interest on any shares, debentures, or other securities, of, and otherwise to support and assist, any person, firm or company including (without limiting the generality of the foregoing) any company which is for the time being a holding company of the Company or another subsidiary of any such holding company or is otherwise allied to or associated with the Company or any such subsidiary or holding company in business or otherwise, but so that nothing in this paragraph shall authorise the carrying on by the Company of an insurance business and so that (without prejudice to the construction of any other paragraph hereof) this paragraph shall be construed both as a separate and independent object of the Company and as a power ancillary to the other objects of the Company."

The taxpayer was carrying on business

The taxpayer was acquired by the family for the purpose of carrying out the business scheme of the family in order to achieve the tax benefit. This involved the placing of off-shore deposits, and the pledging of the deposits as securities for the loans advanced by the banks. The asset of the taxpayer was the money which was advanced to it by the family. The placing of deposits by the taxpayer with the Westpac Bank and the Citibank was made pursuant to the terms of the Articles of Memorandum. The deposits were used as securities of the loans advanced by the banks to the hotel company. Interest arose out of the deposits and most of the interest earned by the taxpayer was used by the family to offset interest which was paid by the hotel company in Australia. These clearly show that there was a gainful use of the assets of the taxpayer which, in the words of Lord Diplock, constitutes prima facie a carrying on of a business. If evidence is required for the commercial motive, then the placing of deposits and the furnishing of the deposits as securities are the best evidence one could possibly obtain. Under the Memorandum, the taxpayer is entitled to provide security whether with or without consideration. The activities were carried out over a long period between 1984 and 1989 and involving at least

two banks. This means that there was a continuous repetition of the business activities. The holding of deposits whether considered on its own or in connection with the giving of securities did constitute the carrying on of a business.

There is nothing from the facts which would displace this inference. On the contrary the evidence serves only to reinforce the prima facie inference that the taxpayer was carrying on business. The conclusion of the Board was clearly in error. I am satisfied that the true and only reasonable conclusion from the evidence contradicts the determination of the Board which entitles me to intervene.

Business in Hong Kong ?

The next question to be considered is whether the business was carried on in Hong Kong. The Board found that on the facts that such a business did not take place in Hong Kong; if there were any such business, then the business took place in Australia where all the negotiations took place and where all the decisions were made. In the case of Citibank the locus was in Singapore but it certainly was not in Hong Kong.

Central management and control

The taxpayer supported the decision of the Board. It was argued that the directors and shareholders of the taxpayer were merely nominees of the family who conducted their business in Australia and Singapore. Reliance is made of **De Beers Consolidated Mines Limited v. Howe** [1906] AC 455, where Lord Loreburn LC stated at page 458 that "... a company resides for purposes of income tax where its real business is carried on. ... and the real business is carried on where the central management and control actually abides."

The issue in **De Beers** is whether a foreign corporation was resident in U.K. for the purposes of income tax.

The taxpayer also relied on **Mitchell v. Egyptian Hotels Ltd.** [1915] AC 1022, a company incorporated in England carried on from there an hotel business in Egypt until 1906. In that year they altered their Articles of Association by resolutions which provided that the Egyptian business of the company should be carried on and managed by a local board in Egypt to the exclusion of any board of directors other than the local board. Lord Parker and Lord Sumner found that the trade or business of the company was carried on wholly outside the United Kingdom while Lord Parmoor, whose view was shared by Earl Loreburn, was that the Commissioners of Inland Revenue were entitled to find that the business was not exclusively carried on outside the United Kingdom when all the general financial arrangements were dealt with and controlled at meeting held from time to time at the offices of the company in England. The Commissioners in that case found that the head and seat and controlling power of the company remained in England with the board of directors of the company.

Lord Parker referred to two decisions of the House of Lords. In **Colquhoun v. Brooks** 14 Appeal Cases 493, it was held that where a person resident in the U.K. was interested in a trade or business wholly carried on abroad, such trade or business for the purposes of the Income Tax Acts fell under the head of "possessions in any of Her Majesty's dominants out of Great Britain or foreign possessions" within the meaning of Case 5 of Schedule D and accordingly no part of the profits or gains of such trade or business was assessable to tax under Schedule D unless and until it was transmitted to and received in the United Kingdom.

In **San Paulo (Brazlian) Railway Company v. Carter** [1896] AC 31, it was held that a trade or business cannot be said to be wholly carried on abroad if it was under the control and management of persons resident in the United Kingdom, although such persons acted wholly through agents and managers resident abroad. Where the brain which controlled the operations from which the profits and gains arose was in this country, the trade or business was, at any rate partly, carried on in this country.

Question of fact

Whether a business is carried out in a place is a question of fact. This is a matter referred to by Lord Parmoor.

In the earlier case of **Werle & Co. v. Colquhoun**, Tax Cases 402. Esher M. held at page 408 that :

> "... in each case, when you come to consider is there a trade carried on in England, it is a question of fact."

Central management and control test not applicable

In considering whether the business was carried on in Hong Kong, the principle in **De Beers** could not be the guiding principle. After all, the issue there was whether a foreign corporation was considered to be a resident in U.K. for the purpose of tax.

In the present case, the issue is not whether the taxpayer was resident in Hong Kong or elsewhere but simply whether the business activities were carried out in Hong Kong. The fact that the decisions and negotiations had taken place in Australia or Singapore cannot be the only basis for one to conclude that the business did not take place in Hong Kong.

The conclusion reached by the Board is understandable because it found that there was no business being carried out by the taxpayer. However, once it is concluded that there was business, the evidence clearly showed that the business activities were carried out in Hong Kong. In respect of Westpac Bank, all the deposits were placed and rolled over in Hong Kong. It was against the deposits that a first mortgage was created in

favour of Westpac Bank. In respect of the Citibank, for two years the deposits were in Singapore. However, the funds were transferred from the taxpayer's account in Westpac Bank Hong Kong to Singapore. From August and September 1986 onwards, the deposits in Citibank were transferred from Singapore to their Hong Kong office. The interest income on the deposits were received by the taxpayer in Hong Kong. In **Werle & Co.**, Esher M. held that :

> "If the profits are received in England, that is a very strong circumstance. If there is an establishment in England, that is a very strong circumstance; but neither of them is essential. One must come to see what is the truth ...."

The taxpayer kept all of its accounting and other records in Hong Kong. They were maintained by Price Waterhouse. Board meetings of the nominee directors took place in Hong Kong by way of paper meetings. Certainly, as far as Westpac Bank was concerned, although instructions were given to and accepted by the bank from the family members, the legal authorised signatories of the taxpayer were the nominees of Price Waterhouse who were required to confirm the instructions. This is a case where the true and the only reasonable conclusion contradicts the determination of the Board. All the facts point towards the business being carried on in Hong Kong.

Profits derived from Hong Kong

Under s.14 of the *Ordinance*, the profits must be arising in or derived from Hong Kong before the taxpayer is liable for assessment. S.15(1)(f) also requires that the interest derived from Hong Kong. In respect of the Westpac Bank deposits, they were all in Hong Kong and the interests were derived from the Hong Kong deposits. This also applied to the Citibank deposits which were placed in Hong Kong from 1986 onwards. However in 1985 and 1986, the deposits with Citibank were in Singapore. The assessor had not included interest from the Citibank Singapore deposits for assessment.

The Hongkong Bank deposits were also placed in Singapore. It is not clear why interest arising therefrom was included for assessment.

As the matter concerning the deposits in Singapore held by Citibank and Hong Kong has not been fully argued, I grant liberty to the parties to restore the case for hearing on this issue in the event that agreement cannot be reached.

Other business activities

Having decided that the taxpayer was carrying on business by the placing of deposits and the furnishing of securities, it is not necessary to rely on the other activities namely the acquisition of shares and the investment activities in order to decide whether the

taxpayer was carrying on businesses. In any event these two activities clearly constituted the carrying on of business by the taxpayer.

Conclusion

The answer to the first question in the Case Stated is "yes". The answer to the second question is also "yes", subject to the question of the deposits in Singapore with Citibank and Hongkong Bank.

Costs nisi of the hearing is awarded to the Commissioner.

(P. Cheung)
Judge of the High Court

Mr Anthony Wu, P.C.C. (Ag.) of Attorney General's Chambers, for Appellant

Mr Gordon Fisher, inst'd by M/s Baker & McKenzie, for Respondent