HCIA2/2000

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

High Court Inland Revenue Appeal No.2 of 2000

BETWEEN

HONG KONG OXYGEN & ACETYLENE COMPANY LIMITED — Appellant

and

COMMISSIONER OF INLAND REVENUE — Respondent

Before : Hon Tong J in Court
Date of Hearing : 14 November 2000
Date of Handing Down Judgment : 6 February 2001

J U D G M E N T

Background of the proceedings

By a determination dated 21 April 1997, the Commissioner for Inland Revenue ("the Commissioner") ordered the Hong Kong Oxygen & Acetylene Company Limited ("the Taxpayer") to pay profits tax on two sums of $90,000,000 each in respect of the Taxpayer's profits tax assessment for the years of 1993/94 and 1994/95. These two sums were received by the Taxpayer as the "Initial Payment" in the respective years of assessment. The Initial Payment was received by the Taxpayer pursuant to a joint

venture agreement with a property developer in relation to the redevelopment of certain land lot in Junk Bay, which the Taxpayer had previously used for its business and was subsequently surrendered and regranted with some other land as a new lot. The Assessor considered these were chargeable as they were profits arising in or derived from Hong Kong for the relevant years of assessment in question from a trade or business in Hong Kong under section 14(1) of the Inland Revenue Ordinance, Cap.112 ("IRO").

The Taxpayer challenged the assessment by appealing to the Board of Review ("the Board"). Witnesses were called to testify before the Board. After consideration of the Taxpayer's complaint, the Board dismissed the appeal. Upon application by the Taxpayer, the Board had stated, pursuant to section 69 of the IRO, a question of law for the opinion of this court. The question framed was **whether on the facts found by the Board, the Board erred in law in concluding that the receipt of the Initial Payment by the Taxpayer was a trading receipt as opposed to a capital receipt**.

In the Stated Case, the Board had clearly set out the agreed facts, the evidence presented, the factual findings and the basis of the decision. The Board had fully considered the grounds of appeal. In conclusion, the Board found that the grounds of appeal could not be sustained. Section 68(4) of the IRO stipulated that the onus of proving that the assessment in question is excessive or incorrect shall be on the appellant. The Board took the view that the Taxpayer had not discharged its burden in this regard. It confirmed the commissioner's assessment of profits tax in the sums of $15,750,000 and $36,900,548 on the Initial Payment. The question to be decided by this court was whether the Board had erred in law in reaching the conclusion as it did.

I am indebted to both counsel for their ably prepared skeleton submissions. They help to focus the issues in dispute and had presented the respective arguments clearly. The Board had already stated the relevant background facts of the case and I would not repeat them here. For the purpose of the appeal, Mr Chang, SC, for the Taxpayer, had given his view of the relevant background facts in his skeleton as follows :

> "…The Appellant was owner of a property in Tseung Kwan O consisting mainly of Lot No.317 in D.D. No.234 Junk Bay (the 'Subject Property') which it used for industrial purposes and which was, as accepted by the Revenue and the Board, a capital asset. The Initial Payment was a non-refundable payment made to the Appellant in the context of a joint venture agreement entered into between the Appellant, its wholly-owned subsidiary Hong Kong Development Co. Ltd. ('HKOD'), Sun Hung Kai Properties Ltd. ('SHKP') and Tolbright Limited (the 'Developer').
>
> The Board accepted that without the Initial Payment the Appellant would not be able to self-fund its relocation costs and would not have entered into the arrangement under which the Subject Property, which was transferred by the Appellant to HKOD in the context of a joint venture arrangement, was made available for redevelopment. The Initial

Payment was stated in the Joint Venture Agreement to be made to the Appellant to enable it to relocate to a new site.

If the figure of $180 million received by the Appellant by way of the Initial Payment was added to the figure of HK$320 million payable by the Developer to HKOD by way of 'Guaranteed Profit' the resultant figure would be HK$500 million which reflected or approximated the open market value of the relevant capital asset of the Appellant i.e. the Subject Property at the time of the transfer.

The Appellant's case is that the Initial Payment was a capital receipt, not a trading receipt and is therefore not chargeable to profits tax."

The Taxpayer's case

In short, the Taxpayer submitted, *inter alia*, that the Initial Payment was a Capital Receipt for the following reasons :

(1) It was part of the consideration in the negotiation with the developer for the purposes of making the Subject Property available for the redevelopment.

(2) The Taxpayer never intended to become a property developer and was merely looking for the best way to realize its capital asset.

(3) The Taxpayer's primary consideration was, throughout the process, to find a way to recover its relocation costs. The Initial Payment was just a structural way to achieve this objective.

(4) The Initial Payment, together with the guarantee profit, giving rise to the figure of $500 million, actually reflected approximately the open market value of the Subject Property. It showed that the intention of the Taxpayer was to dispose of a capital asset.

The Taxpayer had pointed to certain findings by the Board, contending that these had been made on an erroneous basis. The first finding was in relation to the statement that the HKOD was nothing more but a vehicle for the Taxpayer to participate in the joint venture. The Taxpayer submitted that the Board had erred in law by effectively concluding that HKOD, the subsidiary formed by the Taxpayer for the purpose of the joint venture agreement, could be ignored. The Board should not have assessed the relevant facts as if HKOD was simply not involved in the redevelopment. It was submitted that HKOD and the Taxpayer were separate legal entities. Further, it was argued that, even if the Taxpayer and HKOD could be treated as one entity or the latter as a mere vehicle for the Taxpayer in the joint venture agreement, the non-refundable Initial Payment remained to be receipt of a capital nature.

The second finding which was criticized by the Taxpayer was in relation to the Initial Payment as a consideration for a joint venture agreement. The Board had found that there was no link between the Initial Payment and the consideration for the transfer and that there was no evidence to show that the Initial Payment was part of the consideration received by the Taxpayer for transferring its interest in the Subject Property to HKOD.

In this connection, the Taxpayer submitted that the Initial Payment must have been paid as part of the consideration for the Subject Property since the Subject Property was the only contribution of the Taxpayer to the joint venture. The Taxpayer played no active role in the redevelopment once the joint venture agreement was in place other than contributing the Subject Property to the joint venture and acting as guarantor for HKOD. The Initial Payment was therefore intrinsically linked to the Subject Property as part and parcel of the bargain. Since the Board had, correctly, concluded that the Subject Property was a capital asset, as could be seen in para.12.1in the Stated Case, then the total consideration payable to make it available to the joint venture, including the Initial Payment, must also be a capital receipt.

Concerning the issue of realizing a capital asset, the Taxpayer stated that the Board had made conclusions which were not supported by the facts. They involved, according to Mr Chang, the following findings :

"(a) *In the present case the original site was surrendered and was re-granted with a new site, though mainly falling within the same location but with additional land. Then, it will be developed and the units built will be sold. The gain is no longer a profit gained from the sale of the same original asset; it is an entirely different product that the joint venture partners will be selling after the redevelopment. In the words of Mr Justice BARNETT, it is a* ***'substitution'*** (Case Stated —page 13, para.12.4(viii);

(b) *We do not consider that the participation in such scheme is purely for the enhancement of a capital asset for sale. The original Subject Property has lost its identity after exchange and the units which will be offered for sale pursuant to the JV Agreement are products completely different from the Subject Property* (Case Stated —page 13, para.12.4(ix)); and,

(c) *The Taxpayer was the prime mover of the whole joint venture and it played a positive important role in the whole scheme, particularly at the beginning* (Case Stated —page 13, para.12.4(x))."

The Taxpayer asserted that the Board's finding on the timing of the substitution could not be correct as the Subject Property had, by the time of the regrant by the Government, been transferred to HKOD. Hence, even if there was a substitution, it

did not take place while the Subject Property was owned by the Taxpayer. Furthermore, it would not be right to link the Initial Payment to the re-grant since the Initial Payment was non-refundable, even if these negotiations for the re-grant had failed. By the same token, it would be wrong also to link the Initial Payment with the subsequent sales of the units since the appellant was not entitled to any share of such profits pursuant to the joint venture agreement, as only HKOD was entitled to any share of the profits.

For the Taxpayer, the main objective of the scheme was to find the best way to dispose of the Subject Property, which had not wavered throughout. The Taxpayer never intended to become a property developer and had never became one. However, whether HKOD became a property developer was not relevant in the circumstances.

Another finding by the Board questioned by the Taxpayer was the Board's conclusion that "It is necessary for us to consider the nature of its payment and not for what purpose the money is intended to be used", (at para.12.4(iii), the Case Stated). It was submitted that the intended use of the money would be relevant to the extent that it provides clues as to intention. Here the actual use and the intended use remained the same : to dispose of the Subject Property that would ensure the recovery of the relocation costs. Mr Chang reiterated that the Taxpayer had no intention of becoming a land developer. The joint venture scheme was just a means to recover costs of a capital nature.

Based on these analyses, the Taxpayer insisted that the receipt of the Initial Payment was not a trading receipt and that the assessments issued against the Taxpayer was incorrect and must be cancelled.

The Respondent's case

Mr Fok, SC, for the Inland Revenue, the Respondent, emphasized the importance of section 69(1) of the IRO, which stipulated that the decision of the Board of Review would be final subject to the framing of a question of law for this court. And it was for the Taxpayer to prove that the assessment appealed against was excessive or incorrect, as provided in section 68(4), to the satisfaction of the Board. The present appeal, it was submitted, must be considered within such a framework.

The Respondent stated that the Board's decision was based on a number of factual findings which led to the ultimate conclusion that the Initial Payment was taxable profit. Mr Fok cited 11 points of factual findings which supported the conclusion reached by the Board. The more important ones appeared to be these :

1. the fact that the Taxpayer did not care which of the two methods of out-right sale and redevelopment was to be used so long as it obtained sufficient money for relocation **and also maximized the profits**;

2. the fact that prior to entering into the joint venture agreement the Taxpayer changed its intention with regard to its disposal of the land from that of disposing of it as a capital asset to that of disposing of it by way of trading;

3. the fact that the transfer of the land by the Taxpayer to HKOD was a part of the whole arrangement for the Taxpayer to participate in the joint venture scheme and that HKOD was nothing but a vehicle for the Taxpayer to so participate;

4. the fact that the consideration stated on the assignment of the land was $497 million and that the Initial Payment was not expressed in any part of the assignment and that there was no evidence that the Initial Payment was part of the consideration received by the Taxpayer for transferring its interest in the land to HKOD;

5. the fact that the whole redevelopment scheme was a massive one, involving hundreds of millions of dollars in carrying out the project, requiring an *in situ* exchange of land and taking a long time for the redevelopment — that the original site was surrendered and re-granted with a new site, though mainly falling within the same location but with additional land;

6. the fact that the product which the joint venture partners would be selling after the redevelopment was not the same original asset but an entirely different product, i.e. "a substitution" per Barnett J in *Crawford Realty Ltd. v. CIR* (1991) 3 HKTC 674 at 693; and

7. the fact that the Taxpayer intended to participate in the joint venture scheme which included exchange of land, development of the site and sale of units built and that the participation was not purely for the enhancement of a capital asset for sale.

(Paras.9.5 to 9.11 of the Respondent's skeleton.)

Regarding the Taxpayer's approach in this appeal, the Respondent protested that they were really challenging the Board's findings of primary facts and inferences. In view of the way the present question of law was drafted, it was not really open to the Taxpayer to do so. The Taxpayer had not requested the Board to pose a broader question of law to include the factual findings as an issue for the appeal. The wording of the question could have been whether there was evidence to support the conclusion and/or whether the inferences drawn by the Board were reasonable or sustainable based on the primary facts found. The Respondent argued that what the Taxpayer was doing was inviting this court to deal with matters beyond the scope of the question.

Leaving aside this technical but perhaps fundamental issue, the Respondent maintained that the question whether a receipt was of a revenue or capital nature must depend on the facts and circumstances of each case. And in considering whether a person was trading, his intention would be a relevant consideration. On the basis of the findings of fact made by the Board, the only proper conclusion was indeed that the Initial Payment was a trading receipt instead of a capital receipt. Mr Fok argued that that the Initial Payment must be considered in the terms and context of the joint venture agreement. The Initial Payment was part of the guaranteed minimum return to the Taxpayer from the property redevelopment, and the receipt of $180 million would be taxable because it arose from the trade or business constituted by the joint venture agreement.

The Respondent accepted that the Subject Property had originally been held as a capital asset by the Taxpayer. However, as found by the Board, prior to entering into the joint venture, the Taxpayer had clearly changed its intention in respect of the Subject Property. The Taxpayer had chosen to dispose of it by pursuing a new and separate method, involving an exchange and redevelopment of the Subject Property by a scheme of building and selling residential flats for a profit. The Board found that the change of intention in respect of the Subject Property as capital asset came during the course of 1992, and certainly by the May 1993 board meeting, when the Taxpayer intended to trade the Subject Property by exchange and redevelopment.

The Respondent averred that the Taxpayer might have left the bulk of the work on the joint venture project to SHK, but nevertheless, it remained a real participant in the project and not merely a nominal party. Although $180 million was actually used to cover the costs of moving to the new site, this did not alter the true nature of it being a revenue receipt. The use to which a particular sum of money was put by the person receiving it would not necessarily alter the nature of the receipt. And it was the Board's ultimate finding that the Taxpayer's intention was to trade the Subject Property by exchange and redevelopment.

The Taxpayer's Reply

In relation to the Respondent's submissions, the Taxpayer took serious exception to the issue about the change of intention regarding the Subject Property. The Taxpayer argued that the suggestion that the Subject Property was transferred as a trading asset was entirely new. It was certainly not how the matter was dealt with in all the previous proceedings, especially when the case came before the Board. The Taxpayer argued that the Board made no finding of a change of nature of the Subject Property in para.12.1 of the case stated, contrary to the allegation by the Respondent. It would have been inconceivable and illogical for the Board to do so and it was clear that the Board had assumed that the Subject Property was transferred to HKOD as a capital asset.

In further reply to the matters raised by the Respondent, the Taxpayer reiterated that the principles in *Edwards v. Bairstow* [1956] AC 14 must be followed, which allowed the appellate court to intervene if the Board had reached a decision which no reasonable Tribunal could have reached, and that would be an error of law. It was

submitted that contradictory findings could give rise to such an error of law, and the appellate court had jurisdiction to correct it.

According to Mr Chang, there were at least two major errors of law justifying the intervention by this court. The first was in relation to the statement that "the use to which the particular sum of money is put by the person receiving it does not alter the nature of the receipt". The second point concerned the contradiction between its findings and/or between its findings and conclusion. Mr Chang pointed out that the Board had apparently accepted the evidence of Mr Fuller and Ms Chong that "without the up-front money sufficient to effect relocation the Taxpayer would not be able to move and therefore would not have entered into the arrangement" (see page 10 of the Case Stated). However, notwithstanding such a finding by the Board, it held that that the payment was not linked to the relocation. This would also be contrary to the express terms of the joint venture agreement.

The Taxpayer complained that the Board had failed to apply the principles stated by Lord Wilberforece in *Walter W. Saunders Ltd. v. Dixon* [1962] 40 TC 329 and *Commissioner of Inland Revenue v. Wattie* [1999] 1 WLR 873 (AC). In *Wattie*, the House of Lords had allowed the appeal, and one of the basis was that the Commissioner's findings of facts were inconsistent with the previous findings and with the whole history of the transaction.

The Taxpayer contended that it was the fundamental basis on which the Respondent had argued its case before the Board, and it was, at least implicitly, if not explicitly, the Board's own approach regarding the Subject Property that when the land was transferred from the Taxpayer to HKOD, it was of a capital nature. Otherwise the Board would have to identify with precision the date when the asset was supposed to have changed its character —with tax consequences quite different from those assumed as undisputed before the Board. The Taxpayer stated graphically that the Revenue should not be allowed to move the goal post in this appeal.

Consideration of the issues

Concerning the drafting of the question of law for the opinion of this court, the Respondent cited a number of cases to illustrate that it would be important to frame the right question and if an appellant sought to challenge the factual basis of the Board's decision, a proper question should have been formulated. Now the Taxpayer should not be allowed to go beyond the ambit of the question as it would not be fair to the Board as the Stated case might have been prepared with different emphasis. For example, in *Crawford Realty Ltd v. Commissioner of Inland Revenue* (1991) 3 HKTC 674, the questions of law submitted for the opinion of the High Court were as followed :

> "(1) Whether the Board of Review was correct in law in holding that the Taxpayer carried on a trade or an adventure in the nature of a trade on the facts found.

(2) Whether, on the facts found, the only true and reasonable conclusion contradicts the Board of Review's conclusion that the Taxpayer carried on a trade or adventure in the nature of a trade.

(3) Whether the Board of Review misdirected itself in law in giving undue weight to the terms of the Development Agreement dated 18 May 1979 between the Taxpayer and Walker Realty Limited and disregarded the true nature of the transaction between them in the light of the facts found or agreed."

Another example cited was the case of *All Best Wishes Ltd v. Commissioner of Inland Revenue* (1992) 3 HKTC 750. There the questions formulated were :

"(i) Whether, as a matter of law, and on the facts found it was open to us to conclude that :

(a) profits of $29,493,102, $3,277,908 and $5,263,747 were properly assessable against *All Best Wishes* to profits tax for the years of assessment 1983/84, 1984/85 and 1985/86 respectively;

(ii) Whether there was any evidence to support the following findings of facts made by us …"

These examples did appear to support the Respondent's submission that the issues to be raised should be limited to matter pertinent to the question. This is a sensible principle as the scope of the appeal is limited and therefore the subject for inquiry and consideration on appeal should be confined by the very question asked. In my view, this is not just a technical matter as the question itself formed the basis of the Stated Case. Despite Mr Chang's able submissions to the contrary, in my judgment, the question formulated in the present case would not permit the Taxpayer to raise questions on the factual findings by the Board as argued. However, despite my conclusion on this issue, I believe I shall proceed to deal with the other matters.

On the controversy of the change of the intention in relation to the Subject Property, it would be necessary to consider the actual wordings used by the Board. The Board had dealt with the two major topics, the Intention and the Transfer of the Subject Property to HKOD in paragraphs 12.1 and 12.2 respectively. I believe the important parts were as follows :

"12.1 **Intention**

(i) There is no dispute that the Subject Property was a capital asset. The key question is whether the way of disposing the Subject Property and the receipt of the Initial Payment amount to trading. The intention of the Taxpayer is an

important factor for us to consider — the intention of the Taxpayer for sale of the Subject Property and the intention to join in as a party to the JV Agreement. The intention of a company is usually reflected in the resolutions of its board of directors and also by the actions taken by its staff.

(ii) On 21st May 1992 the board of directors of the Taxpayer resolved in unambiguous term to progress with a move. Mr Fuller was asked to pursue with the two options he presented to the board of directors of the Taxpayer : straight-sale and development. The guiding principles for their decision as expressed in the board minutes extract were : to self fund relocation and to maximise the profit from sale or development. In other words, the Taxpayer did not care which one of the two methods would be used and the Taxpayer wanted to obtain sufficient money for relocation and also to get some profits.

(iii) Mr Fuller in his testimony clearly expressed that his primary concern at that time was to raise sufficient fund for the relocation. Once that was secured he would try to maximise the profit. This is what had happened with SHKP's offer; …

(iv) …

(v) In the Taxpayer's board meeting held on 23rd May 1993 Mr Fuller made '*financial comparisons*' between Swire's proposal and SHKP's one. The latter was found to be more favourable. The Taxpayer's board gave its approval to proceed with entering into a joint venture agreement with SHKP. The Taxpayer's board was fully aware of the basic terms of the joint venture and the Taxpayer's involvement. At that time, the Taxpayer's board was not informed that a subsidiary would be set up for the purpose of participation in the joint venture. It is quite clear, and we have no reason to doubt, that the Taxpayer was prepared to take part in this joint venture; the subsidiary was nothing more than a vehicle to implement the joint venture scheme."

I had taken time to consider this analysis with care. In my judgment, what the Board was saying was that when the Board gave its approval and decided to proceed with the joint venture agreement, by virtue of the terms and conditions of the agreement, the Taxpayer had formed the trading intention. At that time, the Taxpayer had not even been informed that a subsidiary would be set up for the purpose of participation in the joint venture. Hence the intention to trade by entering into the joint venture agreement

had been formed before the use of a subsidiary and before the transfer of the Subject Property.

By implication, the Board's finding was that this intention remained and the subsequent development of the scheme should be viewed subject to this. On this basis, the Board had taken the view that the subsidiary was nothing more than a vehicle to implement the joint venture scheme. In light of this analysis, I could not accept the criticism by the Taxpayer that the Board's approach had in effect ignored the concept of separate legal entity in relation to HKOD. The subsidiary was, in the present case, simply part of the trading scheme, as evinced by the terms of the joint venture agreement.

In *Natal Estates Ltd v. Secretary for Inland Revenue*, 1975 (4) SA 177, in dismissing the appeal, the Court held that :

> "In deciding whether a case is one of realising a capital asset or of carrying on a business or embarking upon a scheme of selling land for profit, one must think one's way through all of the particular facts of each case. Important considerations include, *inter alia*, the intention of the owner, both at the time of buying the land and when selling it (for his intention may have changed in the interim); …
>
> (And) further, that, although assets might originally have been acquired as capital investment, the taxpayer's intention might change to a deliberate adoption of a policy of selling such assets to make profits."

Further, in *Simmons v. IRC* [1980] 1 WLR 1196, Lord Wilberforce pointed out that :

> " …Trading requires an intention to trade : normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions : a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or a loss. Intentions may be changed. What was first an investment may be put into the trading stock —and, I suppose, vice versa. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and, possibly, a liability to tax : see *Sharkey v. Wernher* [1956] AC 58.

These authorities showed the importance of the factor of intention and how it could change, depending on the circumstances.

In this regard, I would have to agree with the Respondent that there was no finding by the Board that the transfer of land by HKO to HKOD was a transfer of a capital

asset. I agree that it would have been non-sensical for the Commissioner to have argued or accepted that the transfer of the land to HKOD was a transfer of a capital asset. I consider that even if the Commissioner had made such a finding, and that the Determination could be properly annexed to the present Stated Case, it was not something that would be binding on the Board, otherwise, there would be no point in calling witnesses before the Board. I took the view that the Board would be entitled to reach its own conclusion of facts and inferences. (see *Nina T.H. Wang v. CIR* [1993] 1 HKLR 7 at 23).

I would also accept the submission that the appeal to the Board was against the assessment and not necessarily the reasons of the Commissioner. There was no real change of goal post here.

There might have been, as the Taxpayer pointed out, different tax consequences as a result of the change of the character of the Subject Property. However, I consider that the Board had already sufficiently identified the time frame of the change and it was not necessary for the Board to go beyond what it had found.

As to the finding under Transfer of the Subject Property to HKOD, the Board's reasoning was as follows :

"12.2 **Transfer of the Subject Property to HKOD**

(i) The evidence indicated that at the early stage no one paid much attention to the transfer. It was not shown in the earlier documents or in Mr Fuller's report that a subsidiary company would be set up and the Subject Property would be transferred to the subsidiary. For example, in the Invitation to submit Proposal, no disclosure was made that the Subject Property would be so transferred. The Taxpayer's board Minutes of 23rd May 1993 meeting, in which approval was given '*to proceed with entering into a joint venture agreement with SHKP*' made no reference about the transfer. The first document which mentioned the use of a subsidiary was the letter dated 2nd July 1993 from the Taxpayer to SHKP which was regarded as '*agreement in principle*'. The letter was signed by Mr Fuller on behalf of the Taxpayer. Ten days later, the Taxpayer's board on 12th July 1993 approved the setting up of a wholly owned subsidiary and the transfer.

(ii) From this account of the event it is not unreasonable for us to conclude that the transfer was taken as a part of the whole arrangement for the Taxpayer to participate in the joint venture scheme. In May 1993, the Taxpayer's board approved the participation in the joint venture; it did not give

> authority to Mr Fuller or any other person to transfer the Subject Property. The Taxpayer's board in July resolved it almost as a matter of course to set up a subsidiary and transfer the property to it. It is our findings that the Taxpayer's board took the assignment and transfer as a normal course of event and that HKOD was nothing but a vehicle for the Taxpayer to participate in the joint venture scheme."

This reasoning was consistent with the analysis of the Taxpayer's intention. The Board concluded that the transfer of the Subject Property to HKOD came after the formation of the intention to trade according to the joint venture agreement and the transfer was simply a step in the whole arrangement for the Taxpayer to participate in the joint venture scheme. The subsequent use of the subsidiary did not alter this intention. It was on such a basis that the Board found HKOD to be nothing but a vehicle for the Taxpayer to participate in the joint venture scheme.

The question as to whether a receipt is of revenue or capital nature must depend on the facts and circumstances of each case. I find the judgment of *Harry Ferguson (Motors) Ltd v. IRC* (1951) 33 TC 15 helpful on this subject. Lord MacDermott CJ, in giving a judgment of the Court of Appeal of Northern Ireland, stated the following :

> "During the debate many cases were cited in which a decision was reached as to whether particular payments were capital or income. We do not propose to review these authorities. They set up no conclusive test of general applicability and it is fruitless to argue them from the facts of one instance to the differing facts of another. There is so far as we are aware no single infallible test for settling the vexed question whether a receipt is of an income or a capital nature. Each case must depend upon its particular facts and what may have weight in one set of circumstances may have little weight in another. Thus the use of the words 'income' and 'capital' is not necessarily conclusive; what is paid out of profits may not always be income; and what is paid as consideration for a capital asset may on occasion be received as income. One has to look to all the relevant circumstances and reach a conclusion according to their general tenor and combined effect."

Further in the case of *Marson v. Monton* [1986] 1 WLR 1343, Sir Nicolas Browne-Wilkinson V-C had given a list of common factors which could assist in determining whether a transaction involved a trade profit. He stated as a conclusion that :

> "I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is

> necessary to stand back, having looked at those matters, and look at the whole picture and ask the question —and for this purpose it is no bad thing to go back to the words of the statute —was this an adventure in the nature of trade? …"

In my view, these principles had apparently been applied by the Board. The Board was also keenly aware of relevant cases such as *Walter W. Saunders Ltd. v Dixon* (1962) 40 TC 329, *Mclean v Needham* (1960) 39 TC 37 and *CIR v Coia* (1959) 38 TC 334. (See para. 12.4 Case Stated). These had also been referred to in the hearing before this court. The judgment of Barnett J in *Crawford Realty Limited v. CIR* (1991) 3 HKTC 674 provides a useful summary here :

> " … Enhancement of an asset, making it as attractive and saleable as reasonable expenditure of time and money can achieve, is one thing. The end product remains substantially the same. Substitution, however, is another matter. It is the taking of one's old car, removing the body work, engine and suspension from the chassis and replacing them with the latest styling and mechanical components. And that is effectively what happened here. The Appellant obtained a price for the old car far in excess of its apparent value (about which no complaint is made by the Commissioner) but then went on to participate in the expenditure of time and money on rebuilding the car with new components in the hope of another profit therefrom. The Appellant was actively involved in this process. …"

In any case, it was said that the question of whether an item of receipt is of a capital or revenue nature, the approach adopted should be that of a practical and business point of view, rather than upon the juristic classification of the legal rights. (*See CIR v Wattie (1999) 1 WLR 873 (AC),* applying the dictum by Dixon J. in *Hallstroms Pty. Ltd. v Federal Commissioner of Taxation (1964) 72 C. L. R. 634 at 648*). Based on these principles, I could not really find fault with the findings of the Board that by consenting to the joint venture agreement, the Taxpayer had, by the terms and conditions of the agreement as a whole, evinced an intention to trade by which the Subject Property, originally a capital asset, had changed its characteristic by substitution.

Conclusion and the answer to the question of law

In this appeal, I would accept the submissions by the Respondent. I found it was not open to the Taxpayer now to attack the findings of primary facts and the inferences drawn by the Board. The scope of the question did not permit this, and even if this court could intervene on the findings of fact, I was not persuaded that there was anything inappropriate about the Board's findings and decision.

The Board had considered all the relevant evidence, including the agreed facts, documentary evidence and testimonies from witnesses. The Board's approach and the analysis of the evidence had been clearly set out in the Stated Case. Was the

conclusion that the two sums were trading profits so unreasonable or perverse? The point is, even if a different Tribunal might have reached a different conclusion, on the whole of the evidence and in view of the substance of the joint venture agreement. I could not say that the decision of the Board was either unreasonable or perverse. In my judgment, and I shall borrow Mortimer J's words when he gave judgment in the case of *All Best Wishes Ltd* that "it was a conclusion which was plainly open both on the evidence and on the facts found" (at p.773).

I considered that there were really no contradictory findings by the Board. The issue of whether the Subject Property was part of the consideration had been fully dealt with in para.12.3 of the Case Stated. Furthermore, the Taxpayer need not become a developer itself in order for the Initial payment to constitute a trading receipt. The statement that "the use to which a particular sum of money was put by the person receiving it did not alter the nature of the receipt" was supported by the authority of *The Hudson's Bay Company Ltd. V Stevens (1990) 7 TC 424 as per Kennedy LJ at p 440.)*

In *Commissioner of Inland Revenue v. Richfield International Land and Investment Co. Ltd* (1989) 1 HKLR 125, it was held by the Court of Appeal that " On a case stated by the Board of Review the High Court was only entitled to review and vary the Board's findings of fact, or inferences of fact, if they were unreasonable or insupportable."

I considered that the Board in the present case had applied the correct principles and had reached a conclusion, which was supported by the evidence. I would not be entitled to review or vary the Board's findings of facts, or inferences of facts, as they were not unreasonable or insupportable.

In the circumstances, the answer to the question of law posed shall be that the Board had not erred in law in concluding that the receipt of the Initial Payment by the Taxpayer was a trading receipt as opposed to a capital receipt, on the facts found by the Board.

The appeal would be dismissed accordingly. I shall make an order *Nisi* that the costs of this appeal be to the Respondent, to be taxed if not agreed. The order shall be made absolute after 14 days from the date of this judgment, with liberty to apply.

(Louis Tong)
Judge of the Court of First Instance,
High Court

Mr Denis Chang, SC, instructed by Messrs Baker & McKenzie, for the Appellant

Mr Joseph Fok, SC & Mr Eugene Fung, instructed by Department of Justice, for the Respondent