HCIA 4/2003

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

INLAND REVENUE APPEAL NO. 4 OF 2003

BETWEEN

STANWELL INVESTMENTS LIMITED Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon Reyes J in Court
Date of Hearing: 20 November 2003
Date of Judgment: 11 December 2003

J U D G M E N T

I. Background

1. The Appellant ("Stanwell") appeals by way of Case Stated under Inland Revenue Ordinance (Cap. 112) ("IRO"), s. 69(1) against the Decision ("the Decision") of the Board of Review ("the Board") dated 31 October 2001. The detailed facts are set out in the Board' s Case

Stated ("the Case Stated") dated 25 June 2003, a copy of which is appended to this Judgment. The questions submitted by the Board for the Court's opinion are at Case Stated §20.

2. By an Agreement dated 21 December 1998 Lucky-Goldstar International (HK) Limited ("LGHK") purchased the 15th and 16th Floors of the Bank of America Tower, together with 8 carpark spaces on the 4th floor, from Bank of America National Trust and Savings Association for $143 million. The purchase was completed on 3 February 1989. I shall refer collectively to the properties purchased as "the Properties" and to the individual spaces acquired as respectively "the 15th Floor," "the 16th Floor," and "the Car Park Spaces". LGHK is beneficially owned by Lucky-Goldstar International Corporation ("LG Korea"), a Korean company. LGHK moved into the 15th Floor in October 1989 and has occupied a substantial part of that floor (about 80%) since then.

3. By an Agreement dated 17 December 1990 Stanwell purchased the Properties from LGHK (Stanwell's ultimate beneficial owner) for $148.8 million. The purchase was not completed until 1 November 1994.

4. By an Agreement dated 15 March 1995 Stanwell sold the 16th Floor and 4 Car Park Spaces (collectively, the 16th Floor Properties") to Goldstar Electron (HK) Limited ("Goldstar") (now known as LG Semicon (HK) Limited) for $212.5 million. There was evidence before the Board that Goldstar was a subsidiary of Semicon Seoul which formed part of the same Group as LG Korea and that Goldstar had been occupying part (some 60%) of the 16th Floor as tenant. See Case Stated §§5(c), 13(n) and 14(b). Goldstar's consideration was determined by reference to a valuation (in the amount of $214 million (see Case Stated §14(i))) made on an open market basis as stated in a report dated 13 January 1995 prepared by Dudley Surveyors Limited for Stanwell and Goldstar. The 15th Floor and remaining 4 Car Park Spaces (collectively, "the 15th Floor Properties") have remained in Stanwell's ownership.

5. The Commissioner determined that Stanwell was liable to tax of $22,226,640.00 for 1995-96 and $25,655.00 for 1996-97 on its profit from the sale of the 16th Floor Properties. The Board affirmed the Commissioner's determination.

II. Discussion

A. Stanwell's case

6. Mr Barlow (appearing for Stanwell) put his case in 2 ways.

7. His main complaint was that, while the Board recognised that Stanwell's purpose in acquiring the Properties could not be isolated from the intention of the Lucky-Goldstar Group ("the Group") in holding the Properties, the Board ignored the logical consequences of such finding.

8. Mr Barlow suggested that in reality the present case comprised a series of related-party transactions. He described those transactions in his Skeleton thus:

> "[LGHK] buys [the Properties] from Bank of America in December 1988 for HK$143 million; it occupies 80% of one floor for its own business, lets 60% of the other to a related company and leases out the balance to outsiders; in order to avoid scrutiny under Korea's exchange control regulations, in December 1990 it transfers the properties to its wholly-owned subsidiary [Stanwell], at cost (HK$148.8 million); [Stanwell's] holding is financed by trade financing facilities guaranteed by LGHK (its parent); after 1989, when the Korean Government's forex oversight is tightened (and the avoidance of detection of investment in overseas property rendered more difficult) LGHK causes the Taxpayer to sell the floor it does not occupy (plus 4 car parks) to the related company at slightly below market valuation."

Given the related-party nature of the transactions in question, Mr Barlow rhetorically asks: "[W]here is the intention to trade? Where is the acquisition of trading stock for the purpose of turning it to account?" For Mr Barlow, the actuality is that there has been "little more than a group reshuffling of assets," first by LGHK to Stanwell as to the Properties and then by Stanwell to Goldstar as to the 16th Floor Properties.

9. As part of his main complaint, Mr Barlow submitted that the Board made the "related error" of "confus[ing] itself as to the financial practicality of the group or of LGHK/its subsidiary holding the properties on a long term basis". Neither the Group in general, nor LGHK and Stanwell in particular had any financial difficulty in holding onto the Properties. Even if there had been difficulty, LGHK could always have sold or mortgaged the 16th Floor Properties.

10. By way of fallback position, Mr Barlow contended that the Board drew conclusions of primary fact which were not supported by the evidence before it. In particular, Mr Barlow argued the following:

(1) In concluding that Stanwell lacked the financial ability to hold onto the Properties, the Board ignored its conclusion that Stanwell's intentions could not be divorced from those of the Group and the Group (through LGHK and LG Korea) was financially capable of retaining the Properties as a long-term investment.

(2) The Board failed to appreciate that the "sale" to Goldstar was no more than an asset reshuffle, Goldstar being a related company within the Group and the occupant since about 1990 of 60% of the 16th Floor.

(3) The Board failed to recognise that the "disposal" of the 16th Floor Properties was consistent with the Group's original purpose in acquiring the Properties (namely, to house the Group's trading operations), since the 16th Floor Properties remained through Goldstar within the Group.

Mr Barlow says that, in light of the evidence which he has identified, no reasonable Board would have concluded as the Board here did.

B. Analysis of the Decision

11. The crux of the Board's reasoning is set out in Decision §§29-34.

12. In Decision §29 the Board draws the following conclusions:

(1) At all material times, LG Korea and LGHK controlled the shares and board of Stanwell.

(2) At all material times, Stanwell's intention cannot be distinguished from the intention of those who controlled its activities, namely LG Korea and LGHK.

13. Decision §30 quotes Mortimer J's justly famous dictum in *All Best Wishes Ltd v. CIR* (1992) 3 HKTC 750 on how a tribunal infers intention by taking account of all surrounding circumstances, including things said and done before, during and after a particular transaction.

14. In Decision §31 (which is nearly identical to Case Stated §19(d)), the Board states:

"[S1][1] We are of the view that the intention of Stanwell cannot be divorced from the manner whereby its acquisition of the properties was financed. [S2] {Whilst its introduction was for the purpose of representing to the outside world an ostensible segregation between Stanwell and the group}, the success or otherwise of such pretence depends on the probability of the Korean Government detecting the true beneficial ownership in Stanwell and the actual mode whereby Stanwell financed its acquisition. [S3] This risk was recognised by those who controlled Stanwell's activities. [S4] Flexibility was therefore the essence of the arrangement. [S5] Completion was deferred so as not incur any stamp duty and not to vest the legal title in Stanwell. [S6] In the event of a heightened risk of detection, Stanwell would have disposed of the property. [S7] We have referred above to reclassification by LGHK of the property investment to account receivables in their audited accounts for the year ended 31st December, 1989. [S8] We have no doubt that the same

[1] For easy reference, I have numbered the sentences in Decision §31 thus: 1st sentence = S1; 2nd sentence = S2; etc. From time to time, I refer below to "S2 (1st part)". By that I mean the part of S2 which I have enclosed in curly brackets ("{ }").

> device would have been adopted by those in control of Stanwell in order to justify the propriety of the transaction should the same be called into question in the light of the Korean foreign exchange regulations."

15. I have difficulty understanding S1.

16. The way in which Stanwell financed the acquisition of the Properties can be stated briefly. In 1990 Banque Nationale de Paris ("BNP") provided banking facilities ("the LGHK facilities") to LGHK. At LGHK's request, BNP agreed to make the LGHK Facilities (up to US$20 million) available to Stanwell for acquisition of the Properties. Stanwell's use of the LGHK facilities was secured by a Letter of Indemnity from LGHK to BNP and a Letter of Awareness from LG Korea to BNP, both letters dated 10 December 1990. On 17 December 1990 Stanwell drew US$19.1 (about $149 million) from the LGHK Facilities to finance its acquisition of the Properties. On 16 December 1991 Stanwell became authorised to use the LGHK Facilities up to a revised maximum of US$40 million. The new limit was secured by a fresh Letter of Awareness from LG Korea. BNP further revised the US$40 million limit on 16 December 1992. On 23 December 1992 Stanwell drew down US$5 million from the LGHK Facilities and lent that amount to Goldstar Electronics International Inc. to derive interest. See Agreed Statement of Facts ("Facts") §7 and Decision §13.

17. The Board does not clearly explain in Decision §31 how the financing arrangements just described have any relevant bearing on Stanwell's intentions. Since Stanwell's use of the LGHK Facilities to purchase the Properties depended on LGHK's approval and the continued provision of letters of security and comfort by LGHK and LG Korea to BNP, the financing of Stanwell's purchase reinforces the 2 premises in Decision §29 which I have identified. I do not see how the financing arrangements can reasonably be interpreted as indicating otherwise.

18. S2 introduces a different subject. It refers to the rationale for LGHK interposing Stanwell as owner of the Properties.

19. The reference is S2 (1st part) to the Group's need for "representing to the outside world an ostensible segregation between Stanwell and the group" relates to cls. 14-24 and 14-25 of the Korean Foreign Exchange Regulations ("the Regulations"). By those sections, the Regulations confined lending by Korean companies to overseas subsidiaries to loans in the nature of trade finance. Such loans were limited to 12 months' duration and could not exceed 18 months including extensions. The Regulations reflected the Korean Government's then policy of discouraging Korean companies from heavy overseas property investment. The Regulations were applied in relaxed fashion before June 1989, but more rigidly thereafter, especially when Hong Kong came to be regarded by the Korean Government as an unstable business environment. To avoid the Korean authorities' scrutiny, LGHK transferred the Properties to Stanwell. As far as documents in the Hong Kong Companies Registry were concerned, Stanwell was owned by persons unconnected to the Group (for example, in 1988, Grosvenor Nominees Limited and Great

China Nominees Limited). In fact, these persons either held their shares in Stanwell on trust for LGHK or its nominee. See, on the Regulations, Facts §7(g) and Case Stated §5(d).

20. Although it is self-evident (as stated in S2) that the success of using Stanwell to avoid scrutiny under the Regulations would depend on whether or not the Korean Government detected that Stanwell was beneficially owned by LGHK, it is unclear what the Board meant when referring at the end of S2 to "the actual mode whereby Stanwell financed its activities". If the Board meant that the success of using Stanwell to avoid scrutiny, depended on whether Stanwell had the financial ability to carry the Properties, it is plain from the way in which the acquisition was funded that (as Mr Barlow argues) long-term financing was not a problem. Given the identity of the controlling minds behind LGHK, LG Korea and Stanwell recognised in Decision §29 and given that Stanwell only had use of the LGHK Facilities through the auspices of LGHK and LG Korea, it is hard to see why the Board should look at Stanwell in isolation when considering the financial viability of the stratagem of using Stanwell to acquire the Properties in order to evade the Regulations. On the Board's own premises in Decision §29 and S2 (1st part), Stanwell was little more than a cipher for LG Korea and LGHK. It was simply used to conceal the Group's investment in the Properties from the Korean authorities. The relevant financing ability was that of the Group in general or LGHK and LG Korea in particular. In my view, the reference solely to Stanwell's mode of financing at the end of S2 does not follow logically from Decision §29 nor S2 (1st part).

21. S3 is unclear as to what the expression "this risk" refers. Only one risk is explicitly mentioned in S2. That is the risk of detection by the Korean Government. Clearly, the risk of such detection would have been obvious to all concerned as S3 points out.

22. But do the words "this risk" refer to anything else? One cannot, strictly speaking, refer to "a risk of the actual mode whereby Stanwell financed its acquisition" since such phrase does not make sense. Instead, it seems from what follows S3 that the Board might also be thinking of the risk that Stanwell could not carry the financing required for acquisition of the Properties. If so, as discussed in relation to S2, there could realistically be no such risk. Stanwell's ability to hold onto the Properties long-term would neither be more nor less than the ability of LG Korea and LGHK (as Stanwell's beneficial owners and controlling minds) to hold onto the Properties long-term. Since there is no question of the financial abilities of LGHK and LG Korea to hold onto the Properties (see, for example, Case Stated §14(h)), there could be no real risk that Stanwell could not carry the Properties long-term. If the Board saw a risk, that would have only been because (contrary to the implication of Decision §29) the Board was considering Stanwell in isolation from LG Korea and LGHK. Thus, S3 is right as a statement of obvious fact, if S3 is read as confined to the risk of early detection by the Korean authorities of Stanwell's true beneficial ownership. If S3 was intended by the Board to go further and make an assertion about the risk of Stanwell lacking financial ability, it would not follow logically from the Board's premises in Decision §29 and S2 (1st part).

23. S4 and S5 may be considered together. It is unclear what "flexibility" the Board has in mind. The Board does not spell out what it means.

24. If S3 merely concerned the risk of early detection by the Korean Government, "flexibility" in S4 could refer to Stanwell's ability in the event of detection either quickly to take evasive measures while keeping the Properties under its custody or quickly to transfer the Properties to some related or unrelated 3rd Party. But how does S5 follow from such reading of S4? If the goal was to keep LGHK's ownership of the Properties secret, the legal title in the Properties should not have been deferred, but transferred as soon as possible. How do deferment of stamp duty and the retention of legal title in LGHK show any relevant "flexibility" to deal with detection by the Korean Government? It seems to me that neither S4 nor S5 logically follow from S3, if S3 is read as only referring to the risk of early detection by the Korean Government.

25. On the other hand, if S3 is also meant to refer to the risk of Stanwell not being able to finance the acquisition of the Properties, "flexibility" might refer to the ability quickly to dispose of the Properties and stem Stanwell's putative losses should cashflow prove to be a problem. Such a reading could explain S5. Completion was deferred to save money. Stanwell could delay having to pay stamp duty until absolutely necessary to minimise demands on liquidity. As to retention of the legal title in LGHK, f Stanwell failed to pay up, LGHK could immediately treat the sale as repudiated and transfer the legal title to a related or unrelated 3rd Party without reference to Stanwell. But such construction of "flexibility" in S4 requires reading S3 in a way which contradicts the implication of Decision §29 (see the discussion in §22 above).

26. Further, reading S4 and S5 in the way suggested in the preceding paragraph still makes no logical sense in light of S2 (1st part). The Board suggests that "[Stanwell's] introduction was for the purpose of representing to the outside world an ostensible segregation between Stanwell and the group". If so, one might ask, why should LGHK keep the Properties in its name?

27. In the circumstances, I conclude that, however read, none of S3, S4 nor S5 hold together coherently.

28. S6 does not dispel the confusion. S6 expressly refers to the "heightened risk of detection". This implies that what went before S6 (namely, S3, S4 and S5) only concerns the risk of detection by the Korean Government and has nothing to do with "the actual mode whereby Stanwell financed its acquisition" mentioned in S2. Further, S6 still does not explain the paradox that the Board seems to think that flexibility requires keeping the legal title in the Properties vested in LGHK, despite the fact that the purpose (according to S2 (1st part)) of using Stanwell is to make it seem that a non-Group entity owns the Properties.

29. S7 alludes to the "reclassification by LGHK of the property investment to account receivable in their audited accounts for the year ended 31st December, 1989". This is a reference to Note 8 of LGHK's Financial Statement for the year ended 31 December 1989 which states that:

> "Debtors and prepayments include a receivable of US$19,065,844 representing the proceeds from the disposal of the Company's property which is due for completion on or before 3rd February 1991."

The amount of $148.8 million which Stanwell paid in December 1990 was used to offset the Account Receivables carried forward from 1989. See Case Stated §§5(e) and 7(f).

30. S8 asserts that the same device (namely, the reclassification of Property Investment to Account Receivables) "would have been adopted by those in control of Stanwell in order to justify the propriety of the transaction" in the event of detection by the Korean authorities.

31. If the same "device" were be used by Stanwell, that would entail Stanwell on-selling the Properties to a 3rd Party and reclassifying relevant entries in its accounts just as LGHK did. Whether the Board envisages the 3rd Party as a person connected or unconnected with LGHK or LG Korea is not stated. If the putative disposal by Stanwell were to a related party, the transaction would effectively be an asset reshuffle (to use Mr Barlow's expression) to a Group nominee to keep one step ahead of the Korean authorities. This would not constitute a genuine disposal by LGHK, LG Korea or Stanwell. The Board, however, appears in S8 to have in mind a transfer to an unrelated person. To see this, it is necessary to consider Decision §32.

32. Decision §32 (which is nearly identical to Case Stated §19(e)) states:

> "[T1][2] In the circumstances, the nature of Stanwell's tenure is a precarious one. [T2] Its tenure was dictated by the need, if any, to justify to the Korean Government that the facilities it received from BNP with the help of LGKorea was in the nature of trade finance so as to avoid any repercussion to LGKorea. [T3] Given the admitted tightening by the Korean Government after 4th June 1989, the need was not one that could be wholly ignored. [T4] Stanwell therefore did not have the ability nor a settled intention to hold the properties on a long term basis."

33. In T1, T2 and T3, the Board argues that Stanwell could not have intended to hold on to the Properties for long because, given any sign of detection by the Korean Government, Stanwell's would have disposed of the Properties and reclassified its accounts. This argument indicates that the Board envisaged Stanwell as intending to transfer the Properties to a 3rd Party which is unrelated to the Group. Otherwise, there would be no true disposal and LGHK, LG Korea and Stanwell would still run the risk of being found out to be in contravention of the Regulations.

34. Assume (as the Board suggests) that Stanwell intended at the outset to make a genuine arm's length disposal of the Properties to a 3rd Party in the event of detection by the

[2] For easy reference, I have numbered the sentences in Decision §32 as T1, T2, etc.

Korean authorities. Such thinking would nonetheless be wholly consistent with an original intention, at the time of acquiring the Properties, to hold the Properties for long-term investment purposes. An investor may buy a property for long-term purposes with every intention from Day 1 of disposing of the property immediately, should the investment unfortunately turn out to be loss-making. The fact that a person intends to sell a property if an adverse circumstance arises, does not mean as a matter of logic that the person acquired the property as trading stock. The intention to sell a property in a time of adversity (should such unfortunately arise) does not imply anything about the purpose for which the property was first acquired.

35. Accordingly, insofar as the Board infers in T4 that Stanwell could not have intended to hold on to the Properties for long-term purposes because Stanwell intended to dispose of the Properties if ever the Korean Government's suspicions were raised, the Board erred. The very purpose of employing Stanwell was to enable LG Korea and LGHK to hang on to the Properties despite the Regulations. If (as stated in Decision §29) Stanwell's intentions are to be treated as identical to those of LGHK and LG Korea, it follows that Stanwell's intention toward the Properties should have been the same, namely, to hold onto the Properties. That LGHK, LG Korea and Stanwell may have had it in mind to dispose of the Properties to a 3rd Party if they ever had to protect themselves against the investigations of the Korean Government, cannot have any bearing on the fact that the Group's original intention in acquiring the Properties was for long-term investment purposes.

36. Incidentally, T4 refers to Stanwell's inability to hold on to the Properties financially. As discussed above, the Board's conclusion that Stanwell did not have the ability to carry the Properties financially contradicts the Board's own premises. T4 would consequently be wrong in this additional respect.

37. Decision §33 (which is nearly identical to Case Stated §19(f)) states:

> "We would also point out that the minutes of Stanwell sanctioning the purchase made no reference to acquiring the properties for long term investment purpose. Had that been Stanwell's intention, one would expect repetition of the views expressed at LGHK's board of directors meeting dated 3rd February, 1989."

38. LGHK acquired the Properties pursuant to a resolution passed at the meeting of 3 February 1989 mentioned in Decision §33. The minutes of that meeting record the resolution that LGHK "should purchase the Property for its own use as a long term investment". See Facts §5(b), Decision §3 and Case Stated §5(b). The Board must have regarded the statement in the minutes as compelling evidence of LGHK's purpose and intention in acquiring the Properties, otherwise there would be little point in inferring an intention not to hold onto the Properties for long-term investment purposes from the absence of such a statement in Stanwell's minutes.

39. However, in light of the Board's premises in Decision §29 as to the identity between Stanwell's intentions and those of LGHK and LG Korea, it is hard to see why a failure mechanically to state the intention to hold the Properties as a long-term investment in Stanwell's minutes should be indicative of anything. The fact is that LGHK had already so stated in its own minutes. Stanwell was merely introduced to get around the Regulations. Stanwell's intentions would have been the same as LGHK's intentions. Nothing had changed, except the need to conceal LGHK's ownership of the Properties from the Korean Government by interposing Stanwell. If anything, it was hoped that the device of using Stanwell would enable LGHK to fulfil its original purpose of beneficially holding onto the Properties for the long term.

40. In my judgment, by attaching any weight to the absence of a statement as to long-term investment purposes in Stanwell's minutes in the circumstances of this case, the Board also erred. It put weight where logically no weight should have been put at all.

41. Decision §34 states:

> "For these reasons, we do not attach great weight to the factors which Mr Law [Stanwell's then counsel] urged upon us. We are not satisfied that Stanwell has properly discharged the onus of proof resting upon them."

42. Inland Revenue Ordinance (Cap. 112) ("IRO") s. 68(4) puts "[t]he onus of proving that the assessment appealed against is excessive or incorrect" on the taxpayer. Mr Barlow suggested that such onus was purely an evidential (as opposed to a persuasive or probative) burden. I disagree. The phrase "the onus of proving" in IRO s. 68(4) plainly imposes more than an evidential burden. That being said, I have sympathy with Mr Barlow's further point that IRO s. 68(4) is often used as a throwaway line whenever a tribunal is against a taxpayer.

43. In this case, analysis of Decision §§29-33 leads me to conclude that the Board's dismissal of Stanwell's appeal cannot stand. The reasoning in Decision §§29-33 contains too many logical inconsistencies and non-sequiturs which make untenable the Board's ultimate conclusion in Decision §35 to dismiss the appeal. To my mind Stanwell has discharged its burden.

44. There are 2 paragraphs in the section of the Decision entitled "Our decision" which I have not so far examined. Those are Decision §§27 and 28. For completeness, I now comment briefly on each. For convenience of exposition, I start with Decision §28.

45. Decision §28 (which is nearly identical to Case Stated §19(b)) states:

> "We reject Stanwell's contention that it held the properties as agent for LGHK. There is no evidence to indicate that Stanwell and LGHK did not intend the 17th December, 1990 Agreement and 17th December, 1990 Supplemental Agreement should not have effect in accordance with their terms. On the contrary, both parties

> acted pursuant to those terms. Stanwell paid LGHK the consideration under the 17th December, 1990 Agreement and the fees under the Supplemental Agreement. In the pre-hearing correspondence, the case projected was that Stanwell and LGHK were dealing in arm's length. There is no evidence to indicate that Stanwell was acquiring these properties as agent of LGHK. Such alleged agency would render the documentation between the parties wholly nugatory."

46. I find Decision §28 puzzling. On the one hand, in Decision §29 the Board accepts that Stanwell's intentions must be treated as identical to those of LGHK and LG Korea. In S2 (1st part) the Board accepts that Stanwell was introduced "for the purpose of representing to the outside world an ostensible segregation between Stanwell and the group". Stanwell was thus simply a device to make it appear that the Properties were not beneficially owned by LGHK and LG Korea. Given those premises, how can it be said that Stanwell dealt with LGHK at arm's length? How can it be said that Stanwell, which all along would seem to be a nominee company by which LGHK could hide its ownership of the Properties, was not an agent of LGHK and LG Korea? In my view, there is an inherent contradiction between the Board's conclusions in Decision §28 on the one hand and Decision §29 and S2 (1st part) on the other.

47. Indeed, as a matter of logic, I do not see how the Board could plausibly conclude, from the mere fact that Stanwell and LGHK acted in accordance with the terms of the various Agreements which they executed between themselves, that Stanwell was not LGHK's agent. The whole point of resorting to Stanwell would be to make it appear to the Korean authorities that an independent 3rd Party owned the Properties. Stanwell and LGHK would have taken pains to ensure that they acted in accordance with the letter of the "contracts" into which they entered. The ruse would not work otherwise. But I do not see how that means in the circumstances of this case that Stanwell and LGHK could not have been agents. I do not think that a reasonable Board could have arrived at the conclusions in Decision §28.

48. Decision §27 (which is nearly identical to Case Stated §19(a)) states:

> "We reject the Revenue's case that Stanwell's intention should be ascertained as at 1st November, 1994 when Stanwell and LGHK completed the sale and purchase of the 15th and 16th floors and the 8 car parking spaces. We are of the view that the relevant time is 17th December, 1990. By the 17th December, 1990 Agreement, Stanwell acquired a beneficial interest in those properties. It would not be realistic to conclude otherwise given the common grounds between the parties that Stanwell paid the consideration upon signing of that agreement."

49. In light of Decision §29, it is hard to see why the date of Stanwell's acquisition of the Properties should be more relevant than the date of acquisition of the Properties by LGHK, Stanwell's beneficial owner. The Board relies on Stanwell's payment of the purchase price in December 1990 in support of its conclusion. But as noted above that was only possible because

LGHK arranged with BNP for Stanwell to make use of the LGHK Facilities. The purchase of the Properties by Stanwell was mere charade to throw off the Korean authorities. The correct inference to be drawn from the way in which Stanwell paid the purchase price for the Properties must be that Stanwell was acting in accordance with a scheme designed by LGHK and LG Korea.

50. I agree with Mr Barlow that the relevant date for ascertaining Stanwell's purpose in acquiring the Properties must be the date when LGHK purchased the Properties, 21 December 1988. LGHK's long-term intention at the time was reflected in its minute of 3 February 1989, the completion date. The "asset reshuffle" to Stanwell in December 1990 to get around the Regulations could not have altered that intention on the part of Stanwell's controlling minds, LGHK and LG Korea. Stanwell's acquisition in acquiring the Properties would have been the same as that of LGHK in acquiring the Properties on December 1988, namely, to enable the Group to hold onto the Properties for long-term investment purposes, notwithstanding the Regulations.

51. Pulling together the various threads in the foregoing discussion, I would summarise my conclusions as follows:

(1) The Board erred in failing to give effect to the logical implications of its recognition that:

(a) Stanwell's intentions cannot be divorced from those of its controlling minds, LGHK and LG Korea; and,

(b) Stanwell acquired the Properties in order falsely to represent to the outside world that the Properties did not belong to the Group.

(2) The Board erred in attaching any weight to Stanwell's intention to dispose of the Properties in the event of a "heightened risk of detection" by the Korean authorities. Such intention would not have been inconsistent logically with an original purpose to hold the Properties for long-term investment purposes. Stanwell's intention in acquiring the Properties in 1990 must have been the same as that of LGHK in originally purchasing the same in 1988. Stanwell was simply introduced into the picture by LGHK and LG Korea in an attempt to evade the Regulations and enable LGHK to retain beneficial ownership in the long-term despite the Regulations.

(3) The Board erred in assessing Stanwell's financial ability to carry the Properties by reference to Stanwell alone. The Board ought to have had regard to the financial ability of Stanwell in conjunction with LGHK and LG Korea in evaluating Stanwell's ability to fund the purchase of the Properties. There is no question that LGHK and LG Korea could carry the Properties financially for an indefinite period. If they could do so, so could Stanwell. Insofar as the Board

drew any conclusions from Stanwell's supposed financial inability, the Board erred.

(4) The Board's errors mean that its dismissal of Stanwell's appeal is a result that no reasonable Board could have reached. The Board's dismissal of the Stanwell's appeal therefore cannot stand.

C. Questions in the Case Stated

52. In this section, I respond to the questions raised by the Board for consideration by the Court. I also take the opportunity to respond to those submissions of Ms Cheng (who appears for the Commissioner) which I have not already substantively dealt with in the course of analysing Decision §§27-35.

C.1 Question (a): Whether the Board of Review erred in law by failing to apply the principles of law governing the identification of an adventure in the nature of trade?

53. I treat this as a question whether the Board misdirected itself as to the applicable law. In my view, the Board did not so much err in stating the law, as in applying the same to the facts of the present case. I would answer this question in the negative.

C.2 Question (b): Whether, on the facts found, the Board of Review erred in law in upholding the Commissioner's Determination that the relevant transactions constituted an adventure in the nature of trade?

54. I would answer this question in the affirmative. In my discussion of Decision §§27-35 I have particularised how the Board, having found as stated in Decision §29 and S2 (1st part), failed to apply the logic of those premises. I have also identified specific gaps in the Board's reasoning.

55. Ms Cheng submits that I should only allow Stanwell's appeal, if Stanwell can show that no reasonable Board of Review could have concluded that the acquisition and sale of the 16th Floor Properties by Stanwell was an adventure in the nature of trade. I agree in principle. But in Section II.B of this Judgment, I have identified those conclusions and inferences of the Board which I believe that no reasonable Board could have arrived at in light of the accepted facts and the Board's own premises.

56. Ms Cheng warns that I am not permitted to quash the Board's decision simply because I would attach different weights to the facts or evidence adduced found by the Board. Again I agree in principle. But again I have tried to show in Section II.B that in critical matters the Board placed weight on facts or contentions which should have carried no weight at all. On the

other hand, the Board ignored the logical consequences of its own premises in Decision §29 and S2 (1st part).

57. Ms Cheng argues that the Board was entitled to regard Stanwell as holding the Properties as trading stock because of Stanwell's treatment of the Properties in its accounts.

58. For each of 1991/92, 1992/93 and 1993/94 Stanwell's Balance Sheet contains the following entry under "Current Assets": "Deposit for acquisition of properties: US$19,0976,923.00". For 1993/94, the Balance Sheet shows "Fixed Assets" of US$25,899.00. Thereafter, for 1994/95, 1995/96, 1996/97 and 1999/2000, the Balance Sheets records respectively "Fixed Assets" of US$19,669.268.00; US$9,528,158.00; US$9,528,158.00; and US$9,528,158.00. Ms Cheng's point is that the Properties do not appear as a Fixed Asset in Stanwell's Balance Sheet until 1994/95 at the earliest. Prior to that, the consideration paid by Stanwell is characterised as a "deposit" under "Current Assets". This (Ms Cheng says) shows that Stanwell regarded the Properties as trading stock.

59. The Board does not specifically deal with this matter as a ground for its Decision. The Board does not, for example, say that it treated this factor as relevant to its conclusion that Stanwell intended to treat the Properties as trading stock. The Board does not even say how it interpreted the evidence in the Balance Sheets.

60. My difficulty is that Stanwell's Balance Sheet is not unambiguously in the Commissioner's favour. For instance, despite the purchase price having been paid in December 1990, completion of the sale of the Properties by LGHK to Stanwell did not take place until November 1994. The sale to Goldstar took place on 15 March 1995. It is possible that the treatment of the deposit in Stanwell's balance Sheet reflects this history. Prior to completion in 1994/95, Stanwell may have considered the deposit paid in December 1990 as a current asset in the sense that Stanwell could legally demand repayment of the purchase consideration from LGHK if one side or the other did not complete. That chose in action would then have been a current asset, without necessarily negativing any intention to hold the actual Properties (once fully transferred) for long-term investment purposes. Following completion in 1994/95, the Properties could then have been treated as fixed assets to reflect the intention to hold the Properties for long-term investment purposes.

61. I am accordingly unable to say that the treatment of the Properties in Stanwell's Balance Sheet necessarily validates what I have found to be flawed reasoning by the Board.

62. Ms Cheng is scathing on what she calls "Mr Barlow's asset reshuffle theory". This was not (Ms Cheng says) the argument advanced before the Board by Stanwell's counsel. The Regulations would have applied to Goldstar as well. What was the point of selling the 16th Floor Properties to Goldstar? Why should selling the 16th Floor Properties to Goldstar be a mere "Group reshuffle"? Goldstar may ultimately be a subsidiary of LG Korea, but there is no specific

finding (Ms Cheng points out) that Goldstar's controlling mind was the same as that of LG Korea for the purposes of the purchase of the 16th Floor Properties from Stanwell. Goldstar probably had different directors with their own motives for the purchase.

63. The Board does not specifically characterise the sale to Goldstar as a reshuffle of assets in order to avoid the scrutiny of the Korean authorities. Instead the Board focuses on Stanwell's intention when acquiring the Properties in December 1990. The Board does not suggest, whatever that intention may have been in December 1990, that there was a change in intention between December 1990 and the time of the sale to Goldstar. In those circumstances, having concluded that Stanwell's intention must be determined by reference to LGHK's original intention when acquiring the Properties in December 1988 (namely, long-term investment), I should assume that such intention persisted at least until the sale of the 16th Floor Properties to Goldstar.

64. I find Mr Barlow's suggestion of an "asset reshuffle" compelling, since Goldstar belongs to the Group and appears to have occupied some 60% of the 16th Floor since 1990. But I do not think that the existence of an "asset reshuffle" with Goldstar is a necessary component towards determining Stanwell's and LGHK's intentions in acquiring the Properties in the first place. It seems to me that whether there was or was not an "asset reshuffle" as far as the sale to Goldstar was concerned, cannot materially affect Mr Barlow's argument.

65. There may be obscurities as to Stanwell's precise motives in selling the 16th Floor Properties to Goldstar. For example, Stanwell may have thought (rightly or wrongly) that it would spread the risk of detection by the Korean authorities. I do not see how such obscurities could validate the Board's decision or affect the intention with which the Properties were acquired in 1988 by LGHK and in 1990 by Stanwell, years before the sale to Goldstar in 1995. I therefore do not think that Ms Cheng's queries on the Goldstar sale take her case much further.

66. It may be that "asset reshuffle" was not propounded before the Board. But that does not prevent Mr Barlow from now raising his theory in light of the Board's primary findings of fact. Mr Barlow is saying that those primary findings are best explained as an asset reshuffle and the Board erred in law by not drawing the appropriate inferences.

C.3 Question (c): Whether, on the facts found, and the evidence adduced, the Board of Review erred in law in concluding that the Taxpayer had failed to discharge its onus of proving that the assessments were incorrect or excessive?

67. I would answer this question in the affirmative in the sense that, for the reasons I have discussed, the Board ought to have found that Stanwell had discharged the onus of proving that the Revenue's assessments were incorrect. No profits tax was assessable.

C.4 Question (d): Whether upon the evidence before the Board of Review and in all the circumstances of the case, the Board erred in law by adopting a view of the facts that: "In

the event of a heightened risk of detection, Stanwell would have disposed of the property."

68. I would answer this question in the negative. The Board was entitled to come to its view as to the possibility of Stanwell disposing of the Properties if the Korean authorities came close to discovering that Stanwell and the Group (especially LGHK and LG Korea) were in breach of the Regulations. But, for the reasons given above, the Board's conclusion on the matter is not material to ascertaining the relevant intention behind Stanwell's acquisition of the Properties. The Board erred in inferring an intention to acquire the Properties as trading stock from its finding as to Stanwell's likely conduct in the event of a "heightened risk of detection".

III. Conclusion

69. I would answer the questions posed by the Board as follows:

(1) Question (a): No.

(2) Question (b): Yes.

(3) Question (c): Yes.

(4) Question (d): No.

70. Stanwell's appeal is allowed. The Board's Decision dismissing Stanwell's appeal against the Commissioner's Determination is quashed. The Revenue's assessment is set aside, no profits tax being assessable on the sale of the Properties. I make an Order Nisi that Stanwell is to have the costs of its appeal to this Court, such costs to be taxed if not agreed.

71. Finally, I note that I have based my conclusions on the Board's findings of fact, including the Facts agreed between the parties. It has not been necessary for me to deal with Mr Barlow's alternative contention that the Board unreasonably ignored certain key evidence in drawing its conclusions. My own impression is that Mr Barlow's alternative case is not materially different from his main complaint. In putting forward his "alternative" case, Mr Barlow was probably doing so only out of an abundance of caution. To my mind, the factual propositions which Mr Barlow says the Board ought to have found from the evidence, have either actually been found by the Board or can be deduced from the Board's findings. Whether or not the Board had regard to its actual findings of fact or the inferences to be drawn from them has been the subject of this Judgment. I simply point out here that in light of my conclusions I have not found it necessary to deal more specifically with Mr Barlow's alternative case.

(A T Reyes)
Judge of the Court of First Instance
High Court

Representation:

Mr Barrie Barlow, instructed by Messrs Kwok & Yih, for the Appellant.

Ms Yvonne Cheng, instructed by the Department of Justice, for the Respondent.