HCIA 8/2005

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

INLAND REVENUE APPEAL NO. 8 OF 2005

BETWEEN

REAL ESTATE INVESTMENTS (N.T.) LIMITED Appellant

and

THE COMMISSIONER OF INLAND REVENUE Respondent

Before: Deputy High Court Judge Carlson in Court
Dates of Hearing: 27, 28 and 29 September 2005
Date of Judgment (Handed Down): 2 December 2005

J U D G M E N T

Introduction

1. This is an appeal by way of case stated against a decision of the Board of Review ["the Board"] dated 5 July this year. The issue before the Board was a familiar one concerning the correctness of assessments for tax raised against the taxpayer on the basis that its disposal of flats

in a residential building at 49, Conduit Road ["the property"] amounted to a sale of a trading asset, and thereby liable to profits tax as opposed to the disposal of a capital asset, which would not.

2. It is necessary to set out the evidence as found by the Board as to the acquisition, use and development of the property by the taxpayer as well as its treatment of it in the accounts of the taxpayer prior to its disposal. There can be no doubt that there are a number of unusual features about the property as there are about the course of its ownership by the taxpayer.

3. The property, which had been built in about 1920, was a low-rise 7-storey residential building with a car park below. It was purchased by the taxpayer for $49.4 million on 2 December 1979.

4. For present purposes it is not necessary to set out, as the Board has in the Case, the precise corporate mechanics which created the taxpayer company and the means by which the taxpayer became the owner of the property at the time of its acquisition.

5. The purchase price was funded entirely from amounts advanced by the taxpayer's shareholders in proportion to their shareholding.

6. The property had been purchased by the taxpayer with the express purpose of redeveloping the site. Initially, re-development could not take place because the government had imposed a moratorium on new building in the area where the property was situated having regard to its proximity to the site of the Kotewell Road landslide in 1972.

7. A first application for re-development was made by the taxpayer to the Building Authority in September 1982 which was unsuccessful and this was followed by a number of other applications which were also unsuccessful.

8. Eventually, on 9 September 1985 an application by the taxpayer to build a 24-storey block of flats was approved. A feature of the approval was that, having regard to the geological nature of the site, against the background of the consequences of the 1972 landslide, no permission was given to build an underground car park underneath the proposed block of flats. An above ground car park as part of the lower floors of the new building would have taken away a significant amount of valuable residential accommodation and therefore, rather unusually, the new building did not provide parking facilities for its residents.

9. The original building was demolished in 1988 (some nine years after it had been purchased), and the new building was completed in 1994. In June 1995 the Building Authority issued an Occupation Permit.

10. It is now necessary to make some brief reference to the shareholdings in the taxpayer because this will have a bearing on the issue of the motive for the acquisition of the property and of

its subsequent development and disposal. In 1978 the taxpayer had, by take-over, become part of the Chinachem group, controlled by Mr and Mrs Teddy Wang, which included property development as part of its commercial activities. At the end of 1979, shortly after the taxpayer had acquired the property its share capital was expanded so that 40% of the shares came to be owned by subsidiaries of Sun Hung Kai Securities Ltd ("SHKSL") part of the Sun Hung Kai group, which also was, and of course still is, a substantial property developer. The effect of this was that the property became a joint venture between Chinachem and SHKSL.

11. On 30 October 1987, shortly before the demolition of the original low-rise building on the site in preparation for its re-development the taxpayer entered into a loan agreement with the Standard Chartered Bank for a building loan facility of up to $32 million to fund, if required, the cost of re-development. An amount of up to $2 million could be used to pay compensation to sitting tenants of the original building, with the balance available for the cost of construction. Any amount drawn down from the facility had to be repaid on or before 31 December 1991.

12. In respect of this facility the taxpayer only found it necessary to draw down $3 million during the course of the financial years ended June 1989 and June 1990. This amount was repaid in full in the course of the year ended June 1992. The balance of the development cost was provided through interest-free loans made by the taxpayer's shareholders.

13. Consequent upon the grant of the Occupation Permit in June 1995 and the subsequent installation of lifts and interior decoration the taxpayer offered the flats in the new building for sale and it is these sales that have attracted the assessments to profits tax.

14. For accounting purposes the property was described in the taxpayer's balance sheets for the years 1980 to 1995 as a fixed asset during which time no re-building allowance was claimed for the property. In the accounts for the year ended 30 June 1996 the property was reclassified as a current asset.

15. Therefore, by way of summary, it becomes apparent from the history of the matter, as I have just recounted it, that the property was retained in its original state until 1988 when it was demolished and rebuilt as a 24-storey block of flats which were offered for sale in the course of 1996.

The Board's conclusions

16. The Board heard the review over 8 days with a number of witnesses giving evidence before it. It directed itself on the law in the following terms:

> *" It is trite law that the nature of an asset (whether trading stock or capital asset) is to be ascertained from the intention of the acquirer at the time of acquisition of the asset ("the relevant intention"). Further the Relevant*

> *Intention is to be ascertained from all the surrounding circumstances. (The) stated intention of the taxpayer is not conclusive. It has to be scrutinised against the surrounding circumstances to see if it was genuinely held and realistic." [para. 3 pages 6 and 7]*

17. From this the Board sought to establish who was or were the directing mind and will of the taxpayer at the time that the property was acquired, in order that it might decide, on the basis of the evidence before it, what was the intention of that or those persons. It had little difficulty in concluding that Mr and Mrs Teddy Wang were those persons, the Chinachem group being a family company operated and controlled by them. Although the taxpayer as a company was a joint venture which included SHKSL, the latter company had not in fact bought into the taxpayer until shortly after the acquisition of the property by the taxpayer, which at that stage was very much under the control of the Wangs.

18. Nevertheless, the Board also observed that once SHKSL and the other shareholders, Tung Wu and Gloria, bought into the taxpayer and appointed their own directors to the taxpayer's board, albeit after the date of acquisition of the property, those directors may also have been able to say what the original intention had been. This comment being a reference to the failure of the taxpayer to call any of its directors, at or close to the time of the acquisition, before the Board; Mr Teddy Wang having disappeared in 1990 and subsequently declared dead. His widow, Mrs Nina Wang, did not give evidence before it, neither had any of the other directors save for a witness statement from a Mr Lee who joined the board in 1996 and who was not in fact called before it to give evidence.

19. The Board considered that it had been hampered by the absence of such a witness or witnesses, whilst expressing its wish to come to a positive conclusion, one way or the other, as to the relevant intention rather than deciding the matter, as it eventually did, by reference to the burden of proof which in the appeal before it lay on the taxpayer. Having decided that the taxpayer had not carried that burden it felt constrained to dismiss the appeal.

The evidence before the Board

20. The Board has provided a summary of the evidence before it [paras. 7 to 29, pages 9 to 17]. In the circumstances I need only make brief reference to it and only for the purpose of addressing the matters raised in the appeal by Mr Swaine, who appears for the taxpayer.

21. Although the taxpayer had not called any of its directors, it did call as its first witness (TW1) a gentleman who had been the Chinachem Company Secretary, a position that he had occupied since 1974 and, who had been made a director of the taxpayer in 1984. As Company Secretary he had worked closely with the Wangs at the time of the property's acquisition in 1979. In chief he told the Board that the Chinachem group's view was that it would be difficult to sell high-end residential flats without parking but that this would not affect rental values and that it was

with this in mind that the property had been purchased. He told the Board in the course of his evidence in chief that he understood from the Wangs that they had acquired the property as a "long-term investment project". It was the Board's view that they could not place any weight on this piece of hearsay, presumably what the Wang's had told the witness, which was evidence going to the heart of the review and which could not be tested by cross-examination – Mrs Wang, at least, still being available to come and give that evidence but electing not to. TW1 was then pressed to say in cross-examination that although the lack of a car park to the flats might affect the price, lower selling prices could still have been sufficiently attractive to justify selling the flats in the re-developed building.

22. TW2 was a Senior Executive reporting directly to the Wangs. He joined Chinachem in 1987. He also spoke of Mr and Mrs Wang saying that the property was to be a long-term investment and that they had said that is was to be used to generate rental income. He had access to all of the files of the taxpayer and of the Chinachem group which he needed in order to oversee its flotation on the Stock Exchange. He told the Board that it was important for him to know the purpose of re-development in order to be able to say whether the property would be sold for development profit or held to provide rental income.

23. What troubled the Board about this witness's evidence of what Mr and Mrs Wang had told him, and therefore hearsay, was that the conversations could not have taken place before 1987 and that without having the primary evidence [Mrs Wang in the absence of the deceased Mr Wang] and having that tested by cross-examination it felt unable to give any weight to this witness's evidence as to the relevant intention on acquisition. In addition, according to this witness, Mr Wang was not a great paperwork man, preferring to make his own assessments on likely property purchases, using his own instincts and experience rather than troubling himself with feasibility studies and cash projections, before deciding whether a property should be redeveloped for sale or held to rent out. As a result there were no contemporaneous documents which might assist on what the intention was at the time of acquisition.

24. TW2 was cross-examined on the loan agreement with the Standard Chartered Bank which, on its face, was predicated on the basis that the property was to be sold after its re-development. The Board appears to have been impressed with this aspect of the evidence as suggesting that the true intention was to re-develop and then to sell. This notwithstanding the fact that the legal charge which the Bank required on the property as security for the loan contemplated the prospect that the property could be let with the Bank's consent.

25. TW3 had joined Chinachem in 1972 as a Clerk. By 1988 he had become Sales Manager. In 1995 Mrs Wang told him that property was to be re-developed and then let out which is what he told reporters and estate agents that year when he was asked about this on several occasions.

26. He said that in May 1996 TW5, an estate agent, contacted him and tried to persuade him to sell the flats because the market was rising. He then spoke to Mrs Wang and to SHKSL, after which he gave TW5 a list of required asking prices which if they could be met might persuade the taxpayer to sell after all. Having considered these prices TW5 told him that they could be achieved. Towards the end of May he consulted Mrs Wang and SHKSL again with the result that TW5' s employer Centaline was appointed sole agent to sell the property. Before this the taxpayer had taken no steps to either rent or sell the property.

27. TW4, another estate agent, told the Board that it would be difficult to sell the property without a car park save at heavily discounted prices. He had contacted TW3 about selling and was told that the property was for rent. TW5 gave evidence which confirmed what had passed between him and TW3. The Board found TW4 and TW5 "independent and truthful witnesses".

28. Nevertheless, the Board felt able to analyse down the evidence of TW3. It considered that all that TW3 was doing was to carry out his instructions from Mrs Wang and SHKSL. The message between June 1995 when the occupation permit had been issued and May 1996 was that the property was for letting and not for sale. But that needed to be put into the context of a weak property market and the position taken, that the property was not for sale could have been a reaction to the market' s weakness. Property prices only began to recover after December 1995. The Board observed that re-development had taken a very long time following acquisition in 1979 and that therefore as savvy business people those in charge of the taxpayer would have been flexible enough and prepared to react to market conditions. The Board reasoned that if the original motive had been to purchase and redevelop for sale the taxpayer' s management would not have followed that course irrespective of the state of the market. They might well have changed their mind and decided to let rather than sell which would have achieved low prices. Accordingly, the Board held that the taxpayers' s publicly stated position would not be an especially weighty or persuasive factor in these circumstances.

29. Lastly, I should refer to the evidence of TW8, an accountant and that of IRW1, also an accountant and the Revenue' s only witness. They were in broad agreement with each other. They both agreed that the accepted definition of a fixed asset [a capital asset as opposed to trading stock] would be an asset that was to be held for longer than 12 months.

The Board' s analysis of the evidence

30. It held that there was no direct evidence before it as to the relevant intention. It decided that the evidence adduced by the taxpayer was "both limited and unconvincing". It appears not to have been impressed by the argument that the property did not offer a good return on sale because of its lack of parking. It drew attention to the fact that this was a question of degree. There would have to be a discount, but depending on market conditions a reasonable profit could still be had. The re-development process was to be a long one having regard to the moratorium on

building in that area and this would not preclude an intention to sell some time in the future if the market made that a sensible course to adopt.

31. Before the Board Mr Swaine had placed considerable reliance on the fact that in the taxpayer's accounts, some of which had been signed by Mr Wang before his disappearance, the property had been described as a fixed asset, which he submitted was good evidence supporting the view that this was a capital asset to be held for rental as other witnesses had given evidence of. The Board considered that the force of this argument was considerably lessened by the fact that the accounting experts had agreed that all that a fixed asset meant was one where the property was to be held for longer than 12 months. It also held that not much could be gained from the fact that Mr Wang himself had signed the accounts until his disappearance in 1990 because there was evidence that he was not a man who bothered much about paperwork and that it was likely that he could have signed because his staff had asked him to and that he had not checked on the accuracy of the statements in the accounts.

32. In arguing this appeal Mr Swaine has levelled very strong criticism about this latter conclusion [see para. 31 page 18 of the Case]. It is convenient that I should dispose of this aspect of the argument now. Whilst of course the facts were entirely for the Board to decide on and to weigh as they considered right it seems to me that their conclusion that *"Mr Wang was not much of a paperwork man, he could simply have signed the accounts relying upon his staff to have checked their accuracy"* as a ground for not having regard to the fact that Mr Wang, as Chairman of the taxpayer had signed them was not a matter that they needed to have regard to in assessing the weight to be attached to the accounts was unreasonable in the recognized sense of being perverse. These were after all professionally prepared audited accounts drawn up by highly reputable accountants who were prepared to certify that they represented a *"true and fair view"*. Mr Wang signed these. There was simply no evidence to suggest that because he may not have troubled himself with feasibility studies and cost projections and in that sense may not have been a "paperwork man" did not entitle the Board to then draw the conclusion that he perfunctorily signed his companies accounts without looking at them. I propose to consider this appeal on the basis that this was not a finding that the Board was able to come to based as it was on, at best, speculation on its part. The effect, if any, of this error I will return to in due course.

33. In concluding their analysis of the evidence the Board drew attention to the Revenue's submission that there were in fact a number of features which tended to show an intention to re-develop for sale. Firstly, the terms of the loan agreement with the Bank which expressly contemplated that there would be a sale after development of the site, although it correctly balanced the force of that argument with the fact that the loan agreement itself did not come into existence until 8 years after the acquisition of the property and was therefore not as compelling as it may at first blush have appeared to be. Secondly, the Board reasoned that the presence of a joint venture partner, SHKSL which was engaged in a different type of property investment tended to militate against an intention to re-develop for long-term rental. It held that where SHKSL had invested so much money without a cash flow prediction or feasibility study it was in no position to come to an

informed judgment about long-term rental prospects and that this therefore made it more likely than not that it was looking to re-development and re-sale at a profit.

The Board's conclusion

34. Standing back from all of the evidence the Board came to the conclusion that the taxpayer had not carried the burden of proof and not shown that the relevant intention at the time of acquisition was to hold this property as a long-term investment in order to obtain a rental return on it. Nevertheless, in putting it in this way, it also felt unable to come to the obverse conclusion, as contended for by the Revenue, that the property had been originally acquired as trading stock to be re-developed and sold which, in the event, is what the taxpayer did.

The appeal

35. No court or tribunal likes to decide a case by the mere application of the burden of proof. That would be a decision of last resort. In this case undoubtedly there were features in the evidence that were capable of supporting both of the rival contentions. It was for the Board to weigh the evidence and come to a decision. In the course of its analysis it has supplied reasons for coming to a particular view on the various aspects of the evidence. With the exception of its conclusion on the effect of Mr Wang's signature of the taxpayer's accounts, Mr Swaine has refrained, and rightly so in my judgment, from submitting that the Board's findings of fact were perverse or that it took matters into account which it should not have or, left out of account matters which is ought to have taken into account. This is not the nature of the appeal. Nevertheless, Mr Swaine has raised a number of fundamental matters which call for a decision by me.

Should the case stated be amended?

36. It is of course trite that in deciding this appeal I am not entitled to go beyond the parameters of the Case Stated itself. This being so Mr Swaine submits that I should direct that it be amended by the Board, which would require me to remit it back for that purpose or, alternatively, I should amend it myself. What Mr Swaine complains of is that by drafting the case in the way that it has and in presenting the questions which I am asked to answer in disposing of this appeal, which Mr Swaine submits do not properly reflect what it is that he wishes to argue in saying that the decision cannot stand, the Board has in effect set its own agenda for this court to rule on and in doing so it has deprived the Appellant taxpayer of bringing to the court's attention what it would wish to argue.

37. This complaint raises two separate issues. Firstly, as to the complaint about insufficiency of evidence in the Case as drafted Mr Swaine submits that it is not possible for me to fairly rule on this appeal without at least a sight of the accounts and, at the very least, of the accountants' evidence which would present a fuller picture of the importance and significance of the accounts which for 15 years showed the property as being held as a capital asset rather than as

stock in trade. Indeed, given more leeway, Mr Swaine would have wished to have attached to the case evidence and witness statements of a number of his clients 8 witnesses before the Board.

38. I have given this aspect anxious consideration. Much of the argument has dwelt on this and I have indicated that I would consider this application before embarking on any substantive ruling on the appeal. Mr Mok, for the Revenue, submits that, amongst other things, it is really much too late, on the hearing of the appeal itself, to invite the court to take such a course. Lateness will always sound in the discretion but lateness is only one factor amongst a number that I am required to consider. It seems to me that the apparent adequacy or otherwise, of the Case as presently drafted is crucially important. My view is that the Case has been sufficiently presented in order to enable me to properly dispose of the appeal. The point after all is commonplace. So many of these reviews before Boards of Review relate to this issue. The Board has set out the essential facts and the evidence relating to those facts for me to understand perfectly well what it is that the Board was being asked to decide and the evidence that had been led before it. In relation to the accounts I know what these accounts say of the nature of the asset represented by the property. There is no doubt that the property was put in as a fixed asset. I fail to see how I could be materially assisted by having all of the accounts before me. The nub of the matter on this aspect is how the Board analysed the fact that the property had been classified as a fixed asset for 15 years. It had agreed evidence from the accounting experts that in order to be classified as a fixed asset all that was required was that the asset was one that was to be held for longer than 12 months. The Board weighed up that evidence as appears in the Case. Whether it did so correctly I will need to rule on presently.

39. Accordingly, I decline to amend the case or to remit it for it to be amended. I do so principally because I have decided that it has been sufficiently drafted and if I were further put to it I would also say that this application is made much too late in all the circumstances.

40. Secondly, Mr Swaine complains that the Board has not posed its questions of law in such a way that enables him to argue the matter fairly on behalf of his clients. It is apparent on the face of the Case that the Board had to conduct separate hearings in order to try and accommodate the parties as to what questions should be left for the High Court. It has sought to provide reasons as to why it has drafted the questions in the way that it has and for my part those questions fairly enable Mr Swaine to argue the points that he has so admirably done in the course of a three-day hearing before me. I have, in my judgment, been left with well-drafted questions which enable me to dispose of the appeal as I am required to.

41. From this I now propose to answer the questions as posed by the Board having regard to the arguments of both Counsel.

> *Question (i) – Whether, as a matter of law and on the facts found, and having held that we were unable to come to a positive finding as to the relevant intention, were we right to conclude that the Appellant had not discharged its*

> *burden of proof in the appeal and consequently to dismiss the appeal and confirm the Determination?*

42. I am satisfied that, save for the one aspect that I have already referred to and decided, the Board came to factual conclusions which were entirely open to it and that it cannot be faulted in any way as to the manner that it approached its task nor in the way in which it sought to weigh the evidence. Mr Swaine has not attempted to argue otherwise. He has approached the matter by inviting me to look at the consequences of the Board's finding. By producing an apparent "scoreless draw" on the evidential contest before it, Mr Swaine submits that the accounts at the very least amounted to a *prima facie* case of an intention to hold the property on a long-term basis for rental purposes. This amounts to the taxpayer presenting the Revenue with an evidential burden for it to discharge which it has singularly failed to do. He says this because the Board also felt unable to say whether the taxpayer intended to trade as at the date that it acquired the property. Once the Revenue failed to overcome the evidential burden created by the *prima facie* case, as I have just described it, then as a matter of logic and law the essence of the case fell to be resolved on the basis of the unanswered *prima facie* case and therefore on a proper analysis the taxpayer had carried its burden and the appeal ought to have succeeded. Although I have expressed it as a "scoreless draw" the consequence was by no means a draw but that of an unanswered goal by the taxpayer. Although expressed by me as a sporting metaphor it appears that this properly illustrates the effect of Mr Swaine's submission.

43. Mr Mok submits that where s.68(4) of the Inland Revenue Ordinance ("the Ordinance") requires the Appellant to prove that the assessment is excessive or incorrect, a failure to establish its case will be fatal to any appeal. That is the simple consequence of this statutory requirement. There is ample authority to support the fact that the onus is on the Appellant. See for example *All Best Wishes Ltd. v CIR* (1992) 3 HKTC 750, *Mok Tse Fung v CIR* (1962) HKLR 258 and recently *Cheung Wah Keung v CIR* (2002) 3 HKLRD 773.

44. It is also abundantly clear that where the tribunal of fact is not able to come to a positive decision one way or the other, as is the case in this matter, it is open to it to say that the party which bears the onus of proof has failed to discharge that burden and must therefore be taken to have lost. This principle was expressed as follows by Lord Brandon in *The Popi M* (1985) 1 WLR 948 @995H-956A:

> *" … the judge is not always bound to make a finding of fact one way or the other with regard to facts averred by the parties, He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases however in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take."*

45. This was the course that was also adopted by the Court of Appeal in *Li Tim Sang v Poon Bum Chak* CACV 153/02, all three Justices; Le Pichon and Cheung JJ.A's, and Stone J referring to this part of Lord Brandon's speech in *The Popi M.*

46. Unquestionably, it was therefore open to the Board to decide the matter on the basis of the burden of proof. That then leaves over the analysis advanced by Mr Swaine that the rejection of the Revenue's case that the property had been acquired for trading purposes must amount to acceptance of the *prima facie* case at least that the property had been acquired as a long-term capital asset.

47. I do not consider that this can be a correct analysis of the Board's inability to come to a decision one way or the other. All that this can mean is the failure by the Appellant taxpayer to do what the Ordinance require of it which is to discharge the burden of proving that the assessment was incorrect or excessive. There is no place in my judgment for any gloss on this perfectly straightforward statutory requirement. Once no finding could be made by the Board the burden of proof engaged and it followed that the Appellant will have failed.

48. The answer to the question therefore is "Yes".

> *Question (ii)(a) – Whether we were right in directing ourselves in effect that the nature of an asset, whether trading stock or capital assets was to be ascertained only from the intention of the acquirer at the time of acquisition of the asset ("the relevant intention")?*

49. I have already set out the Board's approach to this matter at paragraph 16 of this judgment [para. 3 pages 6 & 7 of this Case]. The answer to this question is to be found in *Board of Inland Revenue Board of Review Decisions Case No. D65/87 IRBRD* at pages 79-80.

> *" In Simmons v IRC [1980] STC 350 at 352, Lord Wilberforce authoritatively stated the principles thus:*
>
> *'Trading requires an intention to trade normally the question is whether the 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? … intentions may be changed. What was first an investment may be put into trading stock – and I suppose vice versa …'*
>
> *In deciding whether there was an intention to trade, all the circumstances must be examined, bare assertions of an intention to hold as a long term investment being of little weight. One should examine whether the transaction bore any of the badges of trade (see Simon's Taxes B3212 and Marson v*

> *Morton [1986] STC 463. In each case, it is necessary to stand back having looked at all matters and look at the whole picture and to ask the question – was this an adventure in the nature of trade? (see Marson v Morton at 471g).*
>
> *We see no inconsistency between Lord Wilberforce's statement in Simmons and the badges of trade approach. For there to be an adventure in the nature of trade, an intention to trade is required. In deciding whether there was such an intention, one must look at all the circumstances and examine whether the transaction bore any of the badges of trade. If the transaction bore the badges of trade, it would mean that an intention to trade was present notwithstanding protestations by the Taxpayer to the contrary.*
>
> *In Marson v Morton one of the matters examined was that purchaser's intentions as to resale at the time of purchase. This was said to be in no sense decisive in itself (see 471e). In our view, this is consistent with Lord Wilberforce's statement which refers to an intention to trade. In deciding whether the purchaser had an intention to trade, his intention concerning resale [itself] is relevant but not decisive.*
>
> *As Lord Wilberforce pointed out, intentions may change. If an asset was acquired for investment purposes, the owner may be the time of sale have put it into trading stock and vice versa. The question is whether on the facts, such change had occurred …"*

50. This is precisely the approach adopted by the Board in this case. The submission advanced by Mr Swaine is that the Board's approach was incorrect because it is inconsistent with the badges of trade approach is simply not tenable having regard to the analysis in Case No D65/87 for the reasons which appear in the passages which I have just cited. It seems to be therefore that this question must also be answered "Yes".

> *Question (ii)(b) – Whether, if the answer to (a) above is in the negative, we ought, having been unable to come to a positive finding as to the relevant intention, to have considered the badges of trade as matters separate from the ascertainment of the relevant intention in order to decide on the nature of the asset in question?*

51. Having regard to the answer to (a) in the affirmative this question simply does not arise and I am not disposed to embark on a purely theoretical response.

> *Question (ii)(c) – Whether, if the answer to (b) above is in the affirmative, upon the facts found by us, the only true and reasonable conclusion to which we could properly have arrived was that the profit of the Appellant, the subject matter of*

the appeal, were profit arising from the sale of capital assets within the meaning of s. 14 of the Inland Revenue Ordinance and therefore exempt from tax?

52. Having regard to the affirmative answer to (a) this too cannot now fall to be considered.

Conclusion

53. Given the affirmative answers to question (i) and (ii)(a), this appeal must be dismissed with costs. The order for costs will be in order *nisi* in the usual way.

(Ian Carlson)
Deputy High Court Judge

Mr John Swaine, instructed by Messrs Cheng, Chan & Co., for the Plaintiff

Mr Johnny Mok, instructed by the Secretary for Justice, for the Revenue