FACV No. 14 of 2007

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 14 OF 2007 (CIVIL)
(ON APPEAL FROM CACV NO. 180 OF 2006)

BETWEEN

LEE YEE SHING and YEUNG YUK CHING — Appellants

and

THE COMMISSIONER OF INLAND REVEUNE — Respondent

Court : Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Sir Noel Power NPJ and Mr Justice McHugh NPJ

Date of Hearing : 10 January 2008

Date of Judgment : 31 January 2008

J U D G M E N T

Mr Justice Bokhary PJ and Mr Justice Chan PJ :

Assessments in question

1. Usually it is the Revenue who says that activities amount to the carrying on of a trade or business and the taxpayer who says that they do not. This time it is the other way round. These appellants ("the Taxpayers") are husband and wife who each declared salaries income and jointly elected for personal assessment. They tried to persuade the Revenue that the husband's losses on dealings in securities and futures had been incurred in the carrying on by him of a trade or business and ought therefore to be deducted when computing their total income. The Revenue was not persuaded that those dealings amounted to the carrying on of a trade or business. So the assessments in question, being the personal assessments on the Taxpayers for the years of assessment 1993/94 to 1997/98, were computed without deducting those losses.

2. Thus it is the Taxpayers who assert and the Revenue who denies that the husband's dealings in securities and futures amounted to the carrying on of a trade or business within the meaning of the general profits tax charging provision, namely s.14(1) of the Inland Revenue Ordinance, Cap.112. This subsection reads :

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

Section 2(1) of this Ordinance provides that unless to context otherwise requires :

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

3. Contending that the husband's dealings in securities and futures did amount to the carrying of a trade or business, the Taxpayers appealed to the Board of Review ("the Board") against those assessments. They failed before the Board, the High Court (Burrell J) and the Court of Appeal (Rogers VP, Le Pichon JA and Barma J). And they are now before this Court.

What the Board of Review concluded and why

4. What the Board concluded appears from the first question it posed for the opinion of the High Court. By this question the Board asked in terms whether it was open to it to conclude that the assessments appealed against were not excessive or incorrect. Why the Board so concluded appears from the second question it posed for the opinion of the High Court. By this question the Board asked in effect whether it was entitled to reject the Taxpayers' contention that the husband's losses on dealings in securities and futures had been incurred in the carrying on by him of a trade or business and ought therefore to be deducted when computing their total income.

5. Those two questions raise a single issue. It is the ultimate issue between the parties. And it is, quite simply, whether the Taxpayers are right in their contention that the true and only reasonable conclusion is that the husband's dealings in securities and futures amounted to the carrying on of a trade or business.

Additional findings

6. Before addressing that issue, it is necessary to deal with a question of additional findings.

7. Section 69(4) of the Inland Revenue Ordinance, Cap.112, provides that the High Court "may cause a stated case to be sent back for amendment and thereupon the case shall be amended accordingly". In *Consolidated Goldfields plc v. IRC* [1990] STC 357 at p.361g-h Scott J (as Lord Scott of Foscote then was) addressed the proper approach to a request for a case stated to be sent back for additional findings to be made or to be considered. He warned against countenancing what he condemned as "nit-picking". As to the proper approach to such requests, he said that "[i]f the case stated is full and fair, in that its findings broadly cover the territory desired to be dealt with by the proposed additional findings, the court should … be slow to send the case back".

8. The parties to an appeal by way of case stated should be given an adequate opportunity to put forward their views as to what ought to be included in the case to be stated. And such views should be duly considered by those who state the case. But neither party alone nor even both parties in unison can insist on the case being stated in a particular form or terms. That has been clear in Hong Kong since at least 1911 when *Re an Arbitration between Sander, Wieler & Co. and The Wing On Firm* (1911) 6 HKLR 102 was decided. At p.105 Sir Francis Piggott CJ said that the duty of those called upon to state a case is to state it so "that it shall cover the case submitted". As to what a case stated must contain in order to be regarded as sufficiently covering the issues, the present appeal provides the Court with a welcome opportunity to recognise the utility for Hong Kong's purposes of the practical guidance offered by Scott J in the *Consolidated Goldfields* case.

9. In the present litigation, the question of additional findings arose and evolved in the following unusual way. Shortly before the hearing of their appeal to the High Court, the Taxpayer's

took out a summons by which they asked Burrell J to send the case stated back to the Board and direct the Board to make additional findings on :

> "(i) The activities and circumstances of [the husband] in incurring the losses the subject matter of the appeal, including particulars of all of his securities and future index transactions in the tax years 1990/91 to 1997/98 inclusively;
>
> (ii) The nature and circumstances of [the husband' s] relationship with Y.S. Tide Limited, particularly his beneficial ownership and control of that company;
>
> (iii) Y.S. Tide Limited' s securities and future index transactions in the tax years 1990/91 to 1997/98 inclusively, and the tax treatment of those transactions."

In support of this summons, the Taxpayers filed an affirmation, being that of one Lo Chun Pong dated 14 March 2006. A number of documents were exhibited to this affirmation. These documents included two statements by the husband, a record of his transactions and a record of the transactions of Y S Tide Ltd ("YST").

10. It is asserted in the Taxpayer' s printed case that :

> "A feature of the appeal is that the Judge, in lieu of dealing with an application to have the Case remitted for the finding of additional facts, agreed – with the consent of the parties – to look at a portion of the documentary evidence. This evidence is set out under the Affirmation of Lo Chun Pong dated 14th March, 2006."

That is not what Burrell J says had happened. In his judgment he says :

> "After hearing submissions from Mr John J.E. Swaine for [the Taxpayers] and Ms Jennifer Tsui for [the Revenue] it transpired that the extra ' findings' which Mr Swaine submitted were necessary for an intelligible hearing of the appeal could, in fact, be easily gleaned from the Board' s decision and were not, in any event, controversial or disputed. Once this was established Mr Swaine agreed to withdraw the summons. The order on the summons is ' Summons withdrawn with costs in the cause of the appeal' .
>
> As a result the further facts upon which this appeal proceeded (in addition to the Case Stated but not in any way amending it) were :
>
> (a) that the buying and selling of shares and futures undertaken by [the husband] and [YST] during the years in question and which were considered by the Board did in fact take place;

(b) that [the husband] was the 100% owner and controller of YST; and

(c) that YST's trading was disclosed to the Revenue at all material times and was accepted."

11. The Board incorporated its decision within the body of the case which it stated. As pointed out earlier, the two questions posed in the case stated raise the single issue of whether the Taxpayers are right in their contention that the true and only reasonable conclusion is that the husband's dealings in securities and futures amounted to the carrying on of a trade or business. Apart from formal matters and those two questions, the case stated consists simply of a recital of the Board's decision. So those so-called further facts are not really additional to the case stated. Moreover, as one sees from Burrell J's judgment, they are neither controversial nor disputed.

12. At the hearing of the appeal to this Court, Mr J J E Swaine for the Taxpayers indicated that he also wished to refer to the "statistics", as he called them, mentioned in para.17(iv) and (vii)(a) to (e) of the Taxpayers' printed case. Mr Jennifer Tsui for the Revenue raised no objection to that course. The matters mentioned in para.17(iv) are that the husband's dealings in securities and futures amounted to "some HKS2,820,625,097 over 5,643 transactions in the 5 fiscal years in question". As for the matters mentioned in para.(vii)(a) to (e), they are as follows :

(a) "the average period of holding between acquisition and sale of securities was less than 4 months in every year of assessment, and less than 15 days in 1996/97";

(b) "the period of holding was often less than one week, and not uncommonly one day only";

(c) "the dividend income received by [the husband] represented only 0.10% to 0.45% of return on total purchases";

(d) "[the husband] expended over 5 times more on interest payments on borrowings in order to fund his acquisitions than he earned by way of interest on those acquisitions (HK$23,025,633.58 as against HK$4,187,419.50)"; and

(e) "in only 39 transactions, representing less than 2% of purchases, were securities held for more than one year".

13. All of those matters were before the Board. Referring to the husband's "volume of trading, his variety of brokers, his average number of deals per day, the average length of time he held shares, his comparatively small return of dividends and so on.", Burrell J said that he "looked at the same unchallenged facts that the Board looked at".

14. Apart from volume, none of those matters distinguishes the husband's dealings in securities and futures from those of the many persons in Hong Kong who deal in securities and futures without it being suggested by them or the Revenue that they are doing so by way of trade or business. And there is no basis for saying that there is no such person whose volume of dealings in securities and futures exceeds the husband's. It is to be remembered that volume is represented by turnover, and not the size of the husband's holdings in securities and futures at any given time during the turnover period.

Complaint that the Board of Review had misdirected itself

15. Now, before coming to the ultimate issue, it is necessary to deal with a specific complaint by the Taxpayers that the Board had misdirected itself when it said that "[p]ure speculation is a factor which weighs against the finding that a person is carrying on a trade". It is to be observed that this complaint is not the subject-matter of any question posed in the case stated.

16. In connection with this complaint and for the purpose of showing that "trade" is a term of very wide import, the Taxpayers cite *Barry v. Cordy* [1946] 2 All ER 396 and *Wisdom v. Chamberlain* [1969] 1 WLR 275 decided by the English Court of Appeal and *Griffiths v. JP Harrison (Watford) Ltd* [1963] AC 1 decided by the House of Lords. The taxpayer in that House of Lords case was a dividend-stripper. It had to show a trading loss in order to obtain tax relief. And it said that its activities, namely dividend-stripping, amounted to trading while the Crown said that dividend-stripping was not trading. The only thing which that case and the present one have in common is merely a matter of passing interest, namely the unusual feature of a taxpayer being better off tax-wise if its activities are regarded as amounting to trading.

17. Coming back to the Taxpayers' complaint, they introduce it by suggesting that the husband's securities and futures dealings may amount to the carrying on of a *trade* even if, contrary to their contention, those dealings do not amount to the carrying on of a *business*. As it happens, it has long been recognised that business is a wider concept than trade. Delivering the advice of the Privy Council on appeal from Malaysia in *American Leaf Blending Co. Sdn Bhd v. Director-General of Inland Revenue* [1979] AC 676, Lord Diplock said in terms (at p.648B) that business is a wider concept than trade. A similar observation was made by Lord Nolan (at p.51h) when delivering their Lordships' advice on appeal from New Zealand in *Rangatira Ltd v. CIR* [1997] STC 47. Judicial recognition of the point can be traced at least as far back as the judgment of the Court of King's Bench in *Doe d Wetherell v. Bird* (1834) 2 Ad & E 161 in which Lord Denman CJ said (at p.166) that "[e]very trade is a business, but every business is not a trade".

18. Be all of that as may, the present appeal is not an occasion for pronouncing on how wide each of those two terms, trade and business, is for tax purposes. This complaint can be disposed of very simply. Many people deal in securities and futures otherwise than by carrying on

a trade or business. When what the Board said is read fairly and in context, it becomes clear that by "pure speculation" the Board meant no more than securities and futures dealings of the kind typical of such people. As it indicated in terms, the Board was aware that whether something amounts to the carrying on of a trade or business is a question of fact and degree to be answered in all the circumstances. It so indicated in the same paragraph as the one in which it made the statement that "[p]ure speculation is a factor which weighs against the finding that a person is carrying on a trade". Whether or not that statement is of much utility, it does not point to the Board having misdirected himself.

Ultimate issue : the "true and only reasonable conclusion" question

19. All that remains is for the Court to address the ultimate issue of whether the Taxpayers are right in their contention that the true and only reasonable conclusion is that the husband's dealings in securities and futures amounted to the carrying on of a trade or business. No useful purpose would be served by a recitation of everything the Board said on the facts.

20. The husband was the Taxpayers' main witness. This is what Le Pichon JA, through whose judgment the Court of Appeal spoke, said about his evidence :

> "In brief, [the husband's] evidence was that he was a director of a number of family companies and his remuneration as a director was substantial. From about 1992 he spent much time buying and selling shares and futures. Most of these transactions were in his own name but a significant number were done through a wholly owned company [YST]. Up to 1997, his losses were greater than his gains but in early 1997 very large profits were made, exceeding his previous losses by $15 million. Then came the Asian financial crisis and by 1998, he was sustaining substantial overall losses.
>
> [His] explanation of why he traded in stocks and shares in his own name and also through YST was that he could obtain more credit than YST which accounted for the large volume of share transactions in his own name. Although he treated his own share dealings and those of YST as one and the same he did not register his share trading business until 1998. His explanation was that he was not aware that a sole proprietary business required a business registration. He maintained that he was not a speculator.
>
> The Board … did not accept his explanation as to why a business registration certificate had not been taken out by him earlier and concluded that it was an afterthought. They noted that a claim for deduction of losses was not intended before 1998 and the business registration was not taken out before then. The Board rejected the reasons [he] advanced for not solely using YST to trading shares. Since

> YST was wholly owned by him there was no reason why it should not be able to operate on the same basis and enjoyed the same credit limits as [him]."

21. When dealing with the husband's evidence, the Board began by saying that it did "not find him a very truthful witness [and that he] was evasive and on many occasions was unwilling to give a direct answer to the question put to him". As Le Pichon JA noted, what the Board went on to say includes this :

> "... [the husband's] shares and future index portfolio was perhaps substantial in monetary term, but he fails to convince us that he was truly a trader. We are not impressed by the strategy he claimed to adopt for the purpose of trade. His strategy of not cutting loss and not setting a cap on his stake lacks professionalism and is unconventional to a true trader. As to his sub-underwriting activities, according to his own explanation as to how they were carried out, they were no more than activities undertaken by a valued customer when he was given the first right to subscribe for new shares by his share dealers. As to [his] claim of attending share related courses, reading massive materials, engaging in vast preparation work for the purpose of his share dealings, these activities are not uncommon to and no more than those carried out by, some keen and sophisticated investors of this day."

22. In regard to the materiality of the volume and frequency of the husband's dealings in securities and futures, the Taxpayers cite *Cooper v. Stubbs* (1925) 10 TC 29 at pp 33-41 (where the case stated by the Special Commissioners is set out more fully than in the report at [1925] 2 KB 753), *Lewis Emanuel & Son Ltd v. White* (1965) 42 TC 369 at p.372 and *CIR v. Chiang Liang-jen* (1977) 1 HKTC 975 at pp 976-979 and 981.

23. The Taxpayers also say that the husband's dealings in securities and futures were larger in volume than, at least equally active as and not otherwise distinguishable from YST's dealings in securities and futures. Those dealings of YST's were treated by the Revenue as amounting to the carrying on of a trade or business by YST. The Taxpayers submit that declining to treat the husband's dealings in securities and futures as the carrying on of a trade or business by him while treating YST's dealings in securities and futures as the carrying on of a trade or business by it cannot be justified in principle.

24. As to the Taxpayer's reliance on the volume and frequency of the husband's dealings in securities and futures, this has to be said at once. The fact that dealings are of large volume and frequent can be some indication – but is not necessarily a conclusive indication – that those dealings amount to the carrying on of a trade or business.

25. Turning to the Taxpayers' submission based on a comparison between the husband's dealings and those of YST, it is worth pointing out that the taxpayer in the *Lewis Emmanuel* case was a corporation. "In the case of an individual", Pennycuick J (later Pennycuick VC) observed at

p.377, "he may carry out a whole range of financial activities which do not amount to a trade, but which equally do not amount to an investment, even upon a short-term basis". A distinction of this nature between individuals and corporations was drawn by the Privy Council in the *American Leaf Blending* case where Lord Diplock said this at p.684 B-C :

> "In the case of a private individual it may well be that the mere receipt of rents from property that he owns raises no presumption that he is carrying on a business. In contrast, in their Lordships' view, in the case of a company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business."

26. The Board observed that the husband's involvement with YST was not disclosed until YST's losses had been accepted by the Revenue. And the Board said that it believed that it was only upon such acceptance that the husband "saw fit to claim" that his dealings and those of YST "were one and the same".

27. Just because one taxpayer's dealings are accepted by the Revenue as amounting to the carrying on of a trade or business, it does not mean that the Board is bound to treat another taxpayer's dealings of the same kind, whether larger or smaller and whether more or less frequent, as amounting to the carrying on of a trade or business. Indeed even if such treatment of the first taxpayer's dealings results from a finding by the Board itself rather than from acceptance by the Revenue, it still does not mean that another taxpayer's dealings of the same kind, whether larger or smaller and whether more or less frequent, must be similarly treated by the Board. It is always a matter to be determined in all the circumstances.

28. Let it be remembered that appellate intervention on the "true and only reasonable conclusion" basis is intervention for error of law. This was explained in *Kwong Mile Services Ltd v. CIR* (2004) 7 HKCFAR 275 at pp 287G-289H. Just because there is no appeal on facts, it does not mean that the appellate court is precluded from detecting and correcting errors of law buried beneath conclusions ostensibly of fact. If the true and only reasonable conclusion contradicts the determination appealed against, the appellate court will assume that the determination resulted from an error of law. Where it regards the contrary conclusion as the true and only reasonable one, the appellate court will substitute the contrary conclusion for the one reached by the fact-finding tribunal. But in an appeal on law only the appellate court must bear in mind what scope the circumstances provide for reasonable minds to differ as to the conclusion to be drawn from the primary facts found. And the appellate court will not disturb the fact-finding tribunal's conclusion merely because its own preference is for a contrary conclusion.

29. Mr Swaine accepted that the following list compiled by the Board is a fair summary of the factors pertaining to the husband advanced by the Taxpayers :

> "1. He operated from a stand-alone office, which served as both the office of [YST] and his personal share trade business.
>
> 2. He had a personal assistant cum secretary to help him to keep proper books of accounts.
>
> 3. He operated a number of securities and margin accounts with several broker firms.
>
> 4. He spent full time on his own share trading activities and those of the family companies during the relevant times.
>
> 5. He did a lot of preparation work and study, discussed with dealing directors, read news on listed companies and also used the stock market channel to track his stock portfolio.
>
> 6. He had direct telephone lines to dealer rooms of two securities firms.
>
> 7. He was a majority owner of a securities broking firm during 1997 and 1998 and participated in the management decisions of the firm at that time.
>
> 8. He had the necessary equipments to assist him in his business.
>
> 9. He attended courses to learn new skills and improve old ones.
>
> 10. His transactions were frequent, large in amount and lots. The total amount of his transactions for each year was very large.
>
> 11. He monitored his share portfolio closely.
>
> 12. He participated in index futures trading, sub-sub-underwriting of share offers, and short-selling."

30. The Board said in terms that it had carefully considered each and every one of those factors. In regard to factors 1, 2, 6 and 8 which involve an office, a secretary, direct lines and equipment, the Board found as follows :

> "[The husband] used the same office, secretary, office equipments, computers, telephone lines, and stock channels as [YST] in his share dealing activities. [YST] was the party to bear all the necessary expenses for tax purposes. Although [the secretary] assisted [YST] and [the husband] in their share dealing activities, over the years of assessment she was not paid a salary by [the husband] or [YST] but only an

> allowance which represented from about 30% to 60% of [her] income from Kin Tak Fung."

Still on those factors, the Board continued by making these findings :

> "Though [the husband] had an office and the necessary equipments and facilities for share dealings, and a secretary to keep those records and accounts, these amenities enjoyed by him were not those of his own. He was able to use them because of his special relationship with [YST] and Kin Tak Fung."

31. Factors 3, 5 and 11 can be dealt with by saying that in Hong Kong there is nothing uncommon about all of those things being done by a person who deals in futures and securities otherwise than by way of trade or business.

32. As for factor 7, it is irrelevant. In the capacity to which this factor is directed, the husband would be concerned with customers' dealing in securities and futures, not his own.

33. As to factor 9, the Board did not regard attending such courses as uncommon. In any event, the business of one of the four companies from which the husband was a director and received a salary was, the Board found, "property and share investment". Attending such courses could have been for the purpose of making him better able to discharge his duty to that company.

34. Factor 10 goes essentially to volume, which we have already dealt with. It may be added that of the other three companies of which the husband was a director and received salary, two were in the business of property investment and one was in the business of property development. In assessing the significance of volume, one must do so in context. The context here includes the husband's involvement, as a company director and recipient of salary, in property investment and development.

35. One factor remains, namely factor 12. Participation in index futures trading and short-selling is not uncommon. As to the assertion in this factor that the husband had participated in "sub-sub-underwriting of share offers", the Board found that

> "… according to his own explanation as to how they were carried out, they were no more than activities undertaken by a valued customer when he was given the first right to subscribe for new shares by his share dealers."

36. Even taken cumulatively there is nothing overwhelming in the matters relied upon by the Taxpayers. And that is so even before taking into account any of the countervailing matters mentioned by the Board such as, for example, the absence of a business registration certificate and audited accounts.

37. Dealing in securities and futures is an activity engaged in by many persons in Hong Kong otherwise than by way of a trade or business. They are taxed only indirectly by way of *ad valorem* stamp duty on their sales and purchases. It is a measure of the difficulty in which the circumstances place Mr Swaine that he felt driven to advance the plainly untenable argument that any dealing in securities and futures, even if it consists of a single transaction, would amount to carrying on a trade or business if it was meant to realise an immediate profit.

38. The question whether something amounts to the carrying on of a trade or business is a question of fact and degree to be answered by the fact-finding body upon a consideration of all the circumstances. In the circumstances of the present case, a conclusion that the husband' s dealings in securities and futures amounted to the carrying on of a trade or business is by no means to be regarded as the true and only reasonable conclusion. Imposing a conclusion contrary to that reached by the Board is particularly difficult where – as in the present case – the parties contending for that contrary conclusion bore the onus of proof, the material facts were peculiarly within the knowledge of one of them, they sought to rely on his testimony but he was not found to be a reliable witness and was regarded as an evasive one. It is particularly difficult for parties so placed to establish a sufficiently full set of facts when seeking appellate intervention in their favour on the "true and only reasonable conclusion" basis.

Conclusion

39. For the foregoing reasons, we would dismiss the appeal so that the assessments appealed against stand. It having been accepted by the parties that costs should follow the event, we would award the Revenue costs so that it will have its costs here as well as in the courts below.

40. Since preparing this joint judgment, we have had the benefit of reading the judgment prepared by Mr Justice McHugh NPJ. In addition to saying that we find his judgment valuable generally, we wish to draw particular attention to his observation that an appeal limited to questions of law seems more likely to further the administration of justice than the case stated procedure. This, in our view, is worthy of consideration in the appropriate quarters.

Mr Justice Ribeiro PJ :

41. I agree with the joint judgment of Mr Justice Bokhary PJ and Mr Justice Chan PJ and with the judgment of Mr Justice McHugh NPJ. I would respectfully endorse Mr Justice McHugh' s suggestion that the interests of justice may be better served by abandoning the Case Stated procedure and substituting an appeal on questions of law.

Sir Noel Power NPJ :

42. I agree with the joint judgment of Mr Justice Bokhary PJ and Mr Justice Chan PJ and with the judgment of Mr Justice McHugh NPJ and am in full accord with his criticisms of the form of the Case Stated and the appropriateness of that procedure.

Mr Justice McHugh NPJ :

43. The appellants are husband and wife. They appeal against a finding of the Board of Review that, in dealing in securities and futures, the husband had not been carrying on a trade or business and that the losses he had incurred while so dealing were not allowable deductions for the purpose of determining their total income. The facts of the case are set out in the judgment of Mr Justice Bokhary PJ and Mr Justice Chan PJ. There is no need for me to repeat them except in so far as it is necessary to explain my reasons.

44. As the judgment of their Lordships show, the issue in the appeal is whether, upon the facts found by the Board, it was bound as a matter of law to hold that the husband was carrying on a trade or business of dealing in securities and futures? In my opinion, the Board was not bound as a matter of law to conclude that he was. Like their Lordships, I think that, on the facts found, in so far as they can be ascertained from the Case Stated, it was reasonably open to the Board to find that the husband's dealings were not so systematic and organised that they amounted to the carrying on of a trade or business. No doubt the husband's dealings went well beyond trading in shares for enjoyment, amusement or pastime. His dealings certainly went beyond that of many persons who find pleasure and occasional profit in trading in shares. Nevertheless, because of the absence of any findings as to what system or method he used, it was open to the Board to find that his undoubted profit-making intention and the very large volume and value of his share trades, when examined in the light of the other facts that the Board must be taken to have found, did not make his buying and selling of shares a trade or business.

The Case Stated

45. Some of the difficulties that arise in determining the appeal lie in the failure of the Case Stated to declare precisely the ultimate facts found by the Board and to state with particularity the facts found by the Board, in so far as they can be ascertained from the Case Stated. It may well be the case that the lack of particularity arises from the failure of the taxpayers to tender evidence describing in detail, rather than in generalities, the husband's dealings in securities. If that is so, no criticism can be levelled at the lack of detail in the Case Stated. What is open to legitimate criticism, however, is the failure of the Case to state the facts that Board did find. A Case Stated should set out each fact found, in so far as it is relevant to, and necessary for, the determination of the question or questions stated. That is to say, it should set out "the facts which, if the law is applied to them, will decide the matter of the appeal": *The Queen v. Rigby* (1956) 100 CLR 146 at 152. The principles regulating the contents of cases stated were authoritatively expounded in a passage in the unanimous judgment of the High Court of Australia (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ) in *The Queen v. Rigby* (1956) 100 CLR 146 at 150-151. It is a long passage, but the

application of the principles it contains is relevant in the present appeal and the passage is important enough to justify setting out in full. The Court said :

> "Upon a case stated the court cannot determine questions of fact and it cannot draw inferences of fact from what is stated in the case. Its authority is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of parties. The question may be one of the relevance of evidence and then the nature of the evidence becomes in a sense an ultimate fact for the purpose of that question. But that is not a common case. … The general rule is clearly stated by Isaacs J. in the three following passages: ' It cannot be too clearly understood that on a "case stated" the facts stated are to be taken as the ultimate facts for whatever purpose the case is stated. The Court is not at liberty to draw inferences unless the power is, by express words or by necessary implication, specially conferred by some enactment' … ' Unless care is taken to distinguish between "inference" and "implication", confusion is likely to occur. An implication is included in what is expressed: an implication of fact in a case stated is something which the Court stating the case must, on a proper interpretation of the facts stated, be understood to have meant by what is actually said, though not so stated in express terms. But an inference is something additional to the statements. It may or may not reasonably follow from them: but even if no other conclusion is reasonable, the conclusion itself is an independent fact; it is the ultimate fact, the statements upon which it rests however weak or strong being the evidentiary or subsidiary facts' … ' It has been authoritatively decided by this Court in several cases that no inferences of fact can be drawn by the Supreme Court or this Court in such circumstances … *In the absence of explicit statement of facts, including inferences, the Court engaged in dealing with the case stated may perhaps gather the necessary facts from the construction of the case itself as stated, in the way expounded by Lord Atkinson in Usher' s Wiltshire Brewery Ltd v. Bruce…' "* (citations other than the reference to *Usher' s Wiltshire Brewery Ltd* omitted) (emphasis added).

46. The passage that I have italicised has relevance to the present appeal, as I will later indicate. In *Usher' s Wiltshire Brewery Ltd v. Bruce* [1915] AC 433 at 449-450, Lord Atkinson said :

> "It is for a Court of law to construe these several paragraphs [of the Case] as written documents, just as the Courts of law often have to construe the answers (in writing) of juries to questions put to them by the judge presiding at a trial, or as such Courts have to construe a correspondence between parties litigant to determine whether their letters in the aggregate contain a concluded contract in writing.

> In doing this the tribunal of law does not usurp the jurisdiction of the tribunal of fact, and from the facts found by the latter draw a further inference of fact. It merely discharges its proper and exclusive function of construing written documents. What, then, do those paragraphs disclose?"

47. Unfortunately, the present Case does not comply with the fundamental requirements for stating a Case, as explained in *Rigby*. The terms of the Case are in striking contrast to the Case stated by the Board in *Commissioner of Inland Revenue v. Dr Chang Liang-Jen* (1977) 1 HKTC 975 where the Board set out the facts that it found in considerable detail and then set out its reasons for holding that Dr Chang was not carrying on a trade or business.

48. The Case Stated in this appeal consists of four paragraphs. Paragraph 1 recites that the Board had heard an appeal brought by the appellants. Paragraph 2 sets out the Board's decision which consisted of 40 paragraphs. The first 16 paragraphs of the reasons recite the claim of the taxpayers, the background to the claim, the issue, the relevant statutory provisions, the cases cited by the parties and the legal principles applicable to the appeal. Paragraphs 17 – 26 of the reasons under the heading "The evidence" set out various aspects of the evidence. Paragraphs 27 and 28 of the reasons set out the respective cases of the parties. The remaining paragraphs of the reasons were headed "Our decision" and set out the Board's reasons for rejecting the claim. Paragraph 3 of the Case recites that the appellants had applied to the Board to state a Case on questions of law, and para.4 states two questions of law for the opinion of the Court of First Instance.

49. Nowhere in the reasons for decision did the Case expressly state the facts that the Board found although certain statements of the Board plainly imply factual findings. However, other statements do not make it clear whether the Board accepted evidence of matters relied on by the taxpayers or whether it was merely reciting them for the purpose of declaring that they did not assist the taxpayers whether or not they were true. An example is the statement : "We are not impressed by the strategy he *claimed* to adopt for the purpose of trade. His strategy of not cutting loss and not setting a cap on his stake lacks professionalism and is unconventional to a true trader." (my emphasis) Because this Court can only decide the questions stated on the facts set out in the Case, the Board's failure to state whether the husband did in fact have the claimed strategy means that this Court cannot take that strategy into account in determining the question of law stated.

50. Furthermore, the Case does not say what the strategy was. In determining whether or not a person is carrying on a business, the carrying out of a plan or strategy with the object of maximising profit is a factor that points strongly to the relevant activities being a business. It is possible, but inherently unlikely, that the only strategy that the husband had was not to cut his losses and not to set a cap on his stake. But it seems far more likely that what the Board meant by these statements was that the overall strategy of the husband (whatever it was) was unprofessional in that it did not extend to cutting losses and setting caps on his stake. In the result, the failure of the Case

to state whether the Board accepted that the husband had a strategy and what it was deprives this Court of the opportunity to evaluate an important indicator of business activity.

51. One aspect of the Case, however, is clear. The Board's reasons show that it found that the husband and his secretary were dishonest witnesses. Furthermore, in different parts of its reasons, the Board expressly rejected explanations that the husband gave for doing or not doing certain things. These adverse findings concerning the credibility of the husband and his secretary mean that this Court must take special care in determining whether, upon the proper construction of the Case, the recitation of a fact or evidence constitutes a fact found or implied by the Board. Inevitably, it makes the task of this Court harder than it would be if the Case had stated "the facts which, if the law is applied to them, will decide the matter of the appeal".

52. In the absence of legislation or rules of court or a direction of the tribunal of fact to the contrary, the responsibility for preparing a Case Stated lies on the party requiring the Case to be stated. The Case should be prepared in accordance with the principles to which I have referred. As a matter of practice, it should be served on the other party or parties before being submitted to the tribunal of fact. It is, of course, for the tribunal to determine whether it will accept or amend or reject the applicant's draft. If either party is dissatisfied with the form of the Case, that party has its remedies as the judgment of Mr Justice Bokhary PJ and Mr Justice Chan PJ shows. In an extreme case, where a tribunal of fact refuses to state a Case, those remedies include an order in the nature of mandamus.

The indicia of carrying on a trade or an adventure in the nature of trade

53. The argument for the taxpayers put its emphasis on the case being one concerned with the carrying on a trade. However, the taxpayers also contended that the husband's activities constituted the carrying on of a business. As will appear, I think the case concerns the carrying on of a business rather than a trade. But first it is necessary to deal with the taxpayers' contention that the husband's losses from share trading occurred in the course of carrying on trade or an adventure in the nature of trade.

54. The Inland Revenue Ordinance, Cap.112, defines "trade" to "include every trade and manufacture, and every adventure and concern in the nature of trade": s.2(1). This definition, although not quite circular, is of no practical assistance. Its meaning can only be deduced from the case law. In *Kowloon Stock Exchange Ltd v. Commissioner of Inland Revenue* [1985] 2 HKC 461, Lord Brightman described the term "trade" without attempting to define it when he said (at 468) :

> "The word 'trade' is no doubt capable of bearing a variety of meanings according to the context in which it is used. In its most restricted sense it means the buying and selling of goods; in a slightly wider sense, it includes the buying and selling of land; there is no reason to exclude, in an appropriate context, the buying and selling of

> choses in action. It is commonly used ' … to denote operations of a commercial character by which the trade provides to customers for reward some kind of goods or services' : *Ransom v. Higgs* [1974] 1 WLR 1594 at 1600."

55. This description of the term "trade" suggests that it is not the most appropriate term to describe the activities of a person who buys and then sells shares. Buying and selling shares for immediate profit may constitute trade in the narrow sense of the term. In ordinary speech, however, a person who continuously buys and sells shares for immediate profit is more naturally regarded as carrying on a profession or business rather than engaging in trade. But, appropriate or not, the question here is whether, as a matter of law, the husband' s activities did constitute the carrying on of a trade.

56. No principle of law defines trade. Its application requires the tribunal of fact to make a value judgment after examining all the circumstances involved in the activities claimed to be a trade. As Jessel MR said of the term "trade" in *Erichsen v. Last* (1881) 8 QBD 414 at 416 :

> "There is not, I think, any principle of law which lays down what carrying on trade is. There are a multitude of things which together make up the carrying on of trade."

57. In *Simmons v. Inland Revenue Commissioners* [1980] 2 All ER 798 at 800, however, Lord Wilberforce said :

> "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."

58. The taxpayers relied strongly on this passage. What was necessary, they contended, was to determine whether the husband intended when he bought shares to dispose of them at a profit rather than seeking to hold them as permanent investments. On that test, the only rational conclusion was that the husband was intending to trade and his profits and losses were subject to the tax regime.

59. The intention to trade to which Lord Wilberforce referred is not subjective but objective: *Iswera v. Commissioner of Inland Revenue* [1965] 1 WLR 663 at 668. It is inferred from all the circumstances of the case, as Mortimer J pointed out in *All Best Wishes Ltd v. Commissioner of Inland Revenue* (1992) 3 HKTC 750 at 771. A distinction has to be drawn between the case where the taxpayer concedes that he or she had the intention to resell for profit

when the asset or commodity was acquired and the case where the taxpayer asserts that no such intention existed. If the taxpayer concedes the intention in a case where the taxing authority claims that a profit is assessable to tax, the concession is generally but not always decisive of intention: *Inland Revenue Commissioners v. Reinhold* (1953) 34 TC 389. However, in cases where the taxpayer is claiming that a loss is an allowable deduction because he or she had an intention to resell for profit or where the taxpayer has made a profit but denies an intention to resell at the date of acquisition, the tribunal of fact determines the intention issue objectively by examining all the circumstances of the case. It examines the circumstances to see whether the "badges of trade" are or are not present. In substance, it is "the badges of trade" that are the criteria for determining what Lord Wilberforce called "an operation of trade".

60. What then are the "badges of trade" that indicate an intention to trade or, perhaps more correctly, the carrying on of a trade? An examination of the many cases on the subject indicates that, for most cases, they are whether the taxpayer :

1. has frequently engaged in similar transactions?

2. has held the asset or commodity for a lengthy period?

3. has acquired an asset or commodity that is normally the subject of trading rather than investment?

4. has bought large quantities or numbers of the commodity or asset?

5. has sold the commodity or asset for reasons that would not exist if the taxpayer had an intention to resell at the time of acquisition?

6. has sought to add re-sale value to the asset by additions or repair?

7. has expended time, money or effort in selling the asset or commodity that goes beyond what might be expected of a non-trader seeking to sell an asset of that class?

8. has conceded an actual intention to resell at a profit when the asset or commodity was acquired?

9. has purchased the asset or commodity for personal use or pleasure or for income?

61. In some cases, the source of finance for the purchase may also be a badge of trade, particularly where the asset or commodity is sold shortly after purchase. But borrowing to acquire an asset or commodity is usually a neutral factor.

62. One well-known judicial attempt to expound what are the relevant "badges of trade" is found in the judgment of Browne-Wilkinson VC in *Marson v. Morton* [1986] 1 WLR 1343 at 1348 – 1349, upon which the taxpayers relied. His Lordship said the "badges of trade" were :

1. Whether the transaction was a one-off transaction?

2. Whether the transaction related to the trade which the taxpayer otherwise carried on?

3. Whether the transaction concerned a commodity which was normally the subject of trade?

4. Whether the transaction was carried through was typical of the trade in that commodity?

5. Whether the source of finance for the transaction was borrowed money?

6. Whether the interest purchased was resold as it stood or whether work was done on it for the purpose of resale?

7. Whether the item purchased was broken down into saleable lots?

8. Whether the purchaser intended to resell at the time of purchase?

9. Whether the item was purchased to provide enjoyment or to produce income pending resale?

63. If the "badges of trade" criteria are applied to the buying and selling of shares, it is difficult to see why almost any purchase of shares, except those purchased for investment, is not made in carrying on a trade or, alternatively, is not an adventure or concern in the nature of trade. Such a purchase is almost invariably made with an actual intention of reselling at a profit, is usually held for a comparatively short period, is usually one of a series of transactions of buying and selling over a short period and is a subject matter that is the basis of a recognised form of commercial activity. It is difficult to see any difference in the application of the "badges of trades" criteria to the person who buys 10 lots of shares with the intention of re-selling them at a profit and the person who buys 10 houses or cars with the intention of re-selling them at a profit and with no intention of using them. The circumstances would need to be exceptional before profits made by the latter person were not assessable to tax. Yet the accepted view in Hong Kong is that an intention to resell shares for profit at the date of acquisition does not make the acquisition subject to the tax regime. It is the view of the Commissioner in this very case, and it is the view of the Board of Review in cases generally. In *Case D111/97* (1998) 13 IRBRD 20 at 29, the Board asked itself :

> "Does the intention of the taxpayer at the time of acquisition of shares determine whether he is trading? If the property purchased was landed property, the well-established principle is that does: see *Simmons v. Inland Revenue Commissioners* [1980] 1 WLR 1196. However, it does not seem to be so where the property acquired is a financial instrument such as quoted shares or Hang Seng index futures contracts."

64. The Board expressed similar views in *D74/00* (2000) 15 IRBRD 670 and went so far as to say (at 684) that the principles in *Simmons v. Inland Revenue Commissioners* "are only applicable to a case where the property acquired is a landed property. In a case of shares, instead of looking only at the intention of the taxpayer, we must also consider all relevant facts and ask the question whether the taxpayer was in fact carrying on a trade or business."

65. Why then have taxation authorities and tribunals of fact shown such reluctance to find that the profits and losses of those who buy shares, other than for investment, are not within the tax regime? The answer, I think, must be that, consciously or unconsciously, taxation authorities and tribunals see the buying of shares, other than for investment or as an incident in the carrying on of a business of share trading, as a gamble or akin to a gamble. The unexpressed assumption may be that the price of shares – even so called "blue chip" shares – can fluctuate so greatly during the course of a year that buying and selling shares, for most people, is only a step or two away from wagering in the casino. Indeed, in *Lewis Emanuel & Son Ltd v. White* (1965) 42 TC 369 at 377 in considering whether the buying and selling of shares was an allowable deduction for income tax purposes, Pennycuick J said that "[f]or want of a better phrase, I will describe this class of activities as gambling transactions."

66. Traditionally, gambling is not seen as carrying on a trade: *Graham v. Green* (1925) 9 TC 309 at 314. Hence, the taxation regime is attracted only when the taxpayer's course of share trading is so organised, systematic and habitual that it answers the description of "carrying on a business" or is carried out by persons who own or are employed in or are closely associated with enterprises that are involved in share trading or broking or similar enterprises. Significantly, in the leading case of *Commissioner of Inland Revenue v. Dr Chang Liang-Jen* (1977) 1 HKTC 975, the Board of Review found (at 987) that the profits of the taxpayer derived from the sale of shares "did not arise out of the carrying on or carrying out of a business" rather than they did not arise out of carrying on a trade.

67. It follows then that the present appeal is best decided by determining whether, as a matter of law, the activities of the husband, in so far as the Board of Review accepted them as fact, constituted the carrying on a business which in any event is a wider term than trade.

The indicia of carrying on a business

68. Section 2(1) of the Inland Revenue Ordinance contains an inclusive definition of "business", but it is of no assistance in the present appeal. Long standing authority supports the proposition that business is a wider term than trade: *Doe d Wetherell v. Bird* (1834) 2 Ad & E 161 at 166. In *American Leaf Blending Co. Sdn Bhd v. Director-General of Inland Revenue (Malaysia)* [1979] AC 676 at 684, Lord Diplock said that "'[b]usiness' is a wider concept than 'trade'". Similarly, in *Rangatira Ltd v. Commissioner of Inland Revenue* [1997] STC 47, the Judicial Committee of the Privy Council said "that whereas in the United Kingdom legislation the operative word in the charging provisions is 'trade', the law of New Zealand, and for that matter the law of Australia, uses the broader word 'business'".

69. What then is the definition or ordinary meaning of "business"? The answer is that there is no definition or ordinary meaning that can be universally applied. Nevertheless, ever since *Smith v. Anderson* (1880) 15 Ch D 247, common law courts have never doubted that the expression "carrying on" implies a repetition of acts and that, in the expression "carrying on a business", the series of acts must be such that they constitute a business: *Smith v. Anderson* (1880) 15 Ch D 247 at 277 – 278 per Brett LJ. Much assistance in this context is also gained from the statement of Richardson J in *Calkin v. Commissioner of Inland Revenue* [1984] 1 NZLR 440 at 446 where he said "that underlying … the term 'business' itself when used in the context of a taxation statute, is the fundamental notion of the exercise of an activity in an organised and coherent way and one which is directed to an end result". In *Rangatira Ltd v. Commissioner of Inland Revenue* [1997] STC 47, the Judicial Committee said that it found these words of Richardson J "of assistance".

70. Ordinarily, a series of acts will not constitute a business unless they are continuous and repetitive and done for the purpose of making a gain or profit: *Hope v. Bathurst City Council* (1980) 144 CLR 1 at 8 – 9 per Mason J; *Ferguson v. Federal Commissioner of Taxation* (1979) 79 ATC 4261 at 4264. However, as Lord Diplock pointed out in *American Leaf Blending Co. Sdn Bhd v. Director-General of Inland Revenue (Malaysia)* [1979] AC 676 at 684 "depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between". Exceptionally, a business may exist although the shareholders or members cannot obtain any gain or profit from the activities of the business: *Inland Revenue Commissioners v. Incorporated Council of Law Reporting* (1888) 22 QBD 279 (law reporting body prohibited by its constitution from dividing profits among members). It may exist even though the object of the activities is to make a loss: *c.f. Griffiths v. JP Harrison (Watford) Ltd* [1963] AC 1 (dividend stripping operation). And a corporation, firm or business may carry on business in a particular country even though its profits are earned in another country: *South India Shipping Corp Ltd v. Export-Import Bank of Korea* [1985] 2 All ER 219.

71. While engaging in activities with a view to profit making is an important indicator, and in some cases an essential characteristic, of a business, a profit making purpose does not conclude the question whether the activities constitute a business. Whether or not they do depends on a careful analysis of all the circumstances surrounding the activities. Some may indicate the existence

of a business; some may indicate that no business exists. Ultimately, the issue is one of fact and degree. But, as *Edwards v. Bairstow* [1956] AC 14, *Hope v. Bathurst City Council* (1980) 144 CLR 1 and *Lewis Emanuel & Son Ltd v. White* (1965) 42 TC 369 show, the issue becomes one of law and not fact where the only reasonable conclusion to be drawn from the facts found or admitted is that the activities in question did or did not constitute the carrying on of a business. In such a case, an appellate court, although debarred from finding facts, may reverse the finding of the tribunal of fact and hold that a business was or was not being carried on.

72. Seldom is it difficult to determine whether an incorporated body or partnership is carrying on a business – at all events when the relevant activities of that body or partnership are carried on with the object of making gains or profits. Nor is it often difficult to determine whether an individual is carrying on a business when that person is engaged full time in activities that are normally regarded as a business rather than a pastime or hobby. But questions of great difficulty often arise when individuals pursue activities that are normally regarded as a recreation, hobby or entertainment and do so in the certainty, hope or expectation of making gains or profits. Most sporting activities, recreational games and gambling activities fall into this category. The activities of a football or tennis player, a chess master or a bridge player, a photographer or a horse or dog bettor may each constitute a business although similar activities carried out by millions of others are no more than a pastime, hobby or recreation. To determine on which side of the line, the activities of a particular individual fall is often a difficult question.

73. Even more difficult to determine are those cases where, on a casual, temporary or part time basis, individuals pursue activities that, as a matter of common experience, are normally regarded as constituting a business, trade or profession. The difficulty of determining whether such individuals are carrying on a business is increased when, as is often the case, they do so with the hope or expectation of gain or profit. Share trading is an activity that falls into this difficult class. As the Board of Review pointed out in *Commissioner of Inland Revenue v. Dr Chang Liang-Jen* (1977) 1 HKTC 975 at 984-985 :

> "The difficulty that arises in the case of purchases and sales in the Stock Exchange and whether such transactions constitute a business or adventure in the nature of trade stems from the recognition that in the post-war years of the world today it is common to find persons in every walk of life employing money surplus to their needs or a part of it in the purchase of quoted shares. In so doing, the primary consideration of an investor is not necessarily related to the dividend or income yield but the preservation and growth of his capital in this day and age where inflation is constantly on the rise. As the financial health of companies may vary from time to time according to economic needs or prevailing situations, a shrewd investor may consider switching investments which he thinks will give him more security or bring him a better return either in dividend or in growth. Changes in share investments or realisation of stock securities are, therefore, features which one can expect not only in the case of a trader but also in that of an investor."

74. The difficulties of determining whether the buying and selling of shares is assessable to tax arises not only from the need to distinguish between investments and trading but also between those who carry on share trading as a business and those who do not. Investors are concerned with buying shares for their dividends and long term growth. They tend to hold shares for lengthy periods, selling only for the purpose of investing in another company with better prospects, for financial need or because of changes in the circumstances of the company in which they have invested. Depending on the statutory regime of particular jurisdictions, their dividends will be taxed as income but their profits on the sale of shares will not be taxed as income although they may be the subject of a capital gains tax. In contrast, share traders – those who buy and sell with the intention of re-selling for profit – invariably hold for short periods, ordinarily for less than a year. In the absence of a capital gains tax, their profits or losses on the sale of shares are taxable only when share trading is their business.

75. The buying and selling of shares is a worldwide, multi-trillion dollar business, and the activities of many individuals who participate in it undoubtedly constitute the carrying on of a business. Certainly, in terms of the volume and value of shares traded, those carrying on a business of buying and selling shares account for the great majority of shares traded. Yet, in addition to these professional persons and businesses, throughout the world of stock exchanges and over-the-counter-trading can be found millions of individuals who trade in shares and who could not by any stretch of the imagination be regarded as carrying on a business of share trading. The difficult question, which must be answered in this appeal, is what are the circumstances that indicate that a person who buys and sells shares is in one category rather than the other?

The indicia of a share trading business

76. In a variety of contexts, common law courts have formulated factors that assist in determining whether the activities of an individual constitute the carrying on of a business. By reason of the terms of statute law in other jurisdictions, unsurprisingly this Court was not referred to cases outside Hong Kong and the United Kingdom where a court had to decide whether a share trader was carrying on a business. In other jurisdictions, the question whether the profits made from share trading are assessable to tax does not always depend on whether the trader is carrying on a trade or business; an intention to make a profit or to engage in a profit making scheme may suffice. Counsel for the appellants, however, did refer the Court to Hong Kong and United Kingdom cases where the issue was whether a person who bought and sold shares was carrying on a trade or business, and I have looked at several more. To these cases, I now turn.

77. In the forefront of the cases to which counsel referred the Court was the leading case of *Commissioner of Inland Revenue v. Dr Chang Liang-Jen* (1977) 1 HKTC 975. Counsel for the appellants referred to this case, not to rely on it but to distinguish it. This was a decision of Mr B. Liu, QC, sitting as a Commissioner of the High Court on a Case Stated by the Board of Review which had found (at 987) that the profits of the taxpayer derived from the sale of shares "did not

arise out of the carrying on or carrying out of a business". Mr Liu dismissed the appeal of the Commissioner of Inland Revenue saying (at 1010) that he could not say "that on the facts admitted or proved there was no evidence upon which the Board could reasonably arrive at its decision".

78. In *Chang*, the taxpayer had purchased shares in numerous companies over a seven-year period, had expended large sums of money in acquiring the shares, had frequently sold shares during this period and had made substantial profits in all but one of those years. The Commissioner of Inland Revenue had relied (at 983 – 984) on five factors to support the conclusion that the taxpayer was conducting a separate business of dealing in securities. They were (983 – 984) :

1. The taxpayer kept himself fully informed at all times of the stock market position in Hong Kong.

2. The taxpayer was a qualified economist, the decision to buy and sell shares was his own and he had a particular knowledge of the textile industry and had made use of this knowledge on the stock exchange.

3. The taxpayer's share dealing was conducted from an office where his share transaction records were kept.

4. The taxpayer's dealing in the stock market was extensive and the pattern of his transactions showed that he had not sought security of investment and dividend returns but an early profit from the sale of shares purchased on a rising market.

5. The salary which the taxpayer received from his company was small and the greater part of his income came from profits made through the sale of shares and not from dividends.

79. The Board saw its task (at 986) as determining whether the taxpayer "had engaged himself in the scheme of profit-making by 'playing' the stock market as one would expect of a dealer in shares as opposed to that of an investor".

80. The Board accepted evidence from the taxpayer that all the shares purchased by him were for investment purposes, that such shares, when sold by him were sold either for a reinvestment purchase or a realisation of his investments to provide income to meet his financial commitments in Hong Kong and overseas. The Board also accepted that he was in full-time occupation as a manager of company concerned with the import and re-export of textile machinery and spare parts, that he had no commercial organisation and adopted no commercial methods in engaging in the share transactions, that he incurred no expenses chargeable against his profits as deductions, that he did not borrow or pay any interest for the purchase of his Hong Kong shares, and that, although his shareholdings were substantial, he had caused all shares to be registered in his

own name which the Board thought was indicative of an intention to hold the shares as an investment. Upon these facts, the Board found that the taxpayer had purchased his shares as an investment and was not a trader in shares. The Board thought that the conclusion to be derived from these facts was not undermined by the fact that the taxpayer had also purchased American and Japanese shares on margin and had disposed of them within a comparatively short time after he had purchased them. The Board accepted his explanation that the reason for the sales arose from his feeling uncomfortable over the sensitivity of the market in respect of one purchase and the volatility of another two purchases.

81. In *Case No.52/87* (1987) 2 IRBRD 461, the Board of Review held that the profits made by the appellant from share dealings were chargeable as profits tax. The appellant was a medical practitioner, had numerous shareholdings totalling over many millions of dollars, had nominee accounts with banks and bank overdrafts secured by shares in respect of one company, had a substantial shareholding and had been a non-executive director and deputy chairman of that company. For seven years, his accountants had treated the relevant shares as stock-in-trade. The Board gave five reasons for holding that the appellant had not discharged the burden of showing that the assessment of profits tax was excessive or wrong. They were: (1) the appellant had borrowed heavily from banks to finance share purchases in Hong Kong and abroad; (2) and (3) various shares were kept in the names of various bank nominees and deposited with banks as securities against large overdrafts; (4) shares in a particular company had been characterised as Short-Term Dealing shares by a firm of Chartered Accountants and a solicitors firm who had offered the profits for assessment; (5) in respect of some shares, there was "really very scanty information as to the circumstances of acquisition except that we do know they formed part of *the general pattern of operating extensively on overdraft secured by shares*." (emphasis in original). The Board thought that these factors were not outweighed by the appellant's busy professional commitments, his pastimes, his position as a director of one of the companies and in the community in general, his non-dependence on share profits for his living, his lack of qualifications relating to shares and share dealings and his failure to keep proper books and the facts that he had no commercial organisation relating to his share investments, did not conduct a margin account with a broker and that he eventually put the whole of the unsold balance of his portfolio into a family trust.

82. However, the decision in *Case No.52/87* is fact specific and does not lay down any general principles or general factors for determining whether a person is carrying on the business of share trading. The decision was undoubtedly much influenced by the fact that for many years the taxpayer had treated the shares as stock-in-trade and not as an investment.

83. In *Case D111/97* (1998) 13 IRBRD 20, the Board held that the loss on the purchase of shares had not been incurred in carrying on a trade or business of the sale and purchase of shares. The Board relied on the facts that there was no history of trading in shares, that the purchases took place over a short period of time, that there was no evidence of any system or organisation in the share transactions, that the taxpayer did not hire any salaried staff and that common sense

suggested that the few purchases that were made did not require any administrative or organisation work. The Board stated (at 29) that the case law established "the following propositions" :

> "(1) The question of whether or not the taxpayer was carrying on a trade or business when dealing in shares is a matter of fact and degree to be decided in all the circumstances of the case.
>
> (2) A person can buy and sell shares on the stock market without starting the business of share trading. Private individuals would rarely be considered as carrying on a business of trading in shares unless there were other associated activities. Thus, the prima facie presumption is that an individual is not trading or carrying on a business merely by buying and selling shares in the stock market.
>
> (3) Though it is not essential that a person carrying on a business or trade must have an office and staff and organisation, where none of these attributes exists, there must be other clear evidence of carrying on a trade or business."

84. These propositions are helpful but they throw little light on the indicia that point to the carrying on a business.

85. In *Case D74/00* (2000) 15 IRBRD 670, the Board held that the losses of the taxpayer were not incurred in the course of carrying on the trade or business of share dealing for the year of assessment 1997/98 despite having applied to register a business in May 1998 which she described as "dealing in shares and futures". The evidence established that there had been a total of 260 transactions for the year of assessment and 60 transactions in the previous year, that the shares were bought with the intention of selling them at a quick profit and that they were financed through a margin account and funds borrowed from her employer. The Board said (682) that "whether an individual engaged in speculative dealings in securities is carrying on trade or not, the prima facie presumption is that he is not" and that to constitute the carrying on of a trade or business "there has to be a habitual and systematic course of dealing". The Board concluded (at 684) :

> "In the present case, the Taxpayer is a company director, engaged in business activities unrelated to shares and securities. She has no particular expertise, knowledge or ability in share dealings. She purchased 'hot' shares introduced by friends and share dealers. She admitted that she purchased them on speculative basis, aiming at a largest profit within the shortest period of time and that she did not take hedge or other protective measures to minimise risks … It is evident from these facts that the Taxpayer's dealings in shares were purely speculative and without a system of operation."

86. *Case D74/00* shows the difficulties in establishing that a taxpayer carries on the business of share dealing where the taxpayer has no systematic course of dealing, no direct connection with a share trading or similar business and no particular expertise, knowledge or ability in respect of the buying or selling of shares.

87. None of the United Kingdom cases to which the Court was referred take the matter any further.

88. The above cases point to various factors that indicate that a person was not carrying on a trade or business of share dealing, but they provide little assistance as to the factors that indicate that such a business was being carried on. However, some assistance in the present context can be found in a number of Australian and New Zealand cases where courts and Taxation Boards of Review have had to consider whether the activities of persons betting on horses constitute a business for the purposes of Australian income-tax law. The gambling element of share trading to which Pennycuick J referred in *Lewis Emanuel & Son Ltd v. White* (1965) 42 TC 369 at 377 is also of course present in betting activities.

89. Australian courts and Boards of Review have not accepted the opinion of Rowlatt J in *Graham v. Green* (1925) 9 TC 309 at 314 that a bettor cannot "organise his efforts in the same way a bookmaker organises his". They have taken the view that it depends on the circumstances. New Zealand cases also support the view that a bettor can organise his affairs so as to carry on the business of betting: *Commissioner of Taxes v. McFarlane* (1952) 71 NZLR 349 at 383; *Duggan v. Commissioner of Inland Revenue (NZ)* (1973) ATC 6001. And shortly after *Graham v. Green* was decided by Rowlatt J, Warrington LJ and Atkin LJ reserved for consideration when it arose whether money derived from betting transactions might be a profit assessable to taxation: *Cooper v. Stubbs* [1925] 2 KB 753 at 769, 776.

90. In principle, the factors that determine whether betting is a business seem applicable in determining whether share trading is a business. *Mutatis mutandis*, the factors formulated in the Australian betting cases would seem helpful in determining whether a person has conducted the business of share trading. The financial outcome of both betting and share trading is affected by chance to a greater extent than is the case of traditional businesses such a manufacturing, retailing, banking or money lending enterprises. However, the chances of a successful outcome in both betting and share trading is enhanced when those who engage in these activities do so in an organised and systematic way that reduces the risks of loss that is inherent in betting or share trading by reason of the element of chance. By betting or trading only when their research and systems indicate that the odds are in their favour, savvy bettors and share traders can profit where others lose. Like insurers who set their premiums at a level that statistical analysis and probability theory indicate will compensate for the losses that will inevitably arise on the happening of the insured events in particular classes of business, business-minded bettors and share traders invoke systems that, as a matter of probability, will result in the gains from their successful outcomes outweighing the losses from their losing outcomes. Betting and share trading also share the phenomenon of

bettors and traders who range from the naï ve or inexperienced individual acting on hunches, tips or gossip or even professional advice to the highly organised individuals with access to massive amounts of racing form or financial and market data which they exploit with the aid of computer power that invokes advanced statistical theories and mathematical algorithms. Hence both these fields of activity must distinguish the participants who carry on a business from those who do not.

91. In 1958, Mr C.V. Cullinan, a distinguished Australian taxation lawyer, accurately summed up the case law on betting to that time in an article entitled "Are Those Betting Wins Taxable?". He wrote (1958) 32 ALJ 47 at 50 :

> "Consideration of the cases suggests that an important question to be determined is whether the taxpayer has engaged in punting predominantly as a recreation or hobby, albeit in the hope of profit or predominantly for the purpose of money-making. The court will often find the answer to this question by testing objectively the manner in which the taxpayer has engaged in his punting. Did he organise his activities along business lines? In this connection, important matters are:
>
> 1. The time he devoted to his betting.
> 2. Whether he employed others.
> 3. Whether he set aside capital for investment in the alleged business.
> 4. Whether books of account recording the result of the transactions were kept.
> 5. Whether a bank account was opened and used for the purpose of the betting activities.
> 6. Whether the taxpayer ' laid off' bets in an endeavour to ensure profitable results.
> 7. Whether he has any other connection with the turf.
> 8. Whether he has any other occupation or any other source of income?
>
> If the answer to these questions, or some of them, is in the affirmative, it is more likely that the Court would come to the conclusion that the taxpayer was engaged in a business of betting."

92. Since 1958, Australian courts and tribunals have decided many more cases on the topic. To Mr Cullinan' s summary of indicative factors must now be added the use of computer programs that store and analyse vast amounts of racing form, predict the finishing order of runners and calculate the chance of winning.

93. Among the factors – some of which overlap – seen as pointing to an individual carrying on a business of betting are :

> (1) the betting being so considerable, organised and systematic that it exceeds the activities of a keen follower of the turf: *Martin v. Federal Commissioner of Taxation* (1952) 90 CLR 470 at 479.

(2) applying ordinary commercial principles to the conduct of betting activities: *Woods v. Deputy Commissioner of Taxation* [1999] FCA 1589 at [35].

(3) the scale and volume of the betting and the amount of capital employed being substantial: *Trautwein v. Federal Commissioner of Taxation* (1936) 56 CLR 196 at 206 – 207; *Woods v. Deputy Commissioner of Taxation* [1999] FCA 1589 at [35].

(4) devoting a substantial amount of time, trouble and organising effort to betting: *Evans v. Commissioner of Taxation* (1989) 20 ATR 922 at 942.

(5) the magnitude and regularity of the betting transactions being great: *Hines v. Federal Commissioner of Taxation* (1952) 9 ATD 413 at 420.

(6) engaging in betting on a continuous and repetitive basis: *Woods v. Deputy Commissioner of Taxation* [1999] FCA 1589 at [35].

(7) keeping adequate records to record the bettor' s financial position from day to day and week to week: *Evans v. Commissioner of Taxation* (1989) 20 ATR 922 at 942; *Woods v. Deputy Commissioner of Taxation* [1999] FCA 1589 at [35].

(8) betting in large sums when the bettor is associated with other racing activities such as breeding and owning horses: *Trautwein v. Federal Commissioner of Taxation* (1936) 56 CLR 196 at 206.

(9) racecourse activity being the bettor' s sole source of income: *Vandenberg v. Commissioner of Taxation* (1933) 50 WN (NSW) 238 at 239.

(10) carefully selecting the races on which to bet: *Trautwein v. Federal Commissioner of Taxation* (1936) 56 CLR 196 at 206.

(11) having a fund of capital with which to bet: *Evans v. Commissioner of Taxation* (1989) 20 ATR 922 at 942.

(12) using agents to place and settle bets with bookmakers: *Trautwein v. Federal Commissioner of Taxation* (1936) 56 CLR 196 at 206.

(13) systematically conducting the betting so as to get the most favourable odds obtainable: *Prince v. Federal Commissioner of Taxation* (1959) 12 ATD 45 at 65; *Evans v. Commissioner of Taxation* (1989) 20 ATR 922 at 942.

(14) betting when closely associated with a racing business such as bookmaking, breeding, owning or training horses or being a jockey: *Vandenberg v. Commissioner of Taxation* (1933) 50 WN (NSW) 238 at 239; *Trautwein v. Federal Commissioner of Taxation* (1936) 56 CLR 196 at 206; *Evans v. Commissioner of Taxation* (1989) 20 ATR 922 at 939 – 940; *Commissioner of Taxes v. McFarlane* (1952) 71 NZLR 349 at 377.

(15) using a computer as a database to store the form of horses, to predict finishing order or to calculate the odds about particular horses winning: *Evans v. Commissioner of Taxation* (1989) 20 ATR 922 at 942.

(16) knowing race form and being skilful in assessing that form: *Evans v. Commissioner of Taxation* (1989) 20 ATR 922 at 939.

(17) obtaining inside information from trainers or jockeys concerning the fitness or chance of a horse: *Trautwein v. Federal Commissioner of Taxation* (1936) 56 CLR 196 at 206; *Vandenberg v. Commissioner of Taxation* (1933) 50 WN (NSW) 238 at 239.

None of these factors, apart from (1) which is conclusory rather than indicative, are decisive. In any particular case, they are unlikely to be present in their totality, and any such factors that are present must be weighed with any factors that tell against the betting activities constituting the carrying on of a business. Some of the above factors such as knowing race form and being skilful in assessing that form, engaging in betting on a continuous and repetitive basis and carefully selecting the races on which to bet are characteristics shared by many bettors who attend race meetings for pleasure and who could not possibly be regarded as carrying on the business of betting. Standing on their own these particular factors provide no evidence of the persons engaged in carrying on a business although, when added to other factors, they may lead to the conclusion that the bettor is conducting a business.

94. Conversely, the absence of many of these factors may be a strong indicator that the person is not carrying on the business of betting even though some factors may be present. A good illustration is *Jones v. Federal Commissioner of Taxation* (1932) 2 ATD 16 at 18 which came before Evatt J sitting in the original jurisdiction of the High Court of Australia. Jones, a grazier, had lost a considerable amount of money as a result of a great number of wagers with bookmakers and claimed that they were losses incurred in the course of carrying on a business and deductible allowances under federal tax law. His *modus operandi* had been to obtain "information" from two horse trainers, place wagers on the horses they tipped to him and share the proceeds of winning bets with them. Evatt J held that Jones was not engaged in the business of betting. His Honour said :

> "He acquired no property in connection with betting at races, he had no business premises, he had no proprietary interest in any horse, he was not a trainer of horses, he kept no books and no records of his wins or losses, he had no bank account of his own at all, let alone any business account, he never hedged in any of his betting transactions, he did not set aside or determine upon any amount of capital outlay for the purpose of 'investment' in his supposed business, he never banked his winnings, he was not a member of any recognized club associated with racing and the trades incident thereto, and the only person he employed was one man for a short time to attend Tattersalls Club and pay bookmakers upon settling day."

95. The factors held indicative of business in betting cases, the factors referred to in cases before the Board of Review and general knowledge suggest that, in addition to trading with the intention to make profits, the following factors are relevant in determining whether a person who buys and sells shares is carrying on a business :

1. engaging in regular and repetitive transactions;

2. being engaged full time or mainly full time in buying and selling shares;

3. relying on share trading as the sole or dominant source of income;

4. owning or being employed in or closely associated with a business that is involved in share trading or broking, security analysis, fund management or the provision of financial information;

5. having an office and staff to assist in researching or buying and selling shares;

6. paying for trading, financial or market data or subscribing to trade and financial journals or services that provide such data;

7. buying and selling selectively after carefully examining the history and prospects of a company or its shares;

8. setting price targets for the re-selling of particular shares;

9. using a system or method, based on or guided by statistically validated rules, that seeks to reduce the element of chance;

10. using computer programs with an automated set of rules that provide buy and sell signals, indicate how and when to trade and what numbers of shares should be bought or sold at particular times;

11. assessing the likely direction of the market or particular classes of a shares as result of geopolitical events or changes in interest rates, the balance of payments, government policies, the price of oil, gold or particular commodities or in the value of currencies;

12. using risk management strategies to manage capital and leverage and instruments such as stop-loss orders and options to protect investment in particular shares;

13. systematically re-balancing the structure of the share portfolio to reflect different weightings for various classes of shares;

14. engaging in arbitrage to exploit differences in share prices in different markets;

15. allocating capital for share dealings;

16. investing large sums;

17. having a high turnover of shares;

18. borrowing to finance purchases, particularly short term trades;

19. having access to the management of companies or obtaining private company briefings;

20. making company visits;

21. intensively researching the businesses of companies and assessing their future profitability;

22. using valuation methods such as comparable price/earnings or price/sales ratios or discounted cash flows to determine whether the market has undervalued particular shares;

23. searching for catalysts such as the possible restructuring of the business of a company, the "spin-off" of unprofitable divisions or assets or potential takeovers which may unlock hidden value and cause the price of shares to rise after purchase;

24. keeping detailed records of shares bought and sold; and

25. keeping books of account that record the results of the dealings.

96. The more of these factors that are present the greater the probability that the trader is applying commercial principles in the conduct of a business of share trading. The presence of a considerable number of these factors may indicate that the activities of the trader are so considerable, organised and systematic that they go beyond what is found in the share trading activities of ordinary share buyers – even those who buy and sell many shares frequently or in large sums – and thus amount to a business: *c.f. Martin v. Federal Commissioner of Taxation* (1952) 90 CLR 470 at 479. It is of course necessary that the system or method and organisation of the trader have a rational basis whether widely accepted or not. Buying shares in companies with the word "manufacturing" in them is no more a rational system than backing horses that wear No.7 saddlecloth. In most – may be all – cases, a rational system or method for buying and selling shares will consist of rules or guides that are statistically validated or proved by successful experience. Conversely, the absence of all or many of the above factors – particularly system and organisation – will indicate that the "trader" is "a pure speculator" to use a term of the Board of Review in the present case. That, of course, covers most persons who buy and sell shares with the intention of re-selling for profit whether they do so by acting on tips, intuition, unsophisticated judgment or even professional advice. And it is the reason that the Board of Review and the Commissioner in Hong Kong have taken the view that the profits and losses of most traders do not attract the operation of the Inland Revenue Ordinance.

97. Not all of the above factors will be present in each business of share trading. Indeed some – perhaps many – of them will be used by those who are investors and buy shares for their dividends and long term growth. Moreover, the system or method of the trader which is based on a fundamental analysis of a company's prospects and whether the market has currently undervalued the company's share price is usually very different from those of the trader who uses a system of technical analysis of moving prices and volumes to buy and sell shares. For the fundamental analyst, the important factors are the market share, sales, profit margins, consistency of earnings and profits, free cash flow, financial structure, efficient use of assets, return on invested capital (including long term debt and retained earnings) exceeding its cost and opportunity cost, barriers to entry, quality of management and long term outlook of individual companies. To the fundamental analyst, these factors may indicate that the market has currently undervalued the shares, which will inevitably rise in price when the market perceives their true value. For the technical analyst, the matters that are important to the fundamental analyst are of no importance. It is the direction of the market that matters, either generally or in respect of particular shares. Even among the technical analysts, a difference in approach exists. Traditionalists seek to *predict* the future movement of markets by reference to histories of volume and price. Trend Followers believe that the future directions of markets are impossible to predict. They wait – sometimes for weeks or months – until their trading rules or judgment tell them that a trend has set in. They will then back the trend up or down with long or short positions until their rules or judgment tell them that the trend has finished (see generally, Covel, *Trend Following* (2007) at pp 7 – 8).

The husband's share trading activities

98. As the joint judgment of Mr Justice Bokhary PJ and Mr Justice Chan PJ shows, the taxpayers claimed that, as a matter of law, the 12 factors set out at pp 12 – 13 of their judgment and the five additional matters to which they refer at p.6 established that they were carrying on the business of share trading. Each of these 17 matters is undoubtedly consistent with the carrying on of such a business. A number of them are more consistent with the carrying on of a business of share trading than not carrying it on. They include: operating from a stand-alone office, having a personal assistant to help keep proper books of accounts, working full time on his own share trading activities and those of family companies, doing a lot of preparation work and study and having discussions with dealing directors, being a majority owner of a securities broking firm during 1997 and 1998 and participating in the management decisions of that firm and attending courses to learn new skills and improve old ones. Of these factors, being a majority owner of the securities broking firm, spending full time on share trading activities and doing a lot of preparation work and study and engaging in discussions with dealing directors are very significant factors. Coupled with other factors, particularly the volume and frequency of his dealings amounting to almost HK$3 billion and 5,463 transactions in five fiscal years, they point very strongly to the carrying on of a business. However, by themselves they are not so compelling that, as a matter of law, this Court could conclude that the husband was carrying on the business of share dealing.

99. However, the material before the Board that supported the conclusion that the husband was carrying on the business of share dealing went beyond the seventeen factors to which I have referred. In para.20 of its Reasons, the Board recited evidence of the husband to the following effect :

> "In about 1995 he started dealings in Hang Seng Index Futures and Index warrants for profits and hedging purpose. His trading business included sub-sub-underwriting of rights of new issues. He was a trader because he engaged in all kinds of activities of a true trader. Before choosing a stock, he would gather and study financial news and data from various sources; review research reports; hold discussion with dealers; and carry out analysis of the economic climate and stock market trend. After choosing the stock, he would then study the background of the stock, such as its management, products, profitability, and the current and historical trading data. Also he would from time to time attend seminars on stock trading techniques organised by securities firms. He monitored his portfolio and kept records of transactions at the real-time tracking system provided by the Stock Market Channel. Every morning he checked the statements prepared by his secretary against the Stock Market Channel. He had an office to conduct his share dealings, using two direct lines to dealers, having access to various electronic data suppliers and computer terminals to obtain most up-to-date market news, prices and trading data. He engaged a secretary to assist him in keeping records of the share transactions, and preparing annual returns,

> monthly and yearly profits and loss account. He adopted certain trading strategies in his share dealings."

100. The Board made no findings concerning any of these matters. Some of the most important pieces of this evidence are not mentioned in detail in the 12 factors referred to in the Board's Reasons (para.27) as relied on by the taxpayers to support their case, and, in so far as they are referred to, they are subsumed under generalised and weak versions of the husband's evidence. The reference to the fact that he "did a lot of preparation work and study" hardly does justice to his evidence that before "choosing a stock, he would gather and study financial news and data from various sources; review research reports; hold discussion with dealers; and carry out analysis of the economic climate and stock market trend". Nor does that recorded factor do justice to his evidence that after "choosing a stock, he would then study the background of the stock, such as its management, products, profitability, and the current and historical trading data". Nor does the statement in those 12 factors that he "attended courses to learn new skills and improve old ones" do justice to his evidence that from time to time he attended "seminars on *stock trading techniques* organised by security firms" (my emphasis).

101. If the evidence referred to in para.20 of the Reasons had been accepted as constituting facts and contained in the Case Stated, I would have thought that the only reasonable conclusion was that those facts and the other facts accepted in this appeal as found by the Board established that the husband was carrying on the business of a share trader. Many of the 25 indicia of a share trading business to which I have referred were present in the husband's share dealings. It is true that the most important of those indicators was not present. The evidence did not indicate that he used a system or method, based on or guided by statistically validated rules or successful experience, that seeks to reduce the element of chance. It did not indicate that he used a computer program or a system with a set of rules that provided buy and sell signals or indicated how and when to trade and what numbers of shares should be bought or sold at particular times. But the evidence did indicate that he attended seminars on "stock trading techniques organised by securities firms". One can speculate that at these seminars he did learn techniques for timing his buying and selling and the strength of buy and sell signals and other strategies of the professional dealer. However, the Reasons of the Board provide no details concerning these important matters. Even more importantly, there are no details as to whether the husband applied the techniques that he learned in his trading or what they were, assuming he learned them. However, the evidence did indicate that he analysed the current and historical trading data, stock market trends and the soundness and prospects of companies and that he analysed the economic climate to assess the likely direction of the market. The economic climate probably included matters such as changes in interest rates, the balance of payments, governmental policies affecting the economy, the price of oil, gold and other commodities and changes in the value of currencies. The evidence also did not indicate that he used risk management strategies to manage capital and leverage or instruments such as stop-loss orders and options to protect investment in particular shares. In fact, the evidence showed that he did not use stop-loss orders.

102. Despite the absence of the above factors, if I had been the tribunal of fact in this case, I have little doubt that I would find on the whole of the evidence, if I had accepted it, that the husband carried on the business of share trading. None of the claims or explanations of the husband that the Board rejected affect this view. The Board rejected his claim that he treated the share dealings of Y. S. Tide "as one and the same". It rejected his explanation as to why he did not take out a business registration certificate in respect of his alleged business of share dealings for many years after its commencement. It did not accept his reasons "for not solely using Y. S. Tide to trade in shares". But none of these rejections affect the powerful inferences to be drawn from the positive indicators to which I h ave referred. However, the issue is whether, given the contents of the Case Stated, the only reasonable conclusion open was that the husband was carrying on the business of share trading?

103. The first difficulty in finding that, as a matter of law, the husband was carrying on such a business is that the taxpayers carried the onus of proof and the second difficulty is that the Board made no findings of fact concerning the evidence set out in para.20 of the Case or, for that matter, anywhere else. I have already mentioned the principles concerning the construction of a Case Stated to which Lord Atkinson referred in *Usher's Wiltshire Brewery Ltd v. Bruce* [1915] AC 433 at 449 – 450 and the extended scope that they can give to an appellate court to determine what the paragraphs in at Case Stated truly disclose. But even giving those principles their maximum application to the present Case Stated, I do not think that this Court has the power to treat the recital of evidence in para.20 as constituting facts. This is particularly so as the Board having outlined this evidence went on thereafter to indicate that it had grave doubts as to the overall creditability of the husband. Construing this paragraph as containing implied findings of fact is made even more difficult by reason of the Board referring in para.39 of its Reasons to "the strategy he *claimed* to adopt for the purpose of trade" (my emphasis). Because I think that para.20 cannot be construed as if it consisted of facts found by the Board, I have reluctantly concluded that the appeal must be dismissed.

104. My reluctance to reach this conclusion is not lessened by the *factual* reasoning that the Board used to reject the taxpayers' case. The critical reasons of the Board are found in para.39 where it said :

> "Though [the husband] had an office and the necessary equipments and facilities for share dealings, and a secretary to keep those records and accounts, these amenities enjoyed by him were not those of his own. He was able to use them because of his special relationship with Y. S. Tide and Kin Tak Fung. Further, [the husband's] shares and future index portfolio was perhaps substantial in monetary term, but he fails to convince us that he was truly a trader. We are not impressed by the strategy he claimed to adopt for the purpose of trade. His strategy of not cutting loss and not setting a cap on his stake lacks professionalism and is unconventional to a true trader. As to his sub-underwriting activities, according to his own explanation as to how they were carried out, they were no more than activities undertaken by a valued customer

> when he was given the first right to subscribe for new shares by his share dealers. As to [the husband's] claim of attending share related courses, reading massive materials, engaging in vast preparation work for the purpose of the share dealings, these activities are not uncommon to and no more than those carried out by, some keen and sophisticated investors of this day."

105. To argue that the amenities enjoyed by the husband were not his own misses the point. What was important was that, for the purposes of his share trading activities, he used an office, equipment and facilities and had a secretary who kept his records and accounts. That they belonged to or were paid for by somebody else did not weaken the fact that his use of them was an indicator of his claimed business of share trading.

106. Similarly, the lack of professionalism to which the Board referred does not mean that the husband was not carrying on a business of share trading. Lack of professionalism is not necessarily inconsistent with a person carrying on a trade, profession or business. The insolvencies and bankruptcies of most companies and business proprietors are the product of unprofessional or un-business like strategies, structures or policies. That does not mean that they were not carrying on businesses. Moreover, the fact that a trader's strategy does not extend to cutting losses does not necessarily mean that the trader was unprofessional. If a trader is confident of the accuracy of his or her data and predictions, refusing to cut losses and run may eventually lead to super-profits. Not many persons have profited from the sub-prime mortgage fiasco. But, according to the Wall Street Journal, one who has is Mr John Paulson whose hedge funds is alleged to have made $15 billion by betting that the prices of financial instruments dealing with house mortgages would fall. At one stage when the market was still rising, Paulson was asked whether he should not cut his losses. He replied that he would increase his bet, and subsequent events proved the validity of his judgment (Wall Street Journal, Asia, 16 January, 2008 at pp 14 – 15).

107. Furthermore, dismissing the husband's "claim of attending share related courses, reading massive materials, engaging in vast preparation work for the purpose of the share dealings" as "no more than those carried out by keen and sophisticated investors" again misses the point. The point is whether those activities were an indicator of the carrying on of a business of share trading. If by "investors" the Board was referring to non-traders, the comparison was misdirected because the issue was whether he was carrying on the business of share dealing not whether he was carrying on a business of investing. If the Board was referring to traders when it used the term "investors", it did not follow that the husband's claim was inconsistent with carrying on the business of share dealing. Nor would the fact that what the husband did was comparable to what was done by keen and sophisticated investors tell against his methods pointing to a share dealing business. Whether or not the activities of those investors amounted to the carrying on of a business did not mean that those activities were not an indicator of a share trading business.

108. Although I think the Case Stated and the reasoning of the Board have a number of unsatisfactory elements, the limited scope of an appellate court's function on a Case Stated means that this appeal must be dismissed.

Case Stated or Appeal on Question of Law?

109. The circumstances surrounding this Case Stated raise the question whether cost, efficiency and the interests of justice would not be better served by abandoning the Case Stated procedure and substituting an appeal on questions of law. The Case Stated procedure arose out of circumstances that have long gone. It is now easily overlooked that appeal was not a common law remedy: *Commissioner for Railways (NSW) v. Cavanough* (1935) 53 CLR 220 at 225. It is the product of statute. Under the common law, legal defects in the conduct of cases had to be remedied by the writ of error or the bill of exceptions or motions for a new trial or arrest of judgment (*Conway v. The Queen* (2002) 209 CLR 203 at 209; *Australian Iron and Steel Ltd v. Greenwood* (1962) 107 CLR 308 at 315 – 317) and later by the Case Stated procedure. That procedure probably had its origins in the practice of nisi prius judges referring disputed questions of law to their brethren at Westminster for informal discussion and advice: see *Conway v. The Queen* (2002) 209 CLR 203 at 209 – 210. In days when tribunals and courts seldom had access to transcripts, where there were no appeals and where lay tribunals needed advice on questions of law, the Case Stated procedure no doubt served a useful purpose. But times and circumstances change. The Case Stated procedure now seems an anachronism. Certainly, it creates delay, takes up the time of tribunals and parties and increases the expense of conducting litigation. Often enough, dissatisfaction with the contents of the Case leads to interlocutory litigation. An appeal, limited to questions of law, avoids these delays, expense and potential for interlocutory litigation. The chief downsides of an appeal, as opposed to the Case Stated procedure, are the cost of providing a transcript to the appellate court and the time that is often wasted by that court in determining what facts were found. However, these downsides are present in the appeal system generally. Despite their presence, an appeal, limited to questions of law, seems more likely to further the administration of justice than the Case Stated procedure.

Order

110. For the above reasons, I agree with the orders proposed by Mr Justice Bokhary and Mr Justice Chan.

Mr Justice Bokhary PJ :

111. The appeal is unanimously dismissed with costs so that the assessments appealed against stand and the Revenue has its costs here as well as in the courts below.

(Kemal Bokhary) Permanent Judge

(Patrick Chan) Permanent Judge

(R.A.V. Ribeiro) Permanent Judge

(Sir Noel Power) Non-Permanent Judge

(Michael McHugh) Non-Permanent Judge

Mr J J E Swaine and Mr Anthony Wu (instructed by Messrs Raymond C P Lo & Co.) for the appellants

Ms Jennifer Tsui (instructed by the Department of Justice) and Dr Dick Ho (of that Department) for the respondent