HCIA 2/2007

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE
INLAND REVENUE APPEAL NO. 2 OF 2007

BETWEEN

SHUI ON CREDIT COMPANY LIMITED	Appellant
and	
COMMISSIONER OF INLAND REVENUE	Respondent

Before: Hon Reyes J in Court
Date of Hearing: 25 February 2008
Date of Judgment: 5 March 2008

J U D G M E N T

I. INTRODUCTION

1. By this appeal the Taxpayer seeks to set aside 9 tax assessments raised by the Commissioner against profits earned in financial years 1988/89 to 1996/97.

2. Save for a minor revision, the Board of Review affirmed the assessments. It held that the Taxpayer had wrongly treated certain amounts (described in the Taxpayer's accounts as "deferred expenditure") as deductibles when such amounts were of a capital nature.

3. In the alternative, the Board applied Inland Revenue Ordinance (Cap.112)(IRO) s.61A. It found that the Taxpayer had entered into a Scheme for the sole or dominant purpose of enabling it to enjoy a tax benefit conferred by the Scheme. The Commissioner (the Board concluded) was accordingly entitled to ignore the alleged deductibles when assessing the Taxpayer to profits tax.

4. The Board has certified the following questions for my determination:-

"(1) Whether the Board was correct in holding that the Taxpayer's contention on the deferred expenditure advanced at the hearing of the appeal and summarised in paragraph 99 of the [Board's] Decision was not covered by the Grounds of Appeal and was not open to the [Taxpayer]?

(2) Whether, having regard to all the facts as found by the Board, and on the true construction of sections 14, 16 and 17 of the [IRO], the Board was correct in holding that the deferred expenditure was not deductible?

(3) If the answer to Question (2) is in the affirmative, whether the Board was correct in increasing the assessment for the year of assessment 1993/94 to show assessable profits of $84,829,978, with tax payable thereon of $14,845,246 and in confirming all the other assessments appealed against as confirmed by the [Commissioner]?

(4) Whether, having regard to all the facts as found by the Board, the Board was correct in holding in the alternative that the Taxpayer and the other participants in the Scheme entered into or carried the Scheme for the dominant purpose of enabling the Taxpayer to obtain a tax benefit?"

II. BACKGROUND

5. South Castle is a company within the Shui On Group. It is 100% owned by Shui On Properties which in turn is 100% owned by Shui On Investment. Shui On Investment is 100% held by Shui On Holdings (formerly Shui On Group Limited). At the relevant time South Castle had 3 wholly-owned subsidiaries: the Taxpayer, Centre Co. and Glorion.

6. In 1985 South Castle acquired the Shui On Centre in Wanchai with financing from HSBC. By early 1988 the group was interested in re-financing South Castle's liability to HSBC.

At the time, the Shui On Centre's units had all been leased with an annual rental income of $100 million anticipated. Some $358 million remained due to HSBC.

7. In May 1988 companies within the Shui On Group entered into the Scheme sketched out in paragraphs 8 to 13 below.

8. The following matters took place on 4 May 1988:-

(1) The Taxpayer obtained a loan facility of $600 million at a floating rate from Mitsubishi Bank.

(2) The Taxpayer instructed Mitsubishi to issue a cheque for about $358 million in the name of HSBC.

(3) The Taxpayer directed Mitsubishi to issue a cheque for the balance of the loan facility (about $242 million) in the name of Bankers Trust.

9. The following matters took place on 9 May 1988:-

(1) Centre Co. obtained a loan facility (the Centre Co. Loan) of $1,200 million from FPB Finance. The Centre Co. Loan was repayable in 8 years. Interest accrued on the facility at 9.375% per annum. The Centre Co. Loan was guaranteed by Shui On Holdings and Shui On Investment.

(2) Agnew paid $1,200 million to FPB Finance for the latter's rights and obligations under the Centre Co. Loan. Agnew assigned to the Taxpayer for $600 million all of Agnew's right to receive the interest due under the Centre Co. Loan. FPB Finance told Centre Co. to pay all interest due under the Centre Co. Loan to Agnew.

(3) By a Swap Agreement BT Asia contracted to pay a fixed rate to Centre Co. on specific dates and Centre Co. agreed to pay a floating rate amount to BT Asia on specific dates. The fixed rate amount was 9.375% per annum of $1,200 million. The floating rate amount was based on HIBOR plus a margin applied to a diminishing "notional principal" of $600 million and a "principal instalment". The floating rate payments in fact matched the principal and interest payments due from time to time on Mitsubishi's loan to the Taxpayer.

(4) By a Supplemental Swap Agreement among BT Asia, Centre Co. and the Taxpayer, it was agreed that the Taxpayer would perform all BT Asia's obligations under the Swap Agreement and Centre Co. would perform its obligations under the Swap Agreement as if the Taxpayer were BT Asia.

(5) By a Deed of Covenant Glorion agreed to pay $600 million to Bankers Trust and Bankers Trust agreed to discharge FPB Finance's obligation to account to Agnew for the principal repayment of $1,200 due from Centre Co. to FPB Finance under the Centre Co. Loan Agreement.

10. The following matters took place on 10 May 1988:-

(1) Centre Co. instructed Bankers Trust to pay the loan monies of $1,200 million receivable from FPB Finance to South Castle. This was said to be in partial satisfaction of the consideration due to South Castle for the sale of the Shui On Centre to Centre Co. At the time the Shui On Centre had a market value of about $1,310 million.

(2) South Castle instructed Bankers Trust to credit to Glorion about $600 million of the $1,200 million purchase consideration received from Centre Co. This was said to be in consideration for Glorion issuing new shares in itself to South Castle.

(3) South Castle instructed Bankers Trust to credit Agnew's account with some $358 million of the $1,200 million. This was said to be in order to reimburse Agnew for the payment by Agnew (at South Castle's request) of the outstanding loan of $358 million due from South Castle to HSBC.

(4) The Taxpayer instructed Bankers Trust to credit the Taxpayer's account with a cheque of $242 million to be delivered by Mitsubishi on 11 May 1988. Bankers Trust was then asked to credit that amount from the Taxpayer's account to that of Agnew. This was said to be in part consideration of the $600 million payable by the Taxpayer to Agnew for Agnew's right to receive the interest stream due under the Centre Co. Loan.

(5) Glorion instructed Bankers Trust to credit itself with the $600 million receivable by Glorion from South Castle for the issue of new Glorion shares. This was said to be in consideration of Bankers Trust agreeing to discharge FPB Finance's obligation to account to Agnew for the principal repayment of $1,200 million due under the Centre Co. Loan.

11. The following matters took place on 11 May 1998:-

(1) Agnew instructed the Taxpayer to pay the purchase price for the interest stream of the Centre Co. Loan by way of a cheque in the amount of about

$358 million in favour of HSBC and a transfer of about $242 to Agnew's Bankers Trust account.

(2) South Castle assigned the Shui On Centre to Centre Co.

(3) Centre Co. charged the Shui On Centre and assigned the rentals receivable from its units to Mitsubishi as security for the $600 million loan by Mitsubishi to the Taxpayer.

(4) Mitsubishi authorised the Taxpayer and Centre Co. to grant or renew tenancies in the Shui On Centre.

(5) Shui On Investment received about $242 million from South Castle in settlement of inter-company loans.

12. In 1998 Bankers Trust instructed the liquidators of FPB Finance to release Centre Co. from its obligation under the Centre Co. Loan to repay the loan principal of $1,200 million.

13. The Board found that, as part of the Scheme, there was an assignment by Agnew to Bankers Trust of the right to receive the principal repayment under the Centre Co. Loan and Bankers Trust paid Agnew $600 million for that right.

14. The Board concluded that the net result of the Scheme was that Mitsubishi's $600 million loan "ended up in South Castle". The Mitsubishi loan was in essence split into 2 funds, one in the sum of about $358 million, the other in the sum of about $242 million. The Taxpayer in effect used these funds to pay Agnew for the interest stream under the Centre Co. Loan.

15. If one ignored the flow of the Mitsubishi loan from the Taxpayer to Agnew, the Board pointed out that there was simply a circular flow of the $600 million from Agnew to FPB Finance, then to Centre Co., then to South Castle, then to Glorion, then to Bankers Trust and finally back to Agnew. The Board observed: "Every participant relied on its payer as its source of funds for payment of its payee ... and this went around in a circle". There was an "artificial flow of funds". See the diagram in Annex 1 to this Judgment copied from the Board's Decision.

16. Having purchased the interest stream of the Centre Co. Loan from Agnew for $600 million, the Taxpayer became entitled to receive an income equivalent to 9.375% per annum of $1,200 million from Centre Co. But this income receivable was cancelled out by the Taxpayer's obligation, as a result of the Swap and Supplemental Swap Agreements, to pay Centre Co. an identical amount of interest.

17. As a result of the Swap and Supplemental Swap Agreements, the Taxpayer also acquired the right to receive payments at a floating rate from Centre Co. But this income receivable

was equivalent to (and so cancelled out by) the Taxpayers' s repayments of principal and interest under the Mitsubishi loan.

18. The question before the Board was whether the Taxpayer was entitled to deduct the amortisation of the $600 million consideration paid to Agnew for the income stream of the Centre Co. Loan. It was this amortisation (together with associated legal and professional fees) that was referred to as "deferred expenditure" in the Taxpayer' s accounts.

19. Profits tax was originally assessed by an Assistant Commissioner applying s.61A.

20. On appeal by the Taxpayer, the Commissioner by her Determination upheld the assessments on 12 August 1998. The Commissioner stated:-

> "... the charging of the ' deferred expenditure' in the accounts of [the Taxpayer] is clearly part and parcel of a composite tax avoidance scheme entered into by the relevant persons to obtain a tax benefit. Thus I do not accept the claim that the deferred expenditure was incurred to produce any chargeable profits. I do not think that the conditions in section 16(1) are satisfied at all."

III. DISCUSSION

A. Question (1):-

> *Whether the Board was correct in holding that the Taxpayer' s contention on the deferred expenditure advanced at the hearing of the appeal and summarised in paragraph 99 of the [Board' s] Decision was not covered by the Grounds of Appeal and was not open to the [Taxpayer]?*

A.1. The Taxpayer' s argument before the Board

21. Paragraph 99 of the Decision reads as follows:-

> "Mr. Barrie BARLOW contended that section 61A was a charging provision; that the sections 16 and 17 point did not arise because all the assessments were expressly section 61A assessments and that it was an agreed fact (see paragraph 52 above) that the assessments were raised on the appellant under section 61A(2)."

22. IRO s.16(1) allows the deduction of expenses incurred in the production of profits chargeable to tax. But IRO s.17(1)(c) does not permit deductions of any expenditure of a capital nature.

23. Before the Board Mr. Barrie Barlow SC (appearing for the Taxpayer) submitted that, as the Taxpayer had only been assessed under IRO s.61A, the sole issue was whether s.61A had been rightly invoked. The Board could not consider (Mr. Barlow suggested) whether the deferred expenditure was deductible under s.16(1) or whether it was a non-deductible expense of a capital nature under s.17(1)(c).

24. This was because (Mr. Barlow explained) at the time of the Commissioner's Determination the 6 year time limit in IRO s.60 for additional assessment had passed in relation to 4 of the 9 relevant financial years (that is, 1988/89, 1989/90, 1990/91 and 1991/92). In these 4 cases, the Commissioner (Mr Barlow reasoned) could not use her Determination as a pretext for belatedly charging additional profits tax on some basis (such as s.17(1)(c)) other than under s.61A.

25. Mr. Barlow accepted that it remained open to the Commissioner to assess additional tax for the remaining 5 financial years. But (Mr. Barlow submitted) the Assistant Commissioner had only assessed tax based on s.61A, as opposed to making any alternative assessment applying s.17(1)(c) to disallow certain deductibles.

26. The Assistant Commissioner not having advanced any alternative to a s.61A assessment, the Board (Mr. Barlow contended) could only decide whether the s.61A assessments were valid. If they were not valid, the tax assessments under appeal (Mr. Barlow concluded) had to be nullified in their entirety. The assessments could not be upheld for any reason (such as the application of s.17(1)(c)) apart from s.61A.

27. The Board did not accept Mr. Barlow's argument.

28. The Board noted that the question whether the deferred expenditure was or was not deductible under s.16(1) had been raised by the Taxpayer itself in its first Ground of Appeal. That read: "The deferred expenditure ... for all the years concerned was incurred to produce interest income chargeable to profits tax and, therefore, is deductible under [s.16(1)]." It was consequently open to the Board to consider whether the deferred expenditure was truly deductible.

29. In contrast, the question whether the Commissioner was barred from advancing any assessment other than one based on s.61A was not mentioned in the Grounds of Appeal. Accordingly, applying IRO s.66(3), the Board held that the Taxpayer could not advance the matter without the Board's leave. This the Board refused.

30. But, in case it was wrong that the Taxpayer could not raise the matter, the Board dealt shortly with the contention.

31. The Board noted that s.61A was not a charging provision.

32. Section 61A(1) states that the provision operates where relevant persons enter into tax avoidance schemes of the nature therein described.

33. Section 61A(2) provides that, where a person enters into a tax avoidance scheme, the Inland Revenue may assess liability to tax as if the scheme had not been carried out or in some appropriate manner to counteract the benefit obtained from the scheme.

34. Section 61A(3) defines the expressions "tax benefit" and "transaction".

35. Section 61A makes no mention of a charge to tax. Instead it is merely an aid to the charging provisions found elsewhere in the IRO (for example, in the case of profits tax, in IRO s.14). Section 61A does not stand alone. Where a company' s profits are concerned, the Revenue may determine assessable profits without reference to the tax benefit conferred by a scheme. Profits assessed accordingly are then charged in accordance with s.14.

36. In the present case the assessment was raised under the charge to profits tax in s.14. The Revenue merely employed s.61A as a tool to help determine the Taxpayer' s assessable profits.

37. Citing *Mok Tsze Fung v. CIR* [1962] HKLR 258, *CIR v. The Hong Kong Bottlers Ltd.* [1970] HKLR 581 and *CIR v. D. H. Howe* [1977] HKLR 436, the Board concluded that the Commissioner could assess profits tax afresh. She was not bound by the Assistant Commissioner' s reliance on s.61A. She could (as she did) consider whether the deferred expenditure was deductible under s.16(1). The Board stated:-

> "We are bound by the authorities to hold that the duty of the [Commissioner] in considering the [Taxpayer' s] objection was to act *de novo*, and to determine afresh what should be the proper assessment. We are bound by authorities to reject Mr. Barrie BARLOW' s contention."

A.2 The Taxpayer' s argument before the Court

38. Before this Court Mr. Barlow advances essentially the same argument made to the Board.

39. Not surprisingly, he is unhappy with Question (1) as posed by the Board. He suggests that the question ought instead to have been posed as follows:-

> "As the Board have decided that the deferred expenditure is not deductible under sections 16 and 17 of the IRO, should the appealed assessments (which were expressly made under s.61A) be discharged?"

40. In the alternative, he proposes the following re-formulation of Question (1):-

> "Whether IRO s.68(8)(a) empowered the Board to confirm or increase profits tax assessments raised under s.61A(2) in the absence of any tax benefit to the Taxpayer?"

41. Mr. Barlow submits that I am not bound by Question (1) as formulated by the Board. Citing Rogers JA in *CIR v. Emerson Radio Corp.* [1999] 2 HKC 255 (CA) (at 264C), Mr. Barlow says that IRO s.69(5) and authority enables the Court "to determine a question of law which it considered arose from the case stated".

42. Insofar as the Board relied on *Mok*, *Hong Kong Bottlers* and *Howe*, Mr. Barlow submits that these judgments preceded the introduction of s.61A in 1986 and could not have been a valid basis for rejecting his contentions. In none of those 3 cases (Mr. Barlow says) had there been a tax benefit which, but for the operation of s.61A, would have been legitimately enjoyed by the taxpayers. The cases are thus said to be distinguishable.

A.3 Evaluation of the Taxpayer' s argument

43. I am not persuaded by Mr. Barlow' s submissions.

44. Let me first consider Question (1) as formulated by the Board.

45. The question of a statutory limitation against assessing profits tax on some basis other than s.61A was plainly not among the Taxpayer' s Grounds of Appeal before the Board.

46. Thus, as Mr. Ambrose Ho SC (appearing for the Commissioner) points out, the Board was empowered under IRO s.66(3) to decide as a matter of discretion whether or not to grant leave to the Taxpayer to make the limitation argument.

47. Apart from saying that the question of limitation arises out of the Case Stated and so can be considered by me, the Taxpayer has not advanced any reason for interfering with the Board' s exercise of its discretion under IRO s.66(3).

48. There is no basis then for me to interfere with the Board' s exercise of its discretion to disallow the ground belatedly adduced before it by the Taxpayer. I would answer "Yes" to Question (1) as formulated by the Board.

49. In any event, I do not think that Mr. Barlow' s limitation argument is valid.

50. As Mr. Ho observes, the assessments under appeal were profits tax assessments. That means that they arose out of a process of ascertaining the Taxpayer' s assessable profits and

applying the appropriate rate of tax to the amount so assessed. That process led to a positive amount being charged to the Taxpayer.

51. Although the 9 assessments challenged are informally or loosely described as having been "assessed" under s.61A, strictly there is no such thing as a "s.61A assessment".

52. As the Board stressed, s.61A is only an aid to the charging provisions in the IRO. All s.61A enables the Revenue to do is to disregard the effect of a scheme or otherwise take measures to counteract a tax benefit in the process of assessing a Taxpayer's liability to tax.

53. The duty of the Commissioner in considering objections to assessments is to act afresh. Her duty is to review and (if appropriate) revise an assessment. In so doing, she exercises an administrative (as opposed to judicial or appellate) function of considering what the proper assessment should be. She puts herself in the place of the original assessor and comes to her own opinion in place of that formed by the latter. She is not bound by the basis on which the assessment was initially made.

54. The foregoing principles are long-established. They were cogently articulated by Mills-Owens J in *Mok* at 274-5. I do not think that it makes any material difference that *Mok* pre-dates the introduction of s.61A into the IRO.

55. The issue of limitation asserted by Mr. Barlow simply does not arise. Here certain amounts of profits tax were assessed by the Assistant Commissioner well within the 6 year time-limit. The Commissioner re-considered the amounts assessed and confirmed them in accordance with IRO s.64. That is the long and short of it.

56. The re-formulations of Question (1) proposed by Mr. Barlow are inappropriate. There was no bar to the Commissioner forming the view that the deferred expenditure was not a proper deductible and assessing tax accordingly. The Board did not act *ultra vires* in upholding such determination and such determination does not somehow nullify the assessments challenged.

B. Question (2):-

> *Whether, having regard to all the facts as found by the Board, and on the true construction of sections 14, 16 and 17 of the [IRO], the Board was correct in holding that the deferred expenditure was not deductible?*

B.1 The Taxpayer's argument

57. Mr. Barlow says that the Taxpayer was doing no more than what a finance company like the Taxpayer does.

58. As a finance company, the Taxpayer (Mr. Barlow explains) is in the business of buying and selling financial assets. It borrows a sum at x% interest in the hope of on-lending the same at y% where y is greater than x.

59. The purchase of the Centre Co. Loan was no more than a facet (Mr. Barlow asserts) of this trade of obtaining money cheaply to on-lend to others more dearly. The deferred expenditure arising from the acquisition of the Centre Co. Loan constituted (Mr. Barlow concludes) expense incurred to acquire trading stock and as such should be deductible from the Taxpayer's profit.

60. The Board rejected Mr. Barlow's argument. It held instead that:-

> "what [the Taxpayer] acquired was a contractual right [that is, a contractual right to the income stream payable under the Centre Co. Loan] to last for years and the cost of acquiring the permanent structure of which the income was to be the produce or fruit was of a capital nature. Thus, the consideration, together with the related legal and professional fees, paid by [the Taxpayer] was not deductible."

B.2 Evaluation of the Taxpayer's argument

61. In my view the Board was correct.

62. The Taxpayer was incorporated for the sole purpose of effecting the Scheme.

63. The Taxpayer paid a consideration of $600 million (which, amortised, constituted the deferred expenditure) to acquire a chose in action. On the facts as found by the Board, the chose was not trading stock acquired for the purpose of being traded. Instead the chose formed the Taxpayer's sole profit-yielding structure during the relevant years of assessment. The chose yielded to the Taxpayer an interest stream returnable as taxable income for a period of 8 years.

64. It is true that in the Taxpayer's profit and loss accounts the amortised consideration was described as a "deferred expenditure". But the Taxpayer's own classification cannot be determinative.

65. The deferred expenditure was in actuality a non-recurring or once and for all payment incurred to obtain an income stream. It was of a capital nature and not deductible.

66. I would answer "Yes" to Question (2).

C. Question (3):-

If the answer to Question (2) is in the affirmative, whether the Board was correct in increasing the assessment for the year of assessment 1993/94 to show assessable profits of $84,829,978, with tax payable thereon of $14,845,246 and in confirming all the other assessments appealed against as confirmed by the [Commissioner]?

67. Before the Board, the Commissioner accepted that there was an error in the assessment for 1993/94. She was amenable to revising that assessment down to $14,845,246.

68. Subject to that amendment, it follows from my answer to Question (2) that the assessments under challenge were rightly made.

69. I would answer "Yes" to Question (3).

D. Question (4):-

Whether, having regard to all the facts as found by the Board, the Board was correct in holding in the alternative that the Taxpayer and the other participants in the Scheme entered into or carried the Scheme for the dominant purpose of enabling the Taxpayer to obtain a tax benefit?"

D.1 The Taxpayer's argument

70. IRO s.61A(1) provides as follows:-

> "This section shall apply where any transaction has been entered into or effected .... and that transaction has, or would have had but for this section, the effect of conferring a tax benefit on a person (in this section referred to as 'the relevant person') and, having regard to:-
>
> [7 factors]
>
> it would be concluded that the person, or one of the persons who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person, either alone or in conjunction with other persons, to obtain a tax benefit."

71. Mr. Barlow submits that the Inland Revenue assessed the wrong taxpayer through s.61A. There can (Mr. Barlow contends) only be one sole or dominant purpose for a tax planning scheme. Whatever the dominant purpose of the scheme here, it could not (Mr. Barlow says) have been the acquisition of a deductible in the form of the deferred expenditure by the Taxpayer.

72. Insofar as there was a tax avoidance scheme, its dominant purpose (Mr. Barlow explains) would have been either:-

(1) to bring home to South Castle the capital gain from the Shui On Centre; or,

(2) to avoid profits tax liability on the substantial rentals of $100 million from the units in the Shui On Centre.

73. Balancing the income and expenditure of the Taxpayer and other subsidiaries participating in the Scheme may have been an incidental purpose, but it could not (Mr. Barlow stresses) have been the dominant purpose.

74. Mr. Barlow accordingly concludes that the Inland Revenue should have targeted South Castle or Centre Co. but not the Taxpayer. In charging the wrong person, the Revenue and the Board have (Mr. Barlow contends) acted contrary to constitutional right.

D.2 Evaluation of the Taxpayer's argument

75. I am unable to accept Mr. Barlow's argument. He suggests that resort to s.61A(1) requires the identification of the sole or dominant purpose of a scheme. All the participants (according to Mr. Barlow) must share that one purpose. That is, however, not what s.61A(1) states.

76. The section first requires the Revenue to identify a transaction or scheme which has the effect of conferring a tax benefit on some relevant person.

77. Here the Taxpayer was plainly a relevant person. The benefit which it obtained was the reduction of its assessable profits by the deferred expenditure.

78. The Revenue must then examine the 7 factors and conclude that "the person, or one of the persons, who entered into or carried out the transaction, did so for the sole or dominant purpose of enabling the relevant person ... to obtain a tax benefit".

79. Here, as far as the Taxpayer was concerned, it was found by the Board to have entered into the Scheme for the sole or dominant purpose of obtaining a tax benefit for itself (namely, obtaining the deferred expenditure as a deductible).

80. It is immaterial to s.61A that other persons may conceivably have participated in the Scheme for some other dominant purpose.

81. Thus, assume South Castle predominantly desired to realise a capital gain out of the Scheme. Assume Centre Co. may have predominantly joined the Scheme out of a desire to obtain

some expenditure to set off against the rental accruing from the Shui On Centre. None of this would affect the applicability of s.61A in light of the Taxpayer having "entered into ... the transaction ... for the sole or dominant purpose of enabling [the Taxpayer] ... to obtain a tax benefit".

82. Contrary to Mr Barlow's suggestion, I find nothing *ultra vires* or unconstitutional in the way that the Commissioner and the Board have construed s.61A.

83. I have so far proceeded on the basis that there is substance in Mr. Barlow's assertion that the acquisition of a capital gain by South Castle and the off-setting of rental income by Centre Co. were the only plausible dominant purposes for effecting the Scheme.

84. Ultimately I do not think that the assertion is valid.

85. The Board in fact found that the other participants in the Scheme had the dominant purpose of enabling the Taxpayer to obtain a tax benefit.

86. The result of the Scheme would have been that the Taxpayer (and through it the Shui On Group) could have enjoyed the benefit of a deductible in an amount equal to the principal of the Mitsubishi loan. Had there merely been a straightforward loan of $600 million by Mitsubishi to the Taxpayer or another entity within the Group, such principal amount would not have been deductible.

87. There is therefore nothing implausible in the Board's conclusion that the Taxpayer and other participants in the Scheme went in with the dominant purpose of enabling the Taxpayer to obtain a tax benefit.

88. I would answer "Yes" to Question (4).

IV. CONCLUSION

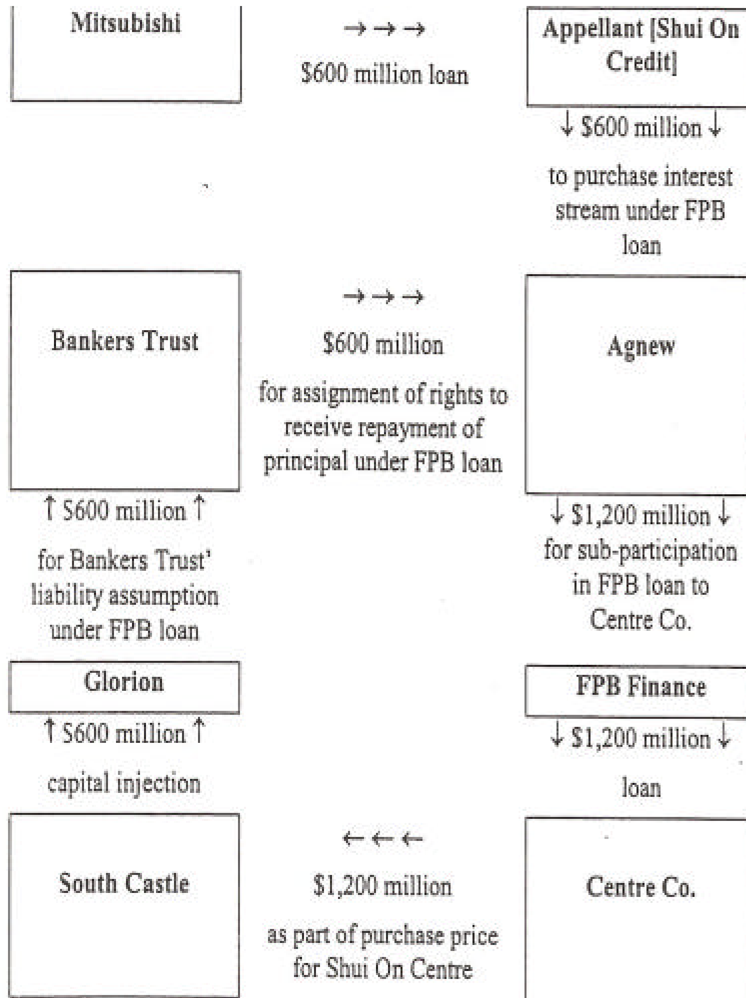
89. In light of the foregoing, the Taxpayer's appeal against the Board's Decision fails. The appeal is dismissed. There will be an Order Nisi that the Taxpayer pay the Commissioner's costs, such costs to be taxed if not agreed.

(A. T. Reyes)

Judge of the Court of First Instance
High Court

Mr Barrie Barlow SC, instructed by Messrs Mallesons Stephen Jaques, for the Appellant

Mr Ambrose Ho SC and Mr Paul H M Leung, instructed by the Department of Justice, for the Respondent


Mitsubishi
→→→
$600 million loan
Appellant [Shui On Credit]
↓ $600 million ↓
to purchase interest stream under FPB loan
Bankers Trust
→→→
$600 million
for assignment of rights to receive repayment of principal under FPB loan
Agnew
↑ $600 million ↑
for Bankers Trust' liability assumption under FPB loan
↓ $1,200 million ↓
for sub-participation in FPB loan to Centre Co.
Glorion
FPB Finance
↑ $600 million ↑
capital injection
↓ $1,200 million ↓
loan
South Castle
←←←
$1,200 million
as part of purchase price for Shui On Centre
Centre Co.
Annex