

Case No. D 12/22

Profits Tax—Consent Scheme—pre-sale of uncompleted units—interest income on deposit and part payment of the purchase price by the purchasers—whether exemption under section 2(1) of the Exemption Order—sections 14, 15 and 68(4) of the Inland Revenue Ordinance

Panel: Liu Yuk Ling Elaine (chairman), Ling Chun Wai and Lo Sze Man.

Date of hearing: 10 May 2022.

Date of decision: 28 July 2022.

The Taxpayer (as developer/ vendor) pre-sold uncompleted units in the Development under the Lands Department Consent Scheme.

The terms of the payment of the deposit and part payment of the purchase price by the purchasers were governed by the ASP, a standard form of agreement for sale and purchase approved by the Government.

The ASP provides that the purchaser is to pay the deposit and part payment of the purchase price to the solicitors' firm engaged by the Taxpayer ('Solicitors') as stakeholder, whom shall place the amounts received into an interest-bearing bank account.

The Taxpayer is entitled to receive the amount of the interest earned thereon pursuant to Clause 26(2) of the ASP.

The Taxpayer contended that the total amount of interest received by the Solicitors from the bank for the years of assessment 2015/16 to 2017/18 should be exempt from Profits Tax under section 2(1) of the Exemption Order.

Held:

1 Section 2(1) of the Exemption Order does not cover the Sums:

- 1.1 In the design of the Government as evidenced in the ASP, the Deposits must be placed in Hong Kong;
- 1.2 The Taxpayer should not be entitled to a tax benefit when it did nothing to bring any funds into the Hong Kong banking system;
- 1.3 Section 2(1)(a) is by definition an exemption from charge, its scope cannot be wider than the charge itself;

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- 1.4 The Taxpayer did not, or not yet, have the ownership of the Deposits when it was placed with the bank by the Solicitors;
 - 1.5 When passed to the Taxpayer, the Sums were not ‘interest derived from any deposit’ within the meaning of section 2(1) of the Exemption Order.
- 2 The Taxpayer failed to discharge its burden of proving the creation of a trust or agency relationship by the ASP.
- 2.1 There is no reference to trust or agency under the ASP;
 - 2.2 A mere statement that the Taxpayer is entitled to all interest is not sufficient to evidence a creation of trust or agency;
 - 2.3 Unless and until the Sums were paid to the Taxpayer, the Sums remained so mixed with the Deposits in the Stakeholders Account.
 - 2.4 A deemed agency only operates in the event the Solicitors acted in default of Clause 26;
- 3 The Board cannot come to a conclusion that the Sums would only go to the Taxpayer but no one else.
- 4 When the Solicitors account to or pay the Sums to the Taxpayer, the basis of the Taxpayer’s receipt of the Sums was not as ‘interest’, but of Clause 26(2) of the ASP or Section 6A(1) of the Solicitors’ Account Rule.
- 5 The Board finds no trust or Quitsclose trust created in respect of the Deposits.
- 5.1 The Consent Scheme was designed to protect the purchasers;
 - 5.2 The application for the funds pursuant to Clause 26(1) also benefits the Taxpayer as the developer;
 - 5.3 The beneficial interest of the Deposits, while they were being held by the Solicitors, does not belong to the Taxpayer only.

Appeal dismissed.

Cases referred to:

Fully Profit (Asia) Ltd v Secretary for Justice (2013) 16 HKCFAR 351
Vallejos v Commissioner of Registration (2013) 16 HKCFAR 45
T v Commissioner of Police (2014) 17 HKCFAR 593
HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574
China Field Ltd v Appeal Tribunal (Buildings) (No. 2) (2009) 12 HKCFAR 342

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Manzanilla Limited v Corton Property and Investment Limited (unreported, 13 November 1996; [1996] Lexis Citation 3767)
Smith v Hamilton [1951] Ch 174
Potters v Loppert [1973] 1 Ch 399
Hastingwood Property Ltd v Saunders Bearman Anselm (a firm) [1991] Ch 114
Various North Point Pall Mall Purchasers v 174 Law Solicitors Ltd [2022] EWHC 4 (Ch)
Commissioner of Inland Revenue v Messrs. Lau, Wong & Chan (1988) 2 HKTC 470
Riches v Westminster Bank Limited [1947] AC 390
Re Euro Hotel (Belgravia) Ltd [1975] 3 All ER 1075
Wharf Properties Ltd v Commissioner of Inland Revenue [1997] AC 505
Wilkinson v Revenue and Customs Commissioners [2020] SFTD 1077
Edward Wong Finance Co Ltd v Johnson Stokes & Master [1984] AC 296
National Commercial Bank Ltd & Another v Albert Hwang, David Chung & Co [2002] 2 HKLRD 408

Benjamin Yu SC and Keith Lam, Counsel, instructed by Mayer Brown, for the Appellant.
Stewart Wong SC and Johnny Ma, Counsel, instructed by the Department of Justice, for the Commissioner of Inland Revenue

Decision:

A. The Appeal

1. This is an appeal against the Determination of the Acting Deputy Commissioner of Inland Revenue dated 4 June 2021 ('Determination') in regard to the Taxpayer's Profits Tax Assessment for the year of assessment 2017/18.
2. This case concerns conveyancing transactions involved in the pre-sale of uncompleted residential units under the Consent Scheme in Hong Kong in which the Taxpayer (as developer / vendor) and the purchasers are required to use a standard form of agreement for sale and purchase approved by the Government ('ASP').
3. The ASP provides that the purchaser is to pay the deposit and part payment of purchase price to the solicitors' firm engaged by the Taxpayer ('Solicitors') as stakeholder, whom shall place the amounts received into an interest-bearing bank account. The Taxpayer is entitled to receive the amount of the interest earned thereon pursuant to Clause 26(2) of the ASP. In the present case, the total amount of interest received by the Solicitors from the bank for the years of assessment 2015/16 to 2017/18 is HK\$35,746,755 ('the Sums').
4. The sole issue in this appeal is whether the Sums shall be exempted from profits tax pursuant to section 2(1) of the Exemption from Profits Tax (Interest Income) Order, Cap. 112T ('the Exemption Order').

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5. Since the agreement in issue is a standard form used in all sales of uncompleted residential properties under the Consent Scheme, the determination of this appeal will have wider implications and may be applicable to the other transactions under the Consent Scheme.

6. We are given to understand that there is no previous decision made by the Board of Review or the Courts on the issue.

7. Pursuant to section 68(4) of the Inland Revenue Ordinance ('the Ordinance'), the Taxpayer bears the onus of proving that the assessment appealed against is incorrect or excessive.

B. Facts

8. The relevant facts are not in dispute and are summarized below. The Taxpayer has not adduced any evidence by way of oral testimony in this appeal.

9. The Taxpayer was incorporated as a private company in Hong Kong in 2010. It was engaged in the business of property development and property investment. At the relevant times, its ultimate holding company was listed on The Stock Exchange of Hong Kong Limited.

10. The Taxpayer commenced business when it acquired a site at Location A ('the Site') by an Agreement and Conditions of Sale dated 6 September 2011. The Taxpayer was developing the Site into a residential development for sale ('the Development') and a retail development for rental purposes.

11. The Taxpayer pre-sold uncompleted units in the Development under the Lands Department Consent Scheme. The terms of the payment of the deposit and part payment of the purchase price by the purchasers were governed by the ASP, which as mentioned above, is a standard form drafted by the Government.

12. The Taxpayer filed its Profits Tax Returns for the years of assessment 2013/14 to 2017/18 together with audited financial statements and profits tax computations for the respective periods ended 30 June 2012 to 2017.

12.1. The returns or tax computations showed that the Taxpayer had the following assessable profits or adjusted loss:

<u>Year of assessment</u>	<u>2012/13</u>	<u>2013/14</u>	<u>2014/15</u>	<u>2015/16</u>	<u>2016/17</u>	<u>2017/18</u>
	\$	\$	\$	\$	\$	\$
Assessable profits / (Adjusted	<u>(9,005)</u>	<u>(10,555)</u>	<u>(16,081,169)</u>	<u>(160,555,146)</u>	<u>(13,210,604)</u>	<u>2,147,836,092</u>

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loss)

12.2. The Taxpayer's aforesaid assessable profits or adjusted losses for the years of assessment 2015/16 to 2017/18 were arrived at after excluding, among others, the Sums as follows:

<u>Year of assessment</u>	<u>2015/16</u>	<u>2016/17</u>	<u>2017/18</u>
	\$	\$	\$
The Sums	<u>7,854,359</u>	<u>20,663,875</u>	<u>7,228,521</u>

12.3. In its financial statements, the Taxpayer disclosed, among others, the following assets held as at 30 June 2015 to 2017:

<u>As at 30 June</u>	<u>2015</u>	<u>2016</u>	<u>2017</u>
	\$	\$	\$
Utility and other deposits / <u>Other receivables,</u> <u>including:</u>			
Deposits with Solicitors	2,088,123,048	1,078,518,545	18,129,594
Others	<u>2,045,300</u>	<u>1,988,300</u>	<u>414</u>
	<u>2,090,168,348</u>	<u>1,080,506,845</u>	<u>18,130,008</u>

13. The Assessor considered that only some of the Taxpayer's losses sustained in the previous years of assessment should be utilized to set-off against the Taxpayer's assessable profits for year of assessment 2017/18 and thus raised on the Taxpayer the following Profits Tax Assessment for the year of assessment 2017/18:

Assessable Profits,	\$	\$
		2,147,836,092
<u>Less:</u>		
Loss set-off, including –		
- Loss for the year 2015/16	160,555,146	
- Loss for the year 2016/17	<u>13,210,604</u>	<u>173,765,750</u>
Net Assessable Profits		<u>1,974,070,342</u>
Tax Payable thereon		<u>325,691,606</u>

14. The Taxpayer, through its representative, objected to the above assessment claiming that it was excessive. It was also claimed that the Taxpayer had tax losses of \$16,100,729 up to the year of assessment 2014/15 which should be utilized to set-off against the Taxpayer's assessable profits for the year of assessment 2017/18.

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15. The gist of the Taxpayer's contentions, *inter alia*, are that:

15.1. The Development was opened for sale in August 2014 when it was still under development. Pursuant to the terms of the ASP, the monies paid by the purchasers of the Development ('Deposits') to the Solicitors as stakeholders. The Solicitors placed the Deposits received from the purchasers in interest-bearing client accounts at various banks in Hong Kong ('Stakeholders Accounts') during the relevant years of assessment.

15.2. The Sums represented the interest derived from the Stakeholders Accounts maintained with banks.

15.3. The Taxpayer was entitled to the Sums earned from the Purchasers' payments kept by the solicitors pursuant to Clause 26(2) of the ASP. The Sums were derived from deposits placed in Hong Kong with authorized institutions. The Taxpayer contended that such income should be exempt from Profits Tax under section 2(1) of the Exemption Order.

16. It is common ground that there was no separate agreement between the Solicitors and the Taxpayer on the stakeholding arrangement. The Solicitors acknowledged in the ASP their receipt of the Deposits as stakeholders. In a statutory declaration made by the Solicitors (which was one of the conditions for the approval under the Consent Scheme), the Solicitors undertook that all purchase money paid by the purchasers will be held by them as stakeholders and will not be released except in accordance with the terms of the ASP and the conditions of the Consent granted by the Directors of Lands to the Taxpayer.

17. The Assessor maintained the view that the Sums are not exempted from the payment of Profits Tax under the Exemption Order. He however considered that the Taxpayer's losses for the years of assessment 2012/13 to 2016/17 and the Profits Tax Assessment for the year of assessment 2017/18 should be revised as follows:

(a) Revised loss for the years of assessment 2012/13 to 2016/17:

<u>Year of assessment</u>	<u>2012/13</u>	<u>2013/14</u>	<u>2014/15</u>	<u>2015/16</u>	<u>2016/17</u>
	\$	\$	\$	\$	\$
(Loss) per return	(9,005)	(10,555)	(16,081,169)	(160,555,146)	(13,210,604)
<u>Add:</u> The Sums	<u>—</u>	<u>—</u>	<u>—</u>	<u>7,854,359</u>	<u>20,663,875</u>
Assessable Profits/(Adjusted Loss)	<u>(9,005)</u>	<u>(10,555)</u>	<u>(16,081,169)</u>	<u>(152,700,787)</u>	<u>7,453,271</u>
<u>Less:</u> Loss set-off					<u>7,453,271</u>
Net Assessable Profits					<u>Nil</u>
Loss brought forward	—	9,005	19,560	16,100,729	168,801,516
<u>Add:</u> Loss for the year	<u>9,005</u>	<u>10,555</u>	<u>16,081,169</u>	<u>152,700,787</u>	<u>—</u>

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<u>Less:</u> Loss set-off	<u>—</u>	<u>—</u>	<u>—</u>	<u>—</u>	<u>7,453,271</u>
Loss carried forward	<u>9,005</u>	<u>19,560</u>	<u>16,100,729</u>	<u>168,801,516</u>	<u>161,348,245</u>

(b) Profits Tax Assessment for the year of assessment 2017/18:

	\$
Profits per return	2,147,836,092
<u>Add:</u> The Sums	<u>7,228,521</u>
Assessable Profits	2,155,064,613
<u>Less:</u> Loss set-off	<u>161,348,245</u>
Net Assessable Profits	<u>1,993,716,368</u>
Tax Payable thereon	<u>328,933,200</u>

18. The Taxpayer raised objection but was unsuccessful. By the Determination, the Acting Deputy Commissioner confirmed the assessments. The Taxpayer lodged its appeal to this board.

C. Relevant provisions of the ASP

19. Clause 3 of the ASP governs the payment of purchase price by the purchasers. Under Clause 3(1), the purchase price is payable by the purchasers to the Solicitors as stakeholders in the manner set out in Schedule 5.

20. Schedule 5 sets out the amounts of different instalments of the purchase price and the due dates for payment to the Solicitors as stakeholders.

21. Clause 3(2) provides that:

‘In the event of any money paid under this Agreement to the stakeholders not being applied in the manner set out in clause 26, such money is deemed to have been paid by the Purchaser to the Vendor’s Solicitors as agent for the Vendor.’

22. Clause 3(3) provides that:

‘In the event of the Purchaser being required pursuant to Schedule 5 to pay the balance of the purchase price when the Vendor is not at that time in a position validly to assign the Property to the Purchaser for whatever reason, the Purchaser is entitled to withhold such payment until the Vendor is in a position validly to assign the Property and has given at least 14 days’ notice in writing to that effect to the Purchaser. Where the Purchaser has opted for payment of the full balance of the purchase price within a specified period after the signing of this Agreement as set out in Schedule 5, then this sub-clause (3) shall not apply.’

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23. Clause 4 relates to the construction of the Development. Under Clause 4(1)(a), the Taxpayer shall continue the construction of the Development with due expedition.

24. If the construction of the Development was delayed or postponed, and the Taxpayer failed to complete the Development within specified date(s), the purchaser may elect to rescind the ASP. Upon rescission of the ASP, the Taxpayer shall repay to the purchaser all amounts that the purchaser had paid with interest at 2% above prime rate pursuant to Clause 4.

25. Clause 26 governs how the money received by the Solicitors as stakeholders from the purchasers are to be applied.

26. Clause 26(1) provides that :

‘Subject as provided in this Clause, any part of the purchase price paid by the Purchaser to the Vendor’s Solicitors shall be held by them as stakeholders pending the completion of the sale and purchase and shall be applied and released in the following manner only –

- (a) first, towards payment of the Construction Costs and the Professional Fees to the Vendor from time to time in such amount or amounts as certified by the Authorized Person as having been expended or having become payable on the construction of the Development;
- (b) second, towards repayment of funds drawn under the Building Mortgage (if any) for payment of the Construction Costs and the Professional Fees and interest on the Construction Costs or Professional Fees;
- (c) third, in the event of the Vendor’s Solicitors and all other solicitors (if any) acting for the Vendor in the sale of the residential units in the Development at any time holding as stakeholders a sufficient sum to cover the entire outstanding balance of the Construction Costs and the Professional Fees as certified by the Authorized Person from time to time and other sums referred to in sub-clause (1)(b) above, towards payment of any other moneys secured by the Building Mortgage (if any); and
- (d) fourth, in the event of the Vendor’s Solicitors and all other solicitors (if any) acting for the Vendor in the sale of the residential units in the Development at any time holding as stakeholders a sufficient sum to cover the total of the sums referred to in sub-clause (1)(c) above, then the Vendor’s Solicitors may release the excess amount to the Vendor.

Provided Always that –

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- (i) in respect of any payment under sub-clause (1)(a) above the Vendor's Solicitors shall not at any time release to the Vendor any sum in excess of the amount certified by the Authorized Person as having been paid and/or become payable towards the Construction Costs and the Professional Fees at that time less the amount which the Vendor has drawn under the Building Mortgage (if any) for payment of the Construction Costs and the Professional Fees; and
- (ii) 'the Vendor shall not in any circumstances draw under the Building Mortgage (if any) any part of the Construction Costs and the Professional Fees already paid under sub-clause (1)(a) above.'

27. Clause 26(2) is the key provision in this appeal. It is common ground that the Sums were paid to the Taxpayer by virtue of this Clause 26(2), which provides as follows:

'All moneys received by the Vendor's Solicitors as stakeholders under this Agreement shall be placed in a client account bearing interest and subject to clearance (if the payment is made by cheque) the Vendor is entitled to all interest (if any) earned on such account.'

28. Other provisions in the ASP may also be relevant. These include Clause 9(2) which provides that:

'If the Purchaser makes and insists on any objection or requisition in respect of the title or otherwise which the Vendor is unable or (on the ground of difficulty, delay or expense or on any other reasonable ground) unwilling to remove or comply with, the Vendor is, notwithstanding any previous negotiation or litigation, at liberty to cancel the sale on giving to the Purchaser or his solicitors at least 14 days' notice in writing to that effect, in which case unless the objection or requisition is in the meantime withdrawn, the sale is cancelled on the expiry of such notice and the Purchaser is entitled to a return of the deposit and other sums of money already paid but without interest, costs or compensation.'

29. Clause 14(3) provides that:

'In the event of the Purchaser requesting and the Vendor agreeing to execute a Cancellation Agreement or any other means which has the effect of cancelling this Agreement or the obligations of the Purchaser under this Agreement, the Vendor is entitled to retain the sum of 5% of the total purchase price of the Property as consideration for its agreeing to cancel this Agreement and not as a penalty and the Purchaser will in addition pay, or reimburse, as the case may be, to the Vendor all legal costs, charges and disbursements (including any stamp duty) in connection with the cancellation of this Agreement.'

30. Clause 17 provides that:

- ‘(1) Should the Purchaser fail to observe or comply with any of the terms and conditions contained in this Agreement or to make the payments in accordance with Schedule 5 or any interest payable under this Agreement within 7 days after the due date, the Vendor may (subject to clause 3(3)) give to the Purchaser notice in writing calling upon the Purchaser to make good his default. If the Purchaser fails within 21 days after the date of service of such notice fully to make good his default, the Vendor may by a further notice in writing forthwith determine this Agreement and in such event –
- (a) The sum paid by the Purchaser under paragraph (a) of Schedule 5 by way of deposit shall be forfeited to the Vendor; and
- (b) where the Purchaser has entered into possession of the Property, the Vendor is entitled to re-enter upon the Property and repossess the same free from any right or interest of the Purchaser in the Property and to receive from the Purchaser as occupation fee a sum equal to interest at the rate of 2% per annum above the prime rate specified by The Hongkong and Shanghai Banking Corporation Limited from time to time on the unpaid balance of the purchase price for the period during which the Purchaser was in occupation.
- (2) Upon determination of this Agreement pursuant to sub-clause (1), the Vendor may resell the Property either by public auction or private contract subject to such stipulations as the Vendor may think fit and any increase in price on a resale belongs to the Vendor. On a resale, any deficiency in price shall be made good and all expenses attending such resale shall be borne by the Purchaser and such deficiency and expenses shall be recoverable by the Vendor as and for liquidated damages Provided That the Purchaser shall not be called upon to bear such deficiency or expenses unless the Property is resold within 6 months after the determination of this Agreement.’

D. Grounds of Appeal

31. The Taxpayer’s grounds of appeal as stated in the Notice of Appeal dated 30 June 2021 are as follows:

- 31.1. The Sums were sums received by, or accrued to, the Taxpayer (and/or the Taxpayer’s solicitors as agent or trustee for the Taxpayer) by way of interest derived from deposits placed in Hong Kong with

authorized institutions, within the meaning of section 2 of the Exemption Order.

31.2. Further or alternatively, on a true construction of the ASP:

31.2.1. The amounts paid as purchase price under the ASP by the purchasers to the Solicitors were received by the Solicitors as agent or trustee for the Taxpayer;

31.2.2. The Sums, being interest on such amounts paid, belonged or accrued to the Taxpayer as a matter of law irrespective of the provision of Clause 26 of the ASP.

31.3. In light of the above, the Taxpayer contended that the Sums should be exempt from profits tax under the Exemption Order.

32. At the hearing of this appeal, the Taxpayer put forward the following three main submissions (using the descriptions adopted in Counsel's written submissions):

- 32.1. the Construction Point;
- 32.2. the Agency / Trust for Interest Portion Point;
- 32.3. the Trust for Deposits Point.

33. The Revenue appeared to have taken a pleading point in its written opening submission that the Construction Point or one of its aspects was not contained in the Notice of Appeal. The Revenue did not develop this point in oral submissions. We heard the argument of the Taxpayer and do not consider that it goes beyond the statement of grounds of appeal given in accordance with section 66(1) of the Ordinance. In any event, we gave our consent pursuant to section 66(3) of the Ordinance.

E. The Construction Point

34. The Taxpayer's first argument is on the construction of section 2(1) of the Exemption Order, which provides as follows:

'2(1) Subject to subsections (2) and (3), where any sum is received by or accrued to—

- (a) a corporation carrying on a trade, profession or business in Hong Kong; or
- (b) a person, other than a corporation, carrying on a trade, profession or business in Hong Kong, in respect of funds of the trade, profession or business,

which sum is by way of interest derived from any deposit placed in Hong Kong with an authorized institution, the corporation or person

other than a corporation shall be exempt from the payment of profits tax chargeable under Part IV of the Ordinance in respect of that interest, after deduction of all allowable outgoings and expenses under Part IV of the Ordinance incurred in producing such interest, and such exemption applies, in respect of—

.....

- (ii) a new deposit placed or an existing deposit renewed on or after 22 June 1998, to the whole of the interest paid on such deposit.’

35. ‘Authorized institution’ is defined in the Exemption Order to mean ‘an authorized institution within the meaning of section 2 of the Banking Ordinance (Cap. 155).’

36. It is common ground that the Stakeholders Accounts were accounts opened with authorized institutions in Hong Kong.

37. According to section 2(1) of the Ordinance, ‘deposit’ means a deposit as defined in section 2(1) of the Banking Ordinance, which define ‘deposit’ as among others, ‘a loan of money – (i) at interest, at no interest or at negative interest; or (ii) repayable at a premium or repayable with any consideration in money or money’s worth.’

38. ‘Interest’ is not defined in the Ordinance or the Exemption Order. The meaning of interest is the subject of discussion in authorities which we will deal with below.

Approach in Construction of Statutory Instruments

39. The key and surer guide for construction of statutory instrument is the overall importance of context and purpose of the relevant law against the background of which it was enacted. The starting point in interpretation should be the consideration of the context and purpose of the statutory instrument, rather than first looking at what may be the natural and ordinary meaning of the words. (Fully Profit (Asia) Ltd v Secretary for Justice (2013) 16 HKCFAR 351, at [15] *per* Ma CJ; Vallejos v Commissioner of Registration (2013) 16 HKCFAR 45, at [75] – [79] *per* Ma CJ)

40. Whatever be the policy and purpose of any statutory instrument, the Court cannot give a meaning to words in a statute which words are incapable of bearing. (T v Commissioner of Police (2014) 17 HKCFAR 593 at [12] *per* Ma CJ and at [194] – [195] *per* Fok PJ, citing HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574 at [63] and China Field Ltd v Appeal Tribunal (Buildings) (No. 2) (2009) 12 HKCFAR 342 at [36]).

The context and purpose of the Exemption Order

41. The Exemption Order came into effect on 22 June 1998.

42. The exemption was introduced for the purpose of encouraging Hong Kong taxpayers to repatriate their offshore (tax-free) deposits, thus injecting liquidity into Hong

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Kong's financial system. (See: Press Release issued by the Hong Kong Government on 3 July 1998, titled 'Exemption of interest income from profits tax'). In the absence of this exemption, interest with a Hong Kong source would be chargeable to profits tax under section 15(1)(f) or (g) of the Ordinance.

43. The purpose of the Exemption Order is to encourage the taxpayers to keep their deposits in Hong Kong. There is no reason to interpret the Exemption Order as extending to situations where the application of the exemption will not advance the purpose.

44. The ASP is in a standard form approved by the Government. The Taxpayer must adopt the standard form of the ASP in sales of uncompleted units under the Consent Scheme. Clause 3(1) of the ASP provides that the purchase price is payable to the Taxpayer's solicitors as stakeholders. Clause 26(2) requires all moneys received by the Taxpayer's solicitors as stakeholders under the ASP shall be placed in a client account bearing interest. Section 2 of the Solicitors Account Rules defines 'client account' as to mean a current or deposit accounts at a bank located and licensed in Hong Kong in the name of the solicitor in the title of which the word 'client' appears; and 'client money' include money held by a solicitor as stakeholder.

45. Accordingly, the Deposits in the transactions that fall within the Consent Scheme must be placed in a Hong Kong bank account. As a matter of fact, neither the Solicitors nor the Taxpayer had any choice to place the Deposits outside of Hong Kong. Thus, this is not a situation which requires the application of the Exemption Order to encourage the placing of the Deposits in Hong Kong. In the same vein, the non-application of the Exemption Order to the Taxpayer insofar as the Sums are concerned would not defeat the purpose of the Exemption Order because in the design of the Government as evidenced in the ASP, the Deposits must be placed in Hong Kong.

46. The Taxpayer argued that although the purpose is to encourage the placing of deposits with local financial institutions, it does not mean that the taxpayer can only take the benefit of the exemption if he proves that he would otherwise have placed the deposits outside of Hong Kong.

47. This does not address the situation of the Taxpayer. The question is not whether or not one has to prove that he would otherwise have placed the deposits outside of Hong Kong in order to get the benefit of the tax relief.

48. The question is whether in light of the context and purpose of encouraging deposits to be kept onshore instead of offshore and thereby increasing the liquidity of the Hong Kong financial system, the Exemption Order is to be construed as extending to the Sums received by the Taxpayer pursuant to Clause 26(2) of the ASP. The Taxpayer was not the entity which placed the Sums with the bank, and the Sums were derived from a principal sum (i.e. the Deposits) which did not belong to the Taxpayer. On the face of it, there is no reason why should the Taxpayer be entitled to a tax benefit when it did nothing to bring any funds into the Hong Kong banking system.

49. The Taxpayer argued that the Exemption Order should be given a wide interpretation. We do not see any convincing justification to support that a wide interpretation shall be given to the Exemption Order to extend its scope to situations where the application of the exemption will not advance the legislative intent or purpose, and will be detrimental to the local public revenue.

50. It is common ground that the construction of the Exemption Order shall be guided by its context and purpose. It is our view that, section 2(1) of the Exemption Order, properly construed in its context and purpose, does not cover the Sums received by the Taxpayer in the present case. As will be explained below, this construction is supported by the language of the section.

Language of section 2(1)

51. Moving to the language of section 2(1) of the Exemption Order, the Taxpayer argued that (1) the Sums were received by or accrued to the Taxpayer (being a corporation carrying on a trade, profession or business in Hong Kong), and (2) the Sums were by way of interest derived from any deposit placed in Hong Kong with an authorized institution. According to the Taxpayer, the requirements under section 2(1) of the Exemption Order are therefore literally fulfilled. There is no requirement in section 2(1) that the Deposits must be the Taxpayer's money or that the Deposits must have been placed by the Taxpayer. The Taxpayer referred to the use of the words 'any deposit' to support its contention that a wide application is intended. The Taxpayer contended that the exemption is not limited to deposits directly placed by the taxpayer with the bank.

52. The Taxpayer further suggested that section 2(1) of the Exemption Order distinguishes between a corporation and a person (such as a natural person). In the case of a person, there is an additional requirement that the sum is received by or accrued to the taxpayer 'in respect of funds of the trade, profession or business'. There is, however, no such requirement in the case of a corporation. This distinction, the Taxpayer submitted, reinforces the point that, in the case of the Taxpayer (being a corporation carrying on a trade, profession or business in Hong Kong), the exemption applies even where the interest is derived from deposits which are not funds in respect of the trade, profession or business.

53. It is common ground that the wording of section 2(1) mirrors that of the charging provision, in particular section 15(1)(f) and (g) of the Ordinance.

54. Section 14 of the Ordinance is the basic charging provision for Profits Tax, pursuant to which Profits Tax shall be chargeable for each year of assessment 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.

55. Section 15 of the Ordinance provides that certain amounts are deemed to be receipts arising in or derived from Hong Kong from a trade, profession or business carried on in Hong Kong. Section 15(1)(f) governs the interest income of a corporation, while section 15(1)(g) governs the interest income of a person. We set out section 15(1)(f) and (g) below:

'15(1) For the purposes of this Ordinance, the sums described in the following paragraphs shall be deemed to be receipts arising in or derived from Hong Kong from a trade, profession or business carried on in Hong Kong—

.....

- (f) sums received by or accrued to a corporation carrying on a trade, profession or business in Hong Kong by way of interest derived from Hong Kong;*

- (g) sums received by or accrued to a person, other than a corporation, carrying on a trade, profession or business in Hong Kong by way of interest derived from Hong Kong which interest is in respect of the funds of the trade, profession or business;'*

56. Mr Stewart Wong SC, Counsel for the Revenue, submitted that there is a necessity to include the requirement in the case of a person but not a corporation because under section 15(1)(f), a corporation is identified as *'a corporation carrying on a trade, profession or business'*. It may be readily assumed that the funds of a corporation are funds in respect of its trade, profession and business. However, in the case of a person, interest income may be derived from his personal savings unrelated to his or its *'trade, profession or business'*. There is thus a need to specify, in the case of a person that interest income would only be deemed to be a taxable receipt if the interest was in respect of the trade, profession and business, so that interest derived from personal savings would not be deemed to be taxable interest income. In other words, the additional words in section 15(1)(g) are included to ensure that persons and corporations are placed on the same fiscal footing as far as the charge on interest is concerned. We agree with this submission. Mr Benjamin Yu SC, Counsel for the Taxpayer, did not demur. It follows that, irrespective of whether the taxpayer is a corporation or person, only interest derived from funds in respect of the trade, profession or business would attract profits tax.

57. As noted above, the same wording is mirrored in section 2(1)(a) and (b) of the Exemption Order. It makes the same distinction between corporations on the one hand and persons on the other. We do not consider it appropriate to read into this difference in wording in section 2(1) (a) and (b) of the Exemption Order as having the meaning suggested by the Taxpayer. This is especially so in light of our decision on the construction of section 2(1) having regard to the context and purpose of the Exemption Order. Moreover, as we pointed out in the previous paragraph, the charging provision aims to put corporations and persons on an equal fiscal footing. It is inconceivable that, when it comes to the Exemption Order, the legislature intended to afford favourable treatment to corporations over persons by giving the former, but not the latter, tax relief. Finally, since section 2(1)(a) is by definition an exemption from charge, its scope cannot be wider than the charge itself.

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58. For these reasons, we take the view that, as a matter of construction, section 2(1) of the Exemption Order does not cover the Sums in question.

59. We now turn to the Revenue's alternative argument that the Sums are not 'interest' at all within the meaning of the Exemption Order. In the tax regime, one will ask why a taxpayer received the sum of money, and accordingly determine the nature of that sum of money from the perspective of that taxpayer, but not the others. Often, the nature of a sum will be different if one looks at it from the perspective of different entities. There are many examples in tax authorities, such as examples on the question of source, or on the question of whether a sum is capital in nature, and so on. One has to approach the question of the nature or character of the Sums from the correct perspective, namely, that of the Taxpayer who received them.

60. There is no dispute that the Deposits were placed by the Solicitors as stakeholders. As far as the bank is concerned, the only person to whom they pay the interest was the Solicitors in whose name the bank account was opened.

61. The Sums were received by the Taxpayer pursuant to Clause 26(2) of the ASP, a contractual stakeholding arrangement.

62. The following passage in the judgment of Millet LJ (as he then was) in Manzanilla Limited v Corton Property and Investment Limited (unreported, 13 November 1996; [1996] Lexis Citation 3767) cited by the Taxpayer and the Revenue summarises the general principles regarding the nature of a stakeholder arrangement:

'Where a stakeholder is involved, there are normally two separate contracts to be considered. There is first the bilateral contract between the two principals which contemplates two possible alternative future events and by which the parties agree to pay a sum of money to a stakeholder to abide the happening of one or other of them. In the present case it consisted of a series of written contracts for the sale of land, and the relevant events were the failure of the contracts by the repudiatory breach of one party or the other. The second contract is the tripartite contract which results from the deposit of the money with the stakeholder on terms that he is to keep it until one or other of the relevant events happens and then pay it to one or other of the parties accordingly. The stakeholder is a party to the second contract but not the first. His rights and obligations are not normally expressly spelled out. They are implicit in the transaction itself, and must be discovered, not by implying terms, but by analysing the relationship of the parties which arises from the deposit of the money.'

The following propositions emerge from the authorities:

(1) The relationship between the stakeholder and the depositors is contractual, not fiduciary. The money is not trust money; the stakeholder is not a trustee or agent; he is a principal who owes contractual

obligations to the depositors: Potters v Loppert [1973] Ch. 399, [1973] 1 All ER 658, p. 406 of the former report; Hastingwood Ltd. v Saunders Bearman [1991] Ch. 114, [1990] 3 All ER 107, p. 123 of the latter report. The underlying relationship is that of debtor and creditor, and is closely analogous to the relationship between a banker and his customer.

(2). ***Until the specified event occurs, the stakeholder is entitled to retain the interest on the money. This is usually described as his reward for holding the money: see Harington v Hoggart (1830), 1 B&Ad 577. This right may be excluded by special arrangement, and was excluded in the present case.***

(3). ***Until the event happens the stakeholder holds the money to the order of both depositors and is bound to pay it (strictly speaking an equivalent sum) to them or as they may jointly direct: Rockeagle v Alsop Wilkinson [1992] Ch. 47, [1991] 4 All ER 659.***

(4). ***Subject to the above, the stakeholder is bound to await the happening of the event and then to pay the money to one or other of the parties according to the event. The money is payable to the party entitled on demand, and if the stakeholder fails to pay in accordance with a proper demand he is liable for interest from the date of the demand: Lee v Munn (1817) 8 Taunt. 45; Gaby v Driver (1828) 2 Y&J 549.***

(5). ***If the occurrence of the event is disputed, the stakeholder cannot safely pay either party, for if he mistakenly pays the party not entitled the payment will not discharge his liability to the other. In these circumstances he may (i) interplead and pay the money into Court; (ii) retain the money pending the resolution of the dispute; or (iii) take the risk of paying one party. The choice is entirely his.***

(6). ***If he takes the second course, he may notify the parties that he is content to abide the outcome of the dispute. There is then no need to join him in any proceedings which are taken to resolve it. If he is not joined, the Court cannot order the money to be paid to the successful party. All it can do is to declare that the successful party is entitled to give a good receipt for the money: see Smith v Hamilton [1951] Ch. 175.***

(7). ***If the stakeholder is not content to abide the outcome of the proceedings, he may be joined in order to bind him. This was done in the present case, albeit on the application of the stakeholder.***

(emphases added)

63. Other relevant authorities are Smith v Hamilton [1951] Ch 174 at 184 *per* Harman J (as he then was); Potters v Loppert [1973] 1 Ch 399 at 405-412 *per* Sir John Pennycuik VC; Hastingwood Property Ltd v Saunders Bearman Anselm (a firm) [1991] Ch

114 at 122G-125E *per* DHCJ Nugee QC and Various North Point Pall Mall Purchasers v 174 Law Solicitors Ltd [2022] EWHC 4 (Ch) at [33]-[42] *per* DHCJ Hodge QC.

64. We do not think one can ignore the undisputed fact that when the Sums were passed to the Taxpayer by the Solicitors, they were passed pursuant to a contractual arrangement, i.e. the ASP. The ASP is not a mere form. It provides the legal basis pursuant to which the Taxpayer was entitled to the Sums notwithstanding that the Taxpayer did not, or not yet, have the ownership of the Deposits when it was placed with the bank by the Solicitors (not the Taxpayer).

65. When the Sums were passed to the Taxpayer, in our view, they no longer bore the character of ‘interest’, which is defined in many authorities¹ as meaning compensation to the recipient for deprivation from having the use of its money (the principal) for a period of time.

66. In Commissioner of Inland Revenue v Messrs. Lau, Wong & Chan (1988) 2 HKTC 470, which was decided before the enactment of the Exemption Order, the Court had to decide whether interest in a solicitor’s client account was chargeable to profits tax in the hands of the solicitor. Mortimer J said at 481 :

‘The only basis upon which this taxpayer receives the interest is by agreement with his client. It is true that the money is interest. It is earned upon a deposit consequent upon an agreement between the solicitor and the bank. But the money with the interest remains the property of the client until the taxpayer receives it in consequence of the agreement. I have no doubt considering the agreement that is made that the solicitor receives that interest in consideration of the professional services which he renders. In those circumstances, this interest ‘arises in or is derived from’ his profession in Hong Kong.’

67. This supports the Revenue’s submission that one must have regard to the contractual agreement or the legal basis pursuant to which the Sums were received by the Taxpayer in order to ascertain their nature or character. From the Taxpayer’s perspective, they were not ‘interest derived from any deposit’ within the meaning of section 2(1) of the Exemption Order.

68. The parties have debated the meaning of ‘interest’. We also note that Megarry J (as he then was) acknowledged in *Re Euro Hotel* that the two requirements set out therein²

¹ Riches v Westminster Bank Limited [1947] AC 390; Re Euro Hotel (Belgravia) Ltd [1975] 3 All ER 1075; Wharf Properties Ltd v Commissioner of Inland Revenue [1997] AC 505; Wilkinson v Revenue and Customs Commissioners [2020] SFTD 1077.

² The two requirements must be satisfied for a payment to amount to interest are (1) there must be a sum of money by reference to which the payment which is said to be interest is to be ascertained. A payment cannot be ‘interest of money’ unless there is the requisite ‘money’ for the payment to be said to be ‘interest of’. (2) those sums of money must be sums that are due to the person entitled to the alleged interest.

are not exhaustive or inescapable. It is, however, of note that these authorities, each in its own context, shared the same view on what amounts to ‘interest’, suggesting that this core meaning of ‘interest’ was adopted irrespective of the different contexts. There is no convincing evidence to support a deviation in the present case from the two requirements insofar as the meaning of ‘interest’ in the present context is concerned.

F. Agency / Trust for Interest Portion Point

69. The Taxpayer’s second point is that under Clause 26(2) of the ASP, the ‘interest’ portion on the Deposits always belonged to the Taxpayer. This, as contended by the Taxpayer, suggests that the Solicitors held the interest portion on trust for the Taxpayer but not as a stakeholder. The Taxpayer also referred to Rule 6A(1) of the Solicitors’ Account Rules, which stipulates that the solicitors must account to the client for any interest earned on the account, as indicative of a fiduciary or agency relationship.

70. Clause 26(2) is silent on the creation of any trust or agency relationship between the Taxpayer and the Solicitors. One has to consider the whole circumstances and arrangements when determining, as a matter of substance, the true relationship between the parties, in particular, whether the creation of a trust or agency relationship was intended. It is trite that the intention to create a trust must be clear and certain. The Taxpayer bears the burden of proving that a trust or agency relationship existed between the Taxpayer and the Solicitors insofar as the Sums are concerned.

71. The legal principles on stakeholders are not in dispute. The general position, as explained above, is that the stakeholder is not an agent or trustee, as neither of the other two parties has any proprietary interest in the stake. (See Manzanilla, *supra*; Hastingwood, *supra* at 123F). Subject to any agreement to the contrary, the stakeholder is not liable to account for any profit which he may make upon the stake (in the way of interest or otherwise). (See Potters v Loppert [1973] 1 Ch 399, at 406D)

72. We bear in mind that in a stakeholding arrangement, parties are free to make agreement in specific areas that are contrary to the conventional stakeholding arrangement. The Consent Scheme contains special features mandated by the Government for the protection of the purchasers. Therefore, even if some features in the ASP are not consistent with the conventional stakeholding arrangement, this is not sufficient to discharge the Taxpayer’s burden of proving the creation of a trust or agency relationship by the ASP. The Taxpayer is required to prove on a balance of probability that a trust or agency is created.

Background information concerning the Consent Scheme

73. The Consent Scheme, and similarly the Non-Consent Scheme, was put in place by the Government to regulate sales of uncompleted units in order to protect the interest of purchasers.

74. Lord Brightman has described in his judgment at Edward Wong Finance Co Ltd v Johnson Stokes & Master [1984] AC 296 a ‘common sense principle’ that ‘... in the

absence of an agreement for credit, the purchase money is not handed over to the vendor or anyone else except in exchange for the delivery of subject matter of the sale, ...". This 'common sense principle' cannot be applied in its full rigour in the sale of uncompleted property units. In National Commercial Bank Ltd & Another v Albert Hwang, David Chung & Co [2002] 2 HKLRD 408, Lam DHCJ (as he then was) made the following remarks in the context of Non-Consent Scheme, which are also applicable to Consent Scheme.

4. *Since the building was under construction, the sale and purchase agreements were in respect of uncompleted units. **Two schemes were in place in Hong Kong to protect the interest of purchasers of uncompleted units: the Consent Scheme in respect of new development at new lots granted by the Government to developers and the Non-Consent Scheme in respect of re-development by demolition of old buildings and erection of new building on old lots acquired by developers from existing owners.***
5. Under the standard form Non-Consent Scheme Sale and Purchase Agreement, the purchase price can be paid to the solicitors for the vendor before completion. That solicitor will hold the money as stakeholder pending completion for specified purposes. Hence, the common sense principle set out in paragraph 1 above cannot be applied to its full rigour when a purchaser decides to purchase an uncompleted unit and makes payment in advance. But a purchaser cannot blame his solicitors for that. It is an inherent risk he agrees to take when he decides to enter into such a transaction. This, however, does not mean that such principle needs not be observed regarding other aspects of the transaction.
6. I shall not recite the relevant provision concerning the term of the stakeholding which could be found in Clause 25 of the five Sale and Purchase Agreements featured in the present case. Suffice it to say that the purpose was to enable the purchase money to be utilized for construction of the building and only the balance over and above the money required to cover the outstanding balance of construction costs and repayment of all liabilities under any building mortgage could be released to the developer. Such provision would give some protection to the purchaser who had to pay the whole of the purchase price before the building was completed. But it was not full protection.
7. Whilst it provided for the money being used for construction of the building, it could not guarantee that construction could be completed. If the developer encountered financial difficulties, there was always a potential risk that the building could not be completed. The purchaser would be left with a claim against the developer. Although he might

also have some security in the land by reason of his equitable interest as purchaser, as a matter of priority, his interest would usually be subordinated to the bank which advanced money to the developer on the strength of a building mortgage.

8. More pertinent in the context of the present case, the protection offered by the clause depended on the integrity of the solicitor for the vendor. As a result of Edward Wong Finance, **there is a safeguard for the purchaser against the fraud of the solicitor. Clause 3(2) of the agreement stipulated as follows:**

‘ In the event of any money paid hereunder to the stakeholders not being applied in the manner set out in Clause 25, such money shall be deemed to have been paid by the Purchaser to [the solicitors for the vendor] as agent for the vendor.’

Hence, if the solicitor absconded with the money, the loss will fall on the doorstep of the developer rather than the purchaser. The purchaser could still enforce his right over the property and seek specific performance against the developer as envisaged by Lord Brightman (see p.308B of the report). However, such provision could only provide protection if the person who signed the Sale and Purchase Agreement and received the purchase money was the authorized representative of the genuine developer. Otherwise, the agreement would not even be worth the paper it was written on. It was therefore important for the purchaser to ensure that the person he dealt with and who signed the agreement on behalf of the vendor was an authorized representative of the developer.’

(emphasis added)

75. The Consent Scheme was administered by the Legal Advisory and Conveyancing Office of the Lands Department on behalf of the Director of Lands. The Solicitors undertook that all purchase money paid by the purchasers will be held by them as stakeholders and will not be released except in accordance with the terms of the ASP and the conditions of the Consent granted by the Directors of Lands to the Taxpayer.

76. The Taxpayer has not provided the conditions of the Consent granted by the Directors of Land in regard to the Development.

77. We note that the Legal Advisory and Conveyancing Office Circular Memorandum No. 72A dated 2 July 2013 issued by the Lands Department sets out in its Annex the rules applicable to the Consent Scheme and the requirements to be fulfilled for getting the approval under the Consent Scheme. (**Memo 72A**).

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78. One of the conditions to be satisfied for the granting of approval under the Consent Scheme is the use of the standard form of ASP adopted by the Government without any variation. Approval for variation is required. It expressly spells out that request for variations to those forms will not normally be entertained, except in the very rare case where a particular variation is considered essential, either, for example, for the better protection of the interests of purchasers, or because of the particular circumstances of a specific case.

79. In regard to the operation of Stakeholder Account, the Annex to Memo 72A stipulates that the following provisions apply:

‘15.2.1 Any stakeholder account must be opened and maintained with a licensed bank and the stakeholder account must be designated for the Development. All purchasers’ payments ... must be made in favour of the Vendor’s Solicitors and paid directly to the stakeholder account.

.....

15.2.3 **No money shall be drawn from any stakeholder account** for reimbursement to the Vendor or for payment as the Construction Costs to any contractor, sub-contractor or supplier other than those whose names have already been disclosed or as the Professional Fees.’

(emphasis added)

80. Three key features of the Consent Scheme can be gleaned from the above rules and conditions stipulated by the Lands Department. Firstly, the terms of the ASP are mandated by the Government, but not the free choice of the Taxpayer. Secondly, the protection of the purchaser is the key consideration. Thirdly, the provision in [15.2.3] provides that **no money** shall be drawn from the Stakeholder Account other than for the stated purpose. There is no distinction between the ‘principal sum’ and ‘interest’.

Relevant provisions of the ASP

81. The ASP expressly provided that the purchase prices were paid to the Solicitors as stakeholders. There is no reference to trust or agency. The provision in Clause 26(2) is that the Taxpayer ‘is entitled to all interest (if any)’ earned on the Stakeholders Account. A mere statement that the Taxpayer is entitled to all interest, without more, is not sufficient to evidence a creation of trust or agency, because the entitlement may arise, for example, by reasons other than trust or agency, such as contractual agreement.

82. The Taxpayer referred to Clause 3(2) of the ASP which provides that if any money paid under the ASP to the stakeholders is not being applied in the manner of Clause 26, such money is deemed to have been paid by the purchaser to the Solicitors as agents for the Taxpayer. This is the only provision in the ASP where agency is expressly mentioned. It is of note that this is a **deemed** agency and it only operates in the event the Solicitors acted in default of Clause 26.

83. Clause 3(2) makes no mention of the ‘interest’ portion. The need to have an express provision of ‘deemed agency’ suggests that but for this provision, no agency was created between the Solicitors and the Taxpayer insofar as the money at the Stakeholder Account is concerned. Otherwise, there is no need to have an express deeming provision.

84. The Taxpayer does not deny that the Sums (i.e. the interest earned by the Solicitors placing the Deposits with the bank) were mixed with the Deposits (i.e. the principal) in the Stakeholders Account. Although Clause 26(2) provides that the Taxpayer ‘is entitled to’ the interest, unless and until the Sums were paid to the Taxpayer, the Sums remained so mixed in the Stakeholders Account by the Solicitors without segregation. There is no evidence that the Solicitors and the Taxpayer had treated the Deposits and the Sums separately. There is also no evidence to show that the Taxpayer and the Solicitors did not treat the Sums as money stakeheld by the Solicitors. For example, when considering whether a sufficient sum was maintained in the Stakeholder Account for the purpose of Clause 26(1)(c) and (d), the Sums were not counted.

85. There remains a possibility that in case of cancellation of the ASP under Clause 9(2) or 14(3), the purchasers may look to the Solicitors (to whom the purchase price was paid) for refund of the purchase price paid under the relevant provisions. While the Sums remain in the Stakeholder Account mixed with the Deposits, we cannot come to a conclusion that the Sums would only go to the Taxpayer but no one else.

86. Further, when the Solicitors account to or pay the Sums to the Taxpayer, the basis of the Taxpayer’s receipt of the Sums was Clause 26(2) of the ASP or Section 6A(1) of the Solicitors’ Account Rule, but not as ‘interest’. For reasons already examined above, the Exemption Order does not apply to those Sums.

G. Trust for Deposits Point

87. The Taxpayer further contended that the whole of the Deposits were held on trust for the Taxpayer and a Quitsclose trust was created because the money was paid to and received by the Solicitors for a specific purpose, that is the money should be applied for the specific uses provided in Clause 26(1) of the ASP, and the parties intended the beneficial interest of the money to be either applied for the Taxpayer’s purposes or to be paid to the Taxpayer. The money was held by the Solicitors in the meantime as agent.

88. The Consent Scheme was designed to protect the purchasers, especially when the property units remain uncompleted and not assigned to the purchasers. The Deposits were held by the Solicitors for the protection of the purchasers, while the application for the funds pursuant to Clause 26(1) also benefits the Taxpayer as the developer. We do not agree that the parties intended that the beneficial interest of the Deposits, while they were being held by the Solicitors, belongs to the Taxpayer only.

89. We do not find that there is a trust or Quitsclose trust created in respect of the Deposits.

H. Order

90. For the reasons set out above, pursuant to section 68(8)(a) of the Ordinance, we dismiss the appeal and confirm the assessments upheld in the Determination. We thank counsel for the Taxpayer and counsel for the Revenue for their able and helpful assistance.