Case No. BR 18/73

Board of Review :

L. J. D'Almada Remedios, *Chairman*, Kenneth Lo, D. Barrett, & P. B. Tata, *Members.*

22nd March 1974.

Trading loss—sales of securities on the New York Stock Exchange resulting in loss—whether loss arose in or was derived from the Colony to be set off in computing assessable profits of taxpayer.

The appellant, a company incorporated in Hong Kong, carried on an import-export business and also traded in overseas marketable securities. In the purchase and sale of shares quoted on the New York Stock Exchange the appellant instructed its bankers in New York to pay to or receive money from sharebrokers in New York in regard to such dealings. The shares purchased were also held by the bank on the appellant's behalf. Sale of the shares resulted in a loss of $308,247. The appellant claimed that since the decision to sell foreign shares was made in Hong Kong the loss incurred arose in Hong Kong and should be taken into account in computing its assessable profits. This claim was disallowed by the Commissioner. On appeal.

Decision: Appeal dismissed.

Case referred to:—C.I.R. v. Black, 21 S.A.T.C. 226.

Reasons :

The Appellant is a company incorporated in Hong Kong which carries on business as importers and exporters and, in addition, traded in overseas marketable securities.

The point with which we are concerned in this reference is whether on the facts before us a loss of $308,247 resulting from sales of shares on the New York Stock Exchange can be taken into account in computing the assessable profits of the Appellant.

Just as a Hong Kong company can make a profit from a transaction which does not arise in the Colony, so too can such a company incur a loss from a transaction which does not arise in the Colony. It is not disputed, therefore, that what is or is not a *profit* arising in or derived from the Colony is equally applicable in deciding what is or is not a *loss* arising in the Colony. This being so, it is conceded that the determining factor is whether the loss incurred in the sale of marketable securities in New York was a loss arising in or derived from the Colony when regard is had to the circumstances of the case and the application of the same criteria as if a profit had been made.

Needless to say, each case turns on its own facts and all the circumstances must be looked at in deciding whether a profit or loss (as the case may be) arose in or was derived from Hong Kong.

The purchase or sale of foreign stock is usually transacted through a bank or agency office in Hong Kong who would give the necessary instructions to brokers abroad to put through and complete an order for the purchase or sale of shares at a price designated by the customer either with or without a leeway or margin as to price. In the case of shares quoted in the New York Stock Exchange, the normal practice would be to buy a draft in U.S. dollars so that arrangements can be made to have the money remitted by the local agency to their New York brokers to effectuate the purchase. As for the transactions under appeal, this procedure was not necessary. The Appellant had available cash fund with the First National City Bank (F.N.C.B.), New York, and the Appellant utilized this fund to make the share acquisitions by instructing the F.N.C.B., New York, to transfer the fund to Merrill Lynch (in New York) to purchase the shares. The shares were held by F.N.C.B., New York, for the Appellant's account. When these shares were disposed of, F.N.C.B., N.Y., was instructed to deliver the shares to Merrill Lynch (New York) and collect the proceeds which were then held in F.N.C.B., New York, again for the Appellant's account. The disposal of the shares resulted in a loss and it is agreed between the parties to this appeal that the question is whether the loss sustained was a loss that arose in or was derived from Hong Kong. If it was, then it can be included in computing the Appellant's assessable profits.

What we have to ask ourselves is : "Where did the operations take place from which the profits (or losses) in substance arose?".

Clearly, on the facts of this case (which we find unnecessary to set out in detail) the answer is : New York. We are not unmindful of what has been so forceably urged upon us, namely, that the decision to acquire or sell the shares was made by the Appellant in Hong Kong and that such decision was arrived at after a study of market rates and movement trends from available reports or literature on the subject or from professional advice sought or obtained. Although we agree that regard is to be had to this feature of the case, it is by no means decisive. It is perhaps truer to say that it is the entering into and the completion of a transaction that produces a profit or loss rather than the studies or exertions antecedent to it. We have been referred to the case of **C.I.R. v. Black**[1] where the circumstances, in principle, are not dissimilar. We think that when all the facts of the appeal before us are looked into one is drawn irresistibly to the conclusion that the purchases and sales of these shares were ex-Hong Kong transactions. Banks or local agencies in Hong Kong are merely the vehicles through which dealers or brokers abroad are contacted for the purpose of putting through a transaction in New York. But it was, in substance, the operations in New York from which the loss has arisen. It was the brokers in New York who found a willing buyer or seller. Negotiations for the contract took place in New York; the contract was entered into the finalized in New York; payment was made in New York and share transfers completed in New York. The whole process was, therefore, essentially a New York transaction. On the

[1] 21 S.A.T.C. 226.

facts as we find them, the loss sustained by the Appellant was not one which arose in or derived from the Colony and, accordingly, we uphold the Commissioner's determination and confirm the assessment.