INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D20/90

<u>Profits tax</u> – whether a loss on a foreign exchange contract can be deducted from profits of stock trading.

Panel: Robert Wei QC (chairman), Donald Cheung Quintin and Foo Tak Ching.

Date of hearing: 10 January 1990. Date of decision: 28 June 1990.

The taxpayer registered himself as carrying on business as stock investment and dealing. He entered into one isolated foreign exchange transaction which resulted in a substantial loss. The taxpayer sought to set off the exchange contract loss against the profits of his stock investment and dealing business.

Held:

One isolated exchange contract did not constitute a trade of foreign exchange dealing.

Appeal dismissed.

Cases referred to:

Cooper v Stubbs 10 TC 29 D55/87, IRBRD, vol 3, 1

H Bale for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. This is an appeal by a taxpayer against an additional personal assessment for the year of assessment 1982/83 on the ground that the assessment is excessive as his profits tax assessment for 1982/83 did not take into account a loss of \$547,200 which he sustained on a foreign exchange futures contract in US dollars.

INLAND REVENUE BOARD OF REVIEW DECISIONS

- 2. No witness was called. The facts stated in paragraph 1 of the determination of the Deputy Commissioner of Inland Revenue dated 23 June 1989 were agreed. Further facts were agreed at the hearing. From the agreed facts and the documents produced at the hearing, the facts of the case may be summarised as follows:
- 2.1 The Taxpayer was the managing director of an importers/exporters/manufacturers company earning an annual salary of about \$260,000 plus rental income.
- 2.2 In July 1980, pursuant to Business Registration Regulations, the Taxpayer made an 'application by an individual for registration of business(es) carried on by him in Hong Kong'. The application stated the following particulars:

'Description and nature of business: stocking investment

and dealing

Date commenced: 1 April 1980'

- 2.3 For the 1980/81 and 1981/82 years of assessment (years ended 31 March 1981 and 1982 respectively) the profits and losses respectively on his 'share dealing' activities were treated by the Taxpayer, and accepted by the Inland Revenue Department, as being subject to the profits tax provisions of section 14 of the Inland Revenue Ordinance.
- On 31 May 1982 the Taxpayer made a forward sale of US\$1,600,000 to his bank at 5.724 for settlement on 12 August 1982. On 6 August 1982 the Taxpayer closed out the contract by purchasing from the bank US\$1,600,000 at 6.066 resulting in a loss of \$547,200. The contract was financed by the bank.
- 2.5 On 17 August 1982 the Taxpayer amended his application mentioned in paragraph 2.2 above by changing the description and nature of business to 'stock investment and exchange dealings'.
- On 11 May 1983, the Taxpayer lodged a profits tax return for the 1982/83 year of assessment (year ended 31 March 1983) stating the nature of business as share dealing and declaring an assessable profit of \$1,991 from the 'share dealings'. There is no mention of the loss made on the US dollar futures contract in the return.
- 2.7 On 26 September 1983 the Taxpayer's tax representatives wrote to the Inland Revenue Department stating that they were instructed to inform the Department of an omission from the above return in respect of the loss on the US dollar contract.
- 2.8 His letters to the Inland Revenue Department disclosed the following:

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (a) That since 1 March 1979 he had done only one foreign exchange dealing on his own account, that is, the afore-mentioned US dollar contract.
- (b) That he had entered into the US dollar contract in the hope that he could earn an easy profit.
- (c) That he had no specialized knowledge of foreign exchange transactions, although he handled and made decisions in foreign exchange transactions on behalf of the company he worked for.
- 3. The question for this appeal is whether the Taxpayer carried on a trade or business of foreign exchange dealing and whether the loss on the US dollar futures contract was sustained by the Taxpayer in the carrying on of that trade or business. The word 'trade' is used in this context to include 'an adventure in the nature of trade'.
- 4. For a trade of foreign exchange dealing to exist, one would normally expect to find some habitual and systematic operations (Cooper v Stubbs 10 TC 29). Here there was nothing of the habitual or systematic, but only one US dollar futures contract closed out by a contrary purchase. In our view, what the Taxpayer did was a one off gambling transaction which did not amount to the carrying on of a trade or an adventure in the nature of trade. Nor can it be regarded as the carrying on of a business. There was no element of skill or expert knowledge or organisation of a business nature. There were no inherent attributes of a business such as the employment of staff, keeping of accounting records, setting aside working capital, acquisition of assets and equipment for use in the business and carrying on his activities in a businesslike manner. (See D55/87). At the hearing the Taxpayer stressed the fact that he had registered a change of his business to 'stock investment and exchange dealings'. We do not think that is relevant in view of the fact that the change was registered sometime after the US dollar contract was closed out.
- 5. For these reasons the appeal is dismissed and the additional personal assessment for the year of assessment 1982/83 is hereby confirmed.