INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D37/93

Profits tax – property trading transaction – transaction carried out with use of trustee – whether trustee liable to profits tax.

Panel: William Turnbull (chairman), Felix Chow Fu Kee and Roland J Mcaulay.

Dates of hearing: 25 and 31 August 1993.
Date of decision: 23 November 1993.

A company purchased a piece of land for the purpose of trading. Instead of registering the land in its own name, the company arranged for the taxpayer to purchase the same as its trustee. The property was subsequently sold by the company as its trustee. The assessor assessed the taxpayer to tax on the profit which arose on the sale of the property. The taxpayer appealed to the Board of Review. The taxpayer submitted that it was a mere trustee and should not be assessable to tax on a profit to which it was not beneficially entitled and which was truly the profit of a third party.

Held:

The taxpayer was nothing more than a nominee. The profit did not belong to the taxpayer. The profit belonged to the company which actually purchased and sold the property and not the taxpayer which only handled the legal estate as a trustee.

Appeal allowed.

Cases referred to:

In re Downshire Settled Estates [1953] 1 CH 218
The Lothian Chemical Co Ltd v Rogers 11 TC 508
Sun Insurance Office v Clark [1912] AC 443
B S C Footwear Ltd v Ridgway [1972] AC 545
Pepper v Hart [1992] 3 WLR 1032
Reid's Trustees v CIR 14 TC 512
Pepper v Hart [1992] STC 898

M Y Cheung for the Commissioner of Inland Revenue.
Gordon Fisher instructed by Messrs Vincent T K Cheung, Yap & Co for the taxpayer.

Decision:

This is an appeal by a taxpayer against a profits tax assessment for the year of assessment 1988/89 in which the Taxpayer has been assessed to a profit on the sale of property which the assessor alleges the Taxpayer had made. The facts are as follows:

1. The Taxpayer was incorporated as a private company in Hong Kong in July 1987. At all relevant times the issued capital of the Taxpayer was $100.

2. Company X was a company incorporated in Hong Kong which carried on the business of property dealing and agency services.

3. On 10 August 1987 the directors of company X resolved to purchase a piece of land ('the property') at a price of $100,000 for the purpose of trading. The board of directors of company X recorded the fact that company X had appointed the Taxpayer as its trustee to execute the assignment of the property and that the Taxpayer had executed a Declaration of Trust in favour of company X declaring that the property purchased by the Taxpayer was in fact purchased by the Taxpayer for and on behalf of company X.

4. The purchase price of the property was paid by company X direct to the vendor of the property without going through the bank account of the Taxpayer.

5. On 2 June 1988 the directors of company X resolved that company X would authorize the Taxpayer to enter into a sale and purchase agreement for the sale of the property held by the Taxpayer for company X under a Declaration of Trust for the price of $12,000,000.

6. On 10 August 1987 the directors of the Taxpayer resolved to purchase the property for the price of $100,000 and declared that the said sum of $100,000 was paid by company X and that the assignment to be executed by the Taxpayer would be executed by the Taxpayer as assignee for and on behalf of company X. The directors stated that they would execute a Declaration of Trust in favour of company X, a copy of which declaration was presented to the board of directors of the Taxpayer and the contents of which were approved. Two of the directors of the Taxpayer were authorised to execute the Declaration of Trust and fix the company seal thereto.

7. The Taxpayer executed a Declaration of Trust dated 10 August 1987 whereby it declared that it held the property upon trust for company X and undertook at the cost and request of company X to assign transfer or otherwise dispose of the property as company X might direct. The Declaration of Trust was submitted to the stamp duty office for adjudication and was duly adjudicated as not chargeable to any ad valorem stamp duty on 25 August 1987. The Declaration of Trust was not registered in the Land Office against the title to the property.

8. On 2 June 1988 the directors of the Taxpayer resolved that the Taxpayer would sell its interest in the property for a price of $12,000,000. A draft sale and purchase

agreement was tabled before the directors and the same was approved and authorization given for its execution. It was noted that completion was to be on or before 1 July 1988 and authorization was given for the execution of the assignment under the seal of the Taxpayer.

9. The aforesaid sales price of $12,000,000 was not paid to the Taxpayer but was paid direct to or accounted to company X.

10. Company X in addition to legal fees incurred certain architects expenses in respect of the property. All of the legal fees and architects fees and any other expenses in relation to the property were all paid by company X and not by the Taxpayer.

11. Company X included the purchase and sale of the property in its accounts which were duly audited. The profit which arose on the purchase and sale of the property was included in the profit and loss account of company X for the year ended 31 December 1988. In its profits tax return for the year of assessment 1988/89 company X included the profit which it had made on the sale of the property. Because company X had carried forward losses it was able to offset the same against the profit which it made and accordingly was not assessed to tax but its carry forward loss was adjusted and reduced accordingly.

12. The Taxpayer submitted a profits tax return for the year of assessment 1988/89 together with financial statements for the period from the date of its incorporation to 31 December 1988. The financial statement and the profits tax return did not show or reflect the purchase and sale of the property. The Taxpayer declared the nature of the business carry on by it as ‘acting as an agent and trustee for property dealing’. Included in the audited accounts was a note stating ‘no profit and loss account has been presented as the company did not trade during the period and all expenses, including the auditors remuneration of $6,000, were borne by a third party’.

13. The assessor became aware of the sale of the property by the Taxpayer and on 1 May 1990 issued to the Taxpayer an additional assessment to profits tax as follows:

Proceeds from sale of the Property	$12,000,000
Less: Cost of purchase	100,000
Additional Assessable Profits	$11,900,000
Additional Tax Payable thereon	$2,023,000

14. On 16 May 1990 the Taxpayer objected to this assessment on it on the ground that the Taxpayer had not derived any assessable profits for the year of assessment 1988/89. The Taxpayer through its tax representatives informed the Commissioner that the Taxpayer had acted as a trustee for holding the property in question and pointed out that the profit had already been reported as taxable income in respect of company X.

15. After the objection had been filed by the Taxpayer and after further information had been provided the assessor re-computed the profit on the sale of the property by the Taxpayer as follows:

Proceeds from sale of the Property		$12,000,000
Interest from deposit		21,025
		12,021,025
Less: Purchase price	$100,000	
Solicitors' fee	28,624	
Architect's fee	100,000	228,624
Profit from sale of the Property		$11,792,401

The interest from deposit, solicitors' fee, and architect's fee referred to by the assessor were incurred by and paid by company X and not by the Taxpayer.

16. By his determination dated 24 April 1993 the Commissioner directed that the assessment dated 1 May 1990 showing additional assessable profits of $11,900,000 with additional tax payable thereon of $2,023,000 should be reduced to additional assessable profits of $11,792,401 with tax payable thereon of $1,827,822. In his determination the Commissioner gave the reasons therefore as follows:

'(1) In terms of section 14 of the Inland Revenue Ordinance, profits tax shall be charged 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 from such trade or business.

(2) In the present case, it is not in dispute that the profit arising from the disposal of the property should be chargeable to tax. The company objected to the assessment on the grounds that it should not be the proper person to be charged. It contended that the property was purchased by it as trustee for and on behalf of company X and the profit on disposal of the property should be assessed on company X.

(3) I cannot accept this claim. By definition in section 2 of the Ordinance, 'person' includes a corporation, partnership, trustee, whether incorporated or unincorporated, or body of persons. It is clear that a trustee is within the purview of chargeability as envisaged by section 14. The fact that the purchase and sale of the property were carried out by the company as trustee does not absolve it from tax liability.

(4) For the above reasons, the company's objection fails. The assessment is to be revised in accordance with the assessor's computation in (fact 15 above). The

profit from sale of the property will be excluded from the tax computation of company X in due course.'

17. By letter dated 21 May 1993 the Taxpayer gave notice of appeal against the determination of the Commissioner.

At the hearing of the appeal the Taxpayer was represented by counsel. Counsel summarised the facts very briefly and we are indebted to him for so doing. We agree with his summary. It is convenient to now set out the facts as he summarised them as follows:

'1. The Taxpayer is a shell corporation having no assets save its $100 paid-up capital.

2. On 10 August 1987, the Taxpayer purchased a vacant lot and did so as trustee for an unrelated company, company X.

3. Company X paid the purchase price of the property, and so paid the same directly to the vendor of the property.

4. On 2 June 1988, the Taxpayer sold the property at the direction of company X.

5. The sale proceeds were paid by the purchaser of the property directly to company X.

6. All expenses relating to the property, including architect's fees, were incurred and paid for directly by company X.

7. The Taxpayer, in its relevant profits tax return, disclosed no profits assessable to tax. The return was accepted.

8. Company X, in its relevant profits tax return, disclosed the profit made on the sale of the property. The return was accepted.

9. On 1 May 1990, the Taxpayer was issued with an additional assessment on the basis that the profit which arose on the sale of the land was taxable to the Taxpayer and not to company X.

10. The Commissioner has notified company X that he will amend company X's profits tax assessment to exclude therefrom the profit which arose on the sale of the property.

11. Company X has a history of trading in land and of doing so through the medium of a trustee.

12. The Taxpayer has no history of trading.'

Counsel then placed the issues before us which he submitted were two in number namely whether the Taxpayer was a 'person' within the meaning thereof in section 2(1) of the Inland Revenue Ordinance (the 'Ordinance') and secondly whether the Taxpayer carried on a trade in the terms of section 14 of the Ordinance such that the profits of that trade fell to be assessed to profits tax. He said that if the answer to the first question was negative then the second question did not need to be answered. If the second question had to be answered then the question to be decided was by whom was the trade in the property conducted.

Counsel referred us to the reason for amending the Ordinance in 1981 which he said was to include a trustee within the meaning of a person but submitted that it did not include all trustees. He said that the amendment was aimed only at trading trustees. He said that it was not the intention to amend the Ordinance with respect to 'bare trustees'. He pointed out that the position of trustees such as a bank nominee was of no relevant interest when the law was amended. He pointed out that such a trustee whilst it certainly holds property on behalf of other persons does not have direction, control, or management of that property as required by the definition of a 'person' in section 2(1) of the Ordinance.

With regard to the second question counsel submitted that even if a trustee were included in the definition of a 'person' it would not be carrying on a trade with its beneficiaries property if it did not exercise direction, control, or management.

Counsel confirmed to the Board and we accept that the property had been purchased from a third party with no connection to the Taxpayer or company X and had been sold to another third party which likewise had no connection with the Taxpayer or company X.

Counsel tabled before the Board a number of documents which evidenced the fact that company X had carried on a number of trading transactions some of which had been carried on with the services of a trustee or nominee as it did in the present case. Counsel for the Taxpayer also stated to the Board that company X was liable to profits tax under the provisions of the Ordinance regardless of whether or not the Taxpayer was also subject to be assessed to tax on the same profit.

Counsel referred us to the following cases:

In re Downshire Settled Estates [1953] 1 CH 218

The Lothian Chemical Co Ltd v Rogers 11 TC 508

Sun Insurance Office v Clark [1912] AC 443

B S C Footwear Ltd v Ridgway [1972] AC 545

Pepper v Hart [1992] 3 WLR 1032

Counsel also referred us to the meaning of the words 'direction', 'control', 'management' in the shorter Oxford English Dictionary.

The Commissioner was also represented by Counsel. He submitted that it did not matter who was beneficially entitled to the profits. He cited Reid's Trustees v CIR 14 TC 512. He also made reference to the amendment to the Ordinance in 1981 which had included trustees in the definition of 'person'. He then referred us to the explanatory notes to the bill which had amended the Ordinance and to an extract from Hansard which set out the speech of the Financial Secretary when he moved the bill. He made reference to Pepper v Hart [1992] STC 898 and a number of other sections of the Ordinance.

The Board pointed out to Counsel for the Commissioner that on the basis of his submission all trustees which includes all nominees would be liable to be assessed to profits tax as well as the beneficial owners and he was asked to confirm that it was the practice of the Commissioner in Hong Kong to assess all such nominees to profits tax including bank nominees who hold shares as nominees on trust for others. The appeal was then adjourned to enable Counsel for the Commissioner to seek further instructions in this regard.

Two of the three members of the Board subsequently reconvened and at the request of the parties it was agreed that final submissions by the parties would be made in writing to the Board. Counsel for the Commissioner confirmed to the Board that it was not the practice of the Commissioner to tax nominee companies such as bank nominees.

In his written supplementary submission counsel for the Commissioner informed the board that the Commissioner does recognise a difference between 'trading trustees' which actively carry on a business for the benefit of the trust and trustees whose main role is to lend their name out as the registered owner of trust property. In the latter instance profits tax assessments are raised on the trustee only in respect of profits from the trustee service business and the lending of the trustee's name is not considered to be part of the services provided by the trust business which is not that of trading in the trust property. Counsel for the Commissioner stated that it was accepted that there was a grey area between a trading trustee and a nominee and that each case must be decided upon its own facts. This was substantially different from the way in which the case had been placed before us by counsel for the Commissioner prior to the adjournment.

This appeal involves a very interesting question which appears to be deceptively simple. The facts are quite clear and straight forward. They are not in dispute and are either agreed or accepted by both parties. Company X was actively engaged in property trading. For reasons known to itself it decided to use the services of the Taxpayer to hold a piece of property which it wished to buy and sell. It was suggested that there were good and commercial reasons for structuring the transaction in this way. It would certainly seem to be an unusual way to carry out a property trading transaction but we see nothing sinister or capable of having a double effect in what the Taxpayer and company X did. It is not unusual to use the services of a nominee in transactions in Hong Kong. There can be many reasons for so doing including confidentiality, avoiding or limiting liability, etc. The

genuineness of this particular transaction is beyond question because the Taxpayer executed a Declaration of Trust in favour of company X which was contemporaneous with the assignment to the Taxpayer of the property. We thus have a simple situation of company X acquiring a piece of property as a trading transaction and using the Taxpayer as its nominee for that purpose.

It is quite clear that the Taxpayer was no more than a nominee. It played no active role in acquiring the property, managing (in the ordinary meaning of that word) the property, and disposing of the property. All decisions were made by the beneficial owner. The transaction was remarkable only because in a period of approximately twelve months company X was able to cause the property to be purchased for the sum of $100,000 and sold for the sum of $12,000,000 realising a profit of $11,900,000. To dispel any doubts we put on record that the property was acquired from a third party having no relationship whatsoever with either company X or the Taxpayer and was sold to a different and separate third party which likewise had no relationship or connection with the Taxpayer or company X. For the sake of clarity we also place on record that though there was no direct relationship between the Taxpayer and company X it would appear that there was some relationship between the two so far as directors or shareholders may have been concerned. However any such relationship was totally irrelevant to the decision which we have to make.

Company X declared the profit which it had made on the property trading transaction to the Commissioner of Inland Revenue and the same was taken into account when the assessor determined the amount of a carry forward loss which was available to company X to be off set against future profits.

The Taxpayer did not declare that it had made any profit and indeed the tax return and accounts which it filed with the Commissioner did not reveal this transaction. This was perfectly correct and in accordance with good accounting practice because the acquisition and disposal of the property as a trustee by the Taxpayer took place within the period covered by the Taxpayer's audited accounts. Accordingly the Taxpayer did not own or have any interest in the property at the beginning or the end of the accounting period. It would be unusual for a company to show details of transactions which took place during an accounting period in its audited accounts other than to record any profit or loss which it might have made or suffered. As it was acting as a Trustee and had no beneficial interest whatsoever in the transaction there would be nothing which would appear in the accounts of the Taxpayer at the end of the financial period in question. It had already accounted to the beneficial owner for all of the proceeds which had in fact been paid direct to or to the order of company X.

We venture to suggest that in normal circumstances the matter would have rested as it was and no further action would have been taken or arisen. It would appear that the Commissioner decided to mount an attack upon the Taxpayer to assess it to tax as a trustee carrying on business either as a matter of principle or, and probably more likely, because company X had a very substantial carry forward tax loss in its books which would not be available to the Taxpayer. We are not at all clear regarding the motives of the

Commissioner because it appears to us that if he is successful in his desire to assess the Taxpayer to tax he will avail himself nought because the Taxpayer has no assets available to it from which it could pay any tax assessed upon it. However it is no part of our function or duty to speculate regarding the motives behind what either the Commissioner or a taxpayer may do. It is our function to hear and adjudicate upon the facts and submissions as they appear before us.

As we have mentioned above the question for our decision is deceptively simple. Can an assessor assess a trustee, including a nominee, to tax on a profit which the trustee has made out of trust property? At first sight the answer appears to be in the affirmative. Section 14 of the Ordinance states that 'profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business'. Section 2 of the Ordinance defines a person to include 'a corporation, partnership, trustee, whether incorporated or unincorporated, or body of persons'; goes on to define 'trustee' to include 'any trustee, guardian, curator, manager, or other person having the direction, control, or management of any property on behalf of any person, but does not include an executor'; and defines 'trade' to include 'every trade and manufacture, and every adventure and concern in the nature of trade'.

The deceptive simplicity of all of these words is immediately apparent. Any trustee can be assessed to tax if he carries on a trade profession or business which includes any adventure in the nature of trade.

The consequences of taking such a simplistic approach would lead to very strange results. It would mean that we would have double taxation. Two different people unrelated to each other would pay tax separately and individually on the self same profit which one would receive beneficially and one would receive as a trustee. Alternatively to avoid double taxation would mean introducing an element of discretion into the Ordinance which clearly does not exist. We cannot find any discretion given by the Ordinance to the Commissioner to decide whether or not in any particular case he should seek to charge a trustee or a beneficiary. To so decide would be clearly contrary to the express words of section 14 of the Ordinance which imposes an obligation upon the Commissioner to collect tax in accordance with the charges which are imposed upon persons who make profits in Hong Kong.

There can be no doubt whatsoever that a person who is carrying on a trading activity using the services of a nominee, for example share trading, is taxable on any profits which he makes through the services of his nominee. If this were not the case then it would be so obviously easy for anyone to avoid all liability to profits tax.

On the other hand if every nominee is liable to be assessed to tax and by virtue of section 14 must be assessed to tax on profits which do not belong beneficially to the nominee, then no person could carry on the business of offering nominee services. They could, and would, be assessed on profits which they had never made for themselves

beneficially and would have no right of recourse to the beneficial recipients of such profits who would also have been assessed to tax on the same profit.

We have referred to nominee services because they are the closest to the case before us but we note that the definition of 'trustee' goes far beyond nominees and includes simple managers and other persons having the direction, control, or management of any property on behalf of any person.

In his determination the Commissioner has sought to solve the problem of double taxation by assuming to himself an arbitrary discretion in stating the following:

> 'The profit from sale of the property will be excluded from the tax computation of (company X) in due course.'

What, we ask ourselves, is the legal right of the Commissioner to make such a statement? We have already stated above that no discretion is given in the Ordinance to allow the Commissioner arbitrarily to decide who he should tax and who he should not. He has quite correctly, brought into account in the tax affairs of company X the profit which company X made from this property trading transaction. He has no right or authority to suggest that he can in some way give them a rebate or credit for the profit which they have made. As it so happens, they have substantial carry forward losses. This means that they have never been assessed to tax on the profit which they made and as we know from other Board of Review decisions a calculation of a loss is not binding upon the Commissioner until an assessment of a profit is made. So in the present case presumably it is the arbitrary intention of the Commissioner to issue an instruction to his assessors informing them that they should increase the carry forward tax loss of the Taxpayer accordingly. If however the facts had been different and an assessment had been made this course of conduct would not be open to the Commissioner. He would have had no power to reduce an assessment which had been made. Section 70 of the Ordinance would govern the matter and section 70A could have no application unless an application were made to correct an error and, with due respect to the Commissioner, it is clear that no error has been made of any description. We must seriously doubt and challenge the right and authority of the Commissioner arbitrarily to direct his assessor to amend the carry forward loss of a Taxpayer without any proper legal justification for so doing.

The Commissioner in his determination and his counsel after the adjournment have confirmed that it was not the intention of the Legislature to introduce double taxation. With this we totally agree. Any interpretation of the Ordinance which leads to a different result must be incorrect.

The definitions in the Inland Revenue Ordinance of the words 'person' and 'trustee' appear to us to be quite clear and beyond doubt. It was argued before us that the words 'having the direction, control, or management of any property on behalf of any person' appearing in the definition of trustee apply not only to the words 'or other person' but to the other persons designated in the definition namely, 'trustee, guardian, curator, manager'. Whilst there may be some ambiguity, we favour the interpretation suggested to

us by the representative for the Commissioner. We do so because the latter words would have little meaning in relation to the earlier words. A trustee by his or its very nature holds property on behalf of someone else. A manager manages property on behalf of someone else. The natural relevance of these words in the definition must apply to the words 'or other person'. However it makes no great difference one way or the other to the case before us because the Taxpayer was a trustee and did have the legal direction, control and management of the property as indeed does any nominee.

The solution to the problems of this appeal lies in a careful understanding of section 14. It was explained to us by both parties that the definition section was amended in 1981 to include trustees in the definition of 'person' to close a possible lacuna or perceived gap in the law of taxation which had been highlighted by the Third Inland Revenue Ordinance Review Committee. In its report the Review Committee said as follows:

> 'Trustees' profits tax liability. In paragraph 93 above we discussed certain aspects of the interest tax liability which arises when a body of trustees receives interest on money lent. There is a minor difference in the wording of two sections in the Ordinance in the words used to describe the person liable to assessment. By section 28(1), interest tax is to be charged on:
>
> > "the recipient"
> >
> > of any sum paid or credited as interest. On the other hand, section 14 directs that profits tax is to be charged on:
> >
> > "every person carrying on a trade … in respect of his profits."
> >
> > One correspondent called attention to the possibility of arguing that section 14 would be ineffective to support a profits tax assessment on trustees who, as a body, were carrying on a trade – on the ground that the trading profits did not belong beneficially to the trustees whereas the use of the possessive adjective ("his profits") might be thought to confine liability to cases where the recipient or recipients of business profits were absolutely entitled to those profits.
> >
> > We are not able to assess the potential strength of this argument just outlined if the matter were to be tested in the courts. But whatever its formal validity (on which we offer no comment), we are satisfied that there is no equitable distinction between trustees and an absolute owner in this respect. As the matter has, we believe, been the subject of public comment we think it right to record the argument here so that consideration may be given, if thought desirable, to the introduction of legislation for the avoidance of any doubt in the matter.'

When the law was amended in 1981 the explanatory note read as follows:

'Clause 2 of the Bill inserts a definition of "certificate of deposit" in section 2 of the principal Ordinance and also amends the definition of "person" to make it clear that it includes a trustee.'

When the Financial Secretary moved the reading of the bill he said as follows:

'The Bill also provides the opportunity to make amendments in respect of two relatively minor matters – first, to place beyond doubt the liability to profits tax of trustees who carry on a trade, profession or business in Hong Kong; and second, to ratify a long-standing practice of the Inland Revenue Department, advantageous to the taxpayer, concerning the capitalization of interest incurred on the acquisition of buildings and plant or machinery.'

All of this is quite clear and precise. It makes it quite clear that a trustee can be subject to tax and, in the case of section 14 of the Ordinance, to profits tax. However with due respect to all concerned it does not remove from section 14 the words 'in respect of his assessable profits'. It is these words which we feel have not properly been considered by the Commissioner. The word 'his' is in our opinion of the utmost and paramount importance. It is the governing word which stops double taxation arising. For taxation purposes a profit belongs to one person or another and can only be taxed in the hands of one or the other. It cannot be taxed in the hands of both. Nor does it give the Commissioner any discretion or authority to decide to tax one person as opposed to another. What must be done in each and every case of profits tax is to consider whether or not there is any trustee element involved. If there is not then no problem arises. If however a trustee is in any way involved then one must look to see whether or not the profit which is made belongs for taxation purposes to the trustee or to some other person. An answer must be sought to the question as to whether or not it is 'his assessable profits'. As a matter of logic a profit cannot belong to a multiplicity of persons.

There are obviously two extremes. One is the person who actively carries on business in his own name and for his own account but who finds it convenient for some reason or another to use the name of a nominee to hold the assets in which he is trading. In such circumstances the profit is his and his alone. It does not and cannot be attributable for taxation purposes to his nominee albeit his nominee is a trustee for him and has a legal entitlement to the profit. The profit is not the profit of the trustee and the trustee must account for it and pay it to the beneficiary.

The other extreme is the trustee who actively carries on and manages a business as part of the trust. In such circumstances it is clear that the profit arising from the business belongs to the trustee and to no one else. It is his profit. No beneficiary can lay claim directly to such profit. In such a situation the beneficiary is in no different position for taxation purposes than a shareholder of a company. In the latter case the company carries on business and pays dividends to its shareholders. In the former case the trustee carries on business and pays surplus income to beneficiaries, discretionary or otherwise.

Between these two extremes are many cases and somewhere in the middle is the line of demarcation. It is then to be decided as a matter of fact on which side of the demarcation line the particular profit in question falls.

In the case before us it is clear that company X was carrying on business for its own account and only used the services of the Taxpayer as its nominee and nothing else. In such circumstances it is easy for us as a matter of fact to find that the word 'his' appearing in section 14 refers to company X and not the Taxpayer. There is no way on the facts before us that we can find that this particular profit belonged for taxation purposes to the Taxpayer. The Taxpayer did nothing. The Taxpayer made no decisions, did not provide the capital to purchase the property, did not receive the proceeds of sale nor perform any function other than holding the legal title to the property. We find as a fact that for the purposes of the Ordinance that the profit in question was not 'his'. It was the profit of company X.

As the case before us is so clear and so far on one side of the demarcation line it is not necessary for us to try to promulgate the considerations which would be taken into account in borderline cases. We leave this for future Boards of Review.

For the reasons given we allow this appeal and direct that the assessment against which the Taxpayer has appealed should be annulled.