INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D42/90

Salaries tax – personal assessment – whether losses incurred in buying and selling Hang Seng Index futures can be deducted against salaries tax liability.

Panel: William Turnbull (chairman), E M I Packwood and Kenneth Ting Woo Shou.

Date of hearing: 16 August 1990.
Date of decision: 14 November 1990.

The taxpayer was a technical officer in the full time employment of a firm in Hong Kong. Prior to the period in question and subsequent thereto the taxpayer did not buy, sell or hold any shares of securities in public companies nor any commodities or previous metal nor any Hang Seng Index futures other than those which are the subject matter of this appeal. The taxpayer decided that he would open an active account with a broker on the Hong Kong futures exchange so that he could trade in Hang Seng Index futures contracts. Almost immediately the taxpayer suffered substantial losses and did not carry on any further trading in futures contracts. The taxpayer claimed to be able to offset the losses which he had made against his income subject to salaries tax by way of personal assessment.

Held:

The question to be decided was whether or not the taxpayer was carrying on a trade or business. On the facts of the case based on the authorities quoted to the Board the taxpayer had not carried on a trade or business.

Appeal dismissed.

Cases referred to:

CIR v Dr Chang Liang-jen 2 HKTC 975
Salt v Chamberlain 53 TC 143
Lewis Emanuel & Sons Ltd v White 42 TC 369
Cooper v Stubbs 10 TC 29
Braikovich v Federal Commissioner of Taxation 20 ATR 1570
D55/87, IRBRD, vol 3, 1
Graham v Green [1925] 2 KB 37
Ransom v Higgs 50 TC 1

Lee Yun Hung for the Commissioner of Inland Revenue.

Taxpayer in Person.

Decision:

This is an appeal by a taxpayer seeking to offset by way of personal assessment certain losses which he incurred in buying and selling Hang Seng Index futures against his salaries tax liability. The facts are as follows:

1. The Taxpayer was a technical officer in the full time employment of a firm in Hong Kong. Prior to the period in question and subsequent thereto, the Taxpayer did not buy, sell or hold any shares or securities in public companies nor any commodities or precious metals nor any Hang Seng Index futures other than those which are the subject matter of this appeal.

2. At some time prior to 27 August 1987, the Taxpayer decided that he would open an active account with a broker on the Hong Kong futures exchange so that he could trade in Hang Seng Index futures contracts. He deposited with the broker the sum of $50,000 which he had available form his own funds and using this as the security or deposit against his possible future liabilities. He then commenced trading in Hang Seng Index futures. His first transaction was on 27 August 1987.

3. Thereafter the Taxpayer actively traded on the Hong Kong futures exchange using the services of the broker with whom he had opened his account. Unfortunately for the Taxpayer he had chosen an inopportune moment in time to commence his futures trading and as is now so well known he was caught by the collapse of the world stock markets which meant that he lost his initial deposit of $50,000. He was obliged to make a further deposit of $50,000 and to pay off by instalments to the broker the substantial losses which he incurred in excess of $100,000.

4. The Taxpayer ceased to trade on the futures exchange on 29 October 1987 and has never made any further transactions. The evidence before us does not say whether the decision by the Taxpayer to cease his trading was because of necessity or because of a voluntary decision. Presumably it was because of necessity as he did not have the money to cover his losses and continue trading. However, it is immaterial in our opinion why he decided to cease trading activities. It is sufficient to find as a fact that he did so decide.

5. When the Taxpayer commenced his futures trading, he did not apply for or take out any business registration certificate and likewise when he ceased his trading activities, he did not cancel any business registration and he did not attempt to file any business tax return with any supporting accounts. What the Taxpayer

did was to file his salaries tax return for the year of assessment 1987/88 and in that tax return he claimed a deduction from his taxable emoluments of the sum of $141,111.2 being the amount which claimed to have lost as the result of his futures trading activities.

6. The assessor informed him that he was not permitted under Hong Kong tax law to claim business losses against his salaries tax liabilities and that if he wished to claim business losses, he must apply for personal assessment. This he proceeded to do. After considering his claim to have made business losses, which he had incurred were not as a result of carrying on any trade or business.

7. As a result of a request dated 7 September 1989 made by the business registration office, the Taxpayer registered himself as carrying on the business of 'trading of Hang Seng Index future'. This business registration was taken out sometime after the Taxpayer had ceased trading in Hang Seng Index futures and was the direct result of the demand of the Commissioner of Inland Revenue in his capacity as the person responsible for the business registration office.

8. The Taxpayer objected to the assessment made on him by the assessor. By his determination dated 11 April 1990, the Deputy Commissioner decided against the Taxpayer and upheld the assessment of the assessor.

9. The Taxpayer duly lodged notice of appeal to this Board of Review against the determination of the Commissioner.

At the hearing of the appeal the Taxpayer appeared in person and referred the Board to the written representations which he had made when filing his notice of appeal to the Board of Review and subsequent thereto. The main thrust of the Taxpayer's submissions were two-fold. One was that the Taxpayer had taken out a business registration some two years after the events in question but as a direct result or his being required to do so by the officers of the business registration office of the Inland Revenue Department. He submitted that this was evidence that the Commissioner had acknowledged that what the Taxpayer had done must constitute carrying on a trade or business because the Commissioner had required the Taxpayer to register under the Business Registration Ordinance. The second part of his submission was to the effect that as he had been trading in Hang Seng Index futures and made losses he should be entitled to deduct those losses from this taxable emoluments.

This Commissioner's representative submitted that the Taxpayer had not been carrying on any trade or business within the meaning of section 14 of the Inland Revenue Ordinance and that what the Taxpayer had done did not amount to trading nor was it an adventure in the nature of trade. He submitted that pure speculation is similar to gambling. Only in extreme cases can such activities amount to carrying on business. There must be associated business activities and clearly definable system and operations of business

nature. As we will be referring in more detail to the submission made by the Commissioner's representative, we will not now elaborate further on it.

This appeal raises a very interesting question and we would like to place on record our appreciation of the assistance given to us by Mr Lee of the Inland Revenue Department who was representing the Commissioner. As a result of the manner in which he conducted the case for the Commissioner, this Board was able to focus its entire attention on the precise matters in dispute and which are of great significance not only to the taxpayer himself but no doubt to many other taxpayers in Hong Kong.

In the course of his submissions, the Commissioner's representative referred us to the following cases:

CIR v Dr Chang Liang-jen 2 HKTC 975

Salt v Chamberlain 53 TC 143

Lewis Emanuel & Sons Ltd v White 42 TC 369

Cooper v Stubbs 10 TC 29

Braikovich v Federal Commissioner of Taxation 20 ATR 1570

D55/87, IRBRD, vol 3, 1

It is surprising that many similar cases have not arisen previously because of the commercial nature of Hong Kong and its citizens. At first sight, it would appear that the Taxpayer should be entitled to deduct the loss which he incurred from his taxable emoluments by way of personal assessment. It is quite clear that the Taxpayer was 'trading' in Hang Seng Index futures. A Hang Seng Index future is very different in nature from shares and securities in public companies. Shares and securities are property which are capable of being held as long term investments and which normally produce significant income whereas a future is an intangible asset of no long term investment value. A future has a short lifespan which expires and disappears and it is incapable of generating any income other than by the sale of the future itself. The question which normally comes before this Board is whether the activities of a person constitute long term investment or trading in shares and securities. The nature of a Hang Seng Index future is such that it would be impossible to claim that it is a long term investment. It might be possible for someone who holds long term capital investments in the stock market to protect his long term investments by the use of the strategy of buying or selling Hang Seng Index futures but it is irrelevant on the facts of this case to consider whether or not this would constitute a 'long term investment'. It is the only conceivable way that we can imagine anyone claiming that the purchase and sale of a future is anything other than trading. Quite rightly the Commissioner has not attempted to argue that the Taxpayer was holding the futures as a long term investment.

In the present case the Taxpayer did not have any investment or trading activities other than his purchases and sales of Hang Seng Index futures. He entered the Hang Seng Index futures market purely and simply with the intention of making short term trading gains, what he did was pure speculation. In the circumstances which we have outlined one would automatically take the view that the Taxpayer was trading and that any profits which he made would be subject to profits tax. If this is the case then likewise any losses which he might make will similarly be capable of being brought into account against his emoluments for salaries tax purposes by way of personal assessment.

However, that is not what the Inland Revenue Ordinance provides. Section 14 of the Inland Revenue Ordinance says that tax is chargeable on a person who carries on a trade or business and who makes profits from that trade or business. Accordingly there is a double test. Only people who are carrying on a trade or business are taxable and then they are only taxable in respect of profits which arise from such trade or business.

One matter which we consider to be of very little, if any, relevance in this case is the question of a business registration. The Taxpayer did not seek to obtain a business registration for his futures trading business and it can be argued hat this might indicate that he himself did not consider at that time that he was carrying on a business. However, having seen and heard the Taxpayer in this appeal, it is quite clear that he is not aware of the legal niceties of 'carrying on a business'. If any significance were to be attached to this fact, then equal opposite significance can be attached to the fact that the Taxpayer did duly file his salaries tax return for the year in question in which he disclosed the results of his 'futures trading business'. He may have been wrong as a matter of law when he included the results of his trading activities in his salaries tax return but it is evidence of his state of mind at that time. However, in our opinion, all of this is not of any great materiality in this appeal because whether or not the Taxpayer obtained a business registration certificate or had thought that he was or was not carrying on a business does not change whether or not he was, as a matter of fact, carrying on business within the meaning of section 14 of the Inland Revenue Ordinance. To answer that question we must look at all of the facts of this case and make our decision accordingly. The decision by the Commissioner to require the Taxpayer to register a business appears to us to have been clearly wrong because whatever may be the nature of the Taxpayer's activities during the months of August to October 1987 he certainly was not carrying on any business thereafter. In our opinion it is unfortunate that the Commissioner should have caused the Taxpayer to obtain a business registration certificate for something which the Commissioner maintains is not a business. However what the Commissioner may have done after the events in question cannot change the facts before us. It would perhaps have been significant if the Taxpayer had taken out a business registration certificate immediately before he traded in futures because that would have been part of the carrying on of a trade or business but as he did not do so it is a futile exercise to speculate as to whether it might have been significant.

Having dealt with this preliminary and largely irrelevant point, we now turn to the real crux of the case. What we must decide is whether or not what the Taxpayer did

constitute 'carrying on a trade or business'. Only if the answer to this question is affirmative do we go on to ask if the profits arose from that trade or business. As we have said above, the prima facie appearance of what the Taxpayer did was trading in Hang Seng Index futures and as it was trading and as the Inland Revenue Ordinance refers to carrying on a 'trade', it must seem at first sight that the losses are capable of deduction. Experience has often shown that first appearances can be deceptive and that is the situation in the present case.

The Commissioner's representative drew our attention to a number of cases on the meaning of carrying on a trade or business. Though they may be distinguishable on their facts, a general pattern of principle appears from these cases. As this is to our knowledge the first time that the question before us has been raised on appeal we think it appropriate that we should analyse the cases cited before us in some detail. It is also useful to set out the guidelines and principles on which the Commissioner currently operates as the same were explained to us by the Commissioner's representative.

The first case it the case of Dr CHANG Liang-jen. That case formed a milestone in tax law in Hong Kong. It recognized the real modern world of today which is substantially different from some years ago and apparently it has become the foundation of the current policy of the Inland Revenue Department. The facts of that case were that a doctor of economics invested money in shares listed in the Hong Kong stock market. Over a period of a few years he regularly sold some of the shares which he had acquired and purchased others. He made significant profits some of which he did not reinvest but withdrew and used for other purposes. The case was taken on appeal to the Supreme Court where Liu J decided in favour of the Taxpayer. The learned Judge recognized that a person who invests in shares and securities on the stock market can sell and buy on many occasions without starting the business of share or securities trading. He also recognized that a person can invest in shares and securities with a view to making gains as well as with a view to simply collecting dividends. Though he did not expressfully say so, he clearly rocognised that in the later part of this century, modern communication and business methods have caused everything to move and happen much more quickly than it did previously. Today a person must think and act quickly to preserve his capital. The representative for the Commissioner informed us that following Dr Chang's case, the Commissioner had accepted that private individuals would rarely be considered as carrying on a business of trading in shares and securities unless there were other associated activities, for example, the individual was a stockbroker or carrying on a similar securities trading business. He suggested that there might be a difference with companies as opposed to private individuals, but agreed that this was a difference of fact and not a difference of principle. The Commissioner's representative considered that companies which are actively carrying on business by their very nature maintain accounts and have organisations which contrasts them with private individuals who do not have such business attributes. The Commissioner would consider that if a company was basically 'dormant' and did not actively carry on business, it would be in a similar situation to a private individual. It is a matter of fact and degree.

As we have said above the facts of Dr Chang's case are clearly distinguishable from the present case but it forms a useful starting point. In Dr Chang's case, the court was dealing with property which by its nature is clearly capable of being held as a long term investment or can form trading stock. The question before the Judge was to decide whether what the taxpayer had done in relation to an asset which could or could not be a long term asset fell on one side or the other of the border. A Hang Seng Index future is a very different type of property and, as we have said above, by its nature is not something which is capable of being held for a long term investment. However, Dr Chang's case does establish a clear guideline as to the type of approach which should be taken in cases of this nature. In that case, what the doctor did was not considered to be trading and, by inference, it could also not be considered to be carrying on a trade or business.

The Commissioner's representative then referred us to the case of Salt v Chamberlain which is a United Kingdom case relating to what is there known as schedule D. Though the United Kingdom tax law and that of Hong Kong are substantially different and there are inherent dangers in referring to overseas cases, the Salt v Chamberlain case is of interest in the present case. Mr Salt was a mathematician with a knowledge of computers who entered into a series of stock exchange transactions as a result of which he incurred losses. For convenience we quote the opening summary of Oliver J's judgment as follows:

> ' This is a taxpayer's appeal from the General Commissioners of West Brixton and it raises an interesting point with regard to the taxpayer's claim for relief under section 168(1) of the Income and Corporation Taxes Act 1970. That section enables a taxpayer to claim relief in respect of losses which he sustains "in any trade, profession, employment or vocation" carried on by him. During the tax year 1972/73 the taxpayer, Mr Michael Stuart Salt, engaged in a number of speculative purchases and sales of securities on the stock exchange, as a result of which he sustained a loss of PDS3,373 and the question is whether he is entitled to claim relief in respect of that loss.
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> I do not propose in this judgment to reproduce the stated case, but the salient facts are these. Mr Salt is a mathematician and, as I understand it, possessed of some expertise in the operation of computers. In 1968 he established himself as what is known as an "operational research consultant" offering advice and assistance with business problems. It occurred to him that he could profitably utilize his expertise in the use of computer technology for forecasting share movements by engaging personally in speculation on the tock market. Over the next few years he effected some two hundred purchases and sales of stocks and shares, financing himself by means of bank loans and insurance policies in addition to such funds of his own as he had available. A substantial proportion of the transactions was represented by purchases and sales or by call or put options. Whether because of the unreliability of computers or the unpredictability of human affairs even by computers, the speculation appears not to have been marked with conspicuous success. In no year during the relevant period did he make a profit and in the year to 31 March 1973 he made

the loss in question. The General Commissioners determined as a fact that the transactions entered into during the year in question were not a trade and, accordingly, that Mr Salt was not entitled to the relief claimed.'

After dealing at some length with the question as to whether or not the question to be decided by the Court was one of fact or law, the Judge found that the decision as to trading was one of fact. He concluded his judgment against Mr Salt as follows:

' It seems to me that, once the question of misdirection in points of law is out of the way, I cannot possibly in this case say that the Commissioners arrived at a plainly wrong conclusion of fact. Where the question is whether an individual engaged in speculative dealings in securities is carrying on a trade, the prima facie presumption would be, as Pennycuick J suggested in the Lewis Emanuel case, that he is not. It is for the fact-finding tribunal to say whether the circumstances proved in evidence or admitted take the case out of the norm.

Mr Salt suggests that his peculiar expertise, his access to computer technology and his general position show that this is not the normal case. No doubt those matters are factors to be taken into account, although I should have thought that they merely pointed to his having, perhaps, an advantage over other investors in the market. But ultimately the question is one for the Commissioners, and it seems to me that they were entitled – Mr Hart puts it higher and says "bound" – to come to the conclusion at which they arrived. In particular I doubt whether the question whether in any given case a person is or is not carrying on a trade is capable of solution by the application of a logical progression of propositions culled from decided cases. The question is, I think, one of overall impression. Some of the difficulties of definition are referred to in the judgment of Rowlatt J in Graham v Green and it is not, I think, helpful to seek to define or confine the term "trade" by reference to the status of the taxpayer or the subject matter of the transactions. As Lord Wilberforce said in Ransom v Higgs: "Everyone is supposed to know what 'trade' means; so Parliament which wrote it into the law of income tax in 1799, has wisely abstained from defining it."

In the instant case the Commissioners determined that the taxpayer was not trading. That was a conclusion which, in my judgment, was plainly open to them, and in those circumstances it is not open to me, even if I were minded to do so, to reverse their decision.'

The Salt v Chamberlain case related to trading only and primarily as to whether the Commissioners had decided a matter of law or fact. However it is clear from a close study of the case that Oliver J was satisfied on the facts before him that the Commissioners were not wrong in their decision that what Mr Salt had done was not trading. Extensive reference was made by Oliver J to the case of Lewis Emanuel & Sons Ltd v White and that is the next case to which the Commissioner's representative referred us.

The facts of the Lewis Emanuel case were that the company had traded as fruit and vegetable importers for many years. Following a business set back, the company began to buy and sell stock exchange securities in addition to its fruit and vegetable trading business. The company engaged additional staff and maintained separate books of account for its share security transactions. The company made losses as a result of its securities activities and sought to have these losses allowed against its taxable profits. It was argued by the Revenue that the activities of the company were pure speculation and did not amount to the carrying on of a separate trade of dealing in securities. The court held that the only conclusion which could be reached on the facts was that the company had been trading in securities on the stock exchange.

Though the representative for the Commissioner sought to rely upon the Lewis Emanuel case as authority for the proposition that speculation in securities is no more than gambling and not trading, with due respect, we feel that the relevance of the Lewis Emanuel case to our present decision is that it demonstrates that a person is capable of trading in securities on the stock exchange and that each case must be decided upon all of its own facts. In Salt v Chamberlain, the taxpayer had done little to set up a 'business' but in the Lewis Emanuel case, the taxpayer had clearly established a business of trading in securities. Between them the two cases show that it is a matter of degree to be decided on the facts of each case.

The next case to which we were referred is also important to our decision. In Cooper v Stubbs, a private individual traded extensively in cotton futures. The facts are summarised in the opening paragraph of the judgment of Rowlatt J as follows:

> 'In this case the respondent, being connected or having been connected with a firm of cotton brokers and merchants, was minded to make, over a large number of years, a series of speculations by way of buying and selling futures in cotton, not with a view to receiving or delivering any cotton, but with a view to closing the transaction and making a profit if he could, and with the necessity of paying the loss, if he made a loss.'

The Special Commissioners had decided in favour of the taxpayer that the taxpayer was not carrying on a trade because he did not deal in future delivery contracts so habitually and systematically as to constitute the carrying on of a trade and secondly that his dealings were gambling transactions and that the profits arising therefrom were not assessable. The special Commissioners' decision was in the following words:

> 'We held that the respondent did not deal in future delivery contracts so habitually and systematically as to constitute these dealings the carrying on of a trade, and that the profits arising therefrom were accordingly not assessable under case I of schedule D. We further held that the dealings were gambling transactions and that the profits arising therefrom were not annual profits assessable under case VI of schedule D. We accordingly discharged the assessments under appeal.'

On appeal to the High Court, Rowlatt J allowed the taxpayer's appeal and decided that on the facts the only conclusion which could be reached was that the taxpayer was trading in cotton futures. The case was then referred to the Court of Appeal where Pollock M R decided that the Commissioners were wrong and that the taxpayer was clearly trading and that speculation of this type is not gambling. The other two Lords Justices of Appeal came to the same decision but for totally different reasons. They decided that whether or not the taxpayer was trading was entirely a matter of fact and that it was not proper to disturb the finding of fact of the Commissioners in this regard. It is necessary to look at the three judgments in detail to find the principles.

First of all the three judges of appeal all took the view that the Board had decided two separate things. They had decided that the taxpayer was not trading for the purposes of case I of schedule D and that the profits were not assessable because they were gambling profits for the purposes of case VI of schedule D. We are not concerned in this case with case VI of schedule D but only case I of schedule D which relates to carrying on a trade. However in so far as the trading profits would not be taxable if they were gambling profits the second finding by the Special Commissioners relating to gambling is material.

Pollock M R decided that in his opinion the activities of the taxpayer constituted trading and were not exempted because they were not gambling transactions. Pollock M R first of all analysed the transactions and decided that commodity future trading transactions were genuine business transactions and not a form of gambling or betting. Pollock M R was careful to state that matters of fact are for the Special Commissioners alone but then went on to say that the Special Commissioner had misdirected themselves as a matter of law when considering whether or not the taxpayer was trading. He said at page 47:

> ' It does not appear to me that a habit or system were characteristics necessary to finding a trade in this case. Mr Henry Stubbs carried on a trade or business. He was a cotton broker and he had the means and the knowledge of engaging in certain transactions upon the cotton exchange according to his own business ability and experience, and he entered into a number of transactions which are real transactions.'

After proceeding to consider the gambling aspects of the transactions, Pollock M R on the same page said:

> ' Testing these transactions from that point of view it does not appear that the habit or system affords a true test on whether or not they are such dealings as indicate a carrying on of a trade. Apparently the Commissioners treat them as, judged apart from his other transactions not being so many or so habitually and systematically entered into per se if taken alone, to prove that this business, if you treat it as an independent business, was such a business as indicated a separate trade on his part; but the basis of their finding is that there was no habit

> or system in them. On the other hand it is clear that these adventures were entered into by him successively in a number of years in large amounts. They amounted to a number of transactions, and in all it is important to remember that they were real contracts which no one except Mr Henry Stubbs himself could treat or deal with otherwise than as real contracts. If he was minded at the end of his own time to close them, well and good; if, on the other hand, he was minded at any time to take delivery or to give delivery he could have done so. It appears to me therefore that the test that has been applied in this first limb of paragraph 11 of the case is not a true test in law, and therefore that the Commissioners have misdirected themselves in holding that this business so carried on by Mr Henry Stubbs did not constitute the carrying on of a trade. If it was the carrying on of a trade then he is liable under case I of schedule D, and when one is dealing with the question of whether a man is carrying on a trade it is important to notice the alternative words which are to be found from section 237 of the Income Tax Act, 1918, that trade "includes manufacture, adventure or concern in the nature of trade". Mr Henry Stubbs was a cotton broker; he did carry on these dealings in the course of his business for his own purposes but they were real contracts made for his own purposes, and because he was a cotton broker. It appears that he did engage in trade in the sense in which that is to be understood, and therefore these profits fall to be assessed under case I of schedule D.
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> The Commissioners go on to say, "We further held that the dealings were gambling transactions". I am not quite certain what they mean by that, and it is not necessary to decide. It appears to me rather that they have used the word "gambling" in some colloquial sense, as meaning that they were fortuitous profits obtained by these independent transactions – independent therefore from the necessary transactions of the business – and it may be that the second part of the finding is coloured by this, that there was not a system or habit in the gambling transactions so as bring Mr Stubbs within the decisions under which a bookmaker is held be carrying on a trade, and they also held that they did not fall under case VI of schedule D. Case VI sweeps in all other profits and gains which are not included in other cases under schedule D. But to my mind when rightly tested the contracts which were made by Mr Henry Stubbs over these years in successive series of contracts do constitute a business, and it is not a right test in law to try and apply the touchstone of habit or system as to whether or not a trade was carried on.'

In our opinion the judgment of Pollock M R is a little confused. It is clear that on the facts he was of the opinion that the taxpayer was trading and as such should be taxable. It is also clear that he did not consider the transactions to be gambling. Perhaps that is a sufficient ratio decided for the purposes of this case. Pollock M R was of the opinion that the taxpayer was trading because he was a cotton broker who in the course of his business and for his own purposes carried on a number of dealings and he said on page 47 on his judgment:

> ‘ Mr Henry Stubbs carried on a trade or business. He was a cotton broker and he had the means and the knowledge of engaging in certain transactions upon the cotton exchange according to his own business ability and experience, and he entered into a number of transactions which are real transactions.’

The judgments of the two other Lords Justices of Appeal are clearer and, being the majority, are binding upon this Board. Warrington L J said at page 51:

> ‘ The Commissioners are the judges of fact, and this Court, and every Court of Appeal from the Commissioners which has jurisdiction in questions of law only, is very much tempted, when it feels that it cannot agree with the Commissioners in the finding of fact, to find some reasons in law by which that finding can be reversed. In my opinion the Court of Appeal ought to be careful not to yield to that temptation, except in very clear cases where either the Commissioner have come to their conclusion without evidence which would support it, that is to say, have come to a conclusion which on the evidence no reasonable person could arrive at, or have misdirected themselves in point of law. I do not say for a moment that Mr Justice Rowlatt was wrong in the conclusion at which he arrived, if he had been the judge of facts. On the contrary, although it is purely irrelevant as to what my own opinion is, I should have been inclined to agree with him; but he is not the judge of facts; nor am I; and I am not prepared to go so far as to say that there was no evidence upon which a tribunal such as the Commissioners could have come to the conclusion at which they arrived. It must be borne in mind that the Commissioners are men of business who are for that reason selected to deal with these questions relating to Income Tax, and, as a tribunal, particularly well qualified to decide such questions of fact, and we ought not, nor ought the King’s Bench, lightly to set aside their findings on such subjects. In my opinion I do not think that this is a case in which it can be said that there was no evidence upon which the Commissioners could arrive at that conclusion. I think, therefore, if it be material, that the finding of the Commissioners with regard to case I is one which ought to be accepted.’

This is a clear and concise statement. Warrington L J was of the personal view that what the taxpayer had done would in normal circumstances amount to trading but he recognises that he is not the judge of fact. He also recognises that the Commissioners have a knowledge and understanding of business and are better qualified to decide the question as to whether or not the taxpayer was carrying on a trade.

Atkin L J agreed with Warrington L J and his judgment is also of considerable assistance to us. At page 54, after deciding that the contracts were not ‘bets’ he went on to say:

‘ Therefore these transactions were, as I have said, real and enforceable contracts in which the differences could have been sued for on one side or the other. It is true that they were speculations, and I think myself that that may be some of the material facts to be considered in respect of the question as to whether or not this gentleman was engaged in a trade, because for my part I see some difficulty in trying to form an opinion of a trade which consists solely of entering into transactions which would merely result in differences, and when the supposed trader never intends to get possession of any commodity, so that he may in fact have the disposal of it by himself or to any third party. Although I do not say it is impossible to have a trade or an adventure in the nature of trade of that kind, I think it is a fact to be taken into account.’

What the learned Lord Justice is saying is that in transactions which are pure speculation this is a factor which weighs against finding that the taxpayer is carrying on a trade.

The Lord Justice then goes on as follows:

‘ Now the first question is whether or not this gentleman, on the footing that he was entering into real transactions for the purchase and sales of a commodity, namely, cotton, was or was not engaged in a trade or vocation, and it seems to me that that must be in the circumstances a question of fact. Unfortunately or fortunately – I do not propose to express any moral judgment about it – one knows that a great number of people whose ordinary life does not lie in the way of commerce do engage in speculations of this kind in commodities, and when a commodity is found which offers tempting fluctuations of price, so that there are good chances of a profit with equally good chances of a loss, one does find individuals from time to time coming into the market and making purely speculative purchases; and one knows that there have been at any rate in one’s own experience three commodities in which that kind of speculation has been quite common at different times. One is this commodity, cotton; another has been in the past, and may be in the present, copper; and another has been in the past and no doubt is in the present, rubber. There are no doubt laymen who do indulge in speculative purchases in those commodities, and they repeat those speculative purchases more than once, being probably buoyed up by their initial successes. Nevertheless, it seems to me to be still a question of fact whether the professional man, to quote an extreme case, who makes purchases of that kind, and makes more than one of them in a year, can be said to be engaged in a trade or a vocation in the course of these purchases. I should think it would probably be a question of degree. Now if it is a question of degree it must be a question of fact, and there is no tribunal more competent to deal with that question of fact than the Special Commissioners; but whether they are competent or not the point is that the legislature has confided to them and to them alone the duty of determining that question of fact, and the courts of law have got no jurisdiction

to deal with the matter at all. Their jurisdiction is confined to the question of law.'

Applying these words to the present case, Atkin L J is saying that whether or not the taxpayer in this case was carrying on a trade of profession is entirely a matter of fact to be decided by this tribunal. In deciding this question, this tribunal must consider the matter as a matter of degree with no hard and fast rule. One must look at all of the facts and reach a considered opinion on the evidence.

Atkin L J then goes on to say the following:

' Now in this case the Commissioners without, so far as I can see, applying any wrong principle, considering the question of habitual and systematic operations, which I do not think can be disputed are relevant to the question of whether a man is carrying on a trade or not have come to the conclusion that the operations in this case are not so habitual and not so systematic as that the person can be properly said to be carrying on a trade in those particular transactions. As it appears to me that is an inference of fact pure and simple, I think their finding must stand, and therefore it is immaterial what view I or any judge on the bench takes of the matter. I am not saying that I agree with them, because I think it is irrelevant. It may very well be if one were left to himself one would find on these transactions that there was vocation of speculating in these futures, or it may be a trade, but I have not formed a definite view at all about it, and I think that the Commissioners' view on this matter must stand as a question of fact.'

Having cited at length from the three judgments in Cooper v Stubbs, it is clear to us that our task in the case before us is to carefully look at the facts and form a considered judgment as to whether in our opinion what the Taxpayer did was sufficient to be considered to be carrying on a trade or business. In Cooper v Stubbs the taxpayer had gone very much further than the Taxpayer in this case. He had over many years carried out many genuine commodity transactions. However the majority of the Lords Justice were of the opinion that the Board was entitled to form a view that what the taxpayer had done did not amount to the carrying on of a trade. The facts of that case would raise an inference of trading which is much stronger than the facts in the case before us.

The other two cases to which the Commissioner's representative referred us relate to whether or not gambling transactions can constitute the carrying on of a trade or business. As they are far removed from the present case, they are of little assistance to us.

Having carefully reviewed the cases cited before us, we are left with the hard practical matter of fact of deciding whether or not the Taxpayer was carrying on a trade or business and if so, whether the losses which he suffered arose from such trade or business. As we have indicated at the beginning of this decision, the purchases and sales of futures contracts by the Taxpayer gave every appearance of trading transactions. However, that

does not answer the question before us. What we must answer is whether or not the Taxpayer was 'carrying on' a trade or business. This must be a matter of degree and must be a matter which depends on the circumstances of each case. The Commissioner's representative invited us to accept that in the Commissioner's opinion all transactions on the futures exchange are a form of gambling and therefore not taxable and that no private individual trading on the futures exchange or any stock exchange in Hong Kong would be taxable unless there were other facts such as the individual being a stock broker. In our opinion, the Commissioner's representative went too far in his submission but there is considerable merit in what he submitted and he is supported by what Atkin L J said at the top of page 54 of his judgment which we have quoted above. Clear evidence is necessary to show that a person who does not habitually carry on a business or trade and who is a pure speculator is carrying on a trade or business. We agree and accept that a company which is actively trading, as for example the taxpayer in the Lewis Emanuel case, has all of the attributes of carrying on a trade or business and is more likely to be found as a fact to be carrying on the trade of buying and selling securities on the stock market or indeed buying and selling futures contracts.

Though it is not essential that a person who is carrying on a trade or business must have an office and staff and organisation we are of the opinion that where none of these attributes exist, there must be other clear evidence of carrying on a trade or business. In the Lewis Emanuel case, mention is made of the fact that to constitute a trade in stock exchange securities, very little organisation beyond a telephone and someone to make entries in a book is required. However, that comment was made in relation to a company which for many years had been actively trading in fruit and vegetables. For such a trading company to extend its trading activities to include carrying on a trade in securities does not require any great additional organisation. It already has a trading organisation at its disposal. However, it is interesting to note that even in that case the company did employ additional staff and kept separate accounts.

In the present case, we ask ourselves what the Taxpayer did which would clothe him so that he would have the appearance of a person carrying on a trade or business. The answer is very little, if any. He opened an account with a broker, he paid a deposit, he gave instructions and in due course when he had suffered losses, paid off his losses and closed the account. It is very hard for us to say that such a person was carrying on a trade or business. The Taxpayer was not a trader or businessman. He was a full time employee of a professional organisation. His 'operations', in so far as they did exist, were far less habitual and systematic than Mr Henry Stubbs and as held by Atkin L J it cannot be disputed that such operations are relevant to the question before us.

On all of the facts of this case, we come to the conclusion that the Taxpayer did not carry on a trade or business of buying and selling Hang Seng Index futures. He certainly speculated with a hope of making a profit but what he did does not constitute carrying on a trade or a business. Accordingly as he was not carrying on a trade or business, the transactions which he carried out could not result in profits or losses which were derived from such trade or business.

For the reasons given we find in favour of the Commissioner and dismiss this appeal.