Case No. D49/88

Profits tax – depreciation – industrial building allowance – definition of 'industrial building' – retailer using warehouse for storing goods in the course of its retailing business – whether its trade 'consists in' storage – s 40(1) of the Inland Revenue Ordinance.

Profits tax – depreciation – industrial building allowance – lease of warehouse for storage of goods on arrival into Hong Kong – whether lessor could claim industrial building allowance – s 40(1) of the Inland Revenue Ordinance.

Panel: T J Gregory (chairman), Yu Yui Chiu and Duncan A Graham.

Date of hearing: 28 September 1988.
Date of decision: 10 November 1988.

The taxpayer company owned a warehouse which it leased to its parent company. The lease provided that the warehouse could be used for storage purposes only, and the tenant used the warehouse to store goods upon their arrival in Hong Kong. The tenant's business was that of a retailer of merchandise, and the warehouse was used by it in the course of that business.

The taxpayer claimed an industrial building allowance with respect to the warehouse. The IRD refused to grant the allowance. The IRD argued that the taxpayer's trade did not consist of the storage of goods on their arrival into Hong Kong (as required by the Inland Revenue Ordinance) but instead consisted of the business of letting premises.

Held:

The warehouse was not an 'industrial building'.

(a) The fact that the taxpayer let a warehouse which was used for storing goods did not mean that the taxpayer was carrying on a business of storing goods. Here, the taxpayer's trade consisted of the letting of premises.

(b) In any case, the fact that the taxpayer itself, as a lessor, was not carrying on a trade which qualified for an industrial building allowance did not of itself jeopardize its entitlement to an industrial building allowance.

(c) A lessor is entitled to an industrial building allowance provided that the occupier of the warehouse (that is, the tenant) is carrying on a qualifying trade.

(d) Here, the tenant did not carry on a qualifying trade merely by using the warehouse for storing goods on their arrival into Hong Kong. In order to qualify, the tenant's trade must consist only, or chiefly, of storing goods on their arrival into Hong Kong. Here, the tenant's trade was that of retailer of merchandise. Its storage of goods in the warehouse was merely incidental to this trade.

(e) In its decision, the Board considered the meanings of the words 'trade', 'storage', 'consists in' and 'used'.

Appeal dismissed.

Cases referred to:

CIR v Tai On Machinery Ltd (1969) 1 HKTC 411
Crusabridge Investments Ltd v Casings International Ltd (1979) 54 TC 246
Dale v Johnson Brothers (1951) 32 TC 487
IRC v Saxone, Lilley & Skinner (Holdings) Ltd [1967] 1 WLR 501

Jennifer Chan for the Commissioner of Inland Revenue.
David Wong of Deloitte, Haskins and Sells for the taxpayer.

Decision:

1. THE NATURE OF THE APPEAL

The Taxpayer appealed to the Board of Review against the Determination of the Commissioner, dated 27 November 1987, which rejected the Taxpayer's objection to the profits tax assessment for the year of assessment 1985/86 raised on it. The Taxpayer claimed that it should be granted industrial building allowance in respect of five floors in a building which, at the material times, were owned by it.

2. AGREED FACTS

While there was no 'statement of agreed facts' prior to the hearing, at the hearing the representatives of each the Taxpayer and the Revenue advised the Board that the following matters were not in dispute:

2.1 At the material times, the Taxpayer was a wholly-owned subsidiary of a company which, in turn, was a wholly-owned subsidiary of a third company ('the parent company').

2.2 At the material times, the Taxpayer was the owner of the sixth to tenth floors, both inclusive, of a building in the New Territories ('the building').

2.3 The building was designed and constructed as, and was in use as, a warehouse.

2.4 By an agreement in writing in 1985, the Taxpayer let the building to its parent company ('the tenant') for a term of three years commencing on 1 May 1985 at a rental of $231,000 per month ('the tenancy agreement').

3. THE PARAMETERS OF THE DISPUTE

At the hearing, the representatives of each of the Taxpayer and the Revenue agreed that the dispute arose out of a difference of opinion on whether, at the material times, the business of the Taxpayer was the storage of goods upon their arrival in Hong Kong within the requirements of sub-section (d)(iii) of the definition of 'industrial building or structure' in section 40(1) of the Inland Revenue Ordinance ('the relevant provision').

4. DOCUMENTATION

At the commencement of the appeal, the Board had before it the following documents:

4.1 A copy of the profit and loss account of the Taxpayer for the period from its incorporation in 1984 to 1985.

4.2 A copy of the Taxpayer's profits tax computation for the same period.

4.3 Part of a submission by the Taxpayer's tax representatives in response to a preliminary view of the assessor with respect to the Taxpayer's claim dated 9 April 1987.

4.4 A copy of the tenancy agreement between the Taxpayer and the tenant dated 30 October 1985, but without the document referred to in Clause 3.11 thereof, and refer paragraph 5.2.1.1.3 below.

4.5 A copy of a letter from the Taxpayer's tax representatives to the Commissioner of Inland Revenue dated 29 October 1987.

4.6 Plans of the building.

4.7 An insurance proposal dated 3 July 1985.

4.8 A copy of a notice issued by the Director of Fire Services with respect to confirmation of requirements for storage Category 9A DG dated 11 January 1985.

4.9 A certificate of compliance with the requirements of the Radiation Ordinance dated 30 July 1987.

4.10 A copy of the Determination of the Commissioner dated 27 November 1987.

4.11 The Taxpayer's notice of appeal dated 22 December 1987.

5. THE CASE FOR THE TAXPAYER

5.1 No evidence was adduced by the Taxpayer.

5.2 The Taxpayer's representative made a submission which may be summarised as follows:

5.2.1 The Tenancy Agreement

5.2.1.1 The tenancy agreement made it clear that the building could be used only for storage purposes. This was established by:

5.2.1.1.1 The clause heading to Clause 1.

5.2.1.1.2 Clause 3.9, which required the tenant to obtain a dangerous goods licence before storing dangerous goods.

5.2.1.1.3 Clause 3.11, which required the tenant:

'to observe and comply with such regulations as the landlord may introduce for the proper operation and maintenance of the building as a first class warehousing facility'.

The Board informed the Taxpayer's representative that the copy of the tenancy agreement before it, did not have attached a copy of the 'Landlord's By-laws and Conditions of Business for the time being in force and a copy of which is annexed'. The Taxpayer's representative was unable to provide a copy and stated that the file copy did not contain a copy of that document.

5.2.1.2 The specific provisions of the tenancy agreement referred to in paragraph 5.2.1.1 only permitted the tenant to use the premises as a warehouse for the storage of goods. The Taxpayer itself was under an obligation to make available the building in the form of a warehouse which could be used by the

tenant for storing goods on their arrival into Hong Kong. The Taxpayer argued that the effect of these provisions constituted the building as an industrial building and thus eligible for the industrial building allowance under the relevant provision. The wording of the tenancy agreement was similar to the relevant provision.

5.2.1.3 The board was requested to accept that the actual use of the building as warehouse premises, and the restrictions in the tenancy agreement as to the use of the building, were such that the building fell squarely within the relevant provision.

5.2.2 Interpretation of the relevant provision

5.2.2.1 If reference was made to sub-paragraph (3) of section 3 of the Determination, the Commissioner gave no definition of either a 'trade of letting' or a 'storage trade'.

5.2.2.2 To understand the relevant provision, it is necessary to interpret the words 'trade' and 'storage' and the phrase 'consists in'. The following interpretations were submitted:

5.2.2.2.1 The word 'trade': the word is used synonymously with the word 'business': refer sections 2 and 14 of the Ordinance. As the definition in section 2 did not assist, it was necessary to apply the common everyday use, namely, as 'the business or work in which one engages regularly' with 'business' meaning 'a usual commercial or mercantile activity engaged as a means of livelihood'. The terms 'trade' or 'business' are very broad and can encompass many activities.

5.2.2.2.2 The word 'storage': this required little explanation beyond 'storing of goods, etc'.

5.2.2.2.3 The phrase 'consists in': the dictionary definition is 'to be composed of or to be made up of' or 'to have as the chief or only element'.

5.2.2.3 The Board was invited to give the relevant provision the broadest interpretation. It was submitted that a reasonable person would accept that the Taxpayer had let the building for 'the purposes of a trade which consists in the storage of goods on their arrival into Hong Kong' whereby the Taxpayer was entitled to the benefit of the relevant provision. The fact that the Taxpayer received rental income should not be taken to mean that it was only in the trade of letting.

5.2.3 The Authorities

5.2.3.1 CIR v Tai On Machinery Limited (1969) 1 HKTC 411 ('the Tai On case')

5.2.3.1.1 Although the Taxpayer had drawn the Commissioner's attention to Crusabridge Investments Limited v Casings International Limited (1979) 54 TC 246 ('the Crusabridge case'), in his determination the Commissioner had failed to provide any reasons for rejecting the argument that the decision in the Crusabridge case should be followed and, instead, had relied on the Tai On case which the Taxpayer's representatives had informed the Commissioner was not relevant to the circumstances of the Taxpayer. As the facts in the appeal could be distinguished from the facts in the Tai On case, that case should not be taken as a precedent to deny the Taxpayer industrial building allowance.

5.2.3.1.2 The Tai On case could be distinguished for the following reasons:

5.2.3.1.2.1 Tai On carried on a business as a manufacturer of machinery. The Taxpayer carried on no activities whatsoever other than making available its warehouse premises for the purpose of storage of goods.

5.2.3.1.2.2 Tai On used the part of the building only for the purposes of its own manufacturing business whereas the Taxpayer's premises were wholly owned and exclusively used for storage.

5.2.3.1.2.3 At the material times, the total space in Tai On's building exceeded Tai On's immediate requirements, so the excess space was let out to one tenant who used the premises for storing goods. That activity, letting, was ancillary to the manufacturing activities of Tai On. The Taxpayer was exclusively in the business of providing storage space to the tenant and was not involved in manufacturing or any other activities.

5.2.3.1.2.4 The quotation from the Judgment in Tai On which appears in paragraph (5) of section 3 of the Determination supported both the Taxpayer's claim and the Commissioner's rejection, which demonstrated how broadly the relevant provision can be interpreted and how varied the interpretation can be.

5.2.3.2 The Crusabridge case

When the facts and points in issue were taken into account, it was apparent that, as the lessee of the premises used the premises for storage of merchandise and goods prior to despatch to purchasers and that the use of the premises was such as that described in section 7(1)(f)(iv) of the Capital Allowances Act 1968, namely for the purposes of a trade 'which consists in the storage ... of goods or materials on their arrival by sea or air into any part of the United Kingdom', the requirements of the law and the facts were parallel. The Board was referred to three passages in the judgment, namely, the paragraph commencing at letter H on page 253, the paragraph commencing at letter B on page 254 and the quotation from Dale v Johnson Brothers (1951) 32 TC 487 commencing at

letter 1 on page 252. The cited passages were relied on as authority for the proposition that there is nothing in the Ordinance which indicates that the goods cannot be those belonging to someone other than the person carrying on the trade consisting in storage. As long as the use of the building qualifies for industrial building allowance, it should be granted.

5.2.4 Conclusion

The conclusion to the taxpayer's submission may be summarised as follows:

5.2.4.1 The Taxpayer let the building to the tenant, but that fact does not preclude the Taxpayer from being in the trade of storage.

5.2.4.2 As the tenancy agreement specificially restricted the tenant's use of the building to the storage of goods, and as the building had only been used for the storage of goods on arrival in Hong Kong, the Taxpayer was in the storage business and therefore entitled to the industrial building allowance.

5.2.4.3 The Taxpayer has no office and its only business consisted in the storage of goods.

5.2.5 Questions from the Board

In response to questions from the Board, the Taxpayer's representative stated that the tenant did not carry on a qualifying trade. The tenant's business was retailing in Hong Kong goods from the parent company's group.

6. THE CASE FOR THE REVENUE

6.1 The Revenue adduced no evidence.

6.2 The Revenue's representative made a submission which may be summarised as follows:

6.2.1 The Issue

Having drawn the Board's attention to sub-section 34(1) and 34(2)(a) of the Ordinance and the relevant provision, the issue before the Board was whether the Taxpayer's trade or business consist in the storage of goods on arrival into Hong Kong.

6.2.2 The Tenancy Agreement

The tenancy agreement was a tenancy agreement and not an agreement to provide storage space, a fact established by comparing certain of its provisions

with passages from Cheshire's Modern Law of Real Property (11th ed) ('Cheshire'), explaining the characteristics of the relationship of landlord and tenant. In particular:

6.2.2.1 Clauses 2.1, 2.2 and 2.3 which imposed on the tenant the obligation to pay rent, rates, utility charges and management fees – provisions common in a lease or tenancy agreement – and refer the first part of the paragraph numbered (A) on page 404 of Cheshire.

6.2.2.2 Clause 3.2 which imposed upon the tenant the obligation to fit out the building.

6.2.2.3 Clauses 3.3, 3.4 and 3.5 which imposed on the tenant the obligation to maintain the interior of the building and its electrical wiring in good clean tenantable repair and condition, and refer the paragraph number (B) on page 406 of Cheshire.

6.2.2.4 Clauses 3.7 and 3.8 which imposed on the tenant the responsibility to effect insurance cover with respect to any loss or damage to the building due to fire or leakage or overflow of water, and refer the paragraph numbered (C) on page 411 of Cheshire.

6.2.2.5 Clause 4.1 which imposed on the Taxpayer the obligation to afford the tenant quiet enjoyment of the property, and refer the paragraph numbered (A)(i) on page 398 of Cheshire.

6.2.2.6 Clause 7.1 which conferred a power of re-entry in the event of non-payment of rent or breach of the agreement and the covenant not to assign or sublet, and refer the paragraph numbered (D) on page 411 of Cheshire.

It was submitted that, from the foregoing, the only conclusion to be drawn was that the tenancy agreement was a document containing terms typical of those found in agreements for the letting of real property and the creation of the relationship of landlord and tenant.

6.2.3 The Taxpayer's trade

Throughout the basis period for the year of assessment 1985/86, the Taxpayer derived its income exclusively from the letting of the building under the terms of the tenancy agreement. It did not have any other trade or business. Thus, it was submitted that the Taxpayer's trade at the relevant time had to be a property letting business.

6.2.4 Was the Taxpayer conducting the trade of storing goods?

The submission on behalf of the Taxpayer that it carried on a storage business was, the Revenue submitted, untenable. In the trade of storage, the contract to be entered into between the parties is a contract of bailment. The Board was referred to certain passages in Chitty on Contracts, vol 11, 23rd ed, which sets out the characteristics of a contract of bailment, particularly:

6.2.4.1 The definition of bailment at page 77.

6.2.4.2 Paragraph 182 on page 90: the warehouseman being rewarded by the depositor of the goods for the performance of the contract.

6.2.4.3 Paragraph 182 on page 90: a typical storage or warehousing business would have identifiable features, particularly that the warehouseman has full responsibility for control of the warehouse and the security of and access to the warehouse, and that the warehouseman has possession of the goods stored in the warehouse.

6.2.4.4 Paragraph 188 on page 94: that the warehouseman is fully responsible for the safe keeping of the goods whilst in his possession and is held responsible for any loss or damage to the goods whilst in his possession.

6.2.4.5 It was also submitted:

6.2.4.5.1 Ownership of the premises from which the operator conducted the business was not relevant.

6.2.4.5.2 The warehouseman is responsible for arranging insurance cover for possible loss or damage to the goods in his custody and to the warehouse: refer Chitty, paragraph 183 at page 92.

6.2.5 The role of the Taxpayer

6.2.5.1 The Revenue submitted that the part played by the Taxpayer was that of a landlord who, as owner of a building which was a warehouse, let the building to a third party. The ownership of the landlord by the tenant was not relevant. There was no evidence to show that the Taxpayer had custody of the goods stored. The tenancy agreement had no resemblance to a contract of bailment and, in fact, its terms were in direct conflict with those in a contract of bailment. As examples: contrary to the requirements of a contract of bailment, the tenant, to the exclusion of the Taxpayer, was responsible for any loss due to fire, flood etc and it was the responsibility of the tenant to apply for the required licence for the storage of dangerous goods and to arrange insurance: refer Clauses 3.7 and 3.9 of the tenancy agreement and the proposal for insurance.

6.2.5.2 The Board’s attention was also drawn to:

6.2.5.2.1 The 'important' notice at the top of the proposal for insurance, which reads:

> ' All values to be inserted in this questionnaire should refer only to the goods of the insured'.

6.2.5.2.2 The person to whom notification of compliance with the requirements of the Dangerous Goods Ordinance had been addressed was the tenant.

6.2.5.2.3 The licence holder of the radioactive substances licence was the tenant.

6.2.5.3 As the Taxpayer was not responsible for the security and safe keeping of the property or the persons in the warehouse (refer Clause 5.3 of the tenancy agreement), the company could not claim to be engaged in the storage or warehousing trade.

6.2.6 The Authorities

6.2.6.1 The Tai On case:

Having referred to the facts set out in the headnote, the Revenue's representative proceeded to read paragraphs 11, 12, 13 and 14 from the Decision of the Board reported from page 414, the second paragraph on page 417 and from page 421 to page 423. It was submitted that the Tai On case made it entirely clear that, for a building to qualify as an industrial building or structure under the relevant provision, it is a fundamental requirement that the trade of the person who was using the building had to be essentially a trade of storage of goods. What trade or business was being carried on in the premises is a question of fact and, on the facts available to the Board in this appeal, it was submitted that the Taxpayer carried on a property letting business and not a storage or warehousing trade.

6.2.6.2 The Crusabridge case

It was submitted that this case was not relevant as it was concerned with the trade of the tenant as opposed to that of the owner. Further, the passage in the judgment commencing at letter C on page 253 supported the decision in the Tai On case.

6.2.7 The Taxpayer's submission

The Taxpayer's submission was to the effect that, as the Taxpayer had no office or activities other than the receipt of the rental from the building, the Taxpayer should be deemed to be carrying on the trade or business of the tenant of the building. This submission was tantamount to a submission that, by way of an

illustration, the owner of a building whose tenant operates a restaurant was thereby constituted a person carrying on a restaurant trade or business.

6.2.8 Questions from the Board

In response to a question from the Board, the representative of the Revenue agreed that the industrial building allowance attached to the building. If the owner of a building let the building, and the use to which the building was put by the tenant fell within the requirements of the relevant provision, then the allowance could be claimed.

7. REPLY OF THE TAXPAYER'S REPRESENTATIVE

Having been invited to reply to the submission of the Revenue, the Taxpayer's representative stated that he had nothing further to add.

8. REASONS FOR THE DECISION

8.1 To enable the Board to reach a decision, it has been necessary for the Board:

8.1.1 to determine:

8.1.1.1 the meaning of certain words and phrases in the relevant provision: refer paragraph 8.2 below;

8.1.1.2 the test to be applied: refer paragraph 8.3 below;

8.1.2 and to consider the interpretation and test determined by the Board in the light of:

8.1.2.1 the authorities cited in the submissions: refer paragraph 8.4 below;

8.1.2.2 any other authorities: refer paragraph 8.5 below;

8.1.3 to determine whether, on the facts known to the Board, the Taxpayer meets the test determined by the Board: refer paragraph 8.6 below.

8.2 The interpretation of the Ordinance

8.2.1 The relevant provision provides as follows:

‘ "industrial building or structure" means any building or structure or part of any building or structure used –

…

(d) for the purposes of a trade which consists in the storage –

…

(iii) of goods or materials on their arrival into Hong Kong'.

8.2.2 For the purposes of this appeal, the Board is of the view that the words requiring interpretation are those referred to by the Taxpayer's representative (refer paragraph 5.2.2.1 above) and, additionally, the word 'used' and the phrase 'trade which consists in the storage'.

8.2.3 'trade'.

8.2.3.1 The Board has no difficulty in accepting the interpretation submitted by the Taxpayer's representative in the notice of appeal (refer paragraph 4.11 above) in which, in paragraph (b)(i) at the foot of page 2, is quoted the definition in the Oxford English Dictionary as follows:

> ' Trade – business carried on as means of livelihood or profit.'

Further, the Board has no difficulty in accepting the proposed definition submitted by the Taxpayer's representative in his submission, namely:

> ' the business or work in which one engages regularly'

with the word 'business' as:

> ' a usual commercial or mercantile activity engaged as a means of livelihood'.

8.2.3.2 In the opinion of this Board, the word 'trade' means an activity engaged in to earn profits.

8.2.4 'storage'

This particular word poses no problem. It can only mean the keeping of goods pending them being required to enable them to be put to the purpose for which they were acquired.

8.2.5 'consists in'

The Board accepts the definition submitted by the representative of the Taxpayer, namely, 'to be composed of or to be made up of' or 'to have as the chief or only element'.

8.2.6 'used'

The word 'used' is not qualified in any way. If the intent of the legislature had been to restrict the right to the allowance to the owner-occupier, this word would have been properly qualified. As it is, the word is not qualified in any way. The only interpretation which can be placed on it is that one must look at the trade of the person using the building, the occupier, and, if the owner was not the occupier, to the exclusion of the trade of the owner. This is confirmed by CIR v Saxone, Lilley & Skinner (Holdings) Limited [1967] 1 WLR 501 ('the Saxone case'): refer paragraph 8.5.1 below.

8.2.7 'trade which consists in the storage'

The Board finds that this phrase describes the business of a workhouseman, that is, a person whose chief or only business is storing goods for reward. This view is confirmed by both the Saxone case and Dale v Johnson Brothers (1951) 32 TC 487, the case quoted in the Crusabridge case ('the Dale Case'): refer paragraph 8.5.2 below. It is clear from the Dale case that the learned Judge was of the view that the wholesaler/retailer who was required to hold stock to enable prompt deliveries to be made was conducting a business, the chief or only element of which was not storage, storage being ancillary to the main business of the wholesaling/retailing. In the Tai On case, the learned Judge followed this view. Presumably the decision on the part of Saxone, Lilley & Skinner (Holdings) Limited to let the warehouse to a subsidiary and to restrict the business of that subsidiary to storage was prompted by the need to have within the group an entity whose only business was storage.

8.2.8 On the basis of the above, it is the opinion of the Board that the relevant provision may be stated to read:

' Industrial building or structure means any building or structure (or any part of any building or structure) used by the occupier, and whether the owner or a tenant or lessee of the owner, for the purposes of carrying on a business, with a view to earning profits therefrom, which has as its chief or only element the storage of goods or materials on their arrival into Hong Kong.'

8.3 The test

The Board finds that the correct test to be applied by the Revenue when a claim for an allowance under the relevant provision is made is to determine the use to which the occupier is putting the building in respect of which the claim is made, and to ascertain what the chief or only element of the trade of the occupier actually is.

8.4 The Authorities

The Board finds both the authorities which were cited to them as relevant and of assistance.

8.4.1 The Crusabridge case.

8.4.1.1 Although this was not a case to which the Commissioners of Inland Revenue were a party, this does not detract from its relevance. The plantiff, as owner of a building, had let the building to the defendant on terms which included a covenant restricting the defendant's use whereby the owner would be able to claim an industrial building allowance under the relevant provisions of the Capital Allowances Act, 1986. The Revenue rejected the plaintiff's claim on the basis that the building was not an industrial building or structure as defined in the applicable legislation. The plaintiff claimed that such rejection arose from the defendant's breach of the restrictive covenant and sought damages for the alleged breach of the restrictive covenant by the defendant, namely, putting the building to a use which took it outside the provisions of the two pieces of legislation referred to in the restrictive covenant. The learned Judge found that the use to which the building was put by the defendant fell within the requirements of both pieces of legislation, and so the action failed. This case is authority for the proposition that it is the trade of the occupier which has to qualify.

8.4.1.2 As, on the Taxpayer's representative's statement (refer paragraph 5.2.5 above), the tenant was not using the building for a qualifying trade, this authority supports the Commissioner's determination.

8.4.2 The Tai On case.

8.4.2.1 This judgment, as reported, is at first glance somewhat confusing either because of a reporting error or of a mistake by the learned Judge in a phrase used by him in the paragraph commencing towards the foot of page 422 and concluding on the top of page 423. On the facts, the owner of the building occupied four floors of the building for his own purposes, which qualified for an industrial building allowance under a part of section 40 of the Ordinance different to the relevant provision. The appeal related to the rejection by the Revenue of a claim for an industrial building allowance in respect of the four floors in the building occupied by the tenant, C Ltd. In the penultimate sentence of the paragraph referred to, the above report reads:

> ' The trade of the taxpayer company is not the storage of such goods but the buying of them in China and disposing them by wholesale or retail sale to shops in the Colony.'

It is patent that, in this sentence, the learned Judge was referring to the business of C Ltd, the tenant, so that the words 'taxpayer company' ought properly to

read ‘C Ltd’, an assumption drawn by the editors of the Reports in question as evidenced by the paragraph numbered 1 in the headnote.

8.4.2.2 When considered as stated in the preceding paragraph, this case also emphasizes the fact that it is the trade or business being carried on by the occupier of the premises with respect to which the claim is made which is the key to the entitlement to the allowance.

8.4.2.3 The Taxpayer’s representative reads the report as if the words ‘taxpayer company’ are intentional, submitting that the business of the taxpayer company was manufacturing whereby the letting of surplus space was ancillary and that the case turned on that point: refer paragraph 5.2.3.1.2.3 above. With respect to the Taxpayer’s representative, that is not what the finding of the learned Judge was. This is self-evident from the description of the business in the sentence quoted above which describes the business of the tenant as opposed to that of the Taxpayer.

8.5 Other Authorities

8.5.1 The Board considered CIR v Saxone, Lilley & Skinner (Holdings) Ltd [1967] 1 WLR 501.

8.5.1.1 It is not considered necessary to rehearse the facts or any passages from the judgment. Suffice it to say that the taxpayer in this particular case had let a warehouse to a wholly-owned subsidiary and the business of that subsidiary was to store shoes manufactured by fellow subsidiaries and shoes purchased from non-related suppliers. The shoes stored in the warehouse were distributed to the retail outlets of other subsidiaries of the taxpayer. Although the shoes manufactured by fellow subsidiaries of the tenant represented only one-third of the total volume of shoes in store at any one time, it was held that the storage of the shoes manufactured by these fellow subsidiaries was a regular and substantial part of the business of the tenant. Thus, the appeal was allowed.

8.5.1.2 The conclusion to be drawn from this authority is that the trade of the taxpayer is irrelevant: it is the trade of the user of the building which is relevant.

8.5.2 The Board also considered Dale v Johnson Brothers (1951) 32 TC 487.

8.5.2.1 Again, it is not considered necessary to rehearse the facts or any passages from the Judgment. Suffice it to say that the taxpayer in this case owned a building, two-thirds of which was used for the storage of goods. However, the taxpayer had agreements with manufacturers of merchandise and, in particular, with the manufacture of ‘Mansion’ polishes. This agreement required the taxpayer to maintain sufficient stocks of ‘Mansion’ polishes to enable it to fill all orders obtained by the taxpayer’s own sales representatives. ‘Mansion’ polishes were

not supplied by the manufacturer on a sale or return basis. The property in the goods passed to the taxpayer. The learned Judge held that the business of the taxpayer was not a storage trade.

8.5.2.2 From the answers given to the Board by the Taxpayer's representative, the tenant's business equates to that of the taxpayer in this case.

8.6 The facts and the test

8.6.1 Applying the interpretation set out in paragraph 8.2.8 above and the test set out in paragraph 8.3 above, the Board is obliged to look at the trade of the occupier of the building, the tenant. It is an agreed fact that the Taxpayer owned the building and at the material times the building had been let under the tenancy agreement. The Taxpayer was not the occupier of the building. Thus, for the purposes of this appeal, the Board finds that the trade of the Taxpayer is irrelevant.

8.6.2 No oral evidence was adduced but, on the basis of documents and the submission of the Taxpayer's representative, it is clear that the case for the Taxpayer is that the tenant did not conduct a qualifying trade or business. The Taxpayer's representative advised the Board that the tenant's business was retailing the parent company's group products in Hong Kong: refer paragraph 5.2.5 above. As the relevant provision can only apply if the occupier of the building is carrying on a qualifying trade and as, on the basis of the Taxpayer's representative's submission, the occupier of the building was not carrying on a qualifying trade, the claim for the allowance was correctly rejected by the Revenue.

8.7 The Taxpayer's case

8.7.1 The Board finds no merit in the submission that the Taxpayer is entitled to the industrial building allowance on the basis that, because the Taxpayer had let the building on restrictive terms, whereunder the building could only be used for storage, and conducted no other business, the Taxpayer should be treated as being in the trade or business of providing storage space which equates to a trade within the relevant provision.

8.7.2 The Board accepts the submission made on behalf of the Revenue that the tenancy agreement was a tenancy agreement and not a contract of bailment masquerading as a tenancy agreement whereby it should be treated as a contract of bailment. It is patent that the relationship between the Taxpayer and the tenant was exclusively that of a landlord and tenant and that the Taxpayer's activities have none of the characteristics of a warehouseman and, on the case for the Taxpayer, the trade of the tenant was not, on the interpretation of the

phrase ‘consists in’ submitted by the Taxpayer’s representative, the ‘chief or only element’ of the tenant’s business.

8.7.3 The view of the Board is that it would be mischievous to accept the proposition that, because a person owns a building which he lets for use for storage, he is to be deemed to be carrying on a storage trade. The Board finds that the legislation does not require the trade of the owner to qualify. It requires the trade of the occupier to qualify to the exclusion of the owner’s trade.

9. THE DECISION

For the reasons stated, the Board is of the view that the determination of the Commissioner was correct, and this appeal must fail.