Case No. 52/87

Board of Review:

Denis K. L. Chang, *Chairman*, Anthony F. Neoh, and E. M. I. Packwood, *Members.*

16 December 1987.

Profits tax—whether profits arising from the sale of certain shares chargeable to profits tax.

The Appellant made profits from investments, had numerous shareholdings and has nominee accounts with banks and bank overdrafts secured by shares. The Appellant had all the characteristics of a sharedealer and in the case of one company he had substantial shareholding and also held non-executive directorship and deputy chairmanship of that Company. In his professional capacity he was a medical practitioner and at the conclusion of the investigation by the Revenue profits figures were agreed for the years 1970/71 to 1977/78 and sharedealing figures were aggregated with his professional income. The status of his shares was like stock-in-trade as at 31 March 1978.

During the year ended 31 March 1979 the Appellant transferred virtually the whole of his portfolio of shares to an off-shore company which was controlled by him. However when the 1978/79 return was filed on 26 November 1979 the shares were still treated as stock-in-trade and the transfer of shares was not disclosed. Estimated assessments were issued in respect of three subsequent years 1979/80, 1980/81 and 1981/82 in the absence of returns and accounts. The Appellant made an application under section 70A of the Inland Revenue Ordinance in March 1983 claiming that the Appellant had ceased sharedealing business in September 1978 and sought re-classification of shares which had tax implications from stock-in-trade to long term investment. The Revenue accepted that the Appellant had ceased his sharedealing business but refused to accept the re-classification of shares. Estimated assessments were then discharged. It followed that the profits realised for the year of assessment 1978/79 were to be calculated by reference to the original classification and to such of the stock-in-trade had as at 1 April 1978 as were disposed of on 28 September 1978. It was in this context that the dispute arose with the revenue. The attempted classification was clearly inconsistent with the Revenue. The attempted classification was clearly inconsistent with the agreed basis upon which profits and losses had been computed and aggregated, the assessments raised and paid and the investigation brought to a close.

Held:

The Appellant did trade in shares and did not demonstrate that the original classification of stock-in trade was wrong. The Appellant failed to discharge the burden of showing that the assessment for 1978/79 was excessive for the following reasons:—

(*a*) He borrowed heavily from banks to finance share purchases in the stock exchanges both here and abroad.

(*b*) The Shares were kept in the names of various bank nominees and deposited with banks as securities against large overdrafts.

(*c*) The shares in one particular company were not purchases with borrowed funds but kept in bank nominee names and used as securities for overdrafts.

(*d*) Some shares were characterised as short-term dealing shares by the Appellant's tax representatives and legal advisers.

(*e*) Scanty information was given in respect of the acquisition of the other shares.

Appeal dismissed.

Cases referred to:

Amalgamated Property Co. v. Taxas Bank [1982] 1 QB 84
Board of Review Decision D30/84
Broken Hill case [1926] AC 94
Caffoor v. Income Tax Commissioner [1961] AC 584
CIR v. Dr. Chang Laing-Jen 1 HKTC 975
Kean v. Holland [1984] 1 WLR 251

D. O'Dwyer for the Commissioner of Inland Revenue.
G. Fisher and F. J. Shiner of Messrs Johnson, Stokes & Master for the Appellant.

Reasons:

This is an appeal under Section 66 of the Inland Revenue Ordinance from the Commissioner's Determination. The relevant year of assessment is that ended 31 March 1979. The question at issue is whether the Assessor has wrongly included in his Profits Tax Assessment dated 10 February 1984 a sum of $17,441,089 being profits arising from the sale of certain shares with tax payable thereon of $2,616,163.

The appellant is Dr. L, a medical practitioner. In or about 1976 the Inland Revenue Department initiated an investigation into Dr. L's medical practice which Dr. L was told was a routine enquiry. Dr. L was at first represented by his accountant Mr. B and upon the latter's death in 1977, a firm of Chartered Accountants acted as Dr. L's tax representatives.

Among the exhibits produced are two Notes of Interview (Exhibits Y and Z). One of them relates to the occasion on 16 July 1976 when the appellant, accompanied by the said Mr. B, was interviewed for the first time by the Inland Revenue. During the interview the appellant was told that the Revenue had reason to suspect that there had been understatements in his returns of profits from his medical practice. The appellant explained his background and said he had made profits from investments in the American Stock Market before the war and that after the war he had also "invested heavily in the local stock market". The Revenue was told that the appellant had "numerous shareholdings" and had nominee accounts at many of the banks at which he maintained current accounts and that he had bank overdrafts secured by shares. There is no dispute about the accuracy of the Note of Interview which was certified by the appellant as a true record.

The other Note, also certified by the appellant as a true record, relates to an interview on 4 April 1979. This time the appellant was accompanied by a Mr. C and a Mr. D of the firm of Chartered Accountants and was informed by the Inland Revenue officers that the purpose of the meeting was "to get agreement in principle to the taxpayer's status as a sharedealer and to discuss certain items which had not been satisfactorily explained". It is quite clear from the Note of the Interview that the items discussed were not confined to share transactions and that an Asset Betterment Statement had been prepared by the Revenue. In relation to the share transactions, however, paragraph 2 of the Note of Interview reads (emphasis supplied):—

> "*Dr. L admitted that he was a sharedealer and the only complication was in respect of shares held prior to his becoming a sharedealer.* He admitted that he had been dealing since before the war and therefore it was pointed out that he would need to show that any shares considered purchased prior to the start of sharedealing activities would need to have been held continuously for about 40 years. The tax representative, Mr. D advised that he would look into the matter and supply details of any such shares if possible. *The tax representative then stated that he considered the private company holdings which were subsequently exchanged for YY Ltd. shares should be excluded as capital items. He was informed that our intention was to include these shares with the other sharedealing transactions.* He then raised the matter of deductions for interest paid on money used to finance sharedealings. He was instructed to produce a schedule of interest payments relating to sharedealing borrowings or a basis of apportionment considered appropriate together with the reasoning and calculation used to arrive at that apportionment basis."

In his evidence before this Board the appellant accepted that he did at the interview admit he was a sharedealer. He said he did so upon the advice of the firm of Chartered Accountants but that he thought this simply meant he was a person who bought and sold shares on the stock exchange as distinguished from a sharetrader. He said that he did not agree at that meeting, or at any time, that the YY Ltd. shares or any other relevant shares, were anything other than long-term investments.

We will revert to the appellant's case in a moment. In the meantime it is to be observed that the YY Ltd. shares, which form the single most significant parcel of shares with which we are concerned in his appeal, were the subject of correspondence between the Revenue and YY Ltd. prior to the second of the interviews referred to above. In a letter dated 13 April 1977 (Annexure "A" to the appellant's Statement of Evidence) YY Ltd. had informed the Revenue (and it is a fact not in dispute) that the shares, totalling 3 388 881 in number, were allotted to the appellant in exchange for shares (described as investments in the letter) held by the appellant in seven subsidiary companies. Of the said YY Ltd. shares, 3 049 993 were allotted and 338 888 were allotted by way of bonus (of 1 for 9). Both were prior to the public floatation of YY Ltd. It is likewise not in dispute that the appellant came to acquire by way of purchase other parcels of YY Ltd. shares. It is accepted by the Revenue that the appellant was at the time of the floatation a non-executive director and Deputy Chairman of the company, a position which he has held to this very day. The said YY Ltd. shares were set out against his name in the Prospectus.

Following the second of the interviews the firm of Chartered Accountants sent a letter dated 14 July 1979 (Exhibit I) to the Assessor. They returned to Revenue the Note of Interview dated 4 April 1979 duly signed by the appellant and also enclosed, *inter alia*, schedules of share movements of "Long Term Share Investment and Short Term Share Dealings Accounts" (based on Lower of Cost of Market Value) for each of the six years ended 31 March 1975. It is not in dispute that the *YY Ltd. shares in question were included in the Short Term Share Dealings*. We also find as a fact that these shares were similarly characterised in Schedules of Share Movement for the three years ended 31 March 1978 (Exhibit L, R and S) supplied by the appellant's said tax representatives to the Revenue (though not under cover of the said letter).

The said letter of 14 July 1979 also stated:—

> "Our client claims that the cost of YY Ltd. shares exchanged with his investment in private companies be valued at $3.00 as the allotments made on 27 June 1972 were at a premium of $1.00 per share."

In other words, for the purposes of applying the rule of "the lower of cost or market value" to the appellant's shares in the Short Term Share Dealings Accounts the appellant was asking the Revenue to accept the cost of the YY Ltd. shares at $1 above its par value.

It is not in contention that there were other YY Ltd. shares which the appellant acquired apart from those reflected in the Prospectus. Indeed the said letter of 14 July 1979 apparently dealt with a query raised by the Revenue concerning two cheques, one being a cheque in the sum of $544,161.72 and the other a cheque in the sum of $537,433.70: the explanation given was that these were the proceeds of two sale transactions entered into by the appellant in relation to certain YY Ltd. shares, the first being a sale to the S Bank and the second a sale to the M Group.

The appellant's tax representatives also included in the Schedules of share movements in respect of the Short Term Share Dealing Accounts (see, for example, Exhibit S) *all the other shares which the appellant now contends were long term investments.* The following shares have been singled out by the appellant for special mention:—

		No. of Shares as at 31.3.78
1.	CP Ltd.	152 550
2.	EA Ltd.	324 248
3.	PM Ltd.	126 000
4.	SC Ltd.	4 218
5.	ST Ltd.	21 200
6.	SP Ltd.	273 900
7.	WH Ltd.	44 931
8.	WA Ltd.	96 800

From the Summary of Exhibits K, L, M, N, O & P it is quite clear that in relation to what the appellant's representatives had categorised as "Short-term Dealing Accounts" *there was a dramatic rise in the volume of purchases in the period ended 31 March 1973*, the same period in which the YY Ltd. shares were acquired by way of exchange. According to the figures supplied, the stock as at the beginning of the period stood at around $4.32 million. Purchases totalling a little over $46.86 million were made during the period and an aggregate sum of $23.85 million were realised by way of proceeds of sales. There was thus shown a profit of some $11.06 million for the period between 1 April 1972 and 31 March 1973 after taking into account the stock at the end of the period with a book value of about $38.4 million being the lower of cost or market value. The figures for the next twelve months, however, reveal a much reduced volume of sales and purchases (some $7.17 million by way of sales and some $3.19 million by way of purchases); the period also saw a dramatic drop in the book value of the stock to approximately $17.02 million as at 31 March 1974, resulting in a loss figure of around $17.39 million. In fact the tax representatives had worked out the figures for all the six 12-months periods between 31 March 1970 and 31 March 1975, yielding an aggregate sum of $42.25 million by way of sale proceeds, $59.56 million by way of purchases and $8.77 million by way of a loss figure. The figures for three subsequent years up to the year ended 31 March 1978 have also been supplied in the Schedules of Share Movements Exhibits Q, R and S.

By letter dated 11 September 1979 (Exhibit J) the firm of Chartered Accountants sent a computation of the interest paid on money borrowed for the purpose of the appellant's sharedealing portfolio (page 20 of Summary of Exhibits). This related to the six years ended 31 March 1975. In calculating the interest to be charged to the sharedealing account the tax representatives included the YY Ltd. shares (among other shares) in "the cost of sharedealing". In the year ended 31 March 1974, for example, a sum of $595,065 was charged by way of interest to the sharedealing account, and another $597,194.60 was charged to the said account for the year ended 31 March 1975. These sums were computed by apportioning the total financing costs between the sharedealing account and other assets (including quoted-shares held on long-term investment).

On 7 November 1979 the said tax representatives wrote to the Assessor enclosing "an Assets Betterment Statement prepared on the Top and Tail Basis as from 31 March 1969 to 31 March 1975". The Assets Betterment Statement included among the assets all the shares both long-term and short-term, the YY Ltd. shares being specifically mentioned and valued at $3,604,657 as at 31 March 1975. There were also included in the statement Unquoted Shares (non-dealing). The letter enclosed Profits Tax Returns for the year of assessment 1975/76, 1976/77 and 1977/78 (Exhibits T, U, V) in respect of the appellant's "Share Dealing Business" together with Statement of Accounts for the three years ended 31 March 1976, 1977 and 1978. The returns were all signed by the appellant.

Not all the correspondence between the Revenue and the appellant's tax representatives has been exhibited but it is an agreed fact that as a result of lengthy correspondence between the I.R.D. and the firm of Chartered Accountants culminating in 1979 the I.R.D. and the

firm of Chartered Accountants agreed in 1979 revised profits in respect of Dr. L's medical practice for the years 1969/70 to 1974/75. It is likewise common ground between the parties that following the filing of profits tax returns in November 1979 in respect of the appellant's share transactions for the years 1975/76 to 1977/78, assessments for the years 1970/71–1977/78 were issued by the Revenue (Exhibits A to H) which reflected the profits and losses from the share transactions. These figures followed those given in the Summary of Exhibits K, L, M, N, O & P for the first three years (used as basis periods for the first three assessments) and were likewise based on the figures supplied in respect of the later periods although there appeared to have been some adjustments upwards for losses incurred during some of the later periods. We find as a fact that the Revenue and the tax representatives acting on behalf of the appellant agreed on the categorisation of the various parcels of shares, including the YY Ltd. shares, as stock-in-trade in the short-term dealing accounts and that it was also agreed that the appellant derived the following profits/incurred the following losses in respect of his share dealing accounts (which included the adjustments referred to above).

Year of Assessment	*Assessable profits/losses*	
1970–71	$ 205,005	(profit)
1971–72	131,184	(profit)
1972–73	1,352,352	(profit)
1973–74	11,314,977	(profit)
1974–75	(18,539,263)	(loss)
1975–76	4,811,853	(profit)
1976–77	(76,983)	(loss)
1977–78	602,465	(profit)

By virtue of the principle of aggregation under Section 15A the sharedealing losses arising from the Short Term Dealing Accounts could be and were set off against the aggregated profits of the medical practice and of the sharedealing. It was possible for example to make use of the massive sharedealing loss of $18,539,263 for the year of assessment 1974–75 to reduce to *nil* the assessable profits for that year and at the same time by virtue of Section 19(1) of the Inland Revenue Ordinance to eliminate by way of set-off *both* the profits of the medical practice and the sharedealing profits for the immediately preceding year (1973–74) while carrying forward the balance of unutilized losses to eliminate what would otherwise be assessable sharedealing profits of the *following* year of assessment (1975–76): Exhibit D and page 8, Exhibit E and page 10, Exhibit F and page 12 of the Summary of Exhibits.

As regards the investigation into the profits of the medical practice itself, we find as a fact that as part of the settlement reached between the Inland Revenue and the said tax representatives acting on behalf of the appellant, the additional agreed profits based on an Asset Betterment approach were apportioned between the various years. The profits were aggregated with the sharedealing figures as aforesaid. Thus, the investigation into the appellant's tax affairs ceased. In his evidence, the appellant said that some time after the

1979 meeting with the Revenue his accountants told him that "they had done a deal with the Revenue and the investigation was concluded". The appellant referred to the fact that in November 1979 he signed the returns for the previous eight years.

There was no objection to the assessments issued in December 1979 for the years 1970/71–1977/78 (Exhibit A to H). The assessment thus became final and conclusive under Section 70 of the Ordinance.

The last of the said assessments was of course for the year ended 31 March 1978. This means that the YY Ltd. shares and all the other shares which the appellant now seeks to re-classify stood as part of the appellant's stock-in-trade as at 31 March 1978.

On 26 November 1979 the firm of Chartered Accountants filed a profits tax return for the year 1978/79 based on the same accounting treatment of the relevant shares. A loss of $80,839 was claimed (Exhibit W). By letter dated 30 November 1979 the Revenue accepted the loss claimed and advised that there were no profits chargeable for that year and that there was a loss of $80,037 to be carried forward. The Revenue raised further estimated assessments in respect of the appellant's alleged sharedealing activities for the year 1979/80 (estimated profits 2,000,000), 1980/81 (estimated profits 4,000,000), 1981/82 (estimated profits 5,000,000). Tax was paid as to $287,994 for the year 1979/80, $600,000 for the year 1980/81 and $600,000 for the year 1981/82 totalling $1,487,994.

In fact, on 28 September 1978, i.e. during the year ended 31 March 1979, the appellant had already transferred virtually the whole of his portfolio of shares to a Liberian company W limited, which was a company controlled by him. On 31 March 1983 the appellant's new tax representatives Messrs. SS, a solicitors firm, made an application under Section 70A of the Inland Revenue in relation to the year of assessment 1978/79, alleging that the appellant ceased his sharedealing business on 28 September 1978; that in fact far from sustaining a loss the appellant made a profit of $3,264,117.55 as per a Schedule of Share Transactions for the period from 1 April 1978 to 28 September 1978; that some of the shares included as opening balance as at 1 April 1978 in the appellant's schedule of share movements for the year ended 31 March 1979 previously submitted (which showed that the value of the appellant's shares held for share dealing was $12,690,796 as at 1 April 1978) should be re-classified as long term investments. These included the YY Ltd. shares and other shares mentioned by name above.

It is clear what the appellant's representatives were seeking to do by the aforesaid application under Section 70A. Section 70A enables errors or omissions in any return or statement, or arithmetical errors or omissions in the calculation of the amount of the assessable income or profits assessed or in the amount of the tax charged, to be corrected by the assessor subject to the fulfillment of certain conditions, one of which is that the tax charged is excessive by reason of the error or omission. Here the appellant's tax representatives were pointing out the opposite, that instead of a loss there was a profit. They were in effect inviting the assessor to issue an assessment on the profits as computed by them for the year of assessment 1978/79 and asking the assessor to accept the fact of

cessation of the sharedealing business and their re-classification of the shares. Acceptance of either of these matters would not only affect the year of assessment 1978/79 but also give them a basis to ask for the subsequent estimated assessments to be vacated.

It is noteworthy that at that point in time the appellant's tax representatives did not allege that there *never* was any sharedealing business. Indeed there were 368 576 YY Ltd. shares (over and above the 3 388 881 YY Ltd. shares) which were, after re-classification, still included in the Schedule of Share Transactions for the period 1 April 1978 to 28 September 1978. These transactions generated the profit of $3,264,117.55 which Messrs. SS, the solicitors firm were offering to be brought to charge. Included in the same schedule were a large portion namely 222 198 of the parcel of 324 248 EA Ltd. shares and a small portion namely 4 500 of the 273 900 SP Ltd. shares referred to above.

The Revenue accepted that the appellant did indeed cease his sharedealing business on 28 September 1978 but refused to accept the re-classification of shares. It followed that the profits realised for the year of assessment 1978/79 were to be calculated by reference to the original classification and to such of the stock-in-trade held as at 1 April 1978 as were disposed of on 28 September 1978. It was in these circumstances that the 1978–79 Profits Tax Assessment was raised on 10 February 1984 on profits computed at $17,441,089. On 3 March 1984 the tax representatives objected to the assessment, claiming that the appellant did not carry on the business of dealing in securities, having also alleged by an earlier letter dated 14 November 1983, among other things, that the appellant had been wrongly advised by his previous accountants. They likewise challenged the subsequent estimated assessments under section 70(A) on the ground that the appellant had ceased trading and relied, where necessary, on section 79 which provides for tax paid in excess to be refunded. They also objected to a further assessment for the year 1981/82 under the objection-procedure laid down in section 64(1). The Commissioner, having accepted the cessation of business, vacated the assessments for the years 1979/80, 1980/81 and 1981/82 but upheld the assessment for the year 1978/79.

On the whole of the evidence, we have no hesitation in rejecting the appellant's claim that he just signed whatever was sent to him by the firm of Chartered Accountants; and that he was ignorant of the inclusion of the YY Ltd. shares or other shares in the category of stock-in-trade as part of the settlement with the Inland Revenue. We find that the appellant must have known what the purpose of the classification of shares into different categories was; he must have known that such classification would carry with it the consequence that those shares treated as stock-in-trade would produce assessable profits or allowable losses. We do not accept that the appellant had no understanding of or was left in the dark as to why there was to be a classification of shares in the first place or why anybody would need to bother about undertaking such an exercise if there were no tax consequences; he could not in our view have failed to appreciate that the Revenue was among other things inquiring into whether he was a person who had been making share dealings on the market the profits in respect of which ought to have been returned. We also find as a fact that the firm of Chartered Accountants knew about the exchange which led to the acquisition of the YY Ltd. shares; that they, nevertheless, as part of the deal with the Revenue, deliberately placed these

shares and the other relevant shares in the category of stock-in-trade; and that the appellant knew, at least in broad terms, what his tax representatives did and agreed to it.

The appellant said in evidence, and we accept, that W Ltd. which purchased the shares in September 1978 was formed on the advice of Messrs. SS, the solicitors firm who had been consulted upon the suggestion of his son-in-law Mr. F. Mr. F was then unaware of the investigation conducted by the Revenue into the appellant's tax affairs. The firm of Chartered Accountants for their part were not informed of the transaction with W Ltd.; this probably explained why they continued to treat the shares as still being owned by the appellant even after September 1978. The Revenue has not disputed the appellant's contention that the company, of whom he is the principal shareholder, was to hold the portfolio of shares on a family trust. We have therefore not found it necessary to look farther into the family trust although the appellant was asked in cross-examination about a letter dated 20 September 1978 (Appendix E to the Determination) signed by him on behalf of W Ltd. and addressed to himself offering to purchase the shares at $28,418,958.43, an offer which he accepted by also signing the letter in his personal capacity. Mr. F in his evidence said that the appellant subscribed for shares in the company using the amount of the agreed purchase price of the shares sold to the company. We do not think, however, it matters for present purposes how the consideration was paid. Once the Revenue accepts that there was indeed a disposal and the share business indeed ceased, we need not go behind the setting up of the family trust nor do we doubt the reality of the disposal.

We do not, however, accept that the appellant's failure to cause returns to be made on the basis of a disposal of the portfolio on 28 September 1978, or his failure until 1983 to claim that he had in fact ceased his share dealing business in 1978, shows that he had no appreciation of the fact that his portfolio of YY Ltd. or other shares had been classified as trading stock by the firm of Chartered Accountants and that such classification had tax implications.

Even if the appellant had simply left it all to his accountants it would not follow that the previous classification should totally be ignored. The attempted re-classification is clearly inconsistent with the agreed basis upon which profits and losses had been computed and aggregated, the assessments raised and paid and the investigation brought to a close.

It may be convenient at this junction to consider to what extent, if any, the appellant is precluded from attempting to re-classify the shares. Outside the field of Revenue law the rule is well established that in general when parties have agreed to act upon an assumed state of facts their rights *in the transaction* are made to depend on the facts assumed to be true. This species of estoppel is sometimes called "estoppel by convention" perhaps to emphasize the point that the estoppel can arise even if the agreement falls short of contract: see Spencer Bower and Turner "Estoppel by Representation" 3rd Edition pp. 157 *et seq* and the case of *Amalgamated Property Co. v. Texas Bank* (C.A.) (1982) 1 Q.B. 84 of *Kean v. Holland* [1984] 1 W.L.R. 251. In the field of Revenue law however the principle is ordinarily of no application (if it ever applies at all) since the Revenue does not usually stand in the same position to the taxpayer as one party to a commercial transaction stands to another; the

finality or otherwise of assessments is governed by statute which lays down a complete code setting out the circumstances in which assessments can be reopened, corrected and additional assessments made. There are, however, cases like the present (1) where the Revenue and the taxpayer negotiate for and eventually reach a settlement of the taxpayer's affairs (2) where a particular treatment of relevant items depends essentially not on law but on fact (3) where the taxpayer by himself or through his tax representatives adopted or accepted a particular treatment of the items as part of the agreed state of facts on which the settlement is to be reached (4) where the treatment is known to have a decisive bearing not only on the amount of the assessments for the period under investigation but also on the status of the items in question beyond the period directly covered by the settlement (5) where assessments are then raised and paid on the basis of the facts and figures agreed and (6) where the assessments themselves have become final and conclusive under Section 70. A question which has exercised our minds is whether in such cases (where all six conditions obtain), the taxpayer would be estopped from treating the items in question in a manner which was inconsistent with the previous agreed treatment even in a case where the new exercise was directed to a period subsequent to that directly covered by the assessments which had become final and conclusive. Quite clearly, if the new exercise were based on a *change of intention* which had the effect in law of shifting the items into a new category that would be something which would not be inconsistent with the previous agreed state of facts. In the present case, however, what we are faced with is a re-classification of shares put forward on the basis that these shares should *never* have been placed on the previously agreed category.

Before us the Revenue's representative Mr. O'Dwyer, while not using the term "estoppel", submitted that there was an agreement that the shares were trading stock and that "the agreement should stand". Mr. Fisher, Counsel for the appellant, submitted that there was no estoppel in law and that it was all on a question of fact. He devoted most of his submission on whether the appellant was in fact a share trader and whether the shares in question were in fact trading-stock or long-term investments, citing such well known authorities as *Salt v. Chamberlain*, Tax Cases, Vol. 53 p. 143–154 and *CIR v. Dr. Chang Laing-Jen HKTC*, 975. The Revenue for its part relies heavily on the burden of proof, citing among other authorities The Board of Review decision in *Case No. D30/84* where the Board said:—

> "It is not possible to totally disregard the fact that for the years 1972/73 to 1976/77 the Appellant had conceded, albeit reluctantly, that she was liable to pay tax in respect of share trading profits and had proceeded to do so. Had she appealed at that time it may be that he Commissioner would have been proved to be wrong but the fact is that she failed to do so and accepted that she was liable to be taxed on trading profits. The Wharf Company shares which were sold had been acquired during the period of time when the Appellant had been taxed as a share trader and had constituted part of her stock in trade at that time. Thus at the time of acquisition of those shares it must be inferred that the Appellant had the intention of trading in those shares. There is good legal authority for the statement that tax payers may change their intention but strong evidence of such change of intention is necessary. In this case there is no such strong evidence of change of intention. The Appellant maintained that as she had never traded in shares a change of intention could not arise. Unfortunately for the Appellant she had,

> rightly or wrongly, conceded that she had embarked on share trading by signing the agreed Assets Betterment Statement and paying tax assessed thereon. These facts cannot be ignored. It is not true to say "once a trader, always a trader," but where an asset has been acquired as stock in trade and conceded so to be, there must be some clear evidence that the asset has become a capital asset. In this case there is no such evidence but only the fact that the asset was held for some time before sale."

The Board of Review in the case cited did not base its decision on estoppel although in holding that it "*must* be inferred" that the appellant had the intention of trading in relation to the shares acquired because she had previously conceded she was a trader at the time of acquisition it in effect placed considerable evidential value on her previous concession.

We have not found the estoppel point an easy one and while not rejecting the possibility of its application in cases where all six conditions obtain *and* the taxpayer is unable to point to any vitiating factor in the prior agreement which produced the settlement we do have reservations about the general relevance of the doctrine of estoppel to assessments under the Inland Revenue Ordinance. In *Caffoor v. Income Tax Comr.* [1961] A.C 584 the Privy Council applied the principle in the *Broken Hill* Case [1926] A.C. 94, P.C. and held that "a question of liability to tax for one year was always to be treated as inherently a different issue from that of liability for another year—as not *eadem quaestio*—even though there might appear to be similarity or identity in the questions of law or which they respectively depended…." This does not mean, of course, that consistency of treatment is unimportant. A taxpayer who by himself or through his tax representatives has conceded that a particular block of shares is his stock-in-trade and proceeds to submit to assessments on that basis should not be too surprised if in relation to the following year the same accounting treatment is demanded of him and his previous concession is regarded as strong evidence that the block of shares in question is indeed stock-in-trade. The evidential value of his concession will of course depend on all the circumstances.

In our view, for reasons summarised below (some of which overlap), the appellant in the present case has not discharged the burden of showing that the assessment for 1978/79 was excessive or wrong.

In the first place, while the appellant did not use margin accounts, he borrowed heavily from banks to finance share purchases in the Stock exchanges both here and abroad. As at 31 March 1975, for example, according to the Assets Betterment Statement prepared for the period from 31 March 1969 to 31 March 1975, "the Bank Over-draft Interest" totalled $3,246,697 and "Repayment and Interest on C Bank Loans" was $2,640,132. Transactions described as "Short Term Dealings" *excluding* the YY Ltd. shares acquired by way of exchange totalled $6,120,986; the cost of quoted shares bought in London totalled $5,568,503. The appellant said that the shares bought in London were Hong Kong shares, that he dealt directly with brokers in London, that during boom time he did "quite a lot of fairly rapid selling of shares".

Secondly, the shares were kept in the names of various bank nominees and deposited with banks as securities against large overdrafts.

Thirdly, while the shares given in exchange for the YY Ltd. shares were not purchased with borrowed funds, the YY Ltd. shares themselves were (like the other shares categorised by the firm of Chartered Accountants as Short-Term Shares) kept in bank nominee names and used as securities for overdrafts. Of these shares 3 330 398 were deposited with C Bank and remained so lodged until their disposal in September 1978, after which they remained with the bank in the account of W Limited. The YY Ltd. shares were acquired in a period where there was a dramatic rise in the volume of purchases and sales of shares by the appellant. As we have mentioned the purchases in the year ended 31 March 1973 totalled over $46.86 million and sales totalled some $23.85 million. The aforesaid Assets Betterment Statement also shows that as at 31 March 1975 the *appellant's liabilities to C Bank* totalled over $4 million whereas the YY Ltd. shares (acquired by way of exchange) were valued at about $3.6 million at that date. At the same date liabilities to S Bank totalled about $1.88 million and B Bank about $0.84 million.

Fourthly, there were other YY Ltd. shares not acquired by way of exchange which were characterised as Short-Term Dealing shares not only by the firm of Chartered Accountants but also by Messrs. SS, the solicitors firm who offered the profits for assessment. 368 576 YY Ltd. shares were regarded as Short-Term shares even on Messrs. SS the solicitors firm's own re-classification. That there were pretty sizeable transactions involving YY Ltd. shares is also borne out by the reference in the firm of Chartered Accountants' letter dated 14 July 1979 (Exhibit I) to the sales of shares in YY Ltd. to S Bank and to the M Group although our conclusion would be the same even without the two specific transactions referred to in the said letter.

Fifthly, as regards *the other shares* which are now being sought to be re-classified, there is really very scantly information as to the circumstances of acquisition except that we do know they formed part of the *general pattern of operating extensively on overdraft secured by shares.* The appellant, quite naturally, relies on the length of ownership as reflected in Annexures F1, F2, F4, F5, F6, F7, F8 and F9. In relation to CP Ltd. for example, there was only one disposition of 14 000 shares but of 44 500 shares in the first of the years appearing in F4 (ended 31 March 1973); there was one substantial purchase the next year and no further movement until 1979. In relation to EA Ltd., however, although a total of 102 050 shares had been re-classified by Messrs. SS, the solicitors firm as long-term, as many as 222 198 shares remained classified as short-term. In our view, the length of retention and the pattern of movements and other factors relied upon by the appellant do not suffice to enable the appellant to discharge his burden of proof.

The other factors relied upon by the appellant as militating against trade or an adventure in the nature of trade include: the background of the appellant, his busy professional and other commitments, his pastimes, his position in YY Ltd. and in the community in general, his non-dependence on share profits for his living, his apparent lack of interest in accounting matters, his lack of qualification relating to shares and share dealings, his failure to keep proper books, the absence of "a commercial organisation" relating to his share investment, the fact that he never conducted a margin account with a broker and the fact that he

eventually put virtually the whole of the unsold balance of his portfolio into a family trust rather than dispose of them in the market. All these, we think, are indeed relevant although we would observe that he did admit in cross-examination that while the records with respect to his medical practice "were terrible" those with respect to his share investments were "good"; it does however appear from Mr. F's evidence that the appellant's affairs were somewhat disorganised. Nevertheless, the sheer volume and number of transactions, the relatively huge sums involved, his exposure by way of overdraft all speak to a man who had considerable practical experience and confidence in share transactions. All in all, we find that the appellant did trade in shares and we find that he has not demonstrated that his previous tax representatives had wrongly advised him or was otherwise wrong in placing the particular shares in question into the category of stock-in-trade even if the appellant is not precluded as a matter of law from attempting to re-classify the shares. In reaching our conclusions, we have borne in mind the so-called "badges of trade" and any contra-indications.

The Appeal must therefore be dismissed and the Commissioner's assessment confirmed.