

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D74/00**

**Personal assessment** – loss sustained by share dealing business – meaning of ‘trade’ and ‘business’ – sections 2, 14(1), 42(2)(b) and 68(4) of the Inland Revenue Ordinance (‘IRO’) – section 5A of the Companies Ordinance.

Panel: Anna Chow Suk Han (chairman), Herbert Tsoi Hak Kong and Alexander Woo Chung Ho.

Date of hearing: 21 September 2000.

Date of decision: 25 October 2000.

The taxpayer and her husband were directors of Company C from which she received an employment income. On 7 May 1998 the taxpayer applied to register a business carried on in her name and the nature of business was described as ‘dealing in shares and futures’. The business was said to commence on 30 July 1996 but the registration of the business was only completed on 8 May 1998.

On 22 September 1998 the taxpayer submitted her tax return – individuals for the year of assessment 1997/98. In the return, the taxpayer and her husband had elected personal assessment. The taxpayer declared a loss of \$9,064,160 sustained from a business of dealings in shares and futures. A set of accounts of the claimed share dealing business for the year ended 31 October 1997 together with a proposed tax computation under personal assessment was sent with the return for the year of assessment 1997/98. The assessor did not take into account in the assessment the said loss and the taxpayer objected to the assessment on, inter alia, the ground that the total income of the taxpayer and her husband should have been reduced by an amount of \$9,064,160 being the taxation loss sustained by the taxpayer in respect of her share dealing business.

**Held:**

1. Whether or not a person is carrying on a trade or business when he is dealing in shares is a matter of fact and degree to be decided on all circumstances of the case.
2. The provision in section 5A of the Companies Ordinance has not in any way altered the application of the tax principles to corporations and individuals. The presumption that ‘more often than not a company carries on a business whereas a private individual does not’ still holds good.

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3. Since the law places weight on the taxpayer's intention according to the nature of the property acquired, the principles in Simmons v IRC, All Best Wishes Ltd v CIR, and D11/80, IRBRD are only applicable to a case where the property acquired is a landed property. In a case of shares, instead of looking only at the intention of the taxpayer, we must also consider all the relevant facts and ask the question whether the taxpayer was in fact carrying on a trade or business. (see Board of Review Decision D111/97).
4. 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 Pennycrick J suggested in the Lewis Emanuel case, that he is not. This is a guiding principle in the case of this nature.
5. 'In the context of shares and securities, a person can sell and buy shares and securities on the stock market on many occasions without starting the business of share or securities trading. Private individuals would rarely be considered as carrying on a business of trading and securities unless there were other associated activities.' This proposition is supported by the Board in D42/90, IRBRD, vol 5, 316.
6. In the present case, the taxpayer is a company director, engaging in business activities unrelated to shares and securities. She has no particular expertise, knowledge or ability in share dealings. She purchased 'hot' shares introduced by friends and share dealers on speculative basis, aiming at a largest profit within the shortest period of time and that she did not take hedge or other protective measures to minimize risks. It is evident from these facts that the taxpayer's dealings in shares were purely speculative and without a system of operation.

### **Appeal dismissed.**

#### Cases referred to:

CIR v Bartica Investment Limited HKTC [1996] volume 4 page 129  
America Leaf Bending Co v Director-General [1978] STC 571  
CIR v The South Behar Railway Co Ltd 12 TC 657  
D137/98, IRBRD, vol 13, 641  
Lionel Simmons Properties Ltd (in liquidation) and Others v IRC [1980] 53 TC 461  
All Best Wishes Ltd v CIR [1992] 3 HKTC 750  
D11/80, IRBRD, vol 1, 374  
CIR v Dr Chang Liang-jen 1 HKTC 971  
D20/90, IRBRD, vol 5, 164

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Cooper v Stubbs 10 TC 29  
Salt v Chamberlain 53 TC 143  
D42/90, IRBRD, vol 5, 164  
D57/94, IRBRD, vol 9, 335  
D111/97, IRBRD, vol 13, 20  
D42/98, IRBRD, vol 13, 280

Chan Wai Mi for the Commissioner of Inland Revenue.  
Taxpayer in person.

### **Decision:**

### **The appeal**

1. This is an appeal by Madam A (‘ the Taxpayer’ ) against the personal assessment for the year of assessment 1997/98 raised on her. She claims that the assessment has not taken into account of the loss of \$9,064,160 sustained by her sharedealing business.

### **The background facts**

2. The Taxpayer and her husband, Mr B were directors of a company called Company C.

3. On 23 May 1997, the Taxpayer submitted her tax return – individuals for the year of assessment 1996/97 in which she declared an employment income of \$170,000 derived from Company C for the period from April 1996 to June 1996 and she did not declare she had any sole proprietorship business.

4. On 7 May 1998, the Taxpayer applied to register a business carried on in her name and the nature of business was described as ‘ dealing in shares and futures’ . The business was said to commence on 30 July 1996, but the registration of the business was only completed on 8 May 1998.

5. By a letter dated 19 May 1998, Messes Stanley So & Co, certified public accountants (‘ the Representative’ ) advised that the Taxpayer commenced a business of share and futures dealings in July 1996. The Representatives submitted on behalf of the Taxpayer copies of the accounts for the period from 30 July 1996 to 31 October 1996 and a proposed tax computation.

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6. On 22 September 1998, the Taxpayer submitted her tax return – individuals for the year of assessment 1997/98. In the return, the Taxpayer and her husband had elected personal assessment. The Taxpayer declared the following income and loss particulars:

- (a) a bonus of \$10,000,000 from Company C,
- (b) a loss of \$9,064,160 sustained from a business of dealings in shares and futures.

A set of accounts of the claimed sharedealing business for the year ended 31 October 1997 together with a proposed tax computation under personal assessment was sent with the 1997/98 tax return.

7. On 20 November 1998, the assessor raised on the Taxpayer the following personal assessment for the year of assessment 1997/98:

	<b>the Taxpayer</b>	<b>Mr B</b>	<b>Total</b>
	\$	\$	\$
Salaries income	<u>10,000,000</u>	<u>241,956</u>	<u>10,241,956</u>
Tax payable thereon	1,499,999	36,294	1,536,293
<u>Less:</u> Salaries tax already charged	<u>1,499,999</u>	<u>4,913</u>	<u>1,506,912</u>
Net tax payable under personal assessment	<u>Nil</u>	<u>29,381</u>	<u>29,381</u>

8. By a letter dated 25 November 1998, the Representatives objected to the assessment on the grounds that it was excessive and that the total income of the Taxpayer and her husband should have been reduced by an amount of \$9,064,160 being the taxation loss sustained by the Taxpayer in respect of her sharedealing business for the year ended 31 October 1997 as claimed in her tax return.

### **The law**

9. Section 42(2)(b) of the IRO provides that in ascertaining the tax liability of an individual under personal assessment for a year of assessment, there shall be deducted from the total income of the individual the amount of the individual's loss or share of loss for that year of assessment computed in accordance with Part IV.

10. The charging section of profits tax under part IV of the IRO is section 14(1) which provides:

*Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade,*

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*profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.'*

11. The words 'trade' and 'business' are defined in section 2 of the IRO:

*' "trade" includes every trade and manufacture, and every adventure and concern in the nature of trade.'*

*' "business" includes agricultural undertaking, poultry and pig rearing and the letting or sub-letting by any corporation to any person of any premises of portion thereof, and the sub-letting by any other person of any premises or portion of any premises held by him under a lease or tenancy other than from the Government.'*

It is clear that, with the use of the word 'includes', the above definitions are by no means exhaustive.

12. In dealing with appeals to the Board of Review, section 68(4) of the IRO provides:

*' The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

In other words, it is for the Taxpayer to prove that she was carrying on a trade or business in respect of the share transactions before she could deduct the loss sustained in that trade or business from her total income under personal assessment.

### **The Taxpayer's case**

13. The grounds of appeal advanced by the Taxpayer in her notice of appeal are as follows:

*' (1) The personal assessment for the year of assessment 1997/98 dated 20 November 1998 under the charge number of 6-1671911-98-8 is*

*(a) Incorrect;*

*(b) Excessive;*

*(c) Not in accordance with the tax return submitted; and*

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- (d) Failed to take into account a loss sustained from the taxpayer's sharedealing business under section 42(2)(b).
- (2) The statement of facts upon which the Commissioner's determination has been based is incomplete and failed to take into account the turnover analysis submitted as per the tax representatives' letter of 13 March 1999 and the trading activities and transactions carried on by the taxpayer during the year concerned.
- (3) The Commissioner (i) has no power to ignore, (ii) fails to observe and (iii) has not exercised his duty to the public under Section 14(1) of the Inland Revenue Ordinance by presuming a person not carrying on a trade, profession or business in Hong Kong.'

14. At the hearing before us, the Taxpayer appeared in person and was represented by Mr Stanley So, a certified public accountant, of the Representatives. Mr So informed the Board that the Taxpayer did not propose to adduce further evidence and would seek to rely on the documents before the Board and the evidence adduced prior to the hearing but the Taxpayer was prepared to adduce oral evidence if the circumstances so required.

15. Mr So presented this Board with a written submission. The following is a summary of the submission on behalf of the Taxpayer.

16. Mr So drew our attention to the relevant provisions of the Taxpayer namely, section 42(2) and section 14(1). He listed out, where available, the statutory definition, the judicial interpretation and some dictionary meanings of the respective words 'trade', 'profession' and 'business' in section 14(1) of the IRO. Mr So submitted that there was a fundamental difference between section 14(1) and the corresponding provision in the United Kingdom legislation in that the words 'a trade, profession or business' appeared in section 14(1) while the words 'trade, profession, employment or vocation' in the corresponding provision and thus it was unsafe to follow the English court authorities. He submitted that the word 'business' in our legislation gave a taxpayer a wider scope of activities.

17. Mr So cited to us the case CIR v Bartica Investment Limited HKTC 1996 volume 4 pages 129 to 168. This is a case where the Commissioner of Inland Revenue required the Board to state and sign a case for the opinion of the High Court pursuant to section 69 of the IRO. Mr So claimed that this case established some useful legal principles as to what constituted 'the carrying on a trade or business' and that it also gave us a better understanding of the application of the tax principles to corporations and private individuals. He quoted to us the following passages of the Board in the case stated to the High Court:

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- ‘ Perhaps the starting point is to place on record that the decision whether a person is carrying on business or not is primarily a matter of fact. There is no useful legal definition of business or carrying on business and previous courts have not given any significant judicial interpretation to the words or the concept. The definition in the Inland Revenue Ordinance is merely inclusive and of little help. Lord Atkin in a different context said that to decide the source of a profit is a practical hard matter of fact. The same words can be applied to what we must now decide. We must look at all of the facts, decide what are the salient or important matters so that we can give a fair and proper weighting to them and then reach our decision accordingly.’
- ‘ Having reached this point we then pose another question. We ask whether there is any distinction to be drawn between a company and a private individual. In other words when we ask the question whether a person is carrying on business, do different rules apply to a person who is a company and a person who is a private individual. The representative for the Commissioner submitted that there was a difference but as a matter of law the answer must be in the negative. The Inland Revenue Ordinance does not draw any distinction whatsoever between a corporation and a private individual for profits taxation matters. We do not have the concept in Hong Kong of corporate profit tax. Our profits tax applies to all persons alike be they corporations or individuals.’
- ‘ Companies as well as individuals which carry on business usually are quite distinct from those that do not. There is often a full time dedicated office with staff and services. There are invoices, filing systems, banking facilities with overdraft accounts and all of the paraphernalia which go with an active modern business operation.’
- ‘ What is being said in all of the decided cases is that every case depends upon its own facts which must be carefully analyzed. More often than not a company carries on business whereas a private individual does not. However that does not mean that there is any legal presumption one way or the other.’

Except for applying the factors referred to in the third passage above, to the facts of this case, Mr So did not explain to us the significance he saw in these passages nor did he explain to us how these passages should influence our decision in this case.

18. Mr So applied the factors mentioned in the third passage quoted above to the facts of this case under appeal. He asserted that the Taxpayer was fully accessible to a room which she used as her place of business thus rendering her having ‘ a full time dedicated office’ . The Taxpayer engaged stock brokers including the Hong Kong Stock Exchange Limited to carry out her instructions of purchases and sales and also managed a working team which could offer clerical support to her sharedealing business, thus having ‘ staff and services’ . The Taxpayer had invoices with proper ad valorem stamp duties paid in support of her purchases and sales. The Taxpayer had a book-keeping system whereby supporting vouchers and books of accounts were kept by her

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Representatives on her behalf in computer. The Taxpayer used credit facilities to finance her share transactions, and the Taxpayer was connected to a real time on line stock market channel and was thus equipped with all the requisite paraphernalia of an active modern business operation.

19. Mr So emphasized that even in the absence of an office, staff, sales, filing system or equipment, the taxpayer in the Bartica case was held to be carrying on a business in Hong Kong.

20. Mr So submitted that in the Bartica case, in considering the error of the Board, Cheung J repeated the words of Lord Diplock in America Leaf Blending Co v Director-General (1978 STC 571). Mr So quoted those words of Lord Diplock as follow:

*‘ ... for the purpose of making profits ... any gainful use to which it puts any of its assets prima facie amounts to the carrying on of a business. ’*

Perhaps, it is appropriate for us at this juncture to point out that the full version of Lord Diplock’s words should be as follows:

*‘ ... In the case of company incorporated for the purpose of making profits for its shareholders any gainful use to which it puts any of its assets prima facie amounts to the carrying on a business. ’*

We hope, the omissions of the words ‘In the case of company incorporated’ and ‘for its shareholders’ in the version quoted by Mr So, were not intended to mislead this Board, since the omissions of those words, would give the prima facie inference a wider concept. The presence of the omitted words would render the prima facie inference capable of being drawn in the case of a corporation only and of not an individual.

21. Mr So claimed that in the Bartica case, even where there were no trading activities save receipts of interest payments, the taxpayer was held to be carrying on a business in Hong Kong.

22. Mr So contended that since traditional mode of business operation had been replaced by the use of advance technology no expenditure claimed by the Taxpayer should not be taken as no business operation by the Taxpayer.

23. Mr So also drew our attention to section 5A of the Companies Ordinance enacted on 8 January 1997 which provides that every company has the capacity and the rights, powers and privileges of a natural person and that the purpose of the provision is to ensure that no act of a company shall be beyond its legal capacity, and for that reason, ultra vires and void. Mr So submitted that thus all tax principles should be equally applied to corporations and private individuals.



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24. Mr So also referred us to the earlier case of Commissioner of Inland Revenue v The South Behar Railway Co Ltd 12 TC 657, cited in the Bartica case. In that case, the taxpayer held a railway which was operated by another company. The taxpayer was entitled to a share in the profits in the operation of the railway. Later, it relinquished the possession of the railway and it was arranged that it should be paid an annuity in lieu of the share of profit. Thereafter, the taxpayer did nothing but receive and distribute the said annuity to its shareholders. It was held by the House of Lords that the taxpayer was carrying on a trade or business or undertaking of similar character and was therefore liable to corporation profits tax. Mr So quoted Lord Sumner as saying:

- ‘ (1) To ascertain the business of a limited liability company one must look at its Memorandum and see what business that provides and whether its objects are still being pursued.
- (2) ... it plays its recurring part in every payment and receipt of gains, and there is here, therefore, that “repetition of acts” which ... is implied in “carrying on business”.
- (3) Business is not confined to being busy: in many business long intervals of inactivity occurred.’

Mr So drew inference from passage (1) above that in the case of a limited company, in order to ascertain its business intention, one looked at its Memorandum, and in the case of an individual, one looked at his action which, Mr So said, spoke louder than words. Mr So asserted that in this case, the Taxpayer’s act of buying shares with a view to disposing of them at a profit spoke for itself. With reference to passage (2) above, Mr So said that the Taxpayer’s repetition of buying and selling of shares and payment and receipt of proceeds implied that the Taxpayer was carrying on a business.

25. Mr So also cited to us the Board of Review Decision D137/98 in which the following legal principles and proposition were held:

- (1) The taxability or otherwise of a profit derived by a person from the sale of an asset turns on his intention at the time of its acquisition. If the intention was to dispose of it at a profit, the asset was a trading asset, and the profit is trading profit and is taxable. If the intention was to hold it as a long-term investment, the asset was a capital asset, and the profit is a capital gain and is not taxable. At any given time, an asset is either a trading asset or a long-term investment; it cannot be both; it cannot be neither. (per Lord Wilberforce in Lionel Simmons Properties Ltd (in liquidation) and Others v IRC [1980] 53 TC 461 at 491).

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- (2) A mere statement of intention is not decision and has to be tested against the circumstances. The intention must be genuinely held, realistic and realizable. (per Mortimer J in All Best Wishes Ltd v CIR [1992] 3 HKTC 750).
- (3) ‘Intention’ connotes an ability to carry it into effect. (D11/80, IRBRD, vol 1, 374 applied).
- (4) Trade is defined in section 2 of the Inland Revenue Ordinance (the IRO) as including ‘every trade and manufacture, and every adventure and concern in the nature of trade’.

He submitted that IRBRD D137/98 was a case where an one-off transaction without a business registration certificate and without the profit being reported in a tax-return, was nonetheless held as constituting a trade or business.

26. Mr So referred us to the stock turnover analyses for the period from 30 July 1996 to 31 October 1996, the year ended 31 October 1997 and the year ended 31 October 1998; a monthly statement from a financial company, Company D for the twelve months ended 31 October 1997; a statement of October 1997 from another financial company, Company E; the accounts for the shares and futures dealing for the year ended 31 October 1998 and the share dealing schedule for the year ended 31 October 1998.

27. From the above submission, Mr So contended on behalf of the Taxpayer as follows:

- (1) Section 14(1) of the IRO excludes chargeability on profits from sale of capital assets but not from sharedealings which amount to carrying on a trade or business.
- (2) As a matter of fact, profits from dealings in shares are always chargeable under section 14(1) (see Dr Chang’s 73/74 and IRBRD D20/90).
- (3) Shares are trading assets.
- (4) Shares are purchased with a view to disposing them at a profit as soon as possible.
- (5) One of the ordinary dictionary meanings of trade is ‘a buying and selling’.
- (6) Repetition of buying and selling of shares amounts to carrying on a trade.
- (7) Putting to gainful use of assets amounts to carrying on a business (per Lord Diplock in America Leaf Blending).

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### **The Respondent's case**

28. The Respondent presented us with the following authorities for our consideration:

- (1) Commissioner of Inland Revenue v Dr Chang Liang-jen 1 HKTC 971.
- (2) Cooper v Stubbs 10 TC 29.
- (3) Salt v Chamberlain 53 TC 143.
- (4) Board of Review Decision D20/90, IRBRD, vol 5, 164.
- (5) Board of Review Decision D42/90, IRBRD, vol 5, 316.
- (6) Board of Review Decision D57/94, IRBRD, vol 9, 335.
- (7) Board of Review Decision D111/97, IRBRD, vol 13, 20.
- (8) Board of Review Decision D42/98, IRBRD, vol 13, 280.

29. The Respondent has also provided us with a written submission in which the legal principles from the above authorities were detailed.

30. Applying the legal principles from the above cases, to the facts in the present case, the Respondent submitted that the overall impression was that the Taxpayer was not carrying on a trade or business in shares and invited us to dismiss this appeal.

### **Our findings**

31. The Taxpayer was not called to give evidence. The facts stated in the determination of the Commission of Inland Revenue dated 28 May 1999 and further facts submitted by the Respondent in its written submission were not disputed. From those facts and the documents produced before this Board, the facts of this case may be summarized as follows:

- (1) The Taxpayer was employed full time by Company C. She was in charge of its shipping, bills of exchange, invoicing, placing and accepting of orders, financial control and marketing for the year of assessment 1997/98.
- (2) Company C subscribed to an on-line stockmarket channel system with the Stock Exchange of Hong Kong Limited in November 1993. The system was installed for the use of its customers and suppliers while they visited

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Company C's office for business. The Taxpayer did not often make use of it. She only knew inputting codes to check update market prices and seldom used the other functions of the system.

- (3) There were buying and selling of about a total of 60 transactions for the year of assessment 1996/97 and a total of 260 transactions for the year of assessment 1997/98. The first seven lots of shares claimed to have been acquired by the Taxpayer on 30 July 1996 were in fact purchased through the Taxpayer's husband's account with Company D, one of which was purchased on 22 March 1996. The shares were later transferred and deposited into the Taxpayer's account for sale. The Taxpayer used her husband's account because her account was not yet put to use.
- (4) Full time supporting staff was not required. The brokers handled the Taxpayer's trading matters. The brokers were Company F, Bank G and Company H.
- (5) For the period from 30 July 1996 to 30 October 1997, the Taxpayer purchased shares in 35 listed companies in Hong Kong involving 29 purchases and 18 sales for the period ended 31 October 1996 and 85 purchases and 88 sales for the year ended 31 October 1997.
- (6) The buying of shares was intended for sale at a quick profit. Most of them were held for less than one month. The Taxpayer did not study the detailed background of the shares and had not acquired knowledge or skill therefor. The Taxpayer had not taken hedge or other protective measures to minimize risks. The Taxpayer's intention was to make the largest profit within shortest period of time in holding the shares.
- (7) The Taxpayer aimed at 'hot' shares at the prevailing time. They were introduced to the Taxpayer by friends and sharedealers on speculation basis.
- (8) All transactions were financed through margin account opened with the finance company associated with the relevant broker.
- (9) The Taxpayer had borrowed funds totalling of approximately \$25,000,000 from her employer Company C during the period up to 30 April 1997. Most of the working capitals was financed through short term credit facilities from finance companies.

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- (10) The Taxpayer opened a margin account with Company D on 5 August 1996. The following shares were deposited into the margin account:

<b>Transaction date</b>	<b>Description</b>
5 August 1996	4,000 Stock 1
	2,000 Stock 2
	4,000 Stock 3
	4,000 Stock 4
	4,000 Stock 5
	10,000 Stock 6
22 August 1996	200,000 Stock 7

- (11) The Taxpayer opened a cash account, a margin account and a futures trading account with Company H, Company D and Company I respectively, on 3 September 1997. The Taxpayer did not use the cash account but had transactions via her margin and futures account. All accounts were closed on 11 June 1998.
- (12) The Representatives were responsible for the drawing up of the Taxpayer's books of account in respect of her sharedealing transactions. Her books and records were kept at the Representatives' office.
- (13) The Taxpayer carried out her share transactions on her own without assistance except those of her share brokers.

32. The applicable principles in this type of case are summarized as follows:

- (1) The question of whether or not a taxpayer is carrying on a trade or business when dealing in shares is a matter of fact and degree to be decided on all circumstances of the case.
- (2) Where the question is whether an individual engaged in speculative dealings in securities is carrying on trades or not, the prima facie presumption is that he is not.
- (3) For dealing in securities or futures, there has to be a habitual and systematic course of dealing. It is a matter of degree.
- (4) Though it is not essential that a person carrying on a trade or business must have an office and an organization, where none of these attributes exists, there must be other clear evidence of carrying on a trade or business.

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33. Before we apply the above principles to the facts of this case, we have the following comments on Mr So's submissions.

34. We do not find Mr So's observation of a difference between section 14(1) of the IRO and the corresponding provision of the UK legislation, helpful to the interpretation of the words 'trade' and 'business'. Neither do we find that the word 'business' in section 14(1) gives a taxpayer a wider scope of activities nor that it means 'to cover trade, profession and everything else which is not a trade or profession', as Mr So submitted. Whether or not a person is carrying on a trade or business when he is dealing in shares is a matter of fact and degree to be decided on all circumstances of the case.

35. Mr So attached much importance to the Bartica case from where he said to have found some useful principles as to which constituted 'the carrying on a trade or business'. However, Mr So had not referred us to those useful principles upon which the Taxpayer's case relies. In the Bartica case, it was held by Cheung J that the Board was in error in that it failed to apply the test propounded in American Leaf Blending Co Sd Bhd v Director of Inland Revenue [1978] STC 561 to the facts of the case when they reached the conclusion that the taxpayer was not carrying on any business. The guiding principle in that case is that 'while ultimately it is a question of fact whether the taxpayer was carrying on business, the prima facie inference for a company incorporated for the purpose of making profits for its shareholders and puts its assets to gainful use is that it is carrying on a business.' Cheung J said that the lack of understanding by Board of this principle is shown by what the Board said at page 12, namely:

*'What is being said in all of the decided case depends upon its own facts which must be carefully analyzed. More often than not a company carries on a business whereas a private individual does not. However that does not mean that there is any legal presumption one way or the other.'*

And at page 14, when it was said that:

*'Having established that there is no legal difference between a private individual and a company and having established that the mere fact of being a company does not import into all and any activities the fact of carrying on business, it is then necessary and possible for us to look at the facts and all the facts of this appeal to ascertain whether or not in the present case what the taxpayer did constituted the carrying on of business.'*

We observe from the above passages that the error of the Board was that it drew no distinction between a corporation and a private individual in deciding that the company was not carrying on a trade or business. If it is Mr So's assertion that 'putting to gainful use of assets amounts to carrying on a business (per Lord Diplock in American Leaf Blending)', his assertion in this regard must fail.

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36. Mr So found support from the Bartica case in that he asserted that even in the absence of those relevant factors, such as office, staff, filing system, or equipments and where there were no trading activities, save receipts of interest payments, the taxpayer in that case was still regarded as carrying on a business in Hong Kong. However, as we observe, there were far more trading activities in the Bartica case than the mere receipts of interest payments, as submitted by Mr So. It was held by Cheung J that the placing of deposits and furnishing of the deposits as securities were evidence of commercial motive and were carried out over a long period between 1984 and 1989; the holding of deposits constituted the carrying on of a business; and the acquisition of shares and the investment activities were further evidence that the taxpayer was carrying on business. Thus, it is incorrect for Mr So to say that there were hardly any trading activities in the Bartica case. In any event, each case depends on its own facts. Also the facts and argument applicable to one case may not carry the same weight in another. We fail to see how the Bartica case can lend support to the present case.

37. As to Mr So's submission on section 5A of the Companies Ordinance, we do not find that this provision has in any way altered the application of the tax principles to corporations and individuals. The presumption that 'more often than not a company carries on a business whereas a private individual does not' still holds good.

38. As to Mr So's submission of the application of the principles held in the cases of 'Simmons v IRC', 'All Best Wishes Ltd v CIR' and 'D11/80 IRBRD' to the present case, since the law places weight on the taxpayer's intention according to the nature of the property acquired, those principles are only applicable to a case where the property acquired is a landed property. In a case of shares, instead of looking only at the intention of the taxpayer, we must also consider all the relevant facts and ask the question whether the taxpayer was in fact carrying on a trade or business. (See Board of Review Decision D111/97).

39. Having dealt with all the essential points under the Taxpayer's submissions, we now come to the nub of this case and analyze carefully the relevant facts to ascertain whether or not the Taxpayer was in fact carrying on a business in her sharedealing activities.

40. 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 Pennycrick J suggested in the Lewis Emanuel case, that he is not. This is a guiding principle in the case of this nature.

41. 'In the context of shares and securities, a person can sell and buy shares and securities on the stock market on many occasions without starting the business of share or securities trading. Private individuals would rarely be considered as carrying on a business of trading and securities unless there were other associated activities.' This proposition is supported by the Board in D42/90, IRBRD, vol 5, 316.

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42. In the present case, the Taxpayer is a company director, engaging in business activities unrelated to shares and securities. She has no particular expertise, knowledge or ability in sharedealings. She purchased 'hot' shares introduced by friends and sharedealers. She admitted that she purchased them on speculative basis, aiming at a largest profit within the shortest period of time and that she did not take hedge or other protective measures to minimize risks. This was the information supplied by her through her Representatives to the assessor during the investigation. It is evident from these facts that the Taxpayer's dealings in shares were purely speculative and without a system of operation.

43. Mr So asserted that the Taxpayer had an office and staff at her disposal and had a filing system, overdraft facilities and all other paraphernalia of a business operation. In our view, these are mere assertions. Having an office and staff at her disposal, placing orders through stockbrokers, having records of the transactions kept by a firm of accountants and subscribing to an on-line stock market channel did not amount to having the necessary business attributes.

44. A business registration certificate is not a requisite for the purpose of carrying on a trade or business. The fact that the Taxpayer did obtain a business registration certificate does not necessarily carry weight in her favour, especially when it was taken out almost two years after the alleged commencement of business.

45. Notwithstanding the extensive volume of transactions and utilization of overdraft facilities, we find that there was no element of system or organization in the Taxpayer's sharedealings. What the Taxpayer embarked upon was simply a speculative venture seeking a high profit return within a short space of time.

46. This is a case where the Taxpayer has failed to discharge the burden of proof placed upon her under section 68(4) of the IRO. Accordingly we confirm the assessment and dismiss the appeal.