

Real Estate Investments (N.T.) Limited *(Appellant)*

and

Commissioner of Inland Revenue *(Respondent)*

Court of First Instance
(Inland Revenue Appeal No. 8 of 2005)

Deputy High Court Judge Carlson
Dates of Hearing : 27, 28 and 29 September 2005
Date of Judgment : 2 December 2005

Court of Appeal
(Civil Appeal No. 15 of 2006)

Hon Cheung JA, Tang JA and A Cheung J
Dates of Hearing : 19 and 20 October 2006
Date of Judgment : 10 November 2006

Court of Final Appeal
(Final Appeal No. 3 of 2007 (Civil))

Mr Justice Bokhary PJ, Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Sir Noel Power NPJ and Mr Justice McHugh NPJ
Date of Hearing and Decision: 7 January 2008
Date of Judgment : 16 January 2008

Inland Revenue Ordinance (Cap. 112) – Profits Tax – whether properties were acquired as trading stock or capital assets – whether profits arising on sale are assessable to profits tax – whether it is open to the Board to dispose an appeal on onus of proof.

The Taxpayer was a joint venture between the Chinachem group and the Sun Hung Kai group. The Taxpayer was the owner of a new building situated at No. 49 Conduit Road, Mid-Levels, Hong Kong [“the Property”] which it acquired in December 1979 and finished redeveloping in June 1996. The Taxpayer contends that the Property was acquired as a capital asset and the intention changed when the redevelopment was completed. Hence, the value attributable to the Property in June 1996 should be taken in calculating the profits on the sale of flats in the new building. If so, it would have resulted in a lower taxable profits.

On appeal, the Board of Review [“the Board”] was unable to come to a positive finding on the intention when the Taxpayer acquired the Property and dismissed the appeal on the Taxpayer’s failure of discharging the onus of proof.

The Taxpayer appealed to the Court of First Instance and applied to the Court to amend the case stated on the grounds that the evidence included in the case stated was not sufficient and that two questions of law proposed by the Taxpayer were not included.

The Court of First Instance and the Court of Appeal upheld the Board’s decision and decided that the Board had considered the circumstances of the case when it reached to the conclusion. The Courts also refused the amendment application. The Taxpayer appealed to the Court of Final Appeal.

Held, dismissing the appeal, that:

- (1) The stated intention of the Taxpayer was not conclusive and the Board had considered all the surrounding circumstances to come to its conclusion. There is no specifically identifiable error of law on the part of the Board.
- (2) The onus of proof cannot be shifted from where section 68(4) of the Inland Revenue Ordinance places it, namely on a taxpayer who appeals against an assessment to show that it is excessive or incorrect.
- (3) The power to send a case back for amendment is discretionary. The Court of Final Appeal will not exercise the discretion unless persuaded that there is a necessity. In the present case, it was plain that the case stated was not in need of being sent back for amendment.

In the Court of First Instance

Mr John J E Swaine (instructed by Messrs Cheng, Chan & Co.) for the appellant

Mr Johnny Mok (instructed by the Department of Justice) for the respondent

In the Court of Appeal

Mr John J E Swaine (instructed by Messrs Cheng, Chan & Co.) for the appellant

Mr Johnny Mok SC (instructed by the Department of Justice) for the respondent

In the Court of Final Appeal

Mr John J E Swaine and Mr Anthony Wu (instructed by Messrs Cheng, Chan & Co.)
for the appellant

Mr Johnny Mok SC and Mr Stewart K M Wong (instructed by the Department of
Justice) for the respondent

Cases referred to in the judgment of the Court of Final Appeal:

Abbott v Albion Greyhounds (Salford) Ltd [1945] 1 All ER 308

Beautiland Co Ltd v CIR [1991] 2 HKLR 511

Bradford Third Equitable Benefit Building Society v Borders (No. 2) [1939] 3 All ER
29

Chinachem Investment Co Ltd v CIR (1987) 2 HKTC 261

Cunliffe v Goodman [1950] 1 All ER 720

Dorman Long (Steel) Ltd v Bell [1964] 1 WLR 333

Edwards v Bairstow [1956] AC 14

General Motors Acceptance Corp (UK) Ltd v IRC [1985] STC 408

Mariner International Hotels Ltd v Atlas Ltd (No. 2) [2007] 4 HKLRD 194

Marson v Morton [1986] 1 WLR 1343

Simmons v IRC [1980] 1 WLR 1196

Ume v Ezechi [1964] 1 WLR 701