Comptroller of Income Tax *v* BBO
[2013] SGHC 74

Case Number : Originating Summons No 681 of 2012

Decision Date : 08 April 2013

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Foo Hui Min, David Lim, and Vikna Rajah (Inland Revenue Authority of Singapore) for the Appellant; Tan Kay Kheng and Tan Shao Tong (WongPartnership LLP) for the Respondent.

Parties : Comptroller of Income Tax — BBO

Revenue Law – Income Taxation – Appeals

8 April 2013 Judgment reserved.

Lai Siu Chiu J:

Introduction

1 This was an appeal under s 81(2) of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the Act") against the decision of the Income Tax Board of Review ("the Board") dated 20 June 2012 ("the Decision") in Income Tax Appeals Nos 3 and 4 of 2010 ("*ITA 3 & 4 of 2010*"). *ITA 3 & 4 of 2010* were in turn appeals by BBO ("the Respondent"), an insurance company, against the decision of the Comptroller of Income Tax ("the Appellant") to tax the gains arising from the disposal in 2001 of shares that the Respondent held in [C], [D] and [E] (collectively referred to as the "Core Shares"). In *ITA 3 & 4 of 2010*, the Board held that the gains arising from the disposal of the Core Shares by the Respondent were not assessable to tax under the Act (see *BBO v The Comptroller of Income Tax* [2012] SGITBR 2).

The background

2 The Respondent is a company registered in Singapore and is part of the [C] group of companies ("the [C] Group"). It carried on the business of a general insurer in Singapore and was registered under the Insurance Act (Cap 142, 2002 Rev Ed) ("the Insurance Act") until December 2009. Under s 17(1) of the Insurance Act, an insurer is required to establish and maintain separate insurance funds for each class of its insurance business. The Respondent established the Singapore Insurance Fund ("SIF") and the Offshore Insurance Fund ("OIF") in respect of its Singapore and its overseas policies respectively. The Respondent used the SIF and the OIF to invest in [C] shares, and used the OIF in particular to invest in [D] and [E] shares. In the years of assessment ("YA") 1973, 1976 1980–1981, 1984–1986, 1988 and 1995, the Respondent sold some of its [C] and [D] shares and reported those gains as taxable income.

3 On 29 June 2001, [F] Limited ("[F]") offered to acquire [C] at a consideration comprising $4.02 in cash and 0.52 [F] share for each [C] share held ("the Takeover"), which offer [C] accepted. Pursuant to the Takeover, the Respondent sold to [F] its entire holding of [C] shares amounting to 13,459,214 shares in exchange for $54,106,040 in cash and 6,998,791 [F] shares. The Respondent also sold, in 2002, its portfolio of [D] and [E] shares in the OIF, amounting to 3,308,000 and

6,000 shares respectively, in exchange for $16,699,280 in cash. This resulted in the Respondent making gains of $89,246,800 from the sale of [C] shares, $7,934,100 from the sale of [D] shares, and $1,452,480 from the sale of [E] shares.

4 The Appellant took the view that the gains made by the Respondent were taxable and issued revised assessments for YA 2002 and YA 2003 to the Respondent. On 15 April 2010, the Appellant issued to the Respondent a Notice of Refusal to Amend the Assessments for YA 2002 and YA 2003.

5 On 19 April 2010, the Respondent filed Notices of Appeal against the Appellant's revised assessments for both YA 2002 and YA 2003. The Board allowed the appeals and issued the Decision on 20 June 2012.

The law

6 For easy reference, the relevant provisions of ss 10(1), 26(1) and 26(3) of the Act are set out below:

> **Charge of income tax**
>
> **10.**—(1) Income tax shall, subject to the provisions of this Act, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from Singapore or received in Singapore from outside Singapore in respect of —
>
> (*a*) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised;
>
> ...
>
> ...
>
> **PART VII**
>
> **ASCERTAINMENT OF CERTAIN INCOME**
>
> **Profits of insurers**
>
> **26.**—(1) Subject to section 34A, this section has effect notwithstanding anything to the contrary in this Act except that nothing in this section shall affect the chargeability to tax of any income of an insurer under section 10.
>
> ...
>
> ***Insurers other than life insurers***
>
> (3) In the case of an insurer whether mutual or proprietary (other than a life insurer) where the gains or profits accrue in part outside Singapore, the gains or profits on which tax is payable shall be ascertained by —
>
> (*a*) taking the gross premiums and interest and other income received or receivable in Singapore (less any premiums returned to the insured and premiums paid on reinsurances);
>
> (*b*) deducting from the balance so arrived at a reserve for unexpired risks at the

percentage adopted by the insurer in relation to its operations as a whole for such risks at the end of the period for which the gains or profits are being ascertained;

(*c*) adding thereto a reserve similarly calculated for unexpired risks outstanding at the commencement of that period; and

(*d*) from the net amount so arrived at, deducting the actual losses (less the amount recovered in respect thereof under reinsurance), the distribution expenses and management expenses incurred in the production of the income referred to in paragraph (*a*) and, in respect of a branch in Singapore, a fair proportion of the expenses of its head office.

(4) For the purposes of subsection (3), in ascertaining the gains or profits derived by an insurer from carrying on the business (other than the business of life assurance) of insuring and reinsuring offshore risks or any other risks for the purposes of any concessionary rate of tax or exemption from tax prescribed by regulations made under section 43C —

(*a*) no income other than income from premiums or from such dividends, interest and gains or profits realised from the sale of investments as may be specified in those regulations shall be included;

(*b*) income in respect of dividends, interest and gains or profits realised from the sale of investments shall be apportioned in such manner as may be prescribed by those regulations; and

(*c*) any item of expenditure not directly attributable to that business shall be apportioned in such manner as may be prescribed by those regulations.

The decision of the Board

7 The Board held that:

(a) Profits from the sale of investments by insurance companies (other than life insurance companies) were not automatically liable to tax under ss 26(3) and 26(4) of the Act. The Board specifically made the following findings:

(i) sections 26(3) and 26(4) were not charging provisions and did not establish the principle that gains and profits from the sale of any investment would amount to income which was liable to tax;

(ii) in cases involving insurance companies (other than life insurance companies), ss 26(3) and 26(4) did not do away with the distinction between, on the one hand, gains and profits arising from the disposal of shares which amounted to business or trading profits and, on the other hand, gains and profits arising from the disposal of shares which amounted to capital gains;

(iii) insurance companies, like all other taxpayers, could hold shares as capital assets; and

(iv) the real question was whether the Respondent's gains from the sale of the Core Shares amounted to trading or business profits, which would then be taxable under s 10(1)(*a*), or whether they were in the nature of capital gains, which would not be taxable. In

other words, one needed to investigate whether the sale of the investments in question arose in the course of a trade or business, or from the realisation of a capital asset.

(b) The Respondent had not engaged in any trade or business in the transaction of the Core Shares and the profits from the sale of the Core Shares should be treated as capital gains. The Board specifically made the following findings:

(i) the Core Shares were held for the long-term strategic purpose of preserving the corporate structure of the [C] Group;

(ii) the Core Shares were held for a long time regardless of the method used to calculate the duration of holding, and this supported the argument that those shares were acquired for a long-term strategic purpose;

(iii) the Appellant was not able to establish that the Core Shares were previously sold by the Respondent to meet its offshore claim liabilities;

(iv) those of the Core Shares which the Respondent sold were sold to other companies within the [C] Group, which further reinforced the corporate preservation policy; and

(v) as [E] was not a listed company, the case in relation to the gains and profits derived by the Respondent from the sale of the [E] shares being capital gains was even stronger.

The issues before the court

8 The issues which needed to be addressed by this court were as follows:

(a) whether the gains made by the Respondent from the sale of the Core Shares were income in respect of gains or profits from the Respondent's trade or business and, hence, taxable under s 10(1)(*a*) of the Act ("Issue 1"); and

(b) whether it was implied in ss 26(3) and 26(4) of the Act that gains or profits from the sale of investments by insurance companies other than life insurance companies (also known as general insurance companies) should be subject to tax ("Issue 2").

The Appellant's case

9 The Appellant had two main submissions: (a) the gains made by the Respondent from the sale of the Core Shares were taxable under s 10(1)(*a*) of the Act as, under common law principles, such gains were considered part of the Respondent's insurance business; and (b) it was implied from ss 26(3) and 26(4) of the Act that gains or profits from the sale of investments by insurance companies, other than life insurance companies, should be subject to tax.

10 On the first submission, the Appellant accepted that an insurance company was capable of holding investments as capital assets, but argued that it was permissible only in the narrowest of circumstances. The Appellant gave seven reasons for taxing the gains made by the Respondent from the sale of the Core Shares:

(a) the Respondent had previously sold some of the Core Shares;

(b) the Respondent had purchased the Core Shares using monies in the insurance funds which it maintained pursuant to s 17(1) of the Insurance Act (collectively, the Respondent's "Insurance

Fund") and held the Core Shares in the Insurance Fund at all times;

(c) the Core Shares constituted a significant portion of the assets held in the Respondent's Insurance Fund;

(d) the Core Shares constituted circulating capital of the Respondent;

(e) the relevant provisions in the Insurance Act and the guidelines issued by the Monetary Authority of Singapore ("MAS") pointed to the gains from the sale of the Core Shares being subject to tax;

(f) the Core Shares were taken into consideration when calculating solvency margins for the purposes of the Respondent's insurance business; and

(g) until the sale of the Core Shares in 2001/2002, the Respondent had voluntarily subjected the gains and profits from previous disposals of other tranches of such shares to tax.

11 On the second submission, the Appellant relied on the decision of an earlier Board for the proposition that gains made by insurance companies from the sale of investments fell within the ambit of "other income" in the then equivalent of s 26(3) of the Act. Further, the Appellant argued, Parliament intended the gains or profits made by an insurance company (other than a life insurance company) from the sale of investments to be taxable because an extension of the concessionary rate of tax to the gains or profits realised by an insurance company from the sale of investments in the course of its offshore business would only be necessary if such gains or profits were taxable in the first place.

The Respondent's case

12 In response, the Respondent made two submissions. First, the Respondent argued that the Core Shares were capital in nature because they had been acquired with the intention of holding them indefinitely so as to preserve the corporate structure of the [C] Group and afford a defence mechanism against any potential hostile takeover of any company in the [C] Group. This was shown by:

(a) the cross-holdings of shares and the cross-directorships between the companies within the [C] Group;

(b) the holding of shares in the companies in the [C] Group by a company controlled by the founder of [C] and his family;

(c) the fact that the Senior Management of [C] received regular updates on the status of cross-holdings of various companies in the [C] Group;

(d) the fact that any decision to sell any shares or rights in the companies within the [C] Group was closely scrutinised and reviewed to ensure that the appropriate level of shareholding and effective control was maintained;

(e) the fact that the Core Shares were passively held by the Respondent and were not managed by [G] Ltd ("[G]"), the Respondent's fund manager; and

(f) the fact that the shares of [E], a non-listed company, were not readily realisable.

13 Further, the fact that the Core Shares were held for a long time with few disposals, and that the Respondent did not use any borrowings in the acquisition of the Core Shares were consistent with the corporate preservation strategy of the [C] Group and with the Core Shares being capital assets.

14 Second, the Respondent argued that ss 26(3) and 26(4) of the Act did not provide that all gains arising from the sale of investments by insurance companies were liable to tax. For those provisions to apply, the issue of whether the gains or profits in question were income or capital in nature had to be determined first. It was only where the gains or profits were determined to be income in nature that the provisions would apply.

My decision

Issue 1

The applicable legal principles

15 At the outset, it is not disputed that the prerequisite for "gains or profits" from various activities to be subject to income tax under s 10 of the Act is that the "gains or profits" have to be gains or profits that are income in nature (see *The Law and Practice of Singapore Income Tax* (Pok Soy Yoong, Ng Keat Seng & Steven Timms eds) (LexisNexis, 2011) ("*Singapore Income Tax*") at para 3.2). Further, this is clear from the wording of s 10 itself as set out at [6] above.

16 Moreover, s 10(1)(*g*), which is a catch-all provision, refers only to "gains or profits of an income nature" not included in ss 10(1)(*a*)–10(1)(*f*). It should also be noted that the preamble to the Act states that the Act is "an Act to impose a tax upon *incomes* and to regulate the collection thereof" [emphasis added].

17 It is also not disputed that the income versus capital dichotomy is the cornerstone of the income tax regime in Singapore, as framed by the Act. Income tax is a tax on income or revenue gains, not capital gains. Although the concept of "income" is not defined in the Act, some tangential support for the proposition that "income" is revenue in nature and does not include capital gains can be found in a press statement by the Ministry of Finance on 9 July 2009 (see Ministry of Finance, "No tightening of Income Tax policy for property transactions" <http://www.iras.gov.sg/irasHome/page.aspx?id=9192> (assessed 18 March 2013)). See also *Singapore Income Tax* at para 3.2, which states that:

> Singapore does not have a capital gains tax, unlike many countries. Its income tax rules are merely aimed at taxing persons who make an income out of their property transactions. This income tax policy is common among tax authorities internationally, and our local practices are not unique.

18 The broadness of the concept of "income" may have led Jordan CJ to state in *Scott v Commissioner of Taxes (New South Wales)* (1935) 35 SR (NSW) 215 at 219 that:

> The word 'income' is not a term of art, and what forms of receipts are comprehended within it, and what principles are to be applied to ascertain how much of those receipts ought to be treated as income, must be determined in accordance with the ordinary concepts and usages of mankind ...

19 Therefore, the meaning of "income" for the purposes of the Act has to be determined with reference to decided cases where the circumstances of the taxpayer were similar.

20 In the case of insurers, the premiums received by them constitute revenue and are taxable as income. Besides the receipt of premiums, the investment by an insurer of its funds to generate revenue to meet its future liabilities arising from claims by policyholders, such as revenue in the form of dividends and rental, is also part of the business of the insurer. Therefore, such revenue is taxable as income. In the Australian case of *Colonial Mutual Life Assurance Society Ltd v Commissioner of Taxation* ("*Colonial Mutual Life Assurance*") (1946) 73 CLR 604 at 619, Latham CJ, Dixon and Williams JJ said:

> … [A]n insurance company, whether a mutual insurance company or not, is undoubtedly carrying on an insurance business and the investment of its funds is as much a part of that business as the collection of premiums. The purpose of investing the funds of the appellant is to obtain the most effective yield of income.

21 In general, the gains derived from the disposal of investments by an insurer in the course of its investment activities constitute the insurer's income. In the Scottish case of *Northern Assurance Co v Russell* CE 1889 2 TC 551 at 578, the Lord President stated:

> Where the gain is made by the Company … by realising an investment at a larger price than was paid for it, the difference is to be reckoned among the profits and gains of the Company.

22 Similarly, the High Court of Australia recognised the rationale for taxing gains from investments in *Colonial Mutual Life Assurance*. In that case, the Australian High Court had to determine whether the net profits made by the taxpayer upon the sale and maturity of certain investments were part of the assessable income of the taxpayer under s 26(a) of the Income Tax Assessment Act 1936 (Cth), which provided that:

> The assessable income of a taxpayer shall include profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme.

23 The Australian High Court held at 619–620 that the profits were taxable:

> … An insurance company, whether a mutual company or not, is undoubtedly carrying on an insurance business *and the investment of its funds is as much part of that business as the collection of the premiums*. The purpose of investing the funds of the appellant is to obtain the most effective yield of income. The diminution or increase in the capital value of the investment between the date of purchase and that of maturity, and the apportionment and deduction or addition over the intervening period of that diminution from or increase to the interest actually payable on the investment is a material ingredient in the ascertainment of this yield. In *Konstam, Law of Income Tax* (8th ed), p 126, it is stated that "*the buying and selling of investments is a necessity of insurance business; and where an insurance company in the course of its trade realises an investment at a large price than what was paid for it, the difference is to be reckoned among its profit;* conversely, any loss is to be deducted." [emphasis added]

24 Notwithstanding this general position, the gains arising from the disposal of investments by an insurer may in some instances be capital in nature, and, hence, not subject to income tax (see *Singapore Income Tax* at para 16.26). This was not disputed by the Appellant, even though the Appellant argued that the Respondent did not fall within any of those exceptions. Three cases illustrate the exceptions to the general position.

25 First, I refer to the New Zealand case of *Commissioner of Inland Revenue v National Insurance*

Company of New Zealand Limited (1999) 19 NZTC 15,135 ("*National Insurance Company*"), where the New Zealand Court of Appeal considered the issue of whether gains made by the taxpayer, an insurance company, from the sale of its strategic share investments in South Pacific Merchant Finance Limited ("Southpac") were revenue or capital in nature. The New Zealand Court of Appeal held that the Southpac shares were capital assets of the taxpayer, and accordingly, the gains arising from the disposal of the shares were capital in nature.

26 In coming to its decision, the New Zealand Court of Appeal made it clear that there was no absolute or precise rule which stated that *all gains* from the sale of share investments by insurance companies must *necessarily* be income in nature. Instead, each case was to be construed on its own facts. As the New Zealand Court of Appeal stated at [11]:

> The reported cases in this area of tax law are legion. Many were referred to in argument. But as Lord Bridge observed in *Waylee Investment Ltd v C of IR* [1990] STC 780 at p 784 it has to be recognised that *the law has never succeeded in establishing precise rules which can be applied to all situations to distinguish between trading stock and capital assets; and the indications to show to which category a particular investment belongs may be uncertain, inconclusive or even conflicting*. And in *Rangatira*, Lord Nolan observed at NZTC pp 12,764, 12,735; NZLR p 138 that "whether a particular business consists of or includes the buying and selling of shares for profit is indeed as much a businessman's as a lawyer's question". [emphasis added]

27 The critical facts which were considered by the New Zealand Court of Appeal can be summarised as follows:

(a) The taxpayer had sufficient cash reserves such that the sale of its strategic investments was never in contemplation as a means of meeting claims or maintaining profitability. In this regard, the New Zealand Court of Appeal was of the view that there was a weak nexus between the taxpayer's realisation of its Southpac shares and the carrying on of its insurance business.

(b) The taxpayer did not acquire the Southpac shares for the purpose of trading in the shares. Instead, the shares were acquired by the taxpayer with the aim of diversifying its investments and the intention was to hold the shares for an indefinite term.

(c) The Southpac shares were treated differently from shares which were traded. In particular, the Southpac shares were not included in the portfolio of investments which were regularly traded by the taxpayer as part of its insurance business.

(d) The Southpac shares were acquired outside the taxpayer's operations as an insurer.

(e) The taxpayer provided two directors to Southpac's Board of Directors, and those two directors had management responsibilities in that capacity. The directors reported on Southpac directly to the taxpayer.

(f) The Southpac shares were eventually sold only when the taxpayer faced insurmountable difficulties as a minority shareholder in Southpac.

28 After a close examination of the facts, the New Zealand Court of Appeal concluded that the Southpac shares were part of the capital structure of the taxpayer's business and, as such, the disposal of the shares gave rise to capital gains. In this regard, it would be pertinent to take note of [53] of *National Insurance Company* where the New Zealand Court of Appeal stated:

> In the end, this was the making of a value judgment based on the *totality of the evidence*. There were features of the Southpac transaction *distinguishing it from the general run of investments inherent in the nature of the company's insurance business* which we think allowed a conclusion that it was, albeit an investment, a move into another area of business which then, for supervening reasons, it became commercially desirable to terminate. By the time of disposition the shareholding could be seen *as part of the capital structure of a company's business*. [emphasis added]

29 Next, I refer to an earlier New Zealand High Court case, *State Insurance Office v Commissioner of Inland Revenue* [1990] 2 NZLR 444 ("*State Insurance Office*"). The issue that was before the New Zealand High Court in that case was whether the gains arising from the sale of shares by the taxpayer, a fire and general insurer, pursuant to takeovers or mergers were capital or revenue in nature. In coming to its decision that the gains were of a capital nature, the New Zealand High Court, like the New Zealand Court of Appeal in *National Insurance Company*, placed great emphasis on the fact that claims submitted to the taxpayer could easily be met from its cash flow and cash reserves without the need to liquidate any of its shares to meet the claims and liabilities. The New Zealand High Court took into consideration the fact that there was no intention on the taxpayer's part to trade in the shares and that the shares were sold pursuant to compulsory acquisitions. The New Zealand High Court found that this indicated the absence of any need or desire to sell the shares and was consistent with the taxpayer's stated intention of holding the shares on a long-term basis. Therefore, the New Zealand High Court held that the shares were not in their character revenue assets in the sense of their realisation being inherent in or incidental to the carrying on of the taxpayer's insurance business. Instead, the shares had become structural assets and were to be classified as fixed capital, and the gains arising therefrom were thus not to be subject to income tax.

30 The following extract from the judgment of the New Zealand High Court at 476–477 of *State Insurance Office* is particularly illuminating:

> I think in the end it is a matter of standing back and looking at the whole picture in context. These were by their nature sporadic isolated transactions in the history of part of the fixed as opposed to circulating capital of the undertaking. That they had some connection with the insurance business being undertaken cannot be denied because undoubtedly dividend income earned by the shares fell into the cash flow which was used in the manner already mentioned. *Whilst there is a nexus between the income generated by the shares and the operation of the business* I have described, *there is no nexus between the realisations which occurred here and the method of operation of the business.* The level of available assets held in relation to possible claims, explained by the history of the office, makes such realisations much less relevant and not so much linked to the insurance undertaking being carried out than might otherwise be the case. *They are not in their character revenue assets in the sense that their realisation is inherent in or incidental to the carrying on of the business. They had become structural assets accumulated for the purpose of continuing in business after catastrophic claims which would eliminate on the worst projection some proportion of circulating capital.* There was no documentary evidence to verify the long term purpose of share investments as part of the structural capital required to continue in business. That was a thesis expounded only by Mr Stirton on behalf of State. However the taxpayer is required, it seems to me, to show only that the transactions are not part of carrying on or carrying out the business. I think the provision of this sum as a reserve for rebuilding purposes can be accepted if it is not required for any other purpose such as a normal provision against claims. *No one can be absolutely sure that the share investments will not be required to meet claims but on the probabilities I think State has done enough to persuade me that it is not so required or intended* and it is easier therefore to accept the explanation of its true purpose.

...

The fact that investments were realised only after the compulsory acquisition provisions could be relied on, is indicative of the absence of any need or desire to sell the securities and is consistent with the stated intention of holding investments for their return and not for sale at a profit in the future. *It must also eliminate any suggestion that these transactions were business motivated.* That compulsory acquisition in itself distances the transaction from being regarded as an integral part of the insurance business. I add that the compulsory aspect of the realisation is not however decisive in any case.

[emphasis added]

31 Third, I refer to the Australian case of *GRE Insurance Ltd v Federal Commission of Taxation; Unitraders Investments Pty Ltd v Federal Commission of Taxation* (1992) 92 ATC 4089. There, the Full Federal Court of Australia stated at 4093 that:

We have already discussed the principle that the profits from the realisation of investments of an insurance company should *usually* be taken into account in the determination of its assessable income for taxation purposes. Of course, such profits are *not invariably* taken into account.

Thus, in *Brice v. Northern Assurance Co* (1911) 6 T.C. 327, an appeal was abandoned there being *findings of the Commissioners that it was not part of the business or trade of the company to deal in investments or to vary investments or to make profits by doing so, that investments were rarely realised and only for special reasons* and that any profits or gains so derived were not taken into account for dividend purposes but were carried to the capital investment reserve fund or used in writing off depreciation on other securities. In *National Bank of Australasia*, Kitto J. held that profits derived on the sale of certain assets were not assessable income but were of a capital nature. The assets in question had arisen out of a capital merger between the National Bank of Australasia Ltd and a Queensland bank and it was surplus assets arising from that transaction of a capital nature that were disposed of. In *The Chamber of Manufactures Insurance Ltd v. FC of T* 84 ATC 4315; (1984) 2 FCR 455, Bowen C.J., Woodward and Northrop JJ. said at ATC 4318; FCR 460 that *"funds of an insurance company invested in the construction of a building to be used as a head office by that company will probably not attract income tax if the head office is subsequently sold for a profit"*. In *London Australia* at ATC 4410–4411; CLR 130, Jacobs J. pointed out that "in so far as the original capital or that capital enhanced by accumulated profits is laid out in investments in property and not in the business activity of banking or insurance, the investments will have the character of capital and profits or losses on a sale thereof will not be profits of the business of banking or insurance".

These cases illustrate circumstances where profits of an insurance company derived on the realisation of investments may constitute non-assessable profits of a capital nature. Equitable Life itself applied this principle for, in that case, although the taxpayer had previously carried on a life insurance business, it had sold the business prior to the years in question and the share portfolio did not represent the circulating capital of such a business.

[emphasis added]

The present facts

32 The Respondent referred to the "badges of trade" identified by the United Kingdom Royal

Commission in its report entitled "Royal Commission on the taxation of profits and income (1955) Cmd 9474: Comments on what is a trade" to show that in totality, the Respondent had not engaged in any trade or business in the transaction of the Core Shares. I agree with the Appellant that the correct question is not whether the Respondent had engaged in any trade or business in the transaction of the Core Shares. Instead, the issue to be determined is whether the gains made by the Respondent from the sale of the Core Shares were income in respect of gains or profits from the Respondent's trade or business, and, hence, taxable under s 10(1)(*a*) of the Act. Following from that, I agree with the Appellant that the "badges of trade" are not directly relevant because it is not disputed that the Respondent is in the business of general insurance. Nevertheless, the factors relevant to the analysis of whether the Core Shares are capital assets, and, hence, whether any gains from the disposal of the Core Shares are capital and not income in nature, understandably overlap with some of the factors listed as the "badges of trade". These "badges of trade" include:

(a) the subject matter of the realisation;

(b) the duration of ownership of that subject matter;

(c) the frequency or number of similar transactions by the same taxpayer; and

(d) the circumstances that were responsible for the realisation.

I will touch on some of these factors in the discussion below.

(1) Motive of the taxpayer

33 Like the taxpayer in *National Insurance Company*, the Respondent did not acquire the Core Shares with an intention to trade in them. Evidence was given by the Respondent's two witnesses, Ms [H] and Mr [J], that the Core Shares were acquired with the intention of holding them indefinitely so as to preserve the corporate structure of the [C] Group and afford a defence mechanism against any potential hostile takeover of any company in the [C] Group. The corporate preservation strategy of the [C] Group was summarised by Mr [J] during examination-in-chief by counsel for the Respondent:

Q: Page 3, you look, there's a heading there that says: "Corporate Preservation Strategy" and this is what your affidavit dealt with, could you, for the benefit of the Board and – elaborate on what you have set out in this affidavit about corporate preservation strategy?

A: Well, the major shareholder of [C] which was the holding company for all the group companies including [BBO] at that time, the major shareholders holding in the --- in the --- in [C] was only roughly about 34% and therefore, I think he was concerned that, er, the bank might be subject to hostile takeover one day. So I think he then formulate the, er, *corporate preservation struc – structure or strategy, so that the associated companies of the bank would hold shares in that bank and other group companies. To prevent hostile takeover, not --- not say to prevent, but at least to minimise or make hostile takeover more difficult*, because I think the shareholder was aware that unless you hold more than 50% shareholding, er, you are always subject to hostile takeover … *But the objective was really to hold as close to more than 50% as possible. So that was really the corporate preservation strategy --- to make the hostile takeover of the bank difficult, because they don't want to open their door allow --- allow anybody to walk in and take over the company so easily.*

[emphasis added]

34 The Respondent's intention in holding the Core Shares was therefore to promote the long-term strategic interests of itself and the [C] Group. This intention was manifested in various ways. First, there were cross-holdings of shares and cross-directorships between the companies within the [C] Group. For example, prior to the Takeover, [C] had substantial shareholdings of 47.84% in the Respondent and 52.44% in [D]. The Chairman of [C], Mr [K], was also the Chairman of the Respondent and [D] at the material times prior to the Takeover. Other common directors between [C] and [D] included Mr [L] and Mr [M]. The Respondent and [D] also had Mr [N] and Mr [P] on their Board of Directors.

35 Second, the corporate preservation strategy of the [C] Group also involved the holding of shares of companies in the group by [QR] Private Limited ("[QR]"), a company controlled by Mr [S] (the founder of [C]) and his family.

36 Third, regular reports and updates on the status of cross-holdings of various companies in the [C] Group and [QR] were generated to the Senior Management of [C] to enable the Senior Management to monitor and ensure that the shareholding of the companies in the [C] Group was not diluted and that effective control was maintained to minimise the possibility of any hostile takeover.

37 Fourth, any decision to sell any shares or rights in the companies within the [C] Group was closely scrutinised and reviewed to ensure that the appropriate level of shareholding and effective control was maintained so that the corporate preservation strategy would not be jeopardised. Specifically, the Respondent was not allowed to sell any of its shares or rights in companies within the [C] Group without the requisite approval from [C], as the intention behind the acquisition of the Core Shares was to retain them for the corporate preservation strategy. There were also stringent checks by the Investment Committee of the [C] Group to ensure that the sale of [C] shares or rights would not jeopardise the corporate preservation strategy: the Investment Committee made sure that whenever [C] shares or rights were sold, the other companies in the [C] Group still held sufficient [C] shares to maintain effective control.

38 I note in passing that it seems that the corporate preservation strategy was effective because [C] was able to fend off an unsolicited hostile bid from [AA] Ltd which was made prior to [F]'s successful takeover offer.

39 Fifth, the Core Shares were passively held by the Respondent and were not managed by [G], the Respondent's fund manager, as they were not meant to be traded and were not intended to be circulating assets. Accordingly, the Respondent did not consider it necessary to pay management fees for the Core Shares to be actively monitored and managed by its fund manager. There was no in-house fund management expertise within the Respondent, and the decisions on the buying and selling of the Core Shares were directed by the [C] Group. In contrast, those of the Respondent's shares that were meant for trading were managed and actively monitored by the Respondent's fund manager, [G]. Ms [H] also affirmed during cross-examination that the Core Shares and the shares meant for trading were managed separately in two different portfolios.

40 Sixth, the shares of [E], a non-listed company, are not readily realisable. This is in contrast with shares of a listed company, which can easily be traded. Therefore, I agree with the Board's holding at [32] of the Decision that there is a strong case for the view that the gains arising from the disposal of at least the [E] shares are of a capital nature.

(2) Duration of ownership

41 Consistent with the [C] Group's corporate preservation strategy, the Respondent acquired the

Core Shares and held onto them for a very long time. The [C] shares were accumulated over a period of 30 years. Most of the [C] shares were acquired from [C] directly through rights and bonus issues. The subscription by the Respondent for the [C] rights issue was in line with the Respondent's long-term investment plan. As stated by the former Chief Executive Officer of the Respondent in an internal memorandum dated 19 June 1997, the [C] shares were "core-stocks" managed by the Respondent and the acceptance of the [C] rights issue was in line with the Respondent's long-term investment plan. The [D] shares were accumulated for some 20 years (from 1983 to 2002). The [E] shares were held for some 27 years (from 1976 to 2002).

42 As the Board rightly pointed out at [29] of the Decision, the long period of holding supported the argument that the Core Shares were acquired for a long-term strategic purpose. This was also a contributing factor that was given weight in *National Insurance Company*, where the New Zealand Court of Appeal decided in favour of the taxpayer.

43 Some support for the proposition that an intention to hold an investment for a long period is an indication of that investment being a capital asset can be found in the case of *Waylee Investment Ltd v Commissioner of Inland Revenue* [1990] STC 780, which dealt with the issue of whether banks could hold shares as capital assets. The Privy Council, in deciding that a bank, like any other trader, could hold investments as capital assets, stated (at 784) that:

> The stock in trade of a bank is money and securities readily convertible into money. But it is equally clear that a bank, like any other trader, may hold investment as capital assets. *The clearest indication that an investment was acquired as a capital asset would be an indication that the bank intended to hold the investment as such for an indefinite period.* The clearest indication that an investment was acquired as trading stock would be an indication that it was held by the bank as available to meet the demands of depositors whenever necessary. [emphasis added]

(3) Multiplicity of disposal of shares

44 Consistent with the corporate preservation strategy of the [C] Group, there were few disposals of the Core Shares by the Respondent throughout the long period of holding. Not a single [D] share was disposed of during the period from 1983 to 2002 (some 20 years). The [D] shares were eventually sold in 2002 pursuant to the Takeover in 2001. Similarly, not a single [E] share was disposed of from the time the [E] shares were acquired by the Respondent in 1976 until 2002 after the Takeover, some 27 years later.

45 There were only nine disposals of [C] shares by the Respondent over a span of 30 years. Further, even when the Respondent sold some of its [C] shares or rights, those shares or rights were almost always sold to and purchased by other companies within the [C] Group pursuant to the corporate preservation strategy. This was evident from the fact that the percentage of [C] shares held by the [C] Group (including the Respondent) remained relatively constant, even for the years where the Respondent sold [C] shares or rights, for instance, for YA 1985 and YA 1986. As was explained by the Respondent's witness, Mr [J], the percentage of [C] shares held by the [C] Group remained relatively constant and ranged between 21.28% and 22.78%. Mr [J] explained that this was because the [C] shares and rights which were sold by the Respondent were sold to other companies within the [C] Group:

> A: No, I think most of those sales would have been sold to other group companies and it --- it is possible on some rare occasions, it could have sold to the market because the other group companies'---

Q: Yes.

A: ---funding could not take it but I would say if you add up all, most of the time, it was sold to group companies. So the corporate preservation strategy was not affected.

46 The Appellant argued that the Board was wrong to find that those of the [C] shares and rights which the Respondent sold had been sold to other companies within the [C] Group as Mr [J] had said that there was a possibility that those shares and rights could have been sold on the open market. However, this was adequately addressed by Mr [J] during re-examination:

Q: Mr Lim [the Appellant's counsel] asked you about the---the year that the issue in question where the shares were sold but there were no acquisition based on the accounts? If you have a situation like that where you sell not to a [C] company but to some other unrelated company in the open market, what would the impact be on the overall holding of the [C] core shares?

A: Very negligible although if---because I think if we look at the overall, the major shareholder holds about 24%. The group company's [*sic*] at that time held about 22% so total is 46%. And I think if you look at the figures, this 46% was very constant throughout the year sort of minus---ups and downs. So that, er, proved the point that the---the corporate preservation strategy actually worked. In other words, not much of the [C] shares were sold to outsider so that the percentage, er, remained approximately the same, about 46%.

...

A: Yes. So you can see there from 1985, as the figure show, to 1991, all the year the figure is around 46%, slightly up and down. So fos---very constant over the years despite they sell by some companies, because they sell so mostly bought by other group companies.

(4) Finances

47 The Respondent did not use any borrowings in acquiring the Core Shares. This was indicative of the Respondent's ability to hold the Core Shares on a long-term basis. There was also no necessity for the Respondent to liquidate the Core Shares to meet claims and liabilities of its insurance business as the Respondent had sufficient cash reserves. Indeed, the Core Shares were never sold by the Respondent to meet insurance claims. From YA 1973 to YA 2003, the Respondent consistently had positive net cash flow of $221,073,322 from its onshore and offshore funds combined, including dividends and interest. This was the cash flow available to the Respondent after taking into account all the claims paid over the years. The dividends and interest received by the Respondent for the period from YA 1973 to YA 2003 was $418,375,846. The Respondent's net cash flow was also positive on a year-to-year basis. This was affirmed by Ms [H] during cross-examination by counsel for the Appellant:

A: Er, I think this table is prepared to---also to---if you were to refer to on a year-to-year basis, there is positive cash flow to---even to meet your operation---your claims payment.

Q: Now, there were---not every year showed a positive cash flow. If you look at THN-6 at page 10, you'll find that for offshore insurance in particular, the years highlighted in dark colour showed that there were actually negative cash flows because of significant offshore claims, especially during the years 84, 85 and 86. Do you agree?

A: Yes, but you have current cash flow and cash flow that carried forward from past years to meet your claims liabilities. So even though you have a negative position in that particular year, you are using your current cash position to settle, and to meet your operational needs.

48 During re-examination by counsel for the Respondent, Ms [H] re-affirmed that the Respondent had consistently had a positive net cash flow from its onshore and offshore funds combined, including dividends and interest:

Q: So if you look at your table, Ms [H], 1985, there's a net---negative net cash flow of four---slightly over $4 million. Would you be able to tell the Board, looking at the prior years---just in the same column---would there be enough cash flow to meet 1984's negative cash flow?

A: Yes.

Q: I'm not sure whether you are able to say, is it enough to meet the following year, year of assessment 1986?

A: Yes, they were more than that.

Q: 1987---

A: Yes.

Q: ---year of assessment?

A: Yes.

Q: 1988?

A: Yes.

Q: And 1989?

A: Yes.

Q: How about 1990?

A: Yes.

Q: You---you---you have calculated? Because you seem to---we are saying it can be deadly.

A: Mm-hm.

Q: Have you---have you made a calculation?

A: Yes.

Q: And then 1991, it's a positive net cash flow.

A: Yes.

Q: And that is looking at this table without taking into consideration any sale proceeds for any

shares, not just the core shares.

A: Just---er, yes, just dividend and interest only.

49 For certain years of assessment, such as YA 1985 and YA 1986, where the offshore claims were higher than the premiums collected, the Respondent would draw upon cash reserves in its offshore fund as well as upon dividend and interest income to meet the cash outflow requirements arising from the offshore claims. Alternatively, the Respondent would transfer monies from the accumulated profits of its onshore fund to its shareholders' fund, and then transfer the monies from the shareholders' fund to the offshore fund to pay the offshore claims. There was no necessity for the Respondent to sell its [C] shares to meet its offshore claims and the Respondent did not do so.

50 Therefore, similar to the situation in *National Insurance Company* and *State Insurance Office*, there was a weak nexus between the sale of the Core Shares and the carrying on of the Respondent's insurance business. The sale of the Core Shares was never contemplated by the Respondent as a means of meeting its claims. To use the words of Heron J in *State Insurance Office*, the Core Shares were not in their character revenue assets in the sense of their realisation being inherent in or incidental to the carrying on of the Respondent's insurance business. Instead, the Core Shares were structural assets.

51 Based on the above analysis at [33]–[50], I am prepared to hold that the Core Shares were capital assets and not revenue assets. Therefore, the gains from the sale of the Core Shares are not taxable as income. For good measure, I will address the Appellant's other arguments below.

(5) Findings by an earlier Board

52 The Appellant argued that an earlier Board which heard a case likewise involving a company in the [C] Group had found that the appellant taxpayer in that case ("[ABD]") could not be the vehicle for corporate preservation because (see [39] of the earlier Board's decision):

> The Comptroller submitted that there was no need to deploy [ABD] as a corporate preservation vehicle as there were already other companies within the [C] group which could well carry out that purpose as these other companies had more capital than [ABD] and were in a better position to do so. However, it was explained that [T] and [D] being subsidiaries of [C] could not hold [C] shares; [W] is the arm which runs the Mandarin Hotel and [BBO] is an insurance company. [ABD's witness] also testified that in terms of structure, [UV] was the investment arm of [C], [ABD] was the investment arm of [the [C]] group and [X], was a public listed companies [*sic*] with at least 50% shareholding by members of the public and was performing a different investment role. [ABD's witness] also testified that if it was intended to carry out trading, then the trading vehicles of the [C] group such as [Y] and [Z] which were trading companies would be used.

53 However, it appears that the earlier Board in the above case was merely saying, in response to the argument that there were other companies in the [C] Group that "were in a better position to [be the corporate preservation vehicle]", that those other companies were not in fact in a better position than [ABD], the appellant taxpayer, to be the corporate preservation vehicle. It was not held that [ABD] was not in fact used as part of the corporate preservation strategy of the [C] Group.

(6) Earlier tax treatment

54 The Appellant argued that the Respondent had previously sold some of the Core Shares in YA 1973, 1976, 1980–1981, 1984–1986, 1988 and 1995, and had reported the gains from those sales

as taxable income. However, the fact that the Respondent had voluntarily paid income tax on previous occasions is in no way conclusive and determinative of the issue of whether the Core Shares were capital or revenue assets. The judgment of the Privy Council in *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue* [1986] 2 MLJ 161 is particularly apposite here. The Privy Council held that an inquiry into the past dealings of the taxpayer could not, by itself, be determinative of the issue of the nature of the transaction under consideration. In this regard, Lord Oliver of Aylmerton said at 166:

> A company may hold both trading stock and capital investments and the *mere statement of historical fact* that, in the past certain surplus property has been disposed of at a profit or that some other property has been acquired and disposed of by way of trade *cannot legitimately be treated as determinative for all time of the company's intention in acquiring, holding and developing other property.* [emphasis added]

55 Similarly, in *State Insurance Office*, the fact that the taxpayer had paid tax on earlier gains did not prevent the New Zealand High Court from deciding that the gains in issue were of a capital nature.

(7) The concept of an insurance fund and s 17(4) of the Insurance Act

56 The Appellant further argued that the Core Shares were not capital assets and the gains from their disposal were taxable as the Core Shares were part of the insurance operations of the Respondent since they were located in the Respondent's Insurance Fund. In this regard, s 17(1) of the Insurance Act provides for the establishment by an insurer of separate insurance funds for each class of its insurance business. Section 17(4) of the Insurance Act stipulates what must be paid into an insurance fund and the restrictions on what an insurance fund may be used for:

> There shall be paid into an insurance fund all receipts of the insurer properly attributable to the business to which the fund relates (including the income of the fund), and the assets comprised in the fund shall be applicable only to meet such part of the insurer's liabilities and expenses as is properly so attributable …

57 A plain reading of s 17(4) shows that where the funds in an insurance fund are used to purchase assets, those assets must be parked in the insurance fund and can only be used for the purposes of meeting the insurer's liabilities. Where the insurer's liabilities are sufficiently high, all the investments in the insurance fund would have to be liquidated. The Appellant contended that since the purpose of the assets in an insurance fund was to provide a minimum level of asset protection to the fund's policyholders (see also Guideline No ID 1/09 issued by MAS on 17 March 2009), and since those assets could only be used for the purposes of meeting the insurer's liabilities, the assets in the Respondent's Insurance Fund were part of the Respondent's business operations. Further, the Appellant argued that any corporate preservation strategy, if accepted, amounted to only a secondary purpose for the purchase and holding of the Core Shares. Therefore, the Core Shares were not capital assets.

58 I reject the Appellant's argument. It is accepted that the aim of the legislative provisions on insurance funds is to separate the assets, receipts, liabilities and expenses of each insurance fund in order to benefit the policyholders of the particular insurance fund concerned in the event of insolvency. However, the regulatory requirement for insurance funds does not restrict an insurance company from holding capital assets in its insurance funds. It is not disputed that in the event of liquidation, the assets in an insurance fund will have to be used to meet the liabilities of the insurance company. However, that can also be said of any other non-insurance company which goes into

liquidation, or even in the normal course of that company's business, as the assets of any company could always potentially be applied to meet its liabilities. This does not preclude companies from holding capital assets such as buildings or shares. Therefore, the fact that certain assets of a company may potentially be applied to meet the company's liabilities in the event of liquidation does not in itself determine if those assets are capital or revenue in nature.

(8) Solvency margin

59 The Appellant submitted that the Core Shares were taken into consideration when calculating the solvency margin of the Respondent's Insurance Fund required under s 18(1)(*a*) of the Insurance Act, and meeting the prescribed solvency margin was a critical part of the Respondent's operations. If that margin was not met, the Respondent faced action from MAS. Since the Core Shares in the Respondent's Insurance Fund helped the Respondent to meet the prescribed solvency margin, the Core Shares were part of the Respondent's operations, and any gains therefrom should be taxed as income.

60 In this regard, the Appellant relied on the Australian case of *Employers' Mutual Indemnity Association Limited v Federal Commission of Taxes* (1991) 91 ATC 4850 ("*Employers' Mutual Indemnity*") for the proposition that where the investments of an insurer were used to calculate its solvency margin, those investments would be part of the insurer's business and gains from them would be taxable as income. In *Employers' Mutual Indemnity*, the taxpayer was an insurance company formed to enable employers to conduct mutual insurance. The Articles of Association of the taxpayer provided that any deficiency in meeting claims would be made good out of the assets in the general fund. In one year, recourse had to be made to the assets in the general fund as a result of the taxpayer suffering a loss. The issue was whether the gains made from the sale of shares bought with the general fund were taxable under s 25(1) of the Income Tax Assessment Act 1936 (Cth) as "gross income derived directly or indirectly from all sources whether in or out of Australia". The Full Federal Court of Sydney dismissed the taxpayer's appeal against the Commissioner's assessment of those profits for income tax. The fact that the funds in the general fund were used to calculate the taxpayer's solvency margin was considered by Gummow J (at 4864):

> Profits derived from the sale of investments ordinarily are brought to account in the assessment of the income of an insurance company: *F. C. of T v. Cooling* 90 ATC 4472 at 4480; *R.A.C. Insurance Pty Ltd v. F.C. of T.* 90 ATC 4737 at 4741. The maintenance of the solvency margin was essential if the taxpayer was to observe the conditions laid down by the Parliament for its authorisation to conduct an insurance business …

61 However, I note that this was merely a factor considered by Gummow J. Earlier in his judgment (at 4862), he downplayed the significance attributed to this factor by the primary judge:

> The requirement of para. 29(1)(b) for the solvency margin is quite distinct from that in sub-s 31(2) as to the making in the accounts of provision in respect of liabilities.
>
> On the other hand, whilst *I do not accept the significance given it by the primary Judge*, the need to observe the requirements of the Insurance Act and the part played by the General Fund in enabling the taxpayer to do so, are still of importance in appreciating the nature of the taxpayer's business.
>
> [emphasis added]

62 Moreover, it appears that Gummow J was led to conclude that a sufficient nexus existed

between the realisation by the taxpayer of the assets in question and the taxpayer's insurance business due to the precise mechanism provided for in the taxpayer's Articles of Association, which explicitly recognised that the general fund was to be used to make good a deficiency in the reserve account. Further, the taxpayer in *Employers' Mutual Indemnity* had actually resorted to the assets in the general fund as a result of suffering a loss from its insurance business. In view of these factors, the significance of the fact that the assets in question were included in the taxpayer's solvency margin is much reduced.

63 Therefore, the fact that the Core Shares were taken into consideration when calculating the solvency margin of the Respondent's Insurance Fund required under s 18(1)(*a*) of the Insurance Act is not determinative in resolving the issue of whether the Core Shares were revenue assets for income tax purposes. Ultimately, the inquiry into whether the Core Shares were revenue assets or capital assets is based on an assessment of the totality of the evidence.

Issue 2

64 The Appellant argued that it should be implied from ss 26(3) and 26(4) of the Act that gains or profits from the sale of investments by insurance companies, other than life insurance companies, should be subject to tax. It was submitted that although s 10 of the Act was the general charging provision for imposing tax on income, s 26 provided guidance by identifying the types of income earned by an insurer that should be subject to tax. In other words, s 26 widened the scope of what was considered taxable income for insurance companies.

65 I do not accept the Appellant's submission. Sections 26(3) and 26(4) of the Act are only concerned with the apportionment of revenue gains which insurance companies derive in Singapore and overseas from their businesses and, in particular, the computation of the amount of income on which Singapore income tax is payable. The provisions do not tax capital gains arising from the sale of investments by insurance companies. I will elaborate below.

66 For easy reference, s 26(3) of the Act is reproduced again below (see also [6] above):

> ***Insurers other than life insurers***
>
> (3) In the case of an insurer whether mutual or proprietary (other than a life insurer) where the gains or profits *accrue in part outside Singapore*, the gains or profits on which tax is payable shall *be ascertained by —*
>
> (*a*) taking the gross premiums and interest and other *income* received or receivable in Singapore (less any premiums returned to the insured and premiums paid on reinsurances);
>
> (*b*) deducting from the balance so arrived at a reserve for unexpired risks at the percentage adopted by the insurer in relation to its operations as a whole for such risks at the end of the period for which the gains or profits are being ascertained;
>
> (*c*) adding thereto a reserve similarly calculated for unexpired risks outstanding at the commencement of that period; and
>
> (*d*) from the net amount so arrived at, deducting the actual losses (less the amount recovered in respect thereof under reinsurance), the distribution expenses and management expenses incurred in the production of the income referred to in paragraph (*a*) and, in respect of a branch in Singapore, a fair proportion of the expenses of its head office.

[emphasis added]

67 It is clear from the words "accrue in part outside Singapore" that s 26(3) contemplates a situation where an insurance company may have derived income from both Singapore and overseas. Since the Act is based on a territorial concept, *ie*, overseas income will not be subject to Singapore income tax unless such overseas income is received in Singapore, s 26(3) therefore provides the mechanism for "ascertaining" that portion of the total income which falls within the ambit of the Act and which should be subject to income tax in Singapore. Support for this can be found in sub-ss (*a*) and (*d*) of s 26(3). Section 26(3)(*a*) provides that only "income received or receivable in Singapore" is to be taken into account. Consistent with that, s 26(3)(*d*) provides that certain losses and expenses "in Singapore" can be deducted against the income computed under sub-s (*a*). Therefore, s 26(3) is only concerned with the ascertainment of what portion of an insurance company's total income falls within the ambit of the Act, and not with capital gains.

68 It is also clear from the words "other income" in s 26(3)(*a*) that s 26(3) is only concerned with income and not capital gains. Therefore, the issue of whether the gains or profits in question are income or capital in nature have to be first determined. It is only where the gains or profits are determined to be income in nature that s 26(3)(*a*) will be applied in computing the amount of income taxable.

69 Section 26(4) of the Act deals with the computation of the income of insurance companies (other than life insurance companies) carrying on (*inter alia*) the specific business of insuring and reinsuring offshore risks. These companies enjoy a concessionary tax rate under s 43C of the Act. For easy reference, s 26(4), which was set out earlier at [6] above, is also reproduced again below:

> (4) For the purposes of subsection (3), in *ascertaining* the gains or profits derived by an insurer from carrying on the business (other than the business of life assurance) of *insuring and reinsuring offshore risks* or any other risks for the purposes of *any concessionary rate of tax* or exemption from tax prescribed by regulations made under section 43C —
>
> (*a*) no *income* other than *income* from premiums or from such dividends, interest and *gains or profits realised from the sale of investments* as may be *specified in those regulations* shall be included;
>
> (*b*) *income* in respect of dividends, interest and *gains or profits realised from the sale of investments* shall be *apportioned* in such manner *as may be prescribed by those regulations*; and
>
> (*c*) any item of *expenditure not directly attributable to that business* shall be *apportioned* in such manner as may be prescribed by those regulations.

[emphasis added]

70 It is clear from the words "ascertaining the gains or profits" in s 26(4) that s 26(4), like s 26(3), is only concerned with ascertaining what portion of an insurance company's total income is subject to income tax in Singapore. While s 26(3) is a general provision, s 26(4) is a specific provision dealing with insurance companies which carry on (*inter alia*) the business of "insuring and reinsuring offshore risks". It should be noted that sub-ss (*a*) and (*b*) of s 26(4) start off with "income" before listing out specific types of income such as "premiums", "dividends", "interest" and "gains or profits realised from the sale of investments". It follows that "gains or profits realised from the sale of investments" must be income in nature before such gains or profits may fall within the scope of s 26(4). In other words,

gains or profits which are capital in nature do not fall within the scope of s 26(4).

71 The Appellant cited the decision of an earlier Board in the unreported case of *The New Zealand Insurance Company Limited v The Comptroller of Income Tax* (ITBR Appeal No 2/82) ("*ITBR Appeal No 2/82*"), where the Board held that gains made by insurance companies from the sale of investments fell within the ambit of "other income" in the then equivalent of s 26(3) of the Act. The Board held at 10:

> We do not accept the contention that the words "other income" in that sub-section [*viz*, the then equivalent of s 26(3) of the Act] should be read ejusdem generis to "gross premiums and interest". For that rule of construction to apply, the words "premiums" and "interest" must constitute part of the same genus, which they do not. *We are thus of the opinion that "other income" refers to receipts of an "income" nature, which surpluses received from investments by general insurance companies are.* [emphasis added]

72 However, it appears that the Board in *ITBR Appeal No 2/82* was not given the opportunity to consider the exceptions to the line of cases which held that gains realised from the sale of investments by insurance companies were revenue in nature. It is clear from the decision of the Board in *ITBR Appeal No 2/82* that counsel for the taxpayer had accepted that the cases clearly held that gains realised from the sale of investments by insurance companies were revenue in nature, and hence did not mount any argument to rebut the decided cases. The Board then accepted and applied those cases. As explained above at [24]–[31], there are persuasive authorities for the proposition that insurance companies can hold shares as capital assets in some circumstances.

73 The Appellant contended that Parliament intended the gains or profits made by insurance companies (other than life insurance companies) from the sale of investments to be taxable. In support of this proposition, the Appellant referred to the Explanatory Statement to the Income Tax (Amendment) Bill 1993 (Bill 23 of 1993), which inserted the words "gains or profits realised from the sale of investments" into the proviso in s 26(2) of the Income Tax Act (Cap 134, 1992 Rev Ed) (that proviso has now become ss 26(4)(*a*) and 26(4)(*b*) of the Act). According to the Explanatory Statement:

> Clause 19 amends section 26(2) … to extend the concessionary rate of tax of 10% on the income of a general insurance company derived from its offshore business to specified gains or profits realised by it from the sale of investments ...

74 The Appellant pointed out that such an extension of the concessionary rate of tax to gains or profits realised by an insurance company (other than a life insurance company) from the sale of investments in the course of its offshore business would only be necessary if gains or profits realised by an insurance company from the sale of investments were taxable in the first place.

75 I reject the Appellant's argument because the extension of the concessionary rate of tax is directed at specified income derived by insurance companies (other than life insurance companies) carrying on the type of business mentioned in s 26(4) of the Act, which income would have remained subject to tax at the prevailing corporate tax rate if not for the concessionary rate of tax. Therefore, it must first be determined if the gains or profits from the sale of investments constitute income, as opposed to capital gains. The concessionary rate of tax does not extend to capital gains arising from the sale of investments by insurance companies (other than life insurance companies) carrying on the type of business specified in s 26(4) as those capital gains would fall outside of the Act entirely.

Conclusion

76 For all the reasons set out earlier, I dismiss the appeal with costs to the Respondent to be taxed on a standard basis unless otherwise agreed.