Comptroller of Income Tax *v* BBO
[2014] SGCA 10

Case Number : Civil Appeal No 58 of 2013

Decision Date : 04 February 2014

Tribunal/Court : Court of Appeal

Coram : Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Andrew Ang J

Counsel Name(s) : Foo Hui Min, David Lim and Vikna Rajah (Inland Revenue Authority of Singapore) for the appellant; Tan Kay Kheng, Tan Shao Tong, Novella Chan and Jeremiah Soh (Wong Partnership LLP) for the respondent.

Parties : Comptroller of Income Tax — BBO

Revenue Law – Income Taxation

4 February 2014 Judgment reserved.

Andrew Ang J (delivering the judgment of the court):

1 This is an appeal under s 81(5) of the Income Tax Act (Cap 134, 2008 Rev Ed) ("the ITA") against the decision of the High Court judge ("the Judge") dismissing the appeal of the appellant Comptroller ("the Appellant") against the decision of the Income Tax Board of Review ("the Board") in Income Tax Appeal Nos 3 and 4 of 2010. The Board had allowed the appeal of the respondent insurance company ("the Respondent") against revised assessments raised on it by the Appellant seeking to tax the gains made by the Respondent on the disposal of certain shares ("the Shares") that had been held by the Respondent in its related companies [C], [D] and [E].

2 The significance of this case lies to some degree in the fact that it is the first local case dealing with the income tax treatment of investment gains accruing to insurance companies. At its core it revolves around the single issue of whether the gains arising from the Respondent's disposal of the Shares were revenue or capital in nature (and hence whether they were liable to be taxed as income). The Appellant submits that the Shares were held as assets of the Respondent's insurance business in its insurance funds at the time of disposal and that the gains therefrom were therefore in the nature of income. The Appellant's arguments (at least on appeal) are based, in large part, on the fact that the Shares were held by the Respondent in statutorily mandated insurance funds and were used to meet the Respondent's solvency margins as prescribed by legislation. In rebuttal, the Respondent argues that insurance companies, like all other companies, are not precluded from holding shares as capital assets, the disposal of which would give rise to *capital* gains. In particular, the Respondent submits that the Shares were held by it as part of a corporate preservation strategy rather than for the purposes of trade.

3 This appeal raises, *inter alia*, interesting questions as to the singular nature of insurance companies as enterprises to which investment activities are central (if not crucial), the impact of this on their consequent tax treatment and the relevance of the overarching regulatory regime to the entire enquiry.

Facts

4 The Respondent is a company registered in Singapore and is part of the [C] Group of

companies. 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 the provisions of the Insurance Act, an insurer is required to establish separate insurance funds for each class of insurance business and to ensure that all assets, receipts, liabilities and expenses are properly attributed to the relevant fund. Pursuant to s 17(1) of the Insurance Act, the Respondent therefore established the Singapore Insurance Fund ("SIF") and the Offshore Insurance Fund ("OIF") in respect of its Singapore and overseas policies respectively. The Respondent used the SIF to invest in [C] shares, and used the OIF to invest in [C], [D] and [E] shares. In the years of assessment ("YA") 1973, 1976, 1980–1981, 1984–1986, 1988 and 1995, the Respondent sold some of the Shares and reported the gains as taxable income.

5 On 29 June 2001, a hitherto unrelated company, [F], made a general offer for the shares of [C] at a consideration of $4.02 in cash and 0.52 [F] share for each [C] share held ("the Takeover Offer"), which offer received the requisite acceptances of [C's] shareholders to become unconditional. In response to the Takeover Offer, 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 $16,669,280 in cash. The Respondent thereby made 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. All in all, the Shares amounted to some 36% of the total value of the SIF and the OIF.

6 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, in response to the Respondent's request for amendment, the Appellant issued to the Respondent a Notice of Refusal to Amend the Assessments for YA 2002 and YA 2003.

7 On 19 April 2010, the Respondent filed Notices of Appeal against the Appellant's revised assessments for both YA 2002 and YA 2003. By way of a decision dated 20 June 2012 ("the Board Decision"), the Board allowed the appeals. The Appellant then appealed against the Board Decision to the High Court under s 81(2) of the ITA by way of Originating Summons No 681 of 2012 ("OS 681/2012"), which appeal was dismissed by the Judge in a decision dated 8 April 2013 ("the Judgment"). On 7 May 2013, the Appellant filed a Notice of Appeal against the decision of the Judge.

Summary of Pleadings

8 In OS 681/2012, the Appellant appealed on the grounds that:

(a) The Board erred in law when it did not take into account the extensive case law indicating that the gains or profits of an insurance company from the sale of its investments are revenue in nature and hence taxable;

(b) The Board erred in law in that it did not treat the gains or profits from the sale of share investments by the Respondent as being taxable under s 26 of the ITA;

(c) The Board erred in fact and law in that it did not recognise that the Shares were the trading stock (rather than the capital) of the Respondent, taking into account:

(i) The manner in which the Shares were previously held for the purposes of the insurance business of the Respondent; and

(ii) The fact that the Respondent had previously, of its own accord, brought to tax the gains from the sale of the same counters of share investments.

(d) The Board erred in fact and law when it held that the gains or profits derived by the Respondent from the sale of the Shares were capital in nature and not taxable.

Decision below

9 Before the Board and the Judge, the Appellant advanced two separate arguments:

(a) That the profits made were profits falling with s 10(1)(*a*) of the ITA as "income … in respect of gains or profits from any trade [or] business"; and

(b) That the profits were, in any event or inferentially, to be brought to assessment by the terms of ss 26(3) and 26(4) of the ITA.

10 The separate argument referred to above at [9(b)] is no longer being pursued. The sole issue on appeal is therefore whether the gains derived from the disposal of the Shares were "income … in respect of gains or profits from any trade [or] business".

11 The Board held, *inter alia*, 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 (4) of the ITA;

(b) The real question was whether the Respondent's gains from the sale of the 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 and hence not exigible to tax;

(c) The Respondent had not engaged in any trade or business in the transaction of the Shares and the profits from the sale of the Shares ought to be treated as capital gains. Specifically:

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

(ii) The Shares were held for a long time and this supported the argument that the Shares were acquired for a long-term strategic purpose;

(iii) The Shares were not previously sold by the Respondent to meet its offshore claim liabilities;

(iv) Those of the 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 Board came to its conclusion after examining the facts and evidence available, including the oral testimonies of the Respondent's two witnesses.

12 The Judge affirmed the Board's findings of fact. In particular, the Judge examined the present

facts with reference to the so-called "badges of trade" in order to determine if the gains from the sale of the Shares were income in respect of gains or profits from the Respondent's trade or business:

(a) In relation to the *motive of the taxpayer*, the Judge found that the Respondent's intention in holding the Shares was to promote the long-term strategic interests of itself and the [C] Group. This was manifested in various ways:

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

(ii) The corporate preservation strategy of the [C] Group also involved the holding of shares of companies in the group by [QR], a company controlled by the founder of [C] and his family;

(iii) The regular reports and updates on the status of cross-holdings of various companies in the [C] Group and [QR] were generated to enable the Senior Management of [C] 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 a hostile takeover;

(iv) Any decision to sell any shares or rights in the companies within the [C] Group was closely scrutinised and reviewed. Specifically, the Respondent was not allowed to sell any of its shares or rights in the companies within the [C] Group without the requisite approval from [C];

(v) The Shares were passively held by the Respondent and were not managed by the Respondent's fund manager; and

(vi) The Shares of [E], a non-listed company, were not readily realisable. Therefore, the Board was correct in finding that there was a strong case for the view that the gains arising from the disposal of at least the [E] shares were of a capital nature.

(b) In relation to the *duration of ownership*, the Judge found that, consistent with the [C] Group's corporate preservation strategy, the Respondent acquired the Shares and held onto them for a long period of up to thirty years. The intention to hold the Shares for a long period of time was an indication that the investment was of a capital nature;

(c) In relation to the *frequency or number of similar transactions*, the Judge found that, consistent with the corporate preservation strategy of the [C] Group, there were few disposals of the Shares by the Respondent throughout the long period of holding. (No [D] and [E] shares were disposed of during the entire period before 2002, and there were only nine disposals of the [C] shares over a span of 30 years); and

(d) In relation to the *circumstances surrounding the realisation*, the Judge found that there was no necessity for the Respondent to liquidate the Shares to meet claims and liabilities of its insurance business as it had sufficient cash reserves.

For the above reasons, the Judge found that the Shares were capital assets and not revenue assets, and that the gains from their sale were therefore not taxable as income. The Judge rejected the Appellant's arguments in relation to the fact that the Shares were held in statutorily mandated insurance funds and the fact that they were taken into consideration when calculating the solvency margin of the said insurance funds. The Judge also rejected the Appellant's arguments in relation to ss 26(3) and 26(4) of the ITA, which the Appellant has since abandoned on appeal to this court.

Appellant's Case/Respondent's Case

13 The Appellant's core argument in the present appeal relates largely to s 17 of the Insurance Act which requires an insurance company to maintain an insurance fund or funds relevant to its particular liabilities. It runs as follows:

(a) The requirement in s 17 of the Insurance Act is a recognition of the nature of the insurance business, *viz*, that of obtaining present receipts in the form of premiums by underwriting future risks and using the premiums so obtained to defray the cost of those future liabilities.

(b) Section 17 contains a requirement that the moneys obtained by means of premiums must be retained in a fund to meet liabilities underwritten by the contracts obtaining those premiums so that the assets of the particular business and its parts are identified. Those assets could only arguably cease to be part of the insurance business if they were determined to be surplus to such requirements with the consequence that, upon satisfying the regulatory requirements, such surplus might be transferred out of the insurance fund into the shareholders' fund. Absent any such transfer, any realisation of assets which had been purchased with the premiums obtained would give rise to a profit or loss over cost which is part of the taxable insurance business. Since the Shares were never taken out of the insurance funds, they remained a part (and a substantial part) of the assets of the insurance business.

(c) Many of the cases relied on by the Judge and the Board in their respective decisions were decided at a time prior to the application of the more detailed regulations or in circumstances where the relevant law did not require the assets of the insurance fund to be identified and separately held.

For the above reasons, the Appellant submits that the gains arising from the realisation of the Shares are profits of the Respondent's business and therefore liable to be taxed.

14 The Respondent argues that the Appellant's contention is unsustainable, for the following reasons:

(a) The Insurance Act is irrelevant to the present appeal because:

(i) Assets which are acquired with the receipts of income would not necessarily be of a revenue nature;

(ii) The purpose of the Insurance Act is not to govern the taxation of insurance companies but to regulate the insurance business;

(iii) The insurance fund is merely part of the regulatory framework for insurance companies and cannot determine the income tax treatment of insurance companies. The purpose of the regulatory framework is to protect policyholders and to this end, the regulatory framework requires assets to be held in the name of the respective insurance funds. The classification of assets, receipts, liabilities and expenses is common to all companies, not just insurance companies. The regulatory framework does not prevent an insurance company from holding capital assets in the same way as any other company. In addition, the capital assets of a company do not become revenue assets just because they could potentially be applied to meet the company's liabilities, in a situation of liquidation or otherwise;

(iv) The Appellant has failed to provide any legal basis to substantiate the supposed relationship between the Insurance Act and the ITA;

(v) The irrelevance of the insurance fund is particularly evident when considering the fact that the ITA actually pre-dated the Insurance Act;

(vi) The Appellant's allusion to a distinction between the insurance fund and shareholders' fund is misleading when there may be no material difference in tax treatment by the Appellant since gains arising from the shareholders' fund could be taxed as well. The insurance fund can and should only be taxed according to the ordinary concepts of income and capital; and

(vii) The Appellant's reliance on the solvency requirements prescribed by the Insurance Act is misplaced. The solvency requirement is merely another regulatory measure to ensure that the interests of policyholders are adequately protected. The taxability of companies cannot be determined by regulatory measures which are prescribed for the protection of their customers.

(b) It is well established in common law that insurance companies, like any other companies, can hold shares as capital assets.

(c) The totality of the evidence indicates that the Shares were capital assets. The "badges of trade" approach adopted by the Judge provided a useful and structured framework for reviewing all the facts and evidence in totality and in coming to this conclusion.

15 We shall address each of these arguments in turn, following a close examination of the applicable law. In our view, whilst the approaches taken in other jurisdictions are of considerable assistance, the question must ultimately be resolved on the basis of first principles and the established rules of revenue law as applied to the specific facts of the instant appeal.

The applicable law

16 The ITA is intended "to impose a tax upon incomes and to regulate the collection thereof". [note: 1] The charging provision is s 10(1) of the ITA which provides:

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;

(*b*) gains or profits from any employment;

…

(*g*) any gains or profits of an income nature not falling within any of the preceding paragraphs.

…

[emphasis added in bold italics]

17 Whilst the concept of "income" is not defined anywhere in the ITA, it is clear that "gains or profits" in ss 10(1)(*a*) and 10(1)(*b*) refer only to gains or profits of an income nature. This is also reflected in the wording of s 10(1)(*g*), which taxes "gains or profits of an income nature" not included in the preceding paragraphs of s 10(1). There is no capital gains tax in Singapore; capital gains are not taxable *even if* the capital gains arise from the carrying on of a trade, business, profession or vocation (*The Law and Practice of Singapore Income Tax*, vol I (Pok Soy Yoong, Ng Keat Seng & Steven Timms eds) (LexisNexis, 2nd Ed, 2013) ("*The Law and Practice of Singapore Income Tax*") at para 6.15). By way of an example, capital gains from the sale of machinery or equipment used in a trade or business are not taxable although a balancing charge is applied to recoup depreciation allowances previously given.

18 In determining the scope of income tax, it is therefore necessary to draw a distinction between taxable income and non-taxable capital gains. However, this distinction is often ambiguous in marginal cases such as those where investment activities are central to the enterprise concerned. The appropriate approach in such situations was considered by the Lord Justice Clerk in the seminal case of *Californian Copper Syndicate (Limited and Reduced) v Harris (Surveyor of Taxes)* (1904) 5 TC 159 ("*Californian Copper Syndicate*") at 165 to 166:

> It is quite a well settled principle in dealing with questions of assessment of Income Tax, that where the owner of an ordinary investment chooses to realise it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit … assessable to Income Tax. But it is equally well established that enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business. The simplest case is that of a person or association of persons buying and selling lands or securities speculatively, in order to make gain, dealing in such investments as a business, and thereby seeking to make profits. There are many companies which in their very inception are formed for such a purpose, and in these cases it is not doubtful that, where they make a gain by a realisation, the gain they make is liable to be assessed for Income Tax.

19 The Lord Justice Clerk then went on to articulate the time-honoured test to be applied in such cases (at 166):

> What is the line which separates the two classes of cases may be difficult to define, and each case must be considered according to its facts; the question to be determined being—*Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain* ***made in an operation of business in carrying out a scheme for profit-making*** *?* [emphasis added in italics and bold italics]

The Appellant submits, and we agree, that the relevant question to be asked in such cases is simple, *viz*, whether the gain in question is a mere enhancement of value by realising a security or whether it was made in an operation of business in carrying out a scheme for profit-making. On our reading of the case, it is not enough that the gain arose in the operation of business; it must also have arisen pursuant to the carrying out of a scheme for *profit-making*. Put another way, the distinction is between the profit that arises when property has been committed to a business as part of its stock in trade and is then realised in the course of trading operations and the gain that arises from a realisation of property not so committed. The former is taxable income, the latter not.

20 In the context of the insurance industry, it is trite that an integral part of the insurance business is to channel its premium receipts and capital into productive activities such as investments in equities, securities and properties which would generate investment income to meet its liabilities arising from claims by policy holders. As the investment of an insurer's funds is generally part of the business of the insurer, any investment *income* (*eg*, in the form of interest or dividends) derived from within or without Singapore constitutes its taxable business income. Likewise, the gains or profits derived from the *disposal of investments* by the insurer in the course of its business activities are generally subject to income tax. This general (and, indeed, pragmatic) proposition has been recognised by courts in various jurisdictions.

21 One of the earliest authorities for this general proposition is a Scottish case, *Northern Assurance Co v Russell* (1889) 2 TC 551, where the surpluses derived by an insurance company from realising investments in the course of its business were held to be part of its profits. There, it was stated in broad terms (at 578) that "[w]here 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". Unfortunately, in our view, this sweeping and unqualified statement is of somewhat limited assistance due to the brevity of the aforementioned judgment and its lack of reasoned analysis.

22 A more detailed examination of the nature of the insurance business and its general consequential treatment for taxation purposes is found in the judgment of Hamilton J in *The Liverpool and London and Globe Insurance Company v Bennett (Surveyor of Taxes)* (1913) 6 TC 327 ("*The Liverpool and London and Globe Insurance*"), where it was stated (at 357) that:

> … The private individual may have property entirely independent of his trade, although part of his assets, no doubt, in case of his insolvency, and it is intelligible to say that his trade does not extend to or touch his private property. I do not think that that is true of the Insurance Companies. The private individual may save to provide for his old age or for his family, he has leisure to enjoy, he has ambitions to gratify, and his existence, in fact, can be separated into his trading and his private life. Nothing of the kind can be done with an Insurance Company. Subject to the scope of the Memorandum and Articles … they are a trading company and a trading company only. …
>
> There is another point with regard to the Insurance Company. It embarks its funds in its business simply by having money ready to pay its debts with. We are not here concerned with manufactories or the maintenance of a stock which is to be sold. *The business of insurance consists in making promises to pay, by way of indemnity*, in futuro *and contingent sums in consideration of present payments of money, and the whole business therefore, apart from the wisdom and prudence with which it is conducted, consists in being ready to meet the liabilities if they accrue, and to the extent to which they accrue, out of one class of funds or another. Consequently the money is embarked in the business as soon as it is money which belongs to and is available to the Insurance Company.* If they have paid it away in the shape of dividends, it is no longer available, but all of their assets substantially are only possessed for the purpose of meeting the contingencies of losses on the policies if they should fall in. I am speaking of fire insurance only as an illustration, but I do not think that either indemnity business or, for this

purpose, life business differs, although of course the calculation of risks and the mode of carrying out the transaction are enormously different.

[emphasis added]

It was decided then that where an English company carrying on insurance business both locally and abroad invested sums of money abroad, and the interest on those sums was not remitted (it being then the law that foreign income was charged only to the extent that the foreign income was remitted back to England), such interest nevertheless formed part of the taxable income of the company assessable under the Income Tax Act 1842, s 100, Schedule D, Case 1.

23 The decision was affirmed on appeal to the English Court of Appeal and the House of Lords. In the words of Lord Mersey (at 379 and 380):

… It is well known that in the course of carrying on an insurance business large sums of money derived from premiums collected and from other sources accumulate in the hands of the insurers, and that one of the most important parts of the profits of the business is derived from the temporary investment of these moneys. These temporary investments are also required for the formation of the reserve fund, a fund created to attract customers and to serve as a standby in the event of sudden claims being made upon the insurers in respect of losses. It is, according to my view, impossible to say that such investments do not form part of this Company's insurance business, or that the returns flowing from them do not form part of its profits. In a commercial sense the directors of the Company owe a duty to their shareholders and to their customers to make such investments, and to receive and distribute in the ordinary course of business, whether in the form of dividends, or in payment of losses, or in the formation of reserves, the moneys collected from them. …

24 Similar sentiments were expressed by the High Court of Australia in *Colonial Mutual Life Assurance Society Limited v Federal Commissioner of Taxation* (1946) 73 CLR 604 ("*Colonial Mutual Life Assurance*") at 619–620:

But an 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 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. (1940), 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 realizes an investment at a larger price than what was paid for it, the difference is to be reckoned among its profits*; conversely, any loss is to be deducted." … [emphasis added]

Likewise, in the Hong Kong case of *Commissioner of Inland Revenue v Sincere Insurance and Investment Co Ltd* [1973] HKCU 47 ("*Sincere Insurance*"), it was observed that "where the person making the gain is an insurance company that fact alone makes it the *more likely* that the gain arises in the carrying on, or carrying out of business" [emphasis added].

25 In our judgment, whilst the above articulations of general principle provide a practical and even compelling approach in relation to the majority of such cases, these statements cannot be read to

stand for any absolute or immutable principle of *law*. On the contrary, the question whether certain investment gains are properly attributable to the revenue or capital account is ultimately a question of *fact*. Courts have frequently cautioned that the word "income" in the context of the income-capital dichotomy is not a term of art and that, in the absence of statutory provision to the contrary, whether a receipt is "income" must be determined in accordance with the ordinary concepts and usages of mankind: *Scott v Commissioner of Taxation (New South Wales)* (1935) 35 SR (NSW) 215 at 219. In a similar vein, the court in *Colonial Mutual Life Assurance* observed that (at 615):

> The crucial question is whether the net profit … *is a profit arising from the carrying on or carrying out of a profit-making scheme*, and if it is not whether this net profit is income *according to ordinary usages and concepts*. As Lord Parker said in *Liverpool and London and Globe Insurance Co v Bennett*, (1913) AC 610 at p 622, "This question ought, in my opinion, to be determined on ordinary business principles, *having regard to the circumstances under which, and the purposes for which, the investments were made and are held by the appellant company."* [emphasis added]

26 Indeed, the language of most of the decisions indicate that the aforementioned proposition (*viz*, that gains or profits derived from the disposal of investments by insurers are generally taxable as revenue) is more in the way of a *general rule* or *presumption of fact* drawn from circumstantial evidence. In *GRE Insurance Ltd v FC of T* 92 ATC 4089 ("*GRE Insurance*"), for example, the Full Federal Court of Australia made it clear (at 4093) that "profits from the realisation of investments of an insurance company … are *not invariably* taken into account" [emphasis added]. In *Colonial Mutual Life Assurance* (at 618), the court was of the view that "profits and losses on the realization of investments of the funds of an insurance company should *usually* be taken into account in the determination of the profits and gains of the business" [emphasis added]. The relevant tribunal is therefore not discharged from its role as fact-finder solely by virtue of the fact that the taxpayer is engaged in the business of insurance or something similar. However, the particular features of the insurance business would generally give rise to the *factual* inference that the gains concerned arose in an "operation of business in carrying out a scheme for profit-making" (see [19] above) unless there is cogent evidence to the contrary.

27 In particular, we would emphasise that the statements expressed in the above cases should not be read in isolation and must be examined in the context of their specific facts. In *Californian Copper Syndicate* (at 166 and 167), *Employers' Mutual Indemnity Association Ltd v Federal Commissioner of Taxation* 91 ATC 4850 (at 4854, 4856 and 4857) and *GRE Insurance* (at 4094 and 4095), the courts consistently stated that the facts of each case must be closely examined and, indeed, reached their decisions based on their findings of fact. It is also apposite to note that none of the above cases bears any factual similarity to the appeal at hand, where it was accepted (by both the Board and the Judge below) that the Shares were acquired, held and disposed of for long-term strategic reasons. In the circumstances, caution must be exercised not to extend any broad and generalised statements in the above cases beyond the actual *ratio decidendi* of those cases.

28 For instance, the facts of *Liverpool and London and Globe Insurance* (cited above at [22]) did *not* in fact involve the taxation of gains from the sale of investments, but instead concerned interest and dividend receipts from investments abroad (*ie*, investment *income*). There was no question but that the interest and dividend receipts were income. What was in issue was whether they were exigible to tax notwithstanding that they had not been remitted back to England. In the result, they were held to form part of taxable income of the company in the carrying on of its insurance business.

29 In *Colonial Mutual Life Assurance* (conveniently summarised by the court in *Sincere Insurance*), the appellant, a mutual life assurance company, was guided in its investments by actuarial

estimations which indicated that, to meet its liabilities under insurance policies, it had to obtain a certain effective yield on its investments. The interest yield was the governing factor influencing the company's policy and it held its securities as investments rather than for the purpose of constantly seeking profits from realising them. In the relevant tax year the amount realised by it in the sale of securities exceeded the cost to it of those securities and the amount of the excess was regarded as assessable income. It was in this context that the court stated that (at 619–620):

> But an 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 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.* … The acquisition of an investment with a view to producing the most effective interest yield is an acquisition with a view to producing a yield of a composite character, the effective yield comprising the actual interest less any diminution or plus any increase in the capital value of the securities. Such an acquisition and subsequent realization is a normal step in carrying on the insurance business, or in other words *an act done in what is truly the carrying on of the business of the [company]*. [emphasis added]

It is clear that the decision in *Colonial Mutual Life Assurance* took place squarely within the framework of a *profit-making* scheme (whether through the optimisation of interest yields or the fortuitous "switching" of securities).

30 Similarly, in *London Australia Investment Co Ltd v The Commissioner of Taxation of the Commonwealth of Australia* (1977) 138 CLR 106, the High Court of Australia found that an *investment* company that had systematically sold shares at a profit in order to increase its dividend yield was earning taxable income from the sale of shares. The court stated (at 116–117) that:

> In the present case the taxpayer naturally placed considerable reliance on the finding that the shares were not bought for the purpose of selling them at a profit. That is indeed an important circumstance. It was then submitted that the shares were acquired on the capital account of the company, for the purpose of adding to its profit-making structure, as the means of producing dividend income, rather than as part of the profit-earning activities within that structure … If that submission were correct, the fact that the shares were realized in a methodical and enterprising way, so as to secure the best results for the taxpayer, would not convert the proceeds of realization into income. But the question whether the shares were acquired on the capital account of the taxpayer can only be answered by applying the tests indicated by [*Californian Copper Syndicate*]. Helsham J. found that during the three years in question it was an integral part of the taxpayer's business to deal in shares, in the sense that switching of investments was desirable to produce the best dividend returns and was indeed necessary if the taxpayer's policy of investing in shares with growth potential was to be adhered to. In my opinion it is impossible to controvert that finding; it was clearly right. *Although the company's business was to invest in shares with the primary purpose of obtaining income by way of dividends, the conduct of the investment business required that the share portfolio should be given regular consideration, and that shares should frequently be sold when the dividend yield dropped, which for practical purposes usually meant when the shares went up in value. The taxpayer systematically sold its shares at a profit for the purpose of increasing the dividend yield of its investments. The sale of the shares was a normal operation in the course of carrying on the business of investing for profit.* It was not a mere realization or change of investment. [emphasis

added]

31 This is largely consonant with the general approach taken in respect of banks and similar financial institutions. In *Punjab Co-operative Bank Limited, Amritsar v Commissioner of Income-Tax, Lahore* [1940] AC 1055, the Privy Council observed as follows (at 1072–1073):

> In the ordinary case of a bank, the business consists in its essence of dealing with money and credit. Numerous depositors place their money with the bank, often receiving a small rate of interest on it. A number of borrowers receive loans of a large part of these deposited funds, at somewhat higher rates of interest. But the banker has always to keep enough cash or easily realizable securities to meet any probable demand by the depositors. No doubt there will generally be loans to persons of undoubted solvency which can quickly be called in, but it may be very undesirable to use this second line of defence. *If, as in the present case, some of the securities are realized in order to meet withdrawals by depositors, it seems to their Lordships to be quite clear that this is a normal step in carrying on the banking business or, in other words, that it is an act done in "what is truly the carrying on" of the banking business.* [emphasis added]

Notwithstanding this, however, the Privy Council in *Waylee Investment Ltd v The Commissioner of Inland Revenue* [1991] 1 HKLR 237 ("*Waylee Investment*") took pains to emphasise that a bank, like any other trader, *could* in certain circumstances hold investments as capital assets. The taxpayer bank subscribed for shares in one of its customers at a time when the customer was facing financial difficulties. The bank subscribed for more than 20% of the issued capital of the customer which was a very large trading concern. Being anxious to ensure that the general public did not misconstrue the investment as indicating that the bank itself intended to enter into the field of general trading, it publicly announced that its acquisition was "a sizable investment of venture capital" and the chairman of the bank affirmed that its intention was to "substantially reduce its shareholding as soon as conditions permit". The shares were realised over a period of some six years. The initial sales were in response to an unsolicited offer. The taxpayer was assessed to tax on the profits from those sales on the basis that it was trading in shares.

32 The Board of Review allowed the bank's appeal against the assessment on the ground that it was not trading. The High Court upheld the Board of Review's decision. On Revenue's appeal however, the Court of Appeal reversed the High Court's decision. It did so in reliance, *inter alia*, on the bank's earlier public statement that it intended to reduce its holding in the customer as soon as conditions permitted. In the opinion of the Court of Appeal, the acquisition of the shares was an adventure in the nature of trade. Allowing the bank's appeal, the Privy Council held (at 242–243):

> … *The stock in trade of a bank is money and securities readily convertible to money.* But it is equally clear that *a bank, like any other trader, may hold investments 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. But the indications to show which category a particular investment belongs may be uncertain, inconclusive or even conflicting. [emphasis added]

It then held that since it was clear that the bank never intended that the relevant shares acquired by the bank should be held as part of the bank's circulating assets, the Court of Appeal was not entitled to reverse the finding by the Board of Review that those shares were acquired as capital assets.

33 Two New Zealand authorities, *Commissioner of Inland Revenue v National Insurance Company*

of New Zealand Ltd (1999) 19 NZTC 15,135 ("National Insurance Company") and *State Insurance Office v Commissioner of Inland Revenue* [1990] 2 NZLR 444 ("*State Insurance Office*"), both relating to insurance companies, were extensively relied on by the Judge below for the proposition that, notwithstanding the general presumption with regards insurance companies, the gains or losses arising from the disposal of investments by an insurer may *in some instances* be capital in nature and therefore not subject to income tax. This was not disputed by the Appellant below, who instead argued that the present case could not be characterised as exceptional in the above sense.

34 Nevertheless, on appeal, the Appellant now contends that the decisions of the New Zealand courts have very little relevance to the present enquiry or should not apply at all. First, the Appellant alleges that due to differences between our legislation and the New Zealand legislation, the New Zealand cases are not necessarily applicable to the interpretation of the words of s 10(1) of the ITA. It is not clear how the differences in the legislation assist the Appellant's case. In our view, the New Zealand legislation, if anything, is broader than our local tax legislation. Section 65(2)(*a*) of the New Zealand Income Tax Act 1976 ("the New Zealand Act") taxed "all profits or gains derived from any business", which is very similar to s 10(1)(*a*) of the ITA which taxes "gains or profits from any trade [or] business". Section 65(2)(*e*) of the New Zealand Act *additionally* taxed:

> *All profits or gains derived from the sale or other disposition of any personal property* or any interest therein … if the business of the taxpayer comprises dealing in such property, or *if the property was acquired for the purpose of selling or otherwise disposing of it*, and all profits or gains derived from the carrying on or carrying out of any undertaking or scheme entered into or devised for the purpose of making a profit: [emphasis added]

In our view, the New Zealand cases, which are based on similar (if not broader) charging provisions, are therefore directly relevant to the present appeal.

35 The Appellant's second contention is that the two New Zealand authorities were determined at a time when New Zealand did not require the maintenance of insurance funds for insurance companies as has been required in Singapore since 1966. The relevance of the insurance fund (or lack thereof) will be discussed later in this judgment (at [41]–[49]). Notwithstanding the legislatively mandated insurance funds, it is clear that the revenue or capital nature of investments gains is an issue to be determined in accordance with ordinary principles on the basis of all the facts and evidence in each case.

36 In *National Insurance Company*, the taxpayer was an insurance company with a 30% shareholding in a private merchant bank. The remaining 70% of shares were held by the National Bank of New Zealand ("the National Bank"). As a significant minority shareholder, the taxpayer had two directors representing it on the board of the merchant bank. The taxpayer sold its shares to the National Bank and realised a profit of $67m on the sale. The Court of Appeal of New Zealand gave judgment for the taxpayer, holding that the shares were capital assets.

37 The court found in that case that there was a weak nexus between the realisation of the shares and the carrying on of the insurance business. In particular, 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. Moreover, the taxpayer did not acquire the shares for the purposes of trading, but with the aim of diversifying its investment. The shares were acquired with an intention to be held long-term, evidenced in part by the fact that the shares were treated differently from the taxpayer's portfolio shares which were traded. Finally, the court also considered the fact that the shares were eventually sold only because of extenuating circumstances.

38 The court concluded that the shares were part of the capital structure of the taxpayer's business and, as such, their disposal gave rise to capital gains (at 15,146):

> … *In the end, this was the making of a value judgment based on the totality of the evidence*. There were features of the … 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]

39 A similar issue arose in *State Insurance Office*, where the issue before the New Zealand High Court was whether gains arising from the sale of shares by the taxpayer (which was a fire and general insurer) pursuant to a takeover or merger were properly characterised as capital gains or revenue. In deciding that the gains were of a capital nature, the court 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 court took into consideration the lack of intention on the shareholders' part to trade in the shares and the fact that the shares were sold pursuant to a compulsory acquisition. Pertinently, the New Zealand High Court held (at 476):

> … Whilst there is a nexus between the income generated by the shares and the operation of the business … *there is no nexus between the realisations which occurred here and the method of operation of the business*. [emphasis added]

The shares therefore were "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".

40 In our view, the relevant enquiry to be undertaken in cases involving the taxation of investment gains by insurance (or similar) companies may be summarised as follows:

> (a) The crucial question is whether the gain in question is a mere enhancement of value by realising a security or whether it was made in an operation of business in carrying out a scheme for profit-making.
>
> (b) This is ultimately a question of *fact* to be determined according to ordinary concepts having regard particularly to the circumstances under which, and the purposes for which, the investments were acquired and held by the taxpayer.
>
> (c) However, as a matter of practicality, the nature of insurance (or similar) businesses would ordinarily give rise to an inference that the gains concerned arose in the course of trade or in the operation of business in carrying out a scheme for profit-making (unless, of course, there is cogent evidence that the investments were acquired and held as capital assets).

It is on this basis that we now go on to examine the Appellant's central argument on appeal *vide* the regulatory regime established by the Insurance Act.

Relevance of the Insurance Act

41 The Appellant's argument on appeal largely relies on s 17 of the Insurance Act. Section 17(1) of the Insurance Act provides for the establishment by an insurer of separate insurance funds for each

class of its insurance business, whilst s 17(4) stipulates what must be paid into an insurance fund and the restrictions on what an insurance fund may be used for:

> **Establishment of insurance funds and allocation of surplus**
>
> **17.**—(1) Every licensed insurer shall establish and maintain a separate insurance fund —
>
> (*a*) for each class of insurance business carried on by the insurer that relates to Singapore policies; and
>
> (*b*) for each class of insurance business carried on by the insurer that relates to offshore policies.
>
> …
>
> (4) 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.

42 The Appellant's primary argument on appeal is that the Shares were attributable to the Respondent's insurance business as the shares were acquired, by applying the proceeds of premiums received, in the course of the insurance business and were at all times in its insurance funds. As such, the Appellant alleges that the gains realised in the disposal of the Shares were taxable as income.

43 At the outset, it is to be noted that the Appellant's position on the appeal, elevating the Insurance Act as the cornerstone of its case, diverges greatly from the case it advanced before the High Court, where the Insurance Act was acknowledged not to be the "main thrust" of the Appellant's arguments. Before the Board and the High Court, the Appellant had accepted that notwithstanding the general presumption with regard to investment gains by insurers, there might be exceptional instances where disposals of investments by insurance companies would give rise to capital gains (although the Appellant submitted that this case was not exceptional on the facts). However, the main contention of the Appellant on appeal now appears to be that gains arising from *all* assets (even fixed assets) held in insurance funds would invariably be assessable income. On such an argument, it would presumably be inappropriate for the relevant tribunal to consider all the other circumstances of the case (such as the circumstances of the acquisition and the realisation of the asset) in coming to its determination.

44 The Appellant's argument is clearly flawed. The regulatory requirement for the establishment and maintenance of insurance funds cannot without more restrict an insurance company from holding capital assets in its insurance funds. Assets which are acquired with the receipts of income would not invariably be of a revenue nature, and the relevant enquiry (set out above at [40]) must be applied at each stage.

45 The Respondent rightly notes that the purpose of the Insurance Act is for the regulation and not the taxation of the insurance industry. The insurance fund is merely part of the regulatory framework for insurance companies and cannot be determinative of their tax treatment. The imposition of tax is solely within the purview of Parliament through the enactment of clear tax legislation which is to be interpreted by the court or relevant tribunal using principles developed incrementally by case law. The fact that certain gains are attributable to investments held in

statutorily mandated insurance funds cannot *automatically* divest the relevant tribunal of its proper role in deciding whether, in all the circumstances of the case, the gains are properly attributable to the revenue or capital account. Otherwise, any regulatory body would theoretically be able to determine the taxation of companies. This runs counter to the fact that regulatory frameworks are often shaped by intricate policy considerations which may have little or nothing to do with tax.

46 Moreover, the distinction between the insurance fund and the shareholders' fund, whilst relevant, cannot be *determinative* of the tax treatment of particular assets or investments. Clearly, gains arising from the shareholders' fund could be taxed as income as well. In our judgment, insurance companies (whether holding assets in the insurance fund or shareholders' fund) should only be taxed according to the ordinary principles of revenue law, albeit the holding of an asset in a particular fund may be a relevant *factor* in ascertaining whether the investment was intended to be held as a capital asset.

47 It is trite that capital assets do not become revenue assets just because they could *potentially* be applied to meet the company's liabilities, in a situation of liquidation or otherwise. In *State Insurance Office* (at 451), the New Zealand High Court held:

> … [The Company] is in the business of insurance, and it is something of a contradiction on the other hand to advocate that it will never have its reserves called upon, and therefore they assume the character of capital detached from the business of insurance, and on the other say that it is necessary for a company to obtain commercial credibility to have such reserves in the event that a calamity does occur. But I think between the two positions the true situation is that normal requirements are met without recourse to investments including shares, and they are truly categorised as fixed capital as opposed to circulating capital. As with all undertakings, fixed capital is not beyond the reach of creditors …

It *cannot* be said that merely because the Shares were held in state-mandated insurance funds and could, in exceptional circumstances, be realised to meet the company's liabilities, the gains attributable to them are invariably revenue as opposed to capital gains.

48 The Appellant has also sought to rely on the solvency requirements prescribed by the Insurance Act to argue that the Shares, which were used to meet the aforesaid solvency requirements, formed part of the Respondent's insurance business. In our view, such arguments are unpersuasive and run the risk of being unduly technical. These solvency requirements are merely regulatory measures introduced to ensure that the interests of policy holders are adequately protected. As mentioned above (at [45]), the taxation of financially regulated companies such as insurance companies, banks and finance companies cannot be determined solely by regulatory measures which are prescribed for a whole gamut of policy reasons which may have little or nothing at all to do with taxation.

49 For the abovementioned reasons, we are of the view that the Insurance Act is *not* determinative of the central issue in the present appeal, *viz*, whether, in light of the totality of the evidence, the gains attributable to the Shares arose in the operation of the Respondent's insurance business in carrying out a scheme for profit-making.

Application of the relevant legal principles to the facts

50 Taking into account the totality of the evidence before the Board and the Judge, which is largely undisputed by the Appellant, we are of the view that the Shares were capital assets and the gains attributable to them were therefore not liable to tax. In coming to the same conclusion, the Judge considered the following factors (which included the "badges of trade") and weighed them in

balance:

(a) Motive of the taxpayer;

(b) Duration of ownership;

(c) Multiplicity of disposal of the Shares;

(d) Finances;

(e) Findings by an earlier Board;

(f) Earlier tax treatment;

(g) Placement of the Shares in insurance funds; and

(h) The consideration of the Shares in calculating the solvency margin of the Respondent's insurance funds.

51 It is pertinent that, on appeal, the Appellant does not contest the *primary findings of fact* reached by the Judge (and indeed, the Board) in relation to the above factors. The Appellant only disputes the *inference of fact* reached by the Judge in concluding that, in light of the above factors, the Shares were capital assets.

Motive of the taxpayer

52 As noted above (at [12(a)]), the Respondent did not acquire the Shares with an intention to trade in them. Instead, the Respondent's intention in holding the Shares was to promote the long-term strategic interests of itself and the [C] Group. This was evidenced by the numerous cross-holdings of shares and cross-directorships between companies within the [C] Group. Regular updates on the status of cross-holdings of companies in the [C] Group and [QR] were generated to the senior management of [C]. Any decision to sell any shares or rights in the companies within the [C] Group was closely scrutinised and reviewed by the Investment Committee of the [C] Group to ensure that the appropriate level of shareholding and effective control was maintained. The Respondent was not allowed to sell any of its shares and rights in relation to companies within the [C] Group without the requisite approval from [C]. The Shares were also treated differently and segregated from shares that were readily traded by the Respondent.

53 The above facts were uncontested by the Appellant who, indeed, appears to concede that the Shares were held as part of a corporate preservation strategy as opposed to for the purposes of trade. For example, at [11] of its Skeletal Arguments, the Appellant states that "it is tempting to be seduced by the fact that the Shares were held for a long period of time … and were held as part of the 'corporate preservation strategy of the [C] Group'". Instead, the Appellant appears to argue that the Shares were part of the Respondent's insurance operations *notwithstanding* the particular motive for the acquisition.

54 We have difficulty accepting this submission. The motive of the Respondent in acquiring and holding the Shares is relevant (indeed, highly relevant) to the enquiry. As observed by Lord Parker in *Liverpool and London and Globe* (at 380), the central question in such cases ought to be determined on ordinary business principles "having regard to the circumstances under which, and the purposes for which, the investments were made and are held by the … company".

55 It is clear to us that the presumption of fact in relation to the taxation of investment gains of insurance companies (*ie*, that they are usually taxable) is predicated on what was viewed to be the intention and purpose behind the acquisition and holding of such investments by most insurance companies, *viz*, for the purposes of trade and profit generation. However, the natural and logical corollary of this is that where there is convincing evidence that the predominant motivation of acquiring the investment is different (*eg*, strategic) this would also be relevant in evaluating whether the gains were in fact capital gains as opposed to income.

56 In these circumstances, the factual finding that the Shares were acquired and held as part of a group corporate preservation strategy (which finding went unchallenged by the Appellant on appeal) gives rise to a very strong inference that they were capital assets.

Duration of ownership

57 As noted above (at [12(b)], the Shares were held for a long period of time. The [C] shares, [D] shares and [E] shares were accumulated over a period of 30 years, 20 years and 27 years respectively. This is in line with the Respondent's stated intention of holding the Shares for an indefinite period pursuant to its corporate preservation strategy and weighs heavily in the balance of the Shares being found to be capital assets of the Respondent. As noted in *Waylee Investment* (cited above at [31]) in the context of banks and financial institutions, "the clearest indication that an investment was acquired as a capital asset would be an indication that the [company] intended to hold the investment as such for an indefinite period."

Multiplicity of similar transactions

58 Consistent with the stated corporate preservation strategy, there were few disposals of the Shares by the Respondent throughout its relatively long period of holding. Evidence was adduced by the Respondent that no [D] shares and [E] shares were disposed before the Takeover by [F] in 2002. There were only nine disposals of [C] shares over a span of 30 years, and these were mostly to other companies within the [C] Group. Moreover, during the period from YA 1983 to YA 1991 (during which there were disposals of [C] shares), the percentage of [C] shares held by the [C] Group remained relatively constant and ranged between 21.28% and 22.78%. Again, the Appellant did not seriously attempt to challenge these primary findings on appeal.

Finances

59 Evidence was adduced by the Respondent to show that the Respondent did not need to and did not in fact liquidate the Shares to meet its liabilities in the insurance business. From YA 1973 to YA 2003, the Respondent's net cash flow was positive from a year-to-year basis. 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 moneys from the accumulated profits of its onshore fund to its shareholders' fund, and then transfer moneys from the shareholders' fund to the offshore fund to pay the offshore claims. As the Judge and the Board noted, there was no necessity for the Respondent to sell the [C] shares to meet its offshore claims and the Respondent did not in fact do so.

60 As such, the Judge rightly found that, similar to the situation in *National Insurance Company* and *State Insurance Office*, there was a weak nexus between the sale of the Shares and the carrying on of the Respondent's insurance business. To borrow the words of Heron J in *State Insurance Office*,

the Judge found 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 Respondent's insurance business. Instead, the Shares were "structural" or capital assets.

Other factors

61 The Judge also considered certain findings made by an earlier Board and the earlier tax treatment of certain shares sold by the Respondent of the same counters. These factors were rightly found to be unpersuasive or at most neutral by the Judge.

The insurance fund

62 For the reasons set out above (at [43]–[49]), the statutorily mandated insurance funds and solvency requirements are not determinative of whether an investment is a capital asset for the purposes of income tax. Insurance companies (whether holding assets in the insurance fund or shareholders' fund) can and should only be taxed according to the ordinary principles of revenue law. Whilst the holding of an asset in a particular fund can be a relevant factor in ascertaining whether the investment is *intended* to be held as a capital asset, the Judge (and the Board) had found (and the Appellant does not dispute) that the Shares were held pursuant to the Respondent's corporate preservation strategy. In these premises, the relevant regulatory framework is insufficient to offset the very strong inference that the Shares were intended to be (and were in fact) held as capital assets.

Conclusion

63 In conclusion, all factors indicated that the Shares were acquired and held to safeguard the long-term strategic interests of the [C] Group and, indeed, the Shares were eventually realised pursuant to the takeover of [C]. At that point, there was no longer any reason for the Respondent to retain the Shares. For the above reasons, we were satisfied on the totality of the evidence that the Board was well entitled to find that the Shares were in fact capital assets, the gains attributable to which were not taxable under the ITA. It follows that the Judge did not err in affirming the determination of the Board. We therefore dismiss the appeal with costs and the usual consequential orders.

[note: 1] Recital to the ITA