Cases for Troubled Times

Andrew Halkyard examines some recent tax cases, offering both good news and bad for Hong Kong businesses

In these unsettled economic times, I hoped that a trawl through recent case law could provide some unexpected relief from the current tax burden. Unfortunately, the reverse is generally true as the following cases illustrate.

Carrying on Business in Hong Kong

It is clear from recent Hong Kong case law that business can be carried on in Hong Kong with a very low level of activity. The Board of Review decision, *D 107/96* 12 IRBRD 83, (1997) HKRC §80-508, applying *CIR v Bartica Investment Ltd* (1996) HKRC §90-080, illustrates this.

In this case a Hong Kong trading company only had one customer, located outside Hong Kong. It had no Hong Kong employees. An individual outside Hong Kong made all its business decisions relating to the purchase and sale of goods. This person then instructed a corporate service provider in Hong Kong to carry out all the administrative work, such as drawing up and issuing purchase orders and pro forma invoices and arranging for the transfer of letters of credit, to implement those decisions. The Board of Review rejected the company's claim that because (1) it was controlled outside Hong Kong, (2) it had no staff in Hong Kong, and (3) the activities of the service provider were merely ancillary administrative actions, then it did not carry on business in Hong Kong.

Instead, the Board held that carrying on business could not just depend on where the controller or central management was located. It concluded that the service provider was the company's agent and that its actions, giving rise to binding legal obligations, were business activities of the company that took place in Hong Kong.

Once this – very low – threshold was satisfied, the Board of Review simply acknowledged that while the company's activities may not have amounted to much, what it did in Hong Kong resulted in profits which were properly subject to tax. This decision will surely put a damper on the claims for tax-free status of Hong Kong based trading companies touted by many of our corporate service providers.

Tax Losses for Individuals Speculating in Securities?

The trend of the Board of Review decisions in this area is well summarised in *D 38/96* 11 IRBRD 529 at 532, (1996) HKRC §80-471 as follows:

(1) An isolated transaction outside a person's ordinary business may amount to a trade. This is a question of fact to be decided on the circumstances of each case;

(2) Where the question is whether an individual engaged in speculative dealings in securities is carrying on a trade, the prima facie presumption is no;

(3) For dealings in securities or futures, there has to be a systematic course of dealing. This is a question of degree; and

(4) Though it is not essential that a person carrying on a trade or business must have an office and staff and organisation, where none of these attributes exist, there must be other clear evidence of carrying on a trade or business.

Applying these principles, the Board in *D 38/96* concluded that a loss claimed by the proprietor of a transport company in a one-off transaction in nickel futures, the taxpayer having no systematic operation or trading account, was not deductible as a trade or business loss of the transport company.

A similar decision was reached in *D 111/97* 13 IRBRD 20, (1998) HKRC §80-556 where the Board held that individuals would rarely be considered to carry on a trade or business in shares unless other associated trading or business activities were present. In this case the Board reviewed the authorities and concluded:

> 'These cases show that the law places different weight on the taxpayer's intention depending on the nature of the property purchased. One may question whether the distinction is justified in the circumstances we have nowadays in Hong Kong where speculation in landed properties is as prevalent and as unsophisticated as speculation in securities. Nevertheless, our duty is to apply the law as we understand it. Instead of looking only at the intention of the taxpayer, we must consider all the facts and ask ourselves whether [the taxpayer] did carry on a trade or business in the purchase and sale of shares. Our conclusion is that it was not. What the taxpayer did ... was in substance no different from what most people were doing in speculating in the stock market, without actually carrying on a trade or business.'

On the basis of these cases, it will be an uphill battle for an individual taxpayer seeking to successfully deduct losses from speculative activities in the securities markets. The only upside is that, in the fortunate event of making profits, the Commissioner will find it equally difficult to assess.

Incentive Payments to Enter into a New Lease

Decisions of the Full Federal Court of Australia in *Selleck v FCT* (1997) 36 ATR 558 and *Montgomery v FCT* (1998) 37 ATR 186 provide some comfort for businesses that receive an upfront payment upon moving premises and entering into a lease with a new landlord.

In both cases, a payment made by a lessor to a partnership as a contribution to the cost of fitting out newly leased premises was, in the circumstances of a forced move to those premises, a 'capital occasion' and not a gain made in the ordinary course of business.

These cases can be compared with the Privy Council decision, on appeal from New Zealand, in *CIR (NZ) v Wattie & Lawrence* [1998] STC 1160. In this case a lump sum payment, described by the court as a negative premium, was made to a partnership as an inducement to enter into a 12-year lease of premises at a rent above market rent. Lord Nolan, giving the judgment of the Privy Council, observed that a lump sum paid to secure the termination of an onerous lease with a substantial period still to run would be a capital payment. By way of analogy, Lord Nolan concluded that the negative premium was 'the mirror image' of such a payment and was, therefore, a non-taxable capital receipt.

As noted above, this series of cases provides some measure of good news for the dispossessed business tenant; the downside will be that such a payment made by the landlord will in all likelihood be regarded in the nature of capital and denied deductibility!

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沙漠的「綠洲」還是「海市蜃樓」？

近期的稅務案例，對本地商家而言可說是報喜亦報憂。賀雅德作出探討

在這個經濟動盪的時候，我固然希望近期的案例可為納稅人帶來一些驚喜。然而，正如以下各宗案例顯示，實際情況往往教人失望。

「在香港經營業務」的解釋

近期本地案例清楚顯示，業務即使只涉及極低程度的活動，也可被視為「在香港經營」的業務。*D 107/96* 12 IRBRD 83, (1997) HKRC §80-508 一案（引用較早前 *CIR v Bartica Investment Ltd* (1996) HKRC §90-080 一案），便是一個好例證。

該案涉及的香港貿易公司，只有一名身處香港境外的顧客。該公司在香港並沒有僱用任何員工。至於公司的運作方式，首先是由一名身處香港境外的人就貨品買賣作出種種商業決定。該人然後指示一名身處香港的公司服務提供者進行所有行政工作以執行上述決定。該等工作包括擬備和簽發購貨單及標準形式發票，以及為信用證的轉移作出安排。該公司聲稱它沒有在香港經營業務，理由如下：（一）公司受境外人士控制；（二）公司在境內沒有僱員；及（三）服務提供者的活動，只不過是附屬的行政工作。但此等理據未被稅務上訴委員會（以下簡稱「委員會」）所接納。

反之，委員會裁定，是否經營業務的問題，不能純粹取決於控制人或中央管理層身處何地。委員會亦裁定，服務提供者乃公司的代理人，而其所作的行動，既可產生具約束力的法律責任，也屬於公司在香港進行的商業活動。

委員會認為，只要通過上述的測試（其標準是非常之低），那麼縱使公司的活動本身並不產生任何實質效果，它在香港境內所做的也會被視為產生可予評稅的利潤。我們的公司服務提供者正為不少設在本地的貿易公司效力，而經過上述判決後，這些貿易公司在聲稱不用納稅前便要三思了。

證券投資上的損失：可否從應繳稅款中扣減？

D 38/96 11 IRBRD 529（見 532 頁），(1996) HKRC §80-471 一案，扼要地說明了委員會在這問題上的立場：

（一）即使某項交易是某人在其通常業務以外進行的單獨交易，它也可以構成一個「行業」。這是一個事實問題，須視乎個別案情而定；

（二）對於從事證券投資交易活動的人是否經營行業的問題，表面的推定答案是否定的；

（三）就證券或期貨交易而言，須證明存在著有系統的交易過程。這是程度上的問題；及

（四）雖然不一定要證明經營行業或業務的人設有辦事處並擁有僱員及完善組織，但在缺乏這些證據的情況下，便要有其他證據以清楚顯示該人經營行業或業務。

在 *D 38/96* 一案，委員會運用以上各項原則，並裁定案中一家運輸公司的東主聲稱在一宗一次過的錄期貨交易中招致的損失，不能作為公司的行業或業務損失而予以扣減，原因是納稅人在交易中既沒有系統性運作，也沒有設立交易帳戶。

這項判決與另一案例 *D 111/97* 13 IRBRD 20，(1998) HKRC §80-556 相當近似。在該案中，委員會裁定，除非存在著其他相聯的行業或商業活動，否則任何人通常不會被視為經營與股票有關的行業或業務。委員會研究有關的典據後，作出了如下的結論：

「這些案例顯示，法律會因應納稅人購買的財產的性質而對其意圖給予不同的分量。有人也許會質疑，在現今的香港，這種區分是否合理，原因是現今香港的土地物業投機活動，其活躍程度絕不遜於證券投機活動，而兩種活動也是同樣地不成熟。可是，我們的職責是把

我們了解的法律運用到案件上。我們要考慮的不僅是納稅人的意圖；我們要根據所有案情來決定〔納稅人〕事實上有否經營股票買賣的行業或業務。就本案而言，我們裁定納稅人沒有如此經營。他所做的 … 在實質上與大多數參與股票投機活動的人所做的無異，實際上並未有涉及經營行業或業務。」

根據這些案例，個別納稅人要成功地把其在證券投機活動中招致的損失從應繳稅項中扣減，將會相當吃力。也許唯一的安慰是，若納稅人僥倖賺取利潤，稅務局局長要向其評稅時也會同樣感到舉步為艱。

以鼓勵簽立新租約的付款

一些公司或業務在搬遷辦公室及與新業主簽訂租約時，會事先收到一筆款項。對於他們來說，以下兩宗案例應能去除他們的憂慮。該兩宗案例分別是 *Selleck v FCT* (1997) 36 ATR 558 及 *Montgomery v FCT* (1998) 37 ATR 186，它們均由澳洲聯邦法院全體審理。

在上述兩案中，出租人均向合夥業務給予款項，作為該業務裝修其租來的單位所需開支的一部分。鑒於情況與租客被迫遷入該單位沒有分別，故法院裁定該合夥業務所收的款項屬「資本增益」，而並非在業務的通常運作中賺取的增益。

上述案例應與另一宗由紐西蘭上訴至樞密院的案例 *CIR (NZ) v Wattie & Lawrence* [1988] STC 1160 相比較。此案涉及的合夥業務，收到一筆被法院形容為「負補費用」的款項，以鼓勵該業務同意簽訂一份為期十二年而租金高於市價的租約。樞密院的判決由 Lord Nolan 宣讀，判決指出，若有關的款項是為了確保終止一份條款苛刻的租約而該租約期要經一段長時期後才會屆滿的話，該筆款項便屬資本付款。樞密院據此類推，裁定案中的負補費用乃上述資本付款的「鏡像」，因此屬於不須課稅的資本收益。

正如上文所說，這一系列的案例可能替那些被迫遷的商業租客帶來一些佳音。但與此同時，業主所付出的款項很可能會被視為屬資本性質，從而不能予以扣減。

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