Estate Duty Planning and the Application of *Ramsay's* Case in Hong Kong

Andrew Halkyard examines a recent decision of the Court of Appeal applying the anti-avoidance doctrine to cases involving Hong Kong's Estate Duty Ordinance

Ever since estate duty planning became prevalent in Hong Kong in the mid-to-late 1980's, a vexed yet critical question has played on practitioners' minds. That is, does the judge-made anti-avoidance doctrine set out in a series of House of Lords decisions such as *Ramsay v IRC* [1982] AC 300 and *Furniss v Dawson* [1984] AC 474 apply in the context of Hong Kong's Estate Duty Ordinance (Cap 111)?

That question has now been answered affirmatively in a much-awaited decision of the Court of Appeal, *Shiu Wing Ltd & Ors v Commissioner of Estate Duty* [1999] 3 HKC 711, decided on 20 August 1999.

The facts of the *Shiu Wing* case can be briefly summarised as follows. Within three years of his death, the deceased disposed of shares in a number of Hong Kong companies and two pieces of land in Hong Kong to the first plaintiff, a Manx company. The Manx company was the sole trustee of five unit trusts. It was owned by the second and third plaintiffs, two companies who were the trustees of discretionary trusts for the ultimate benefit of the deceased's family members. Under a composite transaction, a pre-ordained series of some 20 transfers, all but one of which took place on the same day, vested ownership in the unit trusts of the company shares and the land owned by the deceased.

These asset transfers were financed by a bank loan made to the wife of the deceased. A so-called 'round robin' series of financial transactions then took place and the funds were returned to the bank on the same day. The deceased also made loans to the second and third plaintiffs, in their capacities as trustees of the discretionary trusts, to subscribe for the units in the unit trusts. Subsequently, within his lifetime, the deceased forgave the debts owed to him by the second and third plaintiffs.

It was irrelevant that the deceased had genuine motives for wanting to transfer his property outside of Hong Kong

The Commissioner sought to charge the plaintiffs with estate duty in respect of the various dispositions but the Court of First Instance declared them not chargeable (see [1998] 3 HKC 44). The Commissioner appealed.

The plaintiffs submitted that the transactions involved 'sales' and not gifts of property in Hong Kong. The only 'gifts' made by the deceased were forgiving debts and transferring the proceeds of sale of one of the properties. These were effected when the debts and sale proceeds were offshore. Hence no charge to estate duty arose by virtue of s 10(b) of the Estate Duty Ordinance.

The Commissioner argued that the transactions whereby the deceased's property situated in Hong Kong was converted into property situated outside Hong Kong before any gift of it was made by the deceased, ought for fiscal purposes to be disregarded. If the transactions were disregarded, the end result was that the deceased was to be treated as having made, less than three years before his death, gifts of the property held by the plaintiffs as trustees of the family trusts. Such gifts were chargeable to estate duty in Hong Kong by virtue of s 6(1)(c) of the Estate Duty Ordinance.

In the result, the Court of Appeal by majority (per Mortimer VP, Godfrey and Rogers JJA dissenting) allowed the Commissioner's appeal on the following basis.

The deceased had a number of good reasons for effecting the transfers of property, partly fiscal and partly non-fiscal. However, the true and only reasonable conclusion on the facts of the case is that, although each step in the series of transactions took effect according to its tenor, the purpose of this pre-ordained series was purely fiscal. The purpose was to transfer all the beneficial interest in the transferred property on or before his death from the deceased to his children.

It was irrelevant that the deceased had genuine motives for wanting to transfer his property outside of Hong Kong. Motive and purpose are discrete concepts. The transactions served no commercial purpose and amounted to 'an artificially contrived concatenation of transactions' devised not for any commercial purpose but for the purpose of avoiding estate duty. Applying the principles in *Ramsay's*

case, the conversion of the property to place it offshore must be disregarded and the real transaction must be regarded as a gift of Hong Kong property by the deceased to his children.

It was unnecessary to deal with the alternative argument that the transactions were a 'sham' or as having no legal effect. Nor was it necessary to deal with the submission that the transactions were 'associated operations' as defined by s 3(1) of the Estate Duty Ordinance.

In his dissenting judgment, Rogers JA decided that the *Ramsay* principle did not apply to the facts of this case. Moreover, no disposition of property was made by 'associated operations'; nor were the loans for the purpose of the asset purchases 'shams'. Hence in Rogers JA's view, the declarations granted by the Court of First Instance were correctly granted.

This may not be the final word in this case. In view of the importance of the case, and the amount of duty in dispute, it may well be that the plaintiffs will lodge a further appeal to the Court of Final Appeal.

Andrew Halkyard
teaches Revenue Law at
the University of Hong Kong
and is a Consultant to
Baker & McKenzie

遺產稅務規劃與反避稅規條

賀雅德探討最近上訴法庭把反避稅規條應用到香港《遺產稅條例》的一宗案例

自八十年代中至末期，遺產稅務規劃在香港一直大行其道，而從事稅務的律師也經常被一個具關鍵性的問題困擾：透過一連串英國上議院判例（如 *Ramsay v IRC* [1982] AC 300 及 *Furniss v Dawson* [1984] AC 474 兩案）建立的反避稅 (anti-avoidance) 規條，到底是否適用於香港《遺產稅條例》（第 111 章）（以下簡稱《條例》）的範疇？

這問題的答案，終於在上訴法庭於本年 8 月 20 日裁定的案例，*Shiu Wing Ltd & Ors v Commissioner of Estate Duty* [1999] 3 HKC 711 中得到肯定。

Shiu Wing 一案的案情摘要如下：死者去世前三年內，把多家香港公司的股份及兩片土地轉予第一原告人（一家曼恩島公司）。第一原告人是五項單位信託的單一受託人，該公司由第二及第三原告人擁有。第二及第三原告人是兩家公司，也是數項最終為死者家庭成員利益而設的酌情信託的受託人。透過一宗由約二十項事先安排的轉移組成的綜合交易，死者擁有的公司股份及土地擁有權給轉歸於該等單位信託名下。除了其中一項以外，該宗交易中所有轉移都是於同一日進行。

有關的資產轉移，乃利用一筆由銀行向死者妻子作出的貸款進行。一連串的「循環」財務交易接而發生，而上述款項於同一日返回借款銀行的手中。死者亦向身為上述酌情信託受託人的第二及第三原告人作出借貸，讓它們認購上述單位信託的單位。隨後，死者在身故前，寬免了第二及第三原告人所欠的債項。

遺產稅署署長（以下簡稱「署長」）就各項處置交易尋求對各原告人徵收遺產稅，但原訟法庭裁定該些處置毋須課稅（見 [1998] 3 HKC 44）。署長遂提出上訴。

各原告人稱，有關涉及香港財產的交易乃「售賣」而非饋贈。死者作出的唯一「饋贈」，是在寬免債項以及把出售其中一項物業所得的收益轉移。這些「饋贈」進行時，有關債項和收益均在香港境外。因此，根據《條例》第 10(b) 條毋須課遺產稅。

署長則認為，就稅務目的而言，在死者饋贈財產前把位於香港境內的財產轉變成位於香港以外的財產的各項交易，應不予理會。在這情況下，最終的結果是死者應被視為曾經在其去世前三年內把各原告人作為家庭信託受託人而持有的財產作出饋贈。根據《條例》第 6(1)(c) 條，該些饋贈需要繳納遺產稅。

結果，上訴法庭以大多數（馬天敏副庭長及高奕暉法官；羅傑志法官持不同意見）裁定署長的上訴得直，理據如下。

死者進行各項財產轉移的背後，有著各種稅務上和非稅務上的充分理由。然而，根據有關案情而得出的真正和唯一合理的結論是，縱使涉案一連串交易中的每一步驟按其意旨生效，但整個預先安排的交易系列純粹是為了稅務上的目的，用意是在死者去世前或去世時把經轉移財產的一切實益權益轉移給死者的子女。

至於死者確實有動機把其財產轉移至香港以外，這點在案中並無關聯。動機和目的是兩個互不相連的概念。涉案的各項交易並無任何商業目的，而是只為了避免繳納遺產稅的「一串人工設計而成的交易」。運用 *Ramsay* 一案的原則，法院須對把財產轉移至香港以外的步驟不予理會，而視死者把香港財產贈予其子女為交易的真正性質。

上訴法庭認為毋須處理以下的論據：（一）有關的交易屬於「假局」或沒有法律效力；及（二）有關的交易屬於《條例》第 3(1) 條所指的「相聯行動」。

另一方面，羅傑志法官在其持不同意見之判詞中則認為 *Ramsay* 一案的原則不適用於本案的案情，並認為本案中的財產轉移並無構成「相聯行動」，而用以購買資產的借貸亦不屬於「假局」。故此，羅傑志法官認為原訟法庭頒判的聲明無誤。

此案未必就此告一段落。鑒於案件的重要性以及爭議涉及的稅額，原告人可能會向終審法院提出上訴。

賀雅德
於香港大學教授稅務法，
並為麥堅時律師行顧問