Comptroller of Income Tax v VJ
[2008] SGHC 224

Case Number : ITBR Appeal 3/2007

Decision Date : 01 December 2008

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Foo Hui Min and Lim David (Inland Revenue Authority of Singapore) for the appellant; Ong Sim Ho and Yang Shi Yong (Drew & Napier LLC) for the respondent

Parties : Comptroller of Income Tax — VJ

Revenue Law – Income taxation – Construction of s 10E Income Tax Act (Cap 134, 2001 Rev Ed) – Applicability of s 10E Income Tax Act – Whether company was in the business of letting immovable properties – What income was to be treated as income derived from the business of letting immovable properties – Section 10E Income Tax Act (Cap 134, 2001 Rev Ed)

1 December 2008 Judgment reserved

Andrew Ang J:

1 This was an appeal by the Comptroller of Income Tax ("the Appellant" or "Revenue") against the decision of the Income Tax Board of Review ("the Board") allowing the appeal of the taxpayer company "X" Property Pte Ltd, a company incorporated in Singapore ("the Respondent") against the Comptroller's Notices of Assessment for Years of Assessment 1999, 2000 and 2001.

Factual background

2 The facts based on the Agreed Statement of Facts settled between the parties are as follows:

(a) The Respondent is and was at all material times the owner, developer and manager of AB Shopping Centre ("AB") and CD Serviced Apartments ("CD") (collectively known as "the Property"). AB is a two-level shopping mall and CD comprises 161 units of serviced apartments.

(b) In 1995, the Respondent commenced the development of the Property.

(c) On 15 January 1998, Temporary Occupation Permit ("TOP") was issued for the Property.

(d) On 1 April 1998, the Respondent began leasing out the Property.

(e) The Respondent obtained an interest-bearing loan from its parent company to finance the construction of the Property and to provide working capital for its operations. Interest expenses incurred on the loan before the issuance of the TOP were capitalised as construction costs of the Property, and those which accrued on or after the TOP were brought directly into the Respondent's profit and loss account. The Respondent claimed deduction under s 14 of the Income Tax Act (Cap 134, 2001 Rev Ed)[note: 1] ("the Act") of the interest expenses that were incurred on the loan on and after the issuance of TOP for the Years of Assessment 1999, 2000 and 2001. Further, the Respondent sought to carry forward the excess of the said expenses from the Year of Assessment 1999 to subsequent years of assessment under s 37 of the Act.

(f) In 1996, the Respondent began marketing, promoting and advertising for the rental of the Property. The Respondent accounted for the expenditure of marketing, promotion and advertisement of the Property as deferred expenditure and amortized them over three-year periods. The first deferred expenditure on the Property was brought into the Respondent's accounts on 1 October 1997. The Respondent claimed deduction under s 14 of the Act in respect of the deferred expenditure for the Years of Assessment 1999, 2000 and 2001. Further, the Respondent sought to carry forward the excess of the said expenses from the Year of Assessment 1999 to subsequent years of assessment under s 37 of the Act.

(g) During the construction of the Property, the Respondent incurred capital expenditure on the electrical installation. The capital expenditure comprised the costs of switchgear and sub-main station, transformers and lighting installation which include emergency and feature lightings. The Respondent claimed annual capital allowances under s 19A of the Act for the electrical installation in CD for the Years of Assessment 2000 and 2001, and annual capital allowances for the electrical installation of AB from Year of Assessment 2003 onwards.

(h) In his letter dated 22 September 2000, the Revenue took the position that the Respondent was in the business of the making of investments under s 10E of the Act.

(i) On the basis that s 10E of the Act applied, the Revenue disallowed the Respondent's claims of interest expenses and deferred expenditure incurred before 1 April 1998, the date of the first rental, on the ground that any excess outgoings and expenses over the income derived from the investments in any year were disregarded under s 10E. Further, the Revenue disallowed the carrying forward of the excess expenses from the Year of Assessment 1999 to subsequent years of assessment. The details are as follows:

	CD ($)	**AB ($)**	**Total ($**
Disallowed interest expense from 15 January 1998 (TOP date) to 31 March 1998 (before date of rental)	649,077	365,999	1,015,0
Disallowed deferred expenditure from 1 January 1997 to 31 March 1998 (before date of first rental)	1,187,687	329,197	1,516,8

(j) The Revenue further disallowed the Respondent's claims of the annual capital allowances for the Years of Assessment 2000 and 2001 on the basis that the electrical installation formed part of the premises and setting of the Respondent's business and hence did not qualify as "plant" and "machinery" within the meaning of s 19A of the Act.

(k) The Respondent raised objections to the relevant Notices of Assessment for the Years of Assessment 1999, 2000 and 2001.

(l) On 12 January 2006, the Revenue issued Notices of Refusal to Amend for the Years of Assessment 2000 and 2001. There being no chargeable income for the Year of Assessment 1999, no Notice of Refusal to Amend was issued for that year of assessment.

3 The Respondent took the matter up on appeal before the Board.

4 There were initially three issues before the Board. However, the issue whether the electrical installation qualified as plant and machinery for the purposes of s 19A of the Act was resolved.

5 In the result, the only two issues before the Board were:

(a) whether the Respondent's income from its operation of AB and CD was derived from the "business of the making of investments" within the meaning of s 10E of the Act; and

(b) whether the expenses (including the interest expenses) incurred prior to the date of first rental were deductible under s 14(1) of the Act.

6 The Board decided that s 10E of the Act did not apply to the Respondent's income derived from the operation of AB and CD. On the second issue, it again decided in favour of the Respondent holding that the Respondent's business, commenced on the date of the TOP (15 January 1998) and not on the date of first rental.

7 This led to the Revenue's appeal against the Board's decision.

8 It is common ground between the parties that the income derived by the Respondent from the operation of the Property are chargeable under s 10(1)(a) as income from a business. But the parties disagree on the application of s 10E. The Appellant says the section applies; the Respondent says it does not. The issue in this appeal, therefore, is whether the profits of the Respondent from the operation of the Property are subject to s 10E in addition to s 10(1)(a).

9 Section 10(1)(a) which is the charging section reads:

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;

10 Section 10E (as it stood at the relevant time) read:

10E. — (1) Notwithstanding any other provisions of this Act, in determining the income of a company or trustee of a property trust derived from any business of the making of investments the following provisions shall apply:

(a) any outgoings and expenses incurred by the company or trustee of a property trust in respect of investments of that business which do not produce any income shall not be allowed as a deduction under section 14 for that business or other income of the company or trustee of a property trust;

(b) any outgoings and expenses incurred by the company or trustee of a property trust in respect of investments of that business which produce any income shall only be available as a deduction under section 14 against the income derived from such investments and any excess of such outgoings and expenses over such income in any year shall be disregarded; and

(c) the allowances under sections 19, 19A, 20 and 21 relating to that business shall only

be available as a deduction against the income derived from investments of that business which produce any income and the balance of the allowances in any year shall be disregarded.

(2) In this section –

"business of the making of investments" includes the business of letting immovable properties;

"immovable property-related assets" means debt securities and shares issued by property companies, mortgaged-backed securities, other property trust funds, and assets incidental to the ownership of immovable properties;

"investments" means securities, immovable properties and immovable property-related assets;

"property trust" means a trust which invests in immovable properties or immovable property-related assets.

11 It can thus be seen that whilst s 10(1)(a) charges to tax income from any business, *inter alia*, s 10E applies to a particular type of business income, *viz*, "income of a company … derived from *any* business of the making of investments".

"Any business of the making of investments"

12 The key question in this appeal is what the above-quoted words in s 10E mean.

13 It is first of all a "business". In the well-known Singapore Court of Appeal case of *DEF v Comptroller of Income Tax* (1961) 27 MLJ 55, Buttrose J held that "business" implies or connotes "a series or repetition of acts" in carrying on, or carrying out, a scheme for profit making. He also said at 59:

[T]he word "business" in section 10(1)(a) of the Ordinance is used in association with "trade", "profession" or "vocation", all of which connote habitual and systematic operations, a continuity or repetition of acts or similar operations.

14 In that same case, Ambrose J said at 61:

[T]he fundamental idea underlying the three words "trade, … profession or vocation" in section 10(1)(a) of the Singapore Income Tax Ordinance is the continuous exercise of an activity. Considering the context, it seems to me that the same fundamental idea underlies the word "business" which appears between the word "trade" and the words "profession or vocation"; and that the word "business" must, therefore, be given its ordinary meaning, namely, an occupation habitually engaged in, especially for livelihood or gain.

15 Thus, the carrying on of a business is to be distinguished from passive derivation of income. Examples of the latter to bring out the distinction are set out below.

16 First, where a company merely holds shares in other companies, carries out minimal activities and derives little income apart from dividends, it will not be treated as carrying on a business. The dividends will be assessed to tax under s 10(1)(d), which applies to income derived passively from "dividends, interest or discounts", instead of s 10(1)(a). Deductions under s 14 in the ascertainment of the income are limited to those incurred in the production of that income in the year of

assessment. Given that the company is a passive investor, the deductions allowable would be principally interest incurred on moneys borrowed to purchase the shares. To the extent that the expenses in the year of assessment exceed the income, the excess may not be carried over into the next year of assessment.[note: 2]

17 Secondly, if a company that owns properties merely lets them out but carries out minimal or no other activities, it will not be treated as carrying on a business either. Such a company will be assessed on its rental income under s 10(1)(f), which applies to income derived passively from "rents, royalties, premiums and any other profits arising from property". Here again, any excess of expenses and outgoings over the income in any year of assessment may not be carried forward to the next year of assessment. Moreover, capital allowances which might otherwise be available to a company carrying on such a business are denied to the taxpayer company because it does not carry on a business in undertaking such activities.

"Making of investments"

18 In my view, the phrase simply means "investing". It does not mean the turning over of investments for profit by the purchase and resale of investments. (Indeed, if the business of the company was in the purchase and resale of investments for profit, it would be treated as an investment dealing company. In that event, any gains made in the purchase and resale would be taxable as profits rather than be accorded treatment as a capital gain.) Rowlatt J gives useful guidance on this point in *The Commissioners of Inland Revenue v The Tyre Investment Trust Ltd* (1924) 12 TC 646 where he held at 656:

> Mr Grant suggests that the making of investments means that the Company's principal business is the turning over of investments and making profits by the purchase and re-sale of investments. I do not think so. "Making investments" here does not mean that; "making investments" means investing; "making" is nothing, it means investing, and before you can hold an investment you have to acquire it, in other words, to make it;

19 That s 10E was intended to apply to an investment holding company was recognised by the Court of Appeal in *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR 484.

20 Hence, the emphasis is on the acquisition, holding or retention of an investment, as opposed to the purchase for resale of the investment. By way of clarification, this is not to say that an investment holding company may not realise its investment or switch one investment for another in the course of its business as such. If such transaction truly was undertaken in the course of its business as an investment holding company, any gains derived therefrom would be capital in nature and not exigible to tax. The corollary to that is that losses incurred would be capital in nature and not be available for set-off against income.

21 It follows from the above that I cannot agree with the Respondent's definition of investment-making activities set out in para 7 of the Respondent's case which reads as follows:

> … as a matter of first principles, investment activities *must* comprise the following:

(a) acquisition of investments;

(b) any preparation of the investment to a desired state. For example, in the case of land, the development of the same into a lettable building;

(c) the holding of investment in its desired state;

(d) the receiving or earning of income from the holding of the investment; and

(e) the eventual disposal of the investment upon maturity of investment time horizon.

[emphasis added]

22 Neither do I find tenable the Respondent's Submissions at [12] thereof which I quote below:

> It is submitted that on any reasonable consideration of its activities, the Respondent's *main business* cannot be characterised as the making of investments. A company whose *main business* is property investment would consider the following:

(a) It would take a view of the periodic returns it can expect to receive from holding the property;

(b) It would determine its desired investment time horizon;

(c) It would also consider the expected disposal value of the investment;

(d) Usually in the interim period between the purchase of the land and disposal of the same, the company may decide to develop land for purpose of letting to derive rental income. In doing so it may render some services to its tenants. However such services would be restricted to the basic usual maintenance services which is an integral and necessary part of company's investment in property, which gives rise, not to a business profit, but to rental income. The principal part of the company's income remains to be derived from the rent charged by the company to the tenant for leasing the tenanted premises.

[emphasis added]

23 Quite apart from the fact that the Respondent's counsel gratuitously introduced the concept of a "main business", my other criticism of the submission is that there is no basis for foisting sub-paras (b) and (c) as requirements for a company in the business of letting immovable properties. Respondent's imposition of sub-paras (b) and (c) in its definition of investment-making activities, likewise, is unwarranted. So far as sub-para (b) is concerned, it is obvious that the "preparation of the investment to a desired state" is not essential. An investment company could well purchase a completed building. Moreover, where the investment consists of securities such as stocks and shares, no preparation of any kind is involved.

24 Similarly, the requirement in sub-para (e) for "eventual disposal of the investment upon maturity of investment time horizon" surely cannot be a pre-requisite. There may be no time horizon set. The investment might never be disposed of.

25 The Respondent's attempt to elevate these characteristics (as sometimes they are) of investment-making companies into absolute essentials, and thereby to argue that the Respondent does not qualify as an investment-making company, must fail.

"Business of the making of investments"

26 The above expression involves both the concept of "business" and that of "the making of investments". Given that in the making of investments it is not essential that there be the turning

over of investments, that which makes it a business (rather than a passive investment) may come from activities the company undertakes habitually or continually with a view to profit.

27 Where the activities relate to or are connected with the generation of income from the investment, it is not difficult to conclude that they form part of the business of the making of investments. Where the activities cannot be said to be in any way related to or connected with the generation of income from the investments, it is possible that the activities constitute part of a discrete business separate and distinct from that of the making of investments. Conceptually, I see no difficulty in a company in the business of making investments having another separate and distinct business at the same time. But where the activities can be said to be ancillary or incidental to the business of the making of investments, they form part of that business.

"Business of letting immovable properties"

28 Section 10E(2) defines the "business of the making of investments" to include "the business of letting immovable properties". Here again, the word "business" is juxtaposed against the letting of immovable properties. Once again, therefore, there is a requirement for activities consistent with the carrying on of a business. If a company merely lets out the properties without carrying out other activities, it would be merely a passive investor in immovable properties.

29 In order for a company to be carrying on a "business of letting immovable properties", it must not only rent out properties but also carry out activities that are systematic, habitual or repetitive with respect to the letting of the properties. A paradigm example would be where a company lets immovable properties for rent and additionally provides services and facilities to the tenants making it more attractive for tenants to want to rent the properties (as the Respondent in the instant case does).

The Board's interpretation of "the business of letting immovable properties"

30 The Board did not expressly state what, in their view, was meant by the expression "the business of letting immovable properties". They said (at [13]) that –

> [T]he fact that a business includes the letting of immovable property does not automatically make the business one of 'the making of investments'. This, we believe, is also the import of the UK case of *IRC v George and Another* [2003] EWCA Civ 1763".

The Board then said at [19] that whilst

> *George* concerned a different statute, nevertheless it concerned the very same issue of what may or may not be said to be investments and making or holding investments.

31 With respect to the Board, in following the approach in *Inland Revenue Commissioners v George* [2004] STC 147 ("*IRC v George*"), they made an error of law. The decision in that case related to a different factual and statutory context. Indeed, in *IRC v George* itself, Carnwath LJ at [12] endorsed the view that cases relating to different taxes and different subject matter were unlikely to be helpful. The key question there was whether the business in question consisted "wholly or mainly of … making or holding investments" within the meaning of s 105(3) of the UK Inheritance Tax Act 1984.

32 On the facts, it was undisputed that the business did not consist of, or include, "making … investments" but that it did include "holding investments" although it did not consist of that alone. That being the case, the question was whether the business was mainly that of holding investments.

For this purpose, as observed by Carnwath LJ at [11]:

> [T]he principal areas of debate have been: first, the correct allocation between 'investment' and 'non-investment' of the various activities involved in operating the site, including, in particular, the services provided for the residential park; and, secondly, in the light of that allocation, whether the 'investment' element of the business was predominant.

Comparing that case to ours, the critical difference is that in s 10E there is no requirement that "the business of letting immovable properties" must be the whole or main business of the company.

33 This is not to say that once the business of the company includes that of the letting of immovable properties, s 10E is to apply regardless of whether the income of the company was entirely from the business of the making of investments. As formulated, s 10E applies only in determining the company's income "derived from any business of the making of investments" but not otherwise. (It appears this was where the Revenue fell into error in its submissions before the Board although in the present appeal the Revenue moderated its stand submitting as follows in paras 41 and 43 to 46 of the Appellant's Case (Amended):

> 41. By necessary implication, the income that is subject to s 10E must be circumscribed by the ambit of "business of the making of investments", and "business of the letting of immovable properties". On a literal reading, the expression "income of a company derived from any business of the making of investments" in s 10E(1), and the substituted expression "income of a company derived from any business of letting immovable properties" is not restricted to rent income alone.
>
> …
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> 43. If it is determined that any income in question is not from a "business of the letting of immovable properties", s 10E can only be invoked provided the income arises from the "business of the making of investments". This must logically be so for otherwise, income from investments in the form of securities will not come within the scope of s 10E. The Respondent's concern that the definition in s 10E will be given an "expansionary view" is unfounded.
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> 44. The following examples may serve to illustrate more clearly the circumstances when s 10E may be applied.
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> 45. Company A owns and manages 3 shopping centres which it lets out to tenants. It also provides services to tenants and carries out promotion activities that will draw custom to the shopping centres. The [Revenue] will apply s 10E to the rent and service charge income derived by the Company A from the 3 shopping centres as they constitute immovable properties that are held as investments.
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> 46. Company B owns an office building that is leased to tenants with the usual services of cleaning, power supplies, security, etc. In addition, it also holds a restaurant franchise and operates 2 restaurants from premises it does not own. The [Revenue] will apply s 10E only to the income from the office building, but not the income from the restaurants, as the operation of restaurants is not a business of the making of investments.

34 As can be seen from the above, the Revenue no longer takes the approach that once the business of the company includes that of the letting of immovable properties, the entire income of the company is to be determined in accordance with s 10E. Para 46 in particular clearly admits of the possibility that the company may have income from a business other than that of the making of

investments. Such income clearly ought not to be subject to s 10E. In other words, the business of the taxpayer may be a composite business of which only part is that of the making of investments. That was implicit in the decision of the Board in *IE v Comptroller of Income Tax* [2005] SGITBR 1.

35 In that case, the taxpayer company was the developer and owner of a major integrated complex comprising five office towers, a large retail podium and a convention centre. Three of the office towers were for sale and the gains therefrom were treated as trading profits for tax purposes under s 10(1)(a) of the Act. The appellant company derived rental income from the remaining two office towers and the retail podium and there was no dispute that the rental income was derived from a "business of the making of investments" under s 10E of the Act. What was in issue was whether the income from the operation of the convention centre was similarly to be treated as having been derived from the "business of the making of investments" under s 10E.

36 The appellant company received fees from organising exhibitions, conventions and seminars at the convention centre. It granted licences to exhibitors to use allocated space for a limited time. It also provided technical, audio and visual services to the customers and carried advertisements on large electronic information screens. The appellant company also provided catering services for the various functions at the convention centre. In addition, it operated outlets such as restaurants and speciality food outlets within the centre. From the outset, the appellant company had created a separate operating business division with its own management team led by a general manager. The centre also had its own accounting, administration, marketing, building management, food and beverages and housekeeping departments.

37 On the above facts, the Board held that the appellant company's income from the operation of the convention centre ought to be assessed under s 10(1)(a) of the Act without applying s 10E, leaving only the income from the rental of the two tower blocks and the retail podium to be subject to s 10E. I do not think the decision of the Board in that case was one which, on a proper construction of s 10E, the Board could not have arrived at. What the decision does show is that application of s 10E need not be on an "all or nothing" basis; it is possible that "any business of the making of investments" may be just one of a number of components of a composite business and that other components of the business may fall outside s 10E. However, in arriving at their decision, the Board quoted from *Cook (Inspector of Taxes) v Medway Housing Society Ltd* [1997] STC 90 ("*Cook v Medway*"), *IRC v George* ([31] *supra*) and *Farmer v IRC* [1999] STC 321 ("*Farmer v IRC*"), *inter alia*, with apparent approval. With respect to the Board, their reliance on those case authorities was misplaced.

38 *IRC v George* and *Farmer v IRC*, both related to s 105 of the UK Inheritance Tax Act 1984 ("the 1984 Act"). Under the 1984 Act, inheritance tax was charged on a "transfer of value" made by an individual. On the death of any person, tax was charged as if, immediately before death, there were a transfer of value equal to the value of the person's estate. However, the 1984 Act gave various forms of relief from tax, one of which was relief on "business property". "Relevant business property" was defined by s 104 but s 105(3), in so far as relevant, provided that

> … shares in or securities of a company, are not relevant business property if … the business carried on by the company consists *wholly or mainly* of one or more of the following that is to say, … *making or holding investments* [emphasis added]

In short, if the business of a company consisted wholly or mainly in the making or holding of investments, relief from inheritance tax was unavailable. The statutory formulation therefore required a specific finding whether or not the business of the company met that description. It would not have sufficed merely to say that part of the business of the company was in the making or holding of

investments; whether or not the shares that the deceased held in the company qualified for relief as "business property" depended on the characterisation of the company's business as a whole.

39 In *Cook v Medway* ([37] *supra*), the issue there was whether the business of the taxpayer company was that of an investment company under s 130 of the Income & Corporation Taxes Act 1988 ("the 1988 Act"). By definition in the 1988 Act, "investment company" referred to a "company whose business consists *wholly or mainly* in the making of investments". There again the statute required a finding whether or not the business of the company consisted "wholly or mainly in the making of investments".

40 The approach taken by the Special Commissioner in *Farmer v IRC* ([37] *supra*) at [53] must be understood in that light. In that passage the Special Commissioner said:

> Applying the principles derived from the authorities to the facts of the present appeal, the following factors can be identified as relevant to a decision of what the business consists, namely: the overall context of the business; the capital employed; the time spent by the employees; the turnover; and the profit. When these factors have been considered it will then be necessary to stand back and consider *in the round* whether the business consisted mainly of making or holding investments. [emphasis added]

41 In the present case, the Board also followed the approach in *IRC v George* ([31] *supra*) and *Farmer v IRC* ([37] *supra*). They opined (at [17]):

> We are of the view that a similar multi-factorial approach is to be taken in determining the "business of the making of investments" for purposes of section 10E. The holding of property as investment or the letting of immovable properties is to be only one of the relevant factors to be considered. This was also the approach adopted by the Special Commissioner in another UK case, namely, *Farmer v IRC* [1999] STC (SCD) 321, where he observed …

The Board then proceeded to quote the passage cited in [40] above. As the Appellant correctly argued, determining whether the company is in any business of the making of investments or, in particular, the business of letting immovable properties, is the key question to be considered in s 10E. Unlike the relevant statutory provisions in the UK cases, s 10E does not call for a finding as to the business of the company as a whole.

42 As I stated earlier, if only part of the composite business of a company is in the making of investments, then that part alone would be governed by the provisions of s 10E. (This, of course, still begs the question what activities of the company fall to be considered as part of that investment making business but we shall deal with that later.) With due respect, I therefore am of the view that the Board applied the wrong test when, following *Farmer v IRC* ([37] *supra*), it stated:

> Accordingly, the approach we intend to take in the present case is to look at the business *as a whole and in the round*, with due regard to all relevant factors, and not to rigidly categorise investments versus trade type activities. [emphasis added]

43 Finally, for completeness, I should refer to the dispute between the parties as to the meaning of the word "includes" in s 10E(2) which provides, *inter alia*, as follows:

> "business of the making of investments" includes the business of letting immovable properties;

It would appear from the record that Revenue had argued before the Board as follows:

(a) The "business of making investments" is not confined to the business of letting immovable properties; and

(b) It follows that s 10E does not cover purely the renting of immovable property but includes the provision of services. (At least, when initially the chairman of the Board inferred this to be Revenue's submission, counsel for Revenue confirmed that it was. Only later in the submissions did Revenue qualify this contention by adding that, in order for the provision of services to be included within the business of letting, it had to be connected to the letting and provided by the landlord in the capacity of landlord.)

Initially, quite rightly, if I may say so, the chairman of the Board had responded to Revenue's second proposition by saying that, despite the use of the word "includes", it remained an open question what the business of letting immovable properties covered. That must be correct. The use of the word "includes" amplifies the meaning of "business of the making of investments" and not that of "the business of letting immovable properties". The second proposition was a *non sequitur*.

44 It is therefore puzzling why in their grounds of decision the Board felt it necessary to interpret the word "includes" narrowly as equivalent to "means and includes". That narrow interpretation does not sit well with the rest of s 10E. It will be noted that "investments" is defined to mean "securities, immovable properties and immovable property-related assets". The making of investments therefore could be in securities (*eg*, stock and shares) rather than in immovable properties only. It follows that the word "includes" cannot point to an exhaustive definition.

45 In summary, my view is that the argument over the meaning of the word "includes" was a red herring. The question that had to be answered was whether the provision of services was part of the business of letting immovable properties; the word "includes" was of no assistance.

Whether the Respondent is in the business of letting immovable properties.

46 In my view, it is indisputable that the Respondent is in the business of letting immovable properties. First, the description of its "Principal Activities" set out in the Report of the Directors accompanying the Respondent's audited statements of accounts for each of the years 1998, 1999 and 2000 categorically and consistently states:

The principal activity of the Company is the derivation of rental income from its investment properties. There has been no significant change in the activity during the year.

Counsel for the Respondent sought to downplay the significance of this description, likening it to the objects clause in the Memorandum & Articles of companies. The analogy must fail. Until amendment to s 23 of the Companies Act (Cap 50, 1994 Rev Ed) in 2004, it used to be *de rigueur* for the objects clause to be drafted extensively so as to avoid any argument as to the capacity of the company to undertake any business which it may wish to embark upon.

47 In contrast, the "Principal Activities" in the Report of the Directors describes factually what principal activities the company actually engages in. It will be noted that the Respondent identified "the derivation of rental income from its investment properties" as its singular principal activity.

48 Second, the activities undertaken by the Respondent in –

(a) marketing, promoting and advertising for the rental of the Property;

(b) the provision of services to the tenants; and

(c) the maintenance and management of the Property

serve to show that the "derivation of rental income from its investment properties" was not a passive activity. Nor is the Respondent suggesting that it was, for if so, the Respondent would be taxable under s 10(1)(f). It is common ground between the parties that the Respondent is indeed carrying on a business chargeable under s 10(1)(a), the dispute being only in regard to whether s 10E also applies.

49 The Appellant chose the lease or tenancy agreement as the starting point for determination whether the Respondent is carrying on the business of letting immovable properties. His reasons are set out in [48–50] of the Appellant's Case (Amended) as follows:

> 48. First, the definition in s 10E(2) focuses on the business of letting of properties – nowhere is the focus on letting more manifest, than in a lease or tenancy agreement – it is the lease that produced both the rent and the service charge income; it is from the lease or tenancy agreement, that the respective rights and duties of the Respondent, and that of the tenancy or lessee, are derived. The tenancy agreement shows that the capacity in which the Respondent provides these services, that is, as landlord, the recipient of these services enjoys them only because he was a tenant. In other words, the Respondent would not have provided these services but for the fact that he is landlord.
>
> 49 Second, the service fee payable under the tenancy agreement for [CD] and the service charge in the lease for [AB] shows that the fee or charge is due at the same time the rent is due. The consequence of non-payment of service fee and service charge, like non-payment of rent, will also permit the Respondent as landlord or lessor, to re-enter the premises and terminate the tenancy or lease. As the Respondent's right to earn and enforce payment of the service fee and service charge stem from the tenancy agreement/lease, it is apposite to regard the service fee/charge as income from the letting of immovable properties.
>
> 50 Third, there is UK authority in the decision of *Martin v IRC* (ABA Tab 16) which shows how UK courts use the lease as a tool to distinguish between activities and income that can be attributed to land-owning part of the business, and that which cannot.

50 In rebuttal, counsel for the Respondent quoted from the judgment of Carnwath LJ in *IRC v George* ([31] *supra*) where he said at [28]:

> Where it does matter, in my view, the characterisation of such services depends on the nature and purpose of the activity, not on the terms of the lease (or, where relevant, a site licence). It is true that, in *Fry*, Slesser LJ noted the fact that the particular services mentioned (cleaning, heating and lighting) were optional under the lease, and that a separate charge was made. That was treated as a reason for not regarding them as 'mere incidents' of the tenancy. However, the converse does not follow. There is nothing in that judgment to support the view that, merely because services or facilities are required by the lease, and their cost is included in the rent, they lose their character as services, and become part of the 'holding' of the investment.

The Respondent also criticised the Appellant for being inconsistent in that while the latter distinguished the case of *IRC v George* on the basis that it was decided under a different statutory context, he nevertheless was prepared to endorse *Martin v IRC* [1995] STC (SGD) 5 as being more consistent with the statutory scheme of s 10E, ignoring the fact that both *IRC v George* and *Martin v*

IRC both concerned the same section in the 1984 Act.

51 I have earlier cautioned against inappropriate adoption of tests formulated in other jurisdictions with respect to different statutes. Reference to judicial formulations, no matter how elegantly phrased, involving a totally distinct statutory context may tend to obfuscate rather than clarify. However, this is not to say that there is no room for judicious application of apposite guideposts in a similar context.

52 As in *IRC v George* ([31] *supra*) and *Farmer v IRC* ([37] *supra*), likewise in *Martin v IRC* ([50] *supra*), the principal issue was whether the business in question consisted "wholly or mainly of … making or holding investments". Therefore, inasmuch as I am of the view that judicial pronouncements in the first two of the cases named ought not to be relied upon, *Martin v IRC* must be treated likewise.

53 Be that as it may, for my part I see no reason why we should not look into the lease or tenancy agreement to see whether the services provided by the Respondent were contracted for. If so, and they were incidental to the letting, they would, in my view, be part of the business of letting immovable properties.

Income derived from business of letting immovable properties

54 As I said earlier, it is beyond dispute that the Respondent is in the business of letting immovable properties. What remains to be considered is what income is to be treated as income derived from such business. It is self-evident from a plain reading of s 10E that the income subject to s 10E must be derived from a "business of the making of investments" which expression includes "the business of letting immovable properties". The income from the *business* of letting immovable properties is not limited to rental income. Indeed, if all that a company did was to collect rental from the letting of immovable properties, its claim to carrying on a business might well be met by the objection that, in relation to the immovable properties, it was merely a passive investor.

55 For the Appellant it was argued that the services provided to the tenants are ancillary to the lettings so that the income from the provision of those services is part of the income derived from the business of letting the Property. It is difficult to argue against that. Nevertheless, the Respondent strove to persuade the court that the holding of the Property by the Respondent is incidental and ancillary to its business of providing services. In support of this, the Respondent reasoned that its business is analogous to that of a hotel whose income is not determined under s 10E.

56 In my view, the analogy is strained. The business of a hotel is not normally that of *letting* immovable properties. A hotel guest is a mere licensee (without exclusive possession). Moreover, the hotel derives income not only from room rates paid by in-house guests but also from (i) its food and beverage outlets open to the public; and (ii) its banquet halls and function rooms for conventions, meetings and exhibitions. In contrast, the Respondent's income is from the tenants.

57 The Respondent's suggestion that its holding of the Property is merely incidental to the carrying on of the business of providing services is perhaps aptly described as akin to the suggestion that the tail wags the dog.

Conclusion

58 In the result, I hold that the Respondent, for the Years of Assessment 1999, 2000 and 2001, was carrying on the business of letting immovable properties incidental and ancillary to which services

were provided to the tenants thereof. It follows that s 10E applies to the profits of that business (including the service fee charged under the tenancy agreements in respect of CD and the service charge under the leases in respect of AB).

59 The appeal is allowed with costs to be taxed.

[note: 1]It is immaterial for the purposes of this case whether this or an earlier revised edition of the Act is used.

[note: 2]Although that is strictly the position at law, in practice, as was observed by the Court of Appeal in *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR 484 at [51], the Comptroller has made some concessions as regards the deductibility of expenses in the ascertainment of income not falling under s 10(1)(a).