T Ltd v Comptroller of Income Tax
[2005] SGHC 115

Case Number : DA 14/2004

Decision Date : 30 June 2005

Tribunal/Court : High Court

Coram : Andrew Ang J

Counsel Name(s) : Nand Singh Gandhi (Allen and Gledhill) for the appellant; Liu Hern Kuan and Usha Chandradas (Inland Revenue Authority of Singapore) for the respondent

Parties : T Ltd — Comptroller of Income Tax

Revenue Law – Income taxation – Deduction – Company seeking to claim expenses as deductions – Whether expenses deductible under ss 14(1)(a) and 37(1)(a) Income Tax Act – Whether company incurring expenses before commencement of business – Sections 14(1)(a), 37(1)(a) Income Tax Act (Cap 134, 1996 Rev Ed)

Revenue Law – Income taxation – Deduction – Company seeking to claim expenses as deductions – Whether interest deductible – Whether interest incurred by appellant of capital or revenue nature – Section 15(1)(c) Income Tax Act (Cap 134, 1996 Rev Ed)

1 This is an appeal by the taxpayer company against the decision of the Income Tax Board of Review ("the Board") dated 26 April 2004 in Income Tax Board of Review Appeal No 20 of 2000.

2 The appeal before the Board was based on an Amended Agreed Statement of Facts as is the appeal before me. They are as follows, after due amendment, so as not to reveal the identity of the appellant:

> 1. The appellant, T Ltd ("the Company"), is a company incorporated in Singapore.
>
> 2. The Company was incorporated by a firm of lawyers on 24 July 1989 as a private limited company. It had a $2 paid-up capital and did not carry on any business. In 1992 it was acquired by the D Land Group upon which its name was changed to T Ltd and its first objects:
>
> > (a) To purchase, take on lease or otherwise acquire from the Housing and Development Board the land described as Land Parcel P4, Tampines in the Republic of Singapore and any estate or interest in and any rights connected with such land.
> >
> > (b) To carry on the business of constructing or otherwise developing a building on Land Parcel P4, Tampines, for the purpose of owning, managing and operating a property letting business."
>
> On 24 June 1998, the Company was converted to a public company.
>
> 3. The Company was awarded the land from the HDB on 6 June 1992. It signed a building agreement with the HDB on 1 December 1992 under which it undertook to develop the land. The proposed development project was described as a "comprehensive retail complex with 3 basements (2 for carparks and 1 for shops and supermarket), a 4-storey shopping podium … and two towers …".
>
> 4. The purchase of the land was funded by share capital and interest-bearing shareholders' loans. Subsequently, and during the construction phase, part of the shareholders' loans was converted to share capital and part (but not all) replaced by external borrowing which bore

interest.

5. The Company submitted plans on 16 December 1992 to develop the complex and obtained provisional planning approval on 6 February 1993. The chronology of significant events from then on was:

Date of award of main building contract:

19 October 1993

Date of commencement of superstructure works:

2 November 1993

Date of Temporary Occupation Permit ("TOP"):

15 November 1995

Date when first tenancy commenced:

15 November 1995

6. In the accounts for 1990 and 1991, the principal activity of the Company was described in the Directors' Report as that of "investment in and development of properties. Such activities, however, have not commenced since the date of incorporation of the company." In the accounts for 1992 (the year in which the land was acquired) to 1995, the principal activity was described as "property investment and development".

7. The Company's intention in developing the building was for long-term investment by letting out to various tenants.

8. The Company incurred interest and other expenses such as administrative, marketing and advertising expenses from 28 October 1993 to 15 November 1995, the date of the granting of the TOP. The amount of these pre-TOP expenses brought forward to the year of assessment 1997 (the subject year of this appeal) was $5,213,184, comprised as follows:

Interest	$4,825,015
General and administrative expenses	$ 86,401
Advertising and promotion expenses,	
agency fees and marketing expenses	$ 301,768

9. The Company claimed these expenses ("the said expenses") as deductions under section 14 of the Income Tax Act and sought to carry forward the excess of the said expenses over income as losses under section 37 of the Act.

10. The Comptroller of Income Tax refused to allow the deductions of the said expenses (and hence the carry-forward of the losses) incurred prior to the date of the granting of the TOP.

11. The Company applied to the Comptroller under section 76(2) of the Act, for the said

assessment to be reviewed and revised.

12. On 20 October 2000 the Comptroller issued a Notice of Refusal to Amend in respect of the said assessment and the Company on 20 October 2000 filed with the Comptroller and the Clerk to the Board of Review a Notice of Appeal under section 79(1) of the Act.

3 The questions before the Board were whether the said expenses incurred by the appellant, prior to the date the appellant obtained the TOP:

(a) qualified for deduction under s 14(1) of the Act;

(b) were not disallowed by s 15(1) of the Act; and

(c) qualified to be carried forward as losses under s 37 of the Act to the extent to which they exceeded income in any year of assessment.

4 The parties characterised the underlying issues as the "Pre-Commencement Issue" and the "Capital Expenditure Issue".

The pre-commencement issue

5 The Inland Revenue Authority of Singapore's ("Revenue's") contentions on the Pre-Commencement Issue may be summarised as follows:

(a) Losses of an earlier period may be brought forward and set off against the taxpayer's statutory income of a later year if the requirements of s 37(2)(a) are satisfied.

(b) Section 37(2)(a) losses arise from the incurring of expenditure deductible under s 14; if such expenditure is not deductible under s 14, no s 37(2)(a) losses will arise.

(c) Expenditure is not deductible under s 14 if there is no "business" in existence at the time when the expenditure is incurred.

(d) The appellant's business did not commence until the TOP was granted in respect of T Ltd.

(e) Therefore, expenses incurred during the development period were "pre-commencement" expenses; they were not deductible under s 14 and therefore could not be carried forward as s 37(2(a) losses.

6 Before the Board and in the present appeal, whilst the appellant did not take issue with Revenue's propositions (a), (b) and (c), it contended that proposition (d) was wrong. It argued that its business commenced when, as a property investment company, it commenced to lay out money on the creation or acquisition of its investment property. If proposition (d) was wrong, then proposition (e) likewise would fail.

The capital expenditure issue

7 Revenue's contention with regard to this issue began with the same propositions (a) and (b) as in the Pre-Commencement Issue, but then continued as follows:

(c) Expenditure is not deductible under s 14 if either:

(i) it is itself of a capital nature; or

(ii) it is "in respect of any sum employed as capital" within s 15(1)©.

(d) Interest paid by the appellant was either of a capital nature or within the scope of the words "in respect of sums employed as capital …" in s 15(1)© and hence disallowed.

(e) Therefore, the said expenditure was not deductible under s 14 and could not create s 37(2)(a) losses to be carried forward.

8 The appellant challenged the Revenue's contentions in proposition (d) and argued, firstly, that interest is inherently of a revenue nature and, secondly, that interest incurred by the appellant is not caught by the words "in respect of any sums employed as capital".

9 I shall now deal with the first of the two issues.

Commencement of business

10 Was the appellant carrying on business at the time it incurred the said expenses? If it was not, the expenses are not allowable, being pre-commencement expenses.

11 For the appellant, it was argued that, in order to determine when a business commences, it is necessary to identify what is the true essence of the business. It was contended that with an investment company, the essence of the business consists in laying out capital expenditure with a view to deriving rental income; the business commences when the company commences to lay out its capital expenditure.

12 Counsel for the appellant identified two separate aspects of the business of a typical property investment company. One is the activity of deriving an investment income, *ie*, rents. The other is the activity of owning the investment and doing everything associated therewith. Counsel stressed that in the case of a property investment company, the acquisition of an area of land and the creation of the investment by erecting a building on the land are just as much part of the company's business as the subsequent earning of rents from the building when it has been completed and let.

13 Counsel for the appellant pointed to the objects clause in the appellant's Memorandum of Association and submitted that its business, indeed the very reason for its existence, was to acquire the Housing & Development Board site and to construct a building on it for the purpose of owning, managing and operating a property-letting business.

14 Although counsel conceded that a company cannot conclusively answer the question as to when its business commences merely by what it puts in its objects clause, he submitted nevertheless that there is a very strong presumption that if a company's objects clause indicates that the company has been formed to carry out a particular activity, and the company then proceeds to do precisely what it has been formed to do, its activities are the carrying on of a business, and the business commences as soon as the company starts to perform the functions set out in its objects clause.

15 The same arguments were made before the Board. The Board considered the activities of the appellant in acquiring the building (*ie*, in obtaining a lease of the land and developing a building

thereon) as a one-off or isolated activity. It observed that the appellant owns only that single property and that the regular activity of the appellant was in letting out space in that building to suitable tenants. The Board drew support for its view from one of the principal objects of the appellant which was to "carry on the business of constructing or otherwise developing a building on Land Parcel P4, Tampines, *for the purpose of owning, managing and operating a property letting business*" [emphasis in original].

16 The Board found further support for its view in the Notes to the Accounts of the Company for years 1992 to 1996 wherein it was stated that the "properties [were] held for the primary purpose of producing rental income". Counsel for the appellant raised the objection that the Board omitted to mention that the Notes to the Accounts also stated the principal activities as being property investment and development. However, I doubt that it would have made any difference to the finding of the Board that "the appellant's activities were consistent with the business of letting at the material time rather than in the property investment and development business".

17 In arriving at this finding, the Board had to deal with the appellant's contention that if a company's objects clause indicates that the company has been formed to carry out a particular activity, and the company proceeds to do precisely what it has been formed to do, its business commences. As to this, the Board referred to the case of *Vallambrosa Rubber Company Ltd v Farmer* (1910) 5 TC 529 ("*Vallambrosa*") cited by the appellant and pointed to what it described as a "contrary view" in the judgment of Lord Johnston where he said at 536:

> What is the trade, [*etc*]? I think that this must be ascertained from the Memorandum of the Company, read in conjunction with the actual operations of the Company.

Apart from pointing out that many cases have held that the Memorandum of Association could not be decisive of the nature of a taxpayer's business, the Board referred in particular to the local case of *Mitsui-Soko International Pte Ltd v The Comptroller of Income Tax* (1998) MSTC 7,349 ("*Mitsui-Soko International*"). In that case, the High Court cautioned against adopting as a statement of rule or principle the proposition that if a company's objects are business objects and they are carried out, the company is to be regarded as carrying on business. At [4] Warren L H Khoo J expressed his view thus:

> I first deal with the proposition that if a company's objects are business objects and they are carried out, the company is to be treated as carrying on business. This statement has its origin in what *Pollock* M.R. said in *Inland Revenue Commissioners v. Westleigh Estates Co.* (1924), 1 KB 390. It was referred to with approval by Lord *Guest* in the *Privy Council case of Commissioner of Income Tax v Hanover Agencies Ltd* (1967) AC 681 (appeal from Jamaica). I think, however, that it would not be right to treat these observations as a statement of a rule or principle. In the *American Leaf Blending* case, Lord *Diplock* rightly cautioned against taking them out of the context of the case in which they were made. His lordship expressly dissociated himself from the view that every isolated act of a kind that is authorised by its memorandum, if done by a company, necessarily constitutes the carrying on of a business … A literal application of *Pollock* M.R.'s dictum might result in almost every economic activity carried out by a company as constituting the carrying on of business. That is something which I am sure was not intended.

18 In tax cases where the issue was whether the taxpayer company was either investing or dealing in property, the courts have not been timorous to disregard objects which they considered to be self-serving and to look instead at the operations of the company to determine what its true business was. It should be no different where the enquiry is into the date of commencement of a company's business as such enquiry will bring in tow the question what the business of the company

is. Each case will have to be examined on its facts.

19 The Board also referred to the Australian case of *Hope v The Council of the City of Bathurst* 80 ATC 4386; (1980) 144 CLR 1 where the court suggested that for a business to be carried on, the activities must possess something of a permanent character. The Board considered the *dictum* in the case useful even though the facts of the case were different from our present case. In that case, Mason J (at ATC 4390; CLR 8–9), with whose reasoning Gibbs, Stephen and Aickin JJ agreed, placed emphasis on the question whether the activities in question could be seen as a "commercial enterprise in the nature of a going concern, that is, activities engaged for the purpose of profit on a continuous and repetitive basis".

20 These then were the reasons why the Board came to the conclusion that the business of the appellant was in the letting of property rather than in property investment and development.

21 For my part, whilst I would not be quite so categorical as to say that there must always be repetition before there can be a business, I am unable to say that the Board erred in finding that the business of the appellant was in the letting of space in the property rather than in the construction and development of the investment property. It seems quite clear that the *raison d'etre* of the company is the owning and letting of the completed property. It is not the acquisition of the developed land or the development of the same. Without the letting, neither of the latter activities would earn the company a profit; they are merely preparatory steps.

22 When then did the appellant's business commence? The answer to this question is of course dependent on the determination as to what the business of the appellant was. The Board was of the opinion that the business would commence when a profit making structure was established. Applying that test to the appellant's business of letting of the property, it held that the business commenced when the TOP had been issued and the building was ready for occupation.

23 In arriving at this decision, the Board relied upon cases from South Africa, the United Kingdom and New Zealand as well as the local case of *Mitsui-Soko International* ([17] *supra*) referred to earlier. One was the South African *Income Tax Case No 697*, (1950) 17 SATC 93. I take the liberty of quoting the headnotes from the report:

> Appellant company was the owner of a property on which was erected an old building from which for a period it derived certain rentals which, however, amounted to less than the expenditure on the property by way of interest and assessment rates, etc.
>
> On 1st December, 1947, the company commenced to demolish the old building and immediately the demolition was completed began the erection of a new building which was completed in October 1948, and thereafter let to various tenants.
>
> For the year of assessment ended 30th June, 1958, the appellant company sought to deduct from its income assessment rates sanitary fees and interest amounting to £1,110.
>
> In his determination of the taxable income of the appellant company for the year of assessment in question, the Commissioner for Inland Revenue allowed the deduction of 5/12ths of the sum of £1,110 and refused to allow the deduction of the balance of 7/12ths of the expenditure, i.e. the expenditure covering the period from 1st December, 1947, when the work of demolition began, to 30th June, 1948, by which date the new building had not yet been completed.

> Objection was brought against the Commissioner's disallowance of portion of the expenditure on this basis. On appeal,
>
> *Held*, dismissing the appeal that since the building which was in the course of erection during the period in respect of which the expenditure was disallowed was not an asset which could be used to produce income, the expenditure upon it was of a preliminary or capital nature and was not laid out for purposes of trade or in the production of income and was accordingly not an allowable deduction.

Price J held at 95 that:

> The question in this case is not whether an income was produced or not, but whether there was in existence a business which was being carried on for the purpose of producing income. It is one thing for a taxpayer to conduct a business for the purpose of producing income and to fail to produce that income, and quite another for such a taxpayer to be in the process of equipping an undertaking which he intends to turn into a business for the purpose of producing income. The real question which is involved in this case is whether during the period when the undertaking is being equipped expenditure then incurred, during that period, is expenditure incurred in the production of income or in an attempt to produce income.

The court went on to explain at 96:

> The items disallowed by the Commissioner were disallowed because for a proportionate period in respect of which the expenditure was incurred the building was in the course of erection and was not an asset which could be used to let and to produce income, and that the expenditure, therefore, was of a preliminary or capital nature. It seems to me clear that until the asset becomes an asset capable of producing income any expenditure upon it is of a preliminary nature and is not deductible, because the rates and interest were not laid out exclusively or at all, in point of fact, for the purposes of trade. If a taxpayer has no asset with which he can trade then he cannot be trading. That seems to me to be a simple, logical statement, and it seems to me that it is the simple, logical statement which determines the issue in this case. During the period in respect of which the rates and interest were disallowed the taxpayer had no asset with which he could trade and he was not trading, and if he was not trading the expenditure was not incurred in the production of income. The expenditure was incurred in the creation or equipment of an asset which was intended to be used at a later stage for the purpose of earning income. It was initial or preliminary expenditure designed to extend the scope of the business or to improve its earning capacity. It was money spent in an attempt to create a source of income or to acquire an advantage for the benefit of the business which was later to be undertaken.

24 The same approach was adopted in the English cases. In *The Birmingham & District Cattle By-Products Co Ltd v The Commissioners of Inland Revenue* (1919) 12 TC 92 ("*Birmingham & District Cattle By-Products*"), the English court drew a distinction between transactions preparatory to the commencement of business and those which occurred once the business had commenced. The facts of that case and relevant extracts from the judgment of Rowlatt J have been conveniently summarised by the Board of Review and I adopt the same in the paragraphs following:

> In that case, the taxpayer was incorporated on 20 June 1913. Between 20 June and 6 October 1913, it went about looking at places of business of similar character in various parts of the country. It arranged for the erection of works and purchased plant and machinery. It entered into agreements relating to the purchase of products to be used in its business. It engaged and employed a foreman for its works. It even entered into agreements for the sale of its finished

products. On 6 October 1913, the installation of plant and machinery being completed the taxpayer started to receive raw materials to manufacture into finished products. The issue in that case was whether the taxpayer commenced business on 20 June 1913 or 6 October 1913. The taxpayer contended that it should be the earlier date, while the Revenue insisted on the later date. The Court concluded that acts prior to 6 October 1913 were but preparatory acts to the commencement of the business. In doing so, it said [at 97]:

> … Now the company took over those agreements, and having taken over those agreements the directors, at the expense of the company, as was very proper, went about and looked at places of business of a similar character in various parts of the country. That was an admirable thing to do preparatory to commencing business, but it certainly was not commencing business. If you go and look at other businesses to see how you will conduct your business when you set it up, you are preparing to commence business, but you are not commencing business.
>
> Then they entered into a contract for the erection of works, which works were duly erected in July, 1913. That again is preparatory. The company were occupying themselves with activities within their powers, of course; they were living their life; but they had not yet begun to conduct their trade or business. Then they purchased machinery and plant for carrying on the business. That was getting ready. Then they entered into agreements for the purchase of products. Those are the agreements which I have already referred to which formed the substratum of the company, but no materials came in nor were any sausage skins made from the 20th June. They waited, and I suppose in October, the date they refer to in their Minutes, having looked round, and having got their machinery and plant, and having also employed their foreman, and having got their works erected and generally got everything ready, then they began to take the raw materials and to turn out their product.
>
> I am bound to say that I think the case is extremely clear, and the Commissioners have taken the view that they had not commenced business till then, and I do not see the slightest sign of any error in law in the Commissioners having taken that view.

25 Counsel for the appellant was somewhat equivocal with regard to this case. On the one hand, he claimed to have found support from this case for his contention that the appellant commenced its business when it acquired the Housing and Development Board site for development. On the other hand, in criticising the Board's reliance on the case, he sought to distinguish it on the ground that the case did not deal with deductions but was a decision involving excess duty profits under wartime legislation. Although this observation was not incorrect, the case is, in my view, clearly relevant; the English court had to deal with the question as to when the business of the taxpayer company commenced in order to determine whether certain items of expenditure laid out by the company were deductible as being for the purposes of such business. The appeal before the Board involved a similar question.

26 The *Birmingham & District Cattle By-Products* case ([24] *supra*) was cited with approval in two New Zealand cases. In the first of them, *Calkin v Commissioner of Inland Revenue* (1984) 7 TRNZ 100, the issue was whether certain losses in respect of money advanced to an agent for investment, which was subsequently misappropriated by the agent, were of a capital nature or were incurred in the carrying on of the business. Richardson J in the New Zealand Court of Appeal held (at 106) as follows:

> There is too a distinction between transactions which are preparatory to the commencement of business and those which occur once the business has begun which is well recognised in the

authorities, if sometimes difficult of application in particular cases. Thus in the leading case, *Birmingham and District Cattle By-Products Co Ltd v CIR* (1919) 12 TC 92, Rowlatt J held that a company had not commenced business during the period in which the works were erected, plant assembled and agreements entered into for the purchase of materials preparatory to commencing manufacturing (and see generally *New Zealand Income Tax Law and Practice* para 1-851). Clearly it is not sufficient that the taxpayer has made a commitment to engage in business: he must first establish a profit making structure and begin ordinary current business operations.

27 A similar stand was taken in *Stevens and Stevens v Commissioner of Inland Revenue* (1989) 11 NZTC 6001 but I do not think it is necessary to go into that case.

28 Another authority relied upon by the Board of Review is Income Tax Case No 1322 (1980) 42 SATC 272. In that case, the Zimbabwe Special Court had to decide whether the taxpayer's business had commenced in February 1978. The taxpayer had built a furnace in the backyard of his residence and, with money obtained by mortgaging his house, he acquired during December 1977 some necessary initial equipment with which he conducted successful experiments. In February of 1978 he gave up his insurance work to devote himself fully to the foundry venture. He spent his time thereafter in making, obtaining or assembling the various instruments and equipment necessary to successfully manufacture the castings. Nevertheless, the court disallowed the taxpayer's claim for deductions in respect of expenditure incurred by him in his venture into the foundry business on the basis that such expenditure had been incurred prior to commencement of his business.

29 In arriving at its decision, the court recognised the "clear distinction in tax law between expenditure before a business is begun, and expenditure after its commencement". After referring to the *Birmingham & District Cattle By-Products* case ([24] *supra*) and a South African case authority, the President of the Court, Squires J, arrived at a principle which he stated as follows (at 276):

> [W]here money and effort are expended in acquiring an asset or setting up an enterprise which will be run as a business, the business does not commence until the preparations are sufficiently completed for the purpose of the business to be carried on. Where the object of the business is to earn an income, then this stage is not reached until it is in a position to start earning such income.

30 Before me, counsel for the appellant sought to distinguish the many cases relied upon by the Board as being peculiar to individual taxpayers. I think he was thereby suggesting that those cases would not have been decided the same way had the taxpayers been corporate entities. I find that difficult to accept. The contention seems to me to be a repeat, differently couched, of his assertion that if a company commenced to do what its objects clause stated it had been formed to do, it commenced to carry on a business.

31 To treat companies differently from individual taxpayers in the manner which I believe counsel for the appellant to be suggesting would mean that there would be little room (other than in obvious cases) for applying the well known distinction between pre-commencement expenditure and expenses incurred thereafter. That cannot be right.

32 Counsel for the appellant also criticised the Board for having relied on cases from various jurisdictions with no attempt to examine their respective legislation or facts. So far as the facts are concerned, I note that the Board did at least summarise them in brief. As for the legislation, in the cases relied upon it was unnecessary to look at them. The determination as to when a business commenced did not depend on similarity of legislation; neither were there any peculiarities in the legislation relevant to those cases which might have affected the determination. As we shall see,

where it did matter, the Board did bring out peculiarities of foreign law which rendered reliance on the cases from that jurisdiction problematic.

33 Counsel for the appellant cited a few Indian and Australian cases in support of his submission that the appellant's business commenced with the acquisition of the land parcel. The first of the Indian cases was *Commissioner of Income-Tax, Gujarat I v Saurashtra Cement and Chemical Industries Ltd* [1973] 91 ITR 170 ("*Saurashtra*"). The taxpayer in that case was a limited company incorporated on 11 June 1956 for the manufacture and sale of cement. It took over the benefit of a mining lease and a cement manufacturing licence from its promoter. On 12 December 1956, the company placed an order for plant and machinery and on 9 January 1957 the Registrar of Companies granted to the company a certificate to commence business. The company purchased machinery of considerable value for the purpose of quarrying operations and started extracting limestone from the leased area from April 1958. The plant and machinery which had been ordered by the company arrived in the meantime and the company completed installation of the plant and machinery in June 1960. Manufacture of the cement started in October 1960.

34 The company had incurred expenditure in the form of salary, travelling expenses, brokerage, electricity charges, *etc*, in connection with the installation of the plant and machinery and also for carrying on operations for quarrying limestone. It claimed a deduction in respect of this expenditure. The company also claimed to be entitled to an allowance in respect of depreciation and development rebate on the machinery employed in the extraction of limestone. It was agreed between the parties that the expenditure in so far as it related to the extraction of limestone was allowable as a revenue expenditure. The Revenue took the view, however that the expenditure incurred in connection with the installation of the plant and machinery was capital in nature and could not be deducted in computing the trading profits of the company.

35 So far as the claim of the company for depreciation and development rebate on the machinery used in the extraction of limestone was concerned, the Revenue allowed the claim on the implicit basis that extraction of limestone was part of the business of the taxpayer and the machinery being thus used for the purpose of the business, depreciation and development rebate on it were properly chargeable against the trading results of the company. The Indian Court concluded that the business commenced when the company started to quarry limestone, not at the later time when it commenced the manufacture of cement.

36 Because of the appellant's heavy reliance on this case, it is fair to set out at length the key passage in the judgment of Bhagwati CJ in *Saurashtra* ([33] *supra*) in 175 and 176 as follows:

> It is necessary in order to determine this question to consider what constituted the business of the assessee. Loosely, it may be said that the business of the assessee was manufacture and sale of cement. But in determining questions arising under fiscal legislation, loose use of expression often tends to confound the real issue. To determine what was the business of the assessee, we must consider what are the activities which constituted such business without being misguided by loose expressions of vague and indefinite import. The activities which constituted the business of the assessee were divisible into three categories: the first category consisted of the activity of extraction of limestone by quarrying leased area of land. This activity was necessary for the purpose of acquiring raw material to be utilised in manufacture of cement. The second category comprised the activity of manufacture of cement by user of the plant and machinery set up for the purpose; and the third category consisted of the activity of selling manufactured cement. These three activities combined together constituted the business of the assessee. Each one of these activities was as much essential for the purpose of carrying on the business of the assessee as the others. If the assessee ceased to carry on any one of these

activities, the business would come to an end. Each one of these activities constituted an integral part of the business of the assessee. Why then can it not be said that the assessee commenced its business when it started the first of these activities? The activity of quarrying the leased area of land and extracting limestone from it was as much an activity in the course of carrying on the business as the other two activities of manufacture of cement and sale of manufactured cement. The business could not in fact be carried on without this activity. This activity came first in point of time and laid the foundation for the second activity and the second activity, when completed, laid the foundation for the third activity. The business consisted of a *continuous* process of these three activities and when the first activity was started with a view to embarking upon the second and the third activities, it clearly amounted to commencement of the business. It may be that the whole business was not set up when the activity of quarrying the leased area of land and extracting limestone was started. That would be set up only when the plant and machinery was installed, the manufacture of cement started and an organisation for sale of manufactured cement was established. But, as pointed out above, business is nothing more than a *continuous* course of activities and all the activities which go to make up the business need not be started simultaneously in order that the business may commence. The business would commence when the activity which is first in point of time and which must necessarily precede the other activities is started. Take, for example, a case where an assessee engages in the business of a trader which consists of purchasing and selling goods. The assessee must necessarily purchase goods in order to be able to sell them and purchase of goods must, therefore, necessarily precede their sale. Can it be said in such a case that when the assessee purchases goods for the purpose of sale, he does not commence his business? Is it necessary that he must start the activity of selling goods before he can be said to have commenced his business? We have to consider the question as to when an assessee can be said to have commenced business from a commonsense point of view. We have to ask ourselves the question as to when a businessman would regard a business as being commenced? Would he not consider a business as having commenced when an essential activity of that business is started? The argument of the revenue seeks to confound the commencement of a business with the establishment of the business as a whole and carrying on of all the activities of the business. This confusion is the result of a loose description of the business of the assessee as a business of manufacture and sale of cement. The revenue says that when the business is of manufacture and sale of cement, how can the assessee be said to have commenced the business when manufacture has not started? This argument suffers from the fault of over simplification and ignores the true nature of the activities which constitute the business of the assessee. We are of the view that as soon as an activity which is an essential activity in the course of carrying on the business, or which, in order words, is a business activity is started, the assessee must be held to have commenced the business. To take any other view would not only be illogical but also irrational. The conclusion reached by the Tribunal cannot, therefore, be said to be unreasonable or perverse or based on no evidence at all. [emphasis added]

The Board took the view that the *Saurashtra* case ([33] *supra*) was decided on its own unique facts. Firstly, the parties had agreed that the extraction of limestone did not constitute a distinct and independent business of the taxpayer. In this regard, it may be further noted that the Revenue had implicitly accepted that the extraction of limestone was part of the business of the taxpayer when it allowed the depreciation and development rebate on the machinery used in the extraction of limestone. The Indian court held that the mining activity was "an integral part" of the business of the company as it was essential to acquire raw material for use in the manufacture of the cement.

37 Ultimately, the outcome of each case depends on its own facts and, in particular, on the degree of connection between the activity which the taxpayer claims to be the commencement of the business and the core business of the taxpayer. In the example used by the court of a trader

carrying on the business of buying and selling goods, it is obvious that the purchasing of goods is integral to the business; *ex hypothesi* his business must include the purchase of goods.

38 In the *Saurashtra* case, the connection between the quarrying of the limestone and the manufacture of the cement was probably as strong as that between purchase and sale in the case of a trader. Note that the court referred to the quarrying of limestone as part of the "continuous process" of all three activities. Little wonder then that the court characterised the quarrying activity as integral to the business.

39 In the present case, the degree of connection between the development of the property and the letting thereof is weaker. Certainly it cannot be said that the development of the property was "essential" to the letting. In theory, at least, a completed property could be bought or leased for the purpose of the letting. Besides, whereas the quarrying of limestone would be an ongoing activity throughout the life of the cement manufacturer's business, the property development in this case is a one-off affair.

40 In addition to the *Saurashtra* case, the appellant also cited the Indian cases of *Commissioner of Income-Tax v Western India Seafood (P) Ltd* (1993) 199 ITR 777, *Hotel Alankar v Commissioner of Income-Tax, Gujarat* (1982) 133 ITR 866 ("*Hotel Alankar*"), and *Sarabhai Management Corporation Ltd v Commissioner of Income-Tax, Gujarat* (1976) 102 ITR 25 (Guj) ("*Sarabhai*") which were decided avowedly on similar reasoning to that in the *Saurashtra* case. Admittedly, in *Sarabhai* and in the *Hotel Alankar* case, both of which were decided in favour of the taxpayer, the connection between the taxpayer's core business and the activities which the taxpayer claimed to be the commencement of their respective businesses was not as strong as in the *Saurashtra* case. All I will say is that the taxpayers would be fortunate, were the cases to be decided according to Singapore law, to obtain a similar outcome.

41 Another reason for not following the Indian cases was provided by the Board in para 40 of its Grounds of Decision. The Board quoted extensively from *Hotel Alankar* to show that the Indian cases cited by the appellant's counsel had to be read in the context that in India there is a distinction between "setting up" of a business and "commencement of business". I shall do the same. In *Hotel Alankar*, the High Court of Gujarat said (at 870–871):

> Since the Tribunal had not got the benefit of this decision in *Sarabhai Management's* case [1976] 102 ITR 25 (Guj), we are of the opinion that the Tribunal has not appreciated and applied the principles correctly for the following reasons:
>
> The decision of the Bombay High Court in *Western India Vegetable Products Ltd.'s* case [1954] 26 ITR 151, should be referred to in order to point out as to how the Tribunal erred in appreciating the decision in the proper perspective and reaching a wrong conclusion as a result thereof. It should be recalled that in *Western India Vegetable Products Ltd* [1954] 26 ITR 151 (Bom), the assessee was claiming that his business commenced from 20th April, 1946, being the date of certificate of commencement of business.
>
> …
>
> In the context, the Division Bench of the Bombay High Court, speaking through Chagla C.J., referred to the decision of Mr Justice Rowlatt in *Birmingham & District Cattle By-Products Co. Ltd. v. IRC* [1919] 12 TC 92 (KB).
>
> …

Chagla C.J., after quoting this finding of Justice Rowlatt, observed that if that decision were to be applied to the case of the assessee before the Division Bench of the Bombay High Court, the conclusion would be that the Tribunal has taken a view of the case very favourable to the assessee. *Chagla C.J. thereafter pointed out the distinction between "setting up of business" and "commencing of the business" and in pointing out that distinction observed that when a business is established and is ready to commence business then it could be said of that business that it is set up*. Now, this distinction has been approved and adopted by the Supreme Court in *Ramaraju Surgical Cotton Mills'* case [1967] 63 ITR 478, though, of course, in the context of the W.T. Act.

…

This distinction has been throughout recognized in the earlier decision of this court, viz., *CIT v. Sarabhai Sons Pvt. Ltd* [1973] 90 ITR 318, *Saurashira Cement and Chemical Industries' case* [1973] 91 ITR (Guj), *Sarabhai Management Corporation's case* [1976] 102 ITR 25 (Guj) *and in the decision of this very Division Bench* in Income-Tax Reference 205 of 1974, decided on October 19, 1978 (*CIT v. Speciality Paper Ltd.*) at p. 879 infra). The Tribunal has relied on this distinction made by Chagla C.J. in *Western India Vegetable Products'* case [1954] 26 ITR 151 (Bom) and examined and analysed the facts of the present case. In our opinion, however, the Tribunal has overlooked what has been stated by Chagla C.J. in *Western India Vegetable Products'* case [1954] 26 ITR 151, after pointing out the distinction between "setting up of business" and "commencing of business". We can do no better than quote that very paragraph which will point out significantly as to how the Tribunal has failed to appreciate this distinction in the proper perspective. Chagla C.J. after setting out the passage from Justice Rowlatt's judgment, held as under (p.158):

> That is why it is important to consider whether the expression used in the Indian statute for setting up a business is different from the expression Mr. Justice Rowlatt was considering, viz., 'commencing of the business'. It seems to us, that the expression, 'setting up' means, as is defined in the Oxford English Dictionary, 'to place on foot' or 'to establish', and in contradistinction to 'commence'. The distinction is this that when a business is established and is ready to commence business then it can be said of that business that it is set up. But before it is ready to commence business it is not set up. *But there may be an interregnum, there may be an interval between a business which is set up and a business which is commenced and all expenses incurred after the setting up of the business and before the commencement of the business, all expenses during the interregnum, would be permissible deductions under section 10(2)*.
>
> …
>
> We do not think that the distinction which has been made by Chagla C.J. *Western India Vegetable Products'* case [1954] 26 ITR 151 (Bom) could have been interpreted in the manner in which the Tribunal has done in the present case before us. This has been clearly brought out by the Division Bench consisting of Bhagwati C.J. and P.D. Desai J. in *Saurashira Cement's* case [1973] 91 ITR 170 (Guj). The Division Bench in *Saurashtra Cement's* case [1973] 91 ITR 170 (Guj) was concerned with the question as to when the business of Saurashtra cement and Chemical Industries Ltd, could be said to have been set up.

[emphasis added]

The Indian cases therefore have to be read bearing in mind the peculiarities of Indian tax law.

42 Counsel for the appellant next referred to a passage from the judgment of Lord Johnston in *Vallambrosa* ([17] *supra*) at 536–537 for the proposition that "once the cultivation began with the planting, expenditure on cultivation, production, and marketing was … revenue expenditure for the purposes of the trade, [*etc*]". It is important to view this case in the context of its particular facts. In *Vallambrosa*, the company owned an estate and it was in the business of cultivation and production of rubber for sale. During the relevant years of assessment, one-seventh of the rubber estate produced the rubber while the other six-sevenths were in the process of cultivation for the production of rubber.

43 The company claimed deductions in respect of expenditure for superintendence and weeding for the whole estate. The commissioners disallowed six-sevenths of the expenses but allowed the one-seventh. The Scottish Court allowed the appeal and ruled that the full expenses were deductible. It is pertinent to note, firstly, that a portion of the rubber trees on the same estate had reached its income producing stage. Secondly, the activities during the cultivation were essentially part and parcel of the production of the rubber on one estate, which meant that its business had already commenced. Thus, the proposition in the case ought to be read in the context of a taxpayer whose core business activities had commenced. In any event, as noted by the Board, the wider proposition suggested by the appellant (to include expenses incurred prior to commencement of business) has not gained universal acceptance. In *Income Tax Case No 130*, (1928) 4 SATC 130, also an agricultural production case, the South African court ruled that until the plantation reached an "income-producing stage", all expenses that were incurred were in the creation of an income-producing asset and not in the production of income and so were of a capital nature.

44 A case more to the point is our High Court decision in *Mitsui-Soko International* ([17] *supra*). The taxpayer was a Singapore subsidiary of a Japanese corporation. It had been set up on 11 February 1988 as a corporate vehicle to construct and lease out a warehouse to a company in the Sony Group which had signed a contract with the taxpayer's parent. It obtained a lease of land from the Jurong Town Corporation and proceeded actively to construct the warehouse. By December 1988, the taxpayer had incurred more than $8.5m in the construction of the warehouse. It was completed in February 1989. A temporary occupation licence having been obtained, it was leased to the taxpayer's subsidiary, MSS, on 1 March 1989. Concurrently, MSS entered into a storage service agreement with a Singapore subsidiary of the Sony Group which was to use it as a distribution centre for Sony products.

45 The issue before the Board and, later, before the High Court, was whether the taxpayer had been carrying on business in the year 1988 so as to be entitled to deduct business losses under s 37 of the Act and to carry forward any unabsorbed losses to subsequent years of assessment. The Comptroller disallowed the taxpayer's claims on the ground that the taxpayer was not carrying on business in the year 1988. The taxpayer's appeal was dismissed by the Board of Review which found that the taxpayer was no more than a mere landlord and that it was neither in the business of property investment nor that of letting at the material time. This finding was upheld by the High Court.

46 Counsel for the taxpayer had argued that the taxpayer carried out a number of activities and that business commenced as soon as the taxpayer embarked on the first transaction of a business nature. The High Court disagreed. Warren L H Khoo J stated:

> 14 … The question whether a company is carrying on business is essentially one of fact. Needless to say, it is necessary to consider all the facts and circumstances of the case, rather than applying formulae and a *priori* assumptions.

…

18 I would suggest that such questions should be approached in a common-sensical and pragmatic manner. After all, as appellant counsel agrees, the word "business" should be given its ordinary meaning. Instead of applying generalisations and abstractions, I think it would be *more appropriate to look at the company's activities themselves, and, in the light of the facts and circumstances of the case as a whole, to consider whether those activities can reasonably and fairly* be said to constitute carrying on business according to what the ordinary man (or ordinary businessman if you like) understands by that term. In *Calkin v Commissioner of Inland Revenue* (1984) 7 T.R.N.Z. 100 at 106, Richardson J in the New Zealand Court of Appeal said:

> "The decision whether or not a taxpayer is in business involves a two-fold inquiry: as to the nature of the business carried on – including the period over which they are engaged in, the scale of operations and the volume of transactions, the commitment of time and effort, the pattern of activity and the financial results – and as to the intention of the taxpayer in engaging in those activities."

I think this is as useful a guide as to what to look for as any that one could find in the authorities. From what I have said above, I would only add that one should refrain from reducing the statement (particularly the words in parenthesis) to a formula or a rule.

…

19 … In the period in question (from February to December 1988), the activities of the appellant were primarily directed to the acquisition of land and the construction of the warehouse. These activities were without doubt pursued with vigour. *But they were no more than activities preparatory to realising the object for which the appellant was set up, i.e. to own and provide a warehouse to the Sony Group in accordance with the arrangement made between the respective parent companies. It seems quite clear that, in the circumstances, no business in any real sense as contemplated could have started until the warehouse was in place*.

[emphasis added]

47 Finally, counsel for the appellant cited the case of *Goodman Fielder Wattie Ltd v FC of T* 91 ATC 4438 ("*Goodman Fielder*"), for the proposition that in determining whether or not a business has commenced, the crux of the test to be applied is the element of commitment. The case has been conveniently summed up in the Appellant's Case by counsel for the appellant as follows:

> 82. The case concerned the deductibility of payments made by a taxpayer company to fund research carried on by the Queensland Institute of Technology ("QIT") and expenditure incurred on related manufacturing, administration and research and development.
>
> 83. The taxpayer entered into an agreement with QIT to establish a research development centre for the production of a type of antibody and related products suitable for commercial development. In return for funding the centre, QIT undertook to produce a range of antibodies for commercial exploitation by the taxpayer.
>
> 84. The centre was accordingly set up and research on a full-time basis commenced in early 1982. In November 1982 a business division of the taxpayer company (Mabco Division) leased separate premises to set up commercial development and production facilities. Real operations began there in January 1983. Some products were developed and sold. However, when it became

apparent that the Mabco Division required a further injection of funds to become profitable, the taxpayer sold the Mabco Division in June 1985.

85. The taxpayer claimed deductions for its expenditure on the research centre and expenditure incurred by the Mabco Division under section 51(1) of the Australian Income Tax and Assessment Act ("ITAA"), equivalent to our section 14(1).

86. Section 51(1) of the ITAA provides relevantly as follows:

> "All losses and outgoings to the extent to which they are *incurred in* gaining or *producing* the assessable *income*, or are necessarily incurred in carrying on a business for the purpose of gaining or producing such income, shall be allowable deductions except to the extent to which they are losses or outgoings of capital, or of a capital … nature" [emphasis added to show the similarity to our deduction provision].

87. The Commissioner submitted that the contributions made to the centre by the taxpayer until November 1982 (when the premises were leased by Mabco Division) were not allowable deductions under section 51(1), both because the amounts in question did not fall within the positive limbs of that sub-section, and because the payments in question were outgoings of capital or of a capital nature. It was submitted that the taxpayer had not commenced business or its income-producing activity until the premises were set up, so that its pre-business expenditure was not deductible.

88. The judge therefore had to decide when the business had commenced, a question he said which was "one of difficulty, turning as it does on the facts of the particular case" (at p 4438).

89. He started by remarking that it was "critical" to the resolution of the question to characterise the business activity itself which was said to have commenced. It was conceded by the taxpayer that if the business claimed to be carried on by it was to be characterised as one of manufacturing and selling antibody products, then that business did not commence until November 1982 when the move to the newly-leased premises took place. However the taxpayer submitted that its income-producing activity or business activity should be characterised as researching and developing antibody products for manufacture and sale.

48 The court held that, on the facts of the case before it, the taxpayer had not yet committed itself to the project and that it was engaging in activities of a provisional kind only. During the relevant period, the element of commitment was absent.

49 Counsel for the appellant submitted that the crux of the text being the element of commitment, the appellant should be allowed the deductions claimed for the reason that its commitment to the project was manifested very early. It appears to me that the reasoning of counsel is somewhat syllogistic. I agree with the Board that the element of commitment cannot be the sole determinant of deductibility. In *Goodman Fielder* ([47] *supra*), it was given as a reason for the disallowance. It should not be elevated to a lode-star.

50 In conclusion, I am of the view that the Board was entitled to find, as it did, that the business of the appellant was that of letting of the property. Further, I hold that, in arriving at its decision that the business of the appellant did not commence until the TOP for the property was issued, the Board made no error in the application of principle.

Capital expenditure issue

51 Section 14(1)(a) provides:

> 14.—(1) For the purpose of ascertaining the income of any person for any period from any source chargeable with tax under this Act (referred to in this Part as the income), there shall be deducted all outgoings and expenses wholly and exclusively incurred during that period by that person in the production of the income, including –
>
> (*a*) except as provided in this section, any sum payable by way of interest upon any money borrowed by that person where the Comptroller is satisfied that the interest was payable on capital employed in acquiring the income…

Section 15(1)©, however, prescribes:

> 15.—(1) Notwithstanding the provisions of this Act, for the purpose of ascertaining the income of any person, no deduction shall be allowed in respect of –
>
> …
>
> (c) any capital withdrawn or any sum employed or intended to be employed as capital …;

As earlier stated, Revenue's stand is that interest is not deductible under s 14(1)(a) if it is of a capital nature or if it is "in respect of any sum employed as capital" within s 15(1)(c).

52 Although Revenue's stand is framed in the alternative, its submissions appear to have merged the two. Thus, for example, in para 133 of the Respondent's Case, it is stated:

> Sections 14(1)(a) and 15(1)(c) can easily be applied to the situation of a borrower of moneys. It is a fundamental principle of law that where a company, a borrower, takes out a loan for its business, the loan is ordinarily an addition to the company's capital …. The loan itself is not an expenditure of the borrower so it cannot be subject to sections 14(1)(a) and 15(1)(c). However, interest in the loan would be subject to these provisions. *If that interest is capital expenditure, then pursuant to Section 15(1)(c), it would not be deductible* …" [emphasis added]

Applying the statutory provisions to the facts of the case, Revenue argues that interest on the loan prior to the TOP was of a capital nature and therefore was disallowed by s 15(1)©.

53 At the outset, I should say that the language in s 15(1)© does not lend itself easily to Revenue's construction and that I prefer the appellant's interpretation. As the parties have dwelt at length on this issue, I should consider it in some detail.

54 In the UK, the provision corresponding to our s 15(1)© prescribes that:

> [N]o sum shall be deducted in respect of … any sum employed or intended to be employed as capital …

In *The European Investment Trust Co Ltd v Jackson (Inspector of Taxes)* (1932) 18 TC 1 ("*European Investment Trust*"), the Court of Appeal in England apparently decided that whether or not interest was of a revenue or capital nature depended on whether the loan itself (which gave rise to the interest) was employed as capital in the business. This view was widely criticised and subsequently abrogated by legislation. In *Beauchamp (Inspector of Taxes) v F W Woolworth plc* [1988] STC 714 ("*Woolworth*"), the English Court of Appeal had occasion to consider its earlier decision in the *European Investment Trust* case. Nourse LJ who delivered the judgment of the court described it as "a very curious case". He then went on to say (at 717–718):

> Having read and re-read the report of *The European Investment Trust Co Ltd v Jackson* several times, I have come to a clear conclusion that it can only be explained on the footing that it was conceded throughout that the status of the interest as a deductible item was governed by the status of the advances, and that that concession was made because it was assumed that the words 'in respect of' were the equivalent of 'in connection with' or the like. Perhaps the words of the 1842 Act had been forgotten. If that assumption is made, I can well see that it can be said that the interest on the advances would be sums in respect of the advances and thus no more deductible than the advances themselves. However, a concession on that point is not the equivalent of a binding decision. Indeed, it is no decision at all. So I think that we are free to disregard that case so far as it related to interest, although its authority would no doubt be unimpeachable in regard to the advances themselves.

Although the decision of the Court of Appeal in the *Woolworth* case was reversed by the House of Lords, there is nothing in the House of Lords' judgment delivered by Lord Templeman which detracts from the Court of Appeal's criticism of this aspect of the *European Investment Trust* case ([54] *supra*).

55 So much then as to how the UK provision was construed in the *European Investment Trust* case. Should the Singapore provision be interpreted likewise? Although counsel for the appellant argued cogently why it ought not be likewise construed, he may have been a little generous in conceding that the language of the Singapore provision is close to its UK counterpart. As noted, the UK provision prescribes that:

> [N]o sum shall be deducted in respect of … any sum employed or intended to be employed as capital …

In other words, "no sum … in respect of any sum employed as capital …" is to be deducted.

56 As framed, it is possible to construe the "sum" first referred to as separate and distinct from the second. On this basis, it did no violence to the language of the UK provision for the *European Investment Trust* case ([54] *supra*) to construe the first sum as being referable to interest while the second referred to the principal amount on which the interest accrued.

57 The Singapore provision is differently worded. It states:

> [N]o deduction shall be allowed in respect of … any sum employed or intended to be employed as capital.

The provision makes no mention of any sum other than the sum employed or intended to be employed as capital. Whereas the words "in respect of" in the UK provision could be read to mean "in connection with" without doing violence to the statutory provision, the same words "in connection with" could not, in my view, comfortably substitute for "in respect of" in the Singapore provision. It would immediately invite the question "Deduction of what?" To my mind, the words "in respect of" in the Singapore provision is the equivalent of "for" or "on account of". Thus, what is prohibited is the deduction of the sum employed or intended to be employed as capital.

58 It is inconceivable that the legislature would provide in unambiguous terms in s 14(1)(a) for the deduction of "interest upon any money borrowed … where … the interest was payable on capital employed in acquiring the income" and then in the very next section prescribe in s 15(1)(c) that interest on any sum employed as capital is not deductible. Neither was this the position taken by Revenue before the decision in *Wharf Properties Ltd v Commissioner of Inland Revenue (Hong Kong)* [1977] STC 351 ("*Wharf*"). In that case, a company bought a train depot, financing the purchase by means of short term loans for the purpose of redeveloping the land for rental income as a commercial complex. During its ownership of the site, the company derived small amounts of income by way of licence fees. The issue before the Privy Council was whether the interest on the loans was deductible for tax purposes. The relevant provisions of the Inland Revenue Ordinance (Cap 112) (Hong Kong) are as follows:

(a) Section 16(1)(a) provides that:

> … there shall be deducted all outgoings and expenses to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of profits … including –
>
> (a) … sums payable … by way of interest upon any money borrowed by him for the purpose of producing such profits …

(b) Section 17 then contains a list of expenditures for which no deduction is allowed. It includes:

> (c) … any expenditure of a capital nature.

The Privy Council held that the interest was of a capital nature and, therefore, not an allowable deduction to the taxpayer. Apparently, as a result of this decision, the Revenue in Singapore changed their interpretation of s 15(1)© despite the fact that s 17© of the Hong Kong legislation is in terms much wider than s 15(1)©, disallowing, as it does, deduction for "any expenditure of a capital nature".

59 Further support for the appellant's construction of s 15(1)© may be found in the history of the Singapore legislation. The Singapore Income Tax Ordinance was introduced in 1948, some 16 years after the *European Investment Trust* case ([54] *supra*). In his report to the Governors of the Malayan Union and Singapore in 1947, the draftsman, R B Heasman, a tax expert from the UK, had this to say about the draft legislation (in which our present s 14 was cl 11):

> 42. **Part IV – Ascertainment of Income** – Clause 11 gives authority in general terms for the deduction of all outgoings and expenses wholly and exclusively incurred in earning the income. Certain deductions are mentioned specifically, e.g.*,* interest on borrowed money used in the business; rent payable by a trader in respect of land and buildings occupied by him for business purposes; bad and doubtful debts; contributions under the Widows & Orphans' Funds; and contributions to pension, provident or similar funds approved by the Commissioner.

Note the simple formulation to describe the coverage of s 14(1)(a): "interest on borrowed money used in the business". Counsel for the appellant submitted that that is what s 14(1)(a) was intended to cover and how it should be read. If so, then specific provision was already made in the Singapore Income Tax Ordinance from its inception to overcome the effect of the decision in the *European Investment Trust*. That this was the intention is reinforced when it is remembered that at that time s 15 was subject to the express provisions of s 14. Thus an item of interest expense qualifying for deduction under s 14 could not be disallowed by the general provisions of s 15(1)(c) ("… any sum employed or intended to be employed as capital"). The *European Investment Trust* case, therefore, was inapplicable to Singapore as long ago as 1948.

60 Prior to 1979, s 15(1) commenced with the words "subject to the provisions of this Act". However, the relationship between the two sections was regarded as one where the specific disallowances in s 15(1) would override the general deduction provision of s 14(1), but that if an item of expenditure passed the general positive test in s 14(1), it would not be disqualified under a general disallowance under s 15(1), especially s 15(1)(b). As counsel for the appellant pointed out, this made sense as the legislature could not have intended that an item of expenditure which qualified under the general test in s 14(1) should be disqualified under what was the reverse of the same test in s 15(1)(b).

61 The Malaysian Federal Court in *Director-General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 MLJ 248 endorsed this view of the relationship between the equivalent Malaysian sections (the Malaysian and Singapore income tax legislation both originating from the same colonial model):

> Section 39(1)(b) disallows "any disbursements or expenses not being money wholly and exclusively laid out or expended for the purpose of producing the gross income." If we substitute the words "for the purpose of" for the word "in" the wording would then be the same as that of "the wholly and exclusively" test in section 33(1). On the basis that the Taxpayer's interest payments pass that test and are deductible under section 33(1), they will not be disallowed under section 39(1)(b).
>
> [*per* Lee Hun Hoe CJ (Borneo) at 254]

62 As matters stood before 1979, if the general allowance provision in s 14(1) was not overridden or qualified by the general disallowance provision in s 15(1)(b), even less would a specific allowance provision such as s 14(1)(a).

63 Counsel for the appellant correctly pointed out that this was but an application of the maxim of statutory construction *generalia specialibus non derogant*, *ie*, general provisions will not abrogate special provisions. As was stated in *Craies on Statute Law* (Sweet & Maxwell, 7th Ed, 1971) at p. 378, quoting the Privy Council in the case of *Barker v Edger* [1898] AC 748 at 754:

> When the legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision *unless it manifests that intention very clearly*. [emphasis added]

64 In 1979, the Act was amended by the Income Tax (Amendment) Act (No 7 of 1979). A new paragraph was added to s 15(1) to disallow expenses in respect of a motor car which was not a business service passenger vehicle (or "Q-plate" car). The words "Subject to" in s 15(1) were replaced by "Notwithstanding". In order to preserve the deductibility of some of the specific items under s 14(1) which would otherwise obviously run foul of the general disallowances in s 15(1), exceptions were carved out of some of the paragraphs in s 15(1).

65 Counsel for the appellant submitted that it was never envisaged that a specific deduction for interest on borrowed capital (provided for in s 14(1)(a)) was required to be saved from the general words of s 15(1)(b) or (c) because the accepted view was that the interest mentioned in s 14(1)(a) was of a revenue and not capital nature. I would go further to say that on the construction which I have placed on the words in s 15(1)(c), what is disallowed is a deduction in respect of the loan or

advance and not the interest thereon. Accordingly, no saving words were required to be carved out of s 15(1)(c).

66 Counsel for the appellant's contention that the opening words "Subject to" were replaced by "Notwithstanding" to confer primacy on the disallowance for non Q-plate cars appears to be borne out by the Explanatory Memorandum to the Income Tax (Amendment) Bill (No 9 of 1979) and the Singapore Parliamentary Debates, Official Reports (30 March 1979) that sets out the speech of the Minister for Finance at the Second Reading of the Bill.

67 The entire explanation in the Explanatory Memorandum on the clause amending s 15(1) reads:

> Clause 5 amends section 15 of the Act to disallow deduction of expenses incurred in respect of a motor vehicle which is not registered as a business service passenger vehicle.

68 The Minister's speech is similarly confined to an exposition of the "anomalous situation" being targeted:

> A sole proprietor or a partner of a professional firm can register his car as a private vehicle, use it in connection with his business, and claim tax deduction for expenses under section 14 of the Income tax Act without having to pay the double road tax and Area Licence Fees applicable to business vehicles. To rectify this anomaly, clause 5 of the Bill seeks to amend section 15 of the Act to restrict the deduction for expenses only to motor cars which are registered as business service passenger vehicles.

69 Counsel for the appellant therefore submits that the legislature did not intend that the general disallowance provisions of s 15(1)© were a limit or interference with the specific allowance under s 14(1)(a). I accept that but more because, in my view, s 15(1)(c) was never intended to apply to interest.

70 On the basis of this construction of s 15(1)©, the *Wharf* case would have no application in Singapore. However, in view of Revenue's stand having been framed in the alternative (see [52] *supra*) I should perhaps add some further observations.

71 The *Wharf* case was not followed by the High Court of Australia in the case of *Steele v DFC of T,* 99 ATC 4242 ("*Steele*"). In that case, the taxpayer incurred interest and other holding costs on a site for a proposed motel development which, for a number of reasons, was not proceeded with. After some seven and a half years she disposed of the site at a profit. Meanwhile, relatively insignificant income from the agistment of horses was earned. The taxpayer sought deductions totalling more than $900,000 which consisted mainly of interest. These had been incurred over seven years and were sought to be deducted as losses carried forward. Although the taxpayer had bought the property with the intention of developing an income-producing motel, nothing was ever built on the land despite considerable efforts so to do. The commissioner disallowed the deductions.

72 After several tiers of appeal, special leave to appeal to the High Court of Australia was granted by the High Court on the sole question whether the interest outgoings were of a capital nature, as decided by a majority of the Full Federal Court which adopted the reasoning of the Privy Council in the *Wharf* case. By a 4:1 majority the Australian High Court held that the interest outgoings were not of a capital nature. Gleeson CJ, Gaudron and Gummow JJ expressed the following view at [29]:

> As was explained in *Australia National Hotels v FC of T*, interest is ordinarily a recurrent or

periodic payment which secures, not an enduring advantage, but, rather, the use of the borrowed money during the term of the loan. According to the criteria noted by Dixon J in *Sun Newspapers Ltd and Associated Newspapers Ltd v FC of T* it is therefore ordinarily a revenue item. This is not to deny the possibility that there may be particular circumstances where it is proper to regard the purpose of the interest payments as something other than the raising or maintenance of the borrowing and thus, potentially, of a capital nature. However, in the usual case, of which the present is an example, where interest is a recurrent payment to secure the use for a limited time of loan funds, then it is proper to regard the interest as a revenue item, and its character is not altered by reason of the fact that the borrowed funds are used to purchase a capital asset.

73 The decision of the High Court of Australia in the *Steele* case accords more with the conventional and well known distinction between revenue and capital expenditure. In my view, it is to be preferred to the reasoning in the *Wharf* case. Accordingly, I hold that in the present case, the interest incurred was of a revenue nature. Nevertheless, in the final result, as I have upheld the decision of the Board of Review with regard to the pre-commencement issue, the appeal must fail.

Appeal dismissed with costs.