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CIR v Quitsubdue Ltd

Andrew Halkyard examines a recent court decision holding that the principles laid out by the House of Lords in Sharkey v Wernher do not apply to Hong Kong.

The landmark decision of the House of Lords in Sharkey v Wernher [1956] AC 58 has routinely been applied in Hong Kong by the Inland Revenue Board of Review to tax unrealised profits upon reclassification of assets from trading stock to investment: see, eg, BR 21/76 1 IRBRD 291 and D 55/80 5 IRBRD 420, (1991) HKRC §80-086.

The above cases can be contrasted with D 75/96 12 IRBRD 19, (1997) HKRC §80-491. In the latter case the Board refused to accept that Sharkey v Wernher applied in Hong Kong to tax a notional profit, even though it accepted that there had been a change of intention relating to property held by a company, from trading stock to capital asset, upon a change of shareholding in the company. Yuen J in the Court of First Instance has now upheld the decision, but not the reasoning, of the Board: see CIR v Quitsubdue Ltd (HCIA No 5/98) (30 April 1999).

The facts of the Quitsubdue case are as follows. The taxpayer, a private company, bought all the units in two buildings in 1986. It began to redevelop the properties in 1987. A new building was completed and the units subsequently rented out. The shares in the taxpayer company were sold twice in 1987, the second sale being to the present shareholders.

The Commissioner of Inland Revenue raised on the taxpayer an additional profits tax assessment for the year of assessment 1987/1988 on the basis of a change in intention by the taxpayer. According to the Commissioner, the taxpayer’s intention from the time of acquisition of the properties in 1986 had been to trade in the properties but that subsequently it changed its intention in September 1987 and started holding them as fixed assets when the shares were transferred to the current shareholders. Using the principle in Sharkey v Wernher, the taxpayer’s taxable profits were calculated as the difference between the cost and market value of the properties as at the date of the change in intention.

... it would not be a surprise to find that the Commissioner will look for another case to test the issue in the Court of Appeal or beyond.

On appeal, the Board of Review found that the taxpayer had acquired the properties as trading stock but that in September 1987 there had been a change of intention to hold them as fixed assets. However, since the properties had never been disposed of by the taxpayer, no profits tax could be raised on the notional profit assessed. The Commissioner appealed.

A further question of law for the Court of Appeal is whether the ratio decidendi of Sharkey v Wernher applied or not in Hong Kong. Given that we must consider first the principle of law, there is no question that Yuen J was correct in declining to adopt the Board’s reasoning. Sharkey v Wernher has long been accepted as an example of just what is not allowed in Hong Kong.

Application of Sharkey v Wernher in Hong Kong

Although strictly not necessary for her decision, Yuen J went on to hold that the principle in Sharkey v Wernher did not apply in Hong Kong whether generally or in the circumstances of this case. A person cannot make a profit trading with himself. If, contrary to her findings above, the taxpayer withdrew the properties from trading stock to fixed assets, Yuen J decided that there should be an adjustment in its accounts to write back all the expenses previously deducted for tax purposes in relation to those properties. This reasoning effectively
upholds the minority decision in Sharkey v Wernher.

The judgement of Yuen J is particularly important in the Hong Kong profits tax context. The application of Sharkey v Wernher in Hong Kong has long been a vexing question. Even though the Commissioner may not be overly concerned by the decision relating to the taxpayer’s initial intention, he is doubtless concerned about the implications of Sharkey v Wernher not being applied to tax notional profits upon a change of intention. Although it is understood that the Commissioner has lodged no further appeal, it would not be a surprise to find that the Commissioner will look for another case to test the issue in the Court of Appeal or beyond.

Andrew Halkyard teaches revenue law at Hong Kong University and is a Consultant to Baker & Mckenzie.

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**慣例已否改變？**

最近法院在一系列案件中裁定，英國上訴院在 Sharkey v Wernher 一案中訂立的原則不適用於香港。賀雅德加以剖析

**引言**

英國上訴院在 Sharkey v Wernher [1956] AC 58 案中所作的權為重要的判決，一向以來在香港慣常被稅務上訴委員會引用，作

於把資產由營業存貨改為其他原產物時，及未對利潤作出調整。以下案例是一些好例子：BR 21/76 I IRBRD 291 及 D 55/90 5 IRBRD 420。（1991）HKRC § 80-086。

上述兩例與 D 7598/12 IRBRD 19，(1997) HKRC § 80-491 業有了比較。該案中税務上訴委員會雖然認定，當持有物業公司在持股時並且在其他業務的公司

的控股物業在該公司內的，公司的意圖被視為由持有物業作為營業存貨轉變為持有物業作為營業存貨，其後拒絕按照 Sharkey v Wernher 一案以就貨幣的利潤徵稅。委員會之判決（但非直接適用）已經得到原訴法庭觥家委員會確認：見 CIR v Quitsubdue Ltd（高等法院上訴庭上訴 1998 年第 5 號）（1999 年 4 月 30 日）。

**涉案問題**

Quitsubdue 一案的案情如下：納稅人為一

家私人公司，它於 1986 年購入兩幢大廈的

所有單位，並於 1987 年重新發展該些物

業，建成一幢大廈。該幢大廈的單位隨後

被租出。納稅人的公司在 1987 年時兩度

被出售，第二次的買家為該公司現時的

股東。

在 1987/88 年度的稅項評估中，稅務局

局長向納稅人徵收了一項額外的利得稅，

理由為納稅人的意圖有所改變。據稅務局

局長稱，納稅人在 1986 年購入有關物業

業各單位的資產，以取得實際情況下的

資產，以資產投資物業；（四）納稅人

持有不斷增值的物業，亦未有購買或售出

物業；及（五）納稅人為重新發展項目

取得足夠的融資，這與納稅人持有物業

作為固定資產或以售予他人的目的是一致

的。

賀雅德法官亦指出，納稅人公司的原有

股東對於其股權的意圖，並不反映納稅人

本身對有形資產的意圖（比方 Beautiland Co Ltd v CIR [1991] 3 HKTC 520）。

Sharkey v Wernher 是香港的適用性

變遷並非作出裁決所需，賀雅德法官認為

不論該判決是否及是否適用於香港，有人

可能有理由而獲得利益。法官認為，即使

納稅人可能持有物業的物業收益或營業

存貨轉變為固定資產，納稅人的話題並未

作出調整，現時稅務機關所得的貨幣物

業有關的開支，應予以轉換。這實際上確

認了 Sharkey v Wernher 案上訴庭的少數

判決。

賀雅德法官的判決，對於香港利得稅制

尤為重要。 Sharkey v Wernher 一案在香港

的適用性，長久以來都是一個相當爭議的

問題。即使稅務局局長或不會太關心有關

納稅人最初意圖的裁決，但無疑會關心

Sharkey v Wernher 一案不能用以作為改

變納稅人收益稅後利得稅從數字大廈的含

義。據了解，稅務局局長沒有對賀雅德法

官的判決提出上訴。然而，若我們發現局

長在一宗合適的個案中再次作出上訴法庭

或更高法院提出以上訴議題，也不應感

到驚訝。

賀雅德

於香港大學教授稅務學，

並為麥理倫律師行顧問

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