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Award in Taxation
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Module A – Lecture 2

Passive vs Active Income
– Badges of Trade
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Date: 6 October 2026



AGENDA

- Concept of chargeable income
- Passive vs Active Income
- Badges of Trade



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CONCEPT OF CHARGEABLE INCOME

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CONCEPT OF CHARGEABLE INCOME

- The Income Tax Act Cap.123 of the Laws of Malta ('ITA'), does not charge to tax all gains and profits
- ITA charges to tax:
 - in principle, all income – Article 4(1) ITA;
 - certain capital gains - Article 5 ITA; and
 - transfers of immovable property situated in Malta (Property Transfer Tax) – Article 5A ITA



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CONCEPT OF CHARGEABLE INCOME

Capital, income and Capital gains

- Capital is not taxed
- All income is taxed
- Only certain capital gains are taxed
- Case law on the subject is extremely vast:
 - capital is static but income is recurring and has a circulating nature
 - capital generates income
 - profit on disposal of a revenue generating source of capital gives rise to a capital gain
 - payments derived from the exploitation of capital are of a revenue (income) nature
- Courts and text books have consistently referred to British case law on the doctrine of Badges of Trade to distinguish between income & capital gains as well as active & passive income.



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CONCEPT OF CHARGEABLE INCOME

- The process required to determine the income which is chargeable to tax is different from the exercise which leads to the determination of taxable capital gains. Drawing the distinction is important in view of:
 - **Determining Tax Liability:** whereas all gains of an income nature (saving exemptions) are taxable only the capital gains derived from the transfers listed in Article 5(1)(a)(i) and (ii) ITA are taxable;
 - **Computational Purposes:** the exercise which leads to the determination of gains or profits which are taxable for income tax purposes is different from the exercise leading to the determination of taxable capital gains;
 - **Exemptions and Deductions:** Certain exemptions and deductions apply exclusively to capital gains;
 - **Tax treatment of losses:** tax treatment of a revenue nature is different to that applicable to capital losses;
 - **Jurisdictional Rules:** different jurisdictional rules (basis of taxation) apply to gains of an income nature and capital gains.



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PASSIVE VS ACTIVE INCOME

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PASSIVE VS ACTIVE INCOME

- When a transaction is classified as income such transaction would need to be sub-classified in terms of Article 4(1) ITA
- The classification of income is relevant for computational, reporting and other purposes:
 - different deductions and expenses may be available with respect to active (trading) income and passive income – example more limited deductions when rental income is not of a trading nature when compared to deductions available when rental income is of a trading nature (unless the taxpayer opts for the final withholding tax option)
 - certain tax collection processes apply exclusively to certain types of income



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PASSIVE VS ACTIVE INCOME

Article 4(1)(a) ITA

- Trading (active) income is charged to tax under Article 4(1)(a) ITA: *"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 including the profit arising from the sale by any person of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme"*
- Includes income from self-employment for individuals
- ITA does not contain a definition of trade, business, profession or vocation
- Badges of Trade (refer to slide 26 onwards) are used to identify the existence of a trade as it is not a straightforward task to distinguish between income of a passive nature from those of active nature



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PASSIVE VS ACTIVE INCOME

Article 4(1)(b) ITA

- Income from employment or office is charged to tax under Article 4(1)(b) ITA: *"gains or profits from any employment or office, including the value of any benefit provided by reason of any employment or office"*
- Typically assumes the form of a salary but also includes bonuses, allowance and fringe benefits (in line with Fringe Benefits Rules)
- Tax on income from employment or office is withheld at source in line with the Final Settlement System Rules



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PASSIVE VS ACTIVE INCOME

Article 4(1)(c) ITA - Dividends

- *"dividends, premiums, interest (which includes any gains from any sum of money in whatever currency deposited with a person carrying on the business of banking under the Banking Act in any account whatsoever) or discounts..."*
- Article 2(1) ITA defines dividend as including (non-exhaustive definition):

"(a) bonus shares

(b) any distribution made by a company, to its partners or shareholders, as the case may be, and any amount credited to them as partners or shareholders as the case may be; and

(c) any distribution made by a co-operative society to its members and any amount credited to them as members, including any patronage refund, bonus certificate or bonus share, made, paid or allotted in accordance with the law regulating such societies for the time being in force in Malta;"



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PASSIVE VS ACTIVE INCOME

Article 4(1)(c) ITA - Dividends

- Article 2(1) ITA also defines bonus shares:

"means and includes the paid-up value of shares distributed by a company to its shareholders to the extent to which the paid-up value represents a capitalization of profits"

- Article 47 ITA prescribes that, even *"distributions to shareholders of a company or to partners in any partnership by a liquidator in the course of winding up the company or the partnership, to the extent to which they represent income derived by the company or by the partnership"* are deemed to be dividends for income tax purposes
- A dividend is taxable when it is declared unless the company fixes a later date for payment – as established in Board of Special Commissioners ('BSC') 36/58. Such dividends are subject to tax in Malta at the taxpayer's applicable tax rate
- The taxation of dividends amounts to the taxation of taxed profits - however double taxation in Malta is eliminated via the full imputation system



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PASSIVE VS ACTIVE INCOME

Article 4(1)(c) ITA - Premiums

- Mentioned twice in Article 4(1) – in Article 4(1)(c) and 4(1)(e)
- It has been argued that premiums taxed under Article 4(1)(c) ITA refer to premiums which are not derived from immovable property (and are of a revenue nature)
- Premiums of a capital nature may be taxed under Article 5 ITA (not under Article 4(1))



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PASSIVE VS ACTIVE INCOME

Article 4(1)(c) ITA - Interest

- The ITA does not define the term 'interest'
- In the absence of a definition of interest in the ITA, it is expected that Tax Courts refer to the articles in the Civil Code on loan for consumption or Mutuum and definition of 'interest' contained in paragraph 3 of Article 11 of the OECD Model:

"The term "interest" as used in this Article means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures. Penalty charges for late payment shall not be regarded as interest for the purpose of this Article."



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PASSIVE VS ACTIVE INCOME

Article 4(1)(c) ITA - Interest

- Interest income should be taxed if and when received – in line with the Japanese Bonds case where the Court of Appeal observed:

"In the present case there is no doubt that interest due in arrears became income accruing after the Japanese Government decided to pay them and actually paid them as established. In particular, for the appellant who acquired his titles in 1952 there was no income accruing...In truth when no interest was being paid there was no income..."

- In Leigh v. C.I.R it was established that *"receivability without receipt is nothing at all for tax purposes..."*



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PASSIVE VS ACTIVE INCOME

Article 4(1)(c) ITA - Interest

- The Maltese Tax Authorities have also issued guidelines on the tax treatment of interest from a loan:

"Interest is chargeable to tax under the provisions of Article 4(1)(c) of the Income Tax Act. Interest received from sources situated outside Malta is taxable in Malta and does not benefit from an exemption related to income from participating holdings under the Income Tax Act or under any other law.

It is hereby being clarified that income from a loan, including a loan that has characteristics of both debt and equity e.g. where the lender is entitled to voting rights, to profits etc.) shall be considered to be interest for the purposes of Article 4(1)(c) of the Income Tax Act and is not considered to be income from share capital or from an equity holding for the purposes of the Income Tax Act."



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PASSIVE VS ACTIVE INCOME

Article 4(1)(d) ITA

- *"any pension, charge, annuity or annual payment"*
- The general rule is that pensions are taxable, including state pensions
- However, exemptions are contained in the ITA, such as Articles 12(1)(g) and 12 (1)(h) ITA and in Subsidiary Legislation 123.21 Income Tax Exemption Order
- The Courts differentiated between annuities of a capital nature and annuities of an income nature. Article 4(1)(d) ITA charges to tax only annuities and annual payments of an income nature
- Alimony payments are regarded as annuities of an income nature – however there is no definition as to what is considered to be alimony payments. Important given that Article 12(1)(t) ITA exempts from tax financial assistance received in respect of the maintenance of a child



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PASSIVE VS ACTIVE INCOME

Article 4(1)(e) ITA - Rent

- *"rents, royalties, premiums and any other profits arising from property"*
- Rent has been defined in the ITA as including *"ground rents, whether from an urban or rural tenement"*
- Rents of a trading nature is taxed under Article 4(1)(a) ITA
- Only rents which are not of a trading nature are taxed under Article 4(1)(e) ITA
- Badges of Trade are important to make the distinction
- Manual on the Taxation of Rental Income has been recently issued by the Maltese Tax Authorities



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PASSIVE VS ACTIVE INCOME

Article 4(1)(e) ITA - Rent

- Such manual also makes reference to Badges of Trade and provides that generally:
 - Long lets - considered to be Investment income and taxed under Article 4(1)(e) ITA
 - Short lets - considered to be Trading Income and taxed under Article 4(1)(a) ITA
- Taxpayers may opt to pay a final withholding tax on rental income at the rate of 15% with no deductions being available (Article 31D ITA) instead of including such rental income in the tax return



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PASSIVE VS ACTIVE INCOME

Article 4(1)(e) ITA - Rent

- Reduction in tax rates/rebates apply if certain criteria is satisfied:
 - Article 31A ITA - final withholding tax of 5% where immovable property is rented to the Housing Authority for a minimum period of 10 years
 - Article 31B ITA - final withholding tax of 10% where immovable property is rented to individuals who receive rent subsidies under any scheme of the Housing Authority
 - Article 31C ITA - final withholding tax of 10% (residential purpose) or 15% (commercial purpose) where rental income is derived from restored grade 1 and 2 scheduled immovable property as per MEPA
 - Article 31D ITA – Option to pay 15% final withholding tax on rental income derived from the letting of a tenement. Tax rebate on rental income between EUR 200 and EUR 500 (depending on lease duration and number of bedrooms) derived from a long term private residential lease registered with the Housing Authority and for which the 15% final withholding tax is opted for can be availed of
 - Article 31E ITA - final withholding tax of 5% where immovable property is rented to the same person in excess of 7 years on a continuous basis under a scheme administered by the Housing Authority (excludes immovable property falling under Article 31B ITA)



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PASSIVE VS ACTIVE INCOME

Article 4(1)(e) ITA - Royalties

- The ITA defines the term 'passive interest or royalties' – does not define the term royalties
- Definition of 'royalties' contained in paragraph 2 of Article 12 of the OECD Model:

"payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience"



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PASSIVE VS ACTIVE INCOME

Article 4(1)(e) ITA - Royalties

- Typically, royalties take two main forms:
 - recurring royalties such as those which are paid in return for permission to use a trademark or a patent - taxable under Article 4(1)(e) ITA for the reason that they are of an income nature
 - royalties which are paid upon an outright transfer of an intellectual property right - taxable under Article 5 in view of the fact that they constitute capital gains
- Article 31F ITA provides that "*royalties derived on or after 1 January 2021 by an individual in his capacity as author of a qualifying literary work by virtue of his title to the copyright on that work conferred by the Copyright Act*" may be taxed at the option of the individual at the final withholding tax rate of 15%



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PASSIVE VS ACTIVE INCOME

Article 4(1)(e) ITA - Any other profits

- This provision catches all income from property which is of a revenue nature
- BSC 21/52 – BSC held that although a payment made by tenants to a landlord in respect of fixtures could not be classified as rents or premiums, the payments fell to be taxed as income from immovable property
- BSC 3/52 and BSC 9/57 - held that a laudemium on the transfer of emphyteusis was taxable as income derived from property



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PASSIVE VS ACTIVE INCOME

Article 4(1)(g) ITA

- *"gains or profits not falling under any of the foregoing paragraphs"*
- A blanket catch-all provision which charges to tax any other income not specifically listed in Articles 4(1)(a) to (4)(1)(e) ITA



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BADGES OF TRADE

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BADGES OF TRADE

- Badges of Trade which were consolidated in the report of the Royal Commission on the Taxation of Profits and Income published by the British Revenue in 1954 are used to distinguish between income of a passive and active nature
- Doctrine of badges of trade creates a number of rebuttable presumptions relating to the existence or otherwise of a trade
- Having just one badge of trade does not mean that there is an existence of a 'trade', whilst at the same time not all Badges of Trade need to be present for 'trade' to exist
- The conclusion that an adventure in the nature of a trade is in existence indicates that the yield from such an activity is of a revenue (income) nature and not of a capital gains nature



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BADGES OF TRADE

Key Badges of Trade - meaning as per HMRC (UK) BIM20205

- Badge of Trade 1 – Quantity and Nature of the Goods
 - *"Is the asset of such a type or amount that it can only be turned to advantage by a sale? Or did it yield an income or give 'pride of possession', for example, a picture for personal enjoyment?"*
- Badge of Trade 2 – Supplementary Work (Processing)
 - *"Was the asset repaired, modified or improved to make it more easily saleable or saleable at a greater profit?"*
- Badge of Trade 3 – Method of Acquisition and Disposal
 - *"An asset that is acquired by inheritance, or as a gift, is less likely to be the subject of trade."*
- Badge of Trade 4 – Incidence (Frequency) of Transactions
 - *"Systematic and repeated transactions will support 'trade'."*



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BADGES OF TRADE

Key Badges of Trade - meaning as per HMRC (UK) BIM20205

- Badge of Trade 5 – Interval of Time (between Purchase and Sale)
 - *"Assets that are the subject of trade will normally, but not always, be sold quickly. Therefore, an intention to resell an asset shortly after purchase will support trading. However, an asset, which is to be held indefinitely, is much less likely to be a subject of trade."*
- Badge of Trade 6 – Affinity with Trade
 - *"Was the asset sold in a way that was typical of trading organisations? Alternatively, did it have to be sold to raise cash for an emergency?"*
- Badge of Trade 7 – Organisation
 - *"Transactions that are similar to those of an existing trade may themselves be trading."*
- Badge of Trade 8 – Profit-Seeking Motive
 - *"An intention to make a profit supports trading, but by itself is not conclusive."*



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BADGES OF TRADE

Badge of Trade 1 – Quantity and Nature of the Goods

- Rutledge v CIR:
 - Case dealt with the purchase and re-sale of vast quantities of toilet paper rolls (a million rolls) by a businessman
 - Rutledge claimed that the gains derived from the sale of the toilet paper were derived from an isolated transaction and that the gains did not amount to a gain of a trading nature and were consequently not taxable
 - Court remarked that a number of elements that were present in the transaction were characteristic of a 'trade' - one million rolls of toilet paper could not have been purchased for personal consumption
 - *"The nature and quantity of the subject dealt with exclude the suggestion that it could have been disposed of otherwise than as a trade transaction. Neither the purchaser nor any purchaser from him was likely to require such a quantity for his private use"*
 - Toilet paper could never have been acquired as an investment - it was clear that profits derived from the sale of the toilet rolls were income.



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BADGES OF TRADE

Badge of Trade 1 – Quantity and Nature of the Goods

- Martin v Lowry:
 - Dealt with the purchase and resale of forty million yards of aircraft linen
 - Court concluded that the aircraft linen was clearly trading stock and profits derived from the sale of the linen were of a trading nature
- CIR v Fraser:
 - Case dealt with the sale and purchase of whisky in bulk
 - Court held that the nature and quantity goods under review was clearly that of trading stock
 - *“The purchaser of a large quantity of a quantity of a commodity like whisky, greatly in excess of what could be used by himself, his family and friends, a commodity which yields no pride of possession, which cannot be turned to account except by a process of realisation, I can scarcely consider to be other than an adventurer in a transaction in the nature of a trade... Most important of all, the actual dealings of the Respondent with the whisky were exactly of the kind that take place in ordinary trade”*



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BADGES OF TRADE

Badge of Trade 1 – Quantity and Nature of the Goods

- BSC 5/60:
 - BSC held that a sale made by a company with a view to profit was taxable even though it had been derived from an isolated transaction
 - However, the loss in value of the company's stockholding was not allowed as a deduction because the circumstances surrounding the acquisition of the shares, which were subsequently resold, suggested that the stocks were purchased for investment purposes
 - The nature of the goods tends to indicate whether goods were acquired by way of stock in trade or capital investment - items which either give rise to pride in possession or intrinsic investment value tend to be give rise to capital gains when disposed of and not income



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BADGES OF TRADE

Badge of Trade 1 – Quantity and Nature of the Goods

- BSC 43/86:
 - BSC reached a similar conclusion to the Rutledge case
 - It allowed a taxpayer to utilise losses suffered on the sale of shares as an allowable expense in view of the fact such losses represented trading income because *“the number of shares purchased and sold had been relatively high”*



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BADGES OF TRADE

Badge of Trade 2 – Supplementary Work (Processing)

- CIR v Livingston:
 - Case dealt with the conversion of a decommissioned navy frigate into a trawler
 - Court held that the improvement of the asset prior to sale was indicative of an adventure in the nature of trade
 - *“They bought the vessel and caused it to be converted at their expense with that object in view, and they successfully put her on the market. From beginning to end, these operations seem to me to be the same as those which characterise the trade of converting and refitting second-hand articles for sale... The profit made by the venture arose, not from the mere appreciation of the capital value of an isolated purchase for resale, but from the expenditure on the subject purchased of money laid out upon it for the purpose of making it marketable at a profit. That seems to me of the very essence of trade”*



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BADGES OF TRADE

Badge of Trade 2 – Supplementary Work (Processing)

- Cape Brandy Syndicate v CIR:
 - Case dealt with the blending of brandies before sale
 - Court held that the improvement of the asset prior to sale was indicative of an adventure in the nature of trade
- BSC 5/91:
 - BSC held that although appellant had acquired an asset by way of inheritance the profit derived from the disposal of the asset was of an income nature because the appellant had divided the asset and sold it piecemeal



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BADGES OF TRADE

Badge of Trade 2 – Supplementary Work (Processing)

- BSC 7/94:
 - Similar decision to BSC 5/91
 - Case dealt with the disposal of a hotel, an asset which falls to be considered as an Industrial Building or structure under Article 2 ITA
 - BSC concluded that the circumstances surrounding the sale indicated that the transaction under review was a trading transaction because significant improvements had been made to the asset prior to disposal
 - In the BSC's opinion it was clear that the hotel had been acquired for re-sale and that the improvements made on the hotel premises were intended to increase the saleability of the hotel. BSC held that gains derived from the transfer of the hotel were of an income nature.



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BADGES OF TRADE

Badge of Trade 3 – Method of Acquisition and Disposal

- Taylor v Good:
 - Court held: *"Even if the house was purchased with no thought of trading, I do not see why an intention to trade could not be formed later. What is bought or otherwise acquired (for example, under a will) with no thought of trading cannot thereby acquire an immunity so that, however filled with the desire and intention of trading the owner may later become, it can never be said that any transaction by him with the property constitutes trading. For the taxpayer a non-trading inception may be a valuable asset: but it is no palladium. The proposition that an initial intention not to trade may be displaced by a subsequent intention, in the course of the ownership of the property in question, is, I think, sufficiently established..."*
 - Both the manner an asset is acquired and the manner an asset is sold may be useful pointers
 - Initial intention may be displaced by a subsequent intention
 - Court also held that when a sale was forced by circumstances such a sale was not an act of trade



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BADGES OF TRADE

Badge of Trade 3 – Method of Acquisition and Disposal

- IRC v Old Bushmills Distillery Co Ltd:
 - Court held that the sale by a liquidator of a stock which merely constituted the realisation of the company's stock was not held to constitute a trade because the liquidator's steps were directed towards the winding up of the trade
- William v Davies & Nisbet:
 - Court held that the sale of an asset obtained by donation was held not to be an adventure in the nature of trade
- BSC 53/59:
 - A quasi-identical decision to that in IRC v Old Bushmills Distillery Co Ltd was delivered
 - BSC held that the proceeds of the assets of a company are capital notwithstanding that the assets may include goods which were previously held as trading stock



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BADGES OF TRADE

Badge of Trade 4 – Incidence (Frequency) of Transactions

- Pickford v Quirke
 - Case dealt with a tax payer who used to habitually acquire mills, strip them of all hardware and sell all hardware piecemeal
 - Court held that repetitive transactions were indicative of the existence of a trade: *"It is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader and the profits of the transactions, not taxable so long as they remain isolated, become taxable as items in a trade as a whole"*
- BSC1/97:
 - BSC found that an intensive amount of transactions evidenced that the appellant habitually acquired and re-sold properties. Consequently, the Board confirmed that appellant's profits were taxable as trading profits



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BADGES OF TRADE

Badge of Trade 4 – Incidence (Frequency) of Transactions

- BSC 5/00:
 - Drew heavily from the principles articulated in BSC1/97
 - BSC analysed the numerous public contracts relating to immovable property transfers which the taxpayer had entered into and concluded that taxpayer was not only a Government employee (as he claimed to be) but that his property deals were so numerous and complex that the transactions in immovable property were of a trading nature



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BADGES OF TRADE

Badge of Trade 4 – Incidence (Frequency) of Transactions

- BSC 11/00:
 - BSC held that gains derived from the transfer of a property were of a capital nature because the transaction under review involved the sale of a property by a property leasing company
 - BSC also held that the fact that the appellant company's objects incorporated a power to speculate in real estate was immaterial, because the transfer of the property had actually been forced on the company by the adverse state of the market and therefore the gains derived from the transfer of the property were clearly of a capital nature.
- BSC 28/03:
 - Incidence of transactions determined the nature of a sale:

"A series of transactions involving the sale of shares deemed to constitute trading under article 4(1)(a) and not merely the realization of appellant's capital - article 4(1)(a), ITA"



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BADGES OF TRADE

Badge of Trade 4 – Incidence (Frequency) of Transactions

- BSC 28/03 (cont'd):

"The point at issue in this appeal was whether a series of sales of shares made within a period of five years by appellant constituted trading under article 4(1)(a) or merely the realization of appellant's capital.

Appellant had purchased 2,000 shares from his father at the price of Lm14,000, for which he had to borrow a corresponding amount from his father. Any dividends received therefrom were to be utilised to pay back the Lm14,000 loan. Subsequently appellant sold various blocks of shares, including those purchased from his father, each time registering a profit.

The Board held that the transactions did not constitute merely an operation by appellant to retrieve his capital. This had been a series of transactions from which a profit of Lm22,288 had been derived and which, after all, had not been utilised to repay the loan."



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BADGES OF TRADE

Badge of Trade 5 – Interval of Time (between Purchase and Sale)

- **Wisdom v Chamberlain:**
 - Wisdom entered into a short-term loan to acquire silver bullion, which he re-sold
 - Court held that *“the purchase of silver bullion on a short-term basis as a hedge against the devaluation of sterling was considered to possess the characteristics of an adventure in the nature of trade, rather than an investment”*
- **California Copper Syndicate v Harris**
 - A copper syndicate purchased a piece of land, opened a mine and sold it after a very short time
 - The court held that it was clear that the sale of the mine amounted to an adventure in the nature of trade and gains derived from the sale were held to be taxable



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BADGES OF TRADE

Badge of Trade 5 – Interval of Time (between Purchase and Sale)

- **BSC 35/87:**
 - Case dealt with a share transfer
 - Appellant claimed that gains derived on the transfer of shares were of a capital gains nature because the shares had originally been acquired as an investment and the sale of the shares had been dictated by adverse financial circumstances
 - BSC agreed with appellant highlighting the fact that appellant's transaction in shares was an isolated transaction and that the interval of time between the purchase and sale of the shares was a long one



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BADGES OF TRADE

Badge of Trade 5 – Interval of Time (between Purchase and Sale)

- BSC 6/99:
 - The Maltese Tax Authorities treated a gain derived from the transfer of a property by a company which had used the property for the purposes of its business for a significant period of time as income
 - BSC disagreed as it held that the property had been acquired for rental and not for resale and gains derived from the transfer of the property were of a capital nature even though there was prima facie affinity with appellant's activity.



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BADGES OF TRADE

Badge of Trade 6 – Affinity with Trade

- Page v. Pogson:
 - Case dealt with the sale of second hand railway carriages by a company, which was involved in the manufacture and rental of railway carriages
 - Court held that the sale of carriages was a trading adventure given that the sale of carriages was intimately knit to the company's main trading activity
- Harvey v Caulcott:
 - Profit derived by a builder on the sale of property he had acquired by way of investment was held not to constitute trading income but the Court observed:

"Such a case as the present is always coloured by the fact that the man is a builder. That no doubt puts a peculiar onus on him, to show that the profit from the sale of some property is profit from an investment, or profit from something, which is not trading stock. That onus is not incapable of discharge"



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BADGES OF TRADE

Badge of Trade 6 – Affinity with Trade

- CIR v Fraser:

- Connections between a trade and taxpayer's main trading activity were examined by the Court:

"It is in general more easy to hold that a single transaction entered into by an individual in the line of his own trade (although not part and parcel of his ordinary business) is an adventure in the nature of trade than to hold that a transaction entered into by an individual outside the line of his own trade or occupation is an adventure in the nature of trade".

- Marson v Morton:

- Connections between a trade and taxpayer's main trading activity were also examined by the Court:

"Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel"



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BADGES OF TRADE

Badge of Trade 7 – Organisation

- CIR v Livingston:

- Previously cited under Badge of Trade 2
- Court observed:

"I think the test, which must be used to determine whether a venture such as we are now considering is, or is not, 'in the nature of trade, is whether the operations involved in it are of the same kind, and carried on in the same way, as those which are characteristic of ordinary trading in the line of business in which the venture was made" – therefore even the structure employed by the seller to transfer the asset is useful in order to detect a trade

- Martin v Lowry:

- Previously cited under Badge of Trade 1
- The fact that the aircraft linen was sold through a formal commercial set up suggested that the sale amounted to a trade



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BADGES OF TRADE

Badge of Trade 7 – Organisation

- Wisdom v Chamberlain:
 - Previously cited under Badge of Trade 5
 - Wisdom entered into a short-term loan to acquire silver bullion, which he re-sold
 - Court held that Wisdom had traded and that gains were to be treated as income for tax purposes



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BADGES OF TRADE

Badge of Trade 8 – Profit-Seeking Motive

- Rutledge v CIR
 - Previously cited under Badge of Trade 1
 - Court observed that:

"The mere intention is not enough to invest a transaction with the character of trade. But, on the question whether the appellant entered into an adventure or speculation (trade), the circumstances of the purchase, and also the purchaser's object or intention in making it, do enter, and that directly, into the solution of the question."
- CIR v The Stonehaven Recreational Ground Trustees:
 - Court held that there was a trade even though defendant did not have profit-seeking motive nor intended to set up a commercial operation



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BADGES OF TRADE

Badge of Trade 8 – Profit-Seeking Motive

- CIR v The Incorporated Council of Law Reporting
 - Previously cited under Badge of Trade 1
 - Court held that there was a trade even when there was no profit:

"It is not essential to the carrying on of trade that the people carrying it on should make a profit, nor is it even necessary to the carrying on of trade that the people carrying it on should desire or wish to make a profit. The definition of trade, though it is perfectly true that trade, it may be in ninety-nine cases out of one hundred, does as a matter of fact include the idea of profit, yet the mere word trade" does not necessarily mean profit to be made by the seller to the buyer, or by the buyer from the seller, not at all".



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BADGES OF TRADE

Badge of Trade 8 – Profit-Seeking Motive

- West v. Phillips:
 - A builder acquired a house as an investment
 - When the builder sold the house, the Tax Authorities assessed the profits derived from such a sale as trading profits
 - The Court reversed the decision of the Tax Authorities in view of the fact that the builder had sold the house to settle outstanding debts and because the retention of the property was not viable.
 - Therefore the reason for the sale is another 'intentional' element, which may support an argument that a transaction is not an adventure in the nature of trade



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BADGES OF TRADE

Badge of Trade 8 – Profit-Seeking Motive

- BSC 29/77
 - Case dealt with profits derived from the sale of assets
 - Some of the assets were acquired *animo compensandi* to pay off debtors while other assets had been purchased with a profit-seeking motive
 - BSC concluded that assets sold *animo compensandi* to set off debts amounted to transmutation of capital but assets acquired for re-sale gave rise to income.



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BADGES OF TRADE

Badge of Trade 8 – Profit-Seeking Motive

- BSC 28/03:
 - Case dealt with a sum received on the granting of land by title of sub-emphyteusis
 - The appellant had admitted that he had acquired the title in question with the intention of reselling it and amass a sum of money to enable him to build a house 'for free'
 - BSC held that the sum received was taxable as it referred to an adventure in the nature of trade



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